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IN THE SPOTLIGHT

Options to Purchase in Retail Leasing

By Scott A. Miskimon and Michael R. Thornton

When finalizing a term sheet for a new lease, an option to purchase may seem like an easy, last-minute throw-in item to request or to agree to readily. Even during the drafting process for the actual lease agreement, it may be tempting to address only the basics in the option-to-purchase clause in order to leave more time for issues that are more contentious in a typical retail lease. Unfortunately, this approach often results in a bare-bones "agreement to agree" that leaves the individuals responsible for exercising and closing the purchase option years later without sufficient knowledge of the intent of the original parties that made the deal. On the other hand, the intuition to avoid a full-blown purchase and sale agreement to address every possible contingency seems valid when the primary transaction at hand is a lease of the subject property.

This article identifies issues to consider when dealing with options to purchase; whether and how to grant or request an option in the first place; important issues to include in the terms of the option clause in the lease agreement; and how to manage

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Granting Expansion Options to Tenants

Key Considerations for Landlords

By Matthew B. Mattingly

Flexibility is an important consideration for tenants when approaching a commercial lease. That has likely never been more true than it is in today's market, as tenants have one eye on a prosperous future, but still have the sting of the recent economic downturn fresh in their minds. One way that tenants seek that flexibility is through expansion rights. Whether in the form of pure expansion rights, rights of first offer or rights of first refusal, such rights can provide an enticing incentive for tenants who desire long-term flexibility, but either cannot predict the amount of space they will need long term, or cannot commit to that much space at the time of lease execution. When properly drafted, such expansion rights should not be a significant detriment to the landlord, making them the perfect incentive for both sides. Nonetheless, a prudent landlord must consider a number of factors when granting expansion rights to a tenant.

Type of Right

The first consideration is simply the type of right that will be granted. These can come in many forms. However, this article places them in three basic categories: 1) pure expansion rights; 2) rights of first offer; and 3) rights of first refusal. A pure expansion right means that a tenant has the right, either on a set date or for a given period of time, to expand into additional space. Rights of first offer require the landlord to provide notice to the tenant when certain space comes available or is to be marketed. Rights of first refusal require the landlord to provide notice to the tenant when the landlord has received a bona fide third-party offer for space that it intends to accept, and then allow the tenant a period of time to match that offer. (*See* "In the Spotlight," left.)

Which of these classifications of expansion rights a tenant is given will depend on many factors; however, a landlord would be well-served to avoid granting rights of first refusal when possible. As any real estate broker will tell you, time

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can kill deals, and having to go back to your existing tenant when a deal is in hand with a third party is never an ideal situation. When market or business factors require that a right of first refusal be granted, landlords should keep the tenant's response period as short as possible. A five-day right of first refusal response period is much less likely to impact your third-party offer than a 30-day right of first refusal response period.

Conditions on the Right

The next consideration for landlords when granting expansion rights is the conditions that are placed around the tenant's exercise of those rights. It should be a condition to the tenant's exercise that, at the time of exercise and as of the commencement of the lease of the expansion space, the tenant not be in default under the lease and that no event has occurred that with the passage of time or the giving of notice would constitute a default by the tenant under the lease. Additionally, the tenant's exercise of the expansion right should be conditioned upon the tenant's having not assigned or sublet the existing premises. The rights the landlord grants on the front end of the lease are intended for and relate to that particular tenant and the landlord may not want a successor tenant to have those rights.

Many tenants request that this condition be limited such that it does not apply to their assignment to an affiliate. While every situation is different, that limitation is often acceptable from the landlord's perspective. Another important condition for landlords to consider when granting expansion rights is the amount of term remaining under the lease. Many landlords will limit this to three years, so if a tenant has less than three years remaining on its term, it cannot exercise the expansion right. If a tenant is granted renewal options under the lease, it may be appropriate to qualify that limitation by stating that if the tenant exercises a remaining renewal option and thereafter more than three years remain under the term of the lease, then the condition is satisfied. Finally, any termination of the lease should terminate all rights the tenant has in the expansion space.

