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Seminar 1

Restaurant, Entertainment and Alternative Retail Leasing: Do You Want to Build A Snowman … While Sampling 21 Varieties of Beer?

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I. INTRODUCTION

When negotiating any lease, there will be provisions that concern all tenants going into any type of project anywhere in the country, such as reasonable exit strategies (i.e., assignment and subletting rights) and appropriate risk allocation (i.e., insurance and indemnity). However, there are unique challenges in leasing or developing part or all of a project to entertainment, restaurant and other non-traditional tenants in retail locations. While the universal issues remain in the lease negotiation, today we will focus, both from a landlord and from a tenant perspective, on the specific concerns and associated lease provisions that particularly apply when leasing to these non-traditional retail users and how to best handle issues that may arise from these users.

II. PRELIMINARY CONSIDERATIONS

A. Title, Use and Other Center Restrictions.

1. Type of Project

   As with any proposed use, the first consideration should be to understand the project in which the user is going.

   a) If it is a traditional mall, expect many restrictions including those on title and within other leases. If it is street location or even a new retail development, expect less restrictions. As such, the first question to ask when starting any deal – but particularly a deal in an existing shopping center – is whether the use that you are trying to operate is prohibited by any existing title document or existing lease.

   b) Additionally, depending on the type of project, how parking and other operational matters are handled will be affected by location and types of particular users.

2. Use Restrictions

   As with any use, whether you are purchasing, ground leasing or space leasing, but particularly, at a site for a non-traditional retail use, you will want time to review title. In the case of a purchase agreement or ground lease, the tenant or purchaser typically has a 45 – 60 day due diligence period within which to obtain and review title and confirm whether its intended use and development of the property is permitted. In the event of a space lease, some retailers elect to review title but not

purchase a policy while others rely upon information provided by the landlord, particularly representations and warranties set forth in the lease as to the specific non-traditional use being permitted.

Example Language:

"Tenant shall have a period of sixty (60) days after the Effective Date (the "Inspection Period") to determine that the Premises is suitable for Tenant's intended use, including without limitation, obtaining real estate committee approval, completing title and survey evaluations and any other inspection items required by Tenant. In the event that Tenant determines at any time during the Inspection Period that the Premises is not suitable for Tenant's intended use, then Tenant shall have the right to terminate this Lease by delivery of written notice to Landlord on or before the last day of the Inspection Period, whereupon this Lease shall automatically terminate and the parties hereto shall have no further rights or obligations hereunder, except as expressly set forth herein to survive termination."

When reviewing title in connection with the lease or development of property for a non-traditional retail use, there are numerous restrictions of which to be aware:

a) Use Restrictions: Bowling, arcade games, billiards and the like are all very typical prohibited uses lists for the last twenty years. Today, these uses are some of the most sought after uses for retail developments. With many bog box stores like Sears and JC Penney closing, many developers are back-filling those locations with large entertainment users that often provide exactly the foregoing entertainment so typically prohibited. Unfortunately, as mentioned, many enclosed malls are burdened by extensive use prohibitions in title and under REAs.

   For example:

   Consider this provision:

   "The Shopping Center shall be used for retail, office, residential, service, restaurant, and other uses typically found in first class shopping centers similar to the Shopping Center, such as XYZ Shopping Center."

   Is a Main Event or Dave & Buster's or similar entertainment user permitted? They aren't retail. They have a restaurant, but their uses include many other uses in addition to a restaurant. Consider that XYZ, the referenced example shopping center, includes a Lucky Strike. Is that enough to give comfort that the intention was to permit entertainment uses? Or, is XYZ a reference only for the specific class of uses that are listed and the fact that a bowling alley is located in the shopping center immaterial? In this instance, the entertainment user chose to seek a consent from the parties to the REA (and in typical fashion, those parties used this as leverage over a site plan approval issue, but that is a story for the presentation titled "is it better to ask for permission or forgiveness"!).

   Consider the following provisions:

   "The following uses are prohibited … tavern or bar." Can you operate a restaurant with a bar?

   How about this one:

   "The following uses are prohibited … tavern or bar, except as incidental to the operation of a restaurant." This is better if you are a casual dining restaurant with lower alcohol sales, but what if you are a Bar Louie or Yard House where in some locations your alcohol sales comprise more than 50% of your gross sales? What if you are Main Event or a Lucky Strike? Is the bar incidental to the operation of a restaurant or is the bar incidental to the operation of a bowling alley?

b) Alcohol Restrictions: While a certain level of alcohol sales are typically also found in the prohibited uses list of a Declaration, REA or tenant lease, if you are a restaurant or entertainment user that sells alcohol, you need to confirm whether there are any prohibitions on the amount of alcohol sales. If there is a gross sales threshold, you need to confirm with your client what their average gross sales are from the sale of alcohol. It is important to note that even within a

concept, gross sales from alcohol can vary considerably by location (i.e., a restaurant concept operated in or near a baseball stadium is going to have higher gross sales from alcohol than that same restaurant concept operated in a mall) or region of the country.

c) Radius Restrictions: Many anchor leases will prohibit the operation of a certain users (e.g., restaurants) within so many feet of the anchor's space. When you come upon these type of restrictions, you need to confirm how far away your proposed premises is from such tenant. You also need to pay close attention to how the distance is defined (front door or premises).

d) Architectural Restrictions/Approvals: While this is an issue for any retailer, it is important to determine up front whether any approvals are needed for your proposed development. Many restaurants are developed on outparcels, and in most centers, outparcels are subject to certain height restrictions, whether those are derived from an existing REA or tenant lease. You should be aware of the height of your client's building, including and excluding architectural features, so you can confirm whether there are any issues.

In some instances, you will need additional information in order to confirm whether you violate the restriction:

"The height of the building on Outparcel B shall not exceed 28' measured from the finished floor elevation of the Premises." In this instance, the "Premises" was the Dick's premises located behind the outparcel that the restaurant user was developing. As such, we needed to confirm not only the height of the intended building but also the finished floor elevation of the Dick's premises.

To further complicate matters, during the deal, you need to be aware of whether there are any changes with respect to your proposed building. In the foregoing deal with the restriction from Dick's, the proposed restaurant was well within the limits imposed by the Dick's lease at the time of execution of the lease. During the course of due diligence and permitting, however, the prototype for the building changed and the height of the architectural features was raised significantly which caused it to be in violation of the restriction. In this instance, the client elected to modify the plans to reduce the height of the architectural features rather than seek approval from Dick's of the increased height.

e) Drive Thru Restrictions: If you are representing a fast casual or fast food user with a drive thru, it is important to note whether there are any prohibitions or restrictions on having a drive thru. Many tenant leases and REA's prohibit a drive thru entirely. If a drive thru is not prohibited, there may be a stacking requirement that requires the drive thru to allow stacking for "x" amount of cars to ensure that the cars in the drive thru do not interfere with access in the center.

3. Co-Tenancy. When entering a project, a developer should understand any potential co-tenancy risks.

a) To the extent existing tenants have co-tenancy clauses, they should be analyzed to understand whether non-traditional retail users can be deemed a part of threshold co-tenancies.

Example:

"The "Required Co-Tenancy Level" means occupants of at least seventy percent (70%) of the leasable area of the Shopping Center are open."

