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## THE NEXT LEVEL BROKERAGE

QUEST COLUMN

### Avoiding the 'Dark' Side of Temporary Uses

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**T**emporary tenants, some of which are perennial favorites while others represent novel concepts, can attract customers while landlords search for long-term tenants. Landlords must use caution, however, as temporary uses may impact the image and appearance of the center and cause problems with existing tenants. Here we address some popular temporary uses and suggest how landlords can maximize the benefits to the center while minimizing the drawbacks.

#### Seasonal Uses

Halloween costumes, holiday gift wrapping and calendars are seasonal favorites for temporary sites in many centers. When times are good, these uses often are squeezed into temporary kiosks and carts. With many centers having abundant vacant space, these uses are good candidates to fill up vacant storefronts.

They allow landlords to serve the needs of customers, to reduce dark space and to keep income flowing until permanent tenants are found. Customers perceive a center with substantial unoccupied space as undesirable or even unsafe. Seasonal tenants and services help to promote the appearance of a healthy center.

However, the possible negative impact of seasonal uses on the center as a whole also must be considered. Will the seasonal tenant's customers cross-shop? How will the seasonal tenant affect the appearance and image of the center?

To alleviate the concerns of existing tenants, the landlord should integrate seasonal uses into a centerwide marketing program, including decorations, promotions and events. This takes the emphasis off the seasonal tenant, creates a buzz about the center and encourages the permanent tenants to join in the cross-promotion. Outdoor uses like pumpkin and Christmas tree lots can attract drive-by shoppers who may not have intended to stop but are drawn in by the visible seasonal use. Correct placement for visibility and accessibility is key, as is ensuring

sufficient parking and traffic flow.

#### Pop-Up Stores

Some retailers are opening "pop-up" or new-concept stores to increase seasonal sales (for example, a big-box toy store opening smaller venues in new markets solely for the holidays) or to audition a product line (for example, a high-end retailer assessing the marketability of a designer sneaker line).

Recent bankruptcies and subsequent store closures have left a void in the tenant mix at some centers, but pop-up stores can help by serving the customers of the former tenant.

New-concept stores can provide both revenue and caché to a center, potentially causing its customers to feel that they, like the store, are on the cutting edge. This also can be an opportunity for the landlord to create a hands-on introduction to a seasoned retailer not familiar with the market, without requiring a long-term initial commitment but, one would hope, enticing that tenant to renew for a longer term.

#### Start-Ups and "Great Concept/ Little Capital" Operations

This is also a good time for new business concepts to get into shopping centers that in better times would not consider them. The tenant can try its new business without risking a long-term lease, while the landlord sustains cash flow and fills space, without gambling too much on a start-up that might terminate its tenancy early.

At the end of the lease term, the parties can decide whether they meet each other's needs and whether to enter a long-term lease. With start-ups, the landlord will want a guarantee and/or security deposit. The holdover provision should be drafted to remove any incentive for an unwelcome tenant to stay after the term expires

(but might include postponement of increased rent provisions for a fixed period to allow negotiations of a long-term lease). If the short-term lease has extension options, more substantial lease terms, like stronger default provisions, maintenance and repair obligations and operating requirements should be included.

#### Common Area Uses

Common areas are no longer the sole purview of Santa Claus. There are a multitude of uses for common areas and halls, including fashion shows, concerts, play areas and luxury and "classic" car displays. For seasonal uses, entertainment in common areas can be one aspect of a seasonal marketing campaign.

Placement of these uses is critical to avoid disruption of foot traffic to stores. Existing leases must be reviewed to identify restrictions on such uses near the storefronts of retailers. Landlords should implement crowd-control measures, like stanchions to direct waiting lines. This will require advance planning with the management team, security personnel and tenant representatives.

#### Other Considerations

■ **Leasing Commission Agreements:** Landlords should review existing agreements to determine whether and how they address temporary tenants. To reduce brokerage costs on short-term deals, the center manager rather than a leasing broker could lease up short-term space. If a commission must be paid and there is substantial risk that the tenant might not stay for the full term, the commission should be payable at the end of the term (if it is shorter than one year), based on the actual time the tenant operated in the space, or annually. Alternatively, the commission agreement could contain a

claw-back provision, under which the commission is returned upon an early termination.

■ **Extra Charges:** Temporary tenants frequently pay gross rent and don't contribute to common-area maintenance costs, taxes or marketing fees. In new leases with tenants who pay such charges, where possible the landlord should exclude the gross leasable area of temporary tenants in the calculation of such charges.

If a temporary tenant requires certain portions of the common area to be dedicated only for use by its customers, requires special crowd-control measures or causes the landlord to incur other additional costs specifically for that tenant the landlord should retain the right to allocate all such extra costs to the temporary tenant.

■ **"Retail" Center:** Boilerplate language in existing tenants' leases may assume or require that the landlord operate a "retail" center, yet some temporary uses may arguably be considered "non-retail." Even the use of seemingly innocuous terms like "shopping center" (instead of the more neutral word "project") and references to "stores" rather than "occupants" could pose problems with existing tenants. Landlords should consider revising lease forms accordingly and also modifying the applicable language if the opportunity arises in the context of lease amendments and renewals.

■ **Co-Tenancy:** Although the landlord is looking to the temporary tenant to fill vacancy, the temporary tenant may not satisfy co-tenancy requirements in existing leases that expressly exclude temporary tenants or "non-retail" tenants. Existing leases should be examined before a landlord relies too heavily on temporary tenants to meet its co-tenancy needs. Where possible, landlords should avoid agreeing to such exclusions in new leases. If a lease does not permit the inclusion of temporary or non-retail uses to satisfy a co-tenancy requirement, the landlord, when calculating occupancy, should exclude such gross leasable area entirely from both the numerator and the denominator of the fraction representing the percentage of occupied space. ■

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