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IN THE SPOTLIGHT

Credit Tenant Lease Financing

Understanding Key Principles

By R. Robinson Plowden and Virginia Worthy

While credit tenant loans represent a relatively small scope of overall financing transactions, they are a noteworthy addition to the finance realm due to their creative structures and strong performance. As various financial sources predict that the commercial real estate finance sector is expected to continue on its upward swing, there is a sense that a wider breath of financing structures will be attractive to lenders.

Definition and Description

A credit tenant lease (CTL) is an alternative method of financing real estate based on the credit standing of a major tenant. Generally, this form of financing is structured with an assignment of the rental payments to the lender with the real property pledged as collateral in the form of a first lien. The underlying credit or the tenant's ability to pay rent is the focus of the underwriting for each particular loan.

Although CTL loans can be made on all types of property, they often are utilized in the sale/leaseback or build-to-suit

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Problematic Lease Provisions: The Top Three Offenders

By Jill R. Johnson

Both landlords and tenants of commercial property must be careful in preparing and signing leases. Beyond the financial considerations of the agreement, both parties must consider how to protect themselves before, during and after the term of the lease. Although every commercial lease is unique, there are three provisions that often create the most problems for landlords and tenants: self-help repossession provisions, restrictive covenants, and repair provisions.

Self-Help Repossession: Friend or Foe?

Determining whether self-help repossession is a viable option depends on whom you ask. Self-help is the process of evicting a commercial tenant without resort to the judicial dispossessory procedure (usually a state statutory procedure). It is typically accomplished by a landlord locking the doors to the tenant's space and retaking possession. Many landlords are hesitant to exercise this remedy (despite the fact that a provision allowing it is, in some form or another, in most standard commercial leases). However, the remedy of self-help has been specifically authorized by many states, provided that the lease contains language permitting the landlord to exercise it.

The risks associated with self-help primarily arise from the landlord's seizure, retention and/or disposal of the tenant's property in the space. A prudent landlord would, therefore, also include clear language in the lease that details the landlord's responsibilities related to the tenant's property in the event of a self-help eviction.

Those responsibilities should not include "removing the property from the premises and putting it on the street." The landlord should take great care to make an inventory of the property remaining in the space and store it securely until the tenant is able to retrieve it. Although it may be tempting for a landlord to try to sell the property to satisfy any past-due rent, this is not advisable.

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Tampering with the tenant's property frequently opens the door for a conversion or theft claim by the tenant against the landlord (again, careful wording in the lease will greatly impact these rights).

Despite self-help's bad reputation, there are actually certain circumstances (discussed below) in which it can be very useful to a commercial landlord. For obvious reasons, tenants tend to disagree. Practically speaking, it is probably not advisable for a landlord with an operating tenant in a fully stocked space to engage in self-help. The difficulty and costs associated with the protection of the tenant's property will most likely negate any advantage the landlord gained by the exercise of self-help.

However, if there is little to no property remaining in the space (where, for example, a tenant has abandoned or partially abandoned the space and is no longer operating), self-help is an option to consider. In these circumstances, the landlord would be required to engage in minimal, if any, efforts to secure the tenant's property and the landlord gets the space back immediately, without having to resort to the cost and delays associated with a court proceeding for eviction. A landlord in this situation would not get a judgment against the tenant for the past-due rent without filing a separate lawsuit at some point, but if the landlord has a replacement tenant ready to move into the space, the landlord's priority is likely to get the space back quickly and worry about obtaining a money judgment against the tenant later.

From a tenant's perspective, avoidance of this type of provision in a commercial lease is ideal because it can put the tenant in a situation where it not only has no space in which to operate but, at least temporarily, has no property with which to run its business.

The Risky Business of Restrictive Covenants

Restrictive covenants do just what they say — they put some type of restriction on the parties' obligations under the lease. These provisions can be risky and problematic from a commercial landlord's perspective because often, a breach of a restrictive covenant enables the tenant to terminate the lease or reduce rent, and the violation of these types of covenants is not always within the landlord's control to prevent. There are two primary types of restrictive covenants that often arise in commercial leases — exclusivity provisions and co-tenancy clauses.

Exclusivity Provisions

Exclusivity provisions give particular tenants exclusive rights to operate certain businesses in shopping centers. Careful drafting of these provisions is very important because they are strictly construed by courts due to their restrictions on the landlord's free use of its land (a right that courts hold paramount throughout the country).