Any expansion rights granted to a tenant should be expressly subject to the rights of the current tenant(s) in that space to renew their lease, whether pursuant to an existing renewal option or otherwise. Additionally, all such rights should be subordinate to the rights of other tenants existing as of the date of the lease (or the amendment if the expansion right is granted in an amendment). A landlord cannot commit to provide greater rights than it has. Often, tenants will ask for a list of those with prior rights in the expansion space. From a landlord's perspective, handling this outside of the lease document is preferable, but when necessary a list can be attached as an exhibit. If such an exhibit is attached, then it is obviously imperative that such list is complete and accurate.

Terms of the Option

The next item for a landlord to consider when granting an expansion option to a tenant is the terms under which the tenant will lease that space. Where a right of first refusal has been exercised, business terms will generally be determined by the bona fide third-party offer that the tenant is matching, subject to any specific exceptions called for in the lease. A pure expansion option or right of first offer, however, require that the mechanism for determining those terms be expressly set forth in the lease. Generally speaking, the term of the lease of the expansion space should be co-terminus with the term of the lease of the existing premises. If that is not the case, the lease should

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Restricting Expressive Activities in CA Shopping Centers

By Mindy Wolin Sherman and Sharona Toobian

In December 2012, the California Supreme Court decided a case that attempted to clarify the protective reach and interaction of the California Constitution and California labor statutes on expressive activities on privately owned California shopping centers. This article provides owners and their counsel with suggested guidelines for the restriction of expressive activities, and illustrates the types of shopping center rules that will more likely be upheld by California courts. While this article specifically addresses the interpretation of California statutes and the California Constitution, it should be noted that many jurisdictions look to California interpretations as a starting point on freedom of speech issues.

A key inquiry is whether the expressive activity is labor-related speech, which is provided greater protection than other expressive activities. California statutes protect labor-related speech in nearly all areas of a privately owned shopping center. Other expressive activities in public forum areas of the shopping center (except for certain prohibited speech, including misleading commercial speech, extortion and threats of serious bodily harm) are protected by the California Constitution's liberty of speech provision. Regardless of the type of expressive activity, labor-related or otherwise, owners should heed certain considerations in drafting and enforcing shopping center rules.

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CA Constitution: Public Forum v. Non-Public Forum

The California Constitution requires an owner of a shopping center to respect free speech in the public forum areas of the shopping center. This means that expressive activities can be prohibited in the non-public forum areas. However, if shopping center rules attempt to limit expressive activities in the public forum areas, then the rules must meet certain standards to be upheld.

California courts have determined that public forum areas of a shopping center are designed and furnished to "permit and encourage the public to congregate and socialize at leisure." Examples include common areas, courtyards, plazas or other areas with seating or amenities that encourage visitors to stop shopping in order to converse and socialize with others, relax and/or be entertained. Although privately owned, these areas are categorized as public forums because they are open to the public like traditional public forums, such as public streets, sidewalks and parks.

By contrast, California courts have determined that the non-public forum areas of a shopping center serve specific functions of helping patrons enter and exit stores and view merchandise and advertising displays. These areas typically lack seating and are not intended for lingering or socializing. For example, the sidewalk in front of a store entrance or the areas immediately adjacent to the entrance are not public forum areas and therefore are not subject to the California Constitution's liberty of speech provision.

CA Constitution: Content-Based v. Content-Neutral Restrictions

The California Constitution's protection of free speech in public forum areas is not absolute and allows the imposition of certain restrictions. Different kinds of restrictions are subject to different standards (*i.e.*, whether a particular restriction is content-based or content-neutral).

A content-based restriction attempts to control the topic or underlying message of the speech or activity. Shopping center owners can impose content-based restrictions only if they are narrowly tailored to serve a compelling interest. The following are some helpful tests to determine whether a particular restriction is based on content: 1) the rule necessitates that speech be examined in order to determine its acceptability; 2) the rule distinguishes favored speech from disfavored speech; or 3) the rule exhibits favoritism or hostility toward certain topics. California courts provide no guidance as to what constitutes a compelling interest and rarely, if ever, find that a compelling interest exists. Therefore, owners should refrain from enacting any content-based restriction.

The following are examples of content-based rules that California courts would likely find unconstitutional:

- A rule that prohibits individuals from distributing leaflets outside a store urging customers not to purchase its merchandise will not be upheld. This is a content-based restriction because it is based on disapproval of the message on the leaflets. Additionally, the shopping center's interest in maximizing profits is not compelling when compared to individuals' right to free expression.
- A rule that prohibits individuals from conversing about their religious views with shopping center patrons will not be upheld. This is a content-based restriction because it is aimed at speech on a particular topic, namely religion. Further, the shopping center's interest in providing a stress-free environment to its patrons is not compelling when compared to the free speech rights of others at the shopping center.

