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BERGER SINGERMAN'S REAL ESTATE TEAM AUTHORS CHAMBERS AND PARTNERS' 2022 FLORIDA-US REGIONAL REAL ESTATE CHAPTER

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1. General

1.1 Main Substantive Skills

In addition to skills that all lawyers must possess, such as good communication, judgement and analysis, successful real estate lawyers keep up to date on real estate industry trends, economics, and practices, both on a national and local level. Maintaining a grasp of industry trends in the various real estate markets and product types is as important as having knowledge of substantive real estate law. In addition, top real estate lawyers are innovative in their problem-solving.

1.2 Most Significant Trends

Florida’s location, growing population and desirable climate offer a wealth of business opportunities across various sectors, and Florida has consistently ranked among the top states in terms of commercial real estate development; this past year was no different. In addition, Florida’s commercial real estate market is heavily influenced by foreign investment from all over the world.

Real estate trends in Florida over the past year include:

- an increase in vacant land development transactions in the central part of the state, particularly Tampa, Orlando, and Jacksonville;
- a high volume of loan refinances in the commercial office, multifamily, and retail spaces;
- explosion in the high-end and ultra high-end residential real estate market in South Florida;
- significant development of multifamily projects in all urban areas, just outside of major metropolitan areas, and surrounding waterfront properties;
- transportation hub development in connection with the development of mass transportation;
- redevelopment of urban areas to accommodate the growing trend of urban lifestyles;
- a major resurgence of interest in office development;
- continued development of healthcare-related properties; and
- increased need for affordable housing.

1.3 Impact of Recent US Tax Law Changes

The tax benefits afforded by qualified opportunity zone funds (QOFs) on real estate investments generally fall into two buckets: (i) the “front-end” tax benefit, which generally permits an investor to eliminate up to 15% of taxable gain rolled into a QOF; and (ii) the “back-end” tax benefit, which generally permits an investor to exit a QOF in a tax-free manner. The extent to which an investor can avail himself of the front-end tax benefit depends on when such investor invested into the QOF. Early investors can receive the full front-end tax benefit since such investors will meet the required holding period (ie, seven years). Conversely, investors who invest in a QOF in 2022 or later cannot get any benefit of the front-end tax benefits, since the seven-year holding period cannot be met (all deferred gains rolled into a QOF must be recognized on December 31, 2026). However, any investor can still reap the benefit of the back-end tax benefit if such investor holds their investment in the QOF for at least ten years. In South Florida, most QOFs have been real estate focused. With that said, the qualified-opportunity-zone-tax-tail has not wagged the economic dog. Even if a real estate project is located within a qualified opportunity zone, it has been found that the real estate project must still make economic sense. If the numbers make sense, the fact that real estate is located within a qualified opportunity zone and eligible for these tax benefits is just the “icing on the cake”. The potential tax benefits afforded by qualified opportunity zones have not been seen to significantly move the needle on a real estate project’s economic viability.

1.4 Impact of COVID-19-Related Rules and Regulations

Prior to May 3, 2021, Florida counties and municipalities imposed various COVID-19-related restrictions relating to the occupancy, use and/or operation of real estate. Such restrictions included limitations on occupancy and capacity, cleaning and sanitization requirements, face mask requirements, social distancing requirements, HVAC air filter requirements, signage requirements, cleaning supply requirements, and temperature check requirements. Certain businesses were not permitted to operate at all including restaurants for indoor dining, clubs, fitness facilities, and banquet facilities. On May 3, 2021, Florida governor Ron DeSantis issued Executive Order 21-102, which immediately suspended all local COVID-19 restrictions and mandates on individuals and businesses. Also, on May 3, 2021, Florida governor Ron DeSantis issued Executive Order 21-102, which invalidated all local COVID-19 restrictions which restricted or limited the rights or liberties of individuals or their businesses, which Executive Order became effective July 1, 2021. Although various local governmental authorities disagreed with the governor’s Executive Orders, after review and verification that the governor had the authority to take such action, local governmental authorities complied with the Executive Orders which supersede all local COVID-19-related restrictions on the use and/or operation of real estate. The Executive Orders, however, only take away the ability of local governments to enact emergency orders and impose restrictions on individuals and businesses relating to COVID-19 and do not prohibit private businesses from imposing restrictions or safety guidelines in their establishments. However, in addition to the governor’s Executive Orders, SB 2006 was signed into law by the governor on May 3, 2021, effective July 1, 2021. SB 2006 created and amended various provisions of Florida Statutes including Section 381.00316, Florida Statutes, which prevents business entities from requiring that patrons or customers provide documentation certifying COVID-19 vaccination or post-infection recovery to enter or obtain service from a business in Florida. The law does not prohibit screening protocols consistent with authoritative or controlling government-issued guidance, including those requiring facial coverings.

2. Sale and Purchase

2.1 Ownership Structures

Most sophisticated real estate investors in Florida acquire real estate in a legal entity. The type of entity depends on the overall goal of the acquisition, tax, limitation of liability, and other considerations, and can take the form of a partnership, corporation, or limited liability company (LLC), among others. Due to the corporate protections, tax benefits and flexibility of structural components, Florida and Delaware LLCs have become the most used for real estate transactions.

2.2 Important Jurisdictional Requirements

Transfer of Real Property by Deed, by Quit Claim, or by Transfer of Equity in the Ownership Entity

In Florida, title to real estate is transferred by way of deed or transfer of ownership interest in the entity holding title to real estate by merger or otherwise.

Transfer by Deed

Each deed must be in writing (Florida Statutes Section 725.01), executed by the grantor in front of two witnesses and a notary public (Florida Statutes Section 680.01).

Transfer by Merger

The merger of a legal entity with another legal entity causes the transfer of the real property owned by such legal entity to the surviving entity without the requirement to record a conveyance instrument.

Payment of Documentary Stamp Taxes

Transfers of real property for value in Florida require the payment of documentary stamps taxes based on the consideration for the transfer.

