

**SIDEWALK SHEDS, MULTIPLE FLOOR PREMISES  
AND OTHER ISSUES OF CONCERN FOR TENANTS WHEN LEASING RETAIL  
SPACE IN A “STREET” LOCATION**

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**“I CAN’T GIVE IT AWAY ON SEVENTH AVENUE:**

**WHAT EVERY LANDLORD AND TENANT SHOULD KNOW  
IN TODAY’S RETAIL REAL ESTATE MARKET”**

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A number of issues arise when negotiating a retail lease in a “street” location that are different from those encountered in negotiating a shopping center lease. Two of the most significant issues for tenants are the presence of sidewalk sheds and scaffolding, and the likelihood that the tenant will be leasing multiple floors in a building that has previously had retail tenants only on the ground floor.

**1. Sidewalk Sheds**

Probably the most significant issue facing a retail tenant in an urban environment that shopping center or “big box” retailers do not need to confront is contending with the scaffolding and corresponding sidewalk sheds that property owners regularly affix on the facades of their buildings. The scaffolding and sheds are typically mounted in connection any of the following work projects: compliance with municipal requirements that a building exterior’s brickwork be regularly inspected and/or repaired (often known as “pointing”); capital improvements to the exterior of the building; or tenant work, either undertaken by the landlord or other tenants in the building.

Whatever the cause, the result is the same: a decline in customer sales. Consumers are intimidated by sidewalk sheds: they are dark, they limit access, and they often serve as a basis for garbage to collect and homeless people to congregate. In house counsel at

large retailers have confirmed to me that without fail, sales have dropped at stores where sidewalk sheds are installed.

For retailers this presents a vexing problem. On the one hand, landlords are entitled to make necessary changes to their building, whether they are required by the obligation to comply with law, or to make necessary capital improvements or tenant renovations. On the other hand, retail tenants pay premium rents for unfettered visibility. After a certain period of time, it is not reasonable for a tenant's visibility to be impaired.

If the scaffolding and sidewalk sheds remain for an extended period of time, reduced sales can literally drive a tenant out of business.

There are a number of ways for a tenant's counsel to address this issue. The first, and most obvious, is to require the landlord to use best (or at least reasonable) efforts to minimize the period of time that the scaffolding or sidewalk shed must remain in place. Simple as this may sound, in my view such a provision would give the tenant real leverage in a dispute with a landlord, and tenants' counsel should be weary of any landlord who will not agree to such a basic provision.

Counsel should also try to provide that the landlord is not to install such scaffolding during the fourth quarter of any calendar year, typically the busiest for a retailer. Landlords may not always be amenable to such a provision since the scaffolding may need to be put up as a result of force majeure or other emergency conditions.

Perhaps most important, tenants' counsel should ask for a rent abatement of some sort if the scaffolding and/or sidewalk shed remains for an extended period of time. In my view, a landlord should be obligated to cause the scaffolding to be removed after 90 or perhaps 180 days.

Landlords are of course loath to agree to rent abatements of any sort. But even if the landlord agrees to some kind of rent abatement after a certain period of time (which I have found landlords will be more willing to do in a softer market such as this one), they may try to negotiate for that period of time to be extended if the scaffolding must remain as a result of force majeure acts. I would fight this request vigorously, since I believe that a landlord could successfully argue that virtually any reason for allowing scaffolding to remain could be a force majeure event. If necessary, I would instead agree to allow a longer period of time for the scaffolding to remain before a rent abatement commences.

Landlords may also try to provide that they will allow for an abatement if the scaffolding is not installed as a result of compliance with legal or insurance requirements. I would fight this as well, since the requirement for scaffolding is almost certain to be driven by compliance with legal requirements. By way of example, here in New York City, Local Laws 10 and 11 require that buildings be regularly inspected for facade repairs and that necessary repair work be promptly undertaken. This almost certainly insures that scaffolding will need to be installed on almost every building facade at some point during the average tenant's lease.

