



EXCELLENCE IN
COMMERCIAL REAL ESTATE

LEGAL BRIEFS

ANCHORS AWAY

A landlord can mitigate damages if a major tenant closes shop.

By Dan Villalpando | November.December.17

With the ever-changing face of retail development adversely affecting traditional anchor tenants, such as Macy's, J.C. Penney, and Sears, shopping center owners are facing unforeseen challenges. As some anchor tenants decide to shutter stores, many shopping center owners may be left with large, vacant spaces, often at key entrance points to their malls. However, shopping center owners have the ability to mitigate the negative effect of a closure.

When shopping center owners receive word that an anchor tenant is scheduled to close its doors, they should first review the relevant lease and any related documents, such as covenants, conditions, and restrictions. For example, contractually the anchor tenant may not be allowed to close for business during the term, which immensely increases the owner's bargaining power.

An unauthorized closure would likely be deemed a breach of the lease and may entitle the owner to damages through accelerated rent. Many anchor tenants, however, have the upper hand in lease negotiations because of the foot traffic their stores bring to a shopping center and may not have agreed to an operating covenant in their leases.

Negotiate for Flexibility

Without an operating covenant in the lease, however, the lease terms may provide other options. For example, the owner may have the right to recapture the anchor tenant's premises by terminating the lease and taking back the space.

Such a resolution allows the owner to market and fill the vacant space with one or more tenants. Of course, if the anchor tenant is required to continue to pay rent following a closure, the owner receives some solace through monthly payments. However, a dark space in excess of 50,000 sf may have a chilling effect on the overall success of a shopping center, so the owner may prefer to end the lease and regain control of its space.

Absent an operating covenant or a recapture provision, a landlord may want to negotiate directly with the anchor tenant for a buyout of its lease. Such a resolution may make sense for both parties, allowing the anchor tenant to stop paying rent for the term and permitting the owner to regain its space to fill it with tenants.

The buyout amount is negotiable and should reflect the amount of rent the owner can expect to lose before it has new tenants occupying the space and paying rent. Other terms, such as a

restriction on the owner's ability to lease space to a competitor of the anchor tenant for a specified time, may be included under the terms of the buyout.

If the anchor tenant is attempting to assign its lease or sublet all or a portion of its premises, the owner should review the assignment sections of the lease. The owner may have some consent rights concerning the new tenants.

Additionally, the owner will want to see if the original anchor tenant remains on the hook after an assignment or subletting. The owner will want to discover if there is a limitation of the amount of time the anchor tenant can be closed while it attempts to find a replacement tenant to assume the lease or sublet all or a portion of the premises.

Plan for Renovations

In addition, if a shopping center owner is dealt a lemon through an anchor tenant closure, it may want to try to make lemonade. As an example, since some anchor tenant spaces may look worn out, an owner may want to freshen up the space.

Nationally, several shopping center owners faced with anchor tenant closures have converted their projects into mixed-use developments, usually combining retail, restaurants, housing, and offices. Another, perhaps simpler, approach is to renovate the vacant anchor tenant space and lease it to successful discount operators, such as TJ Maxx, Ross, and Burlington Coat Factory.

Finally, given the recent news that companies such as Amazon will be leasing brick-and-mortar space in shopping centers, an owner may take the opportunity to integrate internet shopping with traditional mall shopping. The owner will stay on the leading edge of the retail landscape.

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