No Special Transfer Laws or Regulations

Except with respect to licenses required to operate certain types of real estate, there are no special laws or regulations that apply to the transfer of different types of real property in Florida.

2.3 Effecting Lawful and Proper Transfer of Title

In Florida, title to real estate is transferred by way of a deed containing the legal description of the property, which is signed by the transferor in front of two witnesses and a notary public. Several types of deeds are used to transfer title, with the most common being a special warranty deed in which the transferor warrants title to the property from the time the transferor acquired title.

2.4 Real Estate Due Diligence

Due diligence can be divided into various components, including site information, site constraints, governmental approvals, development rights, and property condition. Clients are doing more of their own due diligence as opposed to outsourcing to third parties.

2.5 Typical Representations and Warranties for Purchase and Sale Agreements

Typical Representations and Warranties Requested of the Seller – Knowledge Qualifier

A buyer will typically require the seller of real property to provide certain representations and warranties. To the extent that a seller will agree to property-related representations, the seller will typically limit representations concerning the operations, finances and property condition by this type of knowledge-qualifier.

Remedies of Buyer for Breach of Representations and Warranties

Subject to the terms of the purchase agreement, a buyer may bring an action for damages for the breach of a representation and warranty set forth in the purchase and sale agreement.

Limitations for Seller’s Breach of Representation and Warranty

Typically, counsel for the seller of commercial real property will negotiate three limitations to the seller’s liability arising from a breach of representations and warranties:

- a basket amount, which is typically a dollar amount of claims that must exist in the aggregate before a post-closing claim for breach of a representation or warranty may be raised by the buyer;
- a maximum liability amount, which is typically a maximum dollar amount of the seller's liability for the breach of the representations and warranties of the seller; and
- a time period for the survival of the representations and warranties given by the seller under the purchase and sale agreement.

2.6 Important Areas of Law for Foreign Investors

Foreign investors must pay attention to the tax implications of the underlying structure, as well as the investment vehicle involved.

With respect to tax matters, the form and tax classification of the legal entity(ies) within the ownership and organizational structure for the real property has a significant impact on US federal income tax and any applicable state income tax on operating income and sales proceeds. There is also an impact on the federal and any applicable state transfer tax (eg, gift tax or estate tax) on the transfer of interests in the property during lifetime and/or at death.

2.7 Soil Pollution and Environmental Contamination

The owner of real property in Florida is liable for soil pollution or environmental contamination regardless of whether such contamination has been caused by that owner. These laws relate to the protection of human health or the environment, hazardous substances, and/or liability for or costs of other actual or threatened danger to human health or the environment. Some of the pertinent laws include the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Emergency Planning and Community Right-to-Know Act, and the Hazardous Substances Transportation Act, to name a few.

2.8 Permitted Uses of Real Estate under Zoning and Planning Law

Typically, the zoning applicable to any parcel of property is available on the applicable county property appraiser's website or applicable zoning map. In addition, a buyer may request a zoning confirmation letter from the relevant municipality (for a parcel in the incorporated area) or county (for a parcel in the unincorporated area), in order to ascertain the permitted uses of a parcel.

2.9 Condemnation, Expropriation, or Compulsory Purchase

In Florida, most governmental agencies and some private entities may take or condemn private property through eminent domain. The Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner."

2.10 Taxes Applicable to a Transaction

Florida Documentary Stamp Taxes – Deed

Florida documentary stamp taxes are due and payable upon the recordation of a deed conveying real property in Florida. Florida Statutes Section 201.02 provides that the tax on deeds or other instruments conveying interests in real property is calculated based upon the purchase price of the property and is generally USD0.70 for each USD100 (ie, 0.70%) of consideration. In certain counties in Florida (such as Miami-Dade County), a surtax is payable in addition to the documentary stamp taxes, with respect to the recordation of a deed transferring an interest in real property.

Transfer of Ownership in the Entity that Owns the Real Property

In a conveyance of real property transaction, the grantor of the real property may avoid paying documentary stamp tax if the transaction is structured as the transfer of the equity ownership interests of the grantor to the grantee in lieu of obtaining the transfer of the real property by the delivery of a deed.

Exemptions from Documentary Stamp Tax Liability for Deeds

Florida Administrative Code Rule 12B-4.013 (Conveyances Subject to Tax) and Rule 12B-4.014 (Conveyances Not Subject to Tax) list which conveyances are taxable and not taxable under Florida law for Florida documentary stamp tax purposes.

2.11 Rules and Regulations Applicable to Foreign Investors

State Level

Most states, including Florida, do not require advance permission or subsequent notice for non-US entities to acquire real property. Exceptions do apply in certain states that have rules and regulations that are applicable to foreign investors, but not to US investors.

Federal Level

Historically, the USA has not heavily regulated foreign investment in real property, but some laws and regulations governing investment and ownership of real property are unique to foreign investors. Although some states impose certain additional restrictions, foreign investment in US real property is primarily regulated by federal law.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Acquisitions can be financed by equity investment or debt, or by a combination of both, as is typically the case. The investors will often agree in advance to contribute or loan additional monies to the acquisition vehicle. An investor’s failure to contribute as agreed may cause that owner’s equity interest to become diluted relative to the other owner's interests and may also result in a suspension of that owner’s distribution rights.

3.2 Typical Security Created by Commercial Investors

A mortgage is the most common security instrument used to secure borrowed funds for a commercial real estate venture in Florida. A Florida mortgage imposes a perfected lien on the real property described in the mortgage, if it is in proper form and recorded in the public records of the Florida county in which the encumbered real property is located.

3.3 Regulations or Requirements Affecting Foreign Lenders

Apart from various criminal laws directed at money laundering and influence-peddling, the USA Patriot Act intends to identify, verify, and record information on parties to a loan transaction. The law’s focus is to verify that the parties do not engage in or conspire to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in any anti-terrorism law, including the Patriot Act or those that involve "blocked persons". Blocked persons include a person listed as such or made subject to an executive order of the President or a person or entity with which any bank or other financial institution is prohibited from dealing or otherwise engaging in any transaction by any anti-terrorism law.

