



WEINBERG LAND USE FORUM

News

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FALL 2007

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This publication may describe some of the legal matters that the attorneys of Hirschler Fleischer have worked on in the past. Of course, case results depend upon a variety of factors unique to each case and case results do not guarantee or predict a similar result in any future case undertaken by a Hirschler Fleischer attorney.

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Timely Tax Topics Impacting Real Estate Acquisitions, Operations, and Dispositions

W. MICHAEL WALKER, ESQ.

Portions of the real estate market are in turmoil. Credit spreads have significantly widened and availability of product has diminished. Lenders are renegotiating acquisition loans at the last minute. But competition for commercial deals remains fierce and at historically low cap rates. Zoning cases are increasingly difficult.

One constant is that throughout similar times in the past, smart, patient, and well capitalized real estate owners and developers have survived (and, often, prospered). In uncertain times comes a

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HIRSCHLER FLEISCHER PRESENTS

Timely Tax Topics Impacting Real Estate Acquisitions, Operations, and Dispositions

The Weinberg Land Use Forum is pleased to welcome W. Michael Walker, chairman of Hirschler Fleischer's Business Section, as he discusses tax efficient strategies for the acquisition, operation and disposition of real estate (including like kind exchanges), as well as a brief update on conservation easements. We hope that you will join us for this informative program.

Monday, September 24, 2007 at 5:15 p.m.

Westwood Club – 6200 West Club Lane

THE WEINBERG LAND USE FORUM

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Timely Tax Topics Impacting Real Estate Acquisitions, Operations, and Dispositions

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renewed emphasis on costs. One of the largest costs associated with real estate development and ownership is taxes (property, state, and federal). A keen eye on tax reduction and minimization strategies takes on renewed importance in uncertain times. A few of those strategies are set out below:


1. **Cost Segregation Studies.** Cost segregation studies involve hiring an engineer to very carefully allocate the depreciable basis of acquired real estate assets between land and depreciable assets. Careful studies can demonstrate that in certain situations, meaningful portions of the purchase price can be allocated to depreciable assets with recovery periods much shorter than buildings. Competent advisors can quantify the net present value of this accelerated cost recovery.
2. **Like Kind Exchanges.** Forward, reverse, build to suit, and related party exchanges can, under the right circumstances, defer tax bills.
3. **Partnerships, TICs, and REITs.**
 - In partnership deals, consider taking title as tenants in common so that at the end of the venture, the parties can make separate reinvestment/exchange decisions.
 - Remember that in two partner deals, one partner can buy the partnership interest of the other partner as the back end of a like kind exchange.
 - Consider an UPREIT transaction.



4. **Conversion Transactions.** The difference between ordinary income (35%) and capital gains (15%) is more than 100%. Care should be taken to fit those transactions that can be characterized as capital gains rather than ordinary income. Prime examples of these types of transactions include development of raw land into lots, and apartments into condominium conversions. If done correctly, a healthy portion of the gain in such transactions can be successfully captured at capital gains rates. If done incorrectly, all of the gain will be recognized at ordinary income rates.
5. **Integrated Estate Planning.** Many taxpayers cringe at the thought of paying estate tax rates of up to 45% at their death. One effective way to transfer wealth during one's lifetime is through intra-family installment sales. The typical fact pattern is that senior family generation member (Grandma) owns an income producing property. She sells the property to a junior family generation member (Junior), usually through an installment sale. The transaction is usually structured

through a family limited liability company to avoid certain adverse tax results and often to allow the senior family member to retain some degree of control over the property. Through judicious use of discounts, meaningful estate tax discounts are often available.

