

Pop-Up Leasing

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FOMO—Fear of Missing Out. That is the name General Growth Properties (GGP) gave to the 2,200 square foot space located near Chicago at GGP’s Northbrook Court property, which showcases trendy area restaurants on a rotating basis. One of the first restaurants to open features the perennially-favorite American classic comfort food: grilled cheese.

The goal is to “bring in Chicago area restaurants that do not yet have a presence outside the city, introducing new concepts to the community and giving chefs the platform to reach new customers.” Alice York, *FOMO: Not to Be Missed*, DailyNorthShore.com, <https://jwcdaily.com/2017/11/17/fomo-not-to-be-missed/>. Restaurants within the space change periodically, some staying for just a week or perhaps just a day. Begun in November 2017, FOMO Café itself is slated to last for just one year.

FOMO Café is one example of “pop-up” retail, a term that Trendwatching.com claims to have coined in January 2004. This trend has taken on new popularity across the nation as both start-up and established retailers find new, creative, and cost-conscious ways to bring their products to consumers without committing to the significant construction expenses or the lengthy lease agreements required to open a full-service location. It also presents special negotiating and drafting challenges for the real estate practitioner.

History of Retail “Pop-Ups”

“If new products can come and go, why can’t the stores that display them do the same?” asks Trendwatching.com. “Well, you guessed it, retail

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outlets increasingly do. . . . “[T]hese initiatives have a tendency to pop up unannounced, quickly draw in the crowds, and then disappear or morph into something else, adding to retail the fresh feel, exclusivity, and surprise that galleries, theatres, and Cirque du Soleil-adepts have been using for years.” *Pop-Up Retail*, Trendwatching.com, http://trendwatching.com/trends/POPOP_RETAIL.htm.

Essentially the short-term leasing of retail space (the term of the lease can be as little as a few hours or, more typically, for a few months), the modern version of pop-up leasing began in 1977 in Los Angeles with the Ritual Expo. The Ritual Expo began as a venue to blend the sale of streetwear with the music that was then being played in the clubs. The Ritual Expo then expanded to sell and showcase modern art and photo exhibits, live music, and significant local and national fashion and accessory designers. The Expo expanded its locations to several major cities.

Then, entrepreneur Ross Bailey took the pop-up concept to a new art form. After successfully starting a London pop-up shop to sell merchandise for Queen Elizabeth’s Diamond Jubilee, Ross Bailey started the pop-up-focused agency “Appear Here.” Bailey brought together landlords with vacant spaces and tenants who wanted to test the market with their emerging products. Appear Here began in several cities in England and now has various locations throughout Paris and New York City. Appear Here’s website states that it is currently leasing over 10 million square feet. Its mission statement is “[t]o create a world where anyone with an idea can find space to make it happen.” See Appear Here, *The World’s Leading Marketplace to Rent Space*, <https://www.appearhere.us/about/company> (last visited June 14, 2018).

National retail giant Simon Properties introduced The Edit@Roosevelt Field at the Roosevelt Field Mall in

Garden City, New York. Simon teamed up with Appear Here to lease out this project. Simon’s website describes The Edit@Roosevelt Field, as a “scalable retail platform for both budding and established brands to pilot new products, new dimensions, and new territory. Think strategic produce curation, disruptive positioning and online efficiency—all within a brick and mortar space.” Simon, *HiQ x the edit Roosevelt Field*, <http://www.simon.com/the-edit> (last visited June 14, 2018). It appears that the some of the most important features of this type of marketing are designed to bring more foot traffic and appeal to the demographics to which social media is most important.

Considerations for Short-Term Leases

In determining whether a short-term lease is appropriate for the tenant’s (and landlord’s) intended project, landlords and tenants both should consider: (1) how long the tenant needs the prospective space (including time to set up the space and to remove its property after its “pop-up” has closed); (2) the size of the space; (3) whether the space is needed for a special event (one occasion) or for multiple days; and (4) the condition of the space (i.e., whether it can be occupied without permits, what type of permits may be required, and whether anything will need to be removed from the space).

