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Austin, Texas**You Can't Just Store It, Build It and Ship It: Peculiar Issues
with Industrial and Warehouse Leases****Amy M. Mitchell
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Industrial leases can be under-valued and under-negotiated. This could be because the tendency of the negotiator is to focus on the fact that the space is for operations and will not be seen by outsiders. Accordingly, industrial leases sometimes are seen as a form contract used in connection with a business's operation and therefore not subject to much negotiation and focus. Generally, industrial leases are not seen as having the same impact and importance as office and retail leases for spaces where the general public, and in particular the tenants' customers, see the results.

However, this lack of attention can result in unfortunate and costly ordeals involving industrial leases. Industrial leases can be extremely complex because even though the space being leased can be a boring, tilt-wall building, the uses inside the space vary widely. Many times, an industrial lease actually is more a hybrid between an office lease and a retail lease, which incorporates concepts from office and retail uses on top of the complexity of a warehouse, shipping or other function. Understanding the complexities involved in industrial leasing is the first step to ensure that the leases are appropriately negotiated, so that neither party incurs unexpected costs or issues.

There are many complexities that can arise in connection with industrial leases from the tenant's use of the leased space to the financing used to build the building or the tenant's finish out. The following five (5) areas cover some of the basic complexities that might be encountered when handling industrial leasing:

- I. maintenance and repair;
- II. installing specialty equipment;
- III. public financing, tax abatement and other development incentives;
- IV. condition of premises on surrender; and
- V. environmental issues.

These are examples of areas where parties to industrial leases could run into unexpected issues, including disputes and litigation. However, this is not an all-inclusive list and those involved with industrial leasing should take a close, hard look at the uses and needs of both parties in order to ensure that the leases are negotiated in a manner that all parties understand and that will not result in any unwanted surprises.

I. Maintenance and Repair.

While most any lease will address maintenance and repair, addressing maintenance and repair obligations in industrial leases must take into account the tenant's use of the space. Your everyday office lease and retail lease is likely to split the structural maintenance and repair obligations by providing that the tenant is responsible for the non-structural portions of the premises and the landlord is responsible for the structural portions of the premises and the common areas. There is usually a carve-out to the landlord's responsibility for any damage caused by the tenant.

Many industrial lease forms use this same concept and because it matches what a tenant would expect in an office or retail lease, the provision remains unchanged. See Addendum I

attached hereto for an example of this provision in a form industrial lease where a tenant is leasing the entire building. This becomes an issue where the tenant's permitted use under the lease results in damage to the premises and the parties try to point the finger at the other to repair the damage.

For example, assume that a tenant leases space in an industrial building with this provision and the permitted use in the lease is for storing, warehousing and distributing steel and steel-related products. The use requires forklifts and heavy equipment. Both parties fully understand the use and expect that the tenant will be using this type of equipment in the space. However, if the tenant begins to use the space as permitted and the slab begins to crack (not through any malfeasance of the tenant or landlord) as a result of tenant's use, then the parties are faced with a dilemma. The lease would provide that landlord is responsible for the slab (e.g., a structural portion of premises) unless the damage was caused by the tenant. Is damage to a slab in the premises for tenant's use of the space for its permitted use "caused" by tenant? What if the slab was not designed for the tenant's use, but the landlord knowingly leased it to tenant anyway? The answer is unclear, which means that the parties are stuck disputing claims and operations at the space may be hampered because the damage remains unrepaired. The parties may also file suits and counterclaims against each other.

This is all driven because the basic division of maintenance and repair obligations in office and retail leases make sense where the tenants are using the space in a manner that (for the most part) will not result in any appreciable damage to the premises, including the structure. If an industrial lease is negotiated without an appreciation for the tenant's use and the potential repairs and maintenance that will likely come up during the term of the lease, then the parties will at some point likely be in a dispute about who is responsible for maintaining or repairing some crucial aspect of the leased space and there can be an interruption of use at the premises which can seriously impact the tenant's operations at the premises and revenue while the tenant is still obligated to pay full rent.

II. Installing Specialty Equipment

If an industrial user wants to use an industrial building for specialized uses such as a test lab or a clean room, it is probable that the premises will need additional electrical and HVAC capacity as well as other base building improvements including changes to the slab and the roof. An industrial user needs to ensure that the premises will fit its needs at a reasonable cost and an industrial landlord needs to ensure that it will get the premises back in a usable condition without having to spend a lot of money to rehab the space. Specialized equipment can include conveyor lines, wet labs, raised flooring, trenches and a host of numerous other specific equipment that the tenant will need for its use. Every installation of specialized equipment should be looked at carefully and the lease should be negotiated in a manner to appropriately accommodate such installation. The following are some general considerations for specialized equipment in industrial leases:

A. Upgrade Base Building

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