6. **Team Approach.** It is critical for the client to assemble the right team. For a real estate transaction, the team would include a real estate lawyer and a tax advisor (either a tax lawyer or an accountant or both). The situation that should be avoided is leaving the accountant off the team until next March when he/she has a different view of the transaction. Note also that tax return preparers (i.e., accountants) are subject to new potential penalties under IRC Section 6166, if they cannot get to a "more likely than not" comfort level with a return position.
7. **Bulls, Bears, and Pigs.** All have heard the story that bulls make money, bears make money, and pigs get slaughtered. Fewer have heard the speech by the IRS Chief Counsel called "Shelters, Schemes, and Abusive Transactions: Why Today's Thoughtful Advisors Should Tell their Clients to "Just Say No". The point is that there is no substitute for careful, deliberate planning. If a technique looks too good to be true, it probably is. The IRS is starting to win some important cases in this area, creating what may be the rebirth of the economic substance or business purpose doctrine.

Be smart and be careful! 

Jurisdictional UPDATES

THE TOWN OF
Ashland

Neil Holthouser reports that the Town is beginning its Comprehensive Plan update process, which is scheduled for 2008. Mr. Holthouser notes that the Town desires to overhaul its Comprehensive Plan to make it more of a policy guide.

(Our readers should be reminded that Henrico County is also in the process of updating its Comprehensive Plan. Henrico County property owners should monitor the update process, to be sure that their properties are designated (to the extent possible) for uses which they will likely seek zoning in the future.)

THE CITY OF
Richmond

Roy Benbow of the Planning Department reports that the City is considering the adoption of supplemental regulations which will provide density bonuses for developers who include a certain percentage of affordable dwelling units within their projects. The Zoning Ordinance amendments are scheduled to be considered by the Planning Commission and City Council in September. The inclusion of a certain percentage of affordable housing could also result in the reduction of certain development fees.

Mr. Benbow reports that the City is also considering the adoption of a new zoning district to supplement the Urban Business District in the City. The intent is to allow the Urban Business District concept to work more effectively.

Finally, the City is considering the adoption of an amendment to the Zoning Ordinance to broaden the powers of the Board of Zoning Appeals to grant special exceptions for reduced parking requirements in certain circumstances.

THE COUNTY OF
Henrico

The County Manager has impaneled the Independent Commission Examining Land Purchases for the County of Henrico, Virginia. The

panel will be examining policies and procedures with regard to the acquisition of land by the County for public purposes.

THE COUNTY OF
Chesterfield

The County continues to wrestle with land use and water quality issues related to the Upper Swift Creek area. The plan developed by staff has been twice rejected by the Planning Commission and now heads to the Board of Supervisors for review. The Plan suggests a radical reduction in development density, a deferred or no-growth area and water quality standards that few engineers believe can be met.

recommendation was opposed by the majority of the residents on Courthouse Road, but supported by the residents in the subdivisions behind them. The Board of Supervisors sent the plan back to the Planning Commission for further study with a request that the plan be back before the Board in October.

The County is also considering amending the Land Use Plan for the Courthouse Road area generally between Midlothian Turnpike and Lucks Lane. The issues relate to appropriate land uses along Courthouse Road, which has been widened to four lanes, area traffic and the ultimate use of the Moody Tract on which a preservation easement currently exists. The Planning Commission

Based on recent legislation passed in the General Assembly, Chesterfield County is considering assessing road impact fees on residential lots. They have convened an Impact Fee Ordinance Advisory Committee to consider and provide input with regard to such a policy. It is not yet clear how a potential road impact fee, believed to be approximately \$5,800 per lot, would co-exist with cash proffers.

The purpose of the Forum is to promote quality development and viable communities through constructive dialogue between the development community and state and local governments. Hirschler Fleischer's Land Use Team has long been known for its ability to achieve the goals of its clients in all matters of zoning and permitting. Its members continually track ordinance and policy amendments at the state and local levels. We are often called upon to help draft legislation and provide input on new initiatives. We would like to share that knowledge and experience with you on an ongoing basis.

Pending ZONING CASES

THE COUNTY OF
Chesterfield

Jim Theobald amended the zoning for the southeast quadrant of Routes 288 and 360 to permit additional multi-family development behind a proposed shopping center on Route 360. A variety of empty-nester, owner-occupied housing opportunities is envisioned.

