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Outdoor Seating Areas

Issues to be aware of before opening



Bruce Rosen
BRosen@RECDC.com
(202) 577-3552



Peter Pokorny
Peter@RECDC.com
(703) 850-9099

- **Introduction** – Restaurant operations face many challenges as they begin to reopen for business amid the COVID -19 pandemic. Many restaurant tenants are considering expanding their operations outdoors to remain profitable as well as to protect the public health. Before opening or expanding an outdoor dining area, a restaurant tenant should review its lease and consider some of the issues discussed below.
- **Outdoor Use** – Absent an express right in the Lease, most tenants are not permitted to use sidewalks, parking areas or other areas outside of their leased premises for outdoor dining.
- **Restrictions** – A lease that permits outdoor use often includes rules and restrictions. For example, restricting access to the shopping center or blocking pedestrian flow through the common areas are likely prohibited. The lease, or the Landlord's Rules and Regulations, may address storage and disposal of trash, odors, cleaning and maintenance requirements, etc.
- **Landlord's Approval** – If the lease does not permit outdoor dining, the tenant will need to negotiate with the landlord to amend the lease and allow for such use. Given the current environment and financial hardships that restaurant tenants are facing, landlords may be amenable to such negotiations. Some leases may require Landlord's approval for all outdoor furniture, and require the tenant to remove and store the furniture each night. Similarly, the tenant may need approval if there will be music or other similar sounds in the outdoor dining area.



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- **Part of the Premises** – If the lease includes the outdoor area as part of the tenant’s premises, consider how the lease provisions on rent, maintenance, insurance, and indemnification are impacted.
- **Compliance with Laws** – Leases often require tenants to comply with all applicable laws. Regarding outdoor seating areas, this may include laws concerning alcohol sales, seating capacity, signage, operating hours, etc. In the current environment, many states and localities have been more flexible regarding such regulations.
- **Insurance and Indemnities** – A tenant should make sure that its insurance covers it for any property damage to its furnishings in the outdoor area as well as liability from bodily injury. The tenant should also consider if its lease indemnity extends to the outdoor area, and whether the indemnity expands the tenant’s liability by making it responsible for third party actions in the outdoor area.
- **Restrictive Covenants** – In addition to its lease, a tenant may be required to comply with a recorded instrument, such as a declarations of covenants, a deed restrictions or other encumbrances, which may affect use of outdoor space. Other tenants’ leases may have exclusive use, or other restrictions that could impact a tenant’s outdoor operations.
- **Next Step** – This is a brief overview of issues that a restaurant tenant should be aware of prior to opening an outdoor dining area. An experienced team of a commercial real estate attorney and a commercial real estate broker can best advise a tenant and protect a tenant’s interests.



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