USE CLAUSES IN COMMERCIAL LEASING

COUNSEL'S CORNER

It is hardly unusual for tenants to require special licenses to conduct their business, in addition to Certificates of Occupancy and zoning compliance. Bars need liquor licenses from the Texas Alcoholic Beverage Commission. Banks need licenses from the Texas Department of Banking or similar federal authority. Racetracks require licenses from The Texas Racing Commission. Chiropractors must have licensure from the Texas Board of Chiropractic Examiners.

And so on for surveyors, architects, physicians, veterinarians, engineers, lawyers, dentists, accountants, brokers, medical facilities, pest eradication companies, repair shops using oil or hazardous substances, fuel dispensing, etc.

But what happens when the tenant signs the Lease, and then is unable to secure the license? What if the tenant doesn't try [very hard] – should the tenant be excused?

Bre Mariner Conway Crossings, LLC, as Landlord, entered into a five-year commercial Lease with Genuinely Loving Childcare, LLC, as tenant. The Lease provided that tenant could use the premises solely for the purpose of operating a child day care center for up to 35 pre-school children.

The target space consisted of 2800 SF in an Orlando shopping center. The Lease further provided that the tenant must use its best efforts to keep the children inside the premises and prevent them from loitering in the common areas.

In Florida, the operation of a child care center that cares for more than five children requires licensure from the Department of Children and Families. The Florida legislature has set minimum standards for licensure, including that the child care center

must have at least 45 SF of outdoor play area per child. Drop-in childcare and urban child care centers are exempt.

The urban child care center designation which permits the substitution of indoor play space for outdoor play area, requires written documentation from the local governing body that the area where the child care center is located has been declared urban.

Evidently the Lease was signed at the end of 2013 or beginning of 2014. In January 2014 the Florida Department of Children and Families denied tenant a permanent license because the Department did not believe the child care center was located in an urban area. The Department did, however offer a provisional license with the understanding that an outdoor play area would be required for permanent licensure.

Using the provisional license, Tenant opened the child care center in February 2014. Unable to obtain a permanent license, tenant abandoned the premises in February 2015, only one year into a five-year commercial lease term, when tenant's provisional license expired and no further renewals were permitted by operation of Florida law.

The landlord sued Genuinely Loving Childcare, LLC and its Guarantors, and obtained a judgment in trial court for eviction and damages. Tenant appealed the damages portion of the award.

The Appellate Court reviewed the evidence and tenant's affirmative defenses of: (a) impossibility; (b) impracticality; and (c) frustration of purpose. The thread that connects them all is foreseeability at the inception of the Lease. The Court determined that "if a risk was foreseeable at the inception of the lease, then there exists an inference that the risk was either allocated by the contract or was assumed by the party."

Landlord used that argument to Landlord's benefit, stating that tenant's defenses are insufficient because the risk tenant would not obtain a license was foreseen and allocated by the Lease to tenant. However, the Court concluded that *the Lease provisions did not explicitly allocate the risk that the Department of Children and Families would deny tenant the urban designation and a permanent license without outdoor play space.*

Due to a Lease that is ambiguous on this point, the Appellate Court reversed the final Judgment and dispatched the case to the lower court to determine the intent of the parties regarding the licensure issue.

See *Genuinely Loving Childcare, LLC vs. Bre Mariner Crossings, LLC*, Case No. 5D15-4168, District Court of Appeal of Florida, 5th District, January 13, 2017: https://scholar.google.com/scholar_case?case=9889607525199014198&q=genuinely+loving+childcare+v.+bre+mariner&hl=en&as_sdt=6,44&as_vis=1.

Lessons learned:

1. Failure to explicitly allocate the risk of licensure is a common problem in commercial leasing. If a tenant is unable to secure its license, it might assert a position of "*frustration of purpose*," meaning that if the tenant cannot open or continue its business due to matters outside of its control, perhaps it should not remain liable for lease obligations.

2. Landlords, conversely, may insist that Landlord was not operating the business inside the four walls. It's tenant's business and there is no one better than tenant to process the applications, overcome objections and secure necessary licensure.

3. The B/L: In your Lease Agreements provide for not only how the premises will be used, but if it is subject to special licensure to be obtained by tenant and tenant is unable to obtain the license, or perhaps tenant secures the license but not for the duration of the lease term, then also state what happens in those circumstances too. Does the tenant remain liable? For the full remainder of the term? Is there an exit strategy for the tenant where it can terminate the Lease by payment of a set amount?

Stuart A. Lautin, Esq.*****

***** Board Certified, Commercial (1989) and Residential (1988) Real Estate Law,
Texas Board of Legal Specialization

Licensed in the States of Texas and New York

Higier Allen & Lautin, PC
2711 N. Haskell Avenue, Suite 2400
Dallas Texas 75204
P: 972.716.1888
E: slautin@higierallen.com
W: www.higierallen.com