Commercial Office and Retail Leasing: What Tenants and In-House Counsel Need to Know

TUESDAY, JULY 30, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

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TENANT COMMERCIAL LEASING CHECKLIST

[Please note that the below checklist is not intended as an exhaustive or comprehensive list of all issues or negotiated outcomes a tenant should be concerned with. Issues will depend on your specific deal, the unique nature of the project and premises, and other dynamics in the market and relationship with the landlord.]

1. Basic Lease Information
   • Confirm Landlord and Tenant entities?
   • Building Description
   • Premises Description
   • Square Footages per BOMA
   • Base Rent / Correct Calculation? /Right to Remeasure?
   • Rent Abatement
   • Base Year?
   • Term / Commencement Date / Termination Date – End of Month?
   • Permitted Use/Exclusive Use

2. Lease Grant
   • Present, not future tense (demises, grants, leases)
   • Include right to use common areas (including parking areas)
   • Include right to access Premises

3. Adjustment of Commencement Date; Possession
   • Landlord should be responsible for all delays (including Force Majeure delays) except Tenant Delays
   • Landlord to provide Tenant notice of Tenant Delay
   • Definition of Substantial Completion
   • Landlord responsible for Latent Defects and Punchlist Items
   • Rent Abatement for failure to timely deliver possession
   • Penalty tied to holdover under existing lease
   • Termination right
   • Right to Early Possession to install FF&E

4. Rent
   • Sales and use taxes not included in “Taxes”
   • Revised Operating Expenses and Tax Estimates no more than 1x per year
   • Overpayments by Tenant are credited or refunded at Tenant’s election
   • Landlord must issue statement of actual Operating Expenses and Taxes within ninety (90) days or lose its right to collect true-up amounts
   • Landlord can’t collect more than 100% of the costs
   • Capital improvements limited to (a) compliance with laws enacted after Commencement Date and (b) reduction in costs
   • Amortize capital improvements over useful life
   • Cap on Expenses
   • No inclusion for Tax Reduction Costs
   • Audit Rights
   • List of Operating Expenses Exclusions
5. **Compliance with Laws/Rules**
   - Landlord responsible for compliance with Laws
   - Landlord covenants regarding the condition of the Premises
   - Conflict between Rules/Lease; Lease controls
   - Rules applied in a non-discriminatory manner

6. **Security Deposit**
   - Security Deposit returned within 30 days
   - Apply Security Deposit only if default beyond applicable notice and cure periods
   - Reasonable time to replenish (10 Business Days)
   - Landlord must assign Security Deposit to successor

7. **Leasehold Improvements**
   - Landlord to provide notice of requirement to remove above-standard improvements at time of approval of such improvements
   - No requirement to remove Landlord Work and “normal” office improvements
   - No cable removal

8. **Repairs and Alterations**
   - Need to specify Landlord repair obligations
   - Tenant repair obligations to exclude Casualty and Landlord repair obligations
   - Tenant not responsible for repairs due to Landlord’s negligence
   - Tenant only responsible for repairs in the Premises and systems exclusively servicing the Premises
   - Plans required only if necessary to issue permits
   - No security (e.g. performance bonds) should be required for performance of alterations
   - Consider allowing some level of Cosmetic Alteration without landlord consent

9. **Entry by Landlord**
   - Landlord won’t interfere with conduct of Tenant’s business or access to the premises
   - Abatement of Rent for interference
   - Tenant may have an employee accompany Landlord
   - Is there a Tenant Secured Area in the premises with sensitive/confidential information?

10. **Assignment/Subletting**
    - Landlord consent not to be unreasonably withheld. Reasonableness requirement must apply to future transfers as well.
    - Release of Tenant in the event of assignment?
    - If Landlord elects to recapture, Tenant can withdraw its request for consent
    - No Landlord right to (a) recapture or (b) to get review fees or (c) share in profits if Permitted Transfer
    - Advance notice of Landlord’s intention to recapture
    - Cap on Landlord’s review file
    - Determining Landlord’s share of any excess profits (not more than 50%). Also pay excess only when received by Tenant.
    - Goodwill not to be included when calculating Landlord’s share of excess profits
    - Permitted Transfer/Franchisor transfer rights
• Eliminate any requirement that Tenant can’t sublease for less than owner’s rent rate. Comprise: Tenant won’t advertise a lower rent rate.
• Delete requirement that Tenant uses Landlord’s broker to sublease space.
• Delete provision which limits Tenant’s remedy to specific performance if Landlord withholds consent. Compromise: Agree to expedited arbitration.

11. Liens
• No responsibility for liens for work to be paid or performed by Landlord
• 30 days to discharge

12. Indemnity and Waiver of Claims
• Mutual indemnity from Landlord
• Tenant’s waiver of Landlord does not apply to Landlord’s negligent or willful misconduct

13. Insurance
• Review with Tenant’s risk manager
• Cap on Tenant’s liability insurance limits ($3 million?)
• Who insures leasehold improvements?
• Tenant right to self-insure
• Delete/cap earthquake insurance deductibles passed through to Tenant
• Tenant may carry blanket insurance or umbrella coverage
• Landlord’s insurance requirements

14. Subrogation
• Landlord and Tenant waive, and shall cause their insurance carriers to waive.
• Covers Tenant’s property and the Building
• Must be mutual