Alternatively, shopping center owners can impose content-neutral restrictions as long as they are narrowly tailored to serve a significant

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interest and leave open other obvious and easy avenues of communication. In this context, narrowly tailored does not mean the least restrictive or intrusive means; it just means a close fit between the means and end, which is evidenced by the existence of other obvious and less-burdensome alternatives. A content-neutral restriction includes no reference at all to the content of the regulated speech and instead focuses on the time, place and manner of speech. Content-neutral restrictions confer benefits and impose burdens on speech without reference to the underlying message, view or topic. To prove the existence of a significant interest, speculation as to what might happen if the proposed activity is allowed is insufficient; such proof instead must be based on studies, anecdotal evidence or history of activity at the shopping center. California courts have decided several cases where a significant interest was proven.

The following are examples of content-neutral restrictions that California courts would likely rule acceptable:

- A rule that prohibits leafleting unoccupied cars in the shopping center's parking lot will likely be upheld. The restriction is content-neutral because it is unrelated to the message of any particular leaflet. It advances the significant interest of controlling litter and traffic and promoting safety in the entry and exit of the parking lot. Finally, the restriction leaves open alternative avenues of communication because it does not prevent leafleting on the shopping center's sidewalk.
- A rule banning the carrying or wearing of signs in the shopping center will not be upheld. Even though this is a content-neutral restriction that serves a significant interest of protecting patrons from injuries caused by signs or the sticks they are attached to, the ban is not narrowly tailored and does not leave open other avenues of communication. Alternatively, a ban on signs that are used in dangerous or intrusive ways, rather than an outright ban on all images and text, is more likely to be upheld.
- A rule that prohibits expressive activities during peak traffic days will not be upheld. Even though this is a content-neutral restriction, it is too broad. If the rule was more narrowly tailored by limiting the number of individuals engaged in expressive activities at any one time, then it would be more likely to be upheld. Additionally, the rule fails to leave open less burdensome avenues of communication because limiting expressive activity to non-peak times eliminates the opportunity to effectively reach a large percentage of the shopping center's target audience.
- A rule that restricts expressive activities during the busiest 30 days of the year will likely be upheld. If the owner shows

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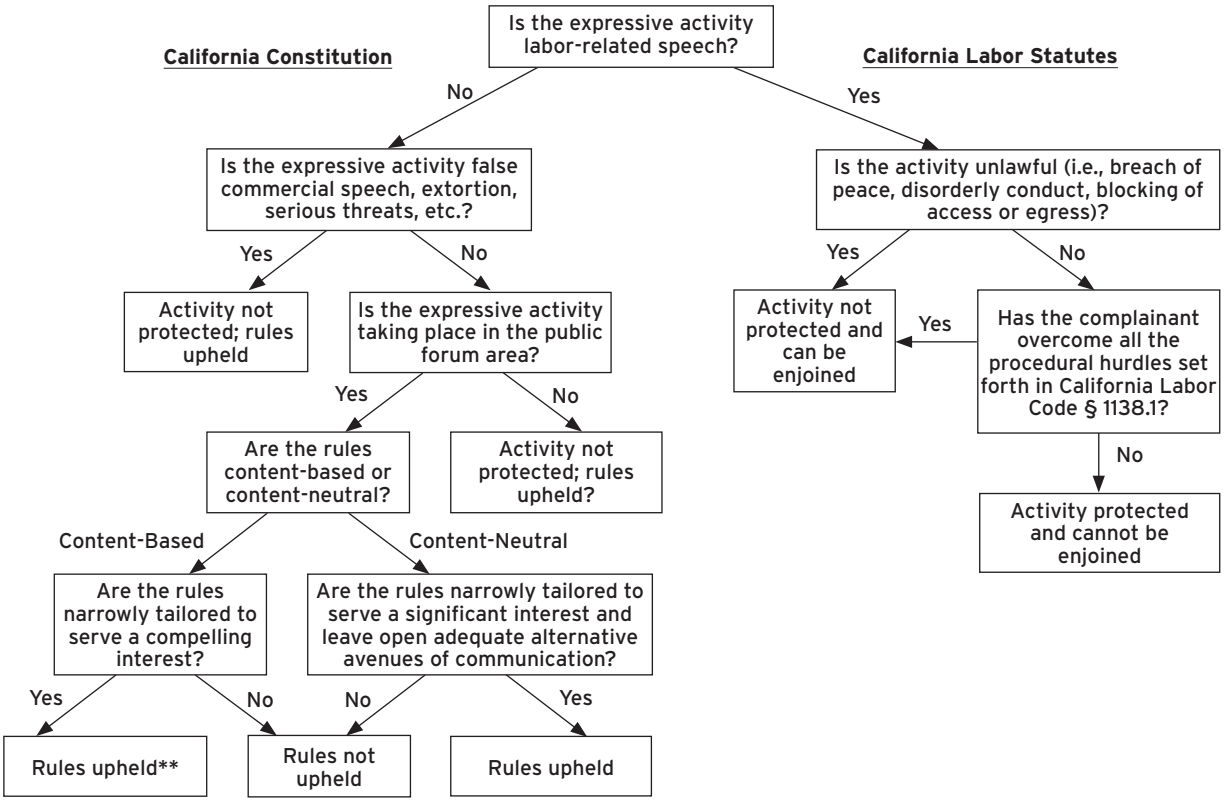