The second concern is how much of a rent abatement the tenant is entitled to. Obviously this is a matter of negotiation. I have seen instances where the tenant is entitled to an abatement of, say 25% of base rent for the period in which the scaffolding remains in place after the 180th day, and then 50% of rent to the extent the scaffolding remains in place after the end of the first year.

In one unique transaction, I negotiated with a landlord to provide that the tenant's base rent would be abated in the same percentage by which its gross sales reduced during the period the scaffolding remained in place. This involved comparing the gross sales for the current

year to gross sales for an earlier year when no scaffolding was in place. Because gross sales should always increase as a result of customary inflation (even if there is no change in the amount of business), this clause also needs incorporated a CPI Index escalation. The sample clause below uses this concept. I note, though, that this concept is best employed in a percentage rent lease, where the tenant is already monitoring its gross sales and reporting them to the landlord.

Other landlord restrictions on scaffolding and sidewalk sheds should take into account are the height of the sidewalk shed. Landlords can typically lease double height sidewalk shed structures – i.e., they clear the tenant’s windows and signage. While this is not a perfect solution, it certainly has the effect of increasing the light coming into the premises and increasing visibility, and thus distracting less potential customers. This could, however, provide a problem to the tenants leasing space on the floors immediately above the retail space; although this is obviously the landlord’s problem as opposed to the tenant’s.

Another concern is how far apart the support columns for the shed are to be located. In one lease I negotiated for high-priced retail space, the parties attached as an exhibit to the lease a schematic drawing of how any scaffolding would be installed; this showed the location of the support columns as well as an exterior elevation which identified the locations of the necessary cross bracing and the height of the plywood siding of the shed.

Tenant’s counsel should negotiate for the right to have their clients’ signage on the exterior of the shed. It is appropriate for the landlord to pay for this signage. The size of the signage should be specified, and the tenant should have the right to install signage incorporating its mark or logo. Perhaps most important, there should be a prohibition from having the landlord lease the entirety of the sidewalk shed to an advertiser that may not even be located in the

building. Perhaps worse still, one can only imagine the consequences of having a landlord sell the entire exterior of a sidewalk shed to a competitor of your client. The large sidewalk shed wrapping the building would dwarf your client's premises, and it would have the ironic effect of reducing your client's business.

The following is a clause that I have negotiated a particular lease:

“Sidewalk Sheds and Scaffolding.”

(a) In the event Landlord shall be required to install or cause to be installed any sidewalk sheds or scaffolding abutting or covering all or any portion of the storefront portion of the Premises, Landlord shall use reasonable efforts to minimize the period of time during which such scaffolding must remain in place and the extent to which the same shall impair the visibility of the Premises. All such scaffolding shall be double-height scaffolding. Upon Tenant's request, Landlord shall install, at its sole cost and expense, signage on such scaffolding identifying Tenant. In no event shall any signage or advertising appear on such scaffolding other than that identifying Tenant.

(b) In the event any such sidewalk shed or scaffolding shall impair the visibility of the Premises and shall remain in place for more than six (6) months, then for each month from and after such sixth (6th) month, the Fixed Rent shall be modified to an amount equal to the lesser of: (A) the Fixed Rent otherwise payable hereunder pursuant to Section \_\_\_ hereof, and (B) the product of (I) the Fixed Rent otherwise payable hereunder pursuant to Section \_\_\_ hereof, and (II) a fraction, the numerator of which shall be the Gross Sales (as such term is defined in Section \_\_\_ hereof) for the month immediately preceding such sixth (6th) calendar month (the “Scaffolding Gross Sales Test Month”), and the denominator of which shall be the product of (i) the Gross Sales for the corresponding

calendar month in the most recent year during which there was no scaffolding impairing the visibility of the Premises (the “No Scaffolding Gross Sales Test Month”), and (ii) the sum of (1) the percentage by which the CPI (as hereinafter defined) shall have increased, if any, from the No Scaffolding Gross Sales Test Month to the Scaffolding Gross Sales Test Month, and (2) 100 percent.