Inquiries about the force and effect of exclusivity provisions are often fact-intensive and potential ambiguities abound. This has created a variety of results in different courts, often directly contradictory to each other, so it is very difficult to predict how these provisions will be interpreted.

For example, one court found that a lease providing that the tenant would operate a drugstore was also intended to mean that the tenant would not be allowed to compete in the sale of food products with another tenant that opened a supermarket. *Belvidere South Towne Center, Inc. v. One Stop Pacemaker, Inc.*, 370 N.E.2d 249 (Ill. App. 1977). Another court found that a lease restricting the tenant's use of the premises to a drugstore business and for no other purpose entitled the tenant to operate a grill or soda

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Will That Restriction Hold Up?

By Peter J. Marino, Scott A. Miskimon and Lauren H. Bradley

For both commercial tenants and landlords, use restrictions are a valuable asset. For the tenant, use restrictions are critical to protecting the value of its business by preventing another tenant from competing for customers in the same shopping center by selling the same or similar goods and services. For the landlord, use restrictions enable the owner to implement its strategy to produce the "tenant mix" it believes will maximize customer traffic and sales, thereby enhancing the value of the property. Given their critical nature to both parties, use clauses, exclusives and prohibited uses are among the most heavily negotiated provisions of any retail lease. As a result, the final draft may contain a number of compromises and vagaries that are understood only by the original parties involved. Moreover, use restrictions are unique due to the frequency with which they are reviewed and referred to during the day-to-day operations of a shopping center, long after the lease has been signed. Use restrictions are a constant topic of conversation among retailers, leasing and management personnel and their attorneys: whether a proposed new tenant is going to create controversy due to restrictions in existing leases, whether to seek or grant a waiver letter to allow a use that would otherwise be prohibited, and so on.

Most disputes over use restrictions are resolved amicably before litigation. However, it is important to understand the legal framework within which the matters would be litigated in court rather than to rely on intuition, even intuition that may have been informed by years of experience in the industry. This article summarizes the most important factors affecting the enforceability of use restrictions, both from a landlord and a tenant perspective.

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General Principles of Use Restrictions in Leases

Use restrictions are provisions that either prohibit a certain use (*e.g.*, tenant shall not sell hamburgers on the premises), require a certain use (*e.g.*, tenant shall operate a department store), or provide exclusive use to the tenant for a particular purpose (*e.g.*, tenant has the exclusive right to operate an electronics store at the shopping center). Radius restrictions expand the geographical reach of a use restriction by prohibiting a use on land that is not adjacent to the benefited party's property, but is within a specified distance from it. They either restrict where a tenant may open other stores (*e.g.*, tenant shall not open another location or an affiliate within a five-mile radius of the shopping center) or, in what is commonly referred to as a "reverse radius restriction," prohibit the landlord from leasing geographically distant parcels to another tenant that would then be in competition with an existing tenant (*e.g.*, landlord shall not use or lease any of its property, now owned or later acquired, to a pharmacy within a five-mile radius of tenant's premises).

How Are Use Restrictions Challenged?

Generally, use restrictions and radius restrictions in commercial leases are enforceable. Such restrictions are not favored in the law, however, and will be strictly construed and interpreted because the law favors the free alienability of property and disfavors restraints on trade. (Strict construction appears to be the majority rule. Check the authorities in your state, however, to determine if this strict standard of review has been abrogated by statute or case law.)

Courts that have reviewed challenges to use restrictions have taken one of several routes, or a combination thereof: 1) review the restriction as a restrictive covenant that "runs with the land" and thus applies and is enforceable against successors-in-interest; 2) review the restriction on strict contract-law terms; and/or 3) review the restriction under principles akin to antitrust and the law of unfair competition.

State law is relatively uniform on the prerequisites for a covenant "running with the land." (However, there may still be some nuances in each state. Conduct appropriate research to determine the rules applicable in your jurisdiction.) Generally speaking, to be enforceable as a covenant running with the land the prerequisites are:

- The restriction must touch and concern the land.
- There must be privity of estate between the party enforcing the restriction and the party against whom the restriction is to be enforced.
- The intent of the original covenanting parties must be that the restriction would run with the land and bind successors.
- There must be notice to successors.

The significance of a covenant running with the land is that it will be enforceable against successors-in-interest, rather than limited to just the original parties to a lease or deed. To satisfy the "touch and concern" element, the covenant must have an economic impact on the two properties to be affected by the covenant — *i.e.*, one parcel will benefit economically from the use restriction and the other will be burdened by it.