**Note: A content-based restriction is presumptively invalid, and such a rule will rarely be upheld.

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> evidence of a history of customer complaints, physical and verbal abuse of store employees, and escalating altercations, then this will prove a significant interest in the smooth operation of the mall during the days with potential for more conflicts. And it is narrowly tailored because the prohibition is for 30 days, which is less than 10% of the year.

CA Constitution: Additional Considerations

It is important to note that regardless of the type of forum or restriction, certain expressive activities may be prohibited altogether. The California Constitution's liberty of speech provision does not protect false or misleading commercial speech, extortion or threats of bodily injury. In addition, an owner should always ensure that the rules do not run afoul of the "void for vagueness" doctrine. This doctrine addresses the due process requirement of adequate notice. In the context of a shopping center, owners should ensure that their rules are clear and concise and illustrate how visitors can comply.

CA Labor Statutes

While the California Constitution protects expressive activities in the public forum areas of a privately owned shopping center, California labor statutes provide even broader protections for labor-related speech in nearly all areas of a shopping center. It is believed that content-based preference for labor speech is justified by the government's objective of promoting the collective bargaining process in order to resolve labor disputes. Consequently, prohibiting labor speech on shopping center premises, even in the non-public forum areas, is very challenging.

One California labor statute aims to promote worker rights in the collective bargaining process and reduce judicial interference in labor disputes by protecting certain labor-dispute activities from enjoinment. The protected activities include communicating the facts of a labor dispute and peaceful picketing or patrolling involving any labor dispute. The statute does not, however, protect unlawful conduct, including breach of the peace, disorderly conduct and unlawful blocking of entrances and exits.

Another California labor statute prohibits injunctions during a labor dispute unless the complainant overcomes various procedural hurdles. For the complainant to obtain relief, the court must find that: 1) unlawful acts have been threatened or will be committed unless restrained; 2) substantial and irreparable injury to the complainant's property will result; 3) greater injury will be inflicted upon the complainant by the denial of relief than will be inflicted upon defendants by granting the relief; 4) the complainant has no adequate remedy at law; and 5) the public officers are unable or unwilling to furnish adequate protection of the complainant's property.

These statutes protect peaceful picketing anywhere in the shopping center, even, for example, on a privately owned walkway in front of a store entrance. While free speech constitutional protection does not apply to privately owned sidewalks in front of customer entrances to stores because they are not considered public forum areas, California statutes step in to protect labor speech in such areas, meaning that picketing would be lawful.

The left side of the chart on page 4 indicates how to evaluate whether a shopping center's restriction of non-labor expressive activities will be upheld. The right side of the chart indicates how to evaluate restrictions of labor-related speech.

Conclusion

In sum, owners of California strip malls and shopping centers lacking public forum areas will likely be permitted to limit expressive activities on their premises, unless the expressive activity relates to union protests. However, in the public forum areas, California courts view blanket restrictions on expressive activities with disfavor. Owners of California shopping centers should invest the time and effort necessary to draft specific and concise shopping center rules based on real (not theoretical) problems. And until the California courts uphold more examples of compelling interests, owners should focus on rules that are unequivocally content-neutral.

