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Legal-Ease: Documenting Common Areas in Office Leases

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Much of the character and ambience of an office building is derived from the property's shared spaces. On a daily basis, tenants and guests could walk through an atrium, stand in an elevator lobby, sit in a plaza or gaze at the flowers on a rooftop deck. These are the common areas that set the tone for the day. When negotiating the terms of an office lease, it is common for landlords and tenants to focus their efforts primarily on rights and obligations related to the leased premises. However, the rights and obligations of both parties extend beyond those walls.

- **Defining the Shared Space.** Most leases define “common areas” as portions of the building or project that are available for use by all tenants or occupants on a non-exclusive basis. The lease often makes reference to specific shared spaces, such as lobbies, stairwells, corridors and entrance ways. Landlords should consider whether certain amenities should be included in the common area definition, or if they should be treated otherwise. For instance, if the building has conference rooms available for use, it is important to be clear about a given tenant's access to that space (how, when and at what cost). Based on these factors, it may make sense to document these spaces outside of the common area concept.
- **Paying for Common Areas.** Costs for maintenance and repair of common areas are generally paid by a land-lord and passed through to tenants in accordance with the lease's operating expense provisions. Most tenants negotiate limitations on the operating expense pass-throughs, such that expenses for capital improvements are not passed through (with the exception of improvements that reduce operating expenses and those necessary to comply with new laws). This means that a redesign of the lobby most likely is not a cost that can be passed through to tenants. However, if accessibility requirements are changed and the building's entrance way needs to be modified for compliance with the Americans with Disabilities Act, this cost likely can be passed through. Artwork is another hot-button issue for tenants when negotiating operating expense exclusions. Leases often preclude the landlord from passing through costs for the acquisