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MISSISSIPPI

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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CONTENTS

1. General	p.5	4. Planning and Zoning	p.9
1.1 Most Significant Trends	p.5	4.1 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction	p.9
1.2 Impact of the New US Tax Law Changes	p.5	4.2 Regulatory Authorities	p.9
2. Sale and Purchase	p.5	4.3 Obtaining Entitlements to Develop a New Project	p.9
2.1 Ownership Structures	p.5	4.4 Right of Appeal Against an Authority's Decision	p.9
2.2 Important Jurisdictional Requirements	p.5	4.5 Agreements with Local or Governmental Authorities	p.9
2.3 Effecting Lawful and Proper Transfer of Title	p.5	4.6 Enforcement of Restrictions on Development and Designated Use	p.9
2.4 Real Estate Due Diligence	p.6	5. Investment Vehicles	p.10
2.5 Typical Representations and Warranties for Purchase and Sale Agreements	p.6	5.1 Types of Entities Available to Investors to Hold Real Estate Assets	p.10
2.6 Important Areas of Laws for Foreign Investors	p.6	5.2 Main Features of the Constitution of Each Type of Entity	p.10
2.7 Soil Pollution and Environmental Contamination	p.6	5.3 Tax Benefits and Costs	p.10
2.8 Permitted Uses of Real Estate under Zoning or Planning Law	p.6	5.4 Applicable Governance Requirements	p.10
2.9 Condemnation, Expropriation or Compulsory Purchase	p.7	6. Commercial Leases	p.11
2.10 Taxes Applicable to a Transaction	p.7	6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time	p.11
2.11 Rules and Regulations Applicable to Foreign Investors	p.7	6.2 Types of Commercial Leases	p.11
3. Real Estate Finance	p.7	6.3 Regulation of Rents or Lease Terms	p.11
3.1 Financing Acquisitions of Commercial Real Estate	p.7	6.4 Typical Terms of a Lease	p.11
3.2 Typical Security Created by Commercial Investors	p.7	6.5 Rent Variation	p.11
3.3 Regulations or Requirements Affecting Foreign Lenders	p.7	6.6 Determination of New Rent	p.11
3.4 Taxes or Fees Relating to the Granting or Enforcement of Security	p.8	6.7 Payment of VAT	p.11
3.5 Legal Requirements Before an Entity Can Give Valid Security	p.8	6.8 Costs Payable by Tenant at Start of Lease	p.11
3.6 Formalities When a Borrower Is in Default	p.8	6.9 Payment of Maintenance and Repair	p.11
3.7 Subordinating Existing Debt to Newly Created Debt	p.8	6.10 Payment of Services, Utilities and Telecommunications	p.12
3.8 Lenders' Liability Under Environmental Laws	p.8	6.11 Insuring the Real Estate That Is Subject to the Lease	p.12
3.9 Effects of Borrower Becoming Insolvent	p.8	6.12 Restrictions on Use of Real Estate	p.12
		6.13 Tenant's Ability to Alter and Improve Real Estate	p.12
		6.14 Specific Regulations	p.12
		6.15 Effect of Tenant's Insolvency	p.12

MISSISSIPPI LAW AND PRACTICE

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6.16	Forms of Security to Protect Against Failure of Tenant to Meet Obligations	p.12
6.17	Right to Occupy After Termination or Expiration of a Lease	p.12
6.18	Right to Terminate Lease	p.12
6.19	Forced Eviction	p.13
6.20	Termination by Third Party	p.13
7.	Construction	p.13
7.1	Common Structures Used to Price Construction Projects	p.13
7.2	Assigning Responsibility for the Design and Construction of a Project	p.13
7.3	Management of Construction Risk	p.13
7.4	Management of Schedule-Related Risk	p.14
7.5	Additional Forms of Security to Guarantee a Contractor's Performance	p.14
7.6	Liens or Encumbrances in the Event of Non-Payment	p.14
7.7	Requirements Before Use or Inhabitation	p.14
8.	Tax	p.14
8.1	Sale or Purchase of Corporate Real Estate	p.14
8.2	Mitigation of Tax Liability	p.14
8.3	Municipal Taxes	p.14
8.4	Income Tax Withholding for Foreign Investors	p.14
8.5	Tax Benefits	p.14
8.6	Key Changes in Federal Tax Reform	p.15

Butler Snow LLP is known for its strength in handling large purchase and sale transactions for a range of commercial developers, with an experienced team handling retail, office and warehouse development and leasing on a nationwide basis for clients. The firm also has substantial experience with industrial, mixed-use, governmental, energy, gaming, agricultural and timber properties. In addition to representing buyers and sellers of all kinds of real estate properties, it has extensive experience in handling the real estate aspects of larger transactions, such as the acquisition and disposition of entire busi-

nesses. Other work includes financing, tax credits, leasing and property management, condominiums, co-operatives and timeshares. In addition, as its healthcare practice has grown into a national practice, it is providing real estate work for national healthcare clients. The firm's real estate practice encompasses a broad range of matters, including acquisitions and dispositions; construction and development; financing; leasing and property management; condominiums, co-operatives and timeshares; administrative law and litigation; title insurance; bankruptcy; and insolvency issues.

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1. General

1.1 Most Significant Trends

The most significant trend in local real estate markets has been the increase in interest rates, which affects all sectors of the real estate market.