Finally, nearly 40 other states have free speech clauses in their constitutions that are very similar to the California Constitution's free speech clause. Interestingly, nearly one-third of those states have rejected California's extension of free speech rights to private shopping centers. While some states may still feel discomfort in categorizing any part of private property as a public forum, most states have traditionally looked to California for its lead on the interpretation of free speech issues. For now, however, California may have one of the most expansive applications of its constitutional free speech clause.

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a client's conduct when the parties who have inherited the original lease have been left in a no-man's land of unfinished thoughts and vague suggestions about how to exercise and close the purchase option.

Initial Decisions

From a tenant-buyer's perspective, the attraction of obtaining an option to purchase in its lease is obvious: control without commitment. The tenant can enjoy the benefits of using the property, knowing it can walk away when the lease expires, while being assured that it can acquire the property in perpetuity if it becomes strategically attractive to own the underlying fee interest. Therefore, the tenant should focus on making the lease terms that describe how to exercise the option and close the purchase as clear and efficient as possible. A well-crafted

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option clause will allow the tenant to avoid becoming bogged down by process or uncertainty in the future, especially if the landlord-seller becomes reluctant to part with the land, while ensuring that there is adequate time to conduct due diligence prior to closing.

The landlord-seller has a broader range of issues to consider before granting an option to purchase. Is the tenant at hand so critical to the shopping center or development project that it is necessary to agree to a potential loss of control of the leased premises? Does the rent sufficiently reflect the value added to the tenant's leasehold interest by a purchase option? Outparcels and single-tenant properties with a long term triple-net ground lease are attractive assets to passive investors in real estate. The landlord cannot assume it will have latitude to field other offers during the lease term, even if the tenant does not intend to purchase the property.

Drafting Considerations

Once the parties have agreed to include a purchase option in the lease, they might not have agreed on any specifics other than a statement in the letter of intent that "Tenant shall have an option to purchase the Demised Premises." In these instances, it will be the attorneys' responsibility to flesh out key terms such as the purchase price and any conditions under which the option will be deemed waived by the tenant, thereby allowing the landlord to sell the property free and clear to a third party. Landlord's counsel should also seek a degree of control over what the tenant can build on the property after the sale.

Determining the purchase price can be tricky because the value of the property at the time of exercise may vary wildly from its value at the beginning of the lease term. The location of the property may have become more desirable because of extensive successful development in the surrounding areas, or the neighborhood may have deteriorated. The property could become environmentally contaminated or undergo other changes to the physical condition of the site. For these reasons, it is common for the landlord and tenant to agree in the lease to base the purchase price on an appraisal rather than set a fixed price. When drafting, it is important to structure the appraisal scenario in an efficient manner that will lead the parties to an agreed price.

Merely requiring that the landlord and tenant choose a "mutually acceptable" appraiser to value the land leaves open the possibility that the parties will not be able to agree. Taking an approach that allows each party to select an appraiser, who then jointly select a third appraiser to appraise the land or determine which party's appraised value is more accurate, is more likely to bring closure by driving the parties to work together to reach a settlement on the purchase price if they are concerned about being on the losing end of the appraisal selection.

The landlord's counsel should also clarify whether the client is better served by some other sales mechanism. For example, a landlord may prefer to grant only a right of first offer or a right of first refusal. These two rights differ from an option to purchase because they do not give a tenant an unconditional right to purchase the property. Instead, they allow the landlord to sell to a third party if the tenant does not agree to purchase the property at a specified price.

In a right of first offer, the landlord determines a market price it believes a third party will pay, and offers the property to the tenant at that price before marketing to any third parties. If the tenant declines the offer, its purchase right is waived, although it is common to reinstate the right of first offer if the price at which the landlord is willing to sell the property drops significantly below the price that the landlord offered to the tenant. In a right of first refusal, the landlord has to expend additional time and effort by negotiating price and terms with a bona fide third party, and then offer the tenant the opportunity to purchase the property on those same terms. Understandably, it may be difficult to convince an outside party to invest time in negotiating a purchase contract when a right of first refusal is in place because the tenant can defeat the deal by stepping into the shoes of the interested buyer.