If the tenant is selling merchandise to the public, the tenant will likely want to promote its products to the largest possible audience, and the location will be a great driving factor as to whether a tenant leases the space. If the tenant is a small restaurateur that is trying a concept for a short period of time, it will focus on the practicalities of installing food service or catering equipment and the customer experience. If the tenant is a one-time special event, it will focus on the environment that the space offers, its proximity to any related events, and

the availability of parking to its guests or valet staff. Landlords and tenants may have to conduct due diligence to confirm the availability of utilities and facilities (e.g., restrooms) sufficient for the tenant's proposed use, any permitting issues, foot traffic, and zoning restrictions.

The landlord will need to consider where such pop-ups are located to maintain the image of its project and, just like any other new tenant, the landlord needs to consider the pop-up tenant's use vis-a-vis any applicable property restrictions or exclusives granted to other tenants of the project, whether a certificate of occupancy or use would be required, and whether the location is subject to the laws or declaration of an owner or tenant association (which may require an additional level of approvals).

Landlords of existing spaces typically will not build out their spaces for short-term leases. With the advent of "pop-up wings" in some malls (for example, in the Roosevelt Mall, New York, Aventura Mall, South Florida, and the Market @ Macys, New York City), however, locations designed for pop-up tenants are constructed as shells that are built out to house a variety of products and to facilitate the process of switching out tenants. Tenants will have to ensure that the spaces meet their needs "as-is" or else be willing to make any necessary improvements. Generally, no long-term

improvements are done at the location and occupancy typically starts within days of execution of the lease.

Key Short-Term Lease Provisions

Attorneys representing landlords and tenants need to know how to document this type of short-term lease. A good example is the lease of the owner of a strip mall in South Florida. In 2008, when the owner was hit by the financial down-turn, she determined that a long-term lease for empty sites was not always an option. The owner took a chance on a music teacher, who might not have been an obvious choice. She offered the music teacher a simple two-page, bare bones lease for a space that she was unable to lease to a traditional long-term tenant. In the end, the music teacher succeeded, took a larger space, hired more teachers, and ultimately entered into a typical long-term lease.

Basic Terms

A typical short-term lease will describe the basic terms of the occupancy that all leases include in their general provisions. These include a description of the leased space in the landlord's project, the term, rent, security deposit, and permitted use. Typically, given the nature of pop-ups, the lease is for a very discrete period, and the rent and security deposit are fixed (gross lease) amounts. Most short-term leases will state the permitted use very specifically and will also typically prohibit both (1) any other use of the space and (2) any "hazardous" uses such as the "storing, manufacturing, or selling any explosives, flammables, or other inherently dangerous substance, chemical, thing, or device."

Exclusion of Certain "Basic" Provisions

Because of the temporary nature of a pop-up lease, many concepts common in commercial leases are not practical for a short-term lease. For example, passing through (and later reconciling) taxes, insurance expenses, common area maintenance, and similar charges to the tenant is not practical (and, on the other side, paying and reconciling

percentage rent to the landlord is similarly impractical).

Requiring short-term tenants to join merchant's associations or pay into promotional funds is likely determined on a case-by-case basis (more likely for a three-month "seasonal" store than a three-weekend restaurant). For this reason, as noted above, the rent for short-term leases is often charged on a "gross" basis rather than triple net basis. Some short-term leases may require the tenant to pay all charges for sewer, gas, electricity, telephone, and other services and utilities, unless otherwise expressly agreed in writing by the landlord. This is not practical in a pop-up space. By the time the tenant obtains service, the tenant has probably vacated the site. This is also true for hauling, dumpster, and trash removal expenses. As with common area maintenance charges, taxes, and landlord's insurance, these costs should be built into the rent.

Landlords should carefully consider what normal expenses would be for the site and intended use, and then probably double it because recouping these charges is also impractical (e.g., the short-term lease mentioned above had no look-back provision, so at the end of the lease term, all obligations ended). Similarly, radius restrictions that prohibit a tenant from having other "competing" locations that could affect percentage rent payments or would protect the tenant's territory (i.e., a provision stating that a landlord cannot, within a certain radius, own or lease property permitting a use that would directly compete with tenant's use) are not needed. No memorandum of lease stating such a restriction should be recorded. Landlords that expect to enter into short-term leases for their projects may want to start including an exception in short-term leases (the parameters of which will need to be specified) in any exclusive uses that they grant to long-term tenants.