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

Florida imposes a documentary stamp tax, which is an excise tax imposed on certain documents executed, delivered, or recorded in Florida. The documentary stamp tax on notes or other written obligation to pay money is USD0.35 per USD100 (or portion thereof) – ie, 0.35% – of the obligation evidenced by the taxable document. The tax is due on a note or other document containing a promise to pay an obligation that is executed and delivered in Florida.

If such a document is not secured by Florida real property, the maximum documentary stamp tax is USD2,450. If the indebtedness document is secured by a mortgage encumbering Florida real property, the stamp tax is due on the mortgage recorded in Florida. The tax would be paid in connection with recording the mortgage, and evidence of payment indicated in the promissory note.

In addition, a non-recurring intangibles tax is imposed on debt secured by a Florida mortgage. The intangibles tax is USD0.20 per USD100 (or portion thereof) – ie, 0.20% – of debt secured by a mortgage encumbering Florida real property. In a leasehold mortgage, the documentary stamp tax would be due, but not the intangibles tax. Recording fees in Florida are set by the counties and are most often based on the number of pages of the document being recorded.

3.5 Legal Requirements before an Entity Can Give Valid Security

As with any action to be taken, the entity and its managers and owners must comply with relevant governing procedures, including proper notice and authorization or ratification from the equity owners or others who may have consent or approval rights. Occasionally, land use restrictions, other governmental restrictions, or private agreements govern or restrict an entity's ability to pledge assets.

3.6 Formalities when a Borrower Is in Default

Upon default under a mortgage, a lender must comply with any notice provisions in the mortgage and provide the borrower with any cure rights that may be applicable under the mortgage. Lenders must also consider any notice that may be required under a security agreement separate and apart from the mortgage, and under the Uniform Commercial Code (UCC), and must also consider demand for turnover of rents, if relevant. If provided for in the loan documents, late fees and/or default interest may be imposed.

If it is determined that a default has occurred, that notice and cure rights have been provided, and that cure has not been effected within the time or in the manner specified in the governing documents, the lender may seek to enforce its remedies, including by foreclosing on the encumbered real estate. In Florida, foreclosure is a judicial remedy (non-judicial foreclosure is not permitted in Florida), requiring the filing of a lawsuit in the appropriate court with proper jurisdiction.

3.7 Subordinating Existing Debt to Newly Created Debt

It is certainly possible for existing debt to be subordinated to newly created debt by agreement. This happens in various contexts, most regularly where some type of early venture or bridge loan precedes permanent financing. A subordination agreement between the first lender and new lender, and usually including the borrower, is the most effective way to accomplish a subordination by contract.

3.8 Lender's Liability under Environmental Laws

It is customary for loan documents to provide indemnification and hold harmless provisions protecting the lender from any environmental liability. If a lender becomes the property owner by foreclosure or deed in lieu, then the lender/owner takes the property as it is, including subject to fines or remediation requirements as may exist at the time.

3.9 Effects of Borrower Becoming Insolvent

The insolvency of a borrower raises several issues for the secured creditor. First, if insolvency results in a bankruptcy proceeding by the borrower, all actions to enforce rights or remedies against the borrower are stayed automatically, by operation of the United States Bankruptcy Code. This means that foreclosure and other enforcement actions against the borrower or its property stop, unless the bankruptcy court orders otherwise following notice and a hearing.

The bankruptcy court may lift the automatic stay by agreement of the borrower, or for a cause, including the lack of adequate protection of the secured creditor's interest in the collateral. A borrower may offer adequate protection in several ways, including through the periodic payment of interest at the non-default rate to the secured creditor.

The bankruptcy filing may also permit the borrower to challenge or seek to set aside the liens of the secured creditor. Generally speaking, a preference is a transfer of an interest in property (including the granting of a lien) on account of an antecedent debt, made while the debtor was insolvent and which allowed the creditor to receive more than it would if the debtor were liquidated. Similarly, a debtor may seek to avoid transfers of property as fraudulent transfers.

These cases involve the transfer of property by an insolvent debtor for less than reasonably equivalent value, or where the debtor transfers property with the intent to hinder, delay or defraud creditors.

3.10 Taxes on Mezzanine Loans

This is not applicable in Florida.

4. Planning and Zoning

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

Design and methods of construction in Florida are governed by the Florida Building Code, which contains strict standards governing construction methods to address the impact of storm surge and high velocity winds in certain areas of Florida, among other things. The Florida Building Code incorporates the Florida Fire Prevention Code and the Life Safety Code, which also regulate design and methods of construction. Local governments, including municipalities and counties, are responsible for enforcement, interpretation and regulation of the Florida Building Code.

4.2 Regulatory Authorities

Local governments, municipalities and counties are responsible for regulating land use and zoning within their jurisdictions. In incorporated areas, municipalities have primary jurisdiction over land use and zoning. Land use and zoning regulations may address permitted, prohibited, conditional, and accessory uses of real property.

4.3 Obtaining Entitlements to Develop a New Project

The first step in the process is to plat the property upon which the new project will be developed. Platting creates lots, parcels and/or tracts that may be developed. Once a plat is approved, it is recorded in the public records of the county where the property is located.

In addition to platting, developers must obtain master plan and/or site plan approval from the local government. Florida law gives all persons the right to participate in and speak in opposition to or in support of development or redevelopment during the approval process, including platting and site planning.

4.4 Right of Appeal against an Authority's Decision

Decisions on applications for development approval are typically appealed by petition for writ of certiorari, which is limited appellate review. The standard of review in certiorari review is whether procedural due process is accorded, whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence (City of Deerfield Beach v Vaillant, 419 So 2d 624, 626 (Florida 1982)).

4.5 Agreements with Local or Governmental Authorities

The Florida Local Government Development Agreement Act, Section 163.3220, et seq, Florida Statutes, allows developers and local governments to enter into development agreements to facilitate development, provided the development agreement meets certain minimum substantive and procedural requirements set forth in the statute.