When the subject property is a portion of a broader project that the landlord will continue to own and operate, such as a shopping center outparcel, the landlord's counsel should specify in the option clause any restrictive covenants that will be necessary to ensure that the property is operated in a manner compatible with the shopping center. Any restrictions on the use of the property that are contained solely in an unrecorded lease agreement may not be enforceable by the landlord after the sale unless they have been placed of record against the subject property prior to closing. Use restrictions and exclusives, architectural approval rights and sign criteria should be included in a recorded REA or in the conveyance deed at closing.

Avoiding Unintended Consequences During Exercise and Closing of The Option

When contained in a retail lease, options to purchase often create a contractual situation in which the parties do not have the same degree of direction regarding performance as a standard land purchase and sale agreement. Moreover, the terms of the option as agreed to in the lease agreement may no longer be

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satisfactory to the parties after the passage of time. These factors may lead the parties, during the exercise and closing of the option, to perform in ways that are contrary to the option clause as written. This conduct can negate the contract terms or expand the parties' contractual obligations, thereby making it difficult to determine what parts of the original option remain binding.

If problems arise between the parties, counsel involved have to pay particular attention to issues of whether their client's conduct has profoundly changed what would otherwise be clear contractual language subject to well-settled rules. When the client's course of performance negates contract terms or expands an obligation, the rules are suddenly different. Any belief that the original option terms remain unchanged is a dangerous assumption that can lead to lengthy and expensive litigation and increase the client's exposure to damages.

For example, consider a clause that states that "time is of the essence" with respect to the closing date and other dates for performance. It sounds simple and clear-cut. But if the parties do not act as if the deadlines are truly critical, how much reliance can counsel or a client place on a time-is-of-the essence clause in a lease or contract?

If the timelines for exercising the option, conducting and completing due diligence, or closing the sale of the property are not followed to the letter, the landlord-seller may believe that the option has been waived by the tenant-buyer, while the tenant-buyer may argue that the landlord-seller waived the time-is-of-the essence clause by acting in a manner that implied the date of performance was not critical to the transaction. This situation may occur when the landlord-seller indicates it is taking action to address property conditions that have been objected to by the tenant-buyer, such as physical or environmental conditions or title matters, but thereafter fails to indicate that it has completed its remedial actions and is ready and able to perform through the delivery of a deed to the seller.

A delay in reaching agreement to the purchase price during the appraisal process is another circumstance that may put the transaction off-schedule. If the parties continue to indicate by their conduct that they intend to perform the sale and purchase of the property after the passing of the original deadline, the time-is-of-the essence clause may be impliedly waived as a matter of law.

In these instances, even if the parties stop communicating for an extended period of time, it is a mistake for the landlord-seller to conclude that the tenant-buyer has abandoned the purchase option and that it is free to sell to another buyer. In fact, a court may rule that entering into an agreement to sell to a third-party buyer constitutes an anticipatory breach of the tenant's option to purchase, thereby exposing the landlord to damages.

So What Are the Parties (And Their Counsel) to Do?

Once an option to purchase in a lease agreement has been exercised, and especially if problems of performance occur, real estate practitioners should consider the following important points:

- A course of performance that varies from the strict terms of the purchase option clause can result in a significant alteration of the parties' rights and obligations. Counsel needs to study the legal effect of the course of performance seriously and advise the client accordingly.
- Undertaking a performance not expressly required by the option clause can have important legal consequences. It may be a better move for a seller to reduce the purchase price rather than undertake to address the buyer's objections in order to avoid a lengthy delay in closing.
- Do not assume that a failure of the parties to communicate, even for a long period of time, means that the option has been abandoned. Abandonment ordinarily requires clear and convincing evidence and it may not be possible to satisfy that higher evidentiary standard with only evidence of non-communication.
- Do not assume that a seller is free to sell the property to someone else merely because of the buyer's silence. The decision to sell the property to a third party buyer should be made carefully, and preferably only after receiving written evidence of unequivocal repudiation of the option to purchase from the tenant-buyer.
- If a landlord-seller believes that it is truly ready and able to perform — and wishes to put the burden on the tenant-buyer to close and pay the purchase price — counsel should notify the tenant-buyer's counsel that the landlord-seller is ready to perform, and then deliver an original of a properly executed and notarized deed that can be recorded, along with all other documents that are customary or expressly required by the contract.
- If a tenant-buyer expects to close, but believes closing may be delayed for a considerable time or that litigation is possible, it must ensure it maintains the funds needed to pay the purchase price in reserve throughout the lengthy closing process and the life of the litigation.
- If an agreement specifies that time is of the essence, the parties should act as if that is the case. In other words, if the parties do not treat deadlines as critical, do not expect that a judge will.

