

Don't Forget Your Hard Hat: Preserving Your Visibility, Access, and Use During Construction

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Practice Area: Retail Real Estate

Here is the scenario: You have finally signed a lease for the perfect retail space, moved in, and opened your doors. Just when you are seeing a steady stream of traffic, you receive a notice from your landlord advising you that there are going to be renovations to the shopping center. Maybe an addition is going in right next door. Maybe landlord is repaving the lot where your customers park. Maybe the renovations are to be performed **inside** your space. Whatever flavor of renovation, as a tenant, you should be concerned. How will these renovations affect your visibility, access, usage, and customer convenience? When you check your lease, hopefully these are the provisions you will find.

Designated Visibility Areas – You have heard the golden rule of real estate: "location, location, location." However, finding the right location means nothing if customers cannot find it. Therein lays the importance to retail tenants of protecting the visibility of their storefront and signage. In the lease, the landlord is inevitably going to reserve the right to make changes to the shopping center, including altering, adding, or remodeling the common areas. Tenants must make sure that this right does not negatively impact the tenant's ability to thrive. When negotiating, tenants should request that a "visibility area" be designated in the lease (usually on a map of the center), which is an area where the landlord cannot make any alterations, additions, or improvements during the lease term. When negotiating the visibility area, make sure that it is large enough that either the store or signage will still be visible to customers from all angles.

Access Restrictions – Visibility goes hand-in-hand with access. The most-visible, prime location means nothing if customers cannot reach it. Leases should limit a landlord's right to make changes to the shopping center as follows: (a) no changes to the shopping center or repairs or construction by landlord shall be materially adverse to tenant's permitted use or permanently disrupt traffic-flow to the space; and (b) landlord's changes to the common areas and buildings and improvements shall not cause parking and other amenities to be materially reduced or affected.

Entry by Landlord – In most leases, landlords require the right to enter a tenant's space with reasonable notice to make repairs or perform other work. The performance of construction activities during business hours could be loud and disrupt a tenant's ability to conduct business. To prevent this from occurring, tenants should insist upon a clause in their lease that forbids the landlord from entering a tenant's space for the purpose of performing work in any way that materially or unreasonably affects, interferes, or interrupts business or operations, except in the case of an emergency.

Remedies for Interference – In the event that the visibility of, use of, or access to space is impeded by landlord, and the lease contains one or more of the above-described restrictions, hopefully it also provides tenant with a remedy. While a tenant would have the right to bring a breach of contract claim against the landlord, this is not a short or inexpensive process, and in the meantime, the violation of one of these provisions could prove fatal to a tenant's business. Instead, a tenant needs a remedy that will provide some immediate relief. A common remedy included in commercial leases for retail spaces is the abatement of the tenant's rent based on the degree of interference with the business for as long as the interference continues. If a tenant is losing customers due to the restricted access, visibility, or use of space, at least the rent should be manageable until the situation is resolved.

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