Versus:

"The "Required Co-Tenancy Level" means [retail] occupants of at least seventy percent (70%) of the leasable area of [the retail portions of the] Shopping Center are open."

The former includes all occupants while the latter would, with addition of either bracketed language, likely exclude restaurants and non-traditional tenants.

For clarity consider adding:

"In the event any non-retail tenant is actually open, such tenant shall be deemed included in the seventy percent (70%) threshold in determining whether the Required Co-Tenancy Level has been satisfied."

b) For the entering non-traditional user, if a co-tenancy clause is requested, the usual caveats should be considered (allowing replacement for named co-tenants, flexibility on an overall percentage threshold to include as many users as possible, etc.).

B. Governmental Approvals.

You have completed your title review and confirmed that you can operate for your intended entertainment or restaurant use without affecting the composition of the project. Now that you know that your use is not prohibited by private third party agreements, you need to get approval from the jurisdiction to construct and operate.

1. Permits and Construction. During due diligence, your client has likely had a site investigation report or SIR performed. The SIR will detail numerous items, but among them, the SIR will set forth zoning issues, permitting timeframes and any special permits needed for your intended use, answering the key question of "Can it be built and operate"?

   a) Liquor Licenses. Restaurants and certain other entertainment users that sell alcohol are required to obtain a liquor license. Depending on the jurisdiction, liquor license may be issued directly from the governmental authority (referred to as "direct issue") or purchased from an existing holder. Availability may be a concern in either circumstance, as often the total number of licenses is limited.

      i. Types – scope of service (beer, wine and/or liquor).

      ii. Hearings – often substantial local involvement is a part of the process and attendance of several hearing may be required.

      iii. Posting Requirements – a notice may be required to be posted at the premises for a period of time prior to a hearing or approval. Having a correct address and place to post should be considered. To the extent that the address of the premises is known at the time of lease execution, it is helpful to licensing to include the address in the lease so that it is available for the liquor application. It is a good idea to include a provision that allows the tenant or purchaser to post any required notices at the site during the permit period. However a note of caution, if the address of the Premises changes from that included on the liquor license application and/or notice, the state alcohol agency may require an amendment to the application (or worse yet, re-filing) and a re-posting.

      iv. Required information – many jurisdictions require information from the fee owner in order to apply for the license. As such, tenants should include language that requires the landlord to cooperate and provide any necessary information. Landlord's may want to try and limit the information that they are required to provide; however, ultimately, if the Landlord wants the tenant to obtain its liquor license, then landlord and tenant need to cooperate to provide the necessary information to satisfy the local authorities.

      The following is sample language to include if you are a tenant to ensure the landlord provides the required information:

      > "Landlord agrees to cooperate in a reasonable and timely manner with Tenant in connection with the obtaining and/or renewal of all permits and licenses which Tenant may need in order to open and operate its intended business at the Premises throughout the Term; provided, however, there shall be no unreimbursed out-of-pocket cost related thereto to Landlord. Such cooperation may, but only if required under any state and/or local Laws applicable to the issuance and/or renewal of such permits and licenses, include the disclosure of information on Landlord ***and its business principals***. Tenant agrees to hold any such information confidential and to use the same only for the purposes of obtaining or renewing the license or permit for which such information is required. All costs associated with obtaining or renewing any such permit or license shall be borne by Tenant."

The underlined language is often objectionable to landlords as the principals may not want to provide such information, but there are certain states where it is required, and you need to check with the people who are handling the licensing to confirm if you can remove that requirement.

v. Gross Sales/Percentage Rent – If you are doing a deal where the tenant is obligated to pay percentage rent, you need to confirm with licensing whether the state where you are located prohibits the inclusion of alcohol sales in gross sales for purposes of percentage rent. A few states view this as the landlord profiting from the sale of alcohol and it triggers certain licensing requirements. As a tenant, you may want to try and exclude the gross sales from alcohol in the definition of gross sales. Of course, from a landlord perspective, this is objectionable and typically the landlord will not agree to this approach. If you find yourself in a jurisdiction that does prohibit including alcohol sales in the definition of gross sales for payment of percentage rent, then you can track alcohol sales separately and then lower the breakpoint by the amount of gross sales derived from the sale of alcohol prior to determining the amount of percentage rent due.

In some jurisdictions, the sale of alcohol and/or operation of games may trigger the need for a conditional use permit (CUP) or special use permit (SUP).

b) Other Operating Licenses, In addition to a liquor license, each type of entertainment use may have several specific licenses and approvals which must be obtained and maintained to be legally allowed to operate, including licenses for games, assembly, valet parking, etc.

c) Construction Issues.

i. As with any new user, permits to construct the premises will usually be required. Depending on the branding, it is important to assess the jurisdiction's or center's restrictions, whether it be landmark issues, REA limitations or otherwise.

ii. Responsibility and cost allocation should be considered as well. For example, movie theatre tenants generally prefer that Landlord build warm shell (per that tenant's specifically prepared plans), with the tenant installing FF&E, while restaurants, particularly larger sit-down dining restaurants, often enter into ground leases where the tenant performs the construction per its own plans. In either case, both parties will have strong preferences over who the contractor will be; the landlord for aesthetic purposes of the project and the tenant for branding purposes.

iii. Regardless, timing considerations will be key – from landlord finishing their work per an agreed schedule to tenants opening per an agreed schedule, with associated penalties for failures in either case.

2. Permit and Other Contingencies. In order to obtain the foregoing approvals, following the due diligence period, most leases or purchase agreements provide for a permit period within which the purchaser or tenant will attempt to obtain all permits needed for its proposed construction and use, failing parties can walk away, answering the question "What if it cannot be built and operate"?. It is important for entertainment and restaurant uses that the permit period language is broad enough to include permits required to permit tenant's or purchaser's use and not just building permits. Sample language is as follows:

> "For a period of ninety (90) days after the expiration of the Inspection Period (the "Permit Period"), Tenant shall prepare the plans and specifications described in Section "---" and promptly apply for, and thereafter use diligent, good faith efforts to pursue and attempt to obtain, all of the permits, licenses and/or governmental approvals necessary to construct Tenant's Improvements and to operate for Tenant's intended use, including without limitation, a liquor license and permits required for games. If, despite Tenant's prompt application for and subsequent use of diligent, good faith efforts to pursue and attempt to obtain, all such permits, licenses and/or governmental approvals have not been obtained by Tenant prior to the end of the Permit Period, Tenant shall have the right to terminate this Lease by delivery of written notice to Landlord on or before the last day of the Permit Period, whereupon this Lease shall automatically terminate and the parties hereto shall

have no further rights or obligations hereunder, except as expressly set forth herein to survive termination."

Liquor licenses typically are not actually issued until a certificate of occupancy is issued. Accordingly, if you are representing a landlord, you may want to insert the following language:

> "Tenant shall apply for and use commercially reasonable good faith efforts to obtain all of the Permits ***(except for Tenant's liquor by the drink permits, with respect to which Tenant shall receive assurances that such permits will be forthcoming to the extent permitted by law)***."

Additionally, the following language even further restricts tenant's ability to utilize the lack of a liquor license as a reason to terminate the lease:

> "Notwithstanding the foregoing, Tenant shall not be permitted to terminate this Lease during the Permitting Period for failure to satisfy the foregoing condition related to liquor by the drink permits unless there is a moratorium on issuing new liquor licenses in _____ County and/or there are no liquor licenses available for purchase or assignment at a commercially reasonable price."