Jim Theobald is representing Read Goode on the old Waldo's Antiques site on Midlothian Turnpike. Retail uses are planned.

Jim Theobald and **Jeff Geiger** were successful in rezoning approximately 18 acres on Genito Road behind Genito Crossing Shopping Center for an owner-occupied townhouse community. Skip Gellely is the developer.

Jim Theobald and **Jeff Geiger** represented Glenn Hill in rezoning nearly 60 acres on Old Hundred Road at Brandermill Parkway to allow Mr. Hill to develop a townhouse community to be named Bailey Park.

Jim Theobald represents EWN Investments, Inc. and has filed an amendment to zoning on the north side of Hull Street Road at Duckridge across from the new Hancock Village shopping center. Retail and/or office uses are planned with the possibility of some residential units over the retail/offices.

Jim Theobald has filed a request on behalf of Otterdale Venture, LLC to rezone 178 acres located at the northwest corner of Hull Street and Otterdale Roads in order to develop a mixed-use community including commercial and residential opportunities.

Chuck Rothenberg and **Jenn Rosen** represent Verizon Wireless in a rezoning application to permit a communication tower near Belmont Road and Chippenham Parkway.

Jim Theobald and **Jeff Geiger** have filed a zoning amendment on property at Chippenham Parkway and Route 10. The Richmond Kickers Youth Soccer Club intends to develop a soccer facility on the site, including a potential future stadium.

Jim Theobald has a request on 52.6 acres along Beach Road between Gates Bluff and Pocahontas Park in which he seeks R-15 zoning for Kevin Floyd, Charlie Primm and Paul Rideout. The gentlemen intend to develop 38 single family homes complimentary to adjacent Gates Bluff Subdivision.

THE COUNTY OF
Henrico

Jim Theobald and **Caroline Nadal** are representing Atack Properties on two zoning requests. The first is on Nuckols Road between New Wade Lane and Hickory Park Drive; a combination of office and hotel uses are being pursued. The second request is off Opaca Lane between the landfill and Twin Hickory Lane with R-3 zoning requested in order to develop single-family homes.

Jim Theobald is assisting BJ's Wholesale Club in their Plan of Development on Starling Drive behind Regency Mall. This will be BJ's second entry in the Richmond market, the first being in Mechanicsville.

Jim Theobald has filed a rezoning request on behalf of Centex Homes on approximately 33 acres on the west side of Pouncey Tract Road at Kain Road. A portion of the site is planned for a townhouse development with ancillary retail and office uses.

Glenn Moore is representing a large building supply retailer in its efforts to resolve outside storage and display enforcement issues at its Short Pump store, through a Plan of Development amendment.

Glenn Moore recently obtained a Provisional Use Permit for outdoor dining for a Greek restaurant on the east line of Skipwith Road, just south of Broad Street.

Jim Theobald and **Jenn Rosen** represent King Properties in its rezoning at Harvie Road and Laburnum Avenue in order to develop an age-restricted multifamily community.

Caroline Nadal is representing Creighton & Laburnum, LLC to rezone approximately 30 acres at the corner of N. Laburnum Avenue and Creighton Road to commercial and office service uses.

Caroline Nadal is representing the Rebkee Company to rezone approximately 2.6 acres at the corner of Patterson Avenue and Lauderdale Drive for the operation of a CVS Pharmacy.

Jim Theobald and **Caroline Nadal** recently obtained rezoning for Collins/Goodman, LLC of an approximate 10 acre site at the corner of Laburnum Avenue and Gay Avenue and continue to assist the developer with site plan approval. The site will include a Best Buy electronics store, as well as other retail and office uses.

Caroline Nadal represented First Centrum in successfully rezoning a site to the west of Brook Road north of Virginia Center Commons for senior apartments with amenities.

Caroline Nadal represented Raj and Akhil Jain in successfully amending proffers on a site on Audubon Drive at the terminus of International Drive for the operation of a Candlewood Suites hotel.

THE TOWN OF
Fredericksburg

John McManus is representing Havelock Land Co. to obtain a special exception on property located at the intersection of Charles and Frederick Streets for a mixed use residential/office development.