"Privity of estate" exists where there is a sufficient legal relationship between two individuals or entities, which allows one party to enforce legal rights against another concerning the other's land. There must be privity between the original covenanting parties, meaning that an interest in land (*e.g.*, a leasehold interest) was conveyed from one

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to the other in connection with the covenant. This is often referred to as "horizontal privity."

There is horizontal privity between a landlord and a tenant by reason of the leasehold interest that is conveyed in the lease. By contrast, there is no horizontal privity when a homeowner makes an agreement with his neighbor that he will not raise chickens in his backyard because no interest in land was conveyed in connection with the restriction. Where either the benefited or burdened land has been sold, or a lease has been assigned, there must also be a conveyance of an interest in land from each of the original covenanting parties to their successors-in-interest. This latter form of privity is called "vertical privity." Without vertical privity, the restriction cannot be enforced by or against a subsequent owner, lessor or lessee. A minority of jurisdictions hold that vertical privity will suffice and that there is no need to show horizontal privity.

The requirement of "notice" for a restriction running with the land does not mean actual notice, though actual notice would generally satisfy this requirement — except in pure race states such as North Carolina that require a recorded instrument to effectuate notice. Recording a memorandum of lease serves as constructive notice of the use restrictions described therein, and is sufficient to bind successors. Note that the affected land must be sufficiently described in the recorded memorandum. For example, if an outparcel tenant intends for its exclusive to apply to the main shopping center, a memorandum containing only a legal description of the leased outparcel may be insufficient to bind a shopping center that constitutes a separate parcel of land.

Radius restrictions particularly are subject to challenges that they unreasonably restrict competition. The overarching question in such challenges is whether the restriction is reasonably necessary to protect the landlord or tenant's legitimate business interest, much like a non-competition agreement in the employment context. Courts may examine the geographic scope and duration of the restriction in reaching a conclusion, though there may be additional or different factors relevant to your jurisdiction. Factors that have led to rulings that a radius restriction was unenforceable include an overly broad radius; the inclusion of towns distantly located from the shopping center where the landlord owned no property; and, in the case of a reverse radius restriction, a finding that the restriction applied only to the original landlord and not a subsequent purchaser of the shopping center.

Drafting and Counseling Tips

Landlords and tenants are advised to focus carefully on the use and radius restriction in their leases and to ensure that those provisions are as clear and precise as possible, that they apply to successors-in-interest, and that they bear a reasonable relation to the business interest sought to be protected. Careful, thoughtful drafting at the outset may avoid costly litigation (or the threat of it) over "gray areas" down the road.

Ideally, use restrictions should specifically state that the parties to the lease intend the restrictions to "run with the land." They should expressly state that the restriction is a covenant that to which both parties intend to bind their respective heirs, successors and assigns. Be sure to state clearly the economic benefit and burden of the restriction/covenant, and recite that it "touches and concerns the land." Drafting the restriction carefully to run with the land is important: If the owner transfers title to other properties within the shopping center to new owners a week after executing your lease, your exclusivity clause may not be worth the paper it is written on absent an express assumption of the lease by the subsequent owner.As a practical matter, consider a requirement that subsequent leases, subleases and/or amendments specifically incorporate any use restrictions. Including the existing restrictions in each subsequent lease document should aid landlords in their enforcement of use restrictions against future violators, though this is not necessarily required for enforcement by the tenant benefitting from the original restriction against the landlord.

From a contract-law perspective, give careful thought to how you define what uses are prohibited on the premises and what is prohibited within the shopping center. For example, if it is prohibited for the landlord to lease space to another bank, is a grocery store with a bank teller window inside also prohibited? Or, does a restriction against another drug store in the shopping center prohibit a grocery superstore from having a full-time pharmacist? Keep in mind that courts will interpret these provisions in a manner that favors full and free use of property, and will construe ambiguous language against whomever drafted the lease. Avoid ambiguity in a use restriction by describing the activity or goods that are restricted rather than solely mentioning a type of business. Prohibiting "the sale of prescription drugs dispensed by a licensed pharmacist" will lead to less confusion than prohibiting "a drug store." Also, consider carefully whether the passage of time could render the terms in the restriction outdated and unenforceable, or overly broad, given the evolving nature of the manner in which goods and services are delivered. For example, would a use restriction drafted in 1950 regarding "drive-in" restaurants prohibit a fast-food restaurant with "drive-thru" service today? An agreement to restrict "massage parlors" in the 1970s could prohibit a day spa offering massage services in the present day.

