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Measure the Premises Twice: Cut the Deal Once

By Glenn I. Becker

Fans of the television shows *This Old House* and *The New Yankee Workshop* know that master carpenter Norm Abram repeatedly cautions his viewers by reciting the age-old adage: "Measure twice, cut once." Well, the same holds true in the commercial real estate context, but in a slightly different form. Landlords should measure their premises "twice" (figuratively, if not literally) even before a letter of intent is negotiated and signed. For purposes of this article, the phrase "measuring the premises twice" is not intended to mean that landlords should actually measure their premises two times; rather, the phrase is intended to convey the notion that landlords should accurately measure their premises early on in the process, and should not rely on old measurements or drawings. Measuring the premises in advance of the letter of intent can help to avoid backtracking on points and re-negotiating the business deal during the lease negotiation process.

Reliance on Old Drawings And Measurements

It is not uncommon for the landlord's leasing representatives and brokers to rely on old drawings and measurements in quoting the square footage contained in certain premises to prospective tenants — especially in older shopping centers which may have changed hands several times since they were initially constructed. While relying on such drawings and measurements is perhaps natural in the fast-paced, time-constrained environment that leasing representatives and brokers operate under, it can lead to some unexpected financial consequences for the landlord.

Consider the following example. Landlord's leasing representative negotiates a letter of intent for existing, as-built space in an older shopping center at a fixed rental rate of $20 per square foot per annum for a five-year term, plus customary pass-through operating expenses. Landlord's representative sends the tenant's representative a lease plan and other drawings which all indicate that the premises contain 1,000 square feet.

While $10,000 over five years may not seem like a lot of money to some people, imagine what would happen if the same problem arises with several other spaces within the shopping center ...

In the letter of intent phase, the parties base their negotiations on the assumption that the premises do in fact contain 1,000 square feet. The signed letter of intent does not contain the word "approximately" before the 1,000 square foot figure; nor does the letter of intent contain any re-measurement language in favor of either party.

After the letter of intent has been signed and during the lease negotiation process, the landlord decides to measure the premises. To the landlord's dismay, it is discovered that the premises actually contain 1,100 square feet, not the 1,000 square feet stated in the signed letter of intent. In a subsequent lease draft, the landlord's attorney attempts to change all of the references to "1,000 square feet" to "1,100 square feet," and to increase the monthly installments of fixed rent proportionately based on the new, accurate square footage. The tenant vehemently objects to these changes and argues that the business deal was underwritten based on the premises containing 1,000 square feet, and for internal budgeting purposes and the like, the deal was approved by tenant's real estate committee based on a maximum of 1,000 square feet.

The tenant is so fixated on the 1,000 square foot figure and is so entrenched in its position that it digs in its heels and will not budge. The landlord reluctantly tells its attorney to accept the smaller size rather than continue to argue to re-negotiate the deal for fear of losing the tenant altogether if it pushes the issue too hard. Not only is the landlord forced to live with an inaccurate and lower square footage, but the landlord (at tenant's insistence) must also delete its standard "re-measurement language" contained in its form lease. (See the sample lease language discussed below.)

The tenant's insistence on sticking with the square footage contained in the letter of intent, and its refusal to agree to the higher actual number naturally lends to a "slippage" in the landlord's potential revenue. Based upon the above example, the landlord is forced to forego (*i.e.*, "eat" or "swallow" — choose your own metaphor) $10,000 in lost revenue ($20/square foot x 100 square feet x 5 years) over the initial term of the lease, not to mention the pass-through expenses (common area expenses, taxes, and insurance) that it cannot recoup because the numerator of tenant's pro rata share is artificially low and is based on 1,000 square feet in lieu of the 1,100 square feet as actually measured. While $10,000 over five years may not seem like a lot of money to some people, imagine what would happen if the same problem arises with several other spaces within the shopping center; the slippage and lost revenue to the landlord would grow and multiply.