(c) As used herein, the “Consumer Price Index” shall mean the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor, New York, N.Y. Northeastern N.J. Area, All Items (1982-84=100), or any successor index thereto, appropriately adjusted. In the event that the Consumer Price Index is converted to a different standard reference base or otherwise revised, the determination of adjustments provided for herein shall be made with the use of such conversion factor, formula or table for converting the Consumer Price Index as may be published by the Bureau of Labor Statistics or, if said Bureau shall not publish the same, then with the use of such conversion factor, formula or table as may be published by Prentice Hall, Inc., or any other nationally recognized publisher of similar statistical information. If the Consumer Price Index ceases to be published, and there is no successor thereto, such other index as Landlord and Tenant shall agree upon in writing shall be substituted for the Consumer Price Index. If Landlord and Tenant are unable to agree as to such substituted index, such matter shall be submitted to the American Arbitration Association or any successor organization for determination in accordance with the regulations and procedures thereof then obtaining for commercial arbitration.”

## **2. Multiple Floor Premises**

Because of the high cost of leasing ground floor space, retail tenants in the last decade or so have begun to lease premises comprising multiple floors, either leasing below grade basement space and/or second floor space simultaneously with the ground floor space. Rents for the basement and second floor space are obviously considerably lower than those on the ground floor, thus saving the retail tenant money on the blended rent. In many instances these spaces have never been occupied before for retail purposes, and this raises a number of issues.

### **(a) ADA Concerns**

Because virtually all retail stores are public accommodations, if the tenant intends to use the basement or second floor spaces for retail use (and, under certain circumstances, even if the tenant does not intend to use these spaces for retail use), in order to comply with the Americans with Disabilities Act and other local handicapped access laws, there is likely to be a requirement that all floors be served by an elevator or lift. Because this trend to lease multiple floors is relatively new, there is a reasonable chance that the multiple floors have never been previously used for retail purposes. As a result, the tenant may well be required to install the lift or elevator, which is obviously an expensive proposition.

A sharp tenant's counsel can save his client a significant expense here if the issue is identified early on in the negotiation. Since a commercial office building is likely to already have elevators installed serving multiple floors, the tenant's counsel should require that: (i) there be access from each of the elevator lobbies on the multiple floors of the building to the premises, and (ii) the landlord make the use of the building's elevators available to the tenant during the hours that the retail tenant anticipates being open for business (and not only during the "business hours" that the office tenants upstairs are using the building).

Often this will not cost the landlord any additional money, since there is obviously little cost in maintaining the elevators during night time and weekend hours and, in addition, the landlord is likely to have a security guard or porter on duty during these hours. However if the tenant's counsel neglects to negotiate these rights in the lease, a tenant that discovers this after the lease has been executed may be facing a landlord reluctant to agree to change.

**(b) Lavatories**

The same issue can be addressed for rest rooms. If the second story of the building is multi tenanted, then there is likely to be a public rest room off the floor's common corridor. If the tenant has access to this common corridor and is permitted under the lease to use this rest room, then the tenant could avoid the expense of constructing bathrooms within the premises. Again, this is not a material concession for the landlord, but one that can result in significant savings for the tenant.

**(c) Certificate of Occupancy**

In buildings where the retail tenant is taking over basement space previously used for storage or second floor space previously used for offices, tenants' counsel need to be extra careful in reviewing the building's certificate of occupancy. In all likelihood when the building was constructed, retail use was only contemplated on the ground floor. Tenants' counsel will need to determine---before the lease is signed---that retail use is in fact permitted as a matter of law on these other levels, and if not what the timing and costs associated with modifying any certificate of occupancy will entail. The tenant's counsel should seek to: (i) obtain a representation from landlord in the lease as to the uses permitted by law; (ii) review the actual certificate of occupancy; (iii) specify who is responsible for amending the certificate of

occupancy if this necessary; and (iv) have termination rights if such an amendment is not possible.