15. Casualty
• Landlord must notify Tenant of election to terminate within 30 days of Casualty
• No Landlord right to terminate if Tenant exercises its renewal options
• Landlord to provide completion estimate within 30 days of Casualty
• Tenant right to terminate if Premises can’t be repaired within 180 days
• Tenant right to terminate during last two years
• Tenant right to terminate if Landlord doesn’t repair within estimated time
• Landlord should be solely responsible for paying all repair costs, not just to the extent of its insurance proceeds
• Tenant right to terminate if Landlord doesn’t have enough insurance proceeds to rebuild
• Landlord restoration must be to substantially the same condition as prior to the Casualty
• Abatement of Rent if Premises is untenantable, unusable or inaccessible

16. Condemnation
• Tenant may terminate if access is taken or if all or a portion of the Premises is taken by Casualty
• If lease is not terminated rent and pro rata share gets adjusted
• If lease is not terminated, Landlord will restore to the condition prior to the taking
• Landlord will exercise its termination right on a non-discriminatory basis
• Tenant may file separate claim for tenant’s property and relocation expenses
17. **Events of Default**
   - Monetary Default only after 5 Business Days’ notice and opportunity to cure
   - Non-Monetary Default – make sure Tenant not in default if commencing and continuing to cure
   - No default because a bankruptcy petition is filed “if Tenant shall contest the same by appropriate proceedings and shall remove or vacate the same within 90 days from the date of the filing.”
   - No default if Tenant abandons or vacates
   - Guarantor default—Tenant has right to find replacement Guarantor

18. **Remedies**
   - “Landlord agrees to use reasonable efforts to mitigate damages.”
   - All costs of reletting and other changes incurred by Landlord must be “reasonable”

19. **Limitation of Liability** - Interest of Landlord in the property to include proceeds (sales and insurance proceeds and rent)

20. **Relocation**
   - One time Landlord right
   - Relocation Space must be comparable
   - 90 days prior notice
   - Restrict location of Relocation Space? Above a certain floor? On a certain side of the Building?
   - Base Rent and Tenant’s Pro Rata Share can’t increase
   - Landlord pays for all costs in connection with the move
   - No relocation during last 2 years or during busy season
   - Tenant right to terminate

21. **Holding Over**
   - No Holdover Rent for first 30 days. Rent calculated on a per diem basis
   - No consequential damages for Holdover

22. **Subordination/Estoppel Certificate**
   - Tenant subordination contingent on receipt of an SNDA
   - Estoppel certificate requirements should be mutual

23. **Surrender of Premises**
   - Tenant must deliver Premises in broom clean condition subject to (a) ordinary wear and tear, (b) Casualty conditions, and (c) Landlord repair work
24. **Additional Retail Considerations**

- Right to Go Dark
- Operating and Opening Co-Tenancies
- No Build/Protected Areas – protect parking, access and visibility
- Early termination right if gross sales do not meet threshold
- Sign rights – protect visibility
- Franchisor rights – address any franchisor requirements to take possession, operate and de-brand following termination
- Operating Hours – limit required operating hours
- Radius restriction – minimize scope or eliminate entirely
- Prohibited uses – restrict Landlord’s right to lease to undesirable tenants (gyms, theaters, cannabis stores, tattoo parlors, adult themed stores, etc.)

Use permit contingency
SAMPLE TENANT ORIENTED WISH LIST OF OPERATING EXPENSE EXCLUSIONS

Notwithstanding anything to the contrary set forth in this Lease, including, without limitation, the terms of this Section, Operating Expenses shall not include:

(1) any payments under a ground lease or master lease relating to the Project;

(2) costs of a capital nature, including, without limitation, capital improvements, capital repairs and capital equipment; except for those (i) required to reduce Operating Expenses (amortized at an annual rate reasonably calculated to equal the amount of Operating Expenses to be saved in each calendar year throughout the Term of the Lease, as reasonably determined at the time Landlord elected to proceed with the capital improvement or acquisition of the capital equipment to reduce Operating Expenses), together with interest at the actual interest rate incurred by Landlord, or (ii) incurred after the Commencement Date in order to comply with any governmental law or regulation that was enacted subsequent to the Commencement Date (but specifically not including any re-enactment or subsequent codification, local or otherwise, of any laws or regulations existing as of the Commencement Date, including without limitation the Americans with Disabilities Act or any state or local codifications thereof) provided that such capital costs shall be amortized over their useful life, together with interest at the actual interest rate incurred by Landlord; all other capital expenditures, improvements and repairs shall be excluded from Operating Expenses;

(3) rentals for items which if purchased, rather than rented, would constitute a capital improvement or equipment;

(4) costs incurred by Landlord for the repair of damage to the Building or for any other part of the Project pursuant to the terms of Section __ of this Lease or otherwise;

(5) the cost of any item reimbursable by insurance or condemnation proceeds or which would be reimbursable from insurance required to be maintained by Landlord under this Lease (or similar insurance on parts of the Project other than the Building);

(6) costs, including permit, license and inspection costs, incurred with respect to the installation of tenants’ or other occupants’ improvements made for tenants or other occupants in the Project or incurred in renovating or otherwise improving, decorating, painting or redecorating space for tenants or other occupants of the Project;

(7) depreciation and amortization;

(8) marketing and promotional costs, including but not limited to leasing commissions, real estate brokerage commissions, and attorneys’ fees in connection with the negotiation and preparation of letters, deal memos, letters of intent, leases, subleases and/or assignments, space planning costs, and other costs and expenses incurred in connection with lease, sublease and/or assignment negotiations and transactions with present or prospective tenants or other occupants of the Project;

(9) costs of services, utilities, or other benefits which are not offered to Tenant or for which Tenant is charged for directly but which are provided to another tenant or occupant of the Project, including, but not limited to, above Building standard heating, ventilation and air-conditioning, janitorial services and exclusive use Common Areas;

(10) costs incurred by Landlord due to any violation of the terms and conditions of any lease of space or occupancy agreement in the Project;

