

# Negotiating a rent commencement date

By Jay Byron Leibovitz

**T**he rent commencement date establishes two of the tenant's most important obligations: the duty to pay rent and, if tenant has covenanted to open and operate, the duty to open for business. In negotiating a rent commencement date, the landlord will want the tenant to open for business and start paying rent on the earliest date possible. The tenant will want to ensure that it is generating sales at a particular store before becoming obligated to pay rent.

A "fixed" date best serves the landlord's goal of maximizing profitability. It guarantees that the tenant will be required to open and pay rent on a certain date.

The tenant, however, will want to avoid a rent commencement date arriving before the tenant is ready to open. Therefore, the tenant often insists upon a "floating" date, gives the tenant time to build out its space. Tenant will want the rent commencement date to be tied to: (1) delivery of the premises, (2) completion of any work by the landlord, (3) landlord's approval of plans, (4) receipt of a fully executed lease, and (5) receipt of permits required to commence and complete its work. In addition, tenants often want the date subject to force majeure delays.

Several factors will determine if landlord can agree to a floating rent commencement date: (1) how far in advance the expected rent commencement date is, (2) whether the premises are currently occupied, (3)

whether the landlord anticipates difficulty with plan approval or permits, and (4) the tenant's bargaining power. If the date is far in advance or the premises are immediately available, the landlord should try to hold firm on a fixed date. With a date fixed far in advance, the tenant should have sufficient notice to plan its build-out. Moreover, the fixed date serves as an incentive to ensure that the tenant moves forward with plans, lease negotiations, and permits in a timely fashion.

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The landlord can build-in safeguards to prevent unwarranted delay. The date should be tied to the landlord's tender of delivery, regardless of whether the tenant actually accepts delivery or starts its work. If delivery upon completion of landlord's work is a condition to the rent commencement date, the date should be conditioned upon tender of possession with landlord's work sufficiently completed such that the tenant is reasonably able to begin its work. The landlord should not be penalized where it has completed its work but for minor punch-list items that will have no impact on the tenant's ability to perform its work. The possession and plan-approval conditions should be subject to the tenant's timely submission of plans in

accordance with lease guidelines. If the date is tied to the tenant's receipt of a fully executed lease, the tenant must be required to negotiate in good faith and to return tenant signed leases to the landlord without modification within a specified time period.

The landlord should be leery of delaying the rent commencement date because of force majeure or the tenant's permits. If the date is subject to force majeure, there should be an outside limit (e.g. thirty days). In either event, the landlord should reserve a right to cancel the lease if delay exceeds a certain number of days. If the landlord must agree to a receipt-of-permits condition, the landlord should require the tenant to submit applications within a reasonable time after plan approval (no more than five days) and to proceed diligently to obtain permits and also require an outside date. The landlord should reserve a right to cancel the lease if delay exceeds a certain number of days.

Once the tenant is able to use the landlord's realty for profit, there is no reason why the landlord should wait to receive rent. The rent commencement date should account for the possibility that the tenant opens ahead of schedule. It should always be an outside date; the tenant's obligation to pay rent should nonetheless commence by the date tenant opens for business. ♦

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