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YOU'RE SPECIAL AND THEY'RE SPECIAL – SPECIALTY LEASING ISSUES

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You're Special and They're Special – Specialty Leasing Issues

I N D E X

YOU'RE SPECIAL AND THEY'RE SPECIAL – SPECIALTY LEASING ISSUES

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INTRODUCTION

Leasing premises to a special use tenant has its advantages; as a tenant invests in fitting up its premises to meet the specific needs of its proposed use, so grows the tenant's desire to maintain a lengthy tenancy (or at least a tenancy long enough to make the initial investment feel worth it). Specialty uses can also draw customers to a development, thereby increasing foot traffic in the shopping centre and benefitting the other occupants of the shopping centre.

Typically, in order to facilitate smooth operations in the premises, lease agreements will be tailored to account for the particular requirements of specialty uses. These requirements may range from large-scale distinctive design configurations to nitty-gritty operational details. Landlords will also need to consider the degree to which a specialty tenant's needs diverge from (and potentially conflict with) the requirements of other tenants of the shopping centre.

This paper cannot provide a step-by-step guide to drafting and negotiating these types of lease agreements, but will attempt to highlight some of the principal issues to which the parties must be attuned. In particular, it will identify some of the unique considerations that must be kept in mind when working with medical offices, movie theatres, fitness facilities, and gas stations.[2]

I. MEDICAL OFFICE LEASING

(a) Privacy

Doctor's offices, walk-in clinics and other medical laboratories and facilities deal, on a daily basis, with highly personal and confidential information. As such, the operation of a medical facility necessarily invokes a heightened expectation of privacy from the practitioners who operate in the premises and the patients who attend there. Further, storage of patient files, charts, physical samples, and medication is regulated by legislation and distribution and even access by unauthorized individuals is strictly controlled. The sensitive nature of this use can make some boilerplate provisions in standard office or retail leases unsuitable in addressing the heightened privacy needs of these medical uses.

Most standard commercial leases, for example, grant the landlord the right to re-enter the premises in particular circumstances, including to effect necessary repairs, to conduct inspections of the premises for compliance with particular lease terms, or even to show the premises to prospective tenants or

[1] The authors would like to thank Manali Pradhan, articling student at Daoust Vukovich LLP, for her assistance with the research of this paper.

[2] For a discussion of the major points applicable to leasing to a McDonald's restaurant, see the attached article by Will Ramjass, titled "Specialty Tenants: Quick-Service Food: McDonald's" and presented at a previous ICSC Canadian Law Conference. Note that while this article is written with a McDonald's restaurant in mind, the major issues highlighted there can equally be applied to other quick service restaurant operations.

mortgagees. Given the sensitive nature of a medical use, however, whatever re-entry rights are granted in the lease must be reconciled with the essential privacy requirements. Access may be controlled by requiring that the landlord be accompanied by a representative of the tenant, and that access be limited to (or strictly prohibited from) certain spaces within the leased premises or to certain times. Outlining strict requirements regarding providing written notice prior to re-entry may also assist the parties. Similarly, in an effort to limit access to sensitive information, a landlord may consider allowing a medical tenant to undertake its own janitorial services in the premises.

While many landlords are wary of negotiating and reducing its rights on a tenant's default, distraint provisions (which allow the landlord to seize the tenant's inventory and assets present in the premises on default) should be tailored to carve out any sensitive or confidential information being stored in the premises. Medical tenants might consider including a provision such as the following:

> *The Landlord shall have the right to terminate this Lease by notice to the Tenant or to re-enter the Premises and repossess them and, in either case, the Landlord may remove all property,* ***excluding patient charts and/or records, whether in paper or electronic form and all electronic data related thereto or in any medium whatsoever****, from the Premises and store such property at the expense and risk of the Tenant or sell or dispose of such property in such manner as the Landlord sees fit without notice to the Tenant.* ***For greater clarity, any medical records, electronic or otherwise, located within the Premises may not be seized, viewed, copied or handled in any way by anyone other than the Tenant at any time. The parties acknowledge the significance of the privacy issues as identified in the Personal Health Information Protection Act or other applicable legislation in the province, and the Landlord hereby agrees to be held fully accountable and responsible for any and all damages which may result from breach of this clause and contravention of the Personal Health Information Protection Act****.*

(b) Bio-medical Waste

Most office and retail leases have at least some provision dealing with the tenant's obligations related to environmental issues. Often, however, these provisions tend to be boilerplate requirements to comply with all environmental and other applicable laws, and while this approach might be sufficient to address the average office-use tenant, it is inadequate with respect to the particular demands of disposing of medical waste.

