

REAL ESTATE CAPITAL MARKETS

YEAR IN REVIEW



2021

HUNTON
ANDREWS KURTH

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DEAR CLIENTS AND FRIENDS,

We are pleased to present our *Hunton Andrews Kurth 2021 Real Estate Capital Markets Year in Review*. Our team had a very active and successful 2021, thanks to our clients and friends who provide us opportunities to work on a variety of interesting, cutting-edge transactions. We are very grateful for the opportunity to partner with many of you in your business, particularly during the ongoing challenges faced and personal sacrifices made as a result of the COVID-19 pandemic. With sincere appreciation, we are pleased to share some highlights of our activity during 2021, as well as some thought leadership and information about our team.

We have been among the most active firms in the REIT industry for decades, since the advent of the modern REIT era in the early 1990s. During 2021, we completed more than 50 public capital markets transactions (and numerous private deals) valued at nearly \$10 billion in aggregate for REITs and other real estate companies, and also advised clients in strategic M&A transactions totaling more than \$8.5 billion in aggregate.

Our focus and broad activity in the REIT industry keep us at the forefront of industry developments. Five of our attorneys were recognized by *Chambers USA* as leaders for REITs in 2021. In addition to our REIT industry capital markets and M&A activity, we regularly provide advice in other areas of interest to REIT industry clients through a multidisciplinary team of firm attorneys, including nationally-recognized practice areas such as REIT tax, real estate, finance (including structured finance), private equity and cybersecurity, among others.

We look forward to another exciting year and thank you again for your continued confidence in the work we do together.



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Kendal is a partner in the firm's Tax practice, supporting our REIT team across a wide variety of transactions. She represents issuers and underwriters in various aspects of federal income tax structuring of capital markets transactions, initial public offerings, at-the-market offerings, mergers and acquisitions, and joint ventures, and in connection with public and private equity and debt offerings by REITs (including REITs investing in mortgage-backed securities, mortgage loans, hotels, excess mortgage servicing rights, commercial office buildings, industrial, and single-family rentals). Kendal also represents private equity funds and investors in fund formation using REITs and other blockers. She has provided tax advice on a number of significant matters for firm clients including Pebblebrook Hotel Trust's \$500 million offering of convertible notes, Pretium REO's acquisition of Front Yard Residential

for \$2.5 billion, Capstead Mortgage Corporation's merger with Franklin BSP Realty Trust, Inc., NewLake Capital Partners, Inc.'s merger with GreenAcreage Real Estate Corp. and subsequent initial public offering, Summit Hotel Properties, Inc.'s acquisition of a 27-hotel portfolio from NewcrestImage, several private REIT sales by various clients, and the formation of the world's first postal REIT.

Kendal is a frequent speaker on REIT issues, and has presented at events hosted by the Practising Law Institute for the past three years. She has been consistently recognized as a leader in REITs: Tax by *Chambers USA*, and in 2019 was named as a "Client Service All-Star" by BTI. *Chambers USA* quotes clients who say that "Kendal is extremely well versed in the tax laws surrounding mortgages and REITs" and that "she can be counted on to provide top level advice on sophisticated issues."

“ We work through a multidisciplinary team that prides itself on our long-term relationships with REIT industry clients. We have represented numerous clients for decades, in many cases from their IPO through their eventual sale or merger. We aim to work with our clients to understand their business objectives and design solutions to achieve those objectives within the REIT tax laws. ”

2021 REIT DEALS BY INDUSTRY SECTOR | ASSET CLASS

During 2021, we acted as issuer's or underwriters' counsel in REIT transactions across multiple sectors and asset classes, as illustrated below. We have a very diverse practice and we are one of a very few law firms that have a robust practice that covers both equity and mortgage REITs.



MORTGAGE
30%



RETAIL/OFFICE
20%



HOTEL
15%



**COMMERCIAL
PROPERTY**
11%



**MULTIFAMILY/
RESIDENTIAL**
10%



INDUSTRIAL
6%



AGRICULTURAL
4%



**DIVERSIFIED/
OTHER**
4%

SELECTED 2021 TRANSACTIONS



ACRES Commercial Realty Corp.