4.6 Enforcement of Restrictions on Development and Designated Use

Restrictions on development may be enforced in several different ways. All building permits are conditioned on construction being consistent with development approvals. Violations of development and/or use restrictions may be enforced through a code enforcement process, which levies per day fines on the property, attached as liens.

Special magistrates or code enforcement boards adjudicate these code enforcement complaints. Recorded code enforcement liens may be foreclosed after two years.

5. Investment Vehicles

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

A purchaser of real property can acquire and hold the property through a variety of investment vehicles. The structure and form of entity or entities ultimately selected to hold real estate assets depend on the specific objectives for the property and can have a significant effect on, among other things, the owners' rights in the property, the management of the property, investors' liability and tax benefits, and liabilities associated with the ownership, operation and disposition of the property.

Selection of an Ownership Entity

The ownership structure can greatly affect the success of an investment in real estate. The specific task and challenge at the outset is to create a structure that captures the underlying goals of the parties and meets the entity's technical, operational, financial, accounting, regulatory, legal, and tax requirements.

Most Common Vehicles

The most common types of legal entities, trusts and forms of direct ownership utilized to effectuate real property investments in the USA generally and in Florida specifically are as follows:

- LLCs;
- limited partnerships;
- general partnerships;
- limited liability partnerships in certain jurisdictions;
- corporations;
- real estate investment trusts (REITs);

- real estate mortgage investment conduits (REMICs);
- land or business trusts; and
- joint estates ie, tenancy in common, joint tenancy, and tenancy by the entirety (between spouses).

5.2 Main Features of the Constitution of Each Type of Entity

LLCs

LLCs combine the opportunity for the liability protection of a corporation with the opportunity for tax classification as a partnership, with certain reflective features. LLCs are also extremely flexible with respect to the management and governance structure, distribution structure (the distribution waterfall), and other transactional matters. For these reasons, LLCs are increasingly popular entities to effectuate real estate joint ventures and transactions.

Ownership of an LLC is defined in terms of membership, with "members" owning equity interests in the company.

Advantages

The advantages of an LLC are numerous and have made the LLC one of the most used ownership vehicles for investing in commercial real estate and real property held for investment purposes.

Disadvantages

The flexibility in structuring and tailoring the organizational documents, operations and management of an LLC truly limit disadvantages associated with this legal entity but there are certain drawbacks, including greater complexity and cost in preparing LLC agreements and related organizational documents, when compared to a corporate structure.

Limited Partnerships

A limited partnership is an association of two or more parties formed under the laws of any state and consisting of at least one general partner (holding a general partnership interest) and at least one limited partner (holding a limited partnership interest). Most states have adopted the Revised Uniform Limited Partnership Act (RULPA), which provides the statutory framework for limited partnerships.

Advantages

A limited partnership offers many of the same advantages as an LLC, including the combination of the limited liability available to limited partners and the tax classification as a partnership.

Traditionally under RULPA, limited partners did not become liable as general partners unless they took part in the "control of the business". RULPA also provided certain rights that limited partners could exercise without taking part in the "control of the business".

Disadvantages

Limited partnerships must comply strictly with the requirements of the state in which the limited partnership is organized and operating. If the limited partnership is formed incorrectly, then the entity is treated as a general partnership for the purposes of liability, and limited partners may not be protected.

Fairly recently, many states, including Florida, have sought to mitigate this issue, adopting statutes that authorize and provide for limited liability limited partnerships (LLLPs), which are limited partnerships (formed under the governing limited partnership statute in the applicable state) that have elected LLLP status.

General Partnerships

A general partnership is an association of two or more persons to carry on as co-owners of a business or investment activity for profit. It can be formed by the actions of the parties, even if there is no formal or written

partnership agreement, or if the participants lead third parties to believe that they are a partnership, and the third parties rely on that assumption.

There are three main characteristics: the sharing of profits and losses, joint ownership of the capital and partnership assets, and joint control and management of the enterprise.

Advantages

The principal advantage of the general partnership structure is the classification of the concern as a partnership for US tax purposes (also available for LLCs and limited partnerships).

Unlike a limited partnership, there are typically no filing requirements or costs associated with the formation of a general partnership, and, unlike a corporation, there are no formal operational requirements that demand compliance.

Disadvantages

The most significant disadvantage of investing through a general partnership is that all the partners have unlimited, joint and several liability for anything that occurs at or with respect to the property or otherwise with respect to the partnership's business and activities. Recourse liabilities are shared by the partners jointly.

Similar to the concept of an LLP, many states, including Florida, have sought to mitigate this issue by adopting statutes that authorize and provide for LLPs, which are general partnerships with elected LLP status. With a valid election in effect, the default rule on general partner liability for the obligations of the general partnership reverses, and, by statute, the general partner is not so liable. Here again, the use of an LLP does not yet provide complete assurance of limited liability for the general partner of the limited partnership, based on the potential for conflict between the governing law of different states.

Corporations

A corporation is a distinct legal entity formed by filing articles of incorporation or other charter instrument with the appropriate state agency.

Advantages

The principal advantage of a corporation as an investment vehicle limits the personal liability of the shareholders to their investment in the corporation. Shareholders become personally liable for corporate liabilities only in rare circumstances, usually involving the failure to observe corporate formalities.

Disadvantages

Perhaps the single biggest disadvantage of a corporate structure is a higher effective federal and state income tax rate generally associated with the two-tier framework of corporate income taxation in the USA, as described herein. Many investors may find this additional cost unacceptable.

An S-corporation with no C-corporation history is generally a "transparent" or "pass-through" entity subject to a single tier of US federal and state income tax. However, an S-corporation is not optimal for most real estate joint ventures, being subject to substantial limitations. An S-corporation must always have only a single class of equity interest outstanding.

Other Real Estate Ownership Structures

REIT

A REIT is a federal income tax classification that allows holders of beneficial interests in a trust to own real estate. REITs offer real estate investors many of the benefits of the corporate form, including limited liability for investors, centralized management, and a ready market for transferring shares.

