



Gary Michael Smith

Negotiating the Commercial Lease: The Tenant's Perspective

With rare exception, every business at some point will need to rent commercial space from a landlord. Unfortunately, most would-be tenants'

experiences with rentals extend from their residential needs. Residential rentals are regulated by state and federal law, thereby affording residential tenants more protections than they would usually know to request. Conversely, commercial rentals are subject to fewer laws, with most salient terms subject to open negotiation. Moreover, in the residential context, typically the only negotiated terms are the length of the lease and the price per month. Meanwhile, in the commercial context, nearly everything is negotiable, ranging from cost and extent of tenant improvements to signage and parking.

In a pro-landlord economy, such as what presently exists in the Scottsdale Airpark, landlords hold a majority of the negotiating power in a rental transaction. However, this does not mean that the prospective tenant is powerless to make requests and to modify the landlord's proposed lease. In fact, the tenant absolutely should negotiate hard for terms they want, considering that the lease itself frequently can be

the most expensive cost to the tenant's business. To put this in perspective, if a tenant enters into a lease with a five year term at \$20,000 annual rent, the contract formed is worth \$100,000. Isn't \$100,000 worth negotiating?

The following list contains just a few practical suggestions the prospective commercial tenant should consider when undertaking negotiation of a lease. This article by no means contains an exhaustive list of terms that a prospective tenant ought to consider.

1. Do not appear overeager to have the space. Eagerness sends the message that you have already said "yes" to the landlord's lease before you have signed it. If you have already said "yes," the landlord knows they can refuse your requested changes, and not risk losing you as a tenant.
2. Negotiate for multiple options to renew in lieu of a long term lease. This allows greater ability to leave (such as if your business fails or if you later buy a building).
3. Request broad usage. In other words, ask to use the space for any purpose, rather than just for the purpose of conducting your specific business. The broad usage might include any general office use and/or the right to sell any products on a retail or wholesale basis. The gain in negotiating this term is that you will have the

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ability to change the character of your business, if necessary, without impedance from your landlord, as well as increased flexibility in assigning the lease.

4. Request exclusivity. There is nothing worse than, two weeks after your grand opening, your landlord rents the space two doors down to an identical business. Exclusivity keeps the competition from swimming in your waters.

5. Ask for a death and disability escape hatch clause. In other words, negotiate an option to terminate in the event of death or disability of one or more of the business principals. This is particularly important for the small, closely held businesses that comprise the majority of businesses in the Airpark.

6. Ask for a new business escape hatch clause. In other words, negotiate an option to terminate in the event average revenue falls below an average dollar threshold per month over a consecutive period of a certain duration.

7. Request an up front good faith estimate of the expected triple net charges. Also, request a cap on the increase of triple net charges over the good faith estimate. (Most leases provide in addition to base rent other charges typically known as triple net. These additional charges include the tenant's share of common area charges, real property taxes, insurance and other expenses).

8. The lease should provide the landlord is liable for its own negligence and that of hired contractors. DANGER: most landlord leases contain clauses absolving the landlord of liability, even for its own negligence.

9. Request a provision that no landlord consent will be unreasonably withheld (such as a request for an assignment of the lease), and that no charge for the landlord consent will be required (such as reimbursement of landlord's attorney fees).

10. Refuse personal guarantees, or at least shorten their effective dates. This applies only to corporations and limited liability companies. After all, if you incorporated to diminish the risk of having to personally pay business debts, why sign a guarantee that places all the risk right back into your name?

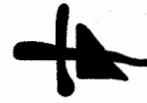
11. Ask for a specific agreement as to parking and signage.

12. Ask for the right to offset rent, in the event of a landlord default.

The most important rule is "if you don't ask, you don't get." Also, prospective tenants should remember that the time to ask for and to obtain concessions comes *before* the lease is signed. After the lease is signed, there is seldom opportunity to negotiate further changes.☺

This article is for general information only, and not to be construed as legal advice or the basis for formation of an attorney-client relationship between the reader and the author.

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