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MEMORANDUM REGARDING COVID-19 AND THE IMPACT TO COMMERCIAL REAL ESTATE IN SOUTH CAROLINA

March 20, 2020

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Many of our commercial real estate clients are asking for guidance about the ramifications of COVID-19 (the coronavirus disease) and the impact on their business. This summary is meant to address some of the general issues that COVID-19 may have on the commercial real estate sector in the State of South Carolina.

A few important caveats. This Memorandum is meant to provide general guidance only. It is not a legal opinion or intended to address any particular situation. Each circumstance and contract is different and must be analyzed independently. This document only addresses possible commercial real estate impacts within the State of South Carolina. We encourage you to seek specific legal advice regarding the impact of COVID-19 on your business.

At the outset, we thought it would be helpful to provide brief summaries of government action taken over the last month, both by the federal government and by state and local governments of South Carolina. Contained therein are perhaps some helpful resources for you and your business. As you may already be aware, the federal government in particular has taken significant steps to provide financial assistance to those individuals and businesses who have been most severely affected by the COVID-19 crisis.

RECENT FEDERAL GOVERNMENT ACTION:

On March 6, 2020, Congress enacted the Coronavirus Preparedness and Response Supplemental Appropriations Act, which declared the COVID-19 outbreak a disaster under the Small Business Act. This Act enabled the Small Business Administration (SBA) to employ its lending authority to offer economic injury disaster loans (EIDLs) to small businesses negatively affected by the pandemic. Then on March 19, the SBA certified South Carolina as an eligible area for EIDLs.[1] On March 23, 2020, the Federal Housing Finance Agency announced that Fannie Mae[2] and Freddie Mac[3] would offer mortgage forbearance to multifamily borrowers.

[1] U.S. Small Business Administration Fact Sheet - Economic Injury Disaster Loans South Carolina Declaration 16352 (https://www.sccommerce.com/sites/default/files/2020-03/SBA%20Fact%20Sheet.pdf)

[2] The Fannie Mae Forbearance Program: https://mfguide.fanniemae.com/node/14026?view=recent_guide_communication

[3] The Freddie Mac Forbearance Program: http://www.freddiemac.com/about/covid-19.html

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act which authorized an historic $2 trillion stimulus package to provide financial assistance to individuals and businesses impacted by the COVID-19 crisis.[4] Importantly, the CARES Act permits entities that have applied for EIDLs to receive a short-term advance of up to $10,000 while their EIDL applications are pending. Perhaps even more importantly, the CARES Act created the Paycheck Protection Program (PPP)[5], which authorizes the SBA to administer up to $349 billion in forgivable loans to small businesses to pay their employees during the COVID-19 crisis. The loan amounts will be forgiven as long as (1) the loan proceeds are used to cover payroll costs, and most mortgage interest, rent, and utility costs over the 8-week period after the loan is made, and (2) employee and compensation levels are maintained. Payroll costs are capped at $100,000 on an annualized basis for each employee, and not more than 25% of the forgiven amount should be for non-payroll costs. Finally, loan payments will be deferred for six months.

Additionally, Section 4022 of the CARES Act provides a moratorium on residential foreclosures for borrowers with federally backed mortgage loans. Section 4024 of the CARES Act provides a moratorium on evictions for residential tenants occupying a "Covered Property" (defined as any property that (A) participates in (i) a covered housing program as defined in Section 41411(a) of the Violence Against Women Act of 1994; or (ii) the rural housing voucher program under section 542 of the Housing Act of 1949; or (B) has a Federally backed mortgage loan or a Federally backed multifamily mortgage loan). Under Section 4023 of the CARES Act, borrowers with a federally backed multifamily mortgage loan may request a forbearance for up to 30 days, including two 30-day extensions. Also under Section 4023, a tenant renting a dwelling unit within such multifamily property cannot be evicted for nonpayment of rent or charged late fees, penalties, or other charges during the forbearance period.

Finally, on April 9, 2020, the Department of Treasury and the IRS announced Notice 2020-23, which extends key tax deadlines related to Section 1031 Like-Kind Exchanges and Opportunity Zones, providing commercial real estate players with some additional relief.

