



Coming to terms

Agreement provisions beg managers' scrutiny

by Pamela V. Rothenberg

Property management agreements define the essential business processes to be pursued by managers on behalf of owners. While every paragraph of a management agreement is important, the following provisions are at the heart of risk allocation issues faced by managers.

Standard of care: Management agreements should include a "standard of care" clause defining the benchmark to which the manager must manage the property. Be wary of clauses setting this benchmark with terms like "first class" unless the project is unquestionably "first class."

The indemnification provision is probably the most critical clause in a management agreement.

Avoid clauses requiring "best efforts" when referring to offered property management services. Instead, require "commercially reasonable efforts," which is more likely to obligate the manager to employ prudent, sound and efficient business practices.

Obtain necessary authority: Agreements should grant managers authority to perform property man-

agement services. They should specifically include provisions permitting managers to terminate any tenancy when sufficient cause exists.

Secure the right to consult with legal counsel to bring forth eviction action: Related fees associated with such actions should be borne by the owner and paid from the property account.

Personnel: Agreements should identify who will hire personnel providing services under the agreement and who will bear associated personnel costs, including salaries, fidelity bonds, payroll taxes, worker's compensation costs, etc. If borne by owners, obtain the express right to pay these expenses from the property account.

Budget approvals: Managers need the right to continue operating properties under the preceding fiscal year's budget, with certain permitted increases in certain expense categories until owners approve the budget.

Obligatory limitations: Clarify in agreements that all financial obligations are incurred on behalf of owners, and managers are not personally liable for those financial obligations. Agreements should also clarify managers are not required to take any action requiring the expenditure of funds unless owners have made adequate funds available.

Indemnification: The indemnification provision is probably the most

critical clause in a management agreement. Managers' indemnity of owners should be limited to only those losses suffered by owners, directly resulting from intentional misconduct or gross negligence by managers.

Conversely, owners should indemnify managers in the same manner. Owners should be obligated to reimburse managers upon demand for expenses managers pay in defense of any claim, action or proceeding instituted by third parties relating to the property. Finally, owners—at their expense—should be required to defend any claims brought against managers relating to the property.

Insurance: Agreements should define responsibilities for obtaining and maintaining insurance for the property. The required insurance should be similar to comparable projects in a property's geographic vicinity. Include a list of minimum insurance coverages maintained for the property.

Liability insurance policies should recognize owners' insurance policies as the primary insurance, with the management companies' insurance as excess, over the owner's insurance. □

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