Represented the underwriters in four public offerings of preferred stock and Senior Notes.

\$261 million in aggregate



AG Mortgage Investment Trust, Inc.

Represented AG Mortgage Investment Trust, Inc. in two public offerings of common stock.

\$138 million in aggregate



Agree Realty Corporation

Represented the underwriters in six public offerings of common stock, depository shares and Senior Notes.

\$2.2 billion in aggregate



Alpine Income Property Trust, Inc.

Represented the underwriters in a public offering of common stock.

\$57 million



Annaly Capital Management, Inc.

Represented Annaly Capital Management, Inc. in a public offering of common stock.

\$1.5 billion



Arbor Realty Trust, Inc.

Represented the underwriters in three public offerings of preferred stock.

\$575 million in aggregate



Arlington Asset Investment Corp.

Represented Arlington Asset Investment Corp. in a public offering of Senior Notes.

\$38 million



Braemar Hotels & Resorts

Represented the underwriters in a public offering of common stock.

\$50 million



Capstead Mortgage Corporation

Represented Capstead Mortgage Corporation in its merger with Benefit Street Partners Realty Trust.

\$1 billion



Chatham Lodging Trust

Represented Chatham Lodging Trust in two public offerings of common and preferred stock.

\$220 million in aggregate



City Office REIT, Inc

Represented City Office REIT, Inc. in a public offering of common and preferred stock.

\$300 million



CTO Realty Growth Inc.

Represented the underwriters in two public offerings of common and preferred stock.

\$225 million in aggregate

SELECTED 2021 TRANSACTIONS



Farmland Partners Inc.

Represented the underwriters in two public offerings of common stock.

\$125 million in aggregate



**INDUSTRIAL LOGISTICS
PROPERTIES TRUST**

Industrial Logistics Properties Trust

Represented Industrial Logistics Properties Trust in its acquisition of Monmouth Real Estate Investment Corporation.

\$4 billion



NewLake
CAPITAL PARTNERS

NewLake Capital Partners, Inc.

Represented NewLake Capital Partners, Inc. in its merger with GreenAcreage Real Estate Corp. and in its subsequent IPO.

\$425 million in aggregate

NEXPOINT
REAL ESTATE FINANCE

NexPoint Real Estate Finance, Inc.

Represented the underwriters in five public offerings of common stock, preferred stock and Senior Notes.

\$358 million in aggregate

pebblebrook
HOTEL TRUST

Pebblebrook Hotel Trust

Represented Pebblebrook Hotel Trust in four public offerings of common shares, preferred shares and Convertible Notes.

\$900 million in aggregate



Postal Realty Trust, Inc.

Represented Postal Realty Trust, Inc. in two public offerings of common stock.

\$140 million in aggregate



Pretium Partners, LLC

Represented Pretium Partners, LLC in its take private acquisition of Front Yard Residential Corporation.

\$2.5 billion



Pretium Partners, LLC

Represented Pretium Partners, LLC in connection with the sale of a multi-state single family residential property portfolio by a REIT subsidiary.

Value Confidential



**Rexford
Industrial**

Rexford Industrial Realty, Inc.

Represented the underwriters in three public offerings of common stock and Senior Notes.

\$1.5 billion in aggregate



Summit Hotel Properties, Inc.

Represented Summit Hotel Properties, Inc. in two public offerings of preferred stock and Convertible Notes.

\$388 million in aggregate



Summit Hotel Properties, Inc.

Represented Summit Hotel Properties, Inc., in its acquisition of a 27-hotel portfolio from affiliates of NewcrestImage Holdings.

\$822 million



TPG Real Estate Finance Trust, Inc.

Represented the underwriters in a public offering of preferred stock.

