

QUICK TAKES ON SPECIAL LEASE SITUATIONS

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Throughout this program, for the most part, presenters have been addressing issues relating to commercial leases generally. The rubric “commercial leases”, however, encompasses a number of different types of lease or occupancy agreements, dealing with types of properties and businesses that vary widely.

Every lease consists of a relationship between a Landlord and a Tenant (and sometimes other parties, such as lenders or franchisors), concerning the possessory strand of the bundle of rights that makes up real property ownership and use. Notwithstanding that every lease deals with essentially the same strand from the bundle of rights, the range of issues that is important within a given lease varies in accordance with the property type and business type. For example, the office building Landlord does not look for percentage rent from the office Tenant, but is much more concerned about interior maintenance issues than the retail Landlord, whose Tenants typically want Landlord to stay out of their interior and focus on the common areas.

To address some of the different emphases in different types of leases, we have gathered presenters who have experience in various types of leases and who will share with us some of the more specialized concerns and issues faced by both Landlords and Tenants negotiating these leases. The below represents a sampling of these issues and a starting point for the discussion of special lease situations, but we welcome audience questions throughout the presentation – if an issue that you have wondered about and mulled over is not addressed, feel free to present it and receive input and thoughts on the policies, customary provisions, and special situations that are of concern.

I. RENT ISSUES – CALCULATION AND MEASUREMENT

A. Per square foot – the gold standard of rent determination, but a per square foot rate requires a measurement of the premises being leased, and there are a number of different measurement standards.

- 1. Measurement of space – BOMA standard, “drip line” measurement, retail measurement standards**
- 2. Stipulated area with a per square foot rent calculation**

B. Gross or “full service” rents are somewhat typical in the office context and are gaining acceptance in some retail contexts, but what is meant by these terms can vary – sometimes specific costs are carved out and must be carefully set out in the lease. Landlords or Tenants must be clear on what is or is not covered in the gross rent, including maintenance.

C. Triple net rents are standard in the retail context for both restaurants and merchandisers. Common Area Maintenance, Insurance, and Real Estate Tax charges are standard with per square foot rent calculations, but what is or should be excluded from these charges in different types of leases?

D. Percentage rents are found almost exclusively in the retail context.

II. USE ISSUES – RESTRICTIONS AND PROHIBITIONS

A. When is it appropriate to restrict use and how is this done in various contexts?

- 1. Exclusive use provisions in office or industrial context – rarely seen, but there may be reasons to include them. Exclusive use provisions in office leases are not uncommon in the medical office building.**
- 2. Operating covenants – when are they appropriate in the office context?**
- 3. When a “retail” use, such as a restaurant, goes into an office building, or when an “office” use such as a stock brokerage**

goes into a shopping center, the use restrictions may need to be reviewed and adjusted.

B. Special concerns about restaurant use issues – trash, smells, cleanup, and patio use – restaurant and food service uses may require special provisions that address these issues.

C. Convenience stores may present special use issues due to gasoline sales (compliance with regulations, special environmental issues) and security concerns.

III. PARKING – THE UNIVERSAL ISSUE.

A. Every lease must deal with parking rights, but different types of leases have different requirements – office tenants may want executive or reserved parking; medical offices may want patient pick up areas. The parties to office leases must be aware of occupancy density regulations that may affect the amount of parking that is appropriate or required. Retailers are concerned with the parking ratio (spaces per thousand square feet of retail area in the project) and protecting parking spaces closest to their stores.

B. Food service and convenience store users must have parking areas that are appropriate to how long customers are in the premises – and what about valet, pickup spaces, and drive-throughs, which are commonly requested by food service users? These may present special concerns.

IV. MAINTENANCE ISSUES

A. There are substantial differences in what Tenants expect of Landlords and what Landlords expect of Tenants under different types of leases, for example, office users often want janitorial and day to day interior maintenance – what standards are available for these users? Industrial or warehouse users would be well advised to document the condition of a building prior to occupancy lest they be held liable for a prior tenant's mishaps with forklifts and structural elements and doors!

B. Freestanding single user buildings in the restaurant, office, and industrial contexts may address exterior maintenance (i.e.

responsibility for exterior hardscape, parking areas, landscaping, and the like) in substantially different ways.

V. TRANSFER ISSUES

A. Landlord's right and desire to approve transfers of lease interests may vary depending upon the financial strength of the Tenant, but also depending on the Tenant's use and the image of the project – a shopping center Landlord may be primarily concerned about tenant mix that maximizes the customer appeal of the center, whereas an office Landlord may be more concerned with financial strength of a replacement Tenant (but for Tenants adjacent to the lobby, the office Landlord's concerns may veer closer to the shopping center Landlord's).

B. Tenant concerns with transfer issues may depend on the strength of a Tenant's desire to maintain flexibility in "exit strategy" – this is an overarching concern for all Tenants, but the approach may differ depending on the type of Tenant and the location of the premises.

VI. QUESTIONS AND ISSUES FROM THE AUDIENCE