**THE PROGRAMMATIC REAL ESTATE JOINT VENTURE**

Programmatic real estate joint ventures are on the rise.

The “why” is not that surprising. Current market conditions are healthy. The economy in general and the real estate industry in specific has rebounded since the Great Recession. Capital sources are plentiful, and the capital available to invest is significant. The best and most talented sponsors (e.g., developers, operators) (“Sponsors”) survived the Great Recession and see new opportunities, but ones where expertise is required to maximize value. And the product supply is restricted, given stagnant development during the Great Recession and capital sources concentrating their investments in strategic and specific markets.

As a result, market participants are seeking competitive advantages. Sponsors want “go to” capital sources in their camp in order to quickly take advantage of opportunities that arise and to provide additional credibility to their bid and acquisition efforts. Capital sources, and in particular equity sources (“Equity Investors”), want greater deal flow with known, quality Sponsors in order to deploy capital in greater amounts and more frequently. Equity Investors also learned from the Great Recession that quality Sponsor relationships are often more critical to value creation than the underlying quality of the real estate.

Strategic alliances have become valuable currency in this market. Sponsors use their Equity Investor relationships as selling points for winning opportunities and as swords for fending off competition. Equity Investors use their Sponsor relationships as selling points for capital raises, for market relevance (and winning new relationships) and for providing insight into current market trends and conditions.

Sponsors and Equity Investors are finding that while a deal here and a deal there with a partner has value, a programmatic real estate joint venture (or, as it is sometimes called, a “portfolio” or “platform” venture), stands apart. In a programmatic venture relationship, Sponsors and Equity Investors go beyond striking a deal for a single transaction and establish a system through which they can invest together as a part of a common plan. Programmatic ventures maximize efficiencies of, among other things, time, effort, capital deployment, expenses, personnel, competition and exit strategies. Correspondingly, the stakes for Sponsors and Equity Investors are higher in programmatic ventures, as mistakes or miscalculations are amplified across portfolios and often entire businesses.

This paper explores the basics of the programmatic venture, and provides essential insight into key terms to consider from the Sponsor and Equity Investor perspective.
STRUCTURAL FORMS OF RELATIONSHIP

Most programmatic joint venture relationships will fall under one of two types of general structures, being either: a) a holding company structure, or b) a framework or deal sharing agreement structure. In a holding company structure, the parties enter into a joint venture agreement at an upper tier level and acquire properties through subsidiaries of the holding company. In a deal sharing or framework agreement, the parties enter into a contract that sets forth the framework under which the parties will enter into various individually and independently documented and executed transactions. A typical framework agreement will provide for some obligation to present deals and form documentation and terms that are attached as exhibits to the framework agreement pursuant to which each of the deals will be carried out. Less formal framework and deal sharing agreements are often employed as well. These arrangements might take the form of a negotiated deal agreement which will become the “form” for future deals, but not include the mechanics of crossing or tying the transactions together contractually.

A holding company structure tends to reflect arrangements where the parties are tied together more extensively in terms of economics and exclusivity and a framework agreement less so, albeit that does not necessarily have to be the case. Holding companies are sometimes favored by virtue of the fact that a holding company will often develop a sufficient balance sheet pursuant to which the venture itself may be able to issue loan guarantees and therefore such guarantees will not be required from the individual partners. Framework agreements are preferred by Sponsors in particular who do not want to tether themselves too closely to a relationship, but still want some efficiencies. Tax considerations and the preferences of differing indirect ownership pools either in the Equity Investor or Sponsor may drive the choice of structure one way or the other as well.