Chuck Rothenberg and **Jenn Rosen** intend to file a rezoning application to permit a communication tower adjacent to Evergreen Baptist Church for Verizon Wireless.

Glenn Moore is representing Larry Page in obtaining zoning approval for the expansion of Page Custom Rods and Restorations, a classic motor vehicle restoration facility in the Goochland County Industrial Park.

Jim Theobald has filed a rezoning request on behalf of Mike Carroll and Gibson Wright at the northwest corner of Mechanicsville Turnpike and Compass Point Lane in order that they may develop retail uses on the front of the site and a self-storage facility on the remainder of the site.

Representing Verizon Wireless, **Chuck Rothenberg** and **Jenn Rosen** are drafting revisions to Hanover's communication tower siting guidelines and ordinance.

Chuck Rothenberg and **Jenn Rosen** are working with the franchisees of the Little Gym. The franchisees discovered that the County is requiring a conditional use permit to operate in B-1, the zoning classification of space that they are interested in leasing. We are asking the county to revisit that determination.

Jim Theobald and **Jeff Geiger** have filed a rezoning request on behalf of Hopkins Properties, L.C. on land between Washington

Highway and Lakeridge Parkway and between Sliding Hill Road and Old Telegraph Road. A development of commercial uses such as a hotel, retail, and office is envisioned.

Chuck Rothenberg and **Jeff Geiger** continue to represent Bon Secours - Memorial Regional Medical Center in connection with amendments to the campus' zoning: the addition of 13 acres to the campus and amendment of traffic density caps to permit an additional 300,000 square feet of medical office building space; the amendment to a special exception to height restrictions; and the extension the existing conditional use permit for constructing an emergency helipad.

Glenn Moore is representing the owner of an historic property in Hanover County who is seeking a Conditional Use Permit to allow the property to be used for a residential rehabilitation facility for addicted gamblers.

Glenn Moore, Chandra Lantz and **Farrah de Leon** represent the Town of Purcellville in resolution of a land use dispute between Loudoun County and the Town regarding the proposed location of a

high school in near proximity to Purcellville. The dispute involves application of the Comprehensive Plan for the area in question.

Chuck Rothenberg is representing Boyd Homes in connection with a mixed use development with 240 residential units and 100,000 square feet of commercial space located in Bottoms Bridge.

Chuck Rothenberg and **Caroline Nadal** are representing Best Industries in connection with an amendment to the Kentland Planned Unit Development in the vicinity of Colonial Downs to relocate permitted use, change the road plan, and add approximately 120 acres to the development.

Glenn Moore and **Jenn Rosen** are representing JH Corporation in its development of about 44 acres on Duryea Road off Old Gun Road. A portion of the site is zoned R-1 and will be developed accordingly, and a portion is being rezoned to R-4. An upscale single family community is planned.

Jim Theobald represents USP Development Co. in its rezoning request along the riverfront near Rocketts Landing for approximately 210 luxury condominiums, public river amenities, a restaurant, health club/spa and other light retail and office uses.

Jay Weinberg and **Caroline Nadal** are filing for a Special Use Permit to have the "Hirschler Fleischer" name placed on The Edgeworth Building.

John McManus is representing Dharmendra M. Patel to rezone a site from R-1 to C-2 for the operation of a commercial retail center.

John McManus is representing the Rebkee Company to obtain approval for special use permits for property located at the intersection of Smith Station Road and Courthouse Road for the operation of a CVS and bank/retail buildings.

John McManus is representing Smith/Packett in a text amendment and rezoning of property located on 20 acres in the Berea Church/Route 17 area for the development of a retirement community,

including independent living, assisted living and nursing home facilities.

An Introduction to the S&P TIC Sponsor Ranking System

Standard & Poor's is a globally recognized financial services company that provides ratings, economic research, and benchmark indices (e.g., the S&P 500 Index) for various financial products and companies including bonds, securitized pools, mutual funds, and most recently, the sponsors of securitized tenant-in-common offerings. The new ranking system, unveiled during the first half of 2007, is one of several recent developments in the tenant-in-common ("TIC") industry reflecting the growth and maturity of an industry that largely began five years ago.

