

A landlord primer for a potential second wave

Winter is coming, and the nation is girding itself for a second wave of the COVID-19 pandemic. Now is the time for retail and office landlords and tenants to prepare for potential closures, slow-downs (and possibly shutdowns), and continuing economic uncertainty, while viewing the change through the lens of lessons learned during the past six months.

Landlords and tenants will need to closely monitor government orders and requirements in order to ensure business operations comply with social distancing guidelines and workplace safety. However, one of the most important lessons of this era is that landlords and tenants would be wise to change long-term strategies due the lasting impact of the COVID-19 pandemic.

As parties move into a new reality in leasing, there are several considerations that should be at the forefront of negotiations, including evolving force majeure clauses, common area and operating expense provisions, operating covenants and co-tenancy provisions.

The reconfiguration of common areas, including the recalculation of operating expenses to incorporate tenants' utilization of formerly shared outdoor and parking spaces, should be at the forefront when looking at rapidly changing business operations. Curbside pickup, take-out and social-distanced outdoor seating require new common area provisions and restrictions. These changes also may include expanded licensing, including liquor licenses.



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The tenant or landlord may be required to carry different insurance policies because of these changes. Consideration also should include implementation or modification of mechanical systems testing for the tenants' premises and any common areas that are being used in a manner different from the original use. Changes to security and health screening measures for both employees and patrons also must be reviewed, as well as new janitorial specifications and evolving building regulations.

A study of the last six-month period shows that the pandemic is not a valid excuse for a tenant to avoid paying rent or terminate its lease. However, we have seen ample rent relief given by landlords based upon each tenant's unique situation. Considering the unusual circumstances and number of tenants whose businesses have been curtailed, most landlords have been forced to the negotiating table despite tenants' tenuous legal positions. Key concepts for landlords to evaluate when considering rent accommodations may include future considerations (i.e., future profitability of the tenant and term extensions) and the specific financial condition of each tenant.

When negotiating rent relief, we



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have seen most deals tied to a concrete current period rather than a potential future time frame. Landlords largely have been unwilling to offer provisions for future relief in case of an uncertain and indefinite circumstance of the pandemic or similar disruptive event beyond a traditional force majeure concept. However, as the pandemic carries on and almost no tenant remains unscathed from the ravages of COVID-19, we have seen more tenants push for abatement in the event of future shutdowns and landlords gradually conceding, as both parties have come to the realization that they are together in this survival battle. Nevertheless, prudent landlords will negotiate each provision carefully to minimize future cash-flow gaps while trying to anticipate situations that may impact each tenant's business.

Force majeure provisions are morphing with the times. Most leases we have negotiated have an express requirement for continued rent payments regardless of force majeure. In fact, force majeure may not even be triggered if not drafted in such a way as to include a pandemic. Force majeure clauses are construed narrowly, and "acts of God" generally have not been found to include a pandemic. However, tenants are



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negotiating broader force majeure provisions that not only include pandemic events, disease and local or national emergencies, but also other disruptive forces that tenants previously may not have asked for. Once again, landlords' counsel must thoroughly analyze each such

addition to avoid frequent rent negotiations. Landlords also should require tenants to determine if they may be able to recoup some of their losses by seeking the benefits of governmental relief programs and business interruption insurance, as some policies include coverage for civil authority interruptions (when a governmental authority orders the closure of businesses).

Operating covenants and, conversely, co-tenancies, which already were controversial for the respective parties (especially in the retail universe), should be even more closely scrutinized moving forward. While we can expect uncertainty in the future of office space and shopping centers, what is certain is that there are few permanent players and pandemic-proof businesses. As such, landlords and tenants should pay close attention to provisions that promise a long-term retail

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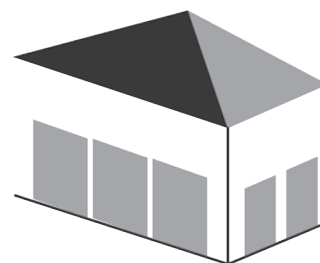
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Diamant

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landscape. The key is to anticipate change as much as possible while allowing each side to run a profit-

able operation.

The tenants' best option is to discuss their situation candidly with their landlord. The more concrete financial background and future

pro forma tenants can provide, the more easily they can reach a mutually workable solution. Ultimately, the best choice for both landlord and tenant is to proactively work together

through the challenges of the pandemic. Such a unified approach will result in both parties emerging from most problems with less disruption and harm. ▲

Mason

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Mammut, which opened in October. At the end of the block, you can catch a DJ set while enjoying a margarita and sorting through a curated collection of vintage vinyl, clothing and accessories at a

new concept called Garage Sale.

By designing the concepts as limited-run, the block is providing local entrepreneurs with the flexibility they need during these uncertain times, along with the option to extend their engagements when their concepts prove suc-

cessful. The result is a renewed sense of energy on the block that benefits all tenants.

While there are no guarantees in the current restaurant or retail environment – especially now – and the challenges will only grow as winter approaches,

by demonstrating flexibility, collaboration and creativity throughout this year, the tenants and the management at Larimer Square are giving people something to look forward to in downtown Denver. The block is proving, once again, its tremendous resilience. ▲

Coon

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outdoor seating experience. Breckenridge is allowing business to set up winterized Yurts while Telluride is refurbishing 20 gondolas that have access to all the dining options at the base of the mountain village. These small, one-table areas can quickly be sanitized between seatings to provide a safe dining experience that a larger dining room cannot. These ideas are

essential to fighting our current circumstances and, in my opinion, they provide great insight into what we can expect in the near future, as far as enhancing the retail experience, and maybe even some ideas that will stick around. It is clear to me that this new wave of ideas is not only important for supporting struggling businesses at this time but also is the right strategy to provide a stable future for these same businesses

long-term.

Since our evening out, I have pondered the possibilities for this pedestrian-focused layout being permanent not only at Larimer Square, but for other developments around our city/state both old and new. Larimer Square always has been a gathering place for our community, but the new feel should be the template for the future post-COVID-19. Retailers, developers and landlords need to

bring people back into the world with a breath of fresh air. I see a future where this concept is successfully developed across all product types in our city to benefit our vital local businesses and continue to grow our community beyond the current pandemic. As we reflect over the past eight months, it is important to find positives, and for me, I see opportunities for improvement and I'm encouraged by the ingenuity I see. ▲

Cobbins

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and wallpaper from local artist Genevieve and Magpie Painting, Mimosas provides a quintessential Five Points experience.

Another new concept, Methodologies and Best Practices, recently took the place of Dunbar Kitchen and Tap

House. Located at 2844 Welton St., Chef D's newly reimagined Methodologies and Best Practices is designed as a go-to gathering place for happy hour and dinner, with an updated menu featuring classic and contemporary American cuisines. As a Black-owned and operated fine-dining restaurant with a full-service bar and large cov-

ered patio space for live music events, Methodologies and Best Practices aims to revive Five Points as a can't-miss nighttime destination.

While the pandemic inevitably has taken its toll on Five Points, the business community along Welton Street has proven that if you come together for meaningful investment in your

own backyard, nothing can keep you down. Even through the struggle, there's a light of hope building on the legacy of dozens of Black-owned businesses that have come before these. Five Points will weather this storm, and the next, because of an undeniable community-first mentality and determination to succeed. ▲



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