



ICSC+LAW SYMPOSIUM OH/KY/IN/MI/PA
Hilton Columbus/Polaris, Columbus, OH
February 29 - March 1, 2024

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Hilton Columbus/Polaris
Columbus, OH
Friday, March 1, 2024
11:00 am – 12:00 pm

Session 2B: Leasing 101 - Hot Topics

Moderator

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Panelists

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OUTLINE

Leasing 101: Hot Topics

A panel discussion from a broker, insurance, landlord and tenant perspective on various hot topics in Leasing. Topics to be discussed to include, but are not limited to the following customary provisions within leases: changes to force majeure since COVID, Guaranty issues, broad use clause and issues with REAs and Coreas, common insurance issues, and assignments.

- 1) Types of CAM
What Tenant wants vs what Landlord wants? i.e. fixed with escalations vs prorata
- 2) Force Majeure
How has it changed since COVID?
- 3) Lease Guaranty issues
What types & alternatives are available?
- 4) Large Tenant's Contribution to Build Out
Potential issues to consider for reimbursement in casualty and condemnation events.
- 5) Insurance common issues that arise for both Landlord and Tenant.
i.e. risk shifting, self-insured tenants, and insurance during construction
- 6) Business Terms negotiation at LOI stage
Key issues to be flushed out?
- 7) Lease requirements for notifying a lender
- 8) Non-permitted transfers that require Landlord consent & excess rents
What tenant wants vs what Landlord wants?
- 9) Broad Use Clauses and issues with REAs and COREAs
Potential issues that arise today?
- 10) Indiana statute that requires recording a memorandum of lease
How about other states?



SESSION MATERIALS

This program examines an overview of few key issues for both landlord and tenant that affect a lease negotiation. The program will include a discussion by the panel on these issues to assist commercial real estate professionals, both new and seasoned in the industry, to be able to spot potential issues that may occur during lease negotiations or after lease execution.

1. Types of CAM

- A. What a tenant wants verse what a landlord wants?
 - i. General Discussion – agreed upon fixed amount with escalation verse prorata
 - 1. Fixed with escalations: It is a fixed rate with fixed escalations. Generally, the escalations are annually and/or on the anniversary of the commencement date.
 - 2. Prorata: tenant pays its prorata share. Matters to consider, include:
 - a. Will there be a floor?
 - b. Capital improvements – LL wants ALL but which ones are fair (repairs, like kind replacements, capital improvements aimed to reduce overall tenant costs; LL fallback to portion of the capex amortized over its useful life that falls within the original lease term (plus option terms))
 - c. Administrative Fees – What’s reasonable to include?
 - d. Common area utilities
 - e. Double Dips (taxes and insurance duplicated)
 - f. Cross-property expenses (vehicles/staff used for multiple properties)
 - g. Depreciation
 - h. Landlord staffing costs
 - i. Controllable verse non-controllable costs
 - j. Roofs/retaining walls/parking lot lighting, etc.
 - k. Landlord wants to be able to exclude “Major TT” square footage from share but include costs related to Major TT premises/common areas
 - l. Seasonal decoration/landscaping
 - m. LL wants NO cap and no consent right for cap ex
 - 3. Hybrid CAM: agreed upon fixed amount with escalations but carve out highly volatile expenses such as snow removal, utilities, and insurance.

Notwithstanding the foregoing, Tenant's share of Landlord's Common Area Costs for the first Lease Year shall be capped at \$x.xx) per square foot of Store Floor Area per annum. In no event shall Tenant's share of Landlord's Common Area Costs increase by more than 5% on a cumulative basis so that such increase shall not exceed an amount equal to the amount of Tenant's share of Landlord's Common Area Costs would be if it had increased by 5% each calendar year of the Lease Term (the "CAM CAP"). The CAM CAP shall exclude any increases on uncontrollable costs attributable to, including but not limited to, snow and/or ice removal costs or utility costs.

- ii. Large landlord verse small
 - 1. Larger landlords generally offer fixed CAM with fixed escalations
 - 2. Smaller landlords offer a prorata CAM charge
- iii. Type of asset will influence how CAM is charged:
 - 1. Single asset verse



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2. Shopping center verse
 3. Regional mall verse
 4. Office building
2. Force Majeure
- A. How has it changed since COVID?
 - i. Is COVID force Majeure? Or is it the government response thereto?
 - ii. Should you keep pandemic separate from force majeure clause?
 - iii. What is effect on rent commencement for new build?
 - iv. Local/Regional verse National
 - v. Large landlord verse small landlord
3. Lease Guaranty issues
- A. What types of Guaranties may be required?
 - i. Personal – an individual or individuals guaranty the lease.
 - ii. Corporate – a legal entity or entities (i.e. corporation, a limited liability company or limited partnership) guaranty the lease.
 - B. Term of Guaranty:
 - i. Burn off
 - ii. For the term of the lease
 - iii. For a rolling period of time
 - iv. All of these terms can be subject to conditions, such as:

So long as Tenant is never in monetary default under the Lease during the first 3 Lease Years of the Lease Term, then starting on the 4th Lease Year of the Lease Term, the undersigned's liability under this Guaranty shall not exceed a sum equal to the Minimum Rent and all Additional Rent charges which would have been due from Tenant to Landlord pursuant to the Lease for a period of 12 months following the date of Tenant's default that gave rise to the undersigned's liability under this Guaranty.

