

Negotiating Takeover And Self-Help Rights In Shopping Center Construction Projects

(With Form)

Jacob W. Reby and Marisa L. Byram

*What's a big tenant to do when the shopping center's
developer goes belly up during construction?*



UNFORTUNATELY, it is the nature of the developer to risk default and oftentimes insolvency during the construction of every new shopping center. The biggest casualty of such a default is usually the shopping center's anchor retailer, that purchased, rather than leased, its site in the shopping center. Out of self-preservation,

the anchor retailer may go so far as to take over the development of the entire shopping center.

As counsel for the anchor retailer, preventing contractual and financial disaster in the event of a pre-opening developer default, and adeptly predicting and handling the many difficulties that may arise in takeovers, requires clear foresight and preparation.

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THE SCENARIO • Your client, Hank's Home Emporium, and another major retailer, Really Big Retail, each enter into a site development agreement ("SDA") with Developer whereby Hank's and Really Big will each own its site in the shopping center, while the smaller stores in the shopping center and on outparcels will lease their sites. Under the SDA, Developer is responsible for the shopping center's infrastructure: widening the public roadway that leads to the center, putting in stoplights, drainage and detention, pylon signs, internal access drives, utilities, grading, lighting, and so forth.

Hank's and Really Big subsidize some of these project components generally on a pro rata basis based on acreage and typically at a capped cost. Developer is also responsible for delivering the completed site to the smaller stores. Hank's and Really Big are for the most part responsible for the construction of their own stores, although Developer may still have some responsibilities such as demolition and pad delivery. Developer has talked Bank into financing the development, perhaps with some additional funding coming from the City in the form of tax increment financing ("TIF") bonds.

POTENTIAL DEFAULT RISKS; COMPOSING AN ACTION PLAN • Developers may default for several reasons:

- A simple lack of funding;
- Inexperience;
- Failure to get firm bids for all of the work;
- Escalating costs; or
- Unexpected problems with the site.

The retailers that own their sites are, practically speaking, in a riskier financial situation than those who simply lease their sites. To minimize the construction risk, Hank's should require Developer to first show Hank's a detailed scope of work and firm bids from a reputable general contractor to complete that work.

Hank's should also require Developer to post some security to insure that on- and off-site construction obligations are completed. That security might be in the form of a purchase price holdback, construction payment retentions, performance or payment bond, personal guaranties, cash escrow, or letter of credit.

The following are several issues that Hank's and Really Big will likely face in the event of Developer's default, and for which preparation at the time of signing the initial purchase agreement and SDA are invaluable.

Circumstances In Which Hank's Is Entitled To Take Over

Hank's and Developer should determine up front what circumstances merit a takeover. Such circumstances may include failure by Developer to comply with the time frames for completing work components established in the SDA. Developer is usually entitled to a written notice of default and opportunity to cure. See Appendix B for a sample clause to be inserted in the SDA authorizing a takeover by Hank.

Relationship Between Hank's And Really Big In The Event Of Developer's Default

If Developer defaults, what will the relationship be between Hank's and Really Big? Hank's and Really Big should negotiate the following between themselves:

- Which retailer will take over first, as between the two of them (considerations include who will open first and who is the bigger "gorilla")?
- Will the retailer responsible for the takeover complete the site construction work on the other retailer's property and are temporary construction licenses in place?
- How should any collateral security be realized and shared?

See Appendix A for a sample agreement between Hank's, Really Big, and Developer dealing with these issues.

What Is The Specific Work Encompassed By The Takeover?

By the time a takeover occurs, the general contractor and subcontractors have usually walked off the job for lack of payment. They may have even filed mechanics' liens. Who will negotiate to get the contractors back on the job and at what price and on what payment terms? Has Bank taken a collateral assignment of all construction related contracts and must Bank participate in these negotiations? Will Bank agree to complete construction? In notifying Developer that Hank's would prefer to do the work itself rather than continue working with Developer, Hank's should indicate the specific work Hank's is undertaking to perform. Who owns the plans and specifications and may Hank's use them to complete construction?

