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PARK WATCH™ LEGAL DEVELOPMENTS NEWSLETTER

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Profitable Ground Leases. Anticipating Malice of the Lessor.

Groundless Assault on Park Owners Stopped

By Terry R. Dowdall, Esq.

UPSHOT:

A new wave of avarice has reared its predatory head in California. Ground leases of yesteryear were predicated on risk: a remote gamble that "trailer parks" might be successful. No one knew the idea would mushroom into good investments, sometimes. But grow they did.

As long as the total housing cost (rents and home mortgages) stayed about $500 less than equivalent sized and located stick-built housing, mobilehome parks could survive. And land owners with large dormant acreage could lease orange groves and dormant acreage to lessees. The lessees hoped to construct mobilehome parks, built, sometimes, with their own hands, shovels, and foresight.

But times change.

No longer can you buy gasoline for $.19 per gallon. And the ground leases have, in some instances, become profitable. Very profitable. Now, some ground lessors want more than they bargained for. Some may take unscrupulous steps to try and take back the park. The incisive observations of the courts, in turn, reflect a story of frivolous challenges, groundless pursuit of extreme remedies, and malicious intent. In some instances, great sums of money are spent for attorney's fees, with questionable results. And these cases will likely continue as long as there are innocent lessors that can be talked into it.

Terry R. Dowdall, Esq.

Some fall victim to a slick sales pitch–from *attorneys*, urging scorched earth attacks on ground lessees to take a park back. Based on the malicious prosecution actions against the failures of ground lessors discussed below, lessors may seek assurances (a guarantee) from their lawyers it will not happen to them (indemnification for such cavalier litigation). Rest assured, virtually no lawyers in this industry sue park owners. But some do. Even WMA and MHET

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members. The effort is sometimes abandoned or dropped or defeated, but only after a sizeable fee has been paid.

Here we discuss a recent malicious prosecution case by park operators that followed a failed effort to terminate the ground lease. The case is emblematic of a failed and groundless assault on a lessee, and a lesson for all "thinking" ground lessors.

SOWING THE SEEDS OF WRONG-HEADED DISCONTENT WITH VINTAGE GROUND LEASES

There are many ground lease mobilehome park operations in the State. In Orange County, California, ground leases are abundant.

The leases have been in effect since the late 1960's and forward, in the main. Then, central Orange County was largely agricultural. Along comes Disneyland, people, and housing needs. Enter the mobilehome park. Orchard owners noticed. The land is more profitable by leasing it to construct and operate mobilehome parks. So leases were entered into, for many decades. Rights to switch uses if the mobilehome park concept failed were preserved. No one knew if people would accept a life style in a tin box and comfort of a swamp cooler.

So many a ground lease has very low payments. But the returns, now, are profitable for the park operator. But who knew? Leases have the right to switch uses if the venture failed. Because no one knew. But it turns out, at the right home prices, buyers were attracted to a new life-style: social life, affordable rents and pass-throughs, and low maintenance. Things began to change when "closed parks" were outlawed after the *AmFac-Suburban Homes* case, but still, there was enough for all and the industry grew.

Some owners of the land believe the ground leases are, today, unfair. Some owners have forgotten the historical circumstances and huge gambles taken by the pioneers in the industry.

These challenges may continue as long as there are landowners falling victim to a slick sales pitch. . .

GROUND LESSORS CONTEMPLATE TAKING BACK GROUND LEASES

Some lessors may focus on the lease as it performs today and say,

"How it is conceivable that my forefathers entered into this lease so one-sided, that is so far below market, that restrains the true use and value of this land?" (something like that).

But the ground leases represented a fair deal at the time. Any long term ground lease must contemplate changing economic circumstances over the course of the term. At the time, long term value was not foreseeable. The deal was fair. If the lessee had failed and defaulted, the value potential in the 50 year lease would only lie in alternate uses. Ground lessees took huge risks in entering into 50-year ground leases for dirt, dust, and rolling tumble weeds.

Some owners go beyond the acceptance of this economic reality. They may be talked into trying to take back the lease. Their counselors may oversell the import of minor performance defaults or lease violations. Or may misjudge the risk-reward calculus. The ability to obtain reinstatement of a breached lease is manifest. Relief from forfeiture of such a lengthy lease will be given a favorable eye because judges hate forfeitures. And most defaults relate to independent covenants, for which termination of the lease is not legally available. Dependent covenants like habitability (for example) do not usually apply in the commercial context. Still, with assistance of some who may encourage frivolous claims, they may try to apply a choke

hold until capitulation. But "Rambo" tactics are sometimes undertaken without clear appreciation for the repercussions if the plan backfires.