- C. Amount of guaranty: Tenant Improvements, plus Gross rent

...plus the unamortized portion of the Construction Allowance, depreciated on a straight-line basis over the Lease Term, as set forth on the Construction Allowance Rider.

- D. Things to consider:
 1. Credit worthiness of tenant
 2. Married individuals whose spouses won't sign guaranty.
 - i. What are the risks?
 - ii. What are potential solutions?
- E. Alternatives to a Guaranty:
 - i. Letter of Credit (LOC)

Tenant shall provide an unconditional, transferrable irrevocable standby Letter of Credit ("LOC") in the amount of \$xxx,xxx.xx for the benefit of Landlord, which shall be of full force and effect for the entire Term.

- ii. Security Deposit
4. Large Tenant's Contribution to Build Out



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- A. What to consider when the Tenant is investing substantial funds in its build out?
Shouldn't the tenant be reimbursed in a casualty and, or condemnation events?

If a portion of the Project is taken by eminent domain, Landlord shall have the right to terminate this Lease, provided it gives written notice thereof to Tenant within ninety (90) days after the date of taking, and if such taking occurs with the first thirty-five (35) months of the Lease, Tenant shall be provided a proportionate share of the Entire Premises Abatement that is has not yet realized as reimbursement as of the date of the taking.

5. Common insurance issues that arise for both Landlord and Tenant
- A. Common general terms – who insures what?
 - B. Shifting risk – the intersection with indemnity clauses and subrogation
 - C. The self-insured tenant
 - i. What is important to consider?
 - D. Insurance during course of construction
 - E. Indemnities – Tenant and Landlord

To the extent permitted by law, Tenant agrees to indemnify and save Landlord, its beneficiaries and their respective partners, agents and employees harmless against any and all third party claims, demands, costs and expenses, including reasonable attorney's fees for the defense thereof, arising from Tenant's use and occupation of the Premises or the Project from any breach or default on the part of Tenant in the performance of any covenant or agreement on the part of Tenant to be performed pursuant to the terms of this Lease, or from any act or neglect of Tenant, its agents, servants, employees or invitees, in or about the Premises or the Project, provided that the terms of the foregoing indemnity shall not apply to the negligence or willful misconduct of Landlord. In case of any action or proceeding brought against Landlord, its beneficiaries or their respective partners, agents or employees by reason of any such claim, upon notice from Landlord, Tenant covenants to defend such action or proceeding by counsel reasonably satisfactory to Landlord. To the extent permitted by law, Landlord agrees to indemnify and save Tenant, its partners, agents and employees harmless against any and all third party claims, demands, costs and expenses, including reasonable attorney's fees for the defense thereof, arising from any breach or default on the part of Landlord in the performance of any covenant or agreement on the part of Landlord to be performed pursuant to the terms of this Lease, or from any negligence or willful misconduct of Landlord, its agents, servants, employees or invitees in the Common Areas, provided that the terms of the foregoing indemnity shall not apply to the negligence or willful misconduct of Tenant, its agents, servants, employees and contractors.

6. Business Terms negotiation at LOI stage
- A. Term
 - B. Type of Rent:
 - i. Rents (with charts for escalations), Gross Rents (with charts for escalations), including renewal term escalations
 - ii. Percentage Rent
 - 1. Percentage Rate
 - 2. Breakpoint- Natural verse unnatural



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Natural: 6% of Gross Sales in excess of the Sales Breakpoint. The Sales Breakpoint shall be determined by multiplying the Minimum Rent by .06.

Unnatural: 6% of Gross Sales in excess of the Sales Breakpoint. The Sales Breakpoint shall be \$x,xxx,xxx.xx per annum through the last day of the Term.

