

Law

Curbside pickup prompts lease provision changes

As we enter 2021, it seems that one thing about the ongoing pandemic is clear – the way tenants are doing business is changing fundamentally for the long term. Customers are realizing that curbside pickup for both retail purchases and food orders makes life easier, pandemic or not. With this change come a number of lease-related issues that landlords and tenants alike will need to consider in order to determine what lease provisions might need to be modified. Some of those issues include signage placement, use and common area restrictions in Covenants, Conditions & Restrictions and adequacy of insurance to cover the new curbside operations.

The location of tenant signage in the common areas and on the premises typically is a heavily negotiated concept within a lease. Landlords like to have control over the types of signage that a tenant can put up and where such signage can be situated, as landlords try to maintain a cohesive look throughout the shopping center and among the various ten-



Tal Diamant
Shareholder,
Brounstein Hyatt
Farber Schreck
LLP, tdiamant@bhfs.com

ants. However, the switch to curbside pickup requires some flexibility by landlords, as tenants will require very clear and directional signage in order to drive customers toward the particular curbside areas. These new curbside-specific signage specifications may not be covered under the existing lease provision and may require an amendment between the parties. The foregoing signage modifications also may be limited by overarching signage criteria for the shopping center that, at a minimum, will require landlord and/or third-party consent, and also may have to be modified.

Furthermore, the ability of tenants to use areas on the exterior of their premises for sales or for tenant-dedicated takeout space likely is limited by not only existing anchor leases but also any CC&Rs that encumber the shopping center. CC&Rs are common in mid-size to large retail projects where several stakeholders seek to develop and own multiple parcels, while creating a harmonious atmosphere in the shopping center. Often, cross parking



Elizabeth Bhappu Kudla
Associate,
Brounstein Hyatt
Farber Schreck LLP,
ebhappukudla@bhfs.com

restrict a tenant's ability to sell products and food at the curbside. Tenants should work with their landlords to determine required CC&Rs and lease approvals and amendments, with the view that such changes really benefit all shopping center owners and occupants.

Another lease provision that landlords and tenants need to scrutinize is the insurance section. The most common method of allocating liability between the landlord and tenant is to have the tenant cover occurrences within the leased premises, while the landlord covers occurrences in the common areas of the shopping center or building. The landlord's and tenant's insurance policies should then track those allocations by covering the corresponding geographic area. Although this split makes sense in a traditional context, it may not ensure protection of a business that is offering curbside pickup, at least not by the tenant's insurance; and logically it is the tenant who should be responsible for claims in these new areas in

which they wish to operate. The landlord's current insurance will cover said claims, but the landlord should not be subject to increased premiums based on additional activities mostly benefiting the tenant.

In order to ensure that the tenant, not the landlord, is bearing the risk resulting from the tenant's expanded outdoor operations, the parties likely will need to amend the definition of "premises" in the lease to encompass the new curbside spaces. Insurance agents usually look to such a premises definition in the lease when issuing their applicable coverage. Further, the landlord (and anyone with current or future management responsibilities over the property in question, such as the property manager, an affiliate of landlord or the lender) should be named as an additional insured under the tenant's liability policy. This step allows the landlord the right to make a direct claim with the insurance company under the policy and avoid the middleman. It is very important for the parties to specifically include the foregoing concepts in the insurance policies and to share proof thereof with each other, as a small mistake can have dire consequences.

Ultimately, as curbside pickup gains traction, both landlords and tenants will need to work through the lease provisions and other governing documents in order to permit more expansive outdoor activities. As is often the case when facing permanent large-scale shifts in the retail industry, it behooves the landlord and tenant to proactively work together through these operational changes in order to achieve win-win outcomes. ▲



Curbside pickup appears to be here to stay, requiring updates to leases and insurance policies.

