

[HOME](#)[TODAY'S
REGIONAL NEWS](#)[RECENT
LEASES](#)[FINANCIAL
RESOURCES](#)[LEGAL
RESOURCES](#)[RESOURCE
GUIDES](#)[1031
RESOURCES](#)

UNDERAPPRECIATED COMMERCIAL LEASE PROVISIONS

There is more to a lease than rental rates... Avoid these common problems.
Justin S. Daniels

Published online 06-20-2005

A thorough understanding of all aspects of a commercial lease is essential to successfully investing in real estate or running your business. Commercial property owners determine whether or not to purchase a commercial building based in large part on the lease revenue such building generates. Business owners who lease space know that their single biggest fixed operating cost is making that lease payment every month. Yet landlords and tenants often do not understand most commercial lease provisions beyond the rent payment until the misconception costs them thousands of dollars.

This article focuses on common issues that arise in build out, restrictive use, assignment and right of first refusal provisions.

Build Out Provisions

A tenant moving to new space typically will require that the landlord build out the space to meet the tenant's specific needs. If delays occur that prevent the tenant from inhabiting the space on time, the landlord may argue that such delay is excused because the lease includes a Force Majeure clause that excuses prompt performance when delays are outside the landlord's control (i.e., the contractor walks off, materials are delayed). However, a tenant that moves his successful business to a better location will lose customers each day the opening of his new location is delayed. A tenant should request specific damages to address the issue of what happens if the premises are not open when promised. Although contractual damages can never restore lost customer goodwill, tenants can negotiate to receive free rental months or a per diem amount for each day the delay continues.

Restrictive Use Provisions

Commercial leases typically contain a lease provision allowing a tenant to use the leased premises for a specific purpose such as a restaurant or a convenience store. Landlords may insist on these restrictions so that there are not two convenience stores located in the building when the landlord has promised a tenant exclusivity and is charging a rent premium for the right. Tenants, on the other hand, want the flexibility to assign or sublease space when it is not being used. The restrictive use provision permits the landlord to charge a premium for an exclusive use, such as a convenience store, while effectively limiting a tenant's options for assigning or subleasing the space since the space may only be used for a specific purpose.

Assignment Provisions

The assignment provision is a commonly used — but greatly overlooked — provision in a lease agreement. Assignment is usually permitted without landlord

REGIONAL EDITION

For more of today's top stories, please click on your region.

[News Archive](#)[Article Archive](#)[Auction Alert](#)[Industry Events](#)[Job Bank](#)[Advertising](#)[Subscribe](#)[Contact Us](#)[About Us](#)[Site Map](#)

consent in leases that do not address assignment. In most commercial leases, however, assignment will not usually be permitted without the landlord's consent. The landlord, moreover, may require the payment of fees to compensate it for the processing and attorney fees related to its consent. In the event the landlord permits the assignment, it generally should require that the existing tenant remain liable in the event the new tenant fails to fulfill its rental obligations. While a landlord will prefer to have the blanket right to refuse the assignment, a tenant can request that the landlord not unreasonably withhold its consent. The assignment provision wording can have a dramatic impact on a struggling tenant that is looking to wring extra revenue from its underutilized space.

Right of First Refusal Provisions

Certain leases may contain provisions giving a tenant the right of first refusal to acquire the property in the event the landlord wishes to sell it. The issue that can arise in this situation is when the lease is silent on how many times the tenant may exercise such right of first refusal. For example, one landlord tried to sell a property after giving the tenant notice and the deal ultimately fell through. On the subsequent deal, the landlord found a willing buyer and entered into a contract without giving the tenant another notice because the landlord thought it had to give such notice only once. A court, reviewing the provision that left silent how often a tenant could exercise such rights, determined that landlord had violated the lease by failing to notify the tenant the second time. The landlord could have easily remedied the problem with a provision limiting the tenant's right of first refusal to a one-time right.

Everyone is familiar with rental rates and renewal options but no one pays any attention to build outs, use restrictions, subletting or first refusal rights until a problem exists. The cost of addressing these concerns in a lease is much less than the cost to sort out a problem arising from the failure to address these common commercial lease issues.

Justin Daniels is a corporate and commercial real estate attorney who practices with the law firm Lamberth, Cifelli, Stokes & Stout, P.A. in Atlanta.

ARCHIVE OF ARTICLES

To search the article archives, please first select a category from the drop down menu below:

< Select an article category > ▾

Please visit our other websites:

FRANCE PUBLICATIONS, INC.

3500 Piedmont Road
Suite 415
Atlanta, Georgia 30305
TEL: 404-832-8262
FAX: 404-832-8260

THE MIDDLE ATLANTA BUSINESS CENTER
**SHOPPING CENTER
BUSINESS**

THE WESTERN REAL ESTATE BUSINESS
**WESTERN
REAL ESTATE
BUSINESS**

THE SOUTHEAST REAL ESTATE BUSINESS
**SOUTHEAST
REAL ESTATE
BUSINESS**

THE HEARTLAND REAL ESTATE BUSINESS
**HEARTLAND
REAL ESTATE
BUSINESS**

THE NORTHEAST REAL ESTATE BUSINESS
**NORTHEAST
REAL ESTATE
BUSINESS**

THE TEXAS REAL ESTATE BUSINESS
**TEXAS
REAL ESTATE
BUSINESS**

© 2005, France Publications, Inc. All Rights Reserved.