3. Escalations with rent and chart

Min Rent starts at \$xxx,xxx.xx per annum with x% annual increases as set for the below:

Year 1: \$xxx,xxx.xx

Year 2: \$xxx,xxx.xx

Year 3: \$xxx,xxx.xx

Year 4: \$xxx,xxx.xx

Year 5: \$xxx,xxx.xx

- C. Other key items to pre-negotiate in the LOI:
 - i. Extra Charges (NNN's) and calculations
 - ii. Utilities
 - 1. Will landlord provide, and if so will tenant reimburse separately or are the utilities included in gross rent?
 - 2. Should tenant contract directly to third party utility company? Will a maintenance contract be required?
 - iii. Maintenance and Repair- who is responsible for what?
 - iv. Will there be an exclusive, and, if so, what are the remedies, if breached?
 - v. Use Clause
- D. Will there be a Radius, and, if so, what are the remedies, if breached?
- E. Will there be a Kickout, and, if so, what are the remedies, if breached?
- F. Turnover of space:
 - i. Will there be landlord work or will it be an "as-is" delivery?
 - ii. Will there be tenant work; if so, what is the scope?
- G. TI and payment schedule
 - i. Landlord would like to pay when 100% complete, open and receipt of all final lien waivers and affidavits.
 - ii. Tenant would like assistance through the build out process
 - 1. 50% at start of construction, 25% at 75% complete and remaining 25% when complete.
- H. Delivery date and penalties for landlord and tenant
- I. Rent commencement date (when tenant actually starts pay rent) verse lease commencement date
- J. Due diligence period, Approval period, etc.
- K. Signage
- L. Co- Tenancy
- M. Parking
- N. No Build Zones
- O. SNDA
- P. Confidentiality
- Q. Compliance with laws
- R. Operating Covenant
- S. Constructions details



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- T. Restoration at end of term
- U. Tenant specifics, such as need for increased electric usage, or such
- V. Brokers involved in the deal for Landlord and Tenant representation
- W. Right of first refusal
- X. Sublease/assignment
- Y. Holdover
- Z. Exclusivity
- AA. Relocation rights
- ii. What exhibits should be included?
 - A. Site plan
 - B. Legal description
 - C. Lease commencement memorandum
 - D. Landlord's work
 - E. Tenant's work
 - F. Existing exclusive use rights & prohibited uses
 - G. Plans and specifications for tenant improvements
 - H. Form of Memorandum of Lease
 - I. Form SNDA
 - J. Rules & Regulations
- 7. Lease requirements for notifying a lender
 - A. Landlord's need to comply with its loan agreements
 - B. Landlord's inability to compel lender action (i.e. SNDA)
 - C. Hidden costs of loans (SNDA and consent fees)
 - D. Effect of tenant's non-compliance
- 8. Non-permitted transfers that require Landlord consent & excess rents:
 - A. What tenant wants verse what Landlord wants?
 - i. Tenant wants:
 - 1. Flexibility to assign the lease without interference from landlord
 - 2. Assignment to an affiliate without needing landlord's consent
 - 3. If able to negotiate payment of more rents, tenant should keep it
 - 4. Tenant and guarantor need to be released, at the very least if new tenant has a certain net worth.
 - 5. Landlord has staff to prepare documents at no additional fee
 - 6. Send basic letter stating who the new tenant is and their billing address
 - 7. If new tenant is different use, landlord should accept it.
 - ii. Landlord wants:
 - 1. Creditworthiness
 - 2. Experience in permitted use
 - 3. If franchisee, bona fide franchisor and ownership of other
 - 4. All rent
 - 5. No release of tenant or guarantor
 - 6. Pay us a fee to process
 - 7. Written assumption
 - 8. No change of use / like kind replacement
 - A. Broad Use Clauses and issues with REAs and COREAs.
 - A. Potential issues that arise today?
 - i. Stuck with retail use only in many documents
 - ii. Prohibitive uses are way out of date and now just secret profit centers (consent for \$)



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The Development shall contain first class retail uses. In the Development second hand stores, churches, schools, tattoo parlors, gun ranges, and entertainment uses shall be prohibited. The Development shall include no more than 2 restaurant uses.

- iii. Who are the parties today and do they still have the same interest they had when the REA was written (e.g., permanently dark Sears box owner does not have the same concerns as an operating department store)?
- iv. Parking lot use issues/restrictions (to-go / BOPIS parking issues)
- B. Indiana statute that requires recording of memorandum of lease
 - i. Indiana Code § 32-31-2-1 provides that no more than “forty-five (45) days after” after lease “execution, a lease of real estate for a period longer than three (3) years shall be recorded in the Miscellaneous Record in the recorder’s office of the county in which the real estate is located.” The statute allows for a memorandum of lease to be recorded in lieu of a lease, if the memorandum is executed and acknowledged by the parties and contains: (1) the names of the parties; (2) the term of the lease...; (3) any option of the lessee to renew or extend the term of the lease...; and (4) the specific legal description of the real estate or a survey or plot plan...showing the location of the real estate. *See Ind. Code § 36-2-11-20(g).*
 - ii. How about other states?