1.2 Impact of the New US Tax Law Changes

The 2017 Federal Tax Cuts and Jobs Act was generally considered to be favorable to commercial real estate investment and ownership. The Act added certain deductions for income from pass-through entities, increased the ability to currently expense certain items and retained 1031 exchanges for real property.

tax and cash distributions scenarios. The Revised Mississippi Limited Liability Company Act provides a modern and flexible framework that generally follows many of the provisions of Delaware or Uniform LLC laws.

2.2 Important Jurisdictional Requirements

There are no specific jurisdictional requirements to transfer title to real property other than the general requirements for a lawful and proper transfer of title. There are no specific laws or regulations applicable to one specific type of real estate as opposed to other types.

2.3 Effecting Lawful and Proper Transfer of Title

All conveyances of real property must be in writing, signed and delivered by the transferor. A deed must be acknowledged and filed for record in the office of the Chancery Clerk of the county where the land is located. Real property may be conveyed by general warranty deed, special warranty deed or a quitclaim deed. In Mississippi, there is no transfer tax; the recording of the deed only requires the payment of nominal recording fees.

2. Sale and Purchase

2.1 Ownership Structures

Any legal business entity may own land in Mississippi, including corporations, partnerships and limited liability companies. However, most of the transactions in recent years have utilized limited liability companies (LLCs). An LLC provides the limited liability of a corporation or limited partner in a limited partnership, but allows the members tremendous freedom to structure transactions with varying

2.4 Real Estate Due Diligence

Buyers usually hire outside firms for certain aspects of their due diligence. The extent and type of due diligence by the buyer can vary widely due to the size of the transaction and the perceived risk for a particular category of property (eg, industrial properties vs undeveloped agricultural land). An environmental/geotechnical engineer would normally be engaged to conduct appropriate reviews and testing of the property, and a civil engineer is hired to handle the survey and any access issues. If the property is vacant land and the buyer plans to develop the land into a subdivision or other large-scale development, the civil engineer will be much more involved in the due diligence phase, to make sure the property can be developed in such manner. Lawyers are hired to handle the ordering and review of the title abstract and the preparation of the title commitment. Typically, the lawyer representing the buyer will oversee all aspects of the due diligence to make sure the land and improvements are in suitable condition and that the property can be operated and/or developed as proposed by the buyer.

2.5 Typical Representations and Warranties for Purchase and Sale Agreements

The representations given in a real estate transaction are subject to the negotiation of the buyer and seller. However, typical representations and warranties requested of a seller are as follows:

- the property is properly zoned for its current use;
- there are no liens or recent construction on the property for which the contractor has not been paid;
- all permits and licenses have been obtained;
- access is current and insurable;
- there have been no attachments, executions or assignments of the property for the benefit of creditors;
- the seller has the authority to execute;
- the purchase agreement is enforceable against the seller;
- the seller has no knowledge of any environmental hazards present on the property;
- the improvements are in good order and working condition;
- any rent rolls or third-party reports are true and correct;
- no leases or rights of first refusal have been granted, except as disclosed to the buyer; and
- there is no conflict with another agreement or state law or regulation.

Most purchase and sale agreements provide for a claim for damages and indemnification if the buyer discovers after closing that the seller misrepresented an aspect of the property. The term of the representations and warranties is negotiated in the purchase and sale agreement, and normally runs between nine months and two years. The seller will often negotiate a cap on the amount of liability from a breached representation, which is usually some percentage of the pur-

chase price. It is also common in Mississippi for the seller to negotiate a deductible that has to be reached before a claim can be filed for a breach.

2.6 Important Areas of Laws for Foreign Investors

In connection with any sale exceeding USD100,000 and involving a nonresident seller or an entity not qualified to do business in Mississippi, 5% of the amount realized by the seller must be withheld and paid to the Mississippi Department of Revenue to ensure payment of income tax on any income realized from the transaction.

2.7 Soil Pollution and Environmental Contamination

A buyer of a real estate asset may be responsible for soil pollution or environmental contamination of a property even if they did not cause the pollution or contamination. Liability depends on what the buyer did prior to the purchase of the property. The owner of the property is jointly and severally liable for environmental cleanup with other potentially responsible parties (PRP). If a buyer takes title to property they are the owner and therefore a PRP. However, under federal and state law, a buyer may establish the following three “defenses” to being a PRP, and must establish and meet all requirements to maintain the defenses against liability:

- innocent landowner defense;
- bona fide purchaser defense; and
- the contiguous landowner defense.

An innocent landowner is a person who conducted necessary and appropriate environmental due diligence but later discovers an environmental issue at the site. A bona fide purchaser is a person who purchases the property clearly knowing that environmental conditions exist on the property. A contiguous landowner is a person who purchases the property where the environmental conditions exist on an adjoining property and has moved or will move onto the purchased property.

All three defenses require “all appropriate inquiry” regarding the environmental condition of the property prior to closing. The requirements to validly establish a defense are extensive and fact-intensive. Since the failure to comply with even one requirement could prevent a buyer using a defense, buyers should engage competent environmental counsel if a property has suspected environmental issues.

2.8 Permitted Uses of Real Estate under Zoning or Planning Law

The zoning ordinances for the applicable jurisdiction will include the permitted uses for the parcel of real estate located in each zone. If requested, local authorities will generally provide written evidence of the applicable zoning classification.

