

**ARE YOU AFRAID OF THE DARK?  
SELECT ISSUES REGARDING “GO DARK” PROVISIONS IN RETAIL LEASES**

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One of the most hotly negotiated aspects of a retail lease is often the so-called “go dark” provision. A provision highly sought after by tenants, the typical “go dark” provision allows a tenant to completely cease operations at the premises without being in default of its lease; provided that the tenant is not then currently in default, continues to pay rent to the landlord and meets its other obligations under the lease. Tenants seek such provisions to provide flexibility with respect to their operation of various stores. In the event a store is not producing sales sufficient to maintain operations, tenants want the ability to cut their losses with respect to such store and reduce their recurring liabilities. Additionally, market conditions, the desirability of the space and corporate philosophy may induce a tenant to “go dark” at a specific location. While a tenant is still required to pay rent to its landlord after exercising its “go dark” option, the tenant will not be required to keep the store fully stocked, staffed or operating.

As with most lease negotiations, a tenant’s ability to receive the benefit of a “go dark”

provision in its lease is largely a function of the relative negotiating strength of the parties, the particular location in question and market forces generally. The impact on a landlord’s center from exercising a “go dark” provision may be significant. If an anchor store “goes dark,” the landlord may suddenly find itself with a large, hulking, empty store and no ability to re-lease the space. Therefore, landlords and tenants must consider the impact of tenant going dark and tailor the lease accordingly so as to give the tenant the flexibility it desires, while providing certain flexibility and protection to the landlord as well. Ironically, the very tenants that will most impact a center by going dark are generally the only tenants with enough negotiation power to force a landlord to concede to such a provision.

When considering a “go dark” provision in a retail lease, landlords and tenants must consider the impact of such a provision on various aspects of the lease. These types of provisions have a widespread impact on other areas of the lease, and a lease containing such a provision must be examined in its totality.

Operating Covenants. The typical “go dark” provision presupposes that the tenant has operated its business at the location for the period of time required by any operating covenant contained in the lease. Because a “go dark” provision contemplates the possibility that tenant may reopen at a later date (discussed below), landlords may negotiate for a secondary operating covenant, to commence upon tenant’s re-opening. While such a requirement may serve to dissuade a “dark” tenant from re-opening, it may also serve to dissuade a landlord from recapturing the dark space (discussed below). Furthermore, this secondary operating covenant may encourage a landlord to accept a “go dark” provisions where it otherwise might not.

Percentage Rent. Many retail leases require the payment to landlord of a percentage of tenant's sales at the premises above a certain threshold level or break-point (generally referred to as "percentage rent"). While there are few circumstances where a tenant will "go dark" during a period in which it is generating enough sales to trigger its obligation to pay percentage rent to the landlord, in certain circumstances landlords base percentage rent payments on projected sales. Notwithstanding that, by

definition, a store that is dark is not generating any sales at all and therefore should not be obligated to pay percentage rent, tenants must be cautious not to obligate themselves to the payment of percentage rent during times in which their store is dark based on these projected or pro-forma sales. However, landlords sometimes seek such projected percentage rent payments or some other sort of additional compensation at the time a store "goes dark" if at such time the store was (or was anticipated to) generate sales at a level which entitled landlord to percentage rent.

Exclusivity Clause. Many retail tenants will seek an "exclusive use" clause, restricting the landlord from leasing space in the center to other tenants for use in competing businesses. In connection with the granting of such exclusive, landlords should cross reference any "go dark" provision and provide for automatic termination of the exclusive use clause if the tenant elects to "go dark." While seemingly simple, the matter is complicated if the tenant (or an affiliate or assignee) resumes operations at the premises. Therefore, if the tenant (or an affiliate or assignee) re-opens the space, tenant should thereafter be entitled to the benefit of the exclusive use provision, excepting therefrom any competing uses which came into being during tenant's "dark" period.

Recapture by Landlord. Many "go dark" provisions provide a mechanism whereby the landlord may take back, or recapture, tenant's space after tenant "goes dark." Tenants frequently argue that they should be compensated by landlord for re-taking the space to which tenant is otherwise entitled, especially if the tenant has invested a considerable sum in the premises.

Often tenants demand compensation in an amount equal to the unamortized value of the improvements which they have constructed in the premises, thereby making them whole for their investment in the space. Landlords argue, however, that they should not be required to pay a recapture premium because the lease contemplated an operating retail store and the presence of dark space adversely affects the performance of the remainder of the center. Furthermore, as tenant's improvements are rarely usable by the landlord or a replacement tenant, landlords strongly argue against payment for such improvements. These negotiations often deadlock negotiations on "go dark" provisions.

"Go Dim" provision. One possible solution to the recapture deadlock is the so-called "go-dim" provision. Such a provision allows a tenant to reduce its operations at the premises without completely closing the store. A tenant may accomplish this by reducing the size of the space which tenant must operate, or by cutting back on the level of operations themselves (i.e. reduce product lines, hours of operation, service). The ability to "go dim" may allow a struggling tenant to weather hard times until they can re-open at full strength. Some landlords are willing to agree to these provisions, provided the tenant otherwise complies with the terms of the lease. These provisions eliminate any requirement that landlord pay a recapture penalty and do not result in dark space in landlord's center. Tenants favor these provisions because they may (depending on the terms of the lease) preserve their exclusive use clause and otherwise keep them in good stead with the landlord, while providing them with the flexibility desired and maintaining their control of the space. Of course, if a tenant desires to reduce the amount of space it will utilize permanently, the excess space should be subject to the standard "go dark/recapture" provisions.

While there are no easy solutions to the "go dark" debate, a careful, practical analysis by landlords and tenants should result in a workable, balanced lease, providing each party with requisite flexibility and protection.