From a cost perspective, maintaining a single janitorial and waste disposal contract for the whole of the development is ideal. If individual tenants are left to obtain their own cleaning and waste management contracts, the landlord not only loses control of the standard and consistency of the services across the development, but the landlord must then also deal with the administrative burden of parsing out which contracted service costs can and cannot be recovered from particular tenants. Similarly, the cost-saving advantages of obtaining large-scale service contracts are eroded as tenants are excluded from the cost-sharing pool.

The medical tenant, however, should bear in mind that while it may have adequate control over its waste materials in its premises, it will have no control over them once the landlord's disposal services have collected them. Where the landlord has agreed to take on the responsibility for the

pick-up and disposal of the waste, tenants might consider seeking an indemnity from the landlord for any loss or damages arising in connection with such waste once it has been removed from the premises.

Both landlords and tenants might prefer to limit liability by requiring the tenant to obtain its own contract with a licensed waste management company. In these circumstances, the lease should deal with adequate standards relating to frequency and manner of pick-up. But what if the tenant fails to obtain adequate removal services, or any removal services at all? Landlords must be careful to ensure that they are entitled to arrange for their own removal services and to recover any incurred costs from the delinquent tenant.

(c) Utilities

More than for the average tenant, ensuring consistent delivery of utility services to the premises may be critical for medical tenants who are storing vaccines, medications, and other sensitive materials. Consequently, medical tenants may seek to negotiate provisions either requiring the landlord to provide back-up generators or permitting the tenant to install and maintain its own in case of emergency.

If the tenant's use is likely to consume a higher than average level of electricity and utilities in the premises (for example, if the tenant requires multiple refrigeration units and/or specialized testing equipment), the landlord might consider arranging to have separate meters installed in the unit and require the tenant to pay for its electricity consumption directly to the relevant supplier. At the very least, for projects where utility costs are pooled and shared among all or a group of tenants, the landlord should ensure that it has the ability to reasonably allocate these costs to the tenant to prevent unfairly burdening other tenants.

(d) Accessibility and Parking

Accessibility to the premises will be essential for medical practitioners whose patients may require different physical accommodations. For prospective tenants, where the existing premises do not adequately address needs such as accessible doors, ramps, and elevator facilities, any required alterations and renovations should be addressed at the offer to lease stage and allocated among the landlord and tenant's work. Depending on the exact nature of the medical tenant's practice, the tenant may consider making its offer to lease conditional on the premises being modified to meet certain accessibility or special facilities standards.

Medical tenants should also consider expressly addressing parking issues in the lease, including minimum spaces which are reserved for use by patients, the location and proximity of reserved spaces to the premises, minimum numbers of accessible spaces, and upper limits on charges for the use of such parking facilities.

(e) Arrangement of the Business Structure

Whether a medical practice is composed of a single doctor or a group of practitioners, it is not uncommon for these practices to operate through an incorporated entity which holds the lease. While an arrangement of this sort can garner some advantages for the tenant, the covenant that the landlord is obtaining on the lease will be compromised where the corporate entity has few assets. In response, landlords sometimes require that the individual practitioners indemnify the corporate entity for the covenants and obligations of the lease.

Similarly, it is not uncommon for individuals to execute a lease while contemplating that they will eventually incorporate a company for the express purpose of holding the lease. In these cases, tenants should be careful to ensure that the lease allows the named individual doctor or other practitioner to assign the lease to a corporation that is controlled by it without having to obtain the landlord's consent. For the landlord's part, the lease should clarify that any corporation that enters into an agreement with the landlord is required to obtain the consent of the landlord to any subsequent transfer. Further, in order to preserve the covenant, the individual named tenant should not be released under the lease, notwithstanding the assignment, and be required to indemnify the landlord for all obligations and covenants to be fulfilled on the part of the tenant.