Landlords may also want the right to attempt to obtain permits on the tenant's behalf if tenant terminates the lease during the permit period for failure to obtain permits.

> "If Tenant fails to obtain the Governmental Approvals within the Permit Period, Landlord may attempt to obtain the Governmental Approvals in accordance with the following provisions. Promptly after Landlord has received notice from Tenant of its failure to obtain the Governmental Approvals ("Failure Notice"), Landlord may, upon giving notice to Tenant ("Takeover Notice"), which notice must be given within twenty (20) business days after Landlord's receipt of the Failure Notice, at its own cost and expense, but subject to reimbursement as hereinafter provided, apply for and thereafter diligently pursue the obtaining of the Governmental Approvals on behalf of Tenant. Any date set for termination of the Lease by Tenant shall be null and void and of no further force and effect. Landlord shall notify Tenant immediately if the Governmental Approvals have been received or denied and in any event Landlord shall by no later than the ninetieth (90^{th}) day after Tenant's receipt of the Takeover Notice, notify Tenant if the Governmental Approvals have been received or denied or that Landlord has not been notified either way. In the event Landlord notifies Tenant that the Governmental Approvals have been received, then Tenant's right to terminate this Lease pursuant to this Section shall be null and void. If Landlord notifies Tenant that the Governmental Approvals have been denied or that Landlord has not been notified of the receipt or denial thereof, then either Landlord or Tenant, at their respective options, by notice to the other given within thirty (30) days next following receipt of such notice from Landlord, may terminate this Lease effective of the giving of such notice with the same force and effect as though such date was the Expiration Date originally set forth herein. If Tenant does not timely give such termination notice to Landlord, Tenant shall be deemed to have waived the condition regarding the receiving of the Governmental Approvals. Tenant shall, at its own cost and expense, cooperate with Landlord in the making of all applications for the Governmental Approvals."

As a practical matter, while landlord's make this request, it really is impossible for a landlord to obtain a liquor license for the tenant. As such, if the tenant is going to agree to allow the landlord to attempt to obtain permits on its behalf, the tenant may want to exclude any alcohol beverage permits from this right. With respect to landlord's right to obtain building permits on tenant's behalf, any such right shall limit landlord's ability to obtain such permits based upon tenant's most recently submitted plans (or only with changes approved by tenant) and subject only to terms and conditions approved by tenant.

3. <u>During the Term</u>. A tenant's ability to operate during the term for the use anticipated is a key consideration for both landlord and tenants. Accordingly, both parties will be interested in making sure to do so. For example, if a particular permits or approvals must remain in full force and effect for the duration of the term, landlords (and tenants) may attempt to provide that the loss of or suspension of a liquor license is a default but that a tenant can work to diligently cure same:

"If at any time after Tenant obtains the Liquor License, the Liquor License is suspended, denied or revoked for any reason, including non-compliance with any governmental conditions, requirements, rules, regulations, ordinances or laws, the same shall constitute a material default in Tenant's obligations hereunder, and Tenant shall promptly (i) deliver to Landlord written notice of such suspension, denial or revocation, and (ii) commence the applicable appeal proceedings and proceed with all due diligence to reinstate the Liquor License. As long as Tenant has so commenced the applicable appeal proceedings, if any, and is proceeding therewith as aforesaid, such suspension, denial or revocation shall not ripen into an Event of Default, and Landlord shall not have the right to terminate this Lease on account thereof, unless and until the suspension, denial or revocation has continued without the Liquor License being reinstated for ninety (90) days or more; but, in the event of such suspension, denial or revocation, if Tenant fails to deliver promptly to Landlord notice thereof, or if Tenant fails promptly to commence the applicable appeal proceedings and to continue thereafter to proceed as aforesaid, then the same shall so ripen into an Event of Default at Landlord's election and upon notice thereof given to Tenant at any time while such suspension, denial or revocation continues. At the time that Tenant makes any filing with or receives a notice or any other communication regarding a hearing or in connection with any purported such non-compliance from any governmental licensing board, agency, commission or like authority with respect to the Liquor License, Tenant promptly shall deliver a copy of such filing, notice or other communication to Landlord."

C. Taxes and Utilities

1. Impact Fees: When you are doing a restaurant or entertainment use, you need to be cognizant of impact fees, particularly those associated with sewer and water. Often these items are covered in the letter of intent and it is a business call with respect to who pays. From the tenant perspective, if you are going to pay for the impact fees, then you should include the underlined language below to the extent there may be credits available:

   "Tenant shall pay any and all traffic impact fees or other charges or fees based, wholly or in part, upon the proposed construction of Tenant's Improvements and/or the Initial Use ***(and, in connection therewith, Tenant shall be entitled to receive the benefit of any and all available credits related to the prior development, use and/or occupancy of the Premises)***.

2. Utilities: Particularly if a non-traditional retail tenant is entering a traditional retail environment, the way utilities are billed and provided can prove tricky. A restaurant uses vastly more water than a dry goods retailer and likely uses gas services as well. To the extent utilities can be separately metered to these kinds of users, they should as it will be to the benefit of both the landlord and the tenant.

III. Parking

A. How much is needed?

It is important to understand how much parking and when such parking will be used by an entertainment and restaurant use. Entertainment users will often have very high occupancy limits, which are not always reflected in local code parking requirements. Often the peaking in parking uses will not mirror traditional retail, but many entertainment uses may have similar needs, such as a bowling and a movie theater. From the tenant's perspective, there are several ways to try and provide the maximum parking for the center. The landlord's goal is to provide maximum flexibility for its current development and future changes.

1. Tenants may attempt to impose parking ratio requirements in excess of what code requires. Most restaurant and entertainment users require far more parking to approve a deal than what the municipality requires. For instance, while code may require a 6,000 square foot restaurant to operate with 80 parking spaces, the tenant would likely require 120 parking spaces to do that deal. As such, tenants attempt to impose those higher parking ratio requirements on the shopping center.

   The Center shall at all times maintain sufficient, usable parking spaces to comply with the greater of (a) the amount required by applicable governmental code and (b) the following minimum requirements:

(i) for a non-restaurant retail use, a minimum of four (4) parking spaces for each one thousand (1,000) square feet of floor area;

(ii) for fast-food restaurants (such as, but not limited to, McDonald's, Burger King, Wendy's and Chick-Fil-A), a minimum of ten (10) parking spaces for each one thousand (1,000) square feet of floor area;

(iii) for full-service restaurants, a minimum of eighteen (18) parking spaces for each one thousand (1,000) square feet of floor area ("full service restaurants" are characterized by offering service to patrons, seated at a table, through servers/waiters);

(iv) for all establishments selling food and/or beverages that do not clearly fit within the categories described in subsections (ii) or (iii) above, including, but not limited to, fast-casual restaurants (such as, but not limited to, Panera Bread, Pei Wei and Chipotle Mexican Grill) and coffee houses (such as, but not limited to, Starbucks and Seattle's Best Coffee), a minimum of fifteen (15) parking spaces for each one thousand (1,000) square feet of floor area;

(v) for offices, a minimum of five (5) parking spaces for each one thousand (1,000) square feet of floor area;

(vi) for medical offices, rehabilitation centers, physical therapy centers or other medical uses, a minimum of ten (10) parking spaces for each one thousand (1,000) square feet of floor area;

(vii) for tutoring and educational uses (such as, but not limited to, Sylvan Learning Centers), a minimum of fifteen (15) parking spaces for each one thousand (1,000) square feet of floor area; and

(viii) for grocery and/or convenience stores, a minimum of six (6) parking spaces for each one thousand (1,000) square feet of floor area.