Since there is no right to declare a non-existent breach, some owners may seek out certain attorneys with or without knowledge of the industry to manufacture invalid claims. The plan is to fabricate a false narrative to attack, to thereby try and make operations expensive, aggravating, painful. When (if) the lessee finally capitulates, the lessor would then take back the park and control ownership and operation.

The lessee needs to understand and prepare to deal with the potential for such false and malicious attacks. A preventive strategy for meaningful and swift defensive response should be considered.

■ *THE CASE OF THE AVARICIOUS ATTORNEYS ("poster child" for cases for an improper purpose)*

In one case, the long-term ground lease was for a mobilehome park in Anaheim, California.

The land lessor was Avi Reese (not his real name). He hired Helena Handbasket, Esq. Avi leased the land on which a park was constructed. The park operator and ground lessee was "MHP, Limited" (not the real name). Barry Goodman (not his real name) was a limited partner.

Avi was very unhappy with the lease's terms (paltry rents) and wanted to sell and redevelop the property, which was impossible because of the long-term ground lease and mobilehome park. Avi began to look for ways to end the lease. He offered MHP's president a personal "seven-figure" payment if he would work with Avi to end the lease. Avi also contacted Barry Goodman to see if he could organize the limited partners against MHC and its president. Avi also tried to persuade Anaheim to "at least threaten condemnation to get the lessee to fall in line."

Unable to succeed with persuasion, Avi hired Helena, Esq. and sued MHP. Avi and Helena named a number of the limited partners, including Barry Goodman. The partners were later dismissed. They had nothing to do with park operations. Twelve of those partners then sued for "malicious prosecution" naming Avi and Helena.

Avi and Helena defended with a legal motion/tactic claiming their actions were constitutionally protected activity. The court did not agree. The court found there would be sufficient evidence for a malicious prosecution claim.

Avi and Helena are stuck. Their tactics were deemed to constitute legal "malice" in attacking the partners. Their intent was to inflict damage and harm for an ulterior motive. The court found there was "ample" (indeed "overwhelming") evidence of malice.

For example, Helena 's admission that "[t]he limited partners make no decisions" strongly suggests that she was aware that as a general rule, the partners did not actively engage in management. They should not have been sued.

After that case was over, Helena even sent an e-mail to MHP's counsel that included a number of thinly-veiled threats of ongoing litigation:

■ Pointing to "many other battles ahead between these clients."

■ Helena warned of a new action and stated that if MHP did not wish to discuss settlement seriously, "[t]here will be many opportunities in the next five years of Superior Court and Court of Appeal litigation to further develop the clients view points."

■ She said that … [A]t this point I assume they understand that 500K a year of an attorneys fees budget on this lease will become the norm for many years to come. . ."

■ Several months later Helena again stated that if MHP did not settle, they could look forward to "the next five to ten years are going to be between our clients in multiple Courts" which would be a "fee generator" for the lawyers in the case. *(Ed.: Such admissions are a plaintiff attorney's dream. As if designed to inflame a jury)*

■ Taken together, all of these statements raise a strong inference that Helena 's (and Avi Reese's) goal in the

ongoing litigation was not to resolve genuine legal disputes, but to push MHC into a settlement.

■ Why sue limited partners? Lessor-attorney-Helena responded that "[she] has plans for the limited partners."

■ Lessor-attorney-Helena even suggested that the limited partners be "aligned" against MHC. She offered to "represent the Limited Partners in a 'derivative' action against MHC on contingency and … provide a 'finders fee.'"

■ After the limited partners were dismissed, attorney Helena called and said Avi would "re-sue" the limited partners unless certain terms were met. She repeated similar threats in court.

The court stated that all of these acts raise a very strong inference that the limited partners had not been sued to vindicate a legal right but to act as "pawns" in Avi's ongoing "chess game" against the park lessee MHC.

> "Indeed, a reasonable trier of fact could conclude that this case appears to be a poster child for cases instituted primarily for an improper purpose, which is one of the hallmarks of malice."

Was the evidence sufficient? **"Overwhelming"** would be a better word, said the court. The limited partners more than met their burden to establish a prima facie case of malice as to Helena the attorney.