(11) costs and the overhead and profit increment paid to Landlord, to affiliates or partners of Landlord, partners or affiliates of such partners, or affiliates of Landlord for goods and/or services in the Project to the extent the same exceeds the costs or the overhead and profit increment, as the case may be, of such
goods and/or services rendered by unaffiliated third parties on a competitive basis in Comparable Buildings;

(12) interest, principal, attorneys’ fees, environmental investigations or reports, points, fees and other lender costs and closing costs on debts or amortization on any mortgage or mortgages or any other debt instrument encumbering the Building or the Project or any part thereof or on any unsecured debt;

(13) Landlord’s general corporate overhead and general and administrative expenses, including costs relating to accounting, payroll, legal and computer services which are partially or totally rendered in locations outside the Project;

(14) salaries of officers, executives or other employees of Landlord, any affiliate of Landlord, or partners or affiliates of such partners or affiliates, other than any personnel engaged exclusively in the management, operation, maintenance, and repair of the Building (but not leasing or marketing), and working in the Building management office and not typically included in the management fee being paid and included in Operating Expenses; provided such individuals do hold a position which is generally considered to be higher in rank than the position of the manager of the Building or the chief engineer of the Building;

(15) all items and services for which Tenant or any other tenant in the Project is required to reimburse Landlord (other than through Tenant’s Percentage or any other tenant’s share of Operating Expenses);

(16) advertising and promotional expenditures, including but not limited to tenant newsletters and Project or Building promotional gifts, events or parties for existing or future occupants, and the costs of signs (other than the Building directory) in or on the Project identifying the owner of the Building or any other building in the Project or other tenants’ signs and any costs related to the celebration or acknowledgement of “Holidays,” as that term is defined in Section ____, below;

(17) electric power or other utility costs for which any tenant directly contracts with the local public service company;

(18) costs incurred in connection with any governmental laws and regulations applicable to the Project, including, but not limited to life, fire and safety codes, including any codes relating to the installation or existence of fire sprinklers, environmental and “Hazardous Materials” laws and federal, state or local laws or regulations relating to disabled access, including, but not limited to, the Americans With Disabilities Act;

(19) costs, penalties, fines, or awards and interest incurred as a result of Landlord’s negligence in Landlord’s operation of the Project, violations of law, negligence or inability or unwillingness to make payments and/or to file any income tax, other tax or informational returns when due;

(20) costs which are covered by and reimbursable under any contractor, manufacturer or supplier warranty;

(21) costs arising from the negligence, or intentional acts of Landlord or its agents, or of any other tenant, or any vendors, contractors, or providers of materials or services selected, hired or engaged by Landlord or its agents;

(22) costs arising from the presence or removal of Hazardous Materials located in the Building or the Project, including, without limitation, any costs incurred pursuant to the requirements of any governmental laws, ordinances, regulations or orders relating to health, safety or environmental conditions, including but not limited to regulations concerning asbestos, soil and ground water conditions or contamination regarding hazardous materials or substances;

(23) costs arising from Landlord’s charitable or political contributions;
(24) costs arising from any type of insurance maintained by Landlord which is not required or allowed to be maintained by Landlord pursuant to Section ___ of this Lease;

(25) costs for sculpture, paintings or other objects of art or the insuring, repair or maintenance thereof;

(26) costs (including in connection therewith all attorneys, fees and costs of settlement judgments and payments in lieu thereof) arising from claims, disputes or potential disputes in connection with potential or actual claims, litigation or arbitrations pertaining to Landlord and/or the Building and/or the Project;

(27) costs, including but not limited to attorneys’ fees associated with the operation of the business of the partnership or entity which constitutes Landlord as the same are distinguished from the costs of operation of the Building, including partnership accounting and legal matters, costs of defending any lawsuits with any mortgagee, costs of selling, syndicating, financing, mortgaging or hypothecating any of Landlord’s interest in the Building, Project or any part thereof, costs of any disputes between Landlord and its employees, disputes of Landlord with Building or Project management or personnel, or outside fees paid in connection with disputes with other tenants;

(28) costs incurred in removing and storing the property of former tenants or occupants of the Project;

(29) the cost of any work or services performed for any tenant (including Tenant) at such tenant’s cost;

(30) (i) the cost of installing, operating and maintaining any specialty service, observatory, broadcasting facilities, luncheon club, museum, athletic or recreational club, or child care facility, and (ii) the cost of installing, operating and maintaining any other service operated or supplied by or normally operated or supplied by a third party under an agreement between a third party and a landlord;

(31) the cost of correcting defects in the design, construction or equipping of the Project or in the Project equipment;

(32) the cost of any work or service performed for any tenant of the Project (other than Tenant) to a materially greater extent or in a materially more favorable manner than that offered to Tenant;

(33) premiums for insurance to the extent Landlord is directly (and not through Operating Expenses) reimbursed therefor;

(34) the cost of furnishing and installing non-Building standard replacement bulbs and ballasts in tenant spaces;

(35) the cost of any labor, service, materials, supplies or equipment, which is not comparable to the prevailing market rate for such labor, service, materials, supplies or equipment at the time in the Comparable Buildings;

(36) the cost of any parties, ceremonies or other events for tenants or third parties which are not tenants of the Building, whether conducted in the Building, Project or in any other location;

(37) reserves of any kind, including but not limited to replacement reserves, and reserves for bad debts or lost rent or any similar charge not involving the payment of money to third parties;

(38) costs incurred by Landlord in connection with rooftop communications equipment of Landlord or other persons, tenants or occupants on the Building or the Project;

(39) costs relating to any management office for the Building including rent, or for any other management office in the Project;