RECENT DEVELOPMENTS IN SOUTH CAROLINA:

On March 28, 2020, Governor McMaster declared a "State of Emergency" in South Carolina due to COVID-19.[6] He then closed all "nonessential business" on March 31, 2020[7] and closed additional nonessential business on April 3, 2020[8]. Governor McMaster issued a "Home or Work" order on April

[4] Pub. L. 116-136, https://www.govtrack.us/congress/bills/116/hr748/text.
[5] Paycheck Protection Program (PPP) Information Sheet: Borrowers, https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf.
[6] S.C. Exec. Order No. 2020-15 (March 28, 2020), https://governor.sc.gov/executive-branch/executive-orders.
[7] S.C. Exec. Order No. 2020-17 (March 31, 2020), https://governor.sc.gov/executive-branch/executive-orders.
[8] S.C. Exec. Order No. 2020-18 (April 3, 2020), https://governor.sc.gov/executive-branch/executive-orders.

6, 2020.[9] Most recently on April 20, 2020, he re-opened certain "nonessential" businesses but with certain occupancy, social distancing and sanitation restrictions.[10]

The mayors of many cities in South Carolina have followed suit, e.g., Charleston and Columbia, both of which have issued "stay at home" orders within the past month.[11] In the case of Charleston, part of that stay at home order was to name "retail stores and shopping malls" as nonessential businesses that should remain closed to the public.[12] The Town of Mount Pleasant adopted the governor's "Home or Work" order on April 7, 2020.[13] The City of Columbia has even gone so far as to approve an "Economic Sustainability Plan" on March 20, 2020 in order to "address possible and known impacts of COVID-19 on small businesses and non-profits in the City" and the "the impacts of the City's budget and ability to provide seamless delivery of public services in response to emergencies."[14]

Whole counties have taken action as well. For example, Lexington County's Emergency Operations Center moved to OPCON-2 on March 23, 2020,[15] and the County of Charleston closed all county buildings on March 27, 2020.[16] Practically the entire state is on home or work lockdown except for "essential activity", which is having a significant impact on many tenants' and landlords' ability to fulfill their lease obligations.

LEASE PROVISIONS:

Over the last month or so, we have undertaken a review of multiple office, retail and industrial leases and contracts. As a general rule, we are finding that landlord "form" leases generally contain favorable force majeure language that applies as a blanket condition to all obligations set forth in the lease. That said, we have found several tenant "form" leases that limit events of force majeure to a set number of days for specific circumstances and a few that do not allow the application of force majeure to certain landlord construction obligations. Other tenant "forms" contain language requiring the landlord to provide written notice to the tenant of any matter of force majeure before the delay clock for force majeure will begin. We encourage the readers of this Memorandum to review the force majeure language in all of their respective leases.

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[9] S.C. Exec. Order No. 2020-21 (April 6, 2020), https://governor.sc.gov/executive-branch/executive-orders.
[10] S.C. Exec. Order No. 2020-28 (April 20), https://governor.sc.gov/executive-branch/executive-orders.
[11] Charleston Ordinance No. 2020-048, https://www.charleston-sc.gov/DocumentCenter/View/26251/Emergency-Ordinance-Stay-at-Home (limiting travel through or congregation in public spaces except for conducting business for "essential services" and for engaging in individual outdoor recreational activities); Columbia Ordinance No. 2020-034, https://www.columbiasc.gov/uploads/headlines/03-26-2020/city-council-shares-draft-ordinance/2020-034 Stay Home Stay Safe %281%29.pdf (limiting travel and congregation in public spaces similarly to Charleston); *see also* https://www.iop.net/news (City of Isle of Palms declared state of emergency on March 20); https://www.northcharleston.org/government/police/emergency-preparedness/coronavirus-covid-19/ (City of North Charleston).
[12] City of Charleston, Guidance on "Stay at Home" Ordinance, https://www.charleston-sc.gov/2410/Guidance-on-Stay-at-Home-Ordinance.
[13] https://www.tompsc.com/AlertCenter.aspx?AID=Mayor-Haynie-Issues-New-Proclamation-Ado-144.
[14] http://columbiasc.net/headlines/03-20-2020/a-resilient-columbia.

