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Peer to Peer Section 4

Site Plan Considerations: Will Your Site Plan Be Forever or Will It Go Down In Flames?

Presented to

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by:

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Introduction:

We know all too well that site plan control is a key provision in many retail leases and that it has the potential for enormous impact on both landlords and tenants alike. Landlords want to maintain broad flexibility to develop and redevelop, alter, add to and remove space from their centers, while tenants want to ensure their businesses are protected during the exercise of such rights. Landlords want to retain the right to reconfigure or develop parking lots or other common area parcels for things such as event space/greenspace or for rideshare pickup or food trucks. In addition, landlords want to retain the right to install EV charging stations or ATMs – generally, the least amount of restriction on the common area and the landlord, the better.

In contrast, having a landlord guarantee access to the premises and visibility of a tenant's storefront and signage are examples of negotiated safeguards that further the goal of protecting a tenant. Typically, a larger (in size and/or number of locations) or more experienced tenant may even want certain rights to use the shopping center's common areas for its customers' benefit – some examples include exclusive parking, sidewalk sales, pet vaccination/adoption events and online order pickup.

In this session, we will examine scenarios and contemplate questions in connection with site plans and common area restrictions and how each party can be protected against issues the arise during the term of a lease.

Hypothetical #1-

The Bank of Ernst has leased an outparcel from the owner of a multi-tenant shopping center in Bell, VA. While the bank is constructing its building, they have set up a staging area immediately adjacent to the pad that comprises their premises. The construction is anticipated to take approximately six months.

The center is anchored by a regional grocer, Lisa's Lettuce & Loafs, who has the following restrictions in its lease:

"The Site Plan is a material consideration for Tenant entering into this Lease. No material change, alteration, deletion, or addition (including, but not limited to, landscaping, benches, seating, trash cans, light poles, directional signage or other structures or obstructions) shall be made to the Protected Area without the prior written consent of Tenant, which may be granted or denied in Tenant's sole and absolute discretion."

a. Does the above language prohibit the bank's use of common area for staging in the Protected Area?
b. Does the duration of the use of the staging area make any difference?
c. What potential carve-outs to the Lisa's Lettuce & Loafs' restriction would ensure that the landlord could provide the staging area to the Bank of Ernst without issue?
d. What if Lisa's was required to be reasonable with its consent?
e. What if the bank was not using the area for staging, but instead installing an ATM in the Protected Area?

"No change or alteration or addition shall be made in the Common Areas outside of the Protected Area (to the extent within Landlord's control) without the prior written consent of Tenant, which materially and adversely affects any one or more of the following: (i) methods of ingress and egress, parking or curbing in the Common Areas; or (iii) access to Tenant's loading dock and loading area."

f. Does the above language prohibit the bank's use of common area for staging?
g. If so, how could this have been drafted to provide more flexibility to the landlord?
h. If not, how could this have been drafted to provide better protection for Lisa's Lettuce & Loafs?

"Subject to permitted modifications pursuant to required conditions of governmental authorities having jurisdiction over the Premises set forth in the final site plan approval, Landlord shall neither reduce the number, nor change the location, size, or layout of parking spaces within the Common Area, nor diminish the service level (i.e. full service, right-in/right-out, final out, etc.) of entrances or exits to and from the Shopping Center or Outparcels, nor reduce the

size of or relocate entrances or exits to and from the Shopping Center or Outparcels, without Tenant's consent in each instance, which consent may be withheld in Tenant's sole discretion."

i. Does the above language restrict the staging area?
j. What if Tenant's consent had to be reasonable?

"The Shopping Center Tract, and each respective Outparcel, shall at all times contain not less than three and one-tenths (3.1) parking spaces (each having a minimum width of nine [9] feet), unless such greater minimum width is specified on the Site Plan for certain designated parking spaces) for every 1,000 square feet of Floor Area within improvements constructed within the Shopping Center Tract and each respective Outparcel."

k. Does the above language prohibit the bank's use of parking spaces for the staging area?
l. Does anything change if Tenant is installing EV charging stations? Exclusive parking spaces?

Hypothetical #2-

Landlord is the owner of Lisa's Shopping Center and has entered into a lease with a quick-service restaurant with a drive through lane ("Tenant A"). Landlord is currently in negotiations with a fast food restaurant, also having a drive through lane, for the pad adjacent to Tenant A's pad ("Tenant B"). There is a potential for interference with Tenant B's drive through lane by customers queuing in the adjacent Tenant A's drive through lane. The site plan in Tenant A's lease has been approved by Tenant A to be submitted by Landlord during the site plan approval process. Construction has not commenced on either pad site yet.

1. Landlord and Tenant B have agreed upon a solution for the queuing issue in a site plan attached to the lease will have to be presented to Tenant A for approval. What are some protections and remedies that both parties should consider if:

    a. They don't receive Tenant A's approval; or
    b. They do receive Tenant A's approval, but Landlord must change the location of Tenant A's drive through lane during the site plan approvals process and it results in a change to Tenant B's queuing?