The primary purpose of S&P's rating system is to provide an independent evaluation of financial products, thereby bringing more transparency to capital markets. The S&P TIC sponsor ranking system has the potential to significantly improve the level of disclosure and transparency in the TIC industry. The ranking system will provide a mechanism enabling investors and their representatives to make better, more informed investment decisions when contemplating securitized TIC offerings. The ultimate impact of this new ranking system will depend in large part on the TIC industry's reaction to its existence. Proponents of the new ranking system will likely include, at a minimum: (i) broker-dealer firms active in the TIC industry that may encourage or require the TIC sponsors with whom they do business (or with

whom they are considering doing business) to participate in the process as part of their regular due diligence and compliance efforts; (ii) industry associations such as the Tenant-In-Common Association ("TICA") that may encourage participation in the ranking process; and (iii) lenders active in the TIC industry that might require participation in the ranking process, or offer some form of inducement for TIC sponsors who do participate and receive a specified ranking. The S&P ranking system will prove most useful if there is wide acceptance in the industry and meaningful participation by TIC sponsors.

The ranking criteria consider a sponsor's experience in the real estate and TIC industries, performance and procedures related to property management and asset management, and reporting practices. There are five separate rankings ranging from "Very Strong" to "Weak." A sponsor can only attain a "Very Strong" or "Strong" ranking if it has (i) been in business for three or more years, (ii) conducted 12 or more securitized TIC offerings within the past three years, and (iii) syndicated at least \$100 million in equity. The sponsor ranking is based upon a point system. Criteria in the industry experience category is objective and accounts for 50% of the total possible points. The sponsor's level of real estate and TIC experience, consistency in meeting projections and any negative litigation or criminal activity affect the score in this category.

Criteria in the property management and asset management category is subjective and accounts for 30% of the total possible points. A sponsor's property management policies and procedures, management oversight and reserves maintenance affect the score in this category. Criteria in the reporting practices category is both objective and subjective and accounts for 20% of the total possible points. A sponsor's responsiveness to property tenants and investors, punctual delivery of tax information, monthly reports and income checks and the comprehensiveness and ease of understanding of the monthly reports affect the score in this category.

S&P's sponsor evaluation process consists of three phases, each of which is estimated to take two weeks to complete. A sponsor ranking is valid for one year. Currently there is an initial fee of \$35,000 charged by S&P which includes a semiannual ranking update. In Phase I, the TIC sponsor delivers information regarding the sponsor, its experience, and its business practices. For a sample due diligence checklist designed to help a TIC sponsor prepare for the first phase of the process, please contact the authors directly at 804-771-9500.

Phase II of the process focuses on the sponsor's property and asset management functions. S&P will evaluate both the oversight and reporting functions as well as the day-to-day management capability of

ALYST JUMPS ON BOARD THE TIC TRAIN

BY: ERIC C. PERKINS, ESQ. AND KATHARINE A. SCHKLOVEN, ESQ.

the sponsor's local property managers (whether an affiliate or a contracted third party).

Phase III consists of a site visit by an S&P analyst and covers any follow up concerning the information previously reviewed and/or learned about the sponsor. The analyst will complete a mathematical computation to determine the recommended ranking. A separate committee will consider the analyst's recommendation and vote on the final ranking. The evaluation and ranking are sent to the sponsor for confirmation of all factual information before the public release of the ranking report. Once a ranking is issued, it will be reviewed and updated semiannually.

As the S&P ranking system gains acceptance, the ranking criteria could impact the manner in which TIC sponsors conduct business. As a general matter, TIC sponsors may find themselves operating in a more formal and institutional manner consistent with the criteria necessary to earn a high ranking under S&P's ranking system. Financial underwriting and projections may become more conservative as 63% of the sponsor experience category score rests upon whether sponsors meet their projected net operating income (NOI) and cash-on-cash return targets on a deal-by-deal basis. Sponsors may also increase property management oversight and formalize operating policies and procedures. Investor communications

may also become more comprehensive and easier to comprehend.

