In a Competitive Restaurant Market, Lease Negotiations Can Dictate Success

Commentary by Adriana Blanco Maurisset, Daily Business Review

July 12, 2016

Miami's food and beverage industry is transforming, with new eateries and upscale bars emerging onto the scene every day and rents climbing north of $100 per square foot for premium spaces.

Contrary to popular opinion, a successful restaurant depends on more than just marketing campaigns, menus and decor. Restaurant leases provide the foundation that will govern the entire life of the business — typically 10 to 20 years.

Unlike conventional commercial tenants, restaurant tenants are faced with unique and often complex legal issues. Restaurant spaces also require a greater degree of customization than your typical office or commercial lease, opening the door to a myriad of construction and zoning issues. With this in mind, restaurant tenants should be wary of entering into leases without consulting experienced legal counsel.

The location of a restaurant merits careful consideration when negotiating leases. In addition to the typical factors like size, visibility and neighborhood, restaurant tenants must consider any zoning and use regulations affecting the prospective space and ensure that all licenses and permits necessary to operate the restaurant are secured.

The lease can include contingency clauses that protect the tenant in the event that permits are not secured or construction is delayed. For example, a restaurant tenant can negotiate the right to terminate the lease if, after an allotted timeframe, zoning prohibits the intended use of the space (e.g. outside seating, maximum capacity, live music, etc.) or if a liquor license cannot be obtained.

In today's market, it is also not uncommon to find commercial spaces in mixed-use buildings managed by a condominium association. To avoid unwanted surprises, condominium documents should be carefully scrutinized to determine the rights and responsibilities of all parties involved, including the landlord, tenant and condominium association. Is the tenant's proposed use permitted under the condominium documents? Is outdoor seating allowed? Can the condominium association enact rules or regulations that will interfere with the operation of the restaurant? All of these are important factors that must be explored and either addressed in the lease or directly with the condominium association.

Key Provisions

Once the perfect space is selected and customized, restaurant tenants should be careful to protect their investment against competition. Exclusivity clauses have a vital impact on the restaurant's performance. Restaurant tenants should consider negotiating a clause that prohibits their landlords from entering into leases with competitors within the same building or shopping center.

For example, if a high-end Japanese restaurant agrees to lease space in a building, the lease might include a clause that prevents another Japanese or even another Asian restaurant from opening on the same property. On the other hand, landlords may attempt to restrict a restaurant tenant's right to open other locations within a specific geographic radius. Although the broader the better, exclusivity restrictions must be reasonable in duration and geographic scope in order to be enforceable by a Florida court.

Restaurant tenants should also aim to curtail operating expenses, negotiating limits on annual increases in costs which are typically passed through to tenants, including maintenance, property taxes and insurance.

Other considerations include intellectual property protection and operating concept flexibility. Carefully protecting a restaurant's brand name is a must, and properly drafted leases will include protections against the landlord's unauthorized use of a tenant's intellectual property.

Additionally, restaurant tenants should strive to negotiate flexibility regarding their operating concept. In today's competitive marketplace, a complete brand and image transformation is exceedingly common. While a landlord's consent is not typically required for simple changes in menu and decor, a change in operating concept will likely trigger the landlord's approval rights.

A restaurant tenant can agree to abide by a pre-defined operating standard but still demand the right to revise its operating concept. For example, the lease can set boundaries for a "first-class" establishment, but still allow the tenant to revise the restaurant's theme as necessary.

A carefully drafted and well-negotiated lease is vital to a restaurant's recipe for success. With the proper built-in legal protections, restaurant owners can reduce their operating risk and focus on delivering a superior dining experience for their patrons.

Adriana Blanco Maurisset is an associate at Tenzer in Miami. She specializes in domestic and international real estate and hospitality law and has experience in negotiating high-end restaurant leases.