Landlords, of course, should attempt to lower these parking ratios or delete them altogether.

2. If the landlord refuses to impose parking ratio requirements, then tenants can attempt to skin the parking cat another way by imposing a "no build area" or "protected are concept" over a portion of the center to insure that at a portion of the center located in close proximity to the tenant remains parking and will not be eliminated or used for other purposes.

Throughout the Term, the Protected Area shall be restricted as follows:

A. The Protected Area shall at all times be and remain used as free customer and employee parking areas, drive aisles and access ways, as depicted on Exhibit B, for the non-exclusive benefit of the Premises. Except for any improvements that may be depicted on Exhibit B (or any modifications that may subsequently be permitted or consented to by Tenant as provided in Section 13.2B), no temporary or permanent structures shall be permitted within the Protected Area other than light poles, sidewalks, curbing, appurtenant landscaping islands and traffic signs. Unless otherwise expressly provided for in this Lease, no staging of materials or vehicles shall be permitted within the Protected Area from and after the date that Tenant opens to the public for business at the Premises. The Protected Area shall not be used for any promotional, public, quasi-public, philanthropic, carnival, festival or any similar activities. The Protected Area shall not be used to park cars for off-site activities, such as, but not limited to, commuter parking and parking for events located outside of the Center, nor shall any adjacent areas of the Center be used as parking for off-site activities if it would cause an overflow of parking from the Center to occur within the Protected Area.

B. Except as provided in Section 13.2D, the Protected Area shall not be modified (in use or design/layout, including, without limitation, landscaping and lighting system modifications) or closed without Tenant's prior written consent, which consent may be withheld, conditioned or delayed in Tenant's sole and absolute discretion; provided, however, Tenant shall have no such right of

consent with respect to any condemnation-related or other governmentally required modification or closure of any portion of the Protected Area.

C. No portion of the Protected Area shall be designated or reserved for the exclusive use of any person or entity. No portion of the Protected Area shall be used for valet parking or for the parking of any taxis, buses or other chauffeured vehicles. No portion of the Protected Area shall be used as a designated "employee parking area"; the foregoing is not intended to prohibit employees of the businesses located within the Center from parking within the Protected Area, but to assure that all of the parking spaces in such area are potentially available to customers of such businesses.

D. Landlord shall have the right to temporarily close portions of the Protected Area for a reasonable period of time as needed to (i) perform repairs and/or maintenance or (ii) avoid a public dedication. During any such closures, Landlord shall provide an alternative means of access so that there shall at all times be reasonable access between the Premises, the balance of the Center and public roads, and Landlord shall provide alternative, accessible parking within a reasonable proximity of the Premises.

Landlords will want limit the "protected area" concept to a "no build area" which simply requires that no buildings may be constructed in the no build area rather than giving the tenant any right to approve modifications to such area.

3. While the protected area concept is good for making sure that the parking that is presented to the tenant at deal inception remains parking, it doesn't help insure that what is originally leased as 10,000 square feet of restaurant space does not become 30,000 square feet of restaurant space utilizing the same parking field. As such, if the landlord will not allow the previously mentioned parking ratio, the tenant can also attempt to preserve parking by placing limitations on the ability of the landlord to lease space in the center to certain high intensity parking users, such as gyms, restaurants (max square footage), theater, grocery store, etc. The landlord should attempt to maximize flexibility by agreeing to these limitations only within a certain portion of the center (i.e. an area depicted on a site plan or within a certain distance from the subject premises). Additionally, the landlord should try to allow certain types of these uses. For instance, a restaurant user may not permit a 30,000 square foot gym in the center, but it may be okay with no more than one fitness facility up to 4,000 square feet such an Orange Theory, yoga studio or similar user.

4. Another interesting concept that is particular to entertainment users is what classification does the user actually fit in? As we discussed previously, most of the old REA's and many older leases prohibit these entertainment uses. As such, the parking ratio requirements in these same documents do not necessarily address how much parking is required for these uses. For instance, in a multi-use entertainment facility that offers bowling, arcade games and restaurant, is a portion of that space counted as retail for purposes of determining parking? Is the restaurant portion required to park at the higher parking ratio set forth in the applicable documents for restaurants? From both a landlord and tenant perspective, the documents and existing conditions should be analyzed to confirm whether the parties need to request approval or an amendment in order to confirm the required parking ratio. Similarly, each jurisdiction may treat these entertainment uses differently as well. Often the person handling site development will have to go meet with the jurisdiction in person to confirm how they are going to treat the use. In some locations, they will categorize the use by one use (i.e., they may treat Main Event as a bowling alley for purposes of determining parking requirements), but in other locations, they may look at each use individually and then determine and aggregate parking requirement.

5. While to-go or short term parking has become more prevalent in recent years, COVID has changed the landscape with respect to the right to designate such parking spaces. This is certainly true for both restaurant and retail users for buy on-line, pick-up in store sales. With respect to restaurant development, as tenant's counsel, you need to be aware of how many parking spaces the client wants to identify as to or short term parking. Can the signs specifically identify the tenant's name or will the landlord only permit general "short term" parking signs that are available for all users? In reviewing the title documents, be aware of any restrictions against designating to-go or short term parking spaces for specific users. From a landlord perspective, when preparing and negotiating REA's on the front of the development, landlords should expressly reserve the right to designate

certain short term parking spaces for the benefit of certain users, notwithstanding a non-exclusive easement granted to all users of the center for parking.

B. Lighting and Security

1. Hours

As discussed above, most entertainment and restaurant uses will operate later into the night than typical retailers. Such users may need access to and from the premises on a daily basis until 2:00 a.m. From a tenant perspective, if you do not control the lighting on your parcel, you need to insure that the landlord will cause the common areas to remain well lit until 2:00 a.m. or at least a couple of hours after tenant closes.

> Example Language:
> Landlord shall maintain, operate and repair (or cause to be maintained, operated and repaired) the Common Areas in an economical and efficient manner according to a commercially reasonable standard for comparable first class, mixed-use developments including retail shopping and entertainment centers of similar age and character located in the Atlanta metropolitan area and in full compliance with all applicable laws, codes, ordinances, regulation and building and health codes, including but not limited to: . . . keeping the Common Areas well lit (including pylon and/or monumental signage) all non-daylight hours through at least two (2) hours after Tenant closes (i.e., no less than an average of five (5) foot candles in parking areas); . . .

2. Additional / Late Night Hours

While landlords should and will agree to keep the Common Areas lighted for these late night hours, the landlord will want to get the tenant to pay for such extended hours. From a tenant perspective, you should attempt to get the landlord to agree to keep the lights on until at least 2 hours after the close of business without extra cost to the tenant (the argument being that the landlord is leasing the premises for restaurant or entertainment purpose and therefore needs to provide the basic service without additional charge other than utility costs that would normally be included in CAM). Tenants will, however, agree to pay for additional hours beyond such 2-hour time period if the tenant requests that the landlord leave the lights on longer than that.

