

HOW LEASES GOVERN COMMON AREA MODIFICATIONS

There are many reasons why a landlord may want to change building common areas. Existing common areas may be underutilized or economically unfeasible. A new law may be in effect that requires relocation of or modifications to restrooms or emergency access. The building owner may be looking to put a new plan for space and services in place to help attract desirable new tenants.

Even though common areas are not subject to the exclusive use of or control by any given tenant, leases include contractual rights to these spaces and the related services so that the landlord's ability to modify common areas is very much tied to tenant leases.

Leases typically include broad rights to the landlord to enable common area modifications. However, although landlords usually have the right to modify the common area, the cost, scope and timing of such modification may be governed by existing tenant leases. As landlords consider common area modifications, it is essential to consider how tenant leases may factor in to such modification decisions.

WHO PAYS?

Most leases include long and involved provisions addressing what the landlord can include as project operating expenses that may be passed through to project tenants on a pro-rata basis. Landlords seek to have operating expenses broadly defined, while savvy tenants seek to narrow the definition by adding a list that could include dozens of operating expense exclusions.

Because of its potential high-dollar implications, the degree to which capital expenses may be passed through as operating expenses is one of the most hotly negotiated operating expense issues. Arguably, the standard approach on this point is that capital expenses are not to be passed through as part of operating expenses unless and to the extent that they:

- Are intended to reduce operating expenses; or
- Are required to comply with laws first enacted or taking effect after the effective or commencement date.

However, many landlords have successfully expanded the pass-throughs to include capital expenses related to health and wellness, sustainability, security and upgrades similar to those of comparable buildings.

Unless the landlord has a broad ability to pass through

capital expenses, the cost for the common area modification may fall solely to the landlord. Even when capital expenses can be passed through to tenants, the landlord must understand how such pass-throughs should occur, as leases may call for amortization over a fixed period or over the life of the improvement.

ELIMINATING COMMON AMENITIES

The landlord's broad discretion to modify the common areas makes sense in the context of eliminating a common area's hallway on a floor that now has a full-floor tenant. However, does the landlord have the same flexibility to get rid of the common area gym or to convert common area meeting space to rentable area? Probably. But the landlord's right and related cost allocation depends on the lease.

A tenant for whom the shared meeting space was essential may have negotiated language in its lease to ensure that such space would always be available for meetings. Furthermore, if the cost for these common area modifications is not a permissible operating expense pass-through, then the cost will likely fall to the landlord.

EXPANDING COMMON AREAS

In light of the trend toward communal workspaces, some landlords have explored the idea of taking space that was previously rentable area and converting it to common area for use by all tenants. In addition to checking for general lease prohibitions on increasing common areas or amenities (which would be unlikely), landlords should be attentive to lease provisions that may restrict the ability of the landlord to increase the tenant's pro-rata share.

LOGISTICS

While more common in the retail lease, an office tenant may have protections related to the timing of common area modifications. Timing restrictions could require certain work to take place outside of business hours or even during certain times of the year. A wise landlord will communicate early and often with all building tenants as common area modifications are performed. [B](#)

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