Removing Liens For Work Already Performed

It is in the retailer's best interest to obtain lien waivers on work performed by the general contractor and subcontractors before the takeover. Any lawsuits claiming such liens should, obviously, be dismissed. In contrast, Hank's as the takeover retailer will want to be able to assert lien rights for the cost of labor, services, and materials it supplies with respect to shopping center property not belonging to Hank's, which costs would otherwise have been borne by Developer. The priority of such liens will vary depending on the jurisdiction. A concurrent title search and notification to the title company of releases and lien waivers are also recommended.

Accessing Developer's Credit

Hank's must understand and be able to access the credit issued to Developer to finance

the shopping center. If Developer defaults, Hank's and Really Big may need to negotiate with the Bank or mortgagee attempting to exercise its default remedies and preference rights. If Developer files for bankruptcy, the project will stall and time schedules will be further delayed, weather and leases notwithstanding. The takeover retailers must determine if it is possible to transfer Developer's unspent bond proceeds to Hank's or Really Big. In doing so, it is necessary to confirm with the lender:

- The lender's responsibility to underwrite the bonds as transferred to the retailer;
- Bond closing dates and terms;
- Date that funds will be available to the retailer for reimbursement; and
- Applicable sales tax, projected sales of all shopping center occupants, dates sales taxes will first be generated and sales tax reporting requirements

Obtaining Other Sources of Funding

Promptly following default and before takeover, Hank's and Really Big should develop an overall project budget for completion of the takeover retailer's site and the shopping center in general. In doing so, an updated appraisal or realtor evaluation may be helpful to justify the additional expenses. Hank's or Really Big may want to force Developer to sell some of the shopping center property to raise money, or to bring in another developer. The takeover retailer must also estimate and determine damages accrued, potentially to include legal fees and liquidated damages called for under the SDA.

Some of the capital for the shopping center might have been provided through city revenue bonds and tax free development notes. To access this capital, Hank's and Really Big will have to negotiate with the City or related agencies. Is completion of specified off-site improvements a condition to Hank's certificate of occupancy?

Funding will be particularly hard to find for portions of the projects for which lien rights are unavailable. Liens are not typically available for work on state- or city-owned property such as areas calling for roadway widening or installing traffic lights in an intersection.

Transfer of Licenses and Permits

Building permits and licenses issued to Developer or its contractors must be effectively, if not actually, transferred to Hank's or Really Big. In transferring the permits, Hank's and Really Big must determine if permits issued in the Developer's name can in fact be assigned to Hank's and Really Big. The permits' expiration dates should also be noted. Are there transfer fees? If so, what are the timing and reissuance requirements? What utilities and highway departments must be contacted, what are their agreements, and what documents must be executed to take over completion of public improvements?

Relations With Smaller Retailers

Really Big and Hank's should obtain copies of any outstanding letters of intent or expressions of interest, contracts, and leases from other potential tenants of the shopping center.

Smaller retailers may view Developer's default as an opportunity to attempt to alter the

design of the shopping center. Less solvent or less scrupulous smaller retailers may also view the chaos as an opportunity to withhold paying for the development of their sites or renegotiate business terms. Should Hank's attempt to control or coordinate other aspects of developing the Shopping Center such as publicity and press releases? Are there confidentiality concerns?

Non-Critical Site Development Work

Given the chaos and cost of the takeover, Hank's may want to defer site development work not critical to its store. Completing this non-critical work may have to be negotiated with Really Big and the smaller retailers. Hank's, Really Big, and Bank should also consider bringing in a new, solvent, experienced developer to finish the shopping center leasing and construction elements, and to be responsible for post construction common area management and maintenance. Consider how that substitute developer will be compensated.

CONCLUSION • By thinking ahead and anticipating the many takeover problems that could likely arise, the parties can deal up front with issues and position themselves to insure that the shopping center is built on time and without added expense to the retailers.

APPENDIX A

Three-Party Agreement For The Takeover Of On-Site Work

This Three-Party Agreement had been concluded this ____ day of _____, 200__ by REALLY BIG RETAILER, INC., a State A corporation ("*Really Big*"), HANK'S HOME EMPORIUM, INC., a State B corporation ("*Hank's*") and _____, a State C limited liability company ("*Developer*") (collectively in this Agreement sometimes referred to as the "*Parties*").