(40) all assessments and premiums shall be paid by Landlord in the maximum number of installments permitted by law and shall not be included as Operating Expenses except in the year in which the assessment or premium installment is actually paid;

(41) payment of any management fee, whether paid to Landlord or an outside managing agent, in excess of the lesser of (i) the prevailing management fee per rentable square foot charged in the
Comparable Buildings, and (ii) an amount equal to the product of (A) two percent (2%) and (B) the actual amount of gross revenues for the Building;

(42) any costs expressly excluded from Operating Expenses or Real Property Taxes elsewhere in this Lease or included as Real Property Taxes;

(43) costs for services normally provided by a property manager where Operating Expenses already include a management fee;

(44) costs incurred in connection with the original construction of the Building or the Project or any addition to the Project or in connection with any renovation, alteration or major change in the Building or the Project, including but not limited to the addition or deletion of floors;

(45) any costs, fees, dues, contributions or similar expenses for industry associations or similar organizations;

(46) any costs associated with the purchase or rental of furniture, fixtures or equipment for any management, security, engineering, or other offices associated with the Project and Common Areas or for Landlord’s offices or the offices of other landlords of the Project or for the Common Areas of the Building or Project;

(47) any compensation paid to clerks, attendants or other persons in commercial concessions operated by Landlord in the Building or Project;

(48) the entertainment expenses and travel expenses of Landlord, its employees, agents, partners and affiliates;

(49) costs incurred by Landlord due to the violation by Landlord of the terms and conditions of any contract or agreement relating to the Project or any part thereof, including any “Project Documents,” as that term is defined below;

(50) costs of traffic studies, environmental impact reports, transportation system management plans and reports, and traffic mitigation measures or due to studies or reports relating to obligations or the terms of the Project Documents;

(51) all assessments and special assessments due to deed restrictions, Project Documents and/or owners associations which accrue against the Project;

(52) any improvement installed or work performed or any other cost or expense incurred by Landlord in order to comply with the requirements for obtaining or renewal of a certificate of occupancy for the Building or Project or any space therein;

(53) any fees, bond costs or assessments levied on the Project by any rapid transit district (or any other governmental entity having the authority to impose such fees, bond costs or assessments for mass transit improvements);

(54) any costs or expenses relating to any provisions of any development agreements, owner’s participation agreement, covenants, conditions, restrictions, conditional use permits, easements or other instruments encumbering the Project or any part thereof or other agreement relating to the development, entitlement, construction or financing of the Project (collectively, the “Project Documents”), including any initial payments or costs or ongoing payments or costs made in connection with any child-care facilities, traffic demand management programs, transportation impact mitigation fees, water and sewage conservation, recycling, housing replacement and linkage fees, special assessment districts, infrastructure and transportation assessments, art programs, or parking requirements and programs;

(55) Real Property Taxes allocable to the tenant improvements of Tenant or other tenants or occupants in the Building or Common Areas which are in excess of $___ per rentable square foot;
(56) any costs recovered by Landlord to the extent such cost recovery allows Landlord to recover more than 100% of Operating Expenses for any Lease Year from tenants of the Building, and in connection therewith, Landlord shall reduce the amount of Operating Expenses by any refund or discount received by Landlord in connection with any expenses previously included in Operating Expenses;

(57) any profit made by Landlord in connection with Landlord’s collections of Operating Expenses;

(58) any costs for which Landlord has been reimbursed or receives a credit, refund or discount, provided if Landlord receives the same in connection with any costs or expenditures previously included in Operating Expenses for a Lease Year, Landlord shall immediately reimburse Tenant for any overpayment for such previous Lease Year;

(59) any costs incurred in connection with the installation, operation, repair and maintenance of all elevators in the Building;

(60) costs, expenses, taxes or assessments associated with or relating to separate items or categories or subcategories of Operating Expenses to the extent such items, categories or subcategories were not part of Operating Expenses for the Base Year;

(61) the portion of any item of Operating Expenses which increases in excess of market increases over the amount of such item included within Operating Expenses for the Base Year.
Julian Freeman

Julian is a real estate transactions attorney at Cox, Castle & Nicholson. His practice includes all aspects of commercial real estate transactions, including acquisitions and dispositions, development, joint ventures, management of real estate assets, and a particular emphasis on office, industrial, and retail leasing. Since 2007, Julian has drafted and negotiated leases and lease amendments for over 15 million square feet of office, industrial and retail space located throughout the nation (and primarily in the western U.S. metropolitan areas), including the largest new office leases in Orange County, California in 2014 (191,000 feet) and 2018 (154,418 feet), each as identified by the Orange County Business Journal. (Email: jfreeman@coxcastle.com; (949) 260-4625)

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Office vs. Retail Leasing: Practical Considerations for the Retail Tenant

By Julian Freeman

Experienced retail tenants are generally well versed in commonly negotiated retail provisions such as those pertaining to exclusive use rights, opening and operating co-tenancies, “go-dark” rights and percentage rent. Do these same concepts apply in the office lease arena? And how do common commercial leasing provisions such as those addressing assignment and subletting, relocation, and reimbursement of operating expenses differ in office leases as compared with those in a typical shopping center lease? Whether a retail tenant is leasing office space for its headquarters, or retail space within an office building or a mixed-use office and retail project, understanding the answers to these questions is critical to negotiating a fair deal with an office landlord.

Before addressing some of the differences, it is important to note that many of the more complicated and frequently negotiated retail leasing provisions are often not applicable in the office leasing context. Some of these provisions include opening and operating co-tenancy requirements, continuous operating covenants, “go-dark” rights, landlord and tenant “kick-out” rights, exclusive use protections (except under limited circumstances, as described herein), percentage rent, minimum business hours, and provisions for payment of promotional and advertising charges.