Ontario landlords should also be aware of an arrangement known as the "Family Health Team" ("FHT"), which consolidates patient care by bringing together doctors, nurses, and other community and health care practitioners to collaboratively treat patients.[3]

Tenants intending to operate in such an arrangement must be careful to ensure that the use clause in the lease contemplates a certain level of flexibility in business practices. For example, a use clause which describes only a traditional medical practice might exclude services offered by dieticians and social workers. This should also be kept in mind when negotiating transfer rights, as the tenant will want the ability to assign the lease to a newly formed collaborative entity, as discussed above, or to sublet space to each of these practitioners in order to maintain flexibility in the medical practice's operations. For example, the practice may include a rotating roster of healthcare providers as opposed to a specified set of individuals.

The Ontario Ministry of Health plays an active part in negotiating agreements for leased premises for the operation of an FHT, including assisting with the costs associated with renovating new space, acquiring and installing new equipment, installing leasehold improvements, and other associated costs. Landlords dealing with FHT's, however, should expect to be subject to approval by the Ministry on everything from the design of the leased premises to the final form of the lease. While securing such a tenant may lead to a more secure covenant (since FHT's obtain initial funding as well as some ongoing financial support from the Ministry), landlords should be prepared for more complex (and potentially more protracted) negotiations.

[3] For more information on these arrangements, see Ontario Ministry of Health and Long-Term Care, *Family Health Teams*, online: <http://www.health.gov.on.ca/en/pro/programs/fht/>.

(f) Restoration Obligations

Premises for medical practices might be altered in a number of ways: multiple examination rooms may be installed, each with its own plumbing; rooms containing heavy equipment (such as large x-ray machines or rolling filing cabinets) may require that floors or walls be reinforced or otherwise fitted up to accommodate specialized machinery. Because the removal of such alterations can be costly, the lease should contemplate which leasehold improvements will be required to be removed on the expiry of the lease, and in what condition the tenant must deliver up the premises. Depending on whether the landlord is willing (or able) to further lease the space for a similar use, the landlord may prefer the premises to be returned back to base building standards upon the expiry of the lease.

II. MOVIE THEATRES

(a) Design and Construction

More than the average retail tenant, movie theatre premises require a number of considerations relating to design and construction which should be contemplated even prior to negotiating the lease; most notably, the physical requirements. Is there sufficient space in the project to accommodate multiple auditoriums? Are there any height restrictions affecting the shopping centre (whether in existing leases or in municipal by-laws) which could limit the installation of tiered theatre seating or full-sized movie theatre screens and/or tall parapets? For existing premises, can the ceiling heights accommodate these large-scale installations? Are there columns or other existing structural obstructions which might compromise the sightlines to the theatre premises and/or to the screens within them?

Once these initial hurdles are cleared and the lease (or offer to lease) is being negotiated, a design and construction issue that should be addressed is that of noise and vibration attenuation, particularly where the premises are connected to a larger shopping centre. In order to ensure that the operations of neighbouring tenants are not disturbed by the activities in the movie theatre premises, landlords should ensure that the governing agreement expressly addresses standards relating to maximum noise and vibration decibels, as well as the landlord's remedies if the tenant's attenuation strategies are not sufficient or effective.

Area measurement issues arise in relation to the increasingly common use of tiered stadium seating in movie theatres. In contrast to the generally low sloped floors of traditional movie theatres, modern multiplex establishments often use the available space beneath tiered stadium seating for the location of other revenue-generating uses such as party rooms and arcade or gaming facilities. This raises the question of whether the area of these spaces should be measured twice – once to account for the stacked theatre seating, and once to account for the ground-level use. These measurement considerations are critical where rent is calculated as a function of the area of the premises, and parties should clearly state in the lease how the tenant's premises will be measured so as to avoid double-counting these areas.