It is possible to enter into specific development agreements to facilitate development projects in Mississippi. These types of agreements are found in larger more complex transactions. Agreements with governmental authorities can relate to economic incentives such as Tax Increment Financing (TIF), infrastructure improvements such as access roads, and a myriad of other areas. The Mississippi Development Authority oversees many state-wide economic development programs that could be applicable to a project. There are also other types of economic development tools that can be used by cities and counties, which may require the developer to enter into an agreement with the applicable authority.

Developers can also enter into contracts regarding environmental issues. Programs include the Voluntary Environmental Program and the Brownfield Program, which both offer expedited review of environmental remediation plans for the site in order to allow potential purchasers to quickly cleanup the site for redevelopment. The Brownfield Program also offers certain financial incentives related to environmental remediation of a site.

2.9 Condemnation, Expropriation or Compulsory Purchase

Condemnation and eminent domain proceedings are possible in the state of Mississippi. The most common condemnation situation would be related to the construction or expansion of roadways. The risk of a taking by public authorities is directly related to the location of the property. Mississippi law provides for a “quick take” process, whereby the condemning authority obtains an appraisal and places a deposit with the courts. The property is then taken, subject to the owner’s right to appeal the valuation through a litigation process. The governmental authority would pay the owner compensation at the value ultimately determined by the court.

2.10 Taxes Applicable to a Transaction

Mississippi does not have transfer or recording tax for a transfer deed (other than nominal recording fees), but does have mineral documentary tax for the transfer of mineral interests in the state. The tax is USD0.03 per acre for the assignment of a mineral lease, and USD0.08 per acre for a mineral deed. In a typical real estate transaction, the seller usually pays for the preparation of the deed and recording fees, and any costs related to delivering clean title to the buyer (eg, release of any existing deed of trust). The buyer will pay for the title commitment, title policy, any desired title endorsements and any lender-related charges. The parties will usually split any escrow fees. There are no transfer taxes for a stock transfer and the division of costs is usually negotiated between the parties.

2.11 Rules and Regulations Applicable to Foreign Investors

In connection with any sale exceeding USD100,000 and involving a nonresident seller or an entity not qualified to do business in Mississippi, 5% of the amount realized by the seller must be withheld and paid to the Mississippi Department of Revenue to ensure payment of income tax on the income associated with the transaction.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Generally, real estate acquisitions are financed with debt secured by an interest in the real property. Sources of debt include traditional bank financing, HUD and other governmental-backed financing and insurance company financing, but can also include funding from private equity or hedge fund type lenders. Bank financing is typically recourse, but can be non-recourse in some circumstances; owners and developers prefer to obtain non-recourse financing if it is available. Large transactions may involve debt and equity financing or multiple layers of debt and equity.

3.2 Typical Security Created by Commercial Investors

It is customary practice in real estate loans for a deed of trust to be granted by the property owner for the benefit of the lender. Deeds of trust in Mississippi may be foreclosed non-judicially. Mississippi law also allows for mortgages that must be judicially foreclosed, so mortgages are rarely used in Mississippi. Assignments of leases and rents are also typical, whether included in a deed of trust or in a separate document. UCC fixture filings are often included within deeds of trust, although a UCC-1 fixture filing can be recorded in the land records as well. Other personal property security interests are subject to Article 9 of the Uniform Commercial Code.

3.3 Regulations or Requirements Affecting Foreign Lenders

Foreign lenders are generally not obligated to qualify to transact business, so long as they have no place of business in Mississippi and the only business activities conducted by the lender in Mississippi involve creating or acquiring indebtedness, mortgages and security interests in real or personal property and/or securing or collecting debts or enforcing mortgages or security interests in property securing the debts, with title to any collateral acquired by the lender in exercising its remedies under any security document being held only for a reasonable period of time pending disposition. Ad valorem taxes will be due and payable on any real or personal property owned by a lender, and income, franchise, privilege and other taxes may be due as the result of

operating a business after foreclosure or acquisition in lieu of foreclosure. The income tax exemption for interest income received or accrued by foreign lenders making loans secured by real estate in Mississippi does not apply to the following:

- a foreign insurance company subject to certification by the Mississippi Commissioner of Insurance;
- a foreign lender qualified to do business in Mississippi;
- a foreign lender that maintains an office or place of business within Mississippi; or
- lenders that sold properties in Mississippi and financed the sale and reported on the installment method.

In some cases, a foreign lender may be subject to the Finance Company Privilege Tax Law as codified in Miss. Code §§ 27-21-1 through 27-21-19, which levies a statewide privilege tax on any lender other than a national or state bank lending money secured by a lien on any tangible personal property and certain specifically listed items located in the state. That tax is 0.25% of the total indebtedness secured by the tangible property located in Mississippi.

3.4 Taxes or Fees Relating to the Granting or Enforcement of Security

The granting or enforcement of a security interest in real property is subject to only nominal recording fees in Mississippi; there are no mortgage, transfer or documentary stamp taxes. There is a documentary stamp tax on the transfer of mineral interests, but a lien on the mineral interest is excepted from such tax.