\$201 million



THOUGHT LEADERSHIP: THE CASE OF AN UNAMBIGUOUSLY AMBIGUOUS PROVISION IN PREFERRED STOCK COMMON TO REITS

In January 2022, a 10-year saga rooted in the contested meaning of a voting provision of a series of preferred stock issued by a REIT came to an end. The case provides a cautionary tale of the continuing importance of both clarity of meaning and consistency of disclosure within an offering document. An ambiguous voting provision, disclosed inconsistently, ultimately hindered an attempt to save the issuer from financial distress. Numerous REITs have issued preferred equity with similar, but not identical, terms.

Read further for the short provision the court held to be unambiguously ambiguous, why it should matter to virtually all REITs and what to watch for going forward.

AN UNAMBIGUOUSLY AMBIGUOUS VOTING PROVISION, INCONSISTENTLY DISCLOSED

The court in *Impac*¹ held that a contested voting provision of a series of the REIT's preferred stock, which also appeared in the prospectus offering the preferred stock, was ambiguous. The following is the Voting Provision, and the only disputed section in *Impac* was the text we emphasized here with underlining:

So long as any shares of Series B Preferred Stock remain outstanding, the Corporation shall not, without the affirmative vote or consent of the holders of at least

two-thirds of the shares of the Series B Preferred Stock outstanding at the time, given in person or by proxy, either in writing or at a meeting (voting separately as a class with all series of Parity Preferred that the Corporation may issue upon which like voting rights have been conferred and are exercisable) ... (ii) amend, alter or repeal any provisions of the Charter, so as to materially and adversely affect any preferences, conversion or other rights, voting powers, restrictions, limitations as to dividends or other distributions, qualifications, or terms or conditions of redemption of the Series B Preferred Stock or the holders thereof; ... (emphasis added)

¹ *Impac Mortgage Holdings, Inc. v. Curtis J. Timm, et al.* (Impac Mortg. Holdings, Inc. v. Timm, 474 Md. 495, 255 A.3d 89 (2021)) ("*Impac*")

With only one series of preferred stock outstanding, the vote requirement is clear: holders of at least two-thirds of that preferred stock must approve. But after different preferred stock (whether a new class or a new series) is later issued, the ambiguity arises: Is the threshold still two-thirds of the first-issued preferred stock, as suggested by the underlined phrase, or does their voting power get diluted by being counted along with the later-issued preferred stock, as suggested by the underlined parenthetical clause?

Although elsewhere the prospectus disclosed the entire Voting Provision, a summary set forth in the section of the prospectus captioned “The Offering” (commonly referred to as the “box pages”) omitted the key parenthetical clause underlined above:

In addition, the affirmative vote of holders of at least two-thirds of the outstanding shares of Series B Preferred Stock will be required to ... (b) amend, alter or repeal any of the provisions of our charter so as to materially and adversely affect the Series B Preferred Stock.

Unlike the Voting Provision itself in the articles supplementary and its full description elsewhere in the Prospectus, this summary disclosure of the Voting Provision does not mention whether and how holders of other series of preferred would be involved in any vote. In particular, it omitted to state, “(voting separately as a class with all series of Parity Preferred that the Corporation may issue upon which like voting rights have been conferred and are exercisable).”

HIGH-LEVEL FAQ

Q: I work for a REIT. Why should I care about *Impac*?

You know that securities offerings, which are critical to REITs’ growth, are usually fast-paced in the lead-up to launch and the pressure to draft and finalize offering documents quickly can be intense. The *Impac* case reminds us of the importance for a REIT and its counsel to make the time to read even established market precedent critically and thoughtfully, to eliminate ambiguity and to revise it as necessary to fit the REIT’s particular circumstances.

Q: I work for an underwriter. Why should I care about *Impac*?