The retail tenant may be relieved to know that it may not be required to spend time (and money) negotiating many of these types of provisions with an office landlord; provisions that consistently make or break a retail lease for space in a shopping center. That is not to say that office leasing is easy or less sophisticated than retail leasing. Many office leasing concepts that differ from similar concepts in retail leasing may leave the retail tenant scratching its head.

This article discusses some of the material differences between common leasing concepts addressed in both retail and office leases. Note that the

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Retail Leasing
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the area measured from the exterior surface of exterior walls and from the center of interior demising walls, with many variations negotiated between the parties to account for quasi-useable space such as mezzanines and outdoor patios. On the other hand, office space is typically measured using an industry standard such as the “Standard Method for Measuring Floor Area in Office Buildings” (the BOMA Standard), created and sponsored by the Building Owners and Managers Association International (BOMA).

The rentable area of office space under the BOMA Standard is determined by measuring the usable area of the space (similar to the retail “floor area” measurement), and then multiplying the usable area in the premises by a “load factor.” The latter allocates to the usable area a portion of common space located outside of the premises, such as lobbies, elevator shafts, restrooms, corridors, and janitorial and telecommunications closets. Accordingly, the “rentable area” of office space exceeds the “usable area” located within the “usable” four corners of the premises. For example, office premises that contain 10,000 usable square feet may actually be deemed to contain upwards of 11,000 “rentable square feet” to account for the load factor of the common elements of the building.

When leasing retail space in an office building, the retail tenant should anticipate that it will be liable for rent and operating expenses based on a rentable area calculation vs. a floor area calculation, and should perform a careful review of the lease to determine and understand the methodology for determining the rentable area.

Relocation

Location, location … relocation? Office and retail tenants are each naturally resistant to relocation rights that allow landlords the right to relocate tenants from their premises to another location.

Retail tenants fear disruption to their business and the loss of value

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Commercial Leasing
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U.S. Supreme Court Holds Local Sign Law Unconstitutional

By Steven M. Silverberg

The significant attention garnered by the United States Supreme Court decisions at the end of its most recent term, relating to such issues as the Affordable Care Act and same-sex marriage, overshadowed a significant decision relating to freedom of speech. This decision has potentially significant ramifications for municipal regulations throughout the country. In Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015), the Court found that the town’s regulation of directional signs was not content-neutral and violated the free speech rights of a local church.

BACKGROUND

The Town Code requires that permits be obtained for signs, but exempts 23 categories of signs from that requirement. The Court focused on three of those categories, noting the manner in which the local law treated each of these categories differently. The first category, “Ideological Signs,” are those that are defined as communicating non-commercial ideas and are not otherwise within the law’s definition of political signs. Ideological Signs are permitted in any zoning district for any length of time and may be up to 20 square feet in size. Next are “Political Signs,” which are defined as a “temporary sign designed to influence the outcome of an election called by a public body ….” The Court noted that these signs may be up to 16 square feet on residential property and 32 square feet on non-residential property, vacant municipal property and rights of way. Political Signs may be erected up to 32 days before a primary election and must come down within 15 days after a general election. Id. at 2227.

The signs at issue in the case are called “Temporary Directional Signs Relating to a Qualifying Event.” The law defines a “Qualifying Event” as “assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.” However, the size, location and time these signs may be posted is limited. No more than four signs, no larger than six square feet each, may be placed on any property. They are permitted on private property and rights of way. Significantly, they may only be displayed up to 12 hours before a qualifying event and only one hour after.

THE CASE

The Good News Community Church is a small local church in the Town of Gilbert, without its own building. As a result, it holds services in different locations in the town and advertises the location of Sunday services by having its members put out signs early on Saturday and then remove them about mid-day on Sunday. This results in 15 to 20 signs being placed around Town, often on the right of way. The signs typically include the name of the Church and the time and location of the service. The Town’s enforcement officer issued citations to the Church for violating the law. The Church Pastor, Reed, attempted to resolve the issue with the Town, but was advised that the Code would continue to be enforced. As a result, an action claiming violation of the First and Fourteenth Amendments to the U.S. Constitution was commenced with an application for a preliminary injunction against continued enforcement. The district court denied the application. The matter was remanded by the U.S. Court of Appeals for the Ninth Circuit. On remand, the district court granted the Town summary judgment and the Ninth Circuit affirmed, finding that the law did not violate the U.S. Constitution, as it is content-neutral. The Supreme Court (Thom as, J.) reversed.

THE DECISION

In finding that the local sign code is not content-neutral, the Court pointed to the distinct criteria applied to the Ideological, Political and Temporary Directional Signs.

... the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. Id. at 2227.

The Court rejected the argument that even if there are distinctions among signs the law may still be content neutral if the distinctions are based upon something other than the content. Rather, the Court held:

[T]his analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of “animus toward the ideas contained” in the regulated speech. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

Id. at 2228.

The decision went on to explain that the Temporary Directional Signs are not content-neutral because they relate to the time and place of an event. The Court found that a “regulation that targets a sign because it conveys a specific event is no less content based than a regulation that targets a sign because it conveys some other idea.” Id. at 2230. As a result, the Court held that the burden falls to the Town to demonstrate a compelling interest in the distinction among the categories of signs that must be narrowly tailored to address that compelling interest.

The Court rejected the claim that there were aesthetic reasons for the distinction, assuming for the sake of continued on page 4
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argument that aesthetics is even a compelling interest. The Court noted that the Political and Ideological signs are no less of an eyesore, and the Town “... cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.” Id. at 2231. Likewise, the Court found that the traffic safety issue was unavailing. It noted that there was no evidence that potentially “sharply worded” ideological signs would be less hazardous to traffic safety than directional signs.