3.5 Legal Requirements Before an Entity Can Give Valid Security

The entity must have the power and authority to grant a security interest in its property, and it must have properly authorized the grant. Consideration must be received by the grantor.

3.6 Formalities When a Borrower Is in Default

A deed of trust is used in virtually all secured real estate transactions. After a default has occurred, the procedure to foreclose is very straightforward, requiring publication of notice in a paper of general circulation in the county in which the property is located for three consecutive weeks (most practitioners publish four times) and conducting a sale at the county courthouse. The procedure in Mississippi is fast and low-cost. Unless contractually required, there is no obligation to notify junior lien holders of the default or the sale. The debtor in Mississippi has the right to “deaccelerate” a loan by the payment of the amount due plus expenses at any time prior to the conclusion of the foreclosure sale. A sale is final and there is no redemption period after the foreclosure sale has been completed. There are no additional steps necessary to give priority: Mississippi is a race/notice

state and priority of a lien is established by filing with the Chancery Clerk in the appropriate county.

3.7 Subordinating Existing Debt to Newly Created Debt

Generally, a properly recorded secured financing will not lose priority to subsequently created debt, although a secured construction loan can become subordinated to later filed construction liens in some circumstances. The construction lender must be able to show that the funds from the loan went into the construction, and that it used reasonable diligence in disbursing the loan proceeds to assure they were used for construction.

In addition, a lender can always contractually agree to subordinate its lien through subordination agreements or intercreditor agreements that establish the relative priorities between the contracting parties.

3.8 Lenders’ Liability Under Environmental Laws

There are situations in which lenders can be responsible for the clean-up, removal, remediation or abatement of pollution, but they are generally excused from liability if they meet two requirements:

- the lender’s ownership interest must be primarily for the purpose of protecting an interest in the property; and
- the lender must not participate in the management of the property or facility.

This generally aligns with federal laws that provide an equivalent exception from liability.

It is anticipated that the state will adopt a new regulation in the near future related to the underground storage tank (“UST”) program, which will require lenders to take affirmative action with respect to USTs after foreclosure on a property that contains one or more USTs.

3.9 Effects of Borrower Becoming Insolvent

If a borrower becomes insolvent and files for bankruptcy, a security interest in real property will be subject to the same bankruptcy law that would apply in any state. Following a foreclosure, a borrower cannot grant a security interest in real property because the borrower would be divested of all of its interest in the property absent a defect in the sale. There is no redemption period after a foreclosure is completed.

4. Planning and Zoning

4.1 Legislative and Governmental Controls Applicable to Design, Appearance and Method of Construction

Mississippi has adopted statutes to establish minimum building codes, and has established the Building Codes Council, which is tasked with adopting standards for construction. However, counties and municipalities were given the opportunity to opt out of the uniform system and establish their own regulations or to not establish regulations. Therefore, some counties and municipalities will have varying regulations related to construction. Most counties and municipalities with larger relative populations have adopted building codes that are typically in line with the International Building Codes.

In addition, design and appearance issues are often covered by county or municipal zoning regulations. The scope of these zoning regulations can vary widely depending on the location of the project.

4.2 Regulatory Authorities

Several different governmental entities may be responsible for regulating development and designated use of parcels of real property. On a state level, the Mississippi Department of Environmental Quality (MDEQ) is involved in the enforcement of federal and state environmental and public health laws and regulations, including those dealing with permitting for water usage, storm water discharge and air quality. Development projects of more than five acres will typically trigger a permitting requirement from MDEQ.

Specific uses of real estate are generally regulated at the county and municipal levels. Most municipalities and counties will have building codes, zoning ordinances and similar types of regulations that must be complied with in order to move forward with development projects. Some localities have subdivision ordinances that require the filing of subdivision plats when real property is divided into new parcels. Additional regulatory compliance may be required for industrial facilities or other specialized developments that are unique to their particular usage.

4.3 Obtaining Entitlements to Develop a New Project

The process for obtaining necessary entitlements for development of a specific parcel of real property is generally handled at the local and county levels, directly with the county or local administration, unless a change such as a rezoning of the property is required. In the case of a rezoning, the process requires notice to be given to adjoining property owners, a published public notice and a public hearing in front of the local or county governing body. Since this is a public process, other property owners and members of the

community at large have the ability to support or object to the specific request being made in connection with a project. Once the governing body has made a determination to grant or deny the requested change, an aggrieved party can appeal the decision to the courts. Appeals must be filed in a relatively short period (ten days in many cases), so developers will quickly know whether other parties intend to pursue action in the courts.

4.4 Right of Appeal Against an Authority's Decision

An adverse decision related to the development or usage of real property by municipal officials or the county board of supervisors can be appealed to the circuit court in the applicable jurisdiction. The deadline to file the notice of appeal is just ten days from the adjournment of the meeting at which the decision being appealed was made, so the appeal must be processed quickly or the courts will not have jurisdiction over the matter. The circuit court acts as an appellate court in such cases. The court reviews the record made before the municipal or county decision-making body. Therefore, it is vital to understand that a proper record must be made at the local level in order for the court to have some record with which to form the basis of an opinion on the matter.