WITNESSETH:

WHEREAS, Developer is the owner and developer of the Shopping Center; and

WHEREAS, the Shopping Center is comprised of the Developer Tracts, the Really Big Tract, and the Hank's Tract, as shown on *Exhibit A* attached to this Agreement (the "*Site Plan*"), and is located in _____ (the "*City*"); and

WHEREAS, Really Big and Hank's (individually, a "*Retailer*" and collectively, the "*Retailers*") each has acquired or will acquire the Really Big Tract and the Hank's Tract respectively (collectively the "*Retailers' Tracts*"), upon which each plans to build and operate its respective retail establishments within the Shopping Center as shown on the Site Plan; and

WHEREAS, Developer is obligated by the Retailers' SDAs (as defined below) to perform certain site improvement work in connection with the development of the Shopping Center (the "*Site Improvement Work*"), which Site Improvement Work in the aggregate includes: (a) certain work to be performed on each of the Retailers' Tracts (such work on the Retailers' Tracts being collectively referred to as the "*Retailer Site Work*" and individually as the "*Really Big Site Work*" and the "*Hank's Site Work*"); (b) certain work, other than the Retailer Site Work, to be performed within the Shopping Center (the "*On-Site Work*"); and (c) certain work required by the City to be performed outside the Shopping Center (the "*Offsite Work*"); and

WHEREAS, the Retailers have each entered into a Site Development Agreement with Developer to set forth the agreements and understandings relating to the performance of the Site Improvement Work (or applicable portions thereof) and the payment of a portion of the costs of the Site Improvement Work by each of the Retailers (the Really Big Site Development Agreement shall be referred to in this Agreement as the "*Really Big SDA*"; the Hank's Site Development Agreement shall be referred to in this Agreement as the "*Hank's SDA*"; and either may be referred to, when appropriate, as the "*Retailer SDA*." Collectively, the Retailers' Site Development Agreements shall be referred to in this Agreement as the "*Retailers SDAs*"); and

WHEREAS, the Retailers SDAs give each Retailer the right under certain circumstances to take over the On-Site Work, the Offsite Work and the respective Retailer's Site Work required to be performed by Developer under the Retailers SDAs; and

WHEREAS, subject to the terms and conditions of the Retailers SDAs, Developer is required to provide one or more Letters of Credit for the benefit of Really Big for the uncompleted Site Improvement Work required to be performed by Developer under the Really Big SDA and for the benefit of Hank's for the uncompleted Site Improvement Work required to be performed by Developer under the Hank's SDA; and

WHEREAS, Developer and the Retailers desire:

To set forth in this Agreement certain uniform agreements and understandings in the event one or both of the Retailers desires to exercise its right under its Retailer SDA to take over the obligations of Developer to perform the Site Development Work as provided under the respective Retailer SDA; and

To avoid duplicate or overlapping Letters of Credit required under the Retailer SDAs.

NOW, THEREFORE, in consideration of the mutual agreements contained in this Agreement and for good and valuable consideration, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties agree as follows:

1. *DEFINITIONS.* As used in this Agreement, "*Milestone Date*" means a date specified in the Hank's SDA, as attached to this Agreement as *Exhibit B* or a date specified in the Really Big SDA, as attached to this Agreement as *Exhibit C*. If this Agreement is executed by Developer and Hank's before the Really Big closing on the purchase of the Really Big Tract, this Agreement shall be effective as between Hank's and Developer and Really Big shall execute this Agreement at the time of its closing and *Exhibit C* shall be attached at such time. In the event that the Really Big closing does not occur by _____, 200____, Developer and Hank's shall execute an amendment to this Agreement addressing such circumstances. If this Agreement is executed by Developer and Really Big before the Hank's closing on the purchase of the Hank's Tract, this Agreement shall be effective as between Really Big and Developer and Hank's shall execute this Agreement at the time of its closing and *Exhibit B* shall be attached at that time. If Hank's closing does not occur by _____, 200____, Developer and Really Big shall execute an amendment to this Agreement addressing these circumstances.

