OCTOBER

2010

KEVIN F. JURSINSKI, ESQ. COMMERCIAL LEASE NEWSLETTER

Parking Issues For Commercial Tenants – Part II

Traditional and current parking lot issues between Landlord and Tenants as a result of the current real estate economy.

In last month's Newsletter we spoke about the manner and method in which a commercial Tenant can protect its interest in regard to parking spaces which may affect its business. This month's Newsletter will address case law and some of the traditional parking problems and how the Courts construed them and some new problems that have arisen as a result of the fact that commercial Landlords have now resorted to utilizing their parking spaces for income producing events such as car shows, promotional events, onsite parking for a fee and other fee generating activities.

Current problems have also arisen because many Landlords are cutting expenses which is reflected by lack of maintenance of the parking facilities creating a potential problem either in the form of reduced lighting, repair and maintenance which could result in the Landlord and Tenant being exposed for claims of personal injury or damages to personal property as a result of such shortcuts.

Here is an overview of cases and issues:

1. Permanent Diminution Of Parking Area:

A classic case of diminishment of parking is Jack Eckerd Corporation, Appellant v. 170170 Collins Avenue Shopping Center, Ltd. and Taco Bell Corporation, 563 So. 2d 103 (3DCA 1990). In that case, the Landlord, a shopping center, had a lease with a Tenant, which in this case was Eckerd Drug Store, which contained a restrictive covenant which prevented the Landlord from reducing the parking area by construction on an outparcel without the consent of the Tenant. The Landlord, nonetheless, and in violation of the restrictive covenant, entered into a new lease with Taco Bell, to build on the outparcel. This trial court initially ruled against the Tenant who sought a temporary injunction with a trial court finding that the modifications proposed to the parking area

were reasonable and would not materially diminish the parking available to the drug store.

The Third District Court of Appeals in the case cited above indicated that in fact a Tenant is not required to prove irreparable damage if the Tenant has a restrictive covenant in its lease. I agree with the finding of the Third District Court of Appeals inasmuch as a trial court should not have placed itself in the position of determining whether diminution of parking spaces would affect a business' operation inasmuch as the Court should focus its attention on enforcing contractual provisions. This is a traditional case involving the Landlord who sought to build out as much of his parking lot as possible, either for prospective rent or prospective sale to third parties.

This is why it is even more important for the commercial Tenant (as indicated in last month's Newsletter), to identify the specific number of parking spaces it has and ideally to have some of those parking spaces reserved and identified for the Tenant and its customers with the appropriate tow away signage, all of which are designed to preserve and protect the major investment that the Tenant has in operating his business at the commercial space.

For a contrasting view on injunctive relief against a Landlord building into outparcels, please see Sacred Family Investments, Inc. v. Doral Supermarket, Inc., 20 So. 3d 412 (3DCA 2009).

2. Lack of Maintenance/Repair for Parking Fields:

Two areas that are creating issues that could be forthcoming given today's real estate downturn is the lack of maintenance and repair for parking lots. In the event, a parking lot is not fully maintained or repaired which could result in the Landlord reducing the amount of lighting, not replacing burned out lighting, failing to repair surface areas, trimming trees, et cetera, the result of such lack of maintenance can be that prospective Tenants might be exposed to injury or damage based upon the lack of repair or maintenance.

Initially and subjectively, prospective customers may choose not to frequent the Tenant's business because of shoddy parking facilities or unsafe parking facilities. Even more important, however, is the fact that Tenants might be exposed to liability from their business invitees or customers based upon a negligent failure as could be the Landlord based upon a negligent failure to repair a dangerous or defective condition.

3. Potential Lighting and Physical or Property Damage Due to Lack of Maintenance:

In the case of Franklin L. Smith v. Grove Apartments, LLC, 976 So. 2d 582 (3DCA 2007), the Landlord failed to maintain the parking lot and there were defective conditions in the parking lot as in the Grove Apartments case, the overgrown trees. In this particular case, the Tenant stated a cause of action against the Landlord for negligent failure to repair a dangerous or defective condition, with the Tenant alleging that the

Landlord either had actual or constructive knowledge of the condition or of statutory code violation for sufficient time to make a correction with the Landlord failing to do so.

This type of situation may arise more often in today's real estate marketplace when commercial Landlords are cutting budgets and finding themselves in a cash crunch for common area maintenance especially when a significant percentage of their Tenants who normally would be paying pass through common area charges have vacated the premises or alternatively have ceased paying all or a portion of their rental. Again, this is a warning for both Landlords and Tenants because there are a number of causes of action and the failure to maintain can result in a number of problems for both the commercial Landlord and Tenant as specified above.

4. Temporary Use to Generate Income – New Issues in Today's Economy:

An interesting facet in today's real estate economy is activities that are undertaken by commercial Landlords, both in retail and office settings, to generate income or alternatively to generate customer traffic.

In retail settings, many commercial Landlords are sponsoring events which create additional foot traffic for the retain Tenants. However, this also creates a problem when the type of event sponsored is not conducive to a certain retail Tenant's business. In certain circumstances, certain retail Tenants have not supported a Landlord's actions in promoting events at the center.

Here is an example:

A commercial center contains a number of stores as well as a sports bar, a hardware store, ladies fashion dress store and sewing/fabric store. To generate return customer traffic, for at least some of the Tenants, the Landlord chooses to sponsor a monthly car show for hot rods and car enthusiasts. This most likely would attract those people who would be more apt to frequent a hardware store and a sports bar versus a high end ladies fashion store and/or a sewing and fabric center (Please – no offense to women or fashion aficionados).

With that said, these events may turn in to a success and a substantial portion of the parking lot may be taken by the car show event. Those attending the car show would be parking in customer parking spaces. Many of those people who frequent the car show might gravitate towards eating or drinking at the sports bar or stopping in at the hardware store but the chances are greater for them doing that than for that person to likewise to frequent the dress shop or sewing/fabric center. At the same time the car show is going on, however, there is a substantial impact upon customers who actually wanted to park and have easy access to the dress shop or the sewing/fabric center. These prospective customers might be inconvenienced by this activity. As such, that type of activity, by the commercial Landlord, even done in good faith, may in fact be detrimental to certain of their retail Tenants.

Likewise, in a commercial setting/office setting located in a desirable location there may be certain occasions or times per month where a portion of the parking lot could be utilized for offsite parking for either event. For example, if there are concerns, promotions or other monthly events occurring in the general area of the commercial parking lot, there may be a substantial overflow of cars from patrons of that event.

The Landlord might find themselves attracted enough to initiate on site "for pay" parking at its commercial parking lot. In doing so, the Landlord would be eliminating the available parking spaces for its very own commercial Tenants which might result in those commercial Tenants being damaged.

In such event and dependent upon the type of lease that was entered into between the commercial Tenant and the commercial Landlord (see last month's article on commercial Tenant clauses relating to parking spaces) and further based upon the impact and negative effect that such parking would have upon the commercial Tenant, the aggrieved Tenant might be in a position to claim damages or alternatively, claim injunctive relief to preclude the Landlord or modify the activities of the Landlord to avoid an ongoing damage to the prospective Tenant.

In all instances involving a commercial lease, both the commercial Landlord and the commercial Tenant should be fully aware of what they are signing when the lease is entered into and then conduct themselves in a commercially businesslike manner. Due to certain situations such as the downturn in the real estate economy, the Landlord may choose to alter their normal business practices which might cause damage to the Tenant's leasehold interests. "Drastic times call for drastic measures" could be applicable to the actions of the Landlord, but unfortunately that creates unintended consequences.

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