A few suggestions for improving a TIC sponsor's chance of obtaining a favorable sponsor ranking would include:

1. developing reasonable and achievable projections;
2. careful financial underwriting and management of reserves;
3. documenting property management oversight procedures;
4. asking investors to evaluate reports and comment on how to make them more understandable and user-friendly;

5. consistently delivering outstanding customer service; and

6. recruiting and retaining employees with industry experience and a high level of integrity.

The S&P TIC sponsor ranking system presents an opportunity for sponsors to distinguish themselves. As legal counsel to nearly two dozen TIC sponsors, the Real Estate Securities Group at Hirschler Fleischer believes this new ranking process will benefit the TIC industry. 🏢

Eric C. Perkins, Esq. and Katharine A. Schkloven, Esq. are members of the Real Estate Securities Group at Hirschler Fleischer, A Professional Corporation, located in Richmond, Virginia, where they specialize in tenant-in-common offerings and related real estate securities matters.





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Calendar Of Upcoming Events

Tenant-In-Common Association's Annual Conference

This year's TICA conference is the cooperative effort between TIC professionals to advance the TIC industry and this year's theme is Serving the Investor.

10/7-10/9/07

Bellagio Hotel, Las Vegas, NV

For more information, www.ticassoc.org

VCU Real Estate Trends Conference

The conference is one of the leading real estate conferences in the region and this year's will feature an in-depth overview of the nation and regional economy with a focus on the housing market.

10/9/07 • 7:30am - 12:30 pm

Greater Richmond Convention Center

For more information, www.realestate.vcu.edu

Successful Sales and Use Tax Strategies

Stay on top of today's regulatory changes and help clients control their tax bills. Attendees will gain an overview of sales and use tax, legislative and administrative updates, how to help clients take full advantage of exemptions and exclusions, overcoming common challenges, how to stay informed of evolving interstate and multistate issues and how to navigate the administrative and judicial process.

10/11/07 • 8:00 am - 5:00 pm

Richmond Marriott West - Glen Allen, VA

Speaking from Hirschler Fleischer: David S. Lionberger – Helping Your Client Take Full Advantage of Exemptions and Exclusions – Overcoming Common Challenges

For more information, www.nbi-sems.com

Business Succession Planning Seminar for Family and Closely Held Businesses

This is the second of a two-part workshop hosted by Hirschler Fleischer and Keiter, Stephens, Hurst, Gary & Shreaves that will provide a comprehensive look at the myriad issues and challenges facing today's business owners as they start to think about stepping back, handing the business over to others, and taking time to enjoy their hard work.

10/25/07 • Seminar: 4:00 pm - 6:00 pm • Reception: 6:00 - 7:30 pm

The Edgeworth Building

For more information, please contact Ben English or Kevin Muldowney at 804.771.9500

IMN 3rd Annual West Coast Private/Non-Traded REITs Symposium

The Non-Traded & Private REIT industry continues to raise funds at a surprisingly strong rate. Over \$6.5 billion of funds were raised in '06 and '07 promises to carry on this impressive volume. To continue to accommodate the large number of Non-Traded REITs, Broker Dealers and Financial Planners in the west, Information Management Network will be hosting its 3rd Annual Western

Private & Non-Traded REIT Symposium.

11/28-11/29/07

Scottsdale, AZ

For more information, www.imn.org

IMN 4th Annual New York Tenant-In-Common (TIC) Transactions Forum

This is the only TIC & Broker/Dealer focused Real Estate Event in New York. This event provides an update on the TIC market, specific 1031 exchanges, new niche TIC strategies, financing, market liquidity, exit strategies and more. This event also includes roundtable presentations and networking opportunities.

12/10-12/11/07

The Westin New York at Times Square, New York, NY

For more information, www.imn.org