■ *WHAT DO "AT RISK" PARK OWNERS DO?*

Ground lessors may continue to be seduced into badgering a ground lessee on the hope and attorney-assurances it will lead to a successful result. But ground lessees are typically well-experienced operators. They are tough people. They have faced rent controls and failure to maintain lawsuits. Our managers are shot at, spat upon, cursed, assaulted. Not much will ruffle their feathers. Not, certainly, just another of the gaggle of aggressive "Rambo"-like attorneys.

Lessees pay attention. Lease duties will be and are respected. Some ground lessors may be blind to these realities, or persuaded otherwise by counsel. But even if minor discrepancies emerge in the operation of a property, the larger issue–the bad bargain– is not enough to escape from the burdens of continuing, what has become, an unprofitable ground lease. And in the unlikely event that a court would ever consider a forfeiture of a long tenured lease, the procedure for reinstatement, absent equitable considerations, will be a strong case to restore the ground lessee to the terms of the lease on conditions set by the court.

<u>The first issues for consideration of a defensive plan against the assertion of groundless claims are the "soft spots" of lease obligations</u>. These soft spots allow for easy fabrication without substance, because the determination is a question of fact in which opinion, discretion, or judgment blurs otherwise precise white lines. "Are you operating a first class park?" is more open to dispute than "did you pay ground rent by the first of the month"? Class of operation can be debatable–payment of the rent is "yes" or "no." So matters of discretion in the lease can be used to try to obfuscate ill and malicious intent, when in fact the operations of the lessee are perfectly within custom and practice.

Custom and Industry standards should not be transgressed in the operation of mobilehome parks. Custom and standards should be followed. "Best practices"should be the ultimate goal for park operators. It should be the goal for ground lessees too. Periodic inspections, maintenance schedules, appearance, audits, disclosures, routine photo shoots, retaining 'happy camper' letters. All business operations should be legally consistent.

Leases Nearing Expiration: As the ground lease moves toward expiration, the aging infrastructure must be considered. In some cases, counsel may demand the removal of homes per the express terms of the grounds lease. Is that enforceable? Interim conduct, understandings and agreements may not mean enforcement of the lease as expressly drafted.

Closure of the Park to Deprive the Client of All Income. One Strategy for Lessee. "Nuance" is a term absent form some attorney vocabularies. They may oversell a strategy, its costs, risks and likelihood of success. Some may urge very destructive positions and risk the best interests of their clients.

In one case, a ground lessor attorney handling an extension negotiation, demanded that all the mobilehomes be removed at lease expiration as per one interpretation of the ground lease–all in order to pressure the ground lessee for better terms. The lessee scoffed at such a ham-fisted approach; the cost of relocation was probably less than the cost of seeking an adjudication of the lease terms or formal closure. Lessee's counsel ignored the 'rocket man' bluster and suggested the practical solution which did not involve the courts. With excellent property management, the lessee arranged consensual relocations with the homeowners, *all* of them. Of course, the lessee's response spelled gloom for the lessor: removing the homes means the previous revenues plummet to zero. Counsel was willing to turn his client into a penniless farmer. Not much later, the lessor "changed horses" and with a different lawyer, re-established a dialogue and made a deal.

Infrastructure. Resolve Well Ahead. If the land reverts *without* the mobilehome park, aging infrastructure, post-expiration, is not a major consideration–clearing it is. If the mobilehome park use is transferred intact to the ground lessor, the infrastructure issue may be present and should be discussed. The ground lessee wants *not* to replace infrastructure on eve of expiration. If the lessor and lessee expect more than *"band-aids,"* with litigation to follow, a discussion of the issues can always supplement the terms of the lease. It may also be good cause to discuss extension of the ground lease, especially if the lessor can relax while lessee performs the replacement with lease proceeds instead of lessor capital infusions.

GROUND LEASE TERMS AND CLAUSES TO CONSIDER, IMPLEMENT

The ground lease should be reviewed to analyze the opportunities to clarify, extend, or enforce to the advantage of the parties.

(a) Gross lease - the tenant pays a fixed dollar amount that includes base rent and additional rent and the landlord pays all operating expenses.

(b) Net Lease - the tenant pays a fixed dollar amount for base rent amount and, as additional rent, all expenses including maintenance, taxes and insurance.

(c) Modified Gross Lease - many ground leases are a hybrid or modified gross lease under which the tenant pays a fixed dollar amount for base rent and, as additional rent, operating expense increases over a base year. The base rent will be a sum sufficient to cover the landlord's costs and provide a profit.

