

Customizing Your Lease: One Size Fits All?

Jack Garson, Esq.

You have invested millions of dollars in your shopping center, hiring only the best architects, brokers and consultants to maximize the return on your investment. Is your next move to print out a standard lease form and apply it to each and every retailer, from Krispy Kreme to Kmart?

You would be ill-advised to ignore the need for a lease form that is customized to specific situations, particularly local requirements. Take, for example, a hypothetical situation 3 to 5 years from now: the neighboring land owner finally agrees to sell you the adjacent property, allowing you to expand your shopping center.

Do all of your current leases address this possibility? Can you modify your pass-thru expense provisions to address a new formula for allocating expenses to your tenants? If the adjacent land is occupied, do the existing exclusive use rights that you have granted your tenants allow for competing uses in the expansion area? Do you have the right to relocate tenants or build on common areas in order to accommodate the expansion?

All of these possibilities can and should be addressed if any expansion, or even a renovation, is possible. The devil is in the details, the saying goes, and well-prepared leases don't overlook future possibilities.

Clearly, you should tailor your expense pass-thru provisions to address local issues. For example, some jurisdictions have enacted numerous fees and "revenue enhancements" which do not clearly fit within traditional real estate tax definitions and pass-thru provisions. In addition to "business taxes" and "gross revenues taxes," some juris-

dictions now impose taxes on the amount of trash generated by a shopping center, and even the number of parking spaces at the shopping center. Only customized lease provisions will clearly avoid disputes with tenants and protect landlords against un-reimbursed expenses.

Similarly, applicable zoning and related use requirements vary from jurisdiction to jurisdiction — and so should your lease form. In many jurisdictions, the signage used by one tenant does not affect the amount of signage available to other tenants. In some jurisdictions, however, the oversized storefront sign of one retailer will deprive future tenants of otherwise permissible signage on their storefronts.

Indeed, excess usage of any regulated activity can have profound consequences. In one such case, the excess parking use by a post office tenant at one shopping center prevented the issuance of occupancy permits for new tenants at the same property. Knowing — and tailoring — your lease to satisfy local requirements can be as important as calculating triple-net rates.

Will the local courts even enforce a "standard" lease? Court cases and statutes impose lease requirements that vary from one locale to another. In many states, if a tenant must obtain the landlord's consent to a lease assignment, the landlord can withhold such consent, regardless of the reason. However, in some jurisdictions, the landlord may only reasonably withhold consent (instead of withholding consent at the landlord's discretion) if the lease includes special wording reserving the landlord's discretion.

The reality is that a variety of landlord rights and remedies are affected by local rules. A landlord's obligation to re-let the premises (after a tenant default), the waiver of the tenant's right to a jury trial and even the ability to recover late charges, interest and attorney's fees, can all be jeopardized by overlooking local rules.

In one case, an anchor tenant remained in possession of the premises without paying rent to the landlord and delayed trial for more than a year because the lease failed to include a proper waiver of jury trial in the lease. Ultimately, the landlord was forced to waive the tenant's default and settle the case to preserve the landlord's ability to pay the mortgage on the property.

Overlooking unique requirements risks expensive disputes, lower revenues and costly delays. Certainly, there are situations where standard forms present less risk.

Standardization is possible with such aspects as your form estoppel certificate, assignment agreement and even an agreement for early lease termination. But your master lease is no more standard than your property or the deal itself.

When a landlord is faced with a tenant who isn't paying the rent and can be evicted only after great difficulty and expense, you can be sure that the landlord wishes he or she had customized the lease to address these problems. **SCB**

Jack Garson is the founding principal of the law firm of Garson Claxton, LLC in Bethesda, Maryland. He can be reached at jgarson@garsonlaw.com.