> Example Language:
> If Landlord is not otherwise required to do so, Landlord shall continue to light the Common Area from Shut-Off Time to whatever time is designated in writing by Tenant (the "Designated Shut Off Time"), and Tenant agrees to pay its pro rata share of the cost thereof. As used in the previous sentence, "pro rata share" shall be computed on the ratio that the total floor area of the Premises bears to the total leaseable floor area of all tenants in the Shopping Center who have requested that the Common Area lights remain on after the Shut Off Time.

If you are a tenant under a ground lease and you lease a full parcel (versus a curb in deal), ideally you can tie the parking lot lights into your building and therefore control the lights without reliance upon landlord to meet any additional lighting requirements.

3. Security Guards (or Not)?

Typically landlords, rather than tenant, attempt to impose obligations on the tenant to use security guards, which is not an issue that usually presents itself with standard retail uses. Tenants most often push back on the obligation to use security guards and to pay for security as part of CAM. The following is some pretty strong language proposed by a landlord:

> Landlord, at Landlord's sole discretion, may require Tenant, at Tenant's sole cost and expense, to hire security personnel ("Security") to ensure quiet and peaceful patronage of Tenant's restaurant. In the event Landlord, at Landlord's sole discretion, believes Security is necessary or appropriate, Landlord shall provide Tenant with written notice directing Tenant to hire Security, beginning the evening of the date immediately following the date Tenant receives such written notice from Landlord and ending on the date when Landlord believes Security is no longer necessary or appropriate, which ending date

> Landlord shall provide Tenant in writing. In the event Tenant fails to hire Security after Landlord's written request, Landlord, on Tenant's behalf, may hire Security, in which case Landlord shall bill Tenant the cost of such Security plus administrative costs of Landlord in a sum equal to twenty percent (20%) of such Security costs, and Tenant shall promptly pay such bill (no later than ten (10) days after receipt from Landlord). Landlord's bill for the Security costs shall be conclusive evidence of same. Additionally, Tenant agrees to pay to Landlord any and all additional cost which Landlord may incur due to vandalism, cleaning, lighting, security or any other expense attributable in any way to Tenant's use and/or occupancy of the Premises. Landlord from time to time shall notify Tenant in writing of the need for such additional cost with an accompanying bill and Tenant shall promptly pay such bill (no later than ten (10) days after receipt of the bill. Landlord's bill for such additional cost shall be conclusive evidence of same.

From a tenant perspective almost everything about the foregoing sample provision is unacceptable. Tenants should not allow the landlord to make these decisions (particularly in their sole discretion), especially when the charge is going to be passed directly back to the tenant. In negotiating this provision, after tenant's attempt to strike the provision in its entirety, landlord proposed to condition its right to require security on police activity at the tenant's premises. The further negotiated provision was as follows:

> Landlord acknowledges that Tenant does not presently intend to provide security or security officers with respect to the business operated on the Premises. If Tenant elects, in its sole discretion, to provide security officers for the Premises, Tenant does not represent, guarantee or assume responsibility that Landlord will be secure from any claims relating to security or such security officers, to the fullest extent permitted under applicable law. Notwithstanding the foregoing, if the use or operation of Tenant's business on the Premises results in two (2) or more police calls in any month, or six (6) or more police calls in any year, then Landlord shall have the right, in its sole discretion, to require Tenant, at Tenant's sole cost and expense, to hire security personnel ("Security") to ensure quiet and peaceful patronage of Tenant's restaurant. In that event, Landlord shall provide Tenant with written notice directing Tenant to hire Security, beginning the evening of the date immediately following the date Tenant receives such written notice from Landlord and ending on the date when Landlord believes Security is no longer necessary or appropriate, which ending date Landlord shall provide Tenant in writing. In the event Tenant fails to hire Security after Landlord's written request, Landlord, on Tenant's behalf, may hire Security, in which case Landlord shall bill Tenant the cost of such Security plus administrative costs of Landlord in a sum equal to ten percent (10%) of such Security costs, and Tenant shall promptly pay such amounts as Additional Rent.

Ultimately, the foregoing language was not acceptable to the tenant either and the parties agreed to the following provision – but there is a mutual provision for the landlord that makes the landlord subject to the same security requirements as the tenant (and excludes the cost of security from CAM):

> Landlord acknowledges that Tenant does not presently intend to provide security or security officers with respect to the business operated on the Premises. If Tenant elects, in its sole discretion, to provide security officers for the Premises, Tenant does not represent, guarantee or assume responsibility that Landlord will be secure from any claims relating to security or such security officers, to the fullest extent permitted under applicable law. Notwithstanding the foregoing, if the use or operation of Tenant's business on the Premises results in three (3) or more "police incidents" (as described below) in any consecutive twelve (12) month period, then Landlord shall have the right, in its sole discretion, to require Tenant, at Tenant's sole cost and expense, to hire security personnel ("Security") to ensure quiet and peaceful patronage of Tenant's restaurant. In that event, Landlord shall provide Tenant with written notice directing Tenant to hire Security, beginning within thirty (30) days after the date Tenant receives such written notice from Landlord and ending on the earlier to occur of: (i) the date when Landlord believes Security is no longer necessary or appropriate, in its commercially reasonable discretion, which ending date Landlord shall provide Tenant in writing, or (ii) the date upon which twelve (12) months has elapsed since the last police incident at the Premises. In the event Tenant fails to hire Security after Landlord's written request, Landlord, on Tenant's behalf, may hire Security, in which case Landlord shall bill Tenant the cost of such Security plus administrative costs of Landlord in a sum equal to ten

percent (10%) of such Security costs, and Tenant shall promptly pay such amounts as Additional Rent. For the purposes of this Lease, a "police incident" shall be one in which the police are called in to address or resolve illegal, unlawful, unruly or disorderly conduct at the Premises, or in reasonable proximity to the Premises as a result of the actions of Tenant's customers or employees, regardless of whether an arrest is made. A "police incident" shall not include other situations in which the police may be called (e.g., traffic accidents, medical emergencies, etc.), which do not also involve illegal, unlawful, unruly or disorderly conduct.

Certain entertainment users may actually require the use of security guards. From a landlord's perspective, if the tenant is going to hire armed security guards for late night activity, landlord may want to consider the following language:

In the event Tenant retains any security guard contractor to service the Premises, Tenant shall provide Landlord with written notice if any such security guard other than any law enforcement officer (whether on or off duty) or [*an armed security guard licensed by the* _____ *Private Investigators Licensing Board*] is to carry a firearm upon the Premises, the Shopping Center, or any other portion of the Development, and in such event, Landlord shall have the right to impose additional insurance requirements upon Tenant and/or such security guard, which shall be complied with by Tenant. Notwithstanding the foregoing, Landlord shall have the sole and absolute right to prohibit any person (excluding any law enforcement officer [*or armed security guard licensed by the* _____ *Private Investigators Licensing Board*]) from carrying a firearm upon the Premises, Shopping Center, or any other portion of the Development.

