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Practice Area: Retail Real Estate

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One of the most hotly contested provisions in a lease is the common area maintenance (CAM) clause...and for good reason! CAM charges can be a substantial portion of the total "rent" paid by a tenant, and the expenses included in (or excluded from) CAM charges can make-or-break the economics of the deal for both landlord and tenant.

There are a number of expenses that are customarily included in CAM charges. For instance, a tenant and a landlord can usually agree that CAM charges should include expenses like repainting lines in the parking lot, maintaining existing landscaping, snowplowing and ice removal, and janitorial and security services shared by all the tenants (just to name a few).

However, negotiations can get heated when CAM charges start to migrate from property "maintenance" expenses towards landlord "ownership" expenses. The issue is often framed as a dichotomy between expenses incurred for the tenants' common good – maintenance of and enhancements to the common areas – versus expenses enhancing the value of the shopping center as a whole and benefitting primarily the landlord. The tension escalates when capital expenditures, especially capital improvements, are included in CAM charges assessed against the tenant. For example, roofing costs are fertile grounds for CAM disputes. A landlord can reasonably argue that the cost of putting a new membrane on a center's roof should be included in CAM charges because the tenants are benefitting from the use of a building component with a limited life expectancy. On the other hand, a tenant could just as reasonably argue that replacing the roof joists are not properly included in CAM charges because the roof joists are a structural component that is normally a Landlord capital upkeep obligation and should be covered by Landlord's capital investment in the property.

There are obviously many other items that may be the subject of a CAM negotiation. The inclusion of management fees or wages and benefits of employees are also often an issue. Green cost allocation is another potential expense that may be the subject of negotiation. A landlord can and will argue that investing in certain capital improvements will create cost and other efficiencies resulting in a financial benefit and savings for the tenant over time, while tenant's position might be that the savings and efficiencies are nominal compared to the cost to be assessed to the tenants as CAMs. There is often merit to both views.

In addition to negotiating over the items to be included in CAMs, there are other CAM related issues that should be addressed. These may include whether a cap should be placed on CAM charges and if so, what that cap should be. There is also a significant movement towards the use of fixed CAMs, which would provide the tenant with some level of financial certainty but also leave open the issue of confirming validity and necessity of all the charges. Another issue of import is whether a tenant will have CAM audit rights. If audit rights are given, landlord may want to include a prohibition on the use of contingency fee auditors, together with timing and location limitations, and a confidentiality provision. Tenants will be most concerned about ensuring that there is a sufficient remedy in place if a discrepancy between actual and assessed CAMs is discovered.

As is often the case, the typical negotiation factors such as the bargaining power of the parties, supply and demand of comparable properties, and the state of the economy will ultimately drive the CAM terms that end up in a particular lease. With so few givens in the negotiation process, landlords and tenants recognize that CAM provisions will no doubt remain some of the most contentious and highly negotiated terms of a lease.

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