Movie theatre operations also require a number of specialized improvements and fixtures such as stadium seating, large format screens, and specialized mezzanine structures for projection equipment

as well as the projection equipment itself. Parties should consider whether some or all of these improvements are to be left in the premises on the expiry of the lease, or whether the tenant will return the premises to base building standards, and at whose cost.

(b) Parking and Wait Areas

In addition to the significant footprint required for most movie theatre premises, these operations tend to require particular parking-related amenities such as designated pickup/drop-off areas and short-term parking areas, as well as traditional parking facilities. Parties should consider whether any reserved parking will be required/granted, the proximity of such reserved parking and other parking facilities to the premises, and whether any charges will be levied for the use of the parking facilities. While tenants are primarily concerned with having adequate (and preferably free) parking available for its patrons, landlords have a critical interest in ensuring that sufficient parking facilities remain available for customers of the balance of the shopping centre (and in particular during peak retail periods, such as the back-to-school and Christmas seasons). Similarly, given the extended hours that these tenants operate (discussed below), parties will have to come to an agreement regarding frequency of snow removal and locations of snow piling.

Theatre tenants may also want to ensure that they are granted rights to allow patrons to temporarily queue in common areas of the development, for example, in the case of special events or on opening nights, without additional charges from the landlord. Landlords, on the other hand, will have to consider whether they can accommodate these needs in connection with the tenant's use of the common areas, including additional security and/or janitorial services. Additionally, the impact of such queues on other tenants and on the overall traffic flow in the development will need to be considered.

(c) Operating Hours

Movie theatres operate on a unique daily schedule. While morning hours tend to be quieter for these tenants, most theatres stay open long past the standard closing time of most shopping centres. As such, landlords tend to be more amenable to allowing these tenants to determine their own opening and closing times. However, the landlord might consider setting a minimum number of hours that the tenant must operate during the week:

> *The Tenant shall open and operate actively and diligently its business in the Premises, seven days per week, for a minimum of eighty (80) hours per week as determined by the Tenant, acting reasonably.*

Where the movie theatre premises are connected to a larger enclosed mall, it is essential that the landlord and tenant make provisions relating to access matters, including which of the mall entrances/exits will remain unlocked for patrons to use beyond standard business hours:

> *The Shopping Centre doors identified on Schedule A shall remain unlocked and available for use by the Tenant's employees, invitees, and customers for access to and from the Premises for one (1) hour before and one (1) hour after the Tenant's regular business hours.*

Due to security concerns relating to customer access in the balance of the shopping centre after hours, the landlord may consider undertaking additional security and reasonably allocating to the tenant its share of such services. Alternatively, the lease could contemplate that the tenant will undertake these responsibilities by dispatching its own security services, and indemnify the landlord for any damage or loss incurred in connection with such after-hours activities in the shopping centre. Other after-hours services that may reasonably be allocated to the tenant include interior and exterior common area lighting, heating/cooling for common areas, and other maintenance services such as snow removal.

Theatre tenants have their own security concerns relating to ensuring safe and secure access to parking lots. These tenants must be sure to raise the issues of after-hours lighting and security, such as:

> *The Landlord will keep open and maintain proper illumination in the Parking Facilities for one (1) hour following the close of the Premises each evening.*

and,

> *The Landlord will provide security for the Shopping Centre for at least one (1) hour following the conclusion of the last film exhibited in the Premises on each night, provided that the Landlord shall be entitled to recover the reasonable cost of such additional security from the Tenant as part of Operating Costs*.

(d) Uses and Exclusives

For most retail tenants, the use clause can be considered one of the most crucial clauses in a lease. After all, the scope of these provisions will determine the amount of flexibility that the tenant is able to maintain in its business operations. Similarly, these clauses (and their corresponding restrictive covenants) dictate how the landlord is able to develop and control the merchandising plan of the complex.

