Protective Lease Provisions

Landlords can avoid conflict with CAM clauses

by Pamela V. Rothenberg

Retail developers and managers agree the success of their shopping centers hinges in large part on the image the centers present to potential tenants and customers. Consequently, maintenance expenses are one of the largest budgetary line items faced by shopping center owners. At the same time, common area maintenance (CAM) costs associated with operating and maintaining a shopping center present significant challenges, as most retail landlords routinely face pressure from tenants to keep these costs down.

To minimize contentious discussions and prevent potential disputes with tenants concerning CAM charges, landlords should strive to include clear and protective CAM provisions in their leases. It is essential these lease clauses clearly support a landlord's rights to pass CAM charges through to the tenants. Otherwise, tenants may have a basis upon which to attempt to reduce or totally avoid their obligations to share in these expenses.

The definition of "CAM Charges" should be written as generally and broadly as possible in the lease (i.e., "any and all direct and indirect costs incurred by the landlord for or in connection with its ownership, management, operation, servicing, repair or maintenance of the common areas of the shopping center"). The lease should also include a detailed list of expenses the landlord intends to pass through to tenants. This list should be reviewed and updated on an ongoing basis to include new types of operating expenses incurred by landlords.

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Finally, the lease should expressly permit the landlord to determine the items and expenses to be included within the meaning of CAM in the lease. If possible, it should also include a catch-all that defines CAM charges to include all other customary expenses in accordance with generally accepted accounting and management principles.

Negotiations with tenants concerning CAM charge provisions are often riddled with tension because tenants believe landlords are using CAM charges as a profit center rather than as reimbursement of legitimately incurred expenses. One relatively new trend being utilized by some retail landlords is the "all-inclusive lease," where CAM charges are converted to a flat, pre-negotiated fee, added to the rent and escalated in the same manner a base rent increases throughout the term of the lease. This approach affords tenants an ability to budget in advance for CAM charges, thereby giving tenants a greater degree of certainty as to what they will be obligated to pay over the term of the lease.

Retail landlords should endeavor to address the issues associated with CAM charges as soon as possible in their negotiations with tenants. This strategy will help resolve early on during the establishment of the landlord/tenant relationship the issues that will inevitably arise concerning these most challenging retail lease provisions. □

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