(d) Percentage Lease: some ground leases call for percentage of revenues in addition to the clauses mentioned.

Percentage rent is frequently calculated on the basis of net revenues, exclusive of utility income. The obligation to pay percentage rent will typically attach upon the tenant reaching the annual break point, which is frequently determined by dividing the annual rent by the percentage rent figure. By way of example, if the annual rent is $100,000 and the percentage rent is eight (8%) percent, the natural break point will equal $1,250,000. As such, the obligation to pay percentage rent will be triggered by the first dollar of net revenue in excess of $1,250,000.

Base Rent and Additional Rent - Generally.

(a) The lease agreement should provide for the base rent (sometimes referred to as minimum rent) to be paid on the first day of the month and additional rent, if any. Care

should be given in the drafting of these clauses in order to ensure clarity in the manner in which the adjustment will be determined.

Additional rent may include, by way of example taxes, insurance premiums, utility charges, expenses attributable to reciprocal easements and business park expenses, building and common area operating expenses, costs incurred by the landlord to cure the tenant's breach of the lease agreement, legal fees to enforce the lease agreement, brokerage fees due to a tenant default, percentage rent and a late fee for failure to pay rent and additional rent when due or within a stated grace period.

- Additional Rent based on Taxes.

The landlord will broadly define taxes to include, by way of example:

(i) Real estate taxes;

(ii) Assessments for municipal improvements;

(iii) Payments in lieu of taxes (PILOT);

(iv) Business Improvement District/Special Improvement District Assessments;

(v) Water and sewer charges and other charges of governmental authorities that may be a lien on the property;

(vi) Taxes arising out of tenant equipment so affixed to the building as to become a fixture and included in the valuation of the property for real estate tax purposes; and

(vii) Taxes that may be imposed in the future such as sales tax on rent.

- Additional Rent based on Insurance.

The ground lessor will want the right to obtain liability and casualty insurance in as broad a form as it may determine and require the tenant to pay its share of the expense. The ground lessor will want the tenant's share of insurance costs to be paid in monthly installments so that the funds are available when the insurance premiums fall due.

- Additional Rent based on Utilities.

The ground lessor will broadly define utilities to include, by way of example water, sewer, gas, electric, heat, phone, cable, and all other utilities or services made available to the leased premises.

(i) In a single occupancy setting, the ground lessor will want the ground lessee to pay all utilities, deposits and related fees.

(ii) When the ground lessee pays utilities directly to the provider, even when the account is in the name of the ground lessee, it is important for the ground lessor to ensure that all utilities are paid or the ground lessor may be responsible to bring the account current before the utility company will permit a new account to be opened in the name of a subsequent ground lessee.

(iii) The ground lessor should account for potential future sustainable development by including in operating expenses a charge for such utilities and/or by obligating the ground lessee to purchase from any on-site or off-site source.

- Additional Rent based on Expenses Attributable to Reciprocal Easement Agreement/Business Park Expenses.

The ground lessor will include in operating expenses, or may separately provide for, the payment of expenses attributable to reciprocal easement agreements and/or the business park generally.

- Additional Rent based on Operating Expenses.

The ground lessor may request a very broad clause, requiring the payment of expenses related to operation, maintenance, repair, and management of the building and common areas as determined to be necessary and desirable by the ground lessor, followed by a representative, but not all inclusive, list of operating expenses.

The ground lessee may seek to limit operating expenses and provide for certain exclusions from operating expenses, including, by way of example: Management fees (not to exceed a fixed percentage of base rent–not including utilities or reference to revenues); Interest on and amortization of debt; Refinancing costs; Expenses that must be treated as capital expenditures under GAAP and therefore capitalized and depreciated. Amounts paid by ground lessor as ground rent; Expenses for which ground lessor is reimbursed by other ground lessees or insurance carriers.

- Capital Costs.

The ground lessor will seek to include capital expenses, for example by providing for the amortization of capital expenses over an agreed upon period of time. If

agreed upon in concept, the ground lessee will likely argue for useful life based on GAAP. The ground lessor will also seek to collect interest on the unamortized portion of the expense. To the extent the ground lessor agrees that capital expenses should be excluded from operating expenses, rather than included on a limited basis, the ground lessor should seek to carve out of the exclusion certain capital expenses, including, by way of example: Capital expenses to address newly enacted laws and regulations; Capital expenses that result in a cost savings with respect to building operation. In this latter event, the ground lessee will try to limit the expense to the actual annual savings achieved.