NOT JUST “A” DEAL

Regardless of form, the process of negotiating a programmatic real estate joint venture differs substantially from that of negotiating a one-off investment in real estate. A programmatic venture is not just “a” deal. Rather, a program contemplates a continuing relationship and, as it were, a “marriage” of sorts between two organizations. While a considerable amount of time will be spent in program negotiations on the investment parameters for the individual assets, a considerable amount (if not the majority) of time will be spent on the “marriage” aspects of the undertaking, such as exclusivity, the “pooling” of economics, sharing of pursuit costs, divorce and other portfolio wide or holding company issues. Also at issue will be the impact that the program itself may have on one or either of the parties on a practical and operational level.
On a practical, organizational and operational level (each with its own legal implications), many questions and considerations will arise. From the perspective of the Equity Investor, does the Sponsor have the staff and infrastructure to handle the programmatic equity commitment at offer by the Equity Investor? Should the Equity Investor have some say over the hiring and termination of key individuals at the Sponsor and some ability to require adequate increases organizational infrastructure and staffing capacities? After all, the Equity Investor may say, it has devoted substantial internal and external resources to negotiating the program and obtaining internal approvals and should have some say over the Sponsor organization itself, even if not an owner. What happens if, by virtue of the program, the Equity Investor puts the Sponsor “on the map” in terms of brand and prestige? Can the Equity Investor benefit from the growth in the Sponsor that its risk capital helped to create? Or may the newly elevated Sponsor renegotiate more favorable terms with a new equity provider at the conclusion of the existing program and terminate the relationship with the original Equity Investor with no consideration for the organizational benefits conferred? Should the Equity Investor have the right to buy into the ownership of the Sponsor or have a right of first offer as to any follow on equity platform relationships proposed by the Sponsor?

From the perspective of the Sponsor, should the relationship impact the ability of the Equity Investor to pursue investments in the same markets as those being pursued by the Sponsor? In other words, should there be reciprocal exclusivity provisions binding equally on both parties? Short of an exclusivity undertaking by the Equity Investor in favor of the Sponsor, what restrictions, if any, should be placed on the Equity Investor if it is being shown the same deal by both the Sponsor and a competing unrelated sponsor at the same time? Or worse, is the Equity Investor free, after first learning about the deal from the Sponsor, to find another sponsor party and pursue the transaction with that party? Should the Sponsor request that the Equity Investor hire an internal team dedicated solely to the program in order that the promise of quick and informed decision making that was an inducement for the Sponsor to undertake the program be made a reality?

In negotiating the programmatic joint venture, the legal, business and organizational considerations are myriad. Many of the questions asked above will be answered differently by different parties depending obviously on individual circumstances and considerations. Most practitioners with experience in real estate investment programs with whom the authors have dealt share the view that an invariable truth about these programs is that they are usually highly negotiated and, while often sharing many similar themes, outcomes and drivers, are typically bespoke and distinct.
EFFICIENCY

Despite the effort, initial costs and complexity involved in undertaking a programmatic joint venture relationship in real estate, the program structure offers certain key strategic advantages to both parties. Among the principal advantages of the program structure are efficiency, rapidity of execution and relative certainty of capital. Negotiating the terms of a joint venture agreement between a Sponsor and an Equity Investor, together with such ancillary agreements as property management, development and perhaps leasing and construction, is often an arduous undertaking that can take at best weeks and sometimes months to complete. Once the program documentation is finally negotiated, further negotiation of the documentation on individual transactions and follow-on transactions is typically minimal.

Efficiency brings with it both competitive and cost advantages. Relative to competition, oftentimes the best development land sites or for sale real estate assets will go to the parties who have the ability to act quickly (i.e., do not have to find an Equity Investor and negotiate terms) and appear to the sellers, and, perhaps more importantly, their brokers, to have the financial wherewithal to close and an established relationship where disagreement over terms does not pose an execution risk. The cost advantages are self-evident, particularly in terms of legal spend. Once “form” documents are agreed, such documents can be “cloned” at comparatively minimal cost without the time intensive and painful negotiations that absorb costly legal time typical of initial joint venture formations. Efficiency between the parties and savings of internal resource time and cost is achieved through the process of two parties working together over and over again, learning each other’s systems, people, committee structures and requirements. The goal of a properly functioning program is to become an efficient and “well-oiled deal generating and closing machine.”

DEAL SHARING AND EXCLUSIVITY

Irrespective of whether a holding company structure or framework structure is employed, programmatic joint ventures in real estate will vary in the extent to which the parties are “tied” together economically and in their ability to conduct business outside of the venture. A key appeal of a program relationship for the Equity Investor is access to a Sponsor’s pipeline of new investments. Equity Investors are in the business of making investments in real estate and the ability to have a first call or first look at a quality Sponsor’s investment pipeline is a valuable right. Equity capital for real estate transactions can be difficult to come by. A reliable and repetitive source of equity capital of the type provided in a well-functioning investment program can be of crucial value to a Sponsor. The Equity Investor and Sponsor will typically have disparate objectives in the nature and extent of deal sharing and exclusivity obligations governing the platform. The Equity Investor, at the far end of the spectrum, would stereotypically desire that: 1) the Sponsor be required to submit all real estate transactions of any type for its approval; 2) to be under no obligation to invest in any transaction or any number of