The operations of the modern day movie theatre, however, can no longer reasonably be thought to encompass only the showing of movies. It is not uncommon for these establishments to now include concession stands selling a variety of food and drink (including full-blown café and/or restaurant facilities), arcade facilities, party rooms and special event services, which can result in very broad use clauses:

> *The Premises may be used for the primary purpose of conducting the business of a movie theatre and entertainment centre for the presentation of motion pictures, televised theatrical performances, exhibitions, concerts, and other televised entertainment presentations, and for such activities in connection therewith as are customary and usual for the operation of a movie theatre and entertainment centre, including, without limitation:*
>
> *(a) the sale of food items (including, without limitation, hot, cold, frozen, fresh, prepared, bulk or packaged foods), beverages (including, without limitation, hot or cold beverages and alcoholic and/or non-alcoholic beverages), and such confections as are commonly sold in theatres, whether any such items are sold from designated concession areas, mobile*

concession stands, and/or as part of a full-service sit down restaurant establishment located within the Premises;

(b) *the operation of party room(s) and/or seating areas containing tables and chairs for the consumption of food and beverages purchased at the Premises;*

(c) *the operation of a "game centre" offering a variety of arcade, pinball, video or prize games, and any other similar form of entertainment uses; and/or*

(d) *any other use which may now or in the future be considered normal or incidental as part of a movie theatre/entertainment centre establishment.*

It goes without saying that where such ancillary uses violate exclusives granted to existing tenants of the shopping centre, the movie theatre tenant should be expressly prohibited from conducting such activities in its premises. Even where there are no current conflicting restrictive covenants, however, landlords have an interest in keeping the tenant's use clause narrow in order to maintain as much flexibility as possible in pursuing other leasing opportunities.

Similarly, though "arcade" uses have historically been considered undesirable in shopping centres, "gaming areas" in multiplex establishments are becoming important revenue sources for theatre tenants. Consequently, landlords should be careful not to agree with other tenants to prohibit such uses in the shopping centre. At the very least, such prohibitions should carve out the movie theatre premises or a portion of such movie theatre premises. The movie theatre tenant's use clause must then be appropriately tailored to limit the amount of space that could be used for such gaming purposes:

> *As ancillary to the Tenant's Primary Use, the Tenant may operate an arcade-style "game centre" offering pay-per-use electronic game machines and other amusement devices for use by its customers, in an area to be agreed to by the Landlord and Tenant, acting reasonably, provided that such gaming area shall, in no event, exceed ** (**) square feet.*

Tenants with broad use clauses may also want the freedom to sublet portions of the premises to individual operators for particular uses without the need to obtain the landlord's prior consent. For example, tenants whose lease clauses allow sit-down food service may want to sublet a portion of the premises to a restaurant or café operator.

(e) Signage

Cinema tenants will insist on significant signage rights. These tenants display large format posters for upcoming movies and/or special events on the exterior of the premises, and will also want the right to regularly change and update these posters. Similarly, electronic marquees may also need to be installed and maintained on the exterior of the premises to advertise movie titles and times.

These tenants are also acutely concerned with maintaining sight lines of their signage. Tenants may consider negotiating penalties against the landlord and/or self-help rights (entitling the tenant to

rectify any issues at the landlord's cost) in the event that visibility of the premises and/or its signage is compromised by the landlord.

Leases should set out clearly which party is responsible for the installation, maintenance, and electricity costs (if any) of such signage, and in any event, require that all signs comply with all applicable municipal or other governmental requirements.

III. FITNESS FACILITIES

(a) Design and Construction

Like movie theatre premises, gyms and other fitness facilities require some special consideration when it comes to design and construction. Health clubs often require higher than usual ceiling clearances to accommodate tall equipment, as well as easy access to shipping and receiving facilities in order to easily move in and periodically replace oversized exercise equipment.

Obligations with respect to noise and vibration attenuation should also be at the forefront of the landlord's mind since specifying permitted levels of such disruptions is imperative. Instructional fitness classes and other group activities offered in these premises often involve loud music and the use of PA systems or other amplification equipment. Similarly, specialized fitness conditioning and other aerobics/dance classes may cause significant vibrations, as can the repeated use of exercise machines and weight equipment. Dropped barbells, the movement of weighted sleds, and other dynamic exercise practices can be disruptive and down-right annoying to neighbouring tenants.