4.5 Agreements with Local or Governmental Authorities

Generally, it is not necessary to enter into specific agreements with governmental entities related to the approval of a development project. However, it is certainly permissible to do so if there are aspects of the project – for example, an access road to be built by the city – that would require the delivery of certain services or improvements necessary for the viability of the project. The use of governmental agreements would occur in very large, extensive projects that require additional co-ordination with local governmental agencies and officials. In many cases, utility providers will enter into agreements with developers in situations where the level of service or capacity of service is over and above that which a typical development might require. For example, a large industrial facility might enter into agreements with utility providers to assure that the proper level of service and quantity of supply is available to the site.

4.6 Enforcement of Restrictions on Development and Designated Use

Restrictions on the development and usage of real property would typically be enforced by the local governmental officials, and often through the courts. If there are administrative remedies available, the offended party may be required to seek a remedy through an administrative process before turning to the courts.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Mississippi recognizes most of the familiar types of entities used to acquire and hold real estate. General partnerships and limited partnerships are potential forms of ownership entities. C-corporations and S-corporations are also possible entity choices, as well as trusts. However, an overwhelming number of transactions in recent years have utilized limited liability companies (LLCs), which provide the limited liability of a corporation or limited partner in a limited partnership, but allow the members tremendous freedom to structure transactions with varying tax and cash distributions scenarios. The Revised Mississippi Limited Liability Company Act provides a modern and flexible framework that generally follows many of the provisions of Delaware or Uniform LLC laws. LLCs are taxed as partnerships under Mississippi law, unless an affirmative election is made to choose to be taxed as an association. Mississippi recognizes subchapter C corporations and subchapter S corporations, and generally follows federal rules applicable to corporations.

Mississippi entities can be formed online at the Secretary of State's website. The Mississippi Secretary of State's office also handles the registration of foreign entities, so they are qualified to do business in the State of Mississippi. Fees for the costs of formation and qualification can be found on the Mississippi Secretary of State's website.

5.2 Main Features of the Constitution of Each Type of Entity

Mississippi generally follows uniform and federal laws with respect to the governance of entities. The primary characteristics sought by investors are limited liability and the flexibility within an entity to structure the governing terms to match the specific transaction. General partnerships are used but do not provide limited liability, so are rarely seen. S-corporations and LLCs both provide limited liability and pass-through tax treatment, but S-corporations are less flexible with respect to the possibility to plan different internal tax and cash treatments for different classes of equity ownership. C-corporations provide limited liability, but do not provide pass-through taxation treatment, which is often desired by investors in real estate transactions. These differences are not necessarily unique to Mississippi but are generally driven by federal tax considerations.

5.3 Tax Benefits and Costs

The tax benefits and costs for entities are generally driven by federal rather than Mississippi tax considerations. LLCs, limited partnerships and S-corporations provide pass-through tax treatment, so the entity itself is not subject to income tax at the state level. The tax attributes are passed through to the

shareholders or members, as applicable. C-corporations are taxed separately from the shareholders in the same manner that a C-corporation is taxed separately for federal income tax purposes.

One advantage of having a Mississippi domestic entity holding real property is the possibility of avoiding capital gains tax on the sale of the equity interest in the entity. Therefore, a sale of real property that can be restructured as an equity sale can sometimes be a method to save state income tax.

5.4 Applicable Governance Requirements

Governance requirements for different entities are typically the same as those found in other states, and are not specific to Mississippi.

Limited partnerships must have at least one general partner, which can be either an individual or an entity. The limited partnership is under the control of the general partner(s). The partnership agreement can require approval of the limited partners in certain situations, although care must be taken not to give the limited partners too much authority, which would risk creating a general partnership instead of the desired limited partnership.

General partnerships are under the control of all of the partners, unless there is a written partnership agreement that provides for the governance mechanisms of the partnership.

Limited liability companies can be either manager-managed or member-managed; more sophisticated companies are generally manager-managed. Managers do not have to be individuals and are frequently other LLCs or entities. The managers or members can appoint officers to serve the LLC, and can assign specific duties to such officers or provide officers with powers that would be similar to the powers of an officer in a corporation. If the LLC is manager-managed, then the members, in their capacity as members, cannot act on behalf of the LLC unless there is specific authorisation. In a member-managed LLC, the members are agents of the LLC absent specific language in the company's operating agreement to the contrary. In real estate transactions, title underwriters and other parties will be looking for copies of the company's operating agreement as well as resolutions to clearly indicate the persons authorized to act on behalf of the company.

LLCs are not required to have an annual meeting of the members. However, if the LLC has not had a meeting in 15 months, then members holding more than 20% of the voting power of all members may call a regular meeting of the members.

Corporate governance is, again, similar to other states. A corporation is required to have at least one officer, but they

generally have a president and a secretary. A board of directors, which can be one or more natural individuals, has ultimate control of the affairs of the corporation. The board of directors can be elected annually or for multi-year and staggered terms. The board of directors appoints the officers of the corporation, who have day-to-day charge over the affairs of the corporation. Depending on the authority granted to the officers of the corporation, real estate transactions will generally require the approval of the board of directors. Title underwriters will want to review articles of incorporation, bylaws and resolutions in connection with the acquisition, encumbrance or disposition of real property in Mississippi.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

One type of arrangement allowing for use of real property without an outright purchase is a lease, which is a real property interest conveyed from an owner to a lessee in return for regular rental payments. The lease is a contract that also includes term and conditions regarding the lessee's use of the property. Another type of arrangement is a license, which is granted by an owner to another party and gives such party the right to use the property under certain conditions. A license does not convey a real property interest and is usually not for an extended term. Licenses are normally used for the grantee to complete some type of project or job, and the license will then terminate. Another type of arrangement is an easement, which is a right to cross or otherwise use another's property for a specified purpose. A common right transferred by easement is the right to access the grantor's property in order to gain access to the grantee's property. With an easement, the legal title to the underlying land remains with the owner of the land.