The moral of the story: "Measure twice, cut once."

Sample Language

Both the letter of intent and the lease itself should expressly reserve the landlord's right to re-measure the premises. Otherwise, the landlord may be stuck with an inaccurate and artificially low measurement that

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does not reflect the "true" square footage of the premises. While full-blown re-measurement language is not absolutely necessary for purposes of the letter of intent, in order to give the landlord "wiggle" room later on, the letter of intent should include terms such as "approximately" or "having an approximate size of … " before the square footage number. The letter of intent can also contain an asterisk or footnote next to the stated rental amounts which reads along the following lines: "The fixed rent amounts, percentage rent breakpoints, and other figures based on the area of the premises shall be adjusted based upon the actual square footage of the premises as measured by the landlord." An example of full-blown re-measurement language for lease purposes is as follows:

> Landlord reserves the right to re-measure the Premises at any time prior to the end of the second year of the term. All measurements shall be made from the outside of exterior walls, shaft walls or corridors of the shopping center, or of any common walls, without deduction for columns, stairs or other interior construction or equipment. If any re-measurement determines that the Premises contain a different number of square feet from that set forth in the Reference Pages, then the Annual Fixed Rent, Breakpoint, Tenant's Proportionate Share of Common Area Charges, Tenant's Proportionate Share of Taxes,

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> and the Security Deposit shall be adjusted retroactively and prospectively on a pro rata basis to reflect the number of square feet determined by such re-measurement. Upon either party's request, the revised square footage shall be confirmed in an amendment to this Lease signed by both parties. Landlord and Tenant agree that for all purposes of this Lease the square footage determined pursuant to this Section, or the square footage set forth in the Reference Pages in the event the Premises are not re-measured pursuant to this Section, shall be controlling, notwithstanding that the actual square footage of the Premises may be different.

The LOD of the Premises

Just as master carpenter Norm Abram requires a dimensioned drawing to construct his furniture, most commercial leases contemplate that a dimensioned drawing of the premises will be attached to the lease as an exhibit. This drawing is often referred to as the "LOD" (meaning "limits of demise" or "lease outline drawing"). Unfortunately, the LOD is frequently overlooked until the last minute, and it is often given to the attorney to attach to the lease only after the lease has already been fully negotiated. Similar to the measurement issue discussed above, the LOD should be requested by and given to the attorney early on in the process; it is hoped, before the first draft of the lease is even prepared. It is not uncommon for the square footage shown on the LOD to be different from the square footage contained in the letter of intent and/or the lease itself, and thus the LOD can serve to reveal or trigger any discrepancy in the stated size of the premises. It probably goes without saying that the square footage shown on the LOD exhibit should match the square footage contained in the lease text.

Unfortunately, the LOD is frequently overlooked until the last minute, and it is often given to the attorney to attach to the lease only after the lease has already been fully negotiated.

If the LOD is given to the attorney early in the process, then some of the problems discussed in this article may be avoided. If the LOD is not given to the attorney until after the lease has been fully negotiated, and there is a substantial discrepancy between the square footage contained in the text of the lease and the square footage shown on the LOD, not only is this extremely embarrassing for the landlord, but the landlord may also be pushed into the uncomfortable position of doing some quick, last-minute re-negotiating of the business deal in order to placate the tenant. In this age of computer assisted design, LODs can be generated fairly quickly and easily without a great deal of expense, and there is no reason that the LOD should not be generated and disseminated early in the process, either during the letter of intent phrase or before the first draft of the lease is prepared.

Conclusion

Before rushing into executing a letter of intent, landlords should take the time to make sure that the square footage of the premises is accurate, generate an accurate and current drawing of the premises, and measure the premises if they have not been recently measured. While it may add some time and minimal expense to the letter of intent process, both sides of the transaction will be rewarded by having a measurement that accurately reflects the actual existing conditions. Always remember: "Measure twice, and cut once!"

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