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[What Are Some Basics of Shopping Center Leases?](#)

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Despite the fact most shopping centers use a standardized uniform lease for most tenants, numerous aspects of such uniform leases should be analyzed and negotiated, to the extent possible, depending upon the financial strength of the parties and prevailing financial conditions. Parties could negotiate as to whether the rent is fixed or it is based on a percentage of gross sales or both, as to whether tenant pays for common areas maintenance costs and how much the tenant is to pay, as to whether tenant is to pay for alterations or improvements and how much, as to whether tenant can sublet or assign part or all of leasehold interests in the premises. Let us, in some detail, analyze SOME of such shopping center lease provisions.

A. SALIENT NOTE

As indicated, most shopping center leases are rather standardized. Such standardized uniformity facilitates renting to prospective tenants without changing the lease for each tenant and enables tenants, to some extent, to accept some terms if they know such terms and provisions are binding upon other tenants, as well.

Consequently, usually, large anchor tenants are successful in negotiating the entire commercial lease. Nonetheless, depending upon prevailing financial conditions, even "small" tenants are often successful in eliciting favorable concessions from shopping center.

B. TERM OF LEASE

Often, shopping center leases are for a fixed term of years. The question rather arises as to when the lease commences, is it when the tenant and landlord sign the lease? Is it when the tenant is obligated to open for business? Is it when the business actually opens for business?



Accordingly, it is incumbent upon the parties to preclude problems by memorializing the commencement AND termination dates of the lease. It is noteworthy; if the shopping center is new the landlord longs to have all rented spaces open for the Grand Opening. On the other hand, the tenant might have signed the lease relatively close to the Grand Opening and logistically might not be able to finish required improvements and alterations in time.

C. FIXED RENT/PERCENTAGE RENT OR COMBINATION OF BOTH

The rent could be fixed annually and payable in equal monthly installments on the first day of each month.

The rent could also be based on the percentage of the gross sales of the business after the sales exceed a base dollar amount. If the rent is paid based on percentage, then the following should be carefully analyzed and considered, among other things:

1. SALIENCE OF UNEQUIVOCAL DEFINITION OF SUBSTANTIAL TERMS: It is imperative for lease to CLEARLY and UNEQUIVOCALLY define "Gross Sales" or any other term employed as a yardstick to ascertain rent percentage. Any ambiguity in such material terms is a breeding ground for litigation.

2. SALIENCE OF TENANT MAINTAINING ACCURATE BOOKS ON PREMISES: In addition, it is imperative for the lease to require tenant to keep accurate books and accounting on the premises to ascertain the necessary numbers required for percentage rent AND to provide landlord with periodic accounting statements.

3. SALIENCE OF LANDLORD'S RIGHT TO CONDUCT AN AUDIT: Furthermore, it is imperative for the lease to provide landlord reasonable access to tenant's books and for the landlord to conduct an audit of the tenant's "Gross Sales".

4. SALIENCE OF LANDLORD'S REMEDIES FOR DISCREPANCIES: Undoubtedly, the lease should provide for remedies in the event the landlord ascertains after an audit the tenant has not been forthright in their transactions and there are deficiencies and discrepancies between what tenant purported to have generated and what the tenant really generated in "Gross Sales". In addition, it is helpful the lease contains a provision which provides landlord the right to terminate the lease if the discrepancy is "substantial" or repeated more than once.

D. SHARE OF COMMON AREA MAINTENANCE COSTS

It is common for shopping center leases to require tenant to contribute to the landlord's cost of maintaining common areas. Often, tenant is required to contribute based on tenant's lease of floor area vis-a-vis the total leasable floor area available.



It is imperative for tenant to negotiate and exclude from such calculation the area leased by major tenants such as department stores, before the tenant's leasable area is calculated for purposes of contributing to common area maintenance costs. The reasoning for such negotiation is a major

tenant, as indicated, usually negotiates its own lease and often elicits favorable concessions from landlord. For instance, to induce a major tenant to lease, a landlord might substantially reduce the major tenant's share of contribution to common area maintenance costs.

E. TENANT'S OBLIGATION TO CONTINUOUSLY OPERATE BUSINESS:

"OPERATING COVENANT"

If the lease is silent on whether the tenant has an obligation to continuously operate the business, generally, there is no implied covenant to the contrary. Absent such operating covenant, landlord will have difficulty obligating the tenant to operate the business continuously. There is an exception under this general rule if rent under commercial lease is a SPECIFIED BUT UNSUBSTANTIAL MINIMUM PLUS a percentage.

F. ALTERATIONS AND IMPROVEMENTS

If the commercial lease is silent on permitting or requiring alterations or leases, tenant may not make MATERIAL alterations or improvements without landlord's consent. In such instance, even when landlord consents, such alteration or improvement becomes property of landlord. On the other hand, landlord may desire to have a provision to require the tenant to remove such improvements or alterations upon termination of the lease AND repair damage caused as a result of such removal.

G. ASSIGNMENT AND SUBLETTING

Absent a provision to the contrary, tenant has unrestricted right of transfer. Nonetheless, most commercial leases contain provisions which require tenant to obtain landlord's consent before assigning the tenant's interest or subletting the premises. Such leases might also restrict landlord from unreasonably withholding such consent.

Alternatively, landlord may insert a provision to require tenant to pay any profit from assignment or sublease. "Profits" in such context means any amount the tenant receives from sublease or assignment over the rent tenant is paying to the landlord.

SALIENT CAVEAT

This article NEITHER supplants NOR supplements the breadth or depth of such esoteric topic. In fact, this article ONLY provides a rather rudimentary synopsis of such expansive esoteric subject matter.



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