[15] https://lex-co.sc.gov/coronavirus-covid-19-information.
[16] https://www.charlestoncounty.org/covid19.php.

FORCE MAJEURE:

As an initial matter, commercial landlord-tenant case law, and pandemic/epidemic circumstances for that matter, are limited in South Carolina. As such, we have little insight into how a court may rule on such a dispute relating to the current COVID-19 pandemic.

With respect to "force majeure", it has generally been defined in South Carolina (SC Code § 38-59-210 (2012)) to mean "any act of God, governmental act, act of terrorism, war, fire, flood, earthquake, hurricane, or other natural disaster, explosion or civil commotion," but a court will typically interpret the language as written in a contract (or lease in this context). Contrast this to other states, like Georgia, where there is a specific statutory "act of God" defense to a breach of contract action (O.C.G.A. § 13-4-21), where the critical question will be whether a pandemic-type scenario would be classified under such statutory term in the context of a contractual dispute. It is likely that until the South Carolina Supreme Court provides clarity (or the South Carolina State House does so via legislation), the unique provisions and wording of such clauses, the facts at issue in particular cases, and the variability of judicial interpretation will render this uncertain territory for businesses. It is instructive that the definition in the South Carolina Code, while not specific to lease or contract disputes, does include non-natural type of events (i.e. terrorism, governmental act, civil commotion) which may further open the door for a court to hold that the pandemic is an applicable event, since it may not be readily identifiable as a "natural" disaster, and particularly if it leads to a tenant being forced to close by municipal order.

That said, a recent South Carolina contract dispute case has provided some insight into how a court would rule on a defense relating to force majeure, by noting that a "party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party", regardless of the probability or responsibility for such performance; and further noting that unless it "cannot by any means be accomplished, it is not considered impossible" (as opposed to commercial impracticability).[17] The same case also considered the duty to mitigate as a factor in considering damages, providing that the injured party has a duty to make reasonable efforts to minimize the damages incurred (so that it cannot make a claim for damages that were avoidable by the use of "reasonable care and diligence" [but not "unreasonable exertion or substantial expense"]).[18]

Based on the foregoing, it would seem that under the current circumstances, tenants seeking relief in South Carolina would have a firm ground to stand on, and thus would make the individual language of the leases of the utmost importance, and further that landlords should take reasonable steps to mitigate as may be feasible. Also, note that if there is an express list of circumstances in the document in question that would constitute a force majeure event, but that is not a complete list, a court will likely only apply the clause to events similar to those already listed under the legal principle of

[17] Norfolk S. Ry. Co. v. Balt. & Annapolis R.R. Co., at *5 (D. S.C. 2015).

[18] Id. at *7.

ejusdem generis, which states that when a limited list of specific things also includes a more general class, that the intent can be inferred that the scope of that more general class is to be limited to other items more like the specific items in the list.[19] Most leases will have an express carve out that a force majeure event will not excuse any monetary obligation, and there is no express statute or case law in South Carolina that would indicate such a clause as problematic.

We recommend all readers to consider including language related to "pandemics, epidemics, viral outbreaks" as part of their force majeure language in all future documents.

CONDEMNATION, EMINENT DOMAIN OR INABILITY TO OPERATE:

Some tenants may also rely on the condemnation or eminent domain lease provisions, due to the fact that a governmental authority ordered closure may prohibit a tenant from operating. While there is no case law on whether a closure in this scenario could be classified as such, the Eminent Domain Act (2006) prohibits "the State [of South Carolina] or a local government" from "condemning, or taking, private property for any purpose except for a public use." This could lead to a rebuttal that any pandemic-related, forced (or recommended) closure would be for the purpose of public safety or well-being, as opposed to public use. Another consideration is that most commercial leases require the tenant to operate in compliance with all applicable laws, ordinances, and governmental requirements, which, in the context of an ordered closure, would require them to cease operations (or at least severely limit).