While taxed at regular corporate income tax rates, a REIT can deduct dividends paid to shareholders if it meets certain qualifications. This deduction effectively eliminates the double taxation (ie, two tiers of income tax) associated with corporations because, with the deduction, income from the REIT is taxable only at the

shareholder level. Deductible losses, however, cannot be passed through to shareholders.

Dividends paid by a REIT constitute either ordinary dividends, which are attributable to operating or active business income, or capital gain dividends, which are attributable gains realized by the REIT on the sale of its investment assets. REIT shareholders report and pay tax on their share of the REIT's taxable income and gains. Both US and non-US individual investors are eligible for the long-term capital gains rate on their allocable share of long-term capital gains of the REIT. Non-US investors are subject to statutory withholding with respect to their share of both ordinary dividends and capital gain dividends.

REMIC

A real estate mortgage investment conduit (REMIC) is an investment entity used to hold a fixed pool of real estate mortgages. REMICs were developed as a result of the growing interest in collateralized mortgage obligations (CMOs) as a conduit for investors investing in real estate mortgages. If a qualified entity elects REMIC status, it is no longer a taxable entity. The REMIC's income is passed directly through to the REMIC's interest holders.

To qualify as a REMIC, substantially all the assets of the REMIC must be real estate mortgages. The mortgages must also be transferred into the REMIC, either as part of its formation or within three months of its formation.

Land or Business Trusts

Land trusts, or business trusts, are allowed in some but not all states. In a land trust, both legal and equitable title to the property is held by a trustee, who holds the property for the beneficiary and only acts when directed by the beneficiary. Although the trustee holds actual title to the property, the beneficiary has the exclusive right to manage and control the property, to have possession of the property, and to receive proceeds from the property.

Joint Estates

Tenancy in common

A tenancy in common gives two or more persons or entities an undivided fractional ownership interest in real property. Tenancies in common are typically governed by tenants in common agreement.

Other features of a tenancy in common are as follows:

- the right of each co-tenant to possess the entire estate;
- no right of survivorship, which means a deceased owner's share passes to their heirs through probate; and
- the right of each co-tenant to unilaterally sell, mortgage or otherwise devise its tenancy in common interest.

Joint tenancy

A joint tenancy gives two or more persons or entities an equal and undivided right to use and possess a property. A joint tenancy generally features the right of survivorship, which means that, when an owner dies, the surviving owners automatically absorb the deceased owner's share in the estate. Some states require the right of survivorship to be expressly provided in the deed.

To form a joint tenancy, the owners must satisfy the four unities of ownership:

- time, whereby each joint tenant must receive title at the same time;
- title, whereby each joint tenant must receive title under the same instrument;
- interest, whereby each joint tenant must receive the same equal share of ownership; and
- possession, whereby each joint tenant must have an identical right of possession of the entire estate.

Joint tenants cannot sell, mortgage, or otherwise dispose of their shares in the joint tenancy without the consent of all the joint tenants. If a joint tenant conveys its interest to a third party, then the joint tenancy is

destroyed and a tenancy in common is formed.

Tenancy by the entirety

Tenancy by the entirety is similar to joint tenancy with a right of survivorship, in that the deceased owner's interest in the real property is transferred and vests automatically in the surviving joint owner. However, tenancy by the entirety is available only to married couples and does not require express language in the deed to create a right of survivorship between the spouses.

Unless the deed provides otherwise, real property acquired by a husband and wife is generally presumed to be held as tenants by the entirety in Florida. Common practice in Florida is to include the marital status of the spouses in the deed when the spouses intend to create a tenancy by the entirety.

5.3 Tax Benefits and Costs

See **8.1 Sale or Purchase of Corporate Real Estate**.

5.4 Applicable Governance Requirements

An LLC is typically classified as either "member-managed" or "manager-managed", with the applicable classification defining and providing the power and authority to govern the company. An LLC may choose – but is not required – to implement a governing body to act subject to member control and with supervisory authority over any appointed officers. An LLC structure is flexible in establishing protocols for any meetings of members and/or managers.

General partners have the exclusive power and authority to govern and manage a limited partnership (including an LLP). A limited partnership structure is also flexible in establishing protocols for any meetings of partners.

6. Commercial Leases

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

In Florida, a person or entity can occupy and use real estate for a limited period without buying it outright by leasing the real estate or obtaining a license to use it. There are differences between the two, including their interest in the property and ability to transfer.

6.2 Types of Commercial Leases

Commercial leases can be categorized into four types – net, double net, triple net and gross – with the main difference between them being how the rent is calculated:

- in a net lease, a tenant pays some of the landlord's real estate taxes, insurance and maintenance expenses, in addition to rent;
- in a double net lease, a tenant pays the landlord's real estate taxes and insurance, in addition to rent;
- in a triple net lease, a tenant pays all the landlord's real estate taxes, insurance, and maintenance, in addition to rent; this type of lease is typical for a ground lease; and
- in a gross lease, the tenant only pays rent and the landlord pays directly for all of its costs of owning and maintaining the property.

6.3 Regulation of Rents or Lease Terms

In Florida, leases are governed by Chapter 83, Florida Statutes.

Regulations relating to the leasing of residential property are more extensive than regulations relating to commercial leases, which are limited to matters such as rights and remedies upon default, landlord lien rights and actions for removal. The regulations for residential leases include these matters as well as "consumer protection" provisions.

6.4 Typical Terms of a Lease

Except for a lease that has an unlimited term, the length of a lease is not regulated by the state. The typical length of a commercial lease is three to five years. Ground leases are typically for 99 years.

Tenants are typically responsible for the maintenance and repair of the real property occupied by the tenant, other than the roof and exterior walls of a structure, which are typically the maintenance responsibility of a landlord.

Landlords typically collect rent payments on a monthly basis. Florida law provides that, if there is no written lease, the duration of the lease is based on the frequency of the rental payments. For example, if rent is payable weekly, then Florida law provides that the tenancy is from week to week.