2. *DEFAULT BY DEVELOPER.* If Really Big or Hank's elects to take over its respective Retailer Site Work, the terms of the respective Retailer SDA shall apply as to notice and cure of such work. If Really Big claims a right to take over the On-Site Work under the terms of the Really Big SDA or if Hank's claims a right to take over the On-Site Work under the terms of the Hank's SDA, the Retailer claiming that right shall deliver written notice to Developer and the other Retailer, which notice shall specify such information as is required by such Retailer SDA (a "*Preliminary Notice*"). Developer shall have 10 days following the receipt of a Preliminary Notice, unless the respective Retailer SDA provides for a longer cure period (a "*Cure Period*") to take such action as may be permitted by the applicable Retailer SDA within the Cure Period to cure the condition specified in the Preliminary Notice (a "*Cure*"). If Developer timely effects a Cure, the notifying Retailer and the other Retailer shall continue to perform their respective obligations to make payments to Developer under the Retailers SDAs if required. If a Retailer takes over the performance of any On-Site Work in accordance with this Agreement, the Retailer shall have the same right to effect a Cure of any condition specified in a Preliminary Notice given subsequent to such takeover as is granted to Developer under this Agreement. The Preliminary Notice and Cure Period set forth in this Agreement shall run concurrently with any notice and cure period set forth in the Retailers SDAs, and not in addition to this Agreement.

3. *TAKEOVER OF ON-SITE WORK.* If a Preliminary Notice is delivered to Developer and the other Retailer in accordance with Section 2 of this Agreement and Developer fails to effect a Cure within the Cure Period, then Developer and the Retailers agree that the Retailer with the earliest missed

Milestone Date (whether such Milestone Date pertains to On-Site Work or Retailer Site Work of such Retailer) shall have the first right, if it so desires, to take over completion of the On-Site Work. That Retailer shall deliver written notice of its decision to take over completion of the On-Site Work (an "*On-Site Work Takeover Notice*") or of its decision to decline to take over the completion of the On-Site Work (a "*Decline Notice*") to Developer and the other Retailer within three business days after expiration of the applicable Cure Period without cure. If the Retailer fails to deliver either an On-Site Work Takeover Notice or a Decline Notice within such three business day period, the Retailer shall be deemed conclusively to have given a Decline Notice. If that Retailer gives or is deemed to have given a Decline Notice, then the other Retailer shall have the next right to so take over completion of the On-Site Work by adhering to the foregoing notice procedures. If a Retailer has elected to complete the On-Site Work, the Retailer shall use its commercially reasonable efforts to commence to take over the On-Site Work as soon as practicable and shall diligently perform the work to completion subject to and in accordance with Section 4 of this Agreement.

4. *PERFORMANCE OF WORK BY A RETAILER.* The Retailers agree that all work performed by a Retailer under this Agreement shall be completed in accordance with the portion of the site plans and specifications for the Site Improvement Work set forth on *Exhibit D* to this Agreement applicable to the On-Site Work, as modified by any change orders approved in writing by Developer and the Retailers as to the On-Site Work (collectively, the "*Plans and Specifications*"). Developer and the Retailers agree to cooperate among themselves and with any Retailer performing any of the On-Site Work under this Agreement. Any Retailer electing to take over completion of the On-Site Work (a "*Take Over Party*") shall use its commercially reasonable efforts to complete all of the On-Site Work with reasonable diligence and in a cost-effective manner in accordance with the Plans and Specifications. All work performed under this Agreement shall be performed to meet (if possible) all Milestone Dates and in a good workmanlike manner, in accordance with sound professional standards, and in accordance with all requirements of law, including all rules, regulations, ordinances, statutes, and guidelines relating to the construction and performance of the On-Site Work and shall be constructed free of all construction liens arising out of the On-Site Work being completed under the provisions of this Agreement.

