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Acquiring Medical Real Estate



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Acquiring a medical office building (MOB) from a hospital poses many unique legal issues. The MOB is often connected with the hospital through a system of above-ground walkways and shared parking, utilities, equipment and services. Challenges are created when legal ownership of the MOB in this system is separated. For example, if an above-ground walkway attaches to both the MOB and the hospital, who will own and operate the walkway after the sale? If parking for the MOB is shared with the hospital, will the new MOB owner be able to reserve parking spaces for its tenants after the sale? The MOB buyer and hospital must negotiate the traditional aspects of a real estate purchase agreement, while also negotiating agreements addressing the separation of the previously unified medical facilities.

Ground Lease

The hospital will frequently transfer the MOB to the new owner by way of a ground lease of the land around and under the MOB and a deed for the improvements. The ground lease allows the hospital, as landlord, to maintain a level of control over the MOB through restrictions on the operation of the MOB. The hospital will restrict the MOB owner from leasing to tenants operating businesses that are competitive with the hospital, such as magnetic resonance imaging, computerized tomography and nuclear medicine. MOB tenants will be required to be either members of the medical profession meeting the hospital's criteria for mem-

bership on the hospital's medical staff or tenants providing auxiliary or incidental services such as pharmacies, optical stores, and food service establishments. If the hospital has a certain religious affiliation, the hospital may prohibit uses violating certain religious and ethical directives. The hospital may want a right of first offer to lease space in the MOB, and if exercised, the hospital will be a tenant in the MOB, while concurrently being the landlord under the ground lease.

The MOB owner will negotiate for maximum flexibility on leasing to insure that the building is fully leased to rent paying tenants. The MOB owner will want any leasing restrictions to apply to all other MOB's on the hospital campus, otherwise the other MOB's will have a competitive advantage by being able to lease to a wider variety of tenants. The MOB owner will require termination of any competitive use restrictions if the hospital ceases providing such services. Medical practices change over time, and the MOB owner will negotiate for the right to modify restrictions if it becomes customary for any restricted services to be performed by physicians within their own office space in treatment of their own patients.

The MOB owner will need to assign the ground lease to a new owner upon a future sale of the MOB. The hospital will typically impose restrictions on assignment such as requiring any assignee to have similar years of experience as the MOB owner in managing medical office buildings. Both parties may want a right of first offer to purchase the others' interest in the event of a sale by either party.

Easements

The MOB owner and hospital will often enter into a reciprocal easement agreement in order to grant the MOB owner easements covering land on the hospital campus that is necessary for the effective operation of the MOB. The agreement may need to provide easements for parking, pedestrian and vehicular access, signage and utilities. The easements will need to be superior to any financing liens covering the hospital campus or MOB so that a foreclosure of any lien will not terminate the easements.

The MOB will need sufficient parking in order to meet applicable zoning and other legal requirements. The reciprocal easement agreement can designate certain parking spaces as exclusive "zoning spaces" for the MOB such that the MOB owner will have the right to segregate such spaces for the MOB if required to do so in order to comply with applicable laws. The MOB owner may want to designate certain parking spaces as reserved for the exclusive use of its tenants.

Pedestrian access on a hospital campus often involves above-ground walkways that connect the MOB to the other buildings on the hospital campus. When legal ownership of the MOB is separated, the hospital and MOB owner will need to address ownership of the walkway and responsibility for the operation, maintenance and repair of the walkway. Easements for directional signage identifying the MOB and hospital buildings may be needed on walkways and driveways providing access to the MOB and hospital buildings.

The MOB may need easements

across portions of the hospital campus for the purpose of providing water, sanitary and storm sewer, gas, electricity, telephone, cable television, fiber optic and other utility services to the MOB. Surface parking facilities, driveways, landscaping or similar improvements may be installed on the above-ground portion of these utility areas, so long as such improvements do not unreasonably interfere with access to and use of the below-grade portions of the utility areas. As medicine is continually evolving, the parties may wish to consider easements for future utilities necessary for the practice of medicine.

Ancillary Agreements

Existing hospital equipment may be providing services for the MOB. The parties may need to enter into a services agreement under which the hospital will continue to provide such services to the MOB for a fee, with flexibility for the MOB owner to terminate the agreement and independently provide the services in the future. The parties may also agree to have the hospital's campus security provide security for the MOB.

The MOB owner will be working with the hospital for years to come due to the proximity of the properties and multiple agreements with the hospital. The MOB owner will need the hospital's cooperation on financing and other issues and will want the hospital to remain a valued tenant in the MOB. A good relationship between the MOB owner and hospital is important for the future success of the MOB.

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