6.5 Rent Variation

Whether rent payments remain the same for the duration of a lease depends upon the terms of the lease agreement. Typically, commercial leases in Florida contain rent escalation clauses pursuant to which the amount of rent payments increase on the annual anniversary of the rent commencement date or other specified date. The rent increase is usually tied to a specific percentage increase.

6.6 Determination of Changes in Rent

Lease agreements typically contain provisions relating to rent increases, typically on a percentage basis, and usually occur on the yearly anniversary date of when the rental payments commenced. If a tenant has an option to extend the term of the lease, payments are typically adjusted for the extended term to fair market value based on an appraisal or other stated formula or process. Changes or increases in rental payments are contractual in nature and not governed or regulated by the State.

6.7 Payment of VAT

Florida imposes sales tax on lease agreements and licenses to use real estate, except certain tenancy rights which are specifically exempt from sales tax, such as non-transient, residential leases with a term greater than six months. This tax is based on the total rent payable under the lease or license agreement.

6.8 Costs Payable by Tenant at the Start of a Lease

In addition to the first month’s rent (plus sales tax), tenants are typically required to pay a security deposit and the last month’s rent (plus sales tax) at the commencement of a lease.

6.9 Payment for Maintenance and Repair

Although landlords will pay the costs of maintaining and repairing common areas, such costs are typically reimbursed by tenants through common area maintenance charges equal to a pro rata share of the costs as set for in net leases.

6.10 Payment for Services, Utilities, and Telecommunications

If utilities and telecommunications services, etc, are not separately metered, then a lease will typically provide that the tenant is responsible for paying its pro rata share of the cost of such services, utilities and telecommunications to the landlord.

6.11 Insuring Real Estate that Is the Subject of a Lease

Landlords typically remain responsible for insuring the leased real estate, and for repairing or replacing the real estate if it is damaged as a result of a casualty event. In a ground lease, the tenant is usually responsible for insuring the real estate and for repairing or replacing the real estate if it is damaged as a result of a casualty event.

6.12 Restrictions on the Use of Real Estate

Leases are purely contractual in nature and landlords may impose various restrictions on how a tenant may use real estate. For instance, a landlord may restrict the tenant's use of the property to a specific type of business. Florida zoning and land use laws also impose restrictions on how real estate may be used.

6.13 Tenant's Ability to Alter or Improve Real Estate

If a lease is silent on such matter, then the tenant may alter or improve the real estate during the lease term, with the only limitations being the practical limitation of the cost of the improvements versus the length of the lease term. Typically, though, landlords impose various restrictions and requirements on tenant alterations and improvements in order to ensure that any alterations and improvements are pre-approved by the landlord, and comply with all laws, rules, and regulations.

6.14 Specific Regulations

Although Part I of Chapter 83 of the Florida Statutes addresses commercial leases such as leases for industrial, office and retail property, such leases are not regulated to the extent of residential leases. Many local governments also impose restrictions on those who rent their homes on Airbnb and other similar platforms, including registration, license and requirements, in addition to requirements relating to the collection of taxes and fees.

6.15 Effect of Tenant's Insolvency

To the extent that a tenant's insolvency results in a bankruptcy, Section 365 of the Bankruptcy Code addresses the rights and remedies to the landlord and tenant. Pursuant to Section 365, a debtor may:

- reject leases determined to be burdensome, creating only a pre-petition damage claim limited under Section 502(b)(6) of the Bankruptcy Code;
- assume or assume and assign leases to third parties (notwithstanding pre-petition defaults or anti-assignment provisions in the leases), as long as defaults are cured and the assignee provides adequate assurance of future performance; or
- negotiate amendments to the terms of its leases.

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

Landlords typically require tenants to post a security deposit to protect against a default of its lease obligations by the tenant, and to provide security for any damage done to the leased premises. The security deposit can be in the form of cash, letter of credit, or a security bond. The amount of the security deposit varies but it is

usually equal to one or two months' rent.

6.17 Right to Occupy after Termination or Expiry of Lease

If the lease expires and the tenant holds over in the possession of the premises, this is considered a tenancy at sufferance. If the landlord accepts rent during the holdover term, this is not a renewal of the term. However, if the landlord provides written consent to the holdover, the tenancy becomes a tenancy at will.

The term of a tenancy is based on the frequency of the rental payments.

6.18 Right to Terminate Lease

A landlord can typically terminate a lease for a monetary default. A landlord may also terminate a lease if a tenant fails to comply with the non-monetary obligations under the lease.

6.19 Forced Eviction

A landlord may evict a tenant in the event of a tenant default prior to the lease expiry date. An eviction action in Florida may take as little as two weeks from the notice delivery to the final removal of a tenant, or could last much longer, depending on the nature of the default in question. By way of example, it is much easier to prove a payment default than a maintenance default.

The exact length of a Florida eviction depends on the reason for the eviction, how fast the landlord moves, and whether the tenant responds so that the tenant can challenge the landlord's allegations in court.

6.20 Termination by Third Party

The government may take private property via eminent domain, provided the government is going to use the property for a public purpose and pays both the landlord and tenant full compensation. A taking is a relatively quick procedure once the condemning authority files the lawsuit and sets the order of taking hearing, at which the condemning authority must prove:

- that the property is necessary;
- that the taking is for a public purpose; and
- that it has prepared a good faith estimate of value based on a valid appraisal report.

Once the judge enters the order of taking, the condemning authority deposits the good faith estimate of value into the court registry and becomes the owner of the property. After the order of taking hearing, the second stage of the quick-take action begins, in which a 12-person jury decides the amount of compensation to be paid to the property or business owner for the taking.

Commercial tenants are considered "property owners" and may share in compensation for real estate encumbered by their leasehold. This "sharing" is usually done pursuant to court order, mediated settlement agreement, or pre-suit settlement that apportions the compensation for the taken real estate between the fee-owner and leaseholder.

7. Construction

7.1 Common Structures Used to Price Construction Projects

Florida construction law practitioners typically use the American Institute of Architects (AIA) suite of documents for construction projects, with modifications to the base forms based upon the terms of the transaction.