5. *SECURITY FOR ON-SITE WORK.* As of the date of this Agreement, Developer shall provide a letter of credit issued by Bank, naming Hank's Really Big and the Escrow Agent (as defined below) as a beneficiary in the amount of \$X (the "*Letter of Credit*"), representing the sum of the amounts allocable to the Retail Site Work for the Hank's Tract and Really Big Tract and the On-Site Work. The Letter of Credit shall provide that Hank's or Really Big, respectively, or the Escrow Agent, if so directed, may draw the proceeds allocable to the Retail Site Work for the Hank's Tract (\$Y) or Really Big Tract (\$Z) if either Hank's or Really Big elects to takeover the Hank's Site Work or the Really Big Site Work, respectively, or Hank's or Really Big, if it has elected to takeover the On-Site Work, may draw the proceeds allocable to the On-Site Work (\$W), in either case, in a single draw, upon presentation to the Bank of an affidavit stating that the affiant is an authorized officer of Hank's or Really Big, as the case may be, and that Hank's or Really Big is entitled as of the date of the affidavit to draw such proceeds under the terms of this Agreement (and, if the Escrow Agent will make that draw, that Escrow Agent is directed to make that draw on the Retailer's behalf). The form of the Letter of Credit

(and any amendment thereto or additional letter of credit) shall be approved by the Retailers, each in its sole and absolute discretion. In no event shall either Retailer be entitled to draw more than the sum of the portion of the Letter of Credit proceeds allocable to On-Site Work and the portion allocable to that Retailer's Site Work.

a. In addition, the Retailers, and each of them separately, shall be entitled to draw the proceeds of the Letter of Credit, or to direct the Escrow Agent to make such draw, upon the occurrence of any of the following events before Developer's completion of the On-Site Work:

- i. Developer has failed to renew the Letter of Credit within 20 days before its expiration date and the Bank does not deliver a notice of renewal to each Retailer of such renewal;
 - ii. Developer has failed to pay when due all or part of the costs of the On-Site Work or the Retailer Site Work;
 - iii. Really Big or Hank's (as the case may be) has taken over the On-Site Work under this Agreement;
 - iv. Developer or an affiliate of Developer has filed or had filed against it a petition in bankruptcy;
- or

v. A trustee or receiver has been appointed for the assets of Developer or an affiliate of Developer.

b. In connection with drawing on the Letter of Credit, the proceeds of such Letter of Credit shall be placed in escrow with _____ Title Insurance Co. ("*Escrow Agent*"), under the Escrow Agreement attached to this Agreement as *Exhibit E* (the "*Escrow*"), and the Letter of Credit proceeds will be drawn from Escrow under the draw request procedures set forth in such Escrow Agreement (excluding the discharging of any construction liens created by Developer which shall be the obligation of Developer to discharge).

c. The Retailer contributions provided for in the Retailers SDAs are absolute amounts and, except as provided below, shall not be increased on account of unforeseen circumstances or conditions or over-time work requirements, the risks associated therewith being assumed solely by Developer. Any costs associated with change orders shall be paid in accordance with the respective Retailer SDA.

6. **RIGHT OF CONTRIBUTION.** If the amount of the Letter of Credit is insufficient to provide for the costs that the Take Over Party incurs to complete the On-Site Work, Developer shall be responsible for the deficiency. If Developer cannot pay or refuses to timely pay the deficiency, then as between Hank's and Really Big each shall pay the deficiency based on its pro rata share of the acreage of the Shopping Center and each thereafter may pursue, independent of the other, its claim against Developer for such contribution. Nothing stated in this Agreement releases Developer from its obligations under the Retailers SDAs. Notwithstanding the foregoing, in the event of such deficiency Developer specifically authorizes Really Big and Hank's to place a lien(s) on Developer's tracts (the "*Developer Tracts*"), as the same is more particularly described in the *Exhibit F* attached to this Agreement, for such deficiency, if any. Such liens shall be superior to any lien of first mortgage on the Developer Tracts and by lender's execution of this Agreement lender specifically agrees that such mortgage lien/security agreement shall be subordinate to any liens filed under this Paragraph.

7. *TEMPORARY LICENSE TO COMPLETE WORK.* Each Retailer shall have a temporary license over all portions of the Shopping Center as may be reasonably necessary to complete any portion of the On-Site Work undertaken by said Retailer as permitted under this Agreement. This temporary license shall terminate upon the completion of all of the On-Site Work contemplated in this Agreement. That license shall not permit any Retailer to delay or obstruct completion of any construction upon the licensed Tract.