While noise insulation can often be installed in premises without the need for wall, floor or ceiling penetration, combatting physical vibrations may require more drastic measures, including modifications to the structure of the premises. Requiring the tenant to install all required noise and vibration reducing materials, however, could be problematic given that most landlords' standard leases prohibit the tenant from conducting any work or alterations that might compromise or in any way affect the structural components of the building. In these circumstances, landlords may have to balance the risks that could arise in allowing the tenant to undertake this work, as against the time and effort required if the landlord were to perform the work. In any event, the landlord will want to be able to hold the tenant responsible for making good any failure of the noise attenuation and vibration mitigation efforts, regardless of whether the landlord has previously approved the tenant's construction plans and specifications.

Some specialty fitness facilities, such as hot yoga studios and pools, may also need additional design and material considerations to accommodate the elevated heat and humidity levels being maintained in the premises, including preventing mould growth and moisture damage.

(b) Other Considerations

It should come as no surprise that these facilities can also consume higher levels of utilities than the average retail or office tenant. Increased demands on air-conditioning and ventilation services, shower amenities, pool and/or other aquatic facilities, on-site laundry and even day-to-day cleaning

place heavy water and electricity demands, which should be separately metered, and payments in respect of which should be made directly from the tenant to the relevant utility supplier.

Gym operations raise many issues similar to those outlined for movie theatre premises, such as the need to maintain visibility and access to the premises, as well as additional security and access issues relating to extended operating hours. For suburban premises in particular, gym tenants will be concerned with having sufficient parking facilities available for its customers in proximity to the premises (and free of charge).

Use clauses for these tenants should also be carefully tailored; increasingly, the scope of health club operations are expanding to offer a variety of "lifestyle" services, including juice bars, massage and other physical therapies, nutritional consulting, daycare services, and even tanning facilities. Tenants may seek the unrestricted ability to sublease portions of the premises or grant licenses for the operation of these ancillary uses to third-parties without having to obtain the landlord's consent.

IV. GAS STATIONS

(a) Environmental Issues

It should come as no surprise that the operation of a gas station is closely regulated and so requires a clear understanding of the governing regulatory regime, allocation of responsibilities, and due diligence requirements. Due to the particularly sensitive nature of this use, landlords who are considering either leasing to new gas station tenants or acquiring premises for existing or future gas station tenants should familiarize themselves with the *Technical Standards and Safety Act*,[4] which regulates the operation of gas stations in Ontario. The Act and its accompanying Code[5] set standards relating to the licensing, maintenance, testing and leak detection requirements. The *Act* also provides guidelines for the permanent decommissioning of sites and the provision of assessment reports.

(i) Setting a Benchmark

In a typical lease, responsibility for environmental issues is allocated with reference to the possession date; contamination existing prior to the possession date will be the landlord's responsibility while any post-possession contamination will be the tenant's responsibility.

It is therefore in both parties' interest to ensure that an environmental site assessment (ESA) report be prepared prior to the possession date. These reports must be prepared by a licensed organization and will be vital in establishing a benchmark from which each party can measure their environmental liability. Because this report should be prepared prior to possession by the tenant, the lease (or offer to lease) should stipulate that the landlord is responsible for arranging to have the report prepared (though the cost may be shared by the parties).

[4] SO 2000, C-16.

[5] See the *Liquid Fuels Handling Code 2007* published by the Technical Standards & Safety Authority. Also see *TSSA* Environmental Management Protocol for Fuel Handling Sites in Ontario, August 2012.

Where a report has been prepared and is available for review during lease negotiations, parties would be wise to include specific reference to it in the lease, expressly setting out that they have agreed to use the report as a baseline. This reference point becomes essential both during the term and on its expiry in determining what (if any) types of clean up or other remediation work will be required and the corresponding liability of each party.