Operating Expense Increase - Limitation.

The ground lessee will seek to limit any increase in operating expenses to the lesser of actual operating expenses or a fixed percentage increase per year. The ground lessor may then seek to counter such position by either (1) carving out of any limitation provision uncontrollable expenses such as taxes, insurance, snow plowing and utilities; or (2) providing that in the event less than the full agreed upon percentage increase is achieved in any one year, the difference may be carried over to another year. By way of example, if the annual cap is four percent (4%) and in one year operating expenses increase by only two percent (2%), then in a subsequent year, the ground lessor may increase the operating expenses by up to six percent (6%). The increase is always limited by the actual increase. Without such a provision, the ground lessor has no incentive to reduce or save on operating expenses.

Audits.

The lease should provide for the ground lessor to provide the ground lessee with a reconciliation of operating expenses by a date certain. Thereafter, the ground lessee should have a set period of time within which to audit the reconciliation. If the ground lessee fails to timely audit the reconciliation, the ground lessee should thereafter be barred from an audit. This clause operates like an internal statute of limitations against delayed claims of miscalculation.

If the ground lessee *does audit the reconciliation*, then the ground lessee should have a set period of time to complete the audit and file any objection. The lease should provide a set period for the parties to amicably resolve the matter before any claim may be filed.

The ground lessor should consider requiring *confidential arbitration* for any claim pertaining to the audit. The information to be disclosed should not fall into the hands of the mobilehome tenants.

In addition, the ground lessor will want to impose a *confidentiality obligation* with respect to the entire audit process by requiring that both the ground lessee and the party undertaking the audit on its behalf execute a non-disclosure agreement satisfactory to the ground lessor as a condition precedent to the exercise of the audit right.

Types of Ground lessee Default.

The description of defaults can help avoid the onset of undefined and vague claims against the ground lessee. Specificity in the lease document can assist in clarification of defaults and consequences of harassment. Monetary default is the failure to pay rent or additional rent. Or non performance of specific terms, such as procurement of insurance, in defined, specified sums, which is definitive on the issue of breach. These terms make breach simple to prove. In the absence of specific terms and assuming the ground lessor controlled the draftsman's pen, the discretion to reasonably interpret adequate performance suggests a delegation of responsibility to the lessee, and lack of concern on the part of the ground lessor.

Notice and Cure Rights.

There are a number of issues for the ground lessor and the ground lessee to resolve with respect to notice and cure rights. There may be many non-monetary defaults with respect to which the ground lessor will not afford the lessee a right to notice or a right to cure, including, by way of example:

(i) The ground lessee's failure to deliver an estoppel certificate in connection with a sale or financing of the premises after the ground lessor has provided a notice requesting delivery;

(ii) The tenant's holding over after the expiration of the lease term;

(iii) A bankruptcy filing or other insolvency proceeding filing with respect to the tenant or a guarantor.

(iv) Entering into sublease agreement with the Mobilehome tenants for a term exceeding the expiration of the ground lease; further, such an excessive-term agreement is not binding on the ground lessor. If the mobilehome tenants are ousted later, they may sue for

breach of quiet enjoyment claim against the ground lessee; if the property was to be closed before expiration of the lease, the ground lessee may also be faced with a claim for closure costs and tenant relocation as the ground lessor seeks to mitigate damages by closing the park (to fulfill the ground lessee's duties).

Mitigation.

So, the ground lessor has an obligation to mitigate damages. A ground lessor's failure to mitigate damages, however, will not necessarily act as a total bar to recovery.

The ground lessor should maintain a record of mitigation efforts, including advertising, listing the space with a broker, placement of signs, maintaining records of property showings to prospective tenants, and consultations with brokers to determine the current fair market rental value of the property.[1]

Good Faith and Fair Dealing.

As might be the case with Avi Reese set forth above, the question of malicious prosecution is also buttressed with the notions of good faith and fair dealing. Unwarranted interference with the performance of the contract, groundless assertions, practical interference is also a reason to seek protection of the courts when the overbearing ground lessor seeks to bully the ground lessee who has done nothing wrong.

