

By Lloyd Birnbaum, **Fox Rothschild LLP**

Ten costly mistakes to avoid in shopping center leases

1. Know your tenant and guarantor. Review financial statements to ensure that names match the tenant and/or guarantor's legal names. Developers anxious to finish the deal often neglect to have the correct credit-worthy entity named on the lease. Tenants and/or guarantors may provide a consolidated financial statement that includes other parties. As a result, the lease or guaranty might not be from the credit-worthy entity.

2. Limit store use to a particular trade name. If percentage rent is part of the deal's economics, the tenant should be limited to operating under a specific trade name to avoid selling merchandise at lower price points.

3. Add a disclaimer to site plan exhibits in new shopping center leases. The lease or the site plan exhibit in new construction should include a disclaimer that allows the developer to make changes to the center that don't adversely impact parking, access, or visibility. Site plan changes may be desired by the developer, or dictated by tenants or the governing authorities as a condition to granting site plan approval. Without the disclaimer, the landlord may face an injunction or lawsuit for misrepresenting the center's configuration.

4. Limit authorized uses. These

clauses should be specific. Avoid granting a use that violates another tenant's exclusive use. In many jurisdictions, unless the lease limits the premises to a specific use, any lawful use is permitted.

5. Avoid broad exclusive uses. These clauses could have unintended consequences. Is the exclusive clause so broad that the landlord is precluded from leasing to others without being in violation? For example, if a lease provides a tenant with an exclusive for medical offices and for the sale of health and wellness products, is the landlord precluded from leasing to a Tempur-pedic store? Litigation of such an issue could be costly.

6. Recapture the premises if the tenant closes its doors. If the tenant won't agree to continuously operate its store, the landlord needs the right to recapture the premises. Vacant stores can be detrimental to the economic viability of a shopping center.

7. Resist exclusions from Common Area Maintenance (CAM) expenses. Landlords and tenants are diametrically opposed when it comes to CAM expenses. Landlords want CAM to be all-inclusive so that the lease is truly triple net. Tenants want CAM to be limited and are concerned about capital improvements that have a useful life longer than the term of the lease. Parties need to analyze the clause's key elements and monetary impact on the net return on investment. Sometimes the issue is resolved by agreeing to a cap on annual CAM increases.

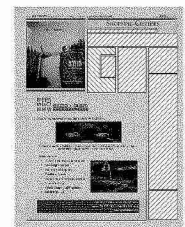
Landlords should insist that a cap exclude costs beyond the landlord's reasonable control, such as increases in costs due to adverse weather conditions. Landlords need to be careful about what they agree to exclude from CAM, since it could impact the "financability" of the lease.

8. Offer estimated v. guaranteed delivery dates: In new construction, tenants want advance notice of the premises' actual delivery date so it can timely hire staff and order inventory. Landlords should offer an estimated delivery date rather than a specific date to avoid late delivery penalties. If the landlord agrees to a penalty, the date should be subject to force majeure delays and capped at a reasonable amount to avoid hardship to the project's bottom line. A termination right can be offered if delivery is more than a certain number of days/months past the estimated date with the landlord's right to nullify the tenant's termination if the landlord delivers within a short period of time following termination.



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9. Landlords need force majeure clauses. Force majeure clauses are essential in new construction. If the landlord is delayed



in delivering the premises due to causes reasonably beyond its control, delivery should be extended without penalty for a period equivalent to the delay. In no event should force majeure ever excuse the timely payment of rent.

10. Tenants should be responsible for compliance with laws. Landlords should make sure

that leases provide for changes in the law, not just laws in effect when signed. Laws can change and compliance could be expensive.

Lloyd Birnbaum, a partner with Fox Rothschild LLP, has more than 20 years experience in commercial real estate. ■