### **3. Tax Payments**

Retail tenants typically pay their proportionate share of a project's real estate taxes. Depending on the nature of the property and the deal, the tenant will either pay its proportionate share of the entire property's taxes, or its proportionate share of any increases in the taxes above a specified base year.

The assessed valuation is typically a hybrid of various concerns: fair market value; recent sales price; rent roll; and/or the extent of capital improvements. In any event, a ground floor retail tenant is likely to be paying a per square foot rental rate far in excess of the rate payable by commercial tenants located elsewhere in the property, and thus contributes more substantially to a property's assessed valuation. For that reason, landlords are likely to determine that the retail tenant's proportionate share should be based upon more than the actual percentage of the property that the premises comprise. The retail space is likely to be more heavily "weighted", and as a result the retail tenant will pay a disproportionately larger proportionate share.

In my view, landlords are entitled to some additional credit here. Retail rents can be as high as ten times the rents paid by office tenants upstairs. However, since the proportionate shares of all tenants in the building should theoretically equal 100%, then if the retail tenant has a higher percentage, the office tenants should have a reduced percentage, and it is almost certain that this will not be the case.

There is no correct formula for calculating the correct proportionate share, and this is a negotiated business point. Tenant's counsel, though, should be alert to the fact that this

percentage is as flexible as the base rent, and can be negotiated in the same fashion: in short, a retail tenant's proportionate share is market driven.

#### **4. Commercial Condominiums**

In the event a building has been converted to condominium ownership, the "landlord" of a retail space will not own the entire building. The implications for a retail tenant will be significant. The landlord's obligations with respect to building services, repairs and maintenance, and casualty and condemnation will all be governed by the terms of a condominium declaration and the actions of the condominium's board of managers.

Notwithstanding the terms of the lease, the landlord of the retail space, for example, cannot covenant: to provide heat, to repair the building's structure, to rebuild following a casualty, or to expeditiously remove sidewalk sheds. All of these obligations are governed by the condominium scheme and can have significant impact on the retail tenant. The tenant's counsel needs to familiarize himself with the terms of the condominium declaration.

In addition, counsel should determine if the landlord of the retail space has representation on the condominium's board of managers. If so, the tenant can compel the landlord to vote a specified way on matters affecting its interests.

Similar issues arise in connection with superior leases.

#### **5. Other Issues**

##### **(a) Signage/Visibility**

Owners of commercial office buildings are less likely to agree that they will be reasonable in approving a retail tenant's signage. The owner has a legitimate concern since an unattractive retail presence can adversely affect the rentals commanded from the many tenants located in the balance of the project.

Of course, tenants want maximum flexibility, both for their own needs and that of subtenants and assignees.

If a landlord is unwilling to be reasonable in approving signage, the tenant should have a signage prototype pre approved in the lease. In addition, the tenant might ask that its signage be deemed acceptable if it is employed in a certain number of stores in the tenant's chain; or, alternatively, if it is consistent with that of another specified retailer. In addition, tenants should have landlords represent that no other tenants in the building have approval rights to signage.

Landlords of commercial buildings also often seek to include language whereby the landlord has the approval of anything displayed in the windows of the premises; these are often referred to as "control zones". I object to this concept strenuously.

**(b) Heat**

The tenant needs to recognize that heat supplied by a landlord in a commercial office building is typically only provided during "business hours". A retailer is likely to be open during nights and weekends, which are not customary "business hours". Tenants should either (i) see if the landlord will agree to provide heat during these hours; or (ii) understand the cost of supplying its own heat during these non business hours.

**(c) Deliveries**

The tenant's counsel needs to understand his or her client's needs for deliveries (i.e., during what hours deliveries are likely to arrive and how they will find their way into the premises) and make sure that the building can accommodate these needs. Retail space in office buildings often has limited means of access.