Modern courts interpreting commercial leases today routinely answer the difficult questions by focusing on the contract law doctrine of the "implied covenant of good faith and fair dealing." Courts presented with arguments that one party acted in bad faith parrot a basic truism - that bad faith occurs when one party acts in such a manner so as to deprive the other of the benefit of its bargain. As does a lessor groundlessly interfering with the operation of the mobilehome park. Lawyers make judgments to which their clients adhere, and take comfort.

In the Avi Reese case, *the court calls for the parties to live with the consequences of lawyer representation."* in other words, pick your lawyer carefully, as his or her advice will guide *and bind* the park owner.

Is your counsel advising you to steer clear of this view of liability?

> *Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasions of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance . . .*

A bad faith breach (except for instances of intentionally and purely malicious or destructive conduct), is often just the ham-fisted effort to regain advantages to a lease which were missed, overlooked or purposefully (Intentionally) kept "off the table" at inception. *For example*, perhaps both parties avoided a particular point for fear of "blowing up" the deal over a detail or point of contention to be worked out later. Parties who violate the duty of good faith are doing nothing more than attempting to "recapture opportunities" that were not negotiated in the initial contractual agreement--"a second bite at the apple." Time spent on the lease document saves these later opportunities for mischief.

A party cannot be said to act in bad faith if that party is merely pursuing an express right granted under the contract. But if the conduct exceeds and is not grounded by the rights in the contract, the ground lessor may not single out the ground lessee. A contracting party may not impose its will when not within the rights afforded by the contract. Conduct cannot be used to fill in the gaps or renegotiate the terms of the ground lease.

One area of attack may be the abuse of the percentage lease. The ground lessee may be required to pay as rent a percentage of net rent revenue. The percentage rent lease required a minimum base rent. Some tenants could take the extreme course of continuing to pay base rent while not charging market rates, so to minimize percentage rent and have more leverage in setting base rent for an extension term.

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[1] Sources: Mark A. Senn, Commercial Real Estate Leases: Preparation, Negotiation, and Forms (5th ed. 2013). 1 Commercial Real Estate Transactions in New Jersey (Jack Fersko ed., 3rd ed. 2010); Milton R. Friedman and Patrick A. Randolph, Jr., Friedman on Leases (5th ed. 2005); S. H. Spencer Compton and Joshua Stein, Ground lessor's Checklist of Silent Lease Issues (Third Edition), Prac. Real Est. Law, May 2013.

The language of the lease may not on its face require the ground lessee to lease at market rates or require ground lessee to keep the park fully occupied for that matter. Both parties could insist on language in the lease that would clarify the rights. Since lessor has power of the pen (and controls the lease language), if such landlord protections are not present, then the ground lessee is simply exercising its rights? Or does the lease contain an implied covenant allowing the tenant conduct?

Does good faith require maximizing income to the benefit of both parties? The ground lessee could have negotiated the right to remain partly occupied or not strive for market rent to avoid tenant objection. However, if ground lessee had attempted to do so, this might have caused lessor to doubt the selection of the lessee and perhaps scrap the deal altogether.

In sum, the more vague the lease, the more difficult it is for the ground lessor to assert breach by the lessee. In one case the court stated that the facts smelled of "old fish," holding that:

> "[T]he Ground Lease did not require him to occupy, improve, build on, or do *anything* with the Premises during his tenancy. It simply permitted him to "use, improve, and develop the Premises or any part thereof for any lawful use or purpose, provided that Lessee shall not commit waste."

That lease sounds like unrepresented parties who wrote the terms of a ground lease on the back of a cocktail napkin. And the less improved the land, the more difficult it is for the ground lessor to assert breach by the lessee. As to land largely unimproved, a court has stated that:

> "[W]here the parties agree that there were no improvements on the Premises, and the Ground Lease did not require him to make any, there was simply no contractual duty of immediate performance ... ever breached."

* * *

Where the ground lessor seeks relief against the Ground lessee over trifles and "nit-picky" complaints, there is little likelihood of success; there is little chance the lessor can prevail where notices to cure are satisfied. There is little likelihood of ultimate success because the well-entrenched ground lessee may ask for relief from the forfeiture of the lease *and be reinstated.* The relief from forfeiture form for non-residential property under ground lease is a form ubiquitous to the form books attorneys use everyday.

For the ground lessee, legal compliance, routine legal auditing, self-imposed inspections and building of defensive evidence as a routine practice is a cost efficient way to dissuade challenges to your operations fueled by avaricious miscreants looking to pry hard-working operators away from their parks.

— TRD

Please Feel Free to Contact Us with Any Questions!