C. Valet

Many restaurants, particularly white table cloth or "sophisticated" restaurants versus casual dining restaurants, may require valet to operate in some or all locations. The requirement may be site specific for certain restaurants, but certain restaurant concepts will not do a deal without the ability to do valet. From a tenant perspective, the tenant wants to (i) have the right to operate a valet, (ii) cone off or rope off parking spaces for the valet's use, and (iii) have the right to drop off and stacking locations, including the ability to put out a sign indicating such valet parking is available.

Tenant shall also have, throughout the Term: (x) the exclusive, non-personal and irrevocable right (subject to all necessary governmental approvals) to place and maintain, at Tenant's sole cost, at the locations within the Common Area so identified on **Exhibit B**, a valet parking stand (on which Tenant shall have the right to keep a sign displaying Tenant's trade name) and at least two (2) "A-Frame" sidewalk signs advertising the availability of and/or drop-off location for a valet parking service (to be selected and hired by Tenant, at Tenant's sole cost) exclusively for Tenant's customers ("Tenant's Valet Service"); (y) the exclusive, non-personal and irrevocable right for Tenant's Valet Service to use and park as many [vehicles as may legally be possible OR _____ (___) vehicles] in available parking spaces and drive aisles (and "stacking" may be utilized if and as permitted by the local governmental authorities) within the portion(s) of the Common Area identified as the "Valet Parking Area" on **Exhibit B** (it being further agreed that Tenant's Valet Service shall have the right to install, on a temporary basis, which may be as often as daily, signs and/or cones in such area identifying [as many as _____ (___) parking spaces in] such area as being for "Valet Parking Only" provided that Landlord shall not be responsible for enforcing or policing Tenant's rights with respect thereto nor responsible for paying any sums to, or for any damages or liabilities related to the use of such area by, Tenant's Valet Service); and (z) the exclusive, non-personal and irrevocable right for Tenant's Valet Service to use and park as many as six (6) vehicles in available parking spaces within the portion of the Common Area identified as the "Valet Holding Area" on **Exhibit B** (it being agreed that Tenant's Valet Service shall have the right to install, on a permanent basis, signs and/or cones in such area identifying each of those parking spaces as being for "Valet Service Use Only" provided that Landlord shall not be responsible for enforcing or policing Tenant's rights with respect thereto nor responsible for paying any sums to, or for any damages or liabilities related to the use of such area by, Tenant's Valet Service). No other valet parking stand or service shall be permitted in front of the Building.

Landlords need to make sure that providing tenants the ability to operate a valet service is not prohibited by any of their other leases or any controlling REA or Declaration. Often the ability to cone off or rope off designated parking spaces for valet operation is seen as providing the restaurant user with "exclusive" parking rights, and designating exclusive parking rights may be prohibited by such existing leases or operating agreements. In that event, the landlord may prohibit the tenant from designating parking spots for valet parking and may require that the valet company uses parking spaces in common with other customers of the center. This may be more challenging for the valet company, but ultimately, this result may be acceptable for the tenant. Additionally, the landlord may be offering valet for the center, in which case, the landlord may not permit the tenant to operate its own valet service but require tenant to participate in landlord's valet service, at an additional cost to the tenant. If the tenant is going to participate in the landlord's valet program, tenant needs to consider the following: (a) insert a requirement that the valet has operating hours that will be long enough to serve all of tenant's customers, (b) cap tenant's exposure on its contribution to valet, (c) will tenant's customers be charged to valet, (d) if tenant's customers will be charged for valet, can tenant participate in a validation program, and (e) tenant should require a most favored nations clause (i.e., if any other restaurant gets to participate in valet for free or a reduced cost, then tenant also is permitted to participate for free or such reduced cost). Depending on which party is running the valet service, the other party may also attempt to approve the valet company (in which case, the party running the valet service should obtain approval in the lease of any valet company that it uses on a national or regional basis) and impose additional insurance requirements in connection with the valet use. In the event that landlord is running the valet service, tenant may also impose a "fetch time" (i.e., 3 – 5 minute time limit for getting the customer's car back to the customer), which is typically also met with some resistance from the landlord. Finally, if tenant's customers are paying for valet service operated by landlord, then the charges should be reasonable charges consistent with the market pricing. While not typically further negotiated, market pricing can be wildly different (i.e., $40/car was not what one of my clients was expecting in Nashville, Tennessee), so if valet is an important part of the restaurant operation and success, perhaps a cap on valet pricing should be considered.

IV. Nuisance

A. Noise

1. Construction Considerations

Let's face it, the point of entertainment uses is to induce laughter, excitement, fun …. and those things all come with associated noise! For certain types of entertainment users such as theaters and bowling alleys, landlords and tenants need to consider who is responsible for noise attenuation, noise complaints and the like starting at the construction phase. The initial landlord's work letter should set forth who is responsible for any noise attenuation, as it is much easier to build in safeguards during construction, as opposed to implementing after the fact remedies. From the landlord's perspective, the landlord typically wants the tenant to be responsible for any work required to keep the noise from the premises from spilling into the adjacent premises. Not surprisingly, from the tenant's perspective, the tenant wants the landlord to be responsible for any work required to keep the noise from spilling into the adjacent premises. Sample language is as follows:

> "Landlord shall also install any demising walls with metal stud framing and drywall to achieve the required fire separation and sound insulation in accordance with all adjacent tenants' requirements in addition to any Landlord requirements. Any and all requirements for sound insulation (regardless of the source of the requirement) shall be at Landlord's cost."
>
> "Acoustical Insulation: Tenant shall design, furnish and install acoustical insulation within the Premises such that, at a minimum, such installation shall prevent the transmission of all sound and noise in excess of __ decibels from the Premises. Tenant agrees that the Landlord may utilize a sound-level meter to verify Tenant's compliance with the preceding sentence. In the event that Landlord determines that Tenant is not in compliance, Tenant shall immediately resolve the condition in a manner approved by Landlord and subject to confirmation by an acoustical engineer, all at Tenant's expense."

2. Complaints

Even with proper sound attenuation, there may be a risk with certain uses that adjoining tenants will complain. As such, the parties may want to set forth who is responsible for any such noise issues at the outset. These issues are often present when theatres and restaurants are adjacent users. In the following language, the parties agreed that if the movie theatre tenant adjacent to the restaurant

complained, then it was the landlord's issue, but if the restaurant user experienced any noise issues from the adjacent theatre, then it was the restaurant user's problem:

> "In addition, any comments or objections provided by any tenant within the Center, including without limitation, any complaints with respect to sound emanating from the Premises shall be the responsibility of Landlord to address, at Landlord's cost, and Tenant shall have no obligation or liability therefor. Without limiting the foregoing, Tenant shall not be obligated to install any sound/acoustical barriers to meet the satisfaction of any tenant in the Center. In the event that Tenant experiences any noise penetrating into the Premises from any adjacent tenant, including without limitation, the theatre above the Premises, Tenant shall be obligated to address any issues caused by such objectionable noise, at its sole cost and expense."