The price structures that are used for construction projects include the following:

- fixed price or lump sum;
- guaranteed maximum price (with savings either retained by the owner or shared with the general contractor, as negotiated); and
- reimbursable based upon various calculation methods, including unit price and cost plus fixed fee.

7.2 Assigning Responsibility for the Design and Construction of a Project

There are several ways to organize the contracting of a construction project, including the following methods.

Design-Bid-Build

The owner engages the design team directly and the design team produces a set of construction documents that are used as the basis for a competitive bidding process.

Construction Manager as Agent

The owner engages a contractor when it engages the design team so that the owner/construction manager/design team work together in collaboration.

Construction Manager at Risk

The owner engages the contractor when it engages the design team so that the owner/construction manager-contractor/design team work together in collaboration for the project.

Design/Build

The owner retains a contractor to provide a turnkey completed project; the contractor retains the architect and is responsible for designing and building the project based upon the owner’s design criteria and budget.

7.3 Management of Construction Risk

Construction risk is allocated by several methods, depending upon the structure of the transaction and the terms of the negotiated agreements. Accordingly, the initial construction risk shifting method used by owners is to select the contracting structure that best suits the risk tolerance of the owner for the proposed project. These methods include indemnification by contractor, warranties, liquidated damages for delay, and waivers of certain types of damages.

7.4 Management of Schedule-Related Risk

Owners typically address this issue by negotiating a "per day" liquidated damages amount in the event the project is not substantially complete as of a certain date set forth in the agreement. Contractors may negotiate a fee plus amount if certain construction milestones are met ahead of schedule.

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

Typically, the cost of the payment and performance bond is paid by the owner, either directly or by inclusion of such costs in the contract sum payable to the contractor. In lieu of a payment and performance bond, an owner may require the contractor to post a letter of credit to secure their performance.

7.6 Liens or Encumbrances in the Event of Non-payment

Prior to construction, the owner and the owner’s construction lender typically require the mortgage securing the mortgage loan to be recorded in the public records prior to the recordation of a notice of commencement. A notice of commencement is a two-page form that is recorded in the public records of the county in which the

real property is located and is posted at the job site.

7.7 Requirements before Use or Inhabitation

Occupancy of improved real property is a local law issue that is determined by the Florida Building Code or other applicable county and municipal laws, rules, codes and regulations. Typically, a municipality requires the issuance of a certificate of occupancy or certificate of completion (that the structure is complete, such as a building, but does not grant occupancy) before a building or structure that has been constructed upon real property may be occupied. A temporary certificate of occupancy may also be issued, which permits temporary occupancy until certain conditions are satisfied.

8. Tax

8.1 Sale or Purchase of Corporate Real Estate

Several primary federal and Florida tax considerations are inherent in addressing a corporation's transfer of real property situated in the USA, as described below.

A "corporation" for this purpose includes both a state law corporation (a legal entity formed under a state's corporate statutes) and any entity classified as a corporation for US tax purposes. The category may also include certain non-US entities which, under US tax law, have a corporate classification as the default status.

Income Taxes

A corporation is generally subject to income tax at the entity level with respect to all income and gains, including gain realized on the sale of real property situated in the USA. Additionally, depending on the ownership of the corporation and other factors, a second tier of income or withholding tax may apply with respect to the distribution or application of the corporation's retained earnings attributable to the sale.

Federal and Florida income taxes apply at the corporate level, including with respect to net taxable gains realized by a corporation on the sale or disposition of real property. The federal corporate income tax applies at a top marginal rate of 21% (recently reduced from 35%, as described below), and the Florida corporate income tax applies at a 5.5% rate.

Liquidating distributions

Corporate and partnership structures pose significantly different US income tax results in connection with the sale of real property. Notably, a corporation (again, a C-corporation) is not eligible for a rate preference with respect to long-term capital gains. Standard federal and Florida corporate income tax rates apply to gains realized by a corporation on the sale of real property.

Only individual taxpayers and certain trusts are potentially eligible for the favorable long-term capital gains rate.

Liquidating distributions by a corporation that result in a redemption of a US person's equity interest in domestic corporation for federal income tax purposes are generally treated as payment in exchange for the shareholder's equity interest in the distributing corporation.

Takeaway, planning implications

The selection of the proper legal entities through which to own and operate US real property is fact intensive. As a guiding principle, the partnership structure frequently remains more favorable in the closely held setting if the business exigencies and investment requirements will accommodate the use of LLCs, limited partnerships and other legal entities.

State Transfer and Related Tax Considerations

Transaction-related taxes

Florida imposes several primary transfer-based or collateral-based taxes with respect to real property transactions, each of which generally applies to both corporate and individual taxpayers.

Successor liability for taxes

Florida statutory law makes a purchaser of more than 50% of a business or the assets of a business jointly liable for certain unpaid taxes of the seller, including sales and use taxes.

Certain pre-sale considerations: federal transfer taxes

The predicate for this discussion – the ownership of US real property through the corporate form – calls attention to choice-of-legal-entity considerations within the context of overall US tax and estate planning. In establishing and perpetuating an organizational structure for the ownership of US real property in the closely held setting, US federal transfer taxes pose material, potential liability and add another layer to the analysis. This exposure is especially acute in the US-inbound setting.

The USA imposes a transfer tax system that consists of a gift tax, an estate tax and a generation-skipping transfer tax (GST).

8.2 Mitigation of Tax Liability

In a conveyance of real property transaction, documentary stamp tax may be avoided if the transaction is structured as the transfer of 100% of the equity ownership interests of the grantor to the grantee in lieu of a transfer of the real property. However, in 2009, the Florida legislature amended Section 201.02, Florida Statutes, which resulted in the documentary stamp taxes being due and payable in connection with certain indirect transfers and transfers without change of beneficial ownership. As amended, Florida law imposes documentary stamp tax on so much of the consideration that is paid on the sale of interests in a "conduit entity" as is attributable to the value of any Florida real property that was transferred to the conduit entity within the preceding three-year period.

