

You Don't Have to Go Home (But You Can't Stay Here): Negotiating Construction Related Relocation Rights

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For most of the country, summer season also means construction season, which impacts everything from your morning commute to your vacation plans. For landlords and their retail tenants, construction season also means center upgrades and relocations. While construction-related relocations may be temporary, coordinating the details of the move may feel like a full-time job. Whether you are the landlord or the tenant, a well thought out relocation clause can help set the groundwork for a more streamlined process and alleviate much of the uncertainty involved in the process.

Landlords often seek to maximize occupancy flexibility by requesting broad relocation clauses in their retail leases, while tenants often seek certainty through the deletion of these provisions. One of the best ways to reach a middle ground is to negotiate defined purposes for which relocation would be a suitable option and the construction or redevelopment of the center is a common restriction used in the relocation clauses of retail leases. In negotiating these provisions, it is important to drill down into the details of what level of construction or development is required to trigger the clause (i.e. is relocation only suitable in the case of substantial redevelopment and, if so, what does substantial mean) and what proof is required to show that this threshold has been met (ex. permit applications, construction plans, proposed timelines).

In addition to defining a triggering event, defining the time period during which the relocation right can be exercised can also help the parties find a middle ground. For example, if the landlord does not have plans for construction or redevelopment at the time the lease is being negotiated, but is merely hoping to retain flexibility for the future, stating that the relocation right does not take effect until after a specific number of years can make this provision more palatable to a tenant who is concerned about their business being upended shortly after the lease begins. Including certain black out months is also a common middle ground for tenants who don't want to be shut down during their busy seasons.

Requiring sufficient notice periods prior to the exercise of such rights is also a great way to ensure that both parties have the time they need to plan. Considering the long lead time for most construction and redevelopment projects, it is often possible for landlords to provide several months' notice without slowing down their project and these lead times help tenants as well.

Tenants negotiating relocation clauses will often want to include parameters for the type of space to which the tenant can be moved and frequently request the addition of approval rights over the suitability of the space. Whether a landlord can grant these rights often depends on the type of center, uniqueness of the retail spaces and the tenant mix.

Other specifics that should be addressed include signage provisions (how will tenant's new space be identified and will the old signage be removed/covered up to avoid confusion), storage (if the temporary space is smaller than tenant's regular location), and the installation of any necessary improvements in the temporary space. Of course, no good relocation provision would be complete without addressing cost. It is imperative to outline who will be responsible for the costs associated with the relocation and the move back to the original space once construction is complete and what rent will be paid by tenant during such periods.

No matter what the season, a well-negotiated relocation clause can help create balance between a landlord's need for flexibility and a tenant's need for predictability.

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