8. *ASSIGNMENT OF PERMITS AND LICENSES.* If any Retailer exercises its right to complete any On-Site Work as permitted in this Agreement, the contract with the general contractor for such Site Improvement Work and any and all permits or approvals necessary to allow said Retailer to complete said work shall be deemed to have been assigned to such Retailer completing the On-Site Work (jointly and severally if more than one Retailer is involved with each to have the license to jointly utilize, on a non-exclusive basis, those covering the work to be completed by one such Retailer), and upon written request of any such Retailer, Developer will furnish a written assignment executed by Developer to further evidence such assignment. Said Retailer, to the extent said Retailer fails or elects not to complete all of the On-Site Work required under a Retailer SDA, shall, upon request and subject to any local laws, reassign such permits or approvals to Developer or the other Retailer or have the same reissued, as the case may be, and as may be necessary to permit the completion of all Really Big Site Work, Hank's Site Work and On-Site Work. Said Retailers shall cooperate with any needed bifurcation of the permits and approvals, if need be, so they separately cover the work to be performed by each of the Retailers performing such work. Any assignment made under this provision shall be before any collateral assignment of said contract, permits and approvals to any construction lender. Any assignment of the permits and approvals by Developer to a Retailer under this Agreement shall not constitute a breach or default under any provisions of any loan agreement between Developer and its lender, or other documents entered into between Developer and its lender, that otherwise restrict the assignment of the permits and approvals. Developer shall ensure that its construction contract with the general contractor which will perform the Site Improvement Work under the Retailers SDAs shall provide that:

- a. Developer may freely assign such contracts to third parties without the consent of the general contractor; and
- b. Should Developer fail to perform under one or both of the Retailers SDAs, that either one or both of the Retailers may assume such contracts with the general contractor for the Site Improvement Work without the consent of Developer or the general contractor.

9. *INDEMNITY/INSURANCE.* The provisions of the ECCR by and between the Parties executed on the date of this Agreement with respect to insurance and indemnification shall be applicable to the Parties and to the terms and conditions of this Agreement.

10. *ASSIGNMENT.* If any Retailer exercises its right to complete any Really Big Site Work, Hank's Site Work or On-Site Work as permitted in this Agreement, the Parties hereby authorize the Retailer or Retailers involved to go upon all parts of the Shopping Center and take possession of any equipment, materials, tools and appliances owned by, or otherwise in the control of Developer to complete the Really Big Site Work, Hank's Site Work, and On-Site Work involved. Subject to the provisions of

Sections 4 and 5 in this Agreement, Developer further authorizes the Retailer entitled to perform the Really Big Site Work, Hank's Site Work and On-Site Work under the provisions of Sections 3 and 4 in this Agreement to perform such other acts and take such action as shall be reasonably necessary for the expedient, proper, cost-efficient, and legal completion of the Really Big Site Work, Hank's Site Work, and On-Site Work involved. It is acknowledged only Really Big has the right to take over the Really Big Site Work and only Hank's has the right to take over the Hank's Site Work.

11. *BINDING AGREEMENT.* This Agreement shall be binding upon and inure to the benefit of the Parties to this Agreement and their successors and assigns.

12. *NOTICE.* Any notice required to be given under this Agreement shall be in writing and shall be personally delivered, sent by registered or certified mail, postage prepaid, return receipt requested, or by overnight courier service.

a. The notice shall be deemed delivered, given, and received upon the earlier of:

i. The date upon which such notice was personally delivered;

ii. If mailed, upon receipt; or

iii. If sent by overnight courier service, one business day after deposit with the courier, to the following address: [Insert the parties' addresses here].

b. Upon at least 10 days' prior written notice, each Party shall have the right to change its address to any other address within the United States of America.

13. *GOVERNING LAW.* Notwithstanding the place where this Agreement may be negotiated or executed, the Parties agree that all terms and provisions of this Agreement shall be construed under the laws of _____.

14. *RELATIONSHIP OF PARTIES.* Nothing contained in this Agreement shall be deemed or construed, either by the Parties to this Agreement or by any third party, to create the relationship of principal and agent or to create any partnership, joint venture, or other association among the Parties to this Agreement.