In a mortgage loan refinance transaction, an existing borrower that is seeking to refinance an existing mortgage loan may save on the documentary stamp taxes and intangible taxes payable with respect to the new mortgage loan if the new lender obtains an assignment of the existing mortgage loan from the existing lender rather than paying off the existing mortgage loan and providing a new mortgage loan.

8.3 Municipal Taxes

Florida levies a sales tax on commercial rental, as well as a sales tax (transient rental tax) on guest accommodations and residential leases of six months or less. The baseline rate is 6%, subject to increase by local surtax.

With respect to related party or inter-company leases, it is possible in appropriate fact patterns to implement a capital lease or "synthetic" lease, which is generally treated as a sale transaction (and not an operating lease) for financial and tax accounting purposes, including Florida sales tax purposes.

8.4 Income Tax Withholding for Foreign Investors

Taxation of Non-US Person’s Sale of US Real Property

FIRPTA (the Foreign Investment in Real Property Tax Act of 1980) is a taxing statute that subjects a non-US person (both individuals and non-US entities) to tax with respect to the sale or disposition of real property situated in the USA (more broadly, the sale of US real property interests – USRPIs). In establishing the basis for taxation, FIRPTA classifies the seller for this purpose as being engaged in a trade or business within the USA during the tax year of the sale, and classifies the gain or loss realized on the sale as being effectively connected with the trade or business. Specific withholding requirements apply to the sale of a USRPI by a non-

US person, as described below.

Equity and profit participation interests in legal entities that hold USRPIs constitute USRPIs as well, if held by the non-US person not solely in the capacity as a creditor. Such interests may include, for example, corporate stock, an LLC interest, a partnership interest, certain beneficial interests in a trust, rights to share in the appreciation of such equity interests, and rights to share in the appreciation in the value of or income, profits or proceeds from the underlying real property.

Planning Considerations

Special rules apply where a non-US corporation generates earnings and profits from the direct conduct of a business in the USA. The USA generally taxes such income when repatriated from the USA or withdrawn from the US trade or business through a branch profits tax (BPT), which generally applies at a fixed statutory rate of 30% of the non-US corporation's "dividend equivalent amount", unless a treaty provides a lower rate or eliminates the BPT.

8.5 Tax Benefits

The US income tax treatment of real estate ownership, including real property used in connection with an active trade or business, generally remains favorable in terms of cost recovery and other income tax attributes. Under the Tax Cuts and Jobs Act of 2017, qualifying property acquired and placed in service after September 27, 2017 is eligible for 100% bonus depreciation in the year placed in service. The 100% rate drops by 20% per year beginning in 2023, until it is eliminated in 2027.

Under the Tax Cuts and Jobs Act of 2017, 100% expensing now is available (for the first time) for both new and used property. Eligible assets for bonus depreciation are those with a depreciable life of 20 years or less including without limitation “qualified improvement property” (QIP), ie, certain improvements to the interior of a non-residential building that occur after the building is placed in service.

Drafting Error

As a result of a drafting error contained in the Tax Cuts and Jobs Act of 2017, Congress did not assign a 15-year class life to QIP (from the 39-year class life applicable under prior law), which drafting error precluded QIP from qualifying for 100% expensing. However, Section 2307 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) corrected that drafting error by reducing the recovery period of QIP to 15 years, thereby making QIP immediately eligible for bonus depreciation. This CARES Act corrective provision is retroactive to the effective date of the Tax Cuts and Jobs Act of 2017 (January 1, 2018), meaning taxpayers may amend prior year returns to capture the benefit of the corrective action and receive an expeditious refund.

Real estate entrepreneurs are engaged in the business of acquiring commercial office buildings trending towards retaining consultants to perform cost segregation studies to maximize available tax benefits associated with depreciation.

Tax Cuts and Jobs Act

The Tax Cuts and Jobs Act of 2017 added Section 1400Z-1 and Section 1400Z-2 to the Internal Revenue Code in an effort to encourage private investment in low-income communities designated as Qualified Opportunity Zones (QOZs). As an added incentive for such investment, Section 1400Z-2 provides favorable tax benefits for real estate investors (and other investors) with eligible capital gains who invest in QOFs.

The Opportunity Zone legislation was conceived by congress as an economic development tool intended to incentivize the migration of equity capital into these designated areas for purposes of the formation and establishment of new businesses, the development and redevelopment of real estate, and other forms of economic stimuli, with the ultimate goal of job creation and poverty reduction in the QOZs. The tax incentives potentially available to investors with eligible capital gains willing to invest in these QOZs by way of investment vehicles known as QOFs include temporary deferral of income taxation on such eligible capital gains, elimination of a portion of the deferred gain via a basis step-up, and the exclusion from gross income of all

post-acquisition capital appreciation in the QOZ investment.

For real estate investors (and other investors) to achieve complete deferral of gain under Section 1400Z-2(a), only an amount up to the gain on the real property (or other qualifying property) sold must be reinvested in a QOF. There has been significant activity in the real estate sector in this area.

Income Tax Rates and Timing

With respect to effective income tax rates, individual investors can structure their ownership of US real property so as to be eligible for long-term capital gains treatment on gain realized upon sale. This rate is generally 20% under current law (exclusive of the additional 3.8% tax on net investment income), subject to a 25% rate applicable to certain depreciation recapture (which is an adjustment to reflect the fact that cost recovery deductions during the ownership phase may offset ordinary income from other activities).

In terms of timing of the taxable event upon a sale, the continued availability of deferral pursuant to a "like-kind exchange" of real property for replacement real property can provide material tax benefits to an investor perpetuating its investment in the form of real property. There is no ceiling on the duration of this deferral, allowing multiple like-kind exchanges over an indefinite period until the investor chooses to monetize its investment.

If an individual taxpayer dies owning replacement real property acquired in "like-kind exchange", there is a step-up in basis at death. This results in the elimination of all the deceased taxpayer's deferred gain, which can provide material tax benefits to the heirs of the deceased taxpayer.

8.6 Key Changes in Federal Tax Reform

See **1.3 Impact of Recent US Tax Law Changes**.

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