(ii) Daily Operations

To reduce the risk of contamination, the landlord will want to limit the types of sensitive substances that are allowed on the premises. Consequently, the lease should specify that the tenant is only permitted to bring into the premise such substances as are directly connected with the permitted use. Cautious landlords may further specify the types of fluids, gases and other related materials that are allowed on the premises, or limit such substances in reference to those that are the same or substantially similar to those offered at the tenant's other retail locations. Parties may agree to include a schedule in which the tenant lists of all sensitive materials and substances to be used on or for the premises.

Tenants tend to be in a better position than the landlord to ensure that adequate containment strategies are being employed in the premises, not only because it would be impractical, if not impossible, for the landlord to constantly supervise the tenant's operations, but also because gas station tenants increasingly tend to be institutional operators and well versed in the required procedures. In light of this fact, landlords may consider describing the tenant's responsibilities with respect to storage, transportation, containment and disposal somewhat generally and to specify strict compliance with standards contained in applicable laws and regulations, in lieu of setting out detailed procedures by which the tenant is required to handle these materials:

> *The Tenant shall, at its sole cost and expense, comply with all environmental laws relating to the Hazardous Substances brought on the Premises by the Tenant or anyone for whom it is in law responsible.*
>
> *The Tenant shall immediately give written notice to the Landlord upon becoming aware of any occurrence which is a contravention of applicable environmental laws. In the event that the Tenant or anyone for whom it is in law responsible causes the occurrence of such event, the Tenant shall, at its own expense*:
>
> > *(a) promptly remedy the contravention in a manner which conforms with the applicable environmental laws; and*
> >
> > *(b) provide the Landlord with evidence satisfactory to the Landlord, acting reasonably, that the contravention has been remedied.*

(iii) Maintenance and Inspections

Equipment and fixtures essential for the operation of a service station require regular and sometimes costly maintenance. Moreover, specialized items (e.g. tanks, fuel lines and pumps) may be installed underground or in other difficult to access areas, making the maintenance of these items more challenging. Given that environmental contamination can be very expensive and time-consuming to

control once it has occurred, landlords have an acute interest in being particularly vigilant about repair and maintenance obligations in gas station premises.

To this end, landlords should consider including additional provisions in the lease allowing it to enter in the premises with its consultants for inspections and sample collection, allowing periodic testing, and granting it rights to effect any required repairs or maintenance at the tenant's cost (provided, of course, that such repairs and maintenance were the tenant's responsibility). The landlord may also require the tenant to provide copies and/or proof of the tenant's licensing documents and any environmental assessments commissioned by the tenant.

Landlords must be careful to ensure that the lease contains remedies where the landlord has reasonable grounds to suspect that the tenant is not in compliance with environmental laws, such as requiring the tenant to provide an independent audit report or current assessment. Parties should consider whether the cost of such reports will be shared equally, regardless of the results, or whether the costs will be borne by one or the other depending on the findings.

In response, tenants should require strict notice periods prior to any such entry and in particular prior to the landlord undertaking any repairs or maintenance in the premises at the tenant's cost. The tenant should require notice from the landlord regarding any such deficiency and that it be given the chance to remedy it before allowing the landlord to enter into the premises. The tenant will also want to set out a mechanism by which the tenant can contest the need for such repairs. The tenant should also prohibit the landlord from conducting any inspections in a manner that would hinder or otherwise interfere with the tenant's business operations, or at least a covenant that the landlord will use its efforts to minimize disruption of the tenant's operations. Any documentation provided to the landlord containing personal or confidential information should not be released to the landlord until it has agreed to keep any such information confidential. Where the landlord has rights to require an audit report or assessment, the tenant should push to have the landlord bear the full cost of any report that does not reveal any contamination beyond legally acceptable levels.