2. After the lease with Tenant B is executed, the potential arises for interference with the adjacent public road by customers queuing in Tenant B's drive-through lane. Tenant A files for injunctive relief because the site plan will need to be modified and Tenant A does not approve of the new site plan (which violates Tenant A's lease). The neighboring community also files for injunctive relief due to the potential for blocked traffic on the main road from Tenant B's drive-through lane queuing.

    c. Who has a valid claim and why?

Hypothetical #3-

Developer Cahn is constructing a new shopping center with a grocery anchor, multiple in-line tenants and several outparcels. The shopping center will include both a large parking lot and a small common greenspace for community events. Tenant A would like to have exclusive curbside pickup, parking and sidewalk events. Tenant B would like to use the common area for community events which could draw a large crowd and fill up the parking lot during such events.

a. What language/concepts would best protect the interests of:
    (i) Tenant A;
    (ii) Tenant B; and
    (iii) Landlord?

Comments:

As a landlord, it is important to maintain broad flexibility in allowing the modification of any site plan attached to a lease and, as a tenant, it is important to narrow down any broad rights a landlord may have to revise the site plan. This can be handled in many different ways:

a. Protective language in the site plan itself:
    (i) Landlord Language: *"This site plan is presented solely for the purpose of identifying the approximate location and size of the improvements in the Shopping Center. Building sizes, dimensions, access and parking areas are subject to change without notice to Tenant and at Landlord's discretion."*
    (ii) Tenant Language: *"This Site Plan is a complete and accurate depiction of the Shopping Center."*

b. Reserving certain rights in the lease:
    (i) Landlord Language: *"Notwithstanding anything to the contrary contained in the Lease, Landlord reserves the right from time to time to change the size, location, dimensions and type of any building, common area or driveways in the Shopping Center."*
    (ii) Tenant Language: *"Landlord shall not, in exercising its rights under this Lease, affect ingress and egress to and from the Premises and/or the visibility of the storefront of the Premises."*

c. Delineating a No Build Area wherein the landlord cannot build or make alterations within, or must obtain permission from the tenant to do so:
    (i) "*Notwithstanding the foregoing, Landlord shall not, in exercising its rights under this Lease, construct, erect or install any buildings, structures or other improvements (excluding lighting standards, landscaping, curbs, benches, planters or other similar improvements) within the area marked "No Build Area" on Exhibit A attached to this Lease."*

d. Consent rights for changes to site plan:
    (i) Landlord Language: Phrases such as *"subject to the approved site plan"* and *"subject to change in accordance with the final engineered drawings"* will provide a landlord with more flexibility to change a site plan during the site plan/development process. This is desirous by a landlord as it lessens the likelihood of future changes requiring the tenant's consent.
    (ii) Tenant Language: *"There shall be no changes to the site plan without Tenant's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed" and "there shall be no changes to the site plan that impede or interfere with Tenant's business at the Premises."*

e. Limiting remedies in the lease:
    (i) Landlord Viewpoint: The landlord will want the least amount of stated remedies in the lease for its breach of a tenant's common area protections. With no stated remedies, a tenant is forced to look outside of the lease for a remedy - usually through a breach of contract claim. This puts the burden on the tenant to prove damages and can be very costly and time-consuming, oftentimes deterring a tenant from pursuing legal action.
    (ii) Tenant Viewpoint: The tenant will want as many remedies as possible expressly provided for in the lease so as to best protect itself (and provide relief for the tenant while avoiding the court process). Examples of remedies include:
        (a) Rent abatements/concessions;
        (b) Termination rights; and
        (c) Reimbursement of certain tenant expenses (e.g., unamortized buildout costs).

When granting protections to a tenant, it is imperative that a landlord maintain its rights to perform day-to-day repair and management functions for the shopping center. We accomplish this by carving out certain situations from a tenant's protection. Some of these to consider addressing when granting access, visibility and/or parking protection to a tenant are:

(i) when access, visibility and/or parking is temporarily affected as a result of repairs, remodeling, renovation, promotional activities, outdoor sales, or other construction to the Shopping Center;

(ii) when access, visibility and/or parking is affected as a result of lighting standards, shopping center signage, landscaping, curbs, benches, planters, trash receptacles or other similar structures; and

(iii) when changes are required by laws.

A landlord may want to require certain criteria to be met in order for a tenant to keep its protection in place:

(i) the tenant has been/must be continuously open and operating in the Premises;

(ii) the tenant may not be/has not been in default under the terms of the lease; and

(iii) the protection is only for the originally named tenant and the lease has not been assigned or transferred to another tenant.

A landlord may also want to consider certain standards when granting protections:

(i) Does the interference have to be material and/or adverse?
(ii) Can the protection be quantified, such as agreeing that the number of parking spaces in the shopping center cannot fall below a certain number? Below code requirements?
(iii) Where is landlord guaranteeing visibility from? Adjacent common area? Certain roadways?
(iv) Where is access being guaranteed? From the premises to parking lots? Via certain points of ingress and egress?

In summary, there is much to consider when negotiating common area rights and protections. Parties can get very creative with language and concepts to satisfy both landlords and tenants and ultimately get a deal done! It is important to remember that you will always need safeguards (for yourself) from the protection you are affording to another party.