The Court also rejected the claim that the ruling would prevent municipalities from regulating signs, arguing that there are many content-neutral criteria that could be applied. Attempting to expand on that concept, the concurring opinion by Justice Alito, joined in by Justices Kennedy and Sotomayor, discussed regulation of signs based upon lighting, size, location and the like.

Yet, the other concurring opinion by Justice Kagan, joined in by Justices Ginsberg and Breyer, agreed that the regulation at issue went too far, but argued the strict scrutiny rule when applied to municipal sign regulations could have unintended consequences:

... courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence — unless courts water down strict scrutiny to something unrecognizable — is that our communities will find themselves in an unenviable bind ...

Id. at 2237.

Justice Kagan concluded that “this Court and others will regret” the application of strict scrutiny in such cases as it will likely result in the Court ultimately becoming the “Supreme Board of Sign Review.” Id. at 2239.

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attendant to an established location, particularly with respect to visibility, foot traffic, access to parking, customer familiarity and goodwill, proximity to complimentary uses, and desirable distance from competitors. Accordingly, the location of retail space is particularly material to negotiating the terms of retail leases. Because of this, retail tenants consistently, vigorously and often successfully object to the inclusion of relocation clauses.

Location is of course important to office tenants as well. But office tenants, particularly those leasing smaller, more generically interchangeable space, frequently do not attribute the same value to a specific location within an office building. They also do not ordinarily rely on visibility or customer foot traffic, nor necessarily on proximity to any other particular space in the building. Since office landlords regularly view office space consisting of less than a full floor as fungible and interchangeable within the building, office tenants leasing smaller space on a multi-tenant floor tend to be less successful than retail tenants in eliminating or restricting a landlord's right to relocate their premises. Office tenants leasing material portions of a building, such as a full floor, or space that commands a premium (such as penthouse space or space with unique views), are an exception and may have sufficient leverage to eliminate or restrict a landlord's right to relocate their premises in a manner more familiar to retail tenants in a shopping center.

Permitted and Exclusive Uses

Use provisions in retail leases are heavily negotiated to precisely and thoroughly define permitted, restricted and prohibited uses. On the other hand, use provisions in office leases are far more generic and rarely stray far from “general office use” as a permitted use. Further, use provisions in office leases usually do not incorporate restricted, prohibited or exclusive use concepts in the same manner as in retail leases (e.g., prohibiting specific uses, restricting uses to certain areas, or restricting hours of operation, etc.), except when a tenant operates retail space and has sufficient bargaining power to insist successfully on comparable retail-center-like protections.

Office landlords may commonly impose restrictions on office tenants to prevent undesirable uses, such as 24-hour call center use or other heavy office density uses, which disproportionately burden parking and/or building services. For example, office landlords may establish a maximum occupancy restriction in the premises to indirectly limit the number of parking spaces used by occupants (for which parking spaces are allocated under the lease) and their visitors (for which additional parking is not always available).

In addition, office landlords rarely grant, and office tenants rarely require, exclusive use provisions. Nonetheless, from time to time an office lease will contain an exclusive provision that restricts the landlord from leasing space to certain competitors (as opposed to specific uses). For example, an insurance company with a building top sign may require that the landlord not lease space within the building to a specified list of its top competitors.

On a positive note for retail tenants, there are typically far fewer retail uses in an office building or mixed use office/retail project, so

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the office landlord’s ability to grant and protect exclusive use rights for the retail tenant tends to be far greater than that of its retail shopping center landlord counterpart. Even so, the office landlord may still be resistant to the exclusive use concept, if only due to its lack of familiarity with the concept from the office world.

Continuous Operation in the Premises
Retail tenants are typically required to comply with an operating covenant that requires continuous operation from the premises throughout the term. This concept is commonly tied to their obligation to pay percentage rent, and is required to ensure consistent foot traffic and activity in a shopping center. To counter the terms of the operating covenant, retail tenants are sometimes able to negotiate remedies that are triggered upon the satisfaction of pre-determined conditions that make it unfavorable to continue to operate the premises. These include, among others, the right to “go dark” while continuing to pay rent, the right to terminate the lease, and the right to pay abated rent. The remedies are often triggered by the failure of other tenants (usually “anchor tenants”) in the shopping center to remain open, or a tenant’s failure to maintain gross sales from the premises in excess of an agreed-upon baseline. In contrast, office landlords tend to be less concerned with whether a tenant operates continually within its premises, so long as the tenant timely pays rent and otherwise complies with its obligations under the lease. This tendency does not apply, however, if the tenant’s use is a retail amenity servicing the office tenants, such as a cafeteria or sundry store, or if the tenant is obligated to pay percentage rent.

Assignment/Exit Strategies
Assignment and subletting provisions are generally less heavily negotiated in office leases than in retail leases. Retail landlords consider tenant mix as one of the most critical factors in determining the success of a shopping center. Tenant mix affects the success of all of the tenants, the amount of rent new tenants are willing to pay, and ultimately the value of the shopping center. Accordingly, retail landlords are highly sensitive to controlling the tenant mix via assignment and subletting provisions. Competing with this notion are retail tenants’ desires to maintain flexibility to change their use and adopt or implement an exit strategy if their store is not profitable by assigning their lease to another operator, perhaps for a completely different use. These conflicting objectives routinely lead to heavy negotiation.