Conclusion

When preparing or negotiating a lease that will contain an option to purchase, counsel must inquire extensively about the intent of the respective clients in order to document a clause that will accomplish their respective goals. Failure to do so may result in a property that cannot be readily acquired or sold without extensive delay, or even litigation. Once the tenant exercises its option to purchase, if an issue arises

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specifically address who is responsible for demising the space back in accordance with all applicable laws and codes.

The terms of the lease must clearly designate the space to which the expansion right applies. This will typically either be done by attaching an exhibit showing such space or with a statement that specifically describes the space. Regardless of how this is accomplished, specifically and clearly describing the property to which an expansion right applies is imperative for landlords. To avoid future problems, a lease must be 100% clear about to which property the tenant has rights.

The lease must also be clear that the expansion right applies only to the entire space and does not grant the tenant a right to lease less than all of the subject space (unless only a portion of such space comes available). If the tenant's bargaining power or the specifics of the transaction lead to a situation where the tenant is granted the right to take a portion of the space, landlords should include a minimum square footage that the tenant must take, and reserve the right to approve the remaining space for marketability and codes compliance. Landlords should also provide that the expansion rights they grant are one-time rather than ongoing rights.

Rent is obviously near and dear to the hearts of all landlords and an expansion right must clearly set forth how rent on the expansion space will be determined. Other than rights of first refusal, which will generally derive rent from the bona fide third-party offer being matched, rental rates under expansion options are commonly determined in one of two ways. Generally, rent will either be at the then current rental rate under the lease (determined on a per-square-foot basis), or it will be at market rent. Setting rent at the per-square-foot rate currently being paid under the lease is the cleanest and quickest way to arrive at rent for the expansion space.

The risk here for a landlord is the same as the risk when granting renewal options to tenants at preset rental rates: that the tenant will only exercise such right if the preset rental rate is below market rent and otherwise will simply approach the landlord about leasing the space outside of the terms of the expansion right set forth in their lease. Setting rent based on market rent is more time-consuming and can involve costs (if arbitration is required) and there is no guarantee as to what that rate will ultimately be determined to be. The best solution from the landlord's perspective is often to set rent at a market rate, but provide for a floor of the current per-square-foot rate under the lease.

Another important consideration with expansion rights set at market rent is to make sure the tenant is bound upon exercise of the option (*i.e.*, the tenant cannot proceed and rescind the exercise of the expansion right based on a disagreement over market rent). In this situation the landlord would have incurred costs that ultimately did not lead to leasing the space, but more importantly, the landlord would have held the space off the market for a period of time thinking the space was leased, only to have to remarket the space later.

Final Consideration

One final consideration for landlords when granting expansion options is whether an expansion could trigger a violation of an exclusive use provision under another tenant's lease. Assuming your exclusive use provisions are well drafted and well thought-out, the answer to this question should be no. Nonetheless, it is a topic that deserves careful consideration. The most likely scenario where an expansion would trigger a violation of another tenant's exclusive use provision is when there is a square-footage threshold in the exclusive use provision.

For example, the existing tenant was not in violation when operating a sporting goods store in 5,000 square feet, but once it crossed the 10,000 square-foot threshold, it triggered a violation. Any prudent retail landlord must have a firm grasp on the exclusive use provisions that encumber their property, so the additional analysis required here should not be a significant burden.

Conclusion

As previously stated, expansion rights can be an ideal tenant inducement, as they provide tenants the flexibility they want and need and, when properly drafted and thought out, do not carry a significant burden for the landlord. Paying attention to the details touched on in this article will help landlords to ensure that the theoretical "win-win" situation is *actually* a "win-win" situation.

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that may signal a lengthy delay in closing and possibly litigation, the transactional attorneys on each side of the deal would likely benefit from consulting with a litigator to assess the client's rights and obligations and assist in crafting a strategy that either results in a closing and avoids litigation altogether, or at least avoids pitfalls that can impair the client's case once litigation begins.

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