(iv) Indemnity Clause

Standard leases typically hold the tenant wholly responsible for the remediation of all contamination in the premises following the date of possession by the tenant, as well as for any costs of compliance with all environmental laws while in occupation of the premises. In the case of gas stations, the lease should also expressly address responsibility for any "offsite migration". Where contamination affects a neighbouring property owner's lands, such third party will no doubt bring an action against both the landlord and the tenant. In these cases, the landlord will want to ensure that it is fully indemnified by the tenant. Indemnities such as the following may be sought by landlords to ensure protection in this regard:

> *The Tenant shall be liable to and shall indemnify and hold harmless the Landlord from and against:*
>
> *(a) all claims reasonably necessary or required by an Authority having jurisdiction to:*
>
> *(i) clean up, remove, treat or in any way deal with hazardous substances; and*

(ii) prevent any release of any such hazardous substances where such release would violate any applicable environmental laws or would endanger or threaten public health or welfare of the environment from the premises; or

(b) any portion of a claim to the extent of the Tenant's contribution to or responsibility for the presence of any hazardous substances in the Premises or migrating from the Premises to any adjoining properties,

which may be brought or made against the Landlord a result of or related to environmental matters or conditions caused or contributed to by the Tenant which arose at any time following the Possession Date.

From the tenant's perspective, the indemnity provision should specifically exclude any liability in connection with pre-existing contamination, post-possession contamination that meets minimum governmental standards, and migration and/or any other contamination not caused by the tenant.

(v) Remediation

The lease should contemplate which party is responsible for initiating any remediation procedures and bearing the expense of reversing or stopping any environmental damage that may have occurred. For example:

Upon demand by the Landlord or any governmental authority having jurisdiction, the Tenant shall undertake the removal, cleanup, remediation or other corrective action deemed to be necessary by such governmental authority or by the Landlord provided that in the event that the Landlord has made such a demand without a correspondence demand from a governmental authority having jurisdiction, the Landlord shall, in its notice, provide reasonable details with respect to the presence, introduction, deposit, release, emission, leak, spill or discharge of hazardous substances at the Premises or on the Lands in question. The Tenant shall promptly at its own expense take all action necessary to carry out a full and complete removal, cleanup, remedial or corrective action.

A prudent landlord may also make provision to entitle it to retain a reputable independent consultant to monitor any remediation activities at the premises prior to expiry or termination of the lease.

Following any remediation, particularly if the work took place during the tenancy (and not at the end of the term), both parties should remember to obtain a copy of the final environmental assessment report. As with the initial ESA report, this assessment will act as a new reference point in determining whether any further remediation is required, and the liability of each party at the end of the tenancy.

(vi) Environmental Insurance

Because remediation and the clean-up of spills or other contamination can be very costly, landlords of gas station premises may consider additional environmental insurance to cover these potential costs. The cost of this insurance may be recovered from the tenant, bearing in mind that if the gas station premises form part of a larger shopping centre or development, the landlord should be careful to ensure that it is entitled to allocate a greater share of these insurance costs to the gas station tenant.

(b) Non-Environmental Issues

(i) Design and Construction

Where the tenant's premises are integrated into or form part of a larger project, the landlord will need to consider the size and arrangement of access routes (including turning radii) to accommodate oversized tanker trucks making fuel deliveries to the premises.

Similarly, the delivery of fuel necessarily takes time, and so where the arrangement of such access routes requires that these delivery vehicles interrupt the natural flow of traffic in the centre, landlords and tenants will need to come to an agreement on the details of the delivery schedule, including timing, frequency, and length of each delivery.

(ii) Proportionate Share

While leases typically require a tenant to pay its proportionate share of the costs of maintenance and operation of the larger centre, delineating the boundaries of the gas station tenant's premises (which is critical in calculating the tenant's share) is not always straightforward. Most service station premises, for example, incorporate a canopy or other partial enclosure in connection with service pump areas. Parties should be careful to outline whether these covered areas are to be considered part of the "premises" such that the tenant pays rent based on this larger footprint, or if the tenant will pay its proportionate share only in relation to fully enclosed areas.

CONCLUSION

Although the fundamental legal principles of commercial leasing also apply to specialty leasing transactions, the unique characteristics of specialty uses can present some challenges for landlords and tenants alike. Given the current competitive markets and increasing push towards more creatively arranged mixed-use complexes, however, parties should not be deterred by the additional considerations that must be accommodated when dealing with these specialty use tenancies. Though this paper has not (and cannot) canvass the full breadth of these features, it should provide landlords and tenants with a good starting point for the negotiation and drafting of these deals.