Although office landlords do value controlling the tenant mix and restricting tenants’ ability to transfer, particularly with respect to amenity retail uses, tenant mix is less important to the success of office buildings. Office landlords are more concerned with the creditworthiness of transferees than controlling the particular tenant mix (although office landlords certainly require the ability to reject a proposed assignment or sublease to a transferee with character or reputation that could damage the value of its building or adversely impact its other valued tenants). As a result, office landlords are often more willing than retail landlords to give up some control in the definition of pre-determined reasonableness standards by which they can deny consent to an assignment or sublease.

Tenant Improvements and the Commencement of the Tenant’s Obligation to Pay Rent
Contrary to the retail arena in which tenants regularly build out their own tenant improvements and improve their store space for their business operations, in the office arena landlords frequently (but not always) control the design and build-out of office space for their tenants. When they do, the tenant’s obligation to commence paying rent is usually tied to the landlord’s “substantial completion” of the tenant improvements, an event largely out of the tenant’s control. In these cases, it is important for tenants to consider appropriate remedies, such as day-for-day abatement of rent and/or an outside termination right, for the landlord’s failure to timely complete the tenant improvements, though such rights may be subject to delays caused by the tenant itself and force majeure delays.

Operating Expenses
Unlike retail leases, which typically require tenants to pay a pro-rata share of operating expenses on a triple net basis, office leases may require tenants to pay a pro-rata share of operating expenses that exceed the expenses incurred during a specific year defined as the “base year” (typically the first year of the lease), or that exceed a certain pre-determined amount identified as an “expense stop.” Allocation of operating expenses can be more complicated in mixed-use projects where landlords allocate expenses separately among office and retail tenants. A retail tenant on the ground floor of an office building, for example, will prefer that expenses benefiting office tenants only, such as the cost to maintain common area-restrooms serving office tenants, and the costs of elevators which only serve floors above, be excluded from retail tenant expenses. Office tenants will similarly seek to exclude and bifurcate expenses attributable to the unique uses and demands of the retail tenants, such as excessive water and electricity use.

In order to allocate different categories of expenses properly, office leases often include a cost pool concept by which the total expenses of operating the office building are shared among some, but not all tenants, dependent upon their various uses and the demands such uses place on the building and its systems, equipment and parking.

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Utilities and Services
Retail tenants are accustomed to paying for utilities and services provided to their premises, such as electricity, gas, sewer, water and janitorial expenses, directly to the applicable utility service providers. In contrast, office landlords frequently supply and pay for such services as part of common operating expenses, and office tenants then reimburse landlords on a pro-rata basis (based on rentable area) as part of operating expenses in the manner described above.

Office landlords may also require tenants to reimburse the landlord directly for utilities and services consumed in excess of what the landlord considers or specifies as reasonable and normal for typical office use (such as paying for electricity used by tenants after business hours). This type of excess and after-hours use treatment is not applicable in the retail context when retail space is separately metered. Although this reimbursement concept may be difficult to accept for retail tenants used to controlling the procurement and payment of services and utilities, it is commonly accepted by office tenants.

Additionally, common-area services provided to office buildings, such as maintaining common-area restrooms and elevators, and staffing the lobby, are often more expensive than common area services provided in shopping centers. Hence, the operating expense component for leases at an office building or mixed-use office/retail project can be considerably higher than the corresponding cost in a typical shopping center lease.

Conclusion
Although the differences between office and retail leasing may be subtle, the concepts are unique and significant enough to warrant careful review and consideration by any retail user venturing into the office market. It is important for retail tenants to be knowledgeable as to the distinctions they can expect in the office arena or to obtain assistance of experienced counsel to navigate these issues, as well as numerous other issues, that retail tenants may encounter when negotiating a lease with an office landlord.

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Preparing for the Worst
With the unprecedented amounts of snowfall, leaking and collapsing roofs and skylights became all too common, and led to unfortunate human and animal tragedies. Just dealing with the daunting tasks of snow removal and cleanup also caused major disruptions in public services, including trash removal and public transportation. These costs have yet to be finalized, but are anticipated to be “budget busters.” The costs to employers for missed/delayed days of work, missed shipments/deliveries, lost business and employee absenteeism/illnesses have yet to be determined, but are estimated in the millions — most of which is unrecoverable through insurance.

With the roof buildup of snow and ice dams, many buildings required swift action to prevent leaks and collapses. The removal of snow off roofs was complicated by the inability to find competent contractors (or in some cases, any contractor) and locating places to put the snow after removal. Normal risk management concerns regarding competency and adequate insurance coverage were frequently ignored, and house painters, landscapers and just about anyone willing to go up on a roof was hired to remove snow from roofs.

With this in mind, here are issues to keep in mind before the wrath of winter descends this year. Delegate Responsibility Clearly in the Lease
Weather conditions create many issues that need to be addressed. Make sure that the parties responsible for snow removal on parking lots, sidewalks and roofs have been clearly identified in the lease.

While leases are usually fairly clear regarding parking lots and sidewalks, they are often silent about roof snow removal.

Is snow removal defined as “maintenance” in the lease? Who is responsible for roof maintenance, repairs and replacement? The risk of roof collapse due to improper removal of snow may create an “emergency” for persons and property, allowing extraordinary actions that are often permitted in retail leases for large stores and sometimes permitted for smaller ones.

If a tenant engages in “self-help” and damages the roof, is the tenant responsible? For example, the damage to the roof could be either from running a snow blower on the roof, or from the use of metal shovels. Furthermore, if a member of the public is injured during the snow removal operations, who is responsible?

If the snow is not removed from the roof and the roof collapses, is the cause of the roof collapse the “weight of snow and ice” or an act of God? How soon after the storm did the roof collapse and who had “knowledge”? continued on page 7
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Depending on the answers to these questions, there may be exposure to civil liability, violations of lease obligations and unknown or ambiguous insurance coverage. Property insurance policies generally cover a roof collapse caused by the weight of snow and ice, but coverage may be decided or affected by factors of policy language, knowledge, time span between snowfall and collapse and an investigation into building design and maintenance.

