NEWS & EVENTS: May 2018

LESSONS ON LEASING FOR RESTAURANT OPERATORS

All of These Issues and Many Others Should Be on the Menu When You Negotiate Your Next Restaurant Lease

By Jason Cohn and Benjamin Gordon

The best restaurateurs are good at the details: they pay attention to what ingredients go into the food, how each dish is plated and served, how much liquor is sold, and how quickly the tables turn.

They need to train that same laser focus on a critical piece of paper that can spell the difference between big profits and big headaches: the lease. The other signatory of the lease—the landlord—certainly is.

When negotiating restaurant leases for retail landlords, tenants, developers, and management companies, there are several key issues that we, as attorneys, need bear in mind. There are particular points that should be included in restaurant leases that may differ from clauses in other commercial real estate leases.

The list begins with one that can drive any restaurateur to drink: the liquor license. Permitting varies depending on jurisdiction, which means the amount of time it takes to obtain a liquor license also can vary widely. That's a big deal, especially if you're a new restaurant with little name recognition that wants to keep patrons coming back. But what if the process will take months, yet your obligation to open and pay rent starts in two weeks? Or, worse, what if your application is rejected?

This can be dealt with in the lease by including a contingency that stipulates how long you can delay the start of operations based on the length of the permitting process or, in a worst-case scenario, can provide you with the ability to terminate the lease if you are unable to obtain a liquor license on acceptable terms and conditions. Most leases have permit contingencies, but few have the business ramifications of an alcohol permit for restaurants. So, work with your landlord to make sure you are protected if you come across any roadblocks in obtaining your liquor license.

Another important lease provision is the use exclusive, which gives a restaurant the right to offer its distinctive fare without competition in the same shopping center. A new pizza shop doesn't want another pizza place a few feet away, but what about a full service Italian restaurant or a movie theater that features pizza as a menu item? Landlords will try to narrow the exclusivity to ensure a good tenant mix for their centers, while restaurateurs will surely want to expand it as far as possible to protect their business. As the operator of a restaurant, that means understanding what you serve and what substitutes your customers may want that can dig into your bottom line. For example, you may be a full service Mexican restaurant but if your wait times get too long, do you really want a Chipotle or Qdoba a few doors down? On the flip side, before finalizing the lease it is best to understand the limitations already existing within a shopping center and whether your current or future use conflicts with another tenant's rights under its lease. Using one of the examples above, do you want the ability to turn your Mexican restaurant into an Italian or seafood concept? While working with the landlord on how to rein in competition, make sure you also discuss how you can expand (or even change) your menu or concept in the future.

In addition, you may also want to draft your lease to guard against pop-up restaurant kiosks and food trucks, which can add buzz and new customers to your centers but can offer similar fare and take away the same parking spaces usually used by your diners.

Parking is important, of course, because restaurants always want ample, and nearby, parking. Restaurants take up far more parking than typical retail tenants, and a lease will almost always have provisions tied to how much parking will be needed to satisfy the restaurant and the landlord, often measured in parks per square feet.

Restaurants typically will seek via the lease to keep other high-intensity parking users, such as grocery stores, movie theaters and fitness centers, as far away as possible so that their customers have ample available spaces. Of course this also works both ways as other parking intense operators may try through their leases to keep your restaurant at a distance.

You can also draft your lease to allow for quick and easy access for the newest concepts in restaurant food delivery, from to-go parking to spaces set aside for Uber Eats, GrubHub, DoorDash and the like. Some landlords may be willing, through the lease negotiation process, to dedicate parking areas and lots for delivery firms. And if your restaurant is delivering food off-site, make sure your lease preserves your ability to do so—without penalty.

The parking lots themselves present additional lease issues. Who will maintain the parking lot? How are costs to maintain the parking lot calculated? Is the landlord responsible for lighting beyond typical shopping center hours, which is critical when your patrons depart at night and your employees who need to stay late to close operations for the day? In one instance, a full-service restaurant at a shopping center recognized that they needed overtime common area lighting since its operations often run later into the evening than neighboring non-restaurant tenants, so they requested that the landlord install the lighting control panel inside their restaurant to give them full control of the lighting (and the restaurant was willing to pay for their share).

Other venues present other concerns for restaurants. For example, a lease in an office building most likely will need to address noxious use restrictions that deal with noise, odor, ventilation, trash removal and related issues, such as where do the exhaust and grease go? Does your landlord provide the dumpster space and frequent garbage service necessary to operate a restaurant? You will need specifically tailored language in your lease to protect your interests.

Visibility can also be crucial, particularly for a new restaurant in an office building or mixed-use development. Where will the signage go? On the street? Inside? With giant or tiny letters? Some of this is governed by government code, but anything that isn't will be governed by the lease. Landlords will want to make sure that their properties maintain a certain ascetic so try to work with them to have signage approved prior to lease execution.

The lease can be drafted to allow for your exit strategy—but beware that landlords will be resistant to expansive assignment and subleasing rights. In the past, landlords might have been agreeable to allow a tenant to assign its lease to other similar restaurant operators provided that they meet a few requirements. However, as the chef-driven restaurant trend continues, landlords have been tightening these assignment provisions because the chefs operating the restaurants may be a big draw to their properties.

That being said, for non-chef driven restaurants, landlords may be more willing to allow you to at least assign the space to a restaurant like yours provided that you meet certain net worth and operating experience requirements. If you're a multi-concept company, you may also be able to carve-out your right to assign or sublease your space to any of your related brands. Similarly, if you're a top national brand, you don't want landlords having a say in your business matters, such as a corporate reshuffling.

Often the lease negotiation process includes other vital documents addressing or bolstering your rights discussed above, such as a memorandum of lease, a declaration, and an easement agreement. When negotiating the lease or any other document, here is the final and best piece of advice: Maintain a cordial and professional relationship with the landlord. The landlord and you both want the landlord's shopping center (or office building), including your restaurant, to be a successful and desirable location, so establishing a friendly and open relationship with the landlord will greatly benefit all parties during the sometimes tough process.

All of these issues and many others should be on the menu when you negotiate your next restaurant lease. Failure to do so could seriously reduce your flexibility and profitability while keeping you from what you do best—feeding your customers and providing an enjoyable dining experience.

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