CO-TENANCY:

Landlords and tenants could also utilize this opportunity to use force majeure clauses proactively. For example, a landlord may claim force majeure clauses excuse co-tenancy requirements (opening, ongoing, or otherwise) and other obligations to its tenants and a tenant may claim force majeure clauses excuse continuous operations clauses to its landlord. Also, with respect to delivery dates and other critical lease dates, it is always a best practice (and even more so important now), to communicate early and often with respect to construction or permitting delays.

BUSINESS INTERRUPTION INSURANCE:

The current situation is a good time to review any relevant business interruption insurance, and in particular, any express exclusions from coverage. Is your business interruption coverage part of a standard policy or is it written as an endorsement to your coverage? Endorsements often provide broader coverage. Most standard policies pay for "direct, physical loss," which generally means that you have suffered property damage that has led to loss of income and other revenues such as rent and utilities. Usually coverage is excluded for economic losses unless you can tie it to an actual business interruption caused by a fire, flooding or other casualty.[20] Is the COVID-19 virus causing

[19] State v. Wilson, 274 S.C. 352, 355, 264 S.E.2d 414, 415 (1980).

[20] *See, e.g.,* the following links to news articles discussing lawsuits filed by policy owners against business interruption insurance companies who denied coverage for lack of physical property damage: https://www.wsj.com/articles/restaurants-vs-insurers-shapes-up-as-main-event-in-d-c-lobbying-fight-11587288600 and https://www.bostonglobe.com/2020/04/17/business/struggling-restaurants-push-legislation-insurance-claims-delivery-fees/?event=event12.

physical damage? The courts have not adopted a uniform rule but some say physical damage must render your property uninhabitable or unfit for its intended purpose.

So a standard policy may not offer coverage for COVID-19 but you should check with your insurance agent on the following:

- Some policies written for health-related businesses and hospitality may include coverage for communicable and infectious diseases and may not require actual physical property damage.
- A "public authority clause" would apply to loss of income that results from the government's order denying access to your property. This clause may kick in if you lose income because of limitations imposed by government in an attempt to stop the spread of diseases even if there is no physical loss.
- If you have "pollution coverage," you need to ask your insurance agent if COVID-19 could be determined to be a pollutant that is causing physical loss. COVID-19 could be deemed a permitted peril under your policy unless the policy specifically excludes such things as viruses, bacteria and other diseases.
- Are you covered by a builder's risk policy? This is a separate policy and covers casualties occurring to your building while under construction. Coverage under this policy could cover losses that you have incurred due to construction delays.

LOAN DOCUMENTS:

Most loan documents do not contain force majeure provisions as lenders expect to get repaid on time no matter the delay. Often times loan documents prohibit landlords from granting rent concessions or modifying leases without lender consent. We encourage all readers to consider the impact of such concessions in the context of what is required by their loan covenants. Loan documents that contain "material adverse change" provisions may also give lenders the ability to place a borrower or guarantor in default as a result of closures due to COVID-19. Many loan documents also require borrowers to notify the lender of material adverse changes to avoid being in default.

In the event a need arises to modify an existing loan, the CARES Act, along with recent guidance from bank regulators, have increased lender flexibility. As previously mentioned, The CARES Act establishes the Paycheck Protection Program, which expands the existing SBA loan program to include forgivable loans. Also, the CARES Act changes the community bank leverage ratio to create greater flexibility for community banks to make loans. Furthermore, the CARES Act gives banks the ability to amend interest rates and repayment terms of loans without triggering troubled debt restructuring (TDR) provisions (so long as the loan is not more than 30 days past due (as of December 31, 2019) and the borrower's adverse circumstances are related to COVID-19). The CARES Act takes the further step of directing regulators to be deferential to banks' determinations regarding suspension of TDR rules, a directive that has been echoed by the FDIC[21] and the Office of the

[21] *See* FDIC FAQ bulletin issued March 27, 2020 ("The FDIC encourages financial institutions to provide borrowers affected in a variety of ways by the COVID-19 outbreak with payment accommodations that facilitate their ability to work through the immediate impact of the virus.")

