

# Commercial Leasing: Tenant-Landlord Disputes

by Stephen A. Cross, CCIM

**F**or most businesses, real estate is the second largest overhead expense (after employee salaries and benefits). Expenditures on the physical work environment is the area companies routinely, and unknowingly, spend significantly more money than they otherwise would have to, particularly when it comes to leasing space.

This is primarily due to the complex nature of the Lease Agreement itself, and the widespread failure of business people to negotiate protections for unforeseen issues that can eventually escalate into tenant-landlord disputes.

The smartest and least expensive way to resolve tenant-landlord disputes is to *anticipate* issues that may occur and incorporate appropriate remedies within the original lease agreement. Remember, one's greatest negotiating leverage exists *before* the lease is signed.

The following are discussions of common tenant-landlord issues and how they can be *preemptively* addressed:

**Maintenance and Repair:** If it is the landlord's responsibility to maintain (among others) the parking lot, roof or HVAC (Heating, Ventilation and Air Conditioning) systems, be certain to negotiate appropriate remedies in the event they ignore their duties. For example, one may negotiate the right to initiate repair of the HVAC system(s) if repairs are not completed within 24 hours of written notification to the landlord and reduce his/her rent by the costs of such repair. Speak to a competent legal advisor before withholding rental payments in an attempt to *force* the landlord to perform its obligations. To do so may place the tenant in breach or default of the lease.

**Early Termination:** Whenever possible, *early termination* penalties should be negotiated as a part of the lease. This allows the tenant to *buy out* of the remaining lease obligation for a predetermined amount. If a tenant has no early termination rights and ultimately finds it necessary to vacate the premises, begin discussions with the landlord at the earliest possible time and ask that the premises be shown and advertised to others and that all offers be disclosed to the tenant. Be certain to make this request both verbally and in writing.

**Right-Sizing:** If your business requires either more or less space contact the landlord immediately to discuss the situation. They may have space suitable to your needs or, in the case where one has too much space, agree to take back the excess space and lease it to others. Alternatively, the landlord may know of another tenant ready, willing and able to lease the entire space and will agree to cancel the lease.

**"NNN" and Excess Operating Expenses:** Whenever possible, "NNN" expenses should be initially fixed, or, if this is not practical, a not-to-exceed number agreed upon. Thereafter, increases in these operating expenses should be capped at a nominal percentage (3%-5% per year). Likewise, in Full Service leases, increases in Excess Operating Expenses over a Base Year should be capped at 3%-5% per year. Also, don't forget to negotiate the advancement of the Base Year when renewing or extending a Full Service lease.

**Parking:** Negotiate the number of parking spaces your business will likely require, including spaces for employees and visitors. Note in the lease document that this number of spaces will be provided either at no charge or for a predetermined price and

where they will be located. Also negotiate a financial remedy in the event the agreed upon spaces are not *regularly* made available, such as \$20 (or more) per space per day, as an offset to rental amounts otherwise due. This may dissuade the landlord from over-parking the property by leasing to tenants who consume an inordinate number of parking spaces. Retailers should ask for marked spaces as close to their entrance door as possible.

**Estoppel Certificates:** When a property is refinanced or sold tenants will be asked to sign an Estoppel Certificate, confirming various economic terms and conditions of the Lease. Generally, leases contain a provision requiring tenants to sign a bona fide Estoppel Certificate within a specific number of days. Be certain the Estoppel Certificate does not go beyond the scope of the original lease document by providing for either the lender or new buyer to modify any previously negotiated rights under the lease.

**Personal Guarantees:** Generally, accountants and attorneys advise business people to incorporate their businesses for tax and liability reasons. However, most landlords require new or small-to medium- sized businesses to personally guarantee the lease obligation. If the landlord insists on this requirement, negotiate a fixed guarantee period after which the guarantee will extinguish (providing the tenant is not in *monetary* default). In the alternative, negotiate a guarantee amount that self-amortizes over the guarantee period.

**Subleasing and Assignments:** Make certain the landlord cannot *unreasonably* withhold its consent to subleasing the space or assigning one's leasehold interest to another party. This is especially important if one wishes to sell his/her business and wants to make certain any renewal options are not *personal*, and can be conveyed to the buyer. Negotiate any *transfer fees* to the lowest amount possible (\$ 500 or less).

**Holding Over:** A "holdover" occurs when the tenant remains in a space after the lease term expires. To discourage this, many leases impose a stiff monetary penalty increasing the rental rate from 150 to 200 percent of the last-paid amount. Modify the language so that if the tenant remains in the space *with the landlord's full knowledge and consent* there is no penalty and the lease continues as a month-to-month tenancy at the last-paid rental amount. Also, require each party to give the other 30-60 days written notice of their intent to terminate the lease.

**Summary:** When it comes to preserving one's rights to a leasehold interest in real estate, every promise, understanding and warranty that exists between the parties should be contained within the original Lease Agreement. Anything subsequently discussed that could affect the rights or obligations of either party should be reduced to writing (create a "paper trail") and mailed or delivered to the other party in a timely fashion. ©



**STEPHEN A. CROSS, CCIM** owns CROSS Commercial Realty Advisors and works to advise business owners and corporate decision-makers on ways to acquire or lease property at the lowest costs and most favorable terms. He may be reached at (480) 998-7998 or [steve@crossrealty.com](mailto:steve@crossrealty.com).