Delivery of Possession and Condition of Delivery

Landlords always try to include the right to delay delivery of possession to a tenant in the event that either

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foreseeable circumstances (holdover by the prior tenant) or unforeseeable circumstances (denial of necessary approvals by the landlord's mortgagee or an owner's or tenant's association, for example) prevent the landlord from turning over the premises to the tenant as scheduled. Those provisions are problematic for pop-up tenants.

Unlike tenants that are planning to make a long-term commitment to a location, short-term tenants are focused on conducting their business for a limited window of time and with as little time before and after that window as possible. Frequently, that window of time is tied to other events and cannot be delayed. Accordingly, short-term tenants and their counsel will not only strongly object to any delay in delivery by landlord but will demand the right to terminate if there is any delay at all. Similarly, although short-term tenants are willing to accept space in its "as-is" condition, they typically do not have the time to undertake any cleaning or repairs, so they will require that the premises be delivered in "broom clean" condition with all mechanical, plumbing, electrical, HVAC, and other systems in good working order.

Approvals and Permitting Issues

As noted above, a landlord that has decided to offer some space to tenants on a short-term basis will need to obtain any necessary approvals and consents for the short-term tenant and confirm that the tenant's use will not violate any restrictions. This is something the landlord should consider undertaking in advance, as the timeline provided by many short-term tenants may not be sufficient to obtain approvals that may be required from mortgagees, associations, insurance carriers, condominium associations or other tenants. At the same time, tenants will need time to obtain occupancy permits, sign permits, health permits, fire department inspections, etc., related to their operations. These issues need to be evaluated on a case-by-case basis, and responsibility must be properly allocated between the parties in the short-term lease.



Parties should again note that, because of the short-term nature of the tenant's operations, there will frequently be a willingness by one or both parties to accept certain risks based on the difficult process or expense related to the required consent or permit. In the case of one short-term lease, a client wanted to use several 20 x 10-foot pop-up tents (yes, really) outside of the space where the client was hosting a one-day special event. The municipality informed the tenant that the permits would be almost \$200 per tent. Rather than pay hundreds of dollars, the tenant decided to "take the risk" and used the tents without receiving the proper permits. This is also possible with signs and other approvals, especially for very short-term events. For this reason, the parties should include appropriate representations or indemnification provisions to protect against liabilities resulting from the failure of the other party to comply with applicable requirements.

Insurance Provisions

Whether the lease is for a short or long-term, insurance provisions must be included in leases, including short-term leases. In a retail lease for a national or regional tenant, insurance provisions are dictated by the relative strength of the landlord and tenant, the type of premises (stand-alone vs. mall location), and the use of the location.

Landlords should carefully consider what normal expenses would be for the site and intended use, and then probably double it as recouping these charges is impractical.

Most short-term leases will require that the tenant obtain and keep in full force and effect commercial general liability and property insurance with a licensed carrier that covers the premises and the tenant's use. The limits of the commercial general liability should not be less than \$1 million per person and \$2 million per accident. The property damage liability should not be less than \$1 million, and these limits do not take a deductible into account.

To the extent tenants perform any approved work at the site, they should be required to carry worker's compensation insurance in maximum statutory limits of coverage and builder's risk coverage. Tenants also should be required to obtain personal property and alterations coverage in full replacement value for its property and alterations.



It is never simple when drafting a retail lease for a national or regional tenant.

Tenants will usually be required to provide valid certificates of insurance coverage to the landlord upon execution of the short-term lease. As with a typical commercial lease, the parties should include a waiver of subrogation in the short-term lease. Some tenants will request the ability to insure under “blanket” policies or even to self-insure. This will need to be determined on a case-by-case basis, depending upon the financial strength of the tenant.

It is never that simple when drafting a retail lease for a national or regional tenant. If the property is being built and the tenant has not accepted the premises as of the date of the signing, the landlord will have to carry the insurance until the tenant takes possession. There will be references to endorsements and special coverages dependent upon the use of the space. Generally, there will be a requirement that the coverage cannot be canceled without

30 days’ notice. The landlord may be required to carry general liability, while the tenant will be required to carry both general liability and property coverage. The parties will usually use commercial reasonableness to have their insurance carriers include a waiver of subrogation provision in their respective policies.