While it is impossible to predict how society and technology will change, there should be a balance between specificity of what is prohibited and flexibility that the language can withstand the test of time. In this age of superstores, it is common for anchor tenants to expect that existing exclusives should not apply to their operations. Landlords can help themselves in future

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anchor negotiations by including a carve-out in their use restrictions that is applicable to anchor tenants, which are typically defined as retailers of more than a minimum leasable floor area (*e.g.*, 50,000 square feet). It is also important to exclude existing tenants from being bound by use restrictions contained in leases with new tenants because by then the landlord has lost the ability to impose additional limitations on existing tenants without their consent.

Reflect on the business interest you are seeking to protect, depending on your role as either a tenant or landlord. As a landlord, would you be harmed (*i.e.*, reduction in percentage rent) if the tenant opened another location two miles away? Five miles? Ten miles? Would you be harmed if the tenant ceased operating a shoe store and began operating a bookstore? What if your tenant instead began operating an adult bookstore? As a tenant, how much would your sales decline if another tenant moved into the shopping center and offered a product that comprises 5%, 10% or 30% of your revenue? What new goods or services might you like to offer in the future? Will it be necessary to protect the tenant from competition from its landlord with a radius restriction and, if so, what should be the radius? Answers to questions like these will inform the reasonableness of a use restriction and/or radius restriction and avoid the risk that an aggressive restriction might be challenged or declared to be an unlawful restraint on trade.

The hard work necessary to enforce a matrix of use restrictions does not end after the lease is signed. The restrictions must be organized and reviewed on a regular basis. Whether landlord or tenant, keeping an eye on what goods and services other tenants are actually offering will be necessary to preserve legal rights to enforce use restrictions. When your landlord client is leasing space to a new tenant, it is important to investigate and understand the prospective tenant's goods, services, and intended current and future use of the property.

Could even a minor part of the new tenant's business be within the ambit of a use restriction already in place that benefits an existing tenant? If your client is a prospective tenant, it will have its own concerns about existing tenants and use restrictions already in place that benefit them. A prospective tenant that induces a landlord to allow a competing use, which is prohibited by an existing tenant's lease, could become liable for tortious interference with contract and be subjected to punitive damages. To avoid such risk, the prospective tenant should not sign a lease unless the landlord first obtains a waiver from the existing tenant. Or, if a waiver is not granted and the circumstances warrant a legal challenge to the validity of the restriction, obtain a declaratory judgment that the restriction is invalid.

Conclusion

Whether landlord or tenant, it is critical to focus carefully on the use and radius restrictions in a proposed lease and draft accordingly to ensure their enforceability. Time and effort expended on the front end of negotiations, with careful drafting of use and radius restrictions, will return dividends down the road and avoid the prospect of threatened or actual litigation that challenges those provisions.

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In the Spotlight

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of corporate headquarters, office buildings, warehouses, distribution centers or retail stores.

CTLs offer real estate owners and developers the opportunity for better terms and conditions for their financing transaction. The advantages of CTL financing include: better loan to value ratios for financing up to 100%; no limit on loan dollars per square foot; and one-step construction and permanent loan financing.

Types of Credit Tenant Leases

There are four categories of CTLs according to the Purposes and Procedures Manual (P&P Manual) of the National Association of Insurance Commissioners (NAIC) Securities Valuation Offices, December 2012 Edition. The four categories include: 1) Bond Lease; 2) Credit Lease; 3) Acceptable Credit Tenant Loan Variants (ACVs); and 4) Multiple Property Transactions (MPTs).

CTLs are attractive investment structures to lender parties since there is less prepayment risk and the monthly cash flow is certain. Lenders will be interested in eliminating or diminishing any risk that a tenant may terminate a lease or a tenant will be relieved of its obligation to pay monthly rent.

CTL financing is a viable option if: 1) the premises is completely constructed with the tenant in possession and paying rent; or 2) the underlying real property has yet to be acquired and the premises is not constructed, but a tenant is in negotiations for the leased premises. In the latter circumstance, the construction risk will need to be mitigated with an acceptable letter of credit or an escrow allowing the loan to be fully repaid if the construction is not completed within a specific time period.