Insurance Issues

Property insurance policies can be structured in various ways, depending on the business being insured. In a single-location business, the insurance will apply to that location only. For a multi-location business, insurance coverage can be provided with a specific limit for each location or on a “blanket basis” with a limit that can be applied for any location.

There are advantages and disadvantages to either scenario. The issues that are of concern include the sufficiency of policy limits for a single location and the sufficiency of blanket limits to cover all of the damaged structures from a severe loss in a large geographic area.

A further complication involves the decision about deductibles. With a policy limit specific for each location, the deductible must be appropriate for the location. For “blanket-basis” policies, the deductible is calculated based on a “per-event” consideration. Usually, there is a single event if the damage to the locations in a geographic area occurs within a 72-hour period. Successive snowstorms would each be a different event if the time period between storms is greater than 72 hours. Given the successive storms in the Boston area discussed above, multiple deductibles may be imposed if there was more than 72 hours between storms. Strange and complicated factors for certain.

Premiums and Deductibles

Premium and deductible amounts vary. Generally, the higher the deductible in the insurance policy, the lower the premium for such policy. This must be balanced with the buyer’s ability to pay premiums and cover any deductible losses.

It is suggested that business owners, landlords and tenants consult with professional insurance agents, brokers, and advisers for discussions on these topics. Additionally, a consultation with legal counsel is recommended to determine whether lease and contract language adjustments may be needed.

During the snow removal crisis, one very clear lease provision to consider as a starting point states:

3.4 Removal of Snow, Ice and Debris.
3.4.1 Tenant shall keep the sidewalks abutting the Premises and Building entrances free and clear of snow, ice, debris, and obstructions of every kind. Tenant shall keep the roof and drains leading from the roof free and clear of snow, ice, debris, or other obstruction which might overload or endanger the roof or adjoining premises, sidewalks, or streets. In performing such work, Tenant shall take all reasonable precautions to avoid damage to the roof. As used herein, the word “roof” shall mean that portion of the roof of the [name of] Building which is over the portion of the Building leased by Tenant.
3.4.2 Landlord shall keep all sidewalks, parking areas, access and the remainder of the [name of] Building free and clear of snow, ice, debris and obstructions of every kind.

In this provision, the Landlord delegates to the Tenant the responsibility to clear the snow off the roof and sidewalks — and to do it carefully.

Liability Policies

Liability policies generally exclude Acts of God and respond to the allegations of negligence of the insured. But the issue is whether the lack of snow removal in “a reasonable period of time” amounts to negligence.

Generally, there is no business interruption coverage unless the particular business suffered a “direct physical loss” to their property, and then only for lost profits (not lost sales). Payroll is not included in the coverage unless it is reported as part of the values being insured; there would most likely be a premium increase for such payroll coverage. (Usually, hourly employees would not get paid if they do not work either because the store is closed or the employee cannot get to the store to work.)

Optional Business Interruption Coverage

There are two optional business interruption coverage, but there generally is a 48-72-hour waiting period before coverage commences, which means that there would be no insurance coverage if the store is able to reopen after two days.

The first optional coverage is triggered when there is no available access to the business, e.g., due to excessive snow or flooding surrounding the store. In this case the store need not be damaged; the policy covers a situation in which customers cannot get to the store.

The second optional coverage is triggered when a government authority prohibits access to the store. Such a prohibition occurred for a very limited area on and near Boylston Street in Boston after the Boston Marathon bombing. Only stores and restaurants within that crime scene were able to collect once the waiting period in their insurance policy expired. Being a nearby business was not sufficient to trigger insurance coverage.

A government-ordered travel ban that lasts long enough could also trigger this optional coverage, such as when the travel ban lasted for several days after the Blizzard of 1978 in Greater Boston.

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Weather-Related Injuries
During one of the snow removal episodes, a contractor's employee fell through an unmarked skylight. As of this writing, the employee is lucky to be alive and is recovering from some severe injuries. However, one municipal employee died as a result of falling through a skylight in a municipal building in a community south of Boston. Should the building owner or tenant have warned the snow removal contractor about the location of the skylight? Should the municipality have allowed the employee to go up to the roof? Who, if anyone, has this obligation?

Lessons to Be Learned
With these and other issues facing the Boston area this winter, questions remain regarding what should have been done; what could be done better and what should other areas of the country learn from this unprecedented winter season.

• First, prepare, prepare and prepare again. Anticipate that an emergency condition can happen in almost any part of the country — if not snow, other natural disasters can be anticipated.
• Second, owners and tenants should clarify lease language regarding responsibilities, maintenance and emergency situations. Detailed and specific documentation and writing is always better.
• Third, review insurance policies to verify that coverage is as broad as possible and obligations imposed by Leases and other contracts related to premises responsibilities are addressed with appropriate insurance.
• Fourth, owners and tenants — especially remote owners and large corporate tenants with multiple locations — should make sure that specific responsibilities and control measures are in place to address emergency situations at each location. Local management should have emergency response information and communication systems in place.
• Fifth, understand that state and local governments may not be able to respond in an emergency situation due to conditions as unprecedented as the storms recently experienced in Buffalo, NY, and Boston. Municipal services are just as vulnerable as private enterprises.

Conclusion
Unprecedented severe weather situations require significant pre-planning, disaster preparedness, review of legal documents to reflect appropriate responsibilities and rehearsed response to mitigate damages and allow for a reasonable recovery.