Right to Entry and Notice Provisions

Landlords often reserve the right to enter on not less than 24 hours’ notice, except in the case of an emergency. This may be acceptable for a two-week lease but would not be feasible for a one- or two-day short-term lease. Also, short-term leases frequently do not include a notice provision, whether for entry or other purposes but, instead, the preamble or signature page simply references each party’s phone, fax, and email address. There are usually no timing requirements for delivery of notice.

In a retail lease for a national or regional tenant, a landlord’s right to enter is discussed in various provisions in the lease including tenant’s default, maintenance of the property, and emergency situations. Further, the notice provisions are much more substantial, several manners of giving notice are permitted, and the lease will specifically address when notice is deemed to be given, including whether notice refused is deemed given when refused. These types of requirements are simply not feasible for the parties in a short-term lease situation.

Maintenance Provisions

A typical short-term lease’s maintenance provision will require that the tenant keep the premises, including exterior entrances, all glass and show windows and moldings, interior walls, fixtures, lighting, heating and plumbing fixtures, and any air conditioning system and sprinkler systems, in good order, condition, and repair. Astute short-term tenants and their counsel will not agree to this because they typically do not have the resources to address these matters if something breaks down during their term. They will request that the landlord provide all necessary maintenance and agree to provide it on an expedited basis if the required maintenance task impairs the tenant’s ability to conduct business.

Assignment, Sublease, Alterations, Holdover

Landlords should include simple statements that tenants are not permitted to sublease all or any part of premises, assign the lease in whole or part, or alter the premises. Although many tenants (particularly national tenants) will want the flexibility to exercise these rights, it is just not practical to deal with these issues for a short-term tenant. Likewise, as tenant’s rights are intended to be short term in nature, holdover penalties and indemnities should be included without any exceptions or grace periods.

Defaults, Late Charges, Default Interest, Remedies

These provisions also need to be reviewed on a case-by-case basis. If the term of the lease is such that the tenant’s possession will be over and the premises vacated before the landlord can exercise a remedy, the landlord will want to adjust any notice or grace periods accordingly and provide for other means of securing tenant obligations (increased security deposits, letters of credit). As a general rule, for shorter terms, all rent should be due no later than delivery of the premises.

Rules and Regulations

If applicable, short-term leases will

require the tenant to comply with shopping center rules, and landlords will reserve the right, in their discretion, to change the rules and regulations and the size, location, elevation, nature, or use of any portion or all of the common areas, the shopping center, or any part thereof, as the landlord may from time to time determine. As with permitting issues, tenants may be willing to take risks by violating rules because their term may be over before the landlord can exercise any remedies. Landlords should be careful to include an indemnity from the tenant if the tenant violates rules and include the right to apply any security deposit toward such indemnity.

Leases vs. Licenses

In 2016, Howard Sigal, vice president and deputy general counsel at General Growth Properties, wrote an article

in the Summer 2016 issue of *Shopping Center Law and Strategy*, published by the International Council of Shopping Centers. Sigal had written about pop-ups back in 2012 and felt compelled to discuss the concept of landlords and tenants entering into a license agreement versus a lease. He pointed out that, with a license, a landlord has more flexibility in its ability to cancel the license and remove a tenant. The positive for a tenant (especially for an unsophisticated tenant) is that such tenant is able to understand and negotiate the important (to them) terms of such license. Sigal noted that *Nextel of New York, Inc. v. Time Management Corp.*, 715 N.E. 2d 117 (N.Y. 2002), stood for the proposition that “if it looks like a duck, sounds like a duck, and walks like a duck, it is a duck.” In the article he suggested provisions for counsel to keep in mind when drafting a license,

most of which we have already discussed. The advantages of a license would be timing and cost savings for landlords and tenants. However, Sigal determined that such savings would not outweigh the missing protective elements in the preferred shortened and simplified lease.

Conclusion

Landlords and tenants are experimenting with nontraditional spaces and terms. Shopping centers are getting makeovers that include wings dedicated to revolving, trendy, and innovative products marketed by short-term tenants. How long this trend will remain is anyone’s guess, but counsel for landlords and tenants should keep informed about the trend and be prepared to negotiate and draft for the special circumstances presented by these short-term leases. ■

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