15. *COUNTERPARTS.* This Agreement may be signed in counterparts, each of which shall be deemed an original and all of which when taken together shall constitute one instrument.

16. *ENTIRE AGREEMENT/RELATION TO RETAILER SDAs.* This Agreement contains the entire agreement among the Parties for the subject matter of this Agreement, but as between each Retailer and the Developer, the Retailers SDAs shall remain in full force and effect as it is the intent of the Parties to this Agreement that in the event of a conflict with the provisions of any Retailers SDAs, as to all the Parties to this Agreement, the provisions of this Agreement shall supersede and control over said conflicting provisions, but this Agreement shall not relieve Developer from liability to a Retailer for all of its obligations under the Retailers SDAs or from all of the remedies of each Retailer under its Retailer SDA.

17. *MODIFICATION.* This Agreement can be modified only by written agreement signed by all of the Parties to this Agreement.

18. *FAILURE FOR ALL PARTIES TO EXECUTE.* If Really Big's closing on the purchase of the Really Big Tract does not occur by _____, 200____, Developer and Hank's shall execute an

amendment to this Agreement that directs the deletion all references to Really Big and that describes the circumstances leading to the amendment, but the covenants, agreements, and obligations between Hank's and Developer (absent the rights and obligations of Really Big) shall continue to be effective as contained in this Agreement.

19. MISCELLANEOUS.

- a. *TIME*. Time is of the essence for the terms of this Agreement.
- b. *ATTORNEYS' FEES*. If a Party to this Agreement employs an attorney to enforce any of the provisions of this Agreement, or to protect its interest in any matter arising under this Agreement, or to recover damages for the breach of this Agreement, the Party prevailing, as determined by the court, shall be entitled to receive from the applicable other Party all reasonable costs, charges, and expenses, including attorneys' fees, expert witness fees, or any other fees expended or incurred in connection with the enforcement of this Agreement whether resolved by out-of-court settlement, arbitration, pre-trial settlement, trial, or appellate proceedings.
- c. *NO THIRD-PARTY BENEFICIARY*. Except as specifically provided for in this Agreement, no right, privilege, or provision of this Agreement shall inure to the benefit of any person or entity not a Party to this Agreement and there shall be no third-party beneficiaries of this Agreement.
- d. *COMPLIANCE WITH LAW*. The Parties to this Agreement agree to comply with all codes, orders, and regulations applicable to the work to be performed under this Agreement.

[signature lines follow]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives effective as of the day and year first written above.

[insert signature blocks]

Lender hereby agrees to subordinate its security interest in and to the takeover rights of Really Big and Hank's for the On-Site Work and by its execution of this Agreement consents to this subordination:

LENDER:

By: _____

(Name)

Title:

Exhibit A

Site Plan

Exhibit B

Construction Schedule For Hank's SDA

Exhibit C

Construction Schedule For Really Big SDA

Exhibit D
List Of Plans And Specifications

Exhibit E
Escrow Agreement

Exhibit F
Developer Tracts Legal Description

APPENDIX B
Site Development Agreement

[Insert Into Site Development Agreement]

Section 7: Take Over By Hank's. If Hank's determines, in its reasonable judgment and in good faith, that the performance of any portion of the Site Improvement Work described in Section 2 is not proceeding so as to be completed within the time limits agreed to in Section 2, (it being understood that time is of the essence), Hank's may serve on Developer written notice of that determination. Thereafter, if Developer does not present to Hank's, within 10 days of receipt of Hank's notice of Developer's non-performance, reasonably satisfactory evidence that either such Site Improvement Work will be completed as required by this Agreement or that an extension of a completion date is permitted and appropriate under the terms of Section 14 below, Hank's shall have the right, but not the obligation, to assume control of all or a portion of the Site Improvement Work and construction activities of Developer upon giving Developer an additional five days' written notice. Upon such assumption of control by Hank's under this Agreement, Hank's agrees to proceed with all reasonable dispatch to complete those portions of the Site Improvement Work for which Hank's has given notice of the exercise of takeover rights. Anything in this Agreement to the contrary notwithstanding, Hank's shall have the right to modify the Site Construction Documents as Hank's, in its reasonable business judgment, deems advisable in order to complete that portion of the Site Improvement Work which is required to open and operate the Hank's facility for business to the public.