It’s not just the issuer who presented evidence, gave testimony and otherwise spent time and money in the

Five team members
recognized by
Chambers USA
as Leaders for REITs

Strategic M&A
transactions totaling
more than
\$8.5 billion
in 2021

Impac case. In addition to the issuer's management and its attorneys, the underwriters' attorneys—perhaps at the underwriters' expense—gave testimony as part of the failed effort to defend the claims. Had the Voting Provision been more clearly drafted, whether by the REIT, the underwriters or their counsel, those expenses might have been prevented. Securities offerings move fast and the legal work must too, but it's good to keep in mind throughout that “If you see something [ambiguous], say something [unambiguously].” (Apologies to the New York Metropolitan Transportation Authority and its licensee, the US Department of Homeland Security.)

Q: Can REITs draft similar voting provisions that are not ambiguous?

A: Yes. There are numerous examples across industry sectors of REITs issuing preferred equity with similar, but unambiguous, voting provisions that have been well received in the market.

SUMMARY OF IMPAC

Issuance and Sale of the Preferred Stock

In 2004, the REIT issued and sold a series of preferred stock in a public underwritten offering pursuant to a prospectus supplement and accompanying base prospectus (the “**Prospectus**”). A few months later in that same year, the REIT issued and sold shares of a second series of its preferred stock having a lower dividend rate.

Attempt to Repurchase the Preferred Stock

In 2009, during the Great Recession, the issuer experienced financial difficulties and sought to relieve its payment obligations under both series of preferred stock by means of a tender offer to

purchase all of the shares at an extreme discount.² The tender offer was linked to a consent solicitation to amend the issuer's charter to permit the tender offer itself, and the amendment would have eliminated most of the rights and preferences of both series.

Owners of at least two-thirds of the shares in the aggregate voted in favor of the tender offer, but owners of at least two-thirds of the first-issued series of preferred stock did not.

After asserting that the tender offer required the approval of at least two-thirds of the two series counted as a single class, the issuer concluded that the tender offer and related consent had been approved. The issuer then amended its charter and consummated the tender offer for all but approximately 33.8% of the first series and all but approximately 32.9% of the second series.

The Litigation (But Only the Pertinent Part)

In December 2011, one of the holders of the first series of preferred stock sued the issuer on his own behalf and (as a class action) on behalf of holders of either series who had not tendered their shares in the 2009 tender offer. The plaintiff alleged, among other things, that the tender offer and related charter amendment, which materially adversely affected the first series, had not been approved because the issuer had not obtained the requisite two-thirds approval from the holders of that series. The plaintiff won the initial lawsuit, then won the appeal, and then won the *Impac* case at the Court of Appeals.

Reasoning of the Court of Appeals

The court determined that the Voting Provision was ambiguous primarily because, in its view, the words

“class” and “series” are not always precise synonyms—even as the court acknowledged that then-recent amendments to the Maryland General Corporation Law included the phrase “class or series” as though the terms are interchangeable—and because, in the words of the court, “neither party's preferred reading of the Voting Provision gives effect to every word without rendering a portion of the language superfluous or meaningless, contrary to a basic rule of contract interpretation... If, as the Plaintiffs contend, the provision was intended to specify separate voting by Series B shareholders alone, the parenthetical phrase would appear to be superfluous. If, as [the issuer] contends, the provision was intended to specify collective voting by Series B and later-issued Parity Preferred shares, such as Series C, the reference in the first clause to an affirmative vote of Series B shares may be meaningless.”

Having determined the Voting Provision to be ambiguous, the court sought relevant admissible extrinsic evidence that illuminated the mutual intent of the parties. The court dismissed the proposition that the underwriters were a party to the articles supplementary for the first series and concluded that the preferred holders were, in effect, “counterparties” as to the Voting Provision. Then, after looking to Delaware precedent to decide that when “the ultimate purchaser of the securities is not a party to the drafting of the instrument which determines her rights, the reasonable expectations of the purchaser of the securities must be given effect,” the court concluded that only one document—the Prospectus—addressed the meaning of the Voting Provision and was publicly available to investors at the time of the issuance and sale of the first series.