Conclusion

As with any transaction secured by real property, it is important to review the lease, title and other due diligence documents, such as the environmental site assessment and any engineering reports.

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fountain in connection with the operation of the drug store. *Jeter v. Windle*, 319 S.W.2d 825 (Ark. 1959).

There are also a number of commonly used terms that quickly become problematic if and when the parties need to attempt to enforce them. For example, an attempted prohibition on nuisance through the prohibition of any "noxious or offensive trade or activity" has been held to be too vague, indefinite and uncertain for enforcement. *Seckinger v. City of Atlanta,* 100 S.E.2d 192 (Ga. 1957). A permitted use of the sale of "ladies apparel" has been interpreted to include the sale of unisex clothing. *Convert-A-Bed, Inc. v. Salem*, 360 So.2d 605 (La. App. 1978). A tenant's exclusive right to sell "groceries" did not include the exclusive right to sell beer. *Purity Stores, Ltd. v. Linda Mar Shopping Center, Inc.*, 177 Cal. App. 2d 568 (1960). Another court has held that the term "groceries" did not include non-food items such as soap, matches and paper napkins. *Winn-Dixie Stores, Inc. v. 99 Cent Stuff-Trail Plaza, LLC*, 811 So.2d 719 (Fla. Dist. Ct. App. 3d 2002). Other terms that have routinely caused trouble are "fast-food restaurant," "family-style restaurant" and "pornography."

Drafting Tips

In light of these potential pitfalls, how should parties protect themselves from dealing with an ambiguity issue down the road when drafting these provisions?

1. Be specific. Use examples in the lease to define or illustrate any terms, even if both the landlord and the tenant have an understanding between themselves as to what the terms mean. For example, the parties may include a restriction on the operation of another fast-food restaurant and include the following clarifying language: "A coffee shop, cookie store, candy store, ice cream store, 'smoothie' store or similar business may be located within the retracted area. In no event shall a quick service restaurant such as Panera Bread be considered to be a 'fast-food' restaurant for purposes of this lease." Do not be afraid to name specific restaurants, in this example, that illustrate what the term is not meant to encompass.

2. Include landlord representations. It is also advisable, from the tenant's perspective, to request that the landlord include representations in the lease concerning the presence or absence in the shopping center of other exclusives or use restrictions in other tenants' leases. Under Pennsylvania law, a shopping center tenant operating a supermarket was held to have notice when it entered into its lease of another tenant's exclusive right in its lease to operate a pharmacy, where a memorandum of that lease was recorded. *J.C. Penney Co., Inc. v. Giant Eagle, Inc.*, 85 F.3d 120 (3d Cir. 1996). It is much easier for the landlord to make a representation regarding the other exclusives at play in the shopping center than for a prospective tenant to search the real estate records itself to try to uncover that information (some of which may not be recorded).

3. Co-Tenancy Requirements. The second type of restrictive covenant is a co-tenancy requirement. These requirements solely benefit commercial tenants and can actually accelerate any negative trends in the amount of leased space in, and profitability of, a shopping center, sometimes even leading to the shopping center's demise in extreme situations.

These provisions typically allow a tenant to terminate its lease in the event a certain percentage of the shopping center becomes vacant and remains so for some period of time. The provisions can be especially harmful to landlords attempting to open new centers during economic downturns. Where the initial tenants in the new development have co-tenancy requirements in their leases, one tenant's failure to occupy and operate its premises may permit the other tenants to vacate or terminate their leases.

Landlords should, therefore, be extremely careful when agreeing to these types of provisions and should only agree to them where absolutely necessary (usually with major anchor tenants).

Repair and Maintenance: Pass the Buck, or Share and Share Alike?

A landlord ordinarily has no duty to repair commercial premises, absent some statutory or contractual obligation to do so. In fact, if a lease requires the tenant to maintain and repair the premises, without specifying further, but is silent with respect to the landlord's obligations, the tenant may be required to make any and all maintenance and repairs to the premises, both ordinary and extraordinary, including expensive structural repairs.

This is unquestionably a harsh result and potentially a grossly unfair burden for the tenant, so often, the parties will agree to a repair and maintenance provision that places some obligations on both parties. These provisions usually require the tenant to make or pay for minor repairs and maintenance, or "ordinary" repairs, and require the landlord to make or pay for major capital expenses or "extraordinary" repairs to the property.