Notwithstanding any exercise by Hank's of its takeover rights under this Agreement, Developer shall remain liable for Developer's Pro Rata Share of the Project Costs under this Agreement, plus any increased costs attributable to or resulting from Hank's exercise of its takeover rights under this Agreement, and Developer agrees to periodically pay such amounts subject to the provisions of Section 5 in this Agreement in the same manner as set forth for payment by Hank's. If Developer fails to pay such amounts due Hank's within the applicable time period, the amounts owed will bear interest at a rate being the lower of one percent per month or such maximum rate as allowed by law from the date due until paid.

The financial obligation of Developer on account of Hank's shall also include the Liquidated Damages, if any, applicable up to and through the date that Hank's shall exercise its takeover rights under this Section 7.

PRACTICE CHECKLIST

Negotiating Takeover And Self-Help Rights In Shopping Center Construction Projects (With Form)

Shopping center developers often become insolvent, leaving the anchor tenant as well as other tenants in dire straights. When representing a tenant in a shopping center project, it is important to safeguard your client's interests against a possible developer default. The relationship among the tenants and the developer is governed by the site development agreement ("SDA"). It is important that the agreement anticipate an anchor or other large tenant's taking over the project to ensure the project's completion. It is also important that tenants, lenders, and developers negotiate a detailed side agreement among themselves governing their relationships in such a takeover.

- When negotiating this agreement, consider the following questions that will come up if the developer defaults:

___ Which retailer will take over first, as between the two of them (considerations include who will open first and who is the bigger "gorilla")?

___ Will the retailer responsible for the takeover complete the site construction work on the other retailer's property and leave alone temporary construction licenses?

___ How should collateral security be realized and shared?

- By the time a takeover occurs, the general contractor and subcontractors have usually walked off the job for lack of payment. They may have even filed mechanics' liens. In negotiating the agreement, resolve the following issues:

___ Who will negotiate to get the contractors back on the job and at what price and on what payment terms?

___ Has the bank taken a collateral assignment of all construction-related contracts and must the bank participate in these negotiations?

___ Will the bank agree to complete construction?

___ In notifying the developer that the takeover retailer would prefer to do the work itself rather than continue working with developer, the takeover retailer should indicate the specific work that it is undertaking to perform.

___ Who owns the plans and specs and may the takeover retailer use them to complete construction?

- Promptly following a developer's default, but before takeover, develop an overall project budget for completion:

___ Consider getting an updated appraisal or realtor evaluation to justify any additional expenses.

___ Consider forcing the developer to sell some of the shopping center property to raise money; consider forcing the developer to bring in another developer.

- ___ Estimate and determine damages accrued, including legal fees and liquidated damages permitted under the SDA.
- If the developer defaults, you may need to negotiate with the bank or mortgagee attempting to exercise its default remedies and preference rights. If the developer files for bankruptcy, the project will stall and time schedules will be further delayed, weather and leases notwithstanding. Determine if it is possible to transfer the developer's unspent bond proceeds to Hank's or Really Big. Confirm with the lender that the lender will underwrite the bonds as transferred to the retailer. Also confirm with the lender:
- ___ The bond closing dates and terms;
- ___ The date that funds will be available to the retailer for reimbursement; and
- ___ The applicable sales tax, projected sales of all shopping center occupants, the dates sales taxes will first be generated and sales tax reporting requirements.
- Determine how mechanics' and other liens will be handled.
- ___ Obtain lien waivers on work performed by the general contractor and subcontractors before the takeover;
- ___ Assert lien rights for the cost of labor, services, and materials that your client supplies for shopping center property that it does not own.
- ___ Determine the priority of any liens your client asserts. Do a concurrent title search and notify the title company of releases and waivers.
- Obtain copies of letters of intent, expressions of interest, and leases from all potential tenants of the shopping center.
- Consider deferring non-critical site development work.
- See to the transfer for building permits and licenses issued to the defaulting developer. Examine these permits and licenses to determine whether or under what conditions they can be transferred and what their expiration dates are.



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