Ropes & Gray Real Estate Group Prominently Featured at IMN's 2nd Annual Real Estate General Counsel Forum

Several members of Ropes & Gray's real estate practice group participated on panels at IMN's 2nd Annual Real Estate General Counsel Forum in New York. The panels focused on a variety of topics relevant to today's changing real estate market, including real estate joint ventures, acquiring and selling loans secured by real estate, and negotiating "bad boy" and other non-recourse carve-out guarantees. We thought it would be helpful to share some key insights, market trends and competitive information discussed by these panels.

Acquiring and Selling Notes: What You Need to Know

David C. Djaha of Ropes & Gray and representatives from Capmark Bank, L&R Group, Resource Real Estate, Inc., and Cole, Schotz, Meisel, Forman & Leonard, P.A.

It is essential to know your preferred exit strategy at the beginning of negotiations, as your strategy ("loan to own" vs. "income play") plays a critical role in determining your focus during acquisition negotiations and diligence.

Deals are moving fast and competition is tight. Buyers often need to perform due diligence as they negotiate deal documents.

As a result of recent local court decisions stopping foreclosure actions due to an inability to verify the title chain, buyers are increasingly cautious regarding the acceptance of lost note affidavits and now require detailed representations relating to loan documents.

Residential buyers have growing concerns about lender liability claims, given the heightened regulatory environment and more stringent federal oversight relating to origination, servicing and enforcement.

Of Operating Partners and Capital Partners: The Joint Venture Trends a General Counsel Should be Aware Of

Richard E. Gordet of Ropes & Gray and representatives from TIAA-CREF, HFZ Capital Group, Goodwin Procter LLP, Arent Fox LLP, and Pircher, Nichols & Meeks.

With capital partners demanding and receiving significant control and major decision rights, it is important that the capital partner and joint venture agreement require, and partners implement, formal procedures for requesting and granting approvals to prevent the inadvertent approval of a major decision by informal e-mail or phone communication.

Consent and approval rights afforded the capital partner should not be used to absolve the operating partner from its obligation to manage and operate the joint venture in accordance with the agreed standard of care.

While joint venture agreements will always contain dispute resolution mechanisms and remedies designed to align interests, nothing beats open and ongoing communication between the operating partner and capital partner to avoid deadlocks and disagreements.

If a joint venture project involves a contaminated site or a site with significant environmental risk, capital partners should consider possibly relinquishing significant day-to-day control over such a site in order to avoid operator liability.

Bad Boy Carve-Outs, Bad Boy Carve-Outs, What You Gonna Do? Evaluating Asset Protection Methodologies, Including Personal Guarantees

John M. Creedon of Ropes & Gray and representatives from NorthStar Realty Finance Corp., Alliance Commercial Partners, LLC, and Arbor Commercial Real Estate

In light of the economic downturn and recent notable court decisions strictly enforcing the terms of non-recourse carve-out guarantees, operating partners increasingly demand that their capital partners share the risks and liabilities associated with these "bad boy" guarantees. More and more, such risk-sharing arrangements are being documented outside of the joint venture agreement through a separate reimbursement or contribution agreement. Capital partners often insist that this backstop only applies when such liabilities do not result from the operating partner's bad acts, or result from external events or circumstances beyond the operating partner's control.

Borrowers and guarantors increasingly demand that violations of special purpose entity (SPE) or separateness covenants only result in full loan liability (also known as "springing recourse" liability) when such violations result in an actual substantive consolidation of the borrower in bankruptcy.

In light of recent case law, borrowers and guarantors are resisting any loan covenants or other obligations (whether included as an SPE requirement or otherwise) that require a borrower to remain solvent throughout the term of the loan. Any recourse liability that arises from a borrower's insolvency is increasingly being limited to the narrow circumstance in which the insolvency results from an improper distribution or misapplication of funds or other "bad act" of the borrower, and not simply as a result of insufficient cash flow sourcing from the property.