Landlords may also want to provide that in the event of any complaints from other tenants, that the user shall promptly address such complaints and take reasonable steps to eliminate the noise from emanating from the premises. In certain circumstances, landlords may want to impose a decibel restriction on certain uses. Prior to agreeing to a decibel restriction, obtain a decibel meter (or an app for your smart phone) and determine what level is acceptable. This is typically met with resistance from tenants, and the tenant should push hard to cause the landlord to live with a general "compliance with noise ordinances" requirement. Most noise levels are measured in dBA, which are decibels adjusted to reflect the ear's response to different frequencies of sounds. Below is a chart showing a range of decibels for certain sounds (courtesy of www.noisehelp.com):

0	healthy hearing threshold		
10	a pin dropping		
20	rustling leaves		
30	whisper		
40	babbling brook	computer	
50	light traffic	refrigerator	
60	conversational speech	air conditioner	
70	shower	dishwasher	
75	toilet flushing	vacuum cleaner	
80	alarm clock	garbage disposal	
85	passing diesel truck	snow blower	
90	squeeze toy	lawn mower	arc welder
95	inside subway car	food processor	belt sander
100	motorcycle (riding)		handheld drill
105	sporting event		table saw
110	rock band		Jackhammer
115	emergency vehicle siren		Riveter
120	thunderclap		oxygen torch
125	balloon popping		
130	peak stadium crowd noise		
135	air raid siren		

140	jet engine at takeoff		
145	firecracker		
150	fighter jet launch		
155	cap gun		
160	shotgun		
165	.357 magnum revolver		
170	safety airbag		
175	howitzer cannon		
180	rocket launch		

3. Hours of Operation

Restaurants and entertainment users face several unique issues given that their hours of operation are typically longer than those of retail establishments. The following items should be considered in connection with such extended hours of operation.

(a) Landlords typically request that the tenant be open and operating for a certain number of hours (typically "the normal hours of the shopping center as established by Landlord from time to time" or express operating hours). While most tenants (regardless of use) do not want the landlord to dictate operating hours, if you are going to agree to certain operating hours, then entertainment and restaurant users need to clarify that those operating hours are minimum operating hours and they are permitted to stay open later. The landlord should agree to this provided that tenant's operation is in compliance with all applicable laws. On the other end of the spectrum, entertainment users and restaurants may not want to participate in "Black Friday" and other extended hours events, as it may not be conducive to their use. As such, any requirement to operate for the mall hours as set by the landlord should also contain a limitation on the time period that tenant is required to open (i.e., for a restaurant that serves lunch and dinner, you may want to insert "in no event shall tenant be required to open for business prior to 11:00 a.m.").

(b) If the landlord has the right to require employees to park in a certain area, entertainment and restaurant users need to be careful to make sure that the area is close enough to the premises that it is safe for employees to leave late at night, since these uses typically operate late and then servers and bar staff are required to stay for an additional hour or two in order to clean up.

(c) In addition to safety and security, if the tenant is in an enclosed mall and will be open beyond the normal operating hours, you should include language to ensure that access to the premises remains open beyond the normal operating hours.

Example Language:

Landlord and Tenant acknowledge that Tenant will be open for business after normal mall hours. Tenant will coordinate with Landlord's property manager to ensure Tenant's customers have access to and from the Premises and the portion of the enclosed mall leading to the parking lot. Tenant acknowledges that Landlord will place stanchions within the enclosed mall (in locations reasonably determined by Landlord) to limit access by Tenant's customer's to other portions of the enclosed mall after normal mall hours, provided Tenant's customers shall at all times have access to the Premises via the Common Areas.

4. Music

For some users, music is an integral part of the theme of the user (i.e., a venue that has live bands or a restaurant with a rock music theme). In such instances, from a tenant perspective, the tenant must ensure that it can operate as it typically operates and have music as part of its theme. Landlords, on the other hand, will want to consider imposing limitations on hours of live music (if permitted at all) and the location of such music (i.e., inside versus on a patio). Certain situations present particularly difficult issues, such as a restaurant in a hotel, and even more difficult, when such restaurant is open to the lobby and other surrounding hotel common areas. In this instance, the hotel operator must give consideration to the location of the hotel rooms versus the restaurant. If there are seven floors of parking garages above the restaurant before you get to the first floor of rooms, this is likely not an issue, but if there is an open air restaurant with guest rooms immediately above the restaurant, a restaurant with a music theme may not be the right use for such a space.

Example Language:

> Landlord hereby acknowledges and agrees that music is an integral part of the theme of a Yard House restaurant. Tenant shall be permitted to play music of the type and at the decibel level typically played by Tenant in its Yard House restaurants, and Landlord hereby further acknowledges and agrees that due to the open nature of the Premises, such music shall be permitted to emanate outside of the Premises into other areas of the Hotel.

B. Odors

Tenants should add an exception to the general clauses that prohibit noxious odors such as: "normal odors associated with the preparation of food and the operation of a restaurant shall not be deemed to be noxious odors." Tenants should also be aware of any obligation imposed by the landlord to install pollution control units or scrubbers (which are used to eliminate odor from the premises but which are also very expensive). Landlord's typically attempt to impose this requirement in mixed-use buildings such as office buildings or hotels. Also, beware that the installation of the scrubber is not the biggest expense associated with it. The maintenance of the scrubber over the term of the lease is an even bigger expense. As such, if the landlord is going to require a scrubber, the parties will often allocate maintenance costs associated therewith as well.

C. Trash Removal

Leases need to be very clear as to whether landlord or tenant is providing the trash removal service for the premises. If the tenant is providing its own trash removal service, the landlord should require that the trash be removed daily or on some regular basis. If the landlord has a service in the center, the landlord may also attempt to impose a requirement on the tenant to use the same service provider. This may be problematic for certain tenants who have national accounts with waste removal service providers.

1. Cost

If the trash removal is going to be performed by landlord, tenant needs to consider the cost of landlord's trash removal versus tenant's cost if tenant were to perform such removal using its own waste removal service. It is rare that the LOI provides a trash charge separate and apart from CAM, but often when you get into the lease, it becomes clear that the landlord intends to charge a trash removal charge in addition to CAM. In this instance, you need to confirm how much the tenant budgeted in its pro forma when the deal was approved to determine if tenant can pay this cost under its currently approved deal. If yes, the tenant should still attempt to cap its exposure:

> Pursuant to Section 3.5, Landlord shall provide a common trash compactor for use by tenants of Buildings 700 and 300 (Buildings 700 and 300 are depicted on Exhibit "A-1"). Landlord shall contract with a waste removal service of Landlord's choice with respect to such trash compactor and waste removal. Tenant agrees to reimburse Landlord for Tenant's Trash Share (as defined hereinafter) within thirty (30) days after invoice and reasonable supporting documentation from Landlord but not more often than one (1) time per month. Tenant's "Trash Share" shall be the product of Landlord's total cost of waste removal for the shared compactor for Buildings 700 and 300 and a fraction, the numerator of which is the square footage of the Premises and the denominator of which

is the total GLA (as defined in Section 2.11 below) of tenants within Buildings 700 and 300 utilizing the shared compactor; provided that in no event will Tenant's Trash Share exceed $15,000.00 per Lease Year (the "Trash Share Cap"); provided, however, that the Trash Share Cap shall be increased by ten percent (10%) over the immediately preceding Trash Share Cap at the commencement of every fifth (5^{th}) Lease Year (i.e., Lease Year 6 for Lease Years 6 through 10, Lease Year 11 (if applicable) for Lease Years 11 through 15, and Lease Year 16 (if applicable) for Lease Years 16 through 20).