Needless to say, problems arise when these provisions are not explicitly drafted. For example, numerous disputes have arisen about whether the landlord or tenant is responsible for certain expensive repairs such as the repair and replacement of HVAC units, roofs, parking lot repair and maintenance, wiring, elevators, etc. Typically, in these situations, the lease provision at issue failed to define a key term, such as "repair," "maintenance," "structural," "extraordinary," or "ordinary wear and tear," sufficiently. As a result, it is often left to a court to interpret the term and the parties' intentions with respect to their repair and maintenance obligations. The parties then run the risk of the court interpreting the provision in a way

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NY's Highest Court Grants License To Change NY's Licensing Law

ByAdam Leitman Bailey and John M. Desiderio

Since at least as early as 1849, in the case of *Dolittle v. Eddy* (7 Barb. 74 (Supreme Court, New York County, 1849)), New York law has defined a license as the "authority to enter on the lands of another, and do a particular act or series of acts, without possessing any interest in the land." Unlike a tenant who obtains the exclusive right to use and occupy the premises pursuant to a lease in consideration of the payment of rent, a licensee obtains no interest in the land, but only a revocable privilege to use it temporarily for a specified fee.

Although the court in *Dolittle* recognized that "[i]t is sometimes difficult to distinguish between an easement, a license, and a lease," the authors of this article, nine years ago, published a thorough review of the case law distinguishing leases from licenses, and we noted that New York courts had consistently held a license exists when: 1) the owner retains absolute control over the premises; 2) the owner supplies all of the essential services required for the licensee's permitted use of the premises; and 3) the owner may revoke the permitted use of the premises "at will." (*See Karp v. Federated Department Stores, Inc. d/b/a Macy's*, 301 AD2d 574, 754 NYS2d 27 (2d Dept. 2003). Since then, due to the frustration and delays in evictions that commercial landlords have suffered for decades, practitioners have increasingly advised their clients to turn to licensing and self-help lease provisions to facilitate more swift and less costly eviction proceedings.

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Update

A year ago, in *Union Square Park Community Coalition, Inc. v. New York City Department of Parks and Recreation*, 2014 NY Slip Op 01207 Decided on Feb. 20, 2014, New York's highest court, the Court of Appeals, appears to have redefined and narrowed the limits of what distinguishes a license from a lease by expanding the scope of what may be deemed a license. In doing so, the court adopted an approach it had never previously used in such cases. By seemingly setting aside the traditional rule distinguishing a lease from a license, the court has made it much easier for landowners to require that users of their premises be subject to controls that traditionally have been included only in leases.

In *Union Square Park*, the court approved an agreement between the City Parks Department and a private business corporation that permits the latter to operate a seasonal restaurant in the Union Square Park pavilion for a term of 15 years for an annual "license" fee over that term beginning at $300,000 and increasing to a maximum of $450,000, or 10% of the annual gross profits of the restaurant, whichever is greater. The agreement also obligates the restaurant owner to invest "at least $700,000 in specified capital improvements." At issue were: 1) whether the restaurant constituted a non-park purpose and thereby violated the public trust doctrine; and 2) whether the agreement between the Department and the private business constituted a lease, not a license, and therefore whether the agreement amounted to an unlawful alienation of parkland. The court held: 1) that the restaurant did not violate the public trust doctrine (7 Barb. 74 (Supreme Court, New York County, 1849); and 2) that the agreement was a valid license and not a lease.

In holding that the agreement constituted a license, and not a lease, the court relied upon the following factors: 1) that the "language of the agreement confirms what it purports to be — a revocable license"; 2) that the "Department retained significant control over the daily operations of the restaurant, including the months and hours of operation, staffing plan, work schedules and menu prices"; 3) that the "use of the premises is only seasonal"; 4) that use "is not exclusive even in the summer, as outdoor seating is required to be available to the general public (with the exception of an area reserved for the service of alcoholic beverages)"; and 5) that the restaurant owner is "obligated to open the pavilion to the public for community events on a weekly basis."

The court also relied upon the agreement's requirements that the restaurant owner comply with extensive environmental standards, "use Greenmarket vendors, offer culinary internships, and host charitable events." In conclusion, the court said: "More importantly, the agreement broadly allows the Department to terminate the license at will *so long as the termination is not arbitrary and capricious*," and, "Consequently, *despite the 15-year term and payment structure*, we agree with the Department that it entered into a valid license arrangement with [the private corporation]." (Emphasis added).