6.2 Types of Commercial Leases

There are different types of commercial leases depending on the use of the leased premises. There are different considerations, protections for the landlord, representation and warranties, and different ways to handle the charges to be paid by the tenant. Types of commercial leases include build-to-suit, sale-leaseback, absolute leases, percentage leases, synthetic leases, ground leases, double net leases, and triple net leases.

6.3 Regulation of Rents or Lease Terms

Rents are not regulated in the state of Mississippi. Mississippi law requires that leases with a term of more than one year are written, signed and delivered.

6.4 Typical Terms of a Lease

The customary length of a lease term in Mississippi is five to ten years.

It is customary in Mississippi for a landlord to be responsible for any common areas of the building or shopping center, for structural aspects of the building/demised premises, and for any utility lines to the boundary of the space. Tenants are responsible for all maintenance within the demised premises.

The customary frequency of rent payments is monthly.

6.5 Rent Variation

Most rents in Mississippi are determined by the terms of the lease agreement. Most rental rates increase during the term, but the details of the initial rent and any escalation are subject to the negotiation of the parties.

6.6 Determination of New Rent

Most leases in Mississippi include an escalator and the rent increase is based upon either an agreed-upon percentage increase (eg, 3% to 5%), the increase in Fair Market Value, or an increase in the Consumer Price Index.

6.7 Payment of VAT

VAT or other taxes are not payable on rent in Mississippi.

6.8 Costs Payable by Tenant at Start of Lease

In Mississippi, the tenant usually pays a security deposit to the landlord at the commencement of the lease. If the lease is triple net, the tenant will also pay the taxes, insurance and common area maintenance costs for the property. These costs are usually paid monthly by the tenant, along with the monthly rent payment. In some leases, tenants are responsible for their own buildout of the leased premises, whereby a tenant will construct the space to the agreed upon plans and specifications between the landlord and tenant. The landlord may only provide a "cold, dark shell" to the tenant with no concrete floor, no ceiling or walls and no electricity, and the tenant will be responsible for providing such to the space. In other leases, a landlord might provide an improvement allowance to the tenant to pay for the buildout. The amount is usually a negotiated rate per square foot of the leased premises. In other cases, the landlord may provide the premises in "move-in condition", ie, ready for occupancy. The condition of the premises and responsibility for completion of the premises typically depends on the type of property being leased.

6.9 Payment of Maintenance and Repair

The maintenance and repair of the common areas (including landscaping) is paid for by all of the tenants of a center or building through a common area maintenance expense to be paid to the landlord monthly. All of the common expenses for these areas are customarily estimated for a lease year, and the landlord determines how much each tenant should pay based upon the square footage of the leased space. The landlord will be responsible for making sure the common areas are in good working order and condition, using the

funds paid by each tenant through the common area maintenance expense.

6.10 Payment of Services, Utilities and Telecommunications

Most utilities can be separately metered for each tenant, and such charges will be paid by each tenant directly to the utility provider. In an office building context, tenants will pay a monthly charge for these services or the landlord will just charge a gross rental rate that includes the payment by the landlord to the utility providers. In Mississippi, this is usually negotiated between the landlord and the tenant during lease negotiations.

6.11 Insuring the Real Estate That Is Subject to the Lease

If the lease is triple net, insurance is paid for by the tenant. Most landlords make sure the insurance payments are made, and will therefore collect an insurance expense from the tenant, on either a monthly or annual basis, and will pay the insurance premium directly to the insurance broker.

Depending on the policy, most events causing damage will be covered by a standard property insurance policy.

6.12 Restrictions on Use of Real Estate

Landlords often impose restrictions on a tenant's use of the demised premises. There are regulations and laws that impose restrictions on how real property can be used (ie, environmental regulations and zoning restrictions). These regulations are specific to each city and county, and depend on the master planning for such. Cities and counties can also set up development districts that have other restrictions on the use, density, parking and the specific look and feel of the area (ie, architectural review).

6.13 Tenant's Ability to Alter and Improve Real Estate

Depending on the lease, a tenant is usually allowed to alter or improve the real estate. A landlord usually specifies what work can be performed to the demised premises, and can cap the work at a certain dollar threshold. The alteration provision of a lease is usually heavily negotiated between the landlord and the tenant, depending on the use of the demised premises.

6.14 Specific Regulations

There is a specific residential landlord tenant act in the state of Mississippi. Residential leases have to comply with the statute, which protects residential tenants from certain actions of a landlord.