2. How Often

Tenants should require that landlords provide a dumpster or compactor large enough to accommodate all users of the dumpster and that the dumpster is emptied often enough to accommodate all such users:

> Landlord agrees to maintain the Trash Area, including without limitation, causing the shared compactor located in the Trash Area to be emptied as often as reasonably necessary to accommodate the trash of all tenants entitled to use such shared compactor.

Even in situations where the trash is shared, tenants may want to put an acknowledgment in the lease where landlord tenant's trash requirements and needs in a stand-alone deal where tenant provides its own dumpster(s) and trash removal service (i.e., Landlord hereby acknowledges and agrees that Tenant requires a minimum of one (1) 6-yard trash container and one (1) 4-yard recycling container to accommodate Tenant's refuse when Tenant has exclusive use of the trash container and recycling container).

3. CAM Expense Pools

If landlord is going to provide services such as trash removal or grease trap cleaning that will serve only a subset of tenants, such as restaurant tenants, the landlord will want to reserve the right to create special pools to calculate the tenant's pro rata share of that cost so that the retailers who do not benefit from such services are not obligated to participate.

> Landlord reserves the right to create pools of similarly situated tenants for the purpose of allocating certain CAM Costs and/or Taxes that benefit only the tenants in such pool ("Specialized Costs"). For the purpose of allocating Specialized Costs for any pool of which Tenant is a member, Tenant's Proportionate Share shall be a fraction, the numerator of which shall be the leasable area of the Premises, and the denominator of which shall be the leasable area of the premises of all tenants in such pool whose premises are leased and occupied, but in no event less than eighty percent of the total leasable area of all similarly situated premises.

Further, while restaurants and retail tenants will often utilize some of the same dumpsters, landlords should reserve the right to allocate an increased cost of trash removal to the restaurant tenants.

V. Force Majeure Considerations.

It is difficult to overlook any mention of force majeure clauses at the first in-person ICSC law conference following the COVID-19 pandemic. While COVID certainly had a negative effect on retail uses, it could be argued that experiential uses such as restaurants and theaters were the hardest hit. Of course, force majeure clauses have now been modified to expressly include pandemics, epidemics, disease, public health emergencies and imposition of governmental regulations in connection therewith. In addition, however, new consideration is being given to when a force majeure event may forgive the payment of rent, which historically has been carved out from an obligation that will be delayed due to a force majeure event. With respect to restaurant uses, restaurant tenants are taking the position that mandated closures and limited occupancy requirements should forgive the tenants obligation to pay rent. Landlords, on the other hand, have mortgage payments to make and are pushing back to either limit the time of any abated (or deferred) rent payments, the amount of any abated (or deferred) rent payments and the circumstances under which there is no abated (or deferred) rent.

Example Language (Force Majeure):

The time for performance by Landlord or Tenant of any obligation set forth in any term, provision or covenant of this Lease (***regardless of whether such term, provision or covenant contains an express reference to delays resulting from force majeure events, including, specifically, the occurrence of the Commencement Date, which shall be subject to extension due to delays resulting from force majeure events***, such as, but not limited to, permitting/licensing/approval, construction and/or inspection delays encountered by either party that result from force majeure events, provided that the party claiming such an extension complied with the notice requirement set forth below) shall be deemed extended by the period of time lost due to delays resulting from acts of God, casualties, strikes, lockouts, unavailability of building materials, civil riots, acts of terrorism, floods, hurricanes, windstorms, material or labor restrictions by any governmental authority, enforcement of governmental regulations or requirements, present or future governmental restrictions, regulations, controls, inaction and/or delays, ***contagious or infectious disease outbreaks or other public health emergencies in the geographic area where the Premises are located, such as, but not limited to, epidemics, pandemics or impositions of quarantine and/or travel restrictions by any governmental authority***, and any other cause not within the control of Landlord or Tenant or their respective agents, employees, contractors or suppliers (except financial inability), as the case may be. The party claiming such an extension due to a delay resulting from a force majeure event shall notify the other party, in writing, of the circumstances supporting such claim within thirty (30) days after the date(s) of such force majeure event (otherwise such extension claim shall be deemed to have been waived).

Example Language (Mandated Closure):

Notwithstanding anything in this Lease to the contrary, if, at any time during the Term following the occurrence of the Commencement Date and provided that Tenant's business at the Premises is then open and operating, any governmental authority (including, without limitation, any public health authority) requires or recommends that the operation of Tenant's business at the Premises be restricted to pick-up/carry-out/delivery service only and/or that the usable capacity of the Premises' dining room be reduced by fifty percent (50%) or more, then the Annual Rent due under this Lease from the date of the imposition of such requirement or recommendation until the date that such requirement or recommendation has been lifted shall be reduced by fifty percent (50%). [Note: When met with resistance on a 50% abatement, the tenant may want to consider offering to pay rent equal to the greater of 50% or "x%" of Tenant's gross sales (not to exceed Annual Rent otherwise due.] Any Annual Rent that Tenant is not required to pay shall be deemed permanently abated and forfeited by Landlord. Also, if, under the circumstances described in the first sentence of this grammatical paragraph, any governmental authority completely restricts the operation of Tenant's business at the Premises, then one hundred percent (100%) of the Rent due under this Lease from the date of the imposition of such restriction until the date that Tenant can resume the normal or partial operation of its business at the Premises shall be abated. ***In such event, the then current portion of the Term (i.e., the Primary Term or a Renewal Term, as applicable) shall automatically be extended by the number of days that Tenant was completely restricted from operating its business at the Premises, and the amount of the Rent due during any such extension period shall be the same amount as the Rent that was due (on a per day basis) during the last month of the then current portion of the Term (regardless of the amount of the Rent that was abated as provided in this section, which shall be deemed permanently abated and forfeited by Landlord).***

One consideration for landlords is that restaurants with drive thru operations were not hit nearly as hard as restaurants that only offer sit down dining, so landlords should treat different types of

restaurants users differently when met with requests for rent abatement or deferral, and tenants who offer drive thru service are less likely to be successful getting full rent abatement if and to the extent the drive thru remains open.

With respect to the to-go parking mentioned above, restaurant tenants may want to consider adding a provision to allow the tenant to increase the number of designated to go parking spaces during any period where tenant is restricted to pick-up, carry-out or delivery service or where limited occupancy restrictions are in place. Finally, restaurants that serve alcohol should attempt to remove language that requires alcohol sales to be "on-premises", as many jurisdictions relaxed to-go alcohol sales prohibitions to permit restaurants to sell to-go alcohol during the pandemic. A better qualifier is that tenant has the right to sell alcohol, in compliance with all applicable laws and tenant's liquor license.

VI. Conclusion

In the day and age of amazon, shipt, and instacart, a restaurant experience and other forms of entertainment which cannot be delivered to a customer's door by the click of a button are important draws to continue to bring customers to shopping centers for in-person shopping experiences. These types of tenants can co-exist very well in mixed use developments, so long as proper planning is done at the outset. While 2020 was certainly a year none of us will ever forget, 2021 has been the year that restaurant and entertainment users have come back to life and are busier than ever working to fill up a pipeline that did not get much attention in 2020. With some forethought and careful planning, restaurant and entertainment users will continue to be vital components to the operation of a successful commercial development.