

Problems with Inaccurately Defined and Measured Leased Premises

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Although it may seem that accurately defining the leased premises in a lease should be a relatively straightforward task, we have recently witnessed several instances when the definitions and space calculations of the premises, building or shopping center have resulted in significant disputes. This article addresses some examples of the potential pitfalls of using leases which are not customized for a specific user and the importance of carefully defining terms related to the leased premises and its environs.

Definition and calculation of leased premises

Landlords and Tenants must be careful when defining leased space for many reasons. First and foremost, many leases calculate rent on a per-square-foot basis. Inaccuracies in the definition of the leased premises could lead to the under-collection or over-billing of rent unless a lease is properly drafted to clearly state what controls in the event of inconsistencies. For example, some leases will state that a tenant is leasing 5,000 square feet at \$20 per square foot for an annual rental amount of \$100,000. In the event that it is determined that the leased premises consists of only 4,900 square feet, does the per-square-foot amount or the gross sum control? This can be especially important in build-to-suit situations where the exact square footage of the premises is dependent upon the completed build-out.

Many leases contain both a description of the premises as well as a depiction. What controls if inconsistencies exist? What happens if the depiction includes areas which are actually part of the common area or are leased by another tenant? If a lease contains both a description and depiction of the premises, it is essential that they be both consistent and accurate.

Some landlords and tenants may believe that they can avoid dispute by incorporating standards set forth by the Building Owners and Managers Association (BOMA) to calculate the size of leased space. However, it is important to note that BOMA issues standards for different types of properties and periodically updates those sets of standards. Therefore, a lease which merely states that the leased premises will be calculated using BOMA standards may still lead to conflict whereas a lease which states that the premises will be measured by the then current and properly applicable BOMA standards should help to avoid ambiguity.

Definition and calculation of building, shopping center, etc.

As important as it is to properly identify the leased premises, it may be equally if not more important in multi-tenant buildings and centers to properly define the applicable

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building, shopping center, office park, etc. Often tenants are required to pay their proportionate share of taxes, insurance, maintenance and other common area expenses with respect to the building or center in which the leased premises are located. The following are just a few of the numerous recent cases across the country which show how easily disputes can arise over these arrangements:

- In *Accenture LLP v. CSDV-MN Limited Partnership*, 2007 U.S. Dist. LEXIS 85211, an office tenant sued its landlord when it realized that it was being assessed its proportionate share of real estate taxes attributable to a parking garage located within the building where the leased premises were located but that the same garage was being excluded in the calculation of tenant's proportionate share of operating expenses. At issue was whether the term "Building," which was silent with respect to the parking garage, could be applied differently within the lease. For the purposes of real estate taxes, the tenant was responsible for paying its share of property taxes on "the Land or the Building" and with respect to operating expenses, the tenant was responsible for its share as calculated by dividing the "total square footage of rentable area...in the Leased Premises" by "the total square footage of rentable area in the Building." In determining whether the tenant had been charged an appropriate amount for real estate taxes, the court found the term "Building" to be ambiguous and its definition a question of fact outside the scope of the present action. However, with respect to operating expenses, the court ruled "rentable area" did not include the parking garage and therefore the landlord had charged tenant for its appropriate percentage of operating expenses. Here we see that both the definition of "Building" and its application throughout the lease will be determinative of how different expenses may be calculated.
- In *Washington and Court, L.L.C. v. Bangz Salon Hoboken, L.L.C.*, 2009 N.J. Super. Unpub. LEXIS 2775, a tenant claimed that it was being unfairly charged for operating charges attributable to other buildings owned by the landlord as part of its obligation for a proportionate share of operating expenses. The landlord claimed that certain expenses were billed for multiple buildings together and that the allocations to the tenants were consistently applied. In this case, the term "Building" made no reference to any other buildings, whether under similar ownership or not. The court agreed that the "Building" did not include other buildings and that the operating expenses incurred by landlord with respect to such other buildings should not have been part of this tenant's operating expense obligation. This shows that leases should be drafted with specificity if the parties intend that the premises are to be treated as part of an integrated center for the purpose of calculating certain expenses.
- In *Eclipse Consulting, Inc. v. Community Bank*, 2010 Ind. App. Unpub. LEXIS 1279, the tenant rented a portion of an outlot building which was part of a shopping center. The lease required tenant to pay its pro rata share of taxes, insurance and common area expenses as related to the entire center. At some point during the lease term, the outlot building was sold but not the main center. The successor landlord began charging tenant its pro rata share with respect solely to the outlot building. This is clearly a much larger percentage but the overall expenses should have been significantly less. In ruling

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in favor of the landlord, an Indiana court looked to language providing the landlord with broad discretion over changes to the center, including those which would alter the square footage of the center and therefore change tenant's proportionate share. Part of what is remarkable about this case is that it made it to trial in the first place. If the tenant's position was enforced, the tenant would have received the windfall of paying only approximately 1% (its relative size to the entire center) of the Building's operating expenses despite occupying over 20% of the building's leasable space.

Recommendations

- Carefully identify the leased premises.
- Carefully identify the building, shopping center or other applicable larger area of which the leased premises are a part.
- Establish mechanisms for calculating the area of the leased premises and determine controlling rent provisions if disputes arise.
- Avoid using one-size-fits-all leases which may not properly define the appropriate areas to an extent sufficient to cover your respective leasing transactions and avoid conflicts which may arise from inconsistent and ambiguous definitions.

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