6.15 Effect of Tenant's Insolvency

Most leases in the state of Mississippi will include a "termination-on-bankruptcy" clause. However, these provisions

are rarely enforceable as federal bankruptcy law will govern. Any interest of a debtor will become property of the bankruptcy estate and the debtor will not lose the property or contract right. However, the bankruptcy of a lessee can terminate a lease agreement. Section 365 of the Bankruptcy Code states that a debtor may assume or reject an unexpired lease; assumption of the lease is a decision to retain or continue the lease by the bankruptcy estate, whereas a rejection is a decision to terminate. A debtor may not assume the lease unless it can cure defaults and provide adequate assurance of future performance of the lease.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

A tenant can be asked to provide a security deposit of several months of rent payments, which can be liquidated in the event of default. A tenant may also be required to provide an irrevocable letter of credit from a financial institution, which the landlord can draw upon to satisfy outstanding rental obligations if the tenant defaults.

6.17 Right to Occupy After Termination or Expiration of a Lease

In Mississippi, a tenant does not have the right to holdover and occupy the leased premises after the expiration or termination of a commercial lease. Mississippi follows the American rule with respect to damages caused to the new tenant when the prior tenant wrongfully holds over. State law affords an exclusive remedy as the measure of damages for holding over after notice to vacate: the payment of double rent to the landlord, which shall continue to be paid during the time the tenant remains in possession. In most leases, the parties will agree that the tenant must pay rent to the landlord in an amount substantially in excess of the rental rate if said tenant remains in possession of the leased premises after the expiration of the stated lease term, and might also state that such holdover tenancy is month-to-month. In such cases, the landlord would have to give appropriate notice to terminate the tenancy and possibly begin eviction proceedings if the tenant does not vacate. Mississippi law requires written notice in order to terminate a periodic tenancy. For a week-to-week or month-to-month tenancy, one week's notice is required. Tenancy for a half-year or quarter-year requires one month's notice, and a tenancy from year-to-year requires two months' notice.

6.18 Right to Terminate Lease

Any event of default as set forth in the lease agreement gives the landlord or tenant the right to terminate the lease. Most leases provide for notice to the other party and the right to cure. Such events of default can be the failure to pay rent or some other charge, abandonment of the demised premises, failure to comply with any provision of the lease, failure to give the landlord notice of an assignment or sublease of the

demised premises, or failure to keep the demised premises in a suitable condition.

6.19 Forced Eviction

The doctrine of constructive eviction is recognized under Mississippi law, and is when the landlord decides not to go through a legal eviction of a tenant and instead takes steps to keep the tenant from continuing to occupy the premises. As a result, the tenant abandons the premises. Steps taken by a landlord can include changing the locks, blocking the driveway, or nailing the door shut.

However, the lease agreement between the landlord and the tenant must include a provision that gives the landlord the right to remove the tenant and take possession of the premises without notice if the tenant fails to pay rent. A lease provision for forfeiture and re-entry for nonpayment of rent is valid and enforceable in certain situations, but the court cannot terminate a contract absent a material breach. A landlord cannot resort to self-help remedies unless the lease agreement between the parties expressly gives the landlord such a right. Without such provision in the lease, the landlord is required to follow the statutory process.

The most common summary remedy for eviction of a tenant is unlawful entry and detainer. These types of actions can be exercised either in front of a Special Court of Justice Court Judges or in front of a County Court Judge. An action for unlawful entry and detainer should be brought in justice court only when the county where the action is filed does not have a county court.

Another remedy for nonpayment of rent is statutory eviction, which can be exercised in the following cases:

- where the tenant shall hold over after expiration of the term without the permission of the landlord; and
- after nonpayment of rent, the landlord must give the tenant three days' written notice requiring the payment of such rent or possession of the leased premises.

A landlord may also initiate a civil suit by filing an affidavit to remove his tenant, specifically asking therein for the tenant's eviction and a money judgment. If the tenant is properly and timely served with a summons yet fails to appear on the return day of the summons or file any responsive pleading, the landlord is entitled to obtain on that day (the return day) a warrant for the immediate removal of the tenant. Once the landlord pays the constable fee for the removal warrant, the constable may immediately serve the removal warrant on the tenant. If the tenant fails to remove his personal property once the constable serves the tenant with the removal warrant, the landlord receives full possession thereof and may remove and dispose of all personal property of the tenant without further notice or obligation to the tenant.

When a tenant fails to make a monthly rental payment or is otherwise in default under the rental agreement, the landlord has the right to forfeit and terminate the rental agreement. If the rental agreement so provides, the landlord may then elect to accelerate the lease and hold the tenant liable for all rents remaining unpaid under the rental agreement in a right of action for breach or anticipatory repudiation. However, the acceleration clause must be clearly and unequivocally set forth in the rental agreement and not open to interpretation. In addition, a residential landlord in Mississippi that evicts a tenant may not continue to collect rent after the lease term expires.

6.20 Termination by Third Party

A lease can be terminated by a government or municipal authority in a condemnation or eminent domain proceeding. The process for determining the allocation of the condemnation proceeds between a landlord and tenant is negotiated in the lease. Mississippi law provides for a "quick take" process whereby the condemning authority obtains an appraisal and deposits the value of the condemned property with the court, subject to the right of the landlord and tenant to appeal the proposed value. The governmental authority would ultimately pay the compensation and the value as determined by the court.

7. Construction

7.1 Common Structures Used to Price Construction Projects

Commonly used pricing structures for construction include guaranteed maximum price (GMP), cost plus, and fixed price contracts.

7.2 Assigning Responsibility for the Design and Construction of a Project

Design and construction functions are typically divided between architects and contractors. However, any number of different arrangements for dividing responsibilities is possible.

