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Gotchas: Traps in Retail Leasing for the Unwary or Uninitiated

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GOTCHAS: TRAPS IN RETAIL LEASING FOR THE UNWARY OR UNINITIATED

I. INTRODUCTION

A. Overview

When a landlord develops a shopping center (or acquires one) the landlord is consciously generating (or acquiring) an income stream. Sometimes, with large, national, credit-type tenants (whether retail "big box" or other "500 lb. gorillas"), the leases contain some traps for the unwary which may cause interruptions in that rent income which the landlord did not intend. Likewise, a tenant can find itself making payments (often when least expected), if they are not careful. This paper deals with problems landlords and tenants face when confronted with such leases, focusing on those aspects of the leases which can interrupt the income stream the landlord thought it was generating or acquiring or unexpectedly increasing the tenant's obligations.

B. Disclaimer No. 1

While all the provisions described below come from real deals, they do not all come from the same deal and the landlord and tenant (as the case may be) had different bargaining power in each transaction. Accordingly, these provisions, comments, suggested revisions and observations are meant not as "end all and be all" provisions for every deal that you are involved in, but merely starting points and things to think about.

C. Disclaimer No. 2

The author actually makes his living in this area. Nothing contained in this paper or said in the presentation can or may be used against him in future negotiations and he reserves the right to deny anything that he has said or written, depending upon the relative bargaining power of his client at the time.

PART A. GOTCHAS FOR LANDLORDS

II. THE RENT COMMENCEMENT DATE CONUNDRUM – WHEN DOES RENT START?

A. From Landlord's Perspective

1. starts the earlier of:
 - a. Opening for business, or
 - b. A specific number of days after Landlord completes its "work" and tenders possession of premises to Tenant.

B. Pitfalls

1. Be careful/precise with definition of "work" – be sure Landlord can do it all.
2. Make sure all Landlord's obligations are within its control.
3. Provide mechanism to evidence compliance by Landlord with its obligations.

C. Tenant's Form

(b) COMMENCEMENT DATE: One Hundred Sixty (160) days following the last to occur of (i) the Delivery Date and (ii) Tenant's receipt of all necessary and required permits and authorizations for the construction of Tenant's Work.

(f) DELIVERY DATE: The first date within a Permitted Delivery Period upon which the last of the following occurs (hereinafter "deliver" or "delivery"): (1) Receipt by Tenant of this Lease fully executed by Landlord; (2) substantial completion of Landlord's Construction Obligations specified in Section 4.1; (3) Landlord's delivery to Tenant of exclusive possession of the Store in broom-clean condition, free of all tenancies (except Tenant's) with all personal property of prior tenants and occupants removed; (4) Landlord has approved Tenant's plans for Tenant's Improvements to the Store and signage; (5) receipt by Tenant of a current certificate from an environmental consultant acceptable to Tenant certifying to Tenant that such consultant conducted a comprehensive survey of the Store prior to the Delivery Date, and that the Store, including, without limitation, the walls, ceilings, structural steel, flooring, pipes and boilers, is free of "Asbestos-Containing Materials" (as defined in Section 16.3(a) below); and (6) Landlord's installation of separate utility meters for all utilities required by Tenant.

D. Observations

1. Not tied to opening – sometimes that's the business deal. Generally, the Landlord will want rent to commence when the Tenant opens for business, notwithstanding that certain conditions remain unsatisfied.
2. What happens if Tenant never gets building permit?
3. What if Tenant delays in preparing plans (so Landlord never "approves" plans per item 4)?
4. What if Tenant doesn't receive asbestos certification – who is to obtain – who is acceptable consultant?

E. Landlord's Revision

(b) COMMENCEMENT DATE: One Hundred Sixty (160) days following the last to occur of (i) the Delivery Date and (ii) Tenant's receipt of all necessary and required permits and authorizations for the construction of Tenant's Work provided that (i) Tenant shall have applied for all such permits and paid all fees relating thereto within ten (10) days after Landlord and Tenant have approved Tenant's Plans (as provided in Section 2.1(t)); (ii) Tenant shall diligently and promptly seek to obtain all such permits within sixty (60) days after submission; (iii) Tenant shall periodically (and at any time upon Landlord's request) advise Landlord of the status of such permit applications (including, without limitation, any objections to Tenant's Plans by applicable officials) and (iv) Landlord shall have the right, but not the obligation, to participate in such process, at Landlord's expense.

(f) DELIVERY DATE: The first date within a Permitted Delivery Period upon which the last of the following occurs (hereinafter "deliver" or "delivery"): (1) Receipt by Tenant of this Lease fully executed by Landlord; (2) substantial completion of Landlord's Construction Obligations specified in Section 4.1 (as evidenced by a certificate of substantial completion thereof by Landlord's architect, certified to both Landlord and Tenant); (3) Landlord's delivery to Tenant of exclusive possession of the Store in broom-clean condition, free of all tenancies (except Tenant's) with all personal property of prior tenants and occupants removed; (4) Landlord has approved Tenant's plans for Tenant's Improvements to the Store and signage (provided Tenant has timely submitted same for Landlord's approval as set forth in Section 2.1(f) below); (5) ~~receipt~~ delivery by Landlord to Tenant of a current certificate from ~~an~~ (or other environmental consultant reasonably acceptable to Tenant) certifying to Tenant that such consultant conducted a comprehensive survey of the Store prior to the Delivery Date, and that the Store, including, without limitation, the walls, ceilings, structural steel, flooring, pipes and boilers, is free of "Asbestos-Containing Materials" (as defined in

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