Earlier Precedent Ignored

In so ruling, the court ignored its earlier precedent in *Miller v. City of New York*, (*See* Bailey & Desiderio, Landlords May Entirely Eliminate Leasing, NYLJ, April 13, 2005) a case with facts virtually "on all fours" with *Union Square Park*. In *Miller*, the court had held that an agreement allowing a private corporation to construct a golf driving range, with accessory shops and a parking lot, on public park land, and to operate the enterprise on a percentage rental basis for 20 years, with certain "revocable" termination rights reserved to the Parks Commissioner, which were not exercisable "at pleasure," was:

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> as a matter of law and on its face … a lease and not a mere revocable license or grant of a privilege or concession to do particular acts appropriate in a public park and subject to appropriate power in the Commissioner to control the operation and revoke the grant at will.

Contrary to the reasoning given by the court in *Union Square Park*, the court's *Miller* decision held that: 1) a "document calling itself a 'license' is still a lease if it grants not merely a revocable right to be exercised over the grantor's land without possessing any interest therein but the exclusive right to use and occupy that land"; 2) controls, such as "prices, times of operation and choice of employees, etc., rather strict and detailed [are] but no more than would be reasonably demanded by a careful owner as against a lessee for such a business use and for so long a term"; and 3) a termination clause which is not "revocable-at-pleasure" is not truly exercisable "at will."

Similar to the situation in *Miller*, the restaurant in *Union Square Park* necessarily has exclusive occupancy to park premises for its kitchen and bar facilities; the only exception to exclusivity being certain outdoor seating in the summertime, a requirement that can hardly impinge on the restaurant's otherwise broad exclusive occupancy of the park pavilion and one that, in the long run, may even serve the restaurant's commercial interests. And, as *Miller* noted, the controls over the restaurant's hours of operation, prices, and staffing do not necessarily turn a lease into a license. Finally, as in *Miller*, the agreement with the restaurant is not truly terminable "at will," as the agreement requires that any termination by the City not be "arbitrary and capricious," a standard that subjects any decision by the City to cancel the "license" to possible reversal and/or damages after judicial review. Moreover, the agreement's requirement of the restaurant owner for $700,000 in capital improvements is certainly unlike the typical license situation where the licensor provides all of the essential services required for the use of the premises.

Contrary to the holding in *Miller*, *Union Square Park* provides authority for commercial property owners: 1) to grant licensees more exclusive use and possession of the licensed premises without granting them an interest in the property, 2) for lengthier periods of time than in the typical license agreement granted prior to Union Square Park, and 3) for "fees" that may be for amounts that would more typically be expected in rental agreements. Commercial property owners that wish to impose "license" terms that more readily resemble lease provisions, which would otherwise have doomed "license" agreements under prior case law (*see* Bailey & Desiderio, Landlords May Entirely Eliminate Leasing, NYLJ, April 13, 2005), may now attempt to implement more expansive license agreements that give them the opportunity and right to remove recalcitrant and/or undesirable licensees without resort to the lengthy, costly, and frustrating litigation that so often characterizes landlord/tenant disputes. *Union Square Park* may enable such owners to terminate a licensee's occupancy and/or to use reasonable self-help to remove the licensee from the premises "at will."

Conclusion

It appears, therefore, that, in *Union Square Park*, seemingly in an effort to affirm the power of the City government to determine the best way to use its park space, the N.Y. Court of Appeals has eschewed its own precedent and that of other courts, regarding the longstanding legal distinction between licenses and leases. Unless *Union Square Park* is limited to its own particularized facts as applied to future cases, the court will have, perhaps unwittingly, redefined the legal landscape for real estate attorneys in drafting and negotiating licenses for the use of commercial property.

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Lease Provisions

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possibly not intended by either or both of the parties.

Again, the key with repair provisions is to be as specific as possible. Clearly define and delineate the parties' respective obligations regarding the maintenance and repair of the property, including not only the interior of the property, but also any and all buildings, structures, and improvements on the property.

Conclusion

Although it can be tedious during the negotiation process, when the parties are usually excited about the prospect of entering into a business relationship together, it is important for both parties to remember that what may seem like "detail overkill" on the front end can become critically important if a problem ever arises under the lease. Being aware of the issues that are associated with these three types of provisions will give both commercial landlords and tenants the ability to negotiate the most favorable terms in their commercial leases, which is ultimately the goal of both parties.

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