7.3 Management of Construction Risk

Construction risk is managed through contractual provisions between the parties, who are generally free to allocate the relative risks in any manner and through whatever mechanisms they deem appropriate. The mechanisms include waivers, indemnification, retainage, pricing bonuses or penalties, scheduling and performance bonuses and penalties, and other methods that are generally available in other states. Generally, the owner cannot require the contractor to prospectively waive its lien rights.

7.4 Management of Schedule-Related Risk

Schedule-related risks in construction projects can be managed with contractual provisions, which allocate the risk of delays between the owner and the contractor. These mechanisms can include penalties for missing milestones as well as incentive payments for performance and achieving milestones set forth in the contract. The contract will typically determine which party is responsible for delays that are not the fault of either party, such as weather delays.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

In public projects, bonding is usually required to secure performance of the construction job. Payment and performance bonds are available in private jobs but are used less frequently because of cost considerations. Many lenders will require construction bonds when the lender is providing the construction financing. Guaranties, letters of credit and other mechanisms for providing security are available, but are used less frequently.

7.6 Liens or Encumbrances in the Event of Non-Payment

Contractors, material suppliers, design professionals and others have statutory lien rights related to work on a project. A secured construction loan will generally maintain its priority over subsequent liens as long as the funds from the construction loan are actually used for purposes of construction of the project and the lender uses reasonable diligence in the application of the proceeds of the construction loan. Once a lien has been filed, the owner can remove the lien by posting a bond in the amount of 110% of the amount of the lien.

7.7 Requirements Before Use or Inhabitation

The process of final approval before occupancy depends on the locality of the project. Typically, the local jurisdiction has inspection requirements that must be satisfied before the local authorities will issue a certificate of occupancy.

8. Tax

8.1 Sale or Purchase of Corporate Real Estate

There are no transfer or documentary taxes, so the sale or purchase of real estate does not itself trigger payment of a tax. If the seller has a gain on the sale of the property, they may be liable for tax on the gain.

8.2 Mitigation of Tax Liability

There are no transfer, recordation or stamp taxes. The fees for recordation of documents in Mississippi are nominal, so mitigation is not necessary.

8.3 Municipal Taxes

There are no occupancy taxes or taxes paid on rent in Mississippi.

8.4 Income Tax Withholding for Foreign Investors

When a non-US person disposes of an interest in US real estate, the proceeds are subject to 15% withholding under the Foreign Investment in Real Property Tax Act (FIRPTA). The amount of withholding can be adjusted by obtaining a withholding certificate from the Internal Revenue Service.

Pursuant to Section 27-7-308 of the Mississippi Code, when a non-resident of the state of Mississippi sells Mississippi real property and associated tangible personal property for a sum in excess of USD100,000, the seller is required to withhold and pay over to the Mississippi Department of Revenue 5% of the amount realized by the seller on the sale. If the amount required to be paid to the Department of Revenue exceeds the net proceeds payable to the seller, the seller is required to pay to the Department of Revenue only the net proceeds otherwise payable to the seller. A corporation registered to do business in the State of Mississippi is considered a resident of the state.

If the seller determines that the 5% required to be paid will result in excess payment on any gain required to be recognized from the sale, they may provide the Department of Revenue an affidavit signed under penalties of perjury stating the amount of the gain required to be recognized from the sale, and may then pay the applicable percentage of the amount of the gain required to be recognized as stated in the affidavit rather than the 5%. Likewise, if the seller makes a payment that results in an excess payment, they may file a claim for a refund of the excess payment with the Department of Revenue, which includes an affidavit signed by the seller under penalties of perjury stating the amount of the gain required to be recognized from the sale, and the department will refund the difference.

Other than the withholding requirements above, foreign sellers and Mississippi sellers are taxed in the same manner.

8.5 Tax Benefits

Property taxes paid are deductible for federal income tax purposes. While land is not depreciable, improvements to land are subject to depreciation, which is deductible on the owner's federal income tax return. Owners may also take advantage of the I.R.C. Section 1031 exchange rules, assuming all conditions are satisfied. Mississippi income tax law does not recognize capital gain, and all gain on property dispositions is ordinary income. In addition, Mississippi income tax law does not recognize federal bonus depreciation or the federal investment tax credit. In order to qualify for a tax-free exchange, both pieces of property must be located in Mississippi.

In Mississippi, local governing authorities may grant eligible businesses a property tax exemption on real and tangible personal property being used in the state for up to ten years. Additionally, certain eligible businesses making certain investments in the state may be eligible to pay a fee in lieu of property taxes under a fee in lieu agreement having a term of up to 30 years, but the fee in lieu on any particular item of property during the term of such an agreement is limited to no more than ten years. These fee in lieu agreements are negotiated between the eligible company and the local governmental authorities. Finally, by locating in or expanding into certain counties in Mississippi, companies may be eligible for property, income, franchise, and sales and use tax incentives under the Growth and Prosperity (GAP) Program.

8.6 Key Changes in Federal Tax Reform

The 2017 Federal Tax Cuts and Jobs Act was generally considered to be favourable to commercial real estate investment and ownership. The Act added certain deductions for income from pass-through entities, increased the ability to currently expense certain items, and retained 1031 exchanges for real property.

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