² At the time the preferred stock was sold, through 2008, the issuer was a REIT, but effective at the beginning of 2009, the issuer revoked its REIT election.

The court found within the Prospectus the only material extrinsic fact that bears on what a reasonable investor would understand the Voting Provision to mean.³ That material extrinsic fact was a portion of a single sentence in the section captioned “The Offering” (commonly referred to as the “box pages”):

In addition, the affirmative vote of holders of at least two-thirds of the outstanding shares of Series B Preferred Stock will be required to ... (b) amend, alter or repeal any of the provisions of our charter so as to materially and adversely affect the Series B Preferred Stock.

Unlike the Voting Provision itself and the fuller description elsewhere in the Prospectus, this text does not contain any mention of holders of other shares of the REIT’s capital stock participating in any such vote.

In August 2021, the Court returned the case to the Circuit Court of Baltimore City for final proceedings and in October 2021

the case was assigned to a judge of the Circuit Court to oversee final disposition of outstanding issues.

In summary, the Court of Appeals held that (1) the Voting Provision was ambiguous, (2) the only relevant and admissible extrinsic evidence (i.e., the single sentence in the Prospectus) resolved the ambiguity as a matter of law in favor of tallying the first series vote separately, and (3) even if the extrinsic evidence had not resolved the ambiguity, the ambiguity would have been construed against the drafter—i.e., the issuer—resulting in the same outcome.

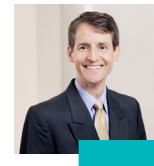
IMPACT OF *IMPAC* ON THE COMPANY

Given the outcome of the case, the charter amendments made in 2009 with respect to the first series of preferred stock had not been validly adopted and so the initial articles supplementary for that series remain in effect. As a result, dividends continue to accumulate, and as of December 31, 2021, cumulative undeclared

dividends on the that series of preferred stock were approximately \$28.72 per share, or approximately 115% of the stock’s per-share liquidation preference.

Further, because the preferred shareholders may elect two additional directors to the issuer’s board of directors whenever dividends on their stock are in arrears for six or more quarters, a special meeting was held for that purpose in October 2021. The meeting lacked a quorum and was adjourned. The special meeting reconvened in November 2021, but also lacked a quorum and was adjourned. In January 2022, the special meeting reconvened, lacked a quorum and was concluded.

The dividends on the preferred stock continue to accrue. ■

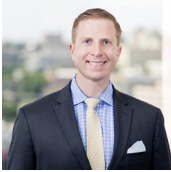


Mark W. Wickersham

³ The court also held that absent the extrinsic evidence it would have construed the ambiguity against the drafter, which, in this case, was the REIT.

50+ public capital markets transactions
worth nearly **\$10 billion** in 2021

CONTACT US



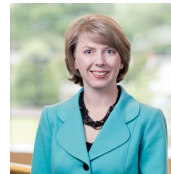
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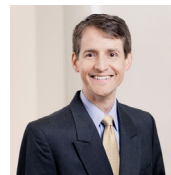
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ABOUT US

Hunton Andrews Kurth LLP consistently ranks as one of the most experienced law firms with respect to real estate capital markets transactions, representing issuers, underwriters, sponsors and lenders in connection with structuring and financing publicly and privately owned real estate companies, including in particular real estate investment trusts (REITs). The firm regularly receives top tier national rankings for its work as both issuer's and underwriter's counsel in *Chambers USA*, *The Legal 500*, *Bloomberg* and *Refinitiv*.

Hunton Andrews Kurth has extensive experience in taking real estate companies public, both as REITs and as C corporations, and in subsequent financing transactions. We have handled approximately 155 IPOs and Rule 144A equity offerings and more than 1,100 capital markets transactions involving more than 210 REITs and other real estate companies. In the course of those and other engagements, we have worked closely with the leading investment banking firms, accounting firms and other professionals active in the real estate finance industry. As a result, our Real Estate Capital Markets Group is particularly well qualified to assist companies accessing the public capital markets as well as private capital sources.



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