

Preface

“The Unexpected Happens”

Margaret Thatcher

When I wrote the first edition of this book in 1991, I thought that it was unfortunate that it had to be written because it was indicative of the then-current difficulties faced by the real estate industry. Five years later, I was shocked that not only had we not seen a complete recovery of the real estate market, but there was a necessity for a second edition of this book. Then, a dozen years later, the real estate market was in free fall in the Great Recession with no end in sight. Next it was a pandemic. In 45 years of practicing real estate law we are involved in the sixth serious real estate recession that I have witnessed. In each of the prior softenings the real estate problems developed in a different fashion and this one is hobbling the office market which was always one of the safest markets with long term leases, but it appears to be the worst of them all.

This time it was not triggered by an economic crisis; but a health crisis. This time the problems did not occur gradually but everywhere at one time. One day office buildings, restaurants, hotels, malls, both luxury shops and bodegas were fully utilized and producing revenue for the owners and operators and the next day they were closed, the employees, laid off, the owners income going to zero while the bills and taxes continued to accrue. Prior recessions were triggered by Tax Reform, the S&L Crisis, the Oil Embargo, a Terrorist Attack, excessive lending and too much leverage, and the end of a business cycle; this time it was a virus that attacked everyone and everywhere. There came a time during the other real estate recessions where the market began to recover, there was growth and demand, increased lending, new projects began to be developed, and normalcy returned. This time the health crisis led to mandatory remote working which, to a large degree, continues because many employees and business professional leaders believe it is more efficient.

We have certainly lived through the worst event of our lives and we share this struggle with the rest of the world. This time, we fought the virus by first sheltering in place and then wearing masks in public as our world slowly started to deal with the virus. Hopefully, in the future, we will be better prepared for a pandemic and fewer people will die or suffer. Although, the real estate industry will recover, there will be lasting repercussions to what we have just witnessed.

History has demonstrated time and again that in due course the problems will abate, prices will firm and then appreciate, and those people in the real estate business who manage to survive the

downturn will find themselves stronger than before. The issue then is how to survive until things turn around with no certainty as to when the turn around will occur. This real estate recession occurred because of the sudden and complete closing of virtually all businesses. The reality is that eventually the economy will again expand and it will cost more to develop property in the future than it did in the past. It becomes a waiting game. Of course, when the wait ends, the value of existing property will increase and confidence will be restored. The history of real estate is replete with stories of boom, bust, and absorption.

There are two old sayings: one is that there are no certainties other than death and taxes and the second is that the three principles of real estate are location, location, and location. I think that there will be a third certainty and that is that, everything is going to change. It is incumbent upon each of us to make certain that the excesses of the past do not reoccur. We also know that the bases of real estate value are not location, location, and location, but location, timing, and use.

The purpose of this book is to provide guidance for borrowers and lenders in responding to a default in order to safeguard their interests in a property until the market improves. Chapter 1 describes the basics of default. Chapter 2 describes the due diligence investigation that should be undertaken by the lender when a default occurs. Chapters 3 through 8 contain strategies for dealing with different kinds of workouts. Chapters 12, 13, and 15 provide an overview of the things that should concern the lender such as environmental and title issues, lender liability claims, actions the borrower should not take, and a borrower's bankruptcy filing. Chapters 10 and 11 describe two aggressive strategies by lenders—foreclosures and deeds-in-lieu of foreclosure. Chapters 14 and 16 round out the advice to borrowers relating to the sale of the property and the tax consequences of the borrower's actions. Each of the chapters is self-contained, contains forms and documents that elaborate on the contents of the chapter, and can be separately utilized as resource material when dealing with a default situation. The book has been written to provide a starting point for the real estate professional to use when considering the best manner of proceeding and surviving in this market.