Comptroller of the Currency[22], giving banks added comfort. In short, banks now have congressional and regulatory flexibility to modify loans without the risk they would normally face of negative impacts. Thus, if you need a loan modification or more credit to survive the pandemic, we would encourage you to ask. On the other hand, if you are a tenant negotiating with a landlord (or a debtor negotiating with another creditor) that needs your payment to meet a loan obligation, try encouraging them to seek a modification of the loan that is putting pressure on them.

LEASE CONCESSIONS:

When permitted by the applicable loan documents, we have seen many clients grant lease concessions in the last month – especially to local tenants (as opposed to national tenants) and restaurant tenants. Most landlords that are granting concessions are requiring tenants to repay the concession amounts beginning on a date certain and over a three-month period. We also encourage our landlord clients to consider including language stipulating the repayment of rent in the event that a tenant receives governmental assistance. If the government provides a tenant with assistance for the payment of rent then the landlord should be the beneficiary of all or part of such concession. You may also want to consider including confidentiality provisions prohibiting either party from discussing the concession with third parties.

CONTRACT CONCESSIONS:

Many clients are facing the impossibility of performance when it comes to closing. If you are under contract with a pending closing date, you may not be able to close because title cannot be updated given that the applicable county Register of Deeds ("ROD") office is closed. Fortunately many ROD offices provide for electronic title updates and electronic recording. We are familiar with these procedures and ready to help you navigate electronic updates and recording wherever possible. We note that most title insurance companies are also taking blanket title exceptions for matters resulting from the pandemic. That said, some title companies are providing insurance when recording cannot occur through the use of gap indemnities and affirmative coverage. If you are unable to close, we can assist with contract modification language that delays closing until the pandemic has passed.

SOUTH CAROLINA SUPREME COURT ORDERS 2020-03-18-01, 2020-04-22-01 AND 2020-04-30-02 REGARDINGSTATEWIDE COURT PROCEDURES, EVICTIONS AND FORECLOSURES:

On March 18, 2020, the South Carolina Supreme Court issued Order 2020-03-18-01 (the "March 18 Order") halting all foreclosures and evictions in South Carolina, "in recognition of the difficulties the COVID-19 pandemic may have on institutions and individuals, and on the basis that increased housing insecurity and homelessness will worsen the threat posed by the illness." (SCSC 2020-03-

[22] *See* Office of the Comptroller of the Currency bulletin issued March 13, 2020 ("The OCC encourages banks to work with affected customers and communities. The OCC recognizes that such efforts serve the long-term interests of communities and the financial system when conducted with appropriate management oversight and are consistent with safe and sound banking practices and applicable laws, including consumer protection laws. These efforts may include . . . offering payment accommodations, such as allowing borrowers to defer or skip some payments or extending the payment due date.")

18-01) The March 18 Order was subsequently extended and superseded by Order 2020-04-30-02 (the "April 30 Order").

Evictions:

Under the March 18 Order, all evictions currently ordered and scheduled were delayed until May 1, 2020 at the earliest. However, the April 30 Order, in light of the recent enactment of the CARES Act, determined that "some facing eviction or foreclosure [could now] honor their financial obligations." (SCSC 2020-04-30-02). The April 30 Order states that "all evictions currently ordered and scheduled statewide shall resume May 15, 2020." (Id.) Thus, Landlords who had filed for eviction or ejectment prior to the March 18 Order can now resume those proceedings beginning May 15, 2020.

The March 18 Order also instructed lower courts not to accept any new applications for eviction from landlords "until directed by subsequent order." The April 30 Order ends this moratorium on new evictions, stating that "the court shall accept applications for ejectment, schedule hearings, issue writs or warrants of ejectment, and proceed in any other manner necessary regarding evictions beginning May 15, 2020" (SCSC 2020-04-30-02). Thus, under the April 30 Order, both existing actions for eviction and new filings by Landlords can begin on or after May 15, 2020. (Id.)

As a practical matter, this is good news for landlords who had, since the March 18 Order, been facing uncertainty with respect to non-performing tenants. While the April 30 Order does not immediately reinstate the ability to evict tenants, it does give a date certain (May 15) in which such activity can resume, and landlords no longer have to allow non-performing tenants to remain in their spaces indefinitely. It should be noted; however, that despite the April 30 Order, courts are likely going to still afford a great amount of deference to tenants facing difficulties due to the COVID-19 pandemic. Landlords still may find it advantageous to attempt to work with a tenant to keep them in their space rather than rush to the courthouse to file eviction. The ability to do so, however, does create greater leverage for a landlord when negotiating with a tenant.

Foreclosures:

The March 18 Order also placed a "moratorium" on foreclosure hearings, foreclosure sales, writs of assistance, and writs of ejectment, and prohibited Masters-in-Equity from proceeding "in any other manner regarding foreclosures until directed by subsequent order." (SCSC 2020-03-18-01). Unlike the portion dealing with evictions, the foreclosure section of the March 18 Order did not automatically expire on May 1, 2020, but rather would stay in place "until directed by subsequent order." (Id.) The April 30 Order is that "subsequent order." It states that "courts statewide shall resume foreclosure hearings, foreclosure sales, issuing writs of assistance and writs of ejectments, and proceed in any other manner regarding foreclosures beginning May 15, 2020." (SCSC 2020-04-30-02). It appears then that foreclosures, both new actions and existing cases, can now resume beginning May 15, 2020. While it does not explicitly state it, the April 30 Order appears to apply to both Masters-in-Equity and Special Referees presiding over foreclosure actions.

Finally, the April 30 Order instructs courts holding both eviction and foreclosure proceedings to adhere to the regulations regarding courthouse operations as set forth in the Supreme Court's April 22, 2020 Order, SCSC 2020-04-22-01, which is discussed at length below.

Courthouse Procedures under SCSC 2020-04-22-01:

As noted above, the Supreme Court issued Order 2020-04-14-01, which was amended by Order 2020-04-22-01 (the "April 22 Order") to "provide guidance on the continued operation of the trial courts during the current coronavirus (COVID-19) emergency." (SCSC 2020-04-22-01(a)). Despite the lifting of the moratorium on foreclosures and evictions via the April 30 Order, the April 22 Order provides further protection for parties in lawsuits facing certain procedural deadlines that may be impacted by the crisis.

Specifically, the April 22 Order forgives all procedural defaults that would occur on or after March 13, 2020. (2020-04-22-01 at (c)(9)(B)). In other words, if a party to a lawsuit – for example a defaulting tenant or borrower - fails to answer the allegations of a complaint under the time usually imposed by the South Carolina Rules of Civil Procedure, that failure to respond is deemed forgiven. Instead, the defaulting party has an additional thirty (30) days from the April 22 Order to respond or take whatever action is applicable. (Id.) Thus, pending collection, foreclosure, or eviction efforts could be delayed or otherwise curtailed by denying creditors and landlords the ability to obtain judgments against debtors and tenants that have failed to respond to lawsuits.

Lenders and landlords alike, whether in the commercial or residential context, should be mindful of the Supreme Court's Orders when evaluating treatment of delinquent tenants and borrowers. While the April 30 Order does restore lenders' and landlords' ability to enforce their rights under a lease or mortgage effective May 15, 2020, both the April 22 Order and the general climate surrounding the pandemic both indicate that debtors, borrowers and tenants will enjoy a great amount of leeway at least until the COVID-19 crisis has passed. Therefore, lenders and landlords are well-served to communicate with their borrowers and tenants facing difficulties to come up with workable solutions that give relative security to both parties. Racing to the courthouse, while often necessary and certainly an important tool to have available, may not always be the best course of action in the long run.

CONCLUSION:

COVID-19 will change commercial real estate in unimaginable ways. As the situation continues to evolve, we can provide more analysis for what the future holds. For now, we encourage you to communicate with your landlords, tenants, borrowers and lenders in the context of your various contractual agreements. Cooperation among these parties is crucial to preventing a cascade of bankruptcies that could harm the commercial real estate industry as a whole. We are here to help you as needed and wish you and your loved ones comfort and health during this difficult time.