

Commercial Real Estate Negotiation – A Tenant’s Perspective

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Commercial landlords and tenants are facing unprecedented times in their industry. Many commercial tenants have come to realize that there is potentially no limit to what terms can be negotiated these days, with the market being what it is. Provisions that were once reserved to the “standard commercial lease” are now being put into play by aggressive, knowledgeable, and well represented commercial tenants, much to the chagrin of commercial landlords. The goal of this article is to provide some basic negotiation points that commercial tenants should keep in mind when entering into a commercial lease. The random sample discussed below is by no means exhaustive.

Know the Landlord, Space and Other Tenants – It is helpful to know the true occupancy rate of a commercial building or mall. It is not as obvious in a large secured building and should be sought out in the preliminary stages of negotiation and during the diligence process. Second, a tenant should work hard to define the “Premises”. The tenant needs to keep in mind that the broader the space is defined, the greater chance the tenant may have to share Common Area Maintenance (CAM) charges associated with certain parts of the space. The tenant and its attorneys/representatives must understand this. Finally, it would be beneficial for tenants to be aware of other commercial tenants and the contract provisions contained in their leases, which could potentially impact other tenants’ financial strength over the term. For example, many large commercial tenants have “outs” in their leases which allow them to leave their premises for certain enumerated reasons. A common example may be that another large commercial tenant is leaving or moving in (possibly pursuant to a previously negotiated exclusivity provision, *see below*). You may not have access to these other tenants’ leases, but it will do you some good to make the proper inquiry.

Option to Renew – It is important for tenants to get the best price possible per square footage, however, there are other benefits that a tenant can secure while working with the landlord on the price, one of which is the option to renew. The longer the lease to which a commercial tenant is willing to commit, the greater flexibility the tenant will have in all areas of the negotiation. This is not surprising I’m sure. However, many clients fail to keep this in mind, focusing narrowly on their immediate bottom line, at the expense of their back-end benefits, which could be substantial if structured properly. On-point example, many commercial landlords, although reluctant, is willing to agree to extremely low percentage increases in rent in later years. Tenants should take advantage of this bargaining power and financial vulnerability of landlord, where it exists.

Additional Fees/Costs – Many commercial landlords charge CAM according to the tenant’s square footage and allocate fees and costs proportionately among tenants for these common areas. This is acceptable and quite standard. However, often times landlords will deal directly with utility companies, and allocate to certain tenants an “administrative fee”. Larger

commercial tenants and most well represented tenants will be able to avoid this fee or percentage.

“Good Guy Guaranty” – As you will most likely be renting commercial space in your corporate name and not in a personal capacity, it is in the landlord’s best interest to require an officer of the company to personally guaranty a portion of the base rent of the lease. Often times, rather than personally guaranteeing the commercial lease for its duration, the tenant can negotiate a “good guy guaranty” which essentially guaranties the base rent for a specific period of the lease, after which, the landlord must look to the corporate entity’s assets in case of a default.

Exclusivity Clause – This is always a source of contention between commercial landlords and commercial tenants when negotiating a lease. Many landlords, especially these days, are willing to grant some sort of exclusivity to a tenant that requests it, so long as it is narrowly tailored and the inclusion of the provision does not cause the landlord to breach any exclusivity clauses in his other leases. One possible solution for both parties may be to allow a tenant to terminate the lease if the landlord decides to rent to a competitor of the tenant who was seeking the exclusivity clause. This is a tough negotiation point, but not uncommon in this current market.

There are countless other negotiation points on which the tenant is much more likely to prevail today than the tenant will be able to five to ten years from now or was able to five years ago. It is no time for commercial tenants to be shy or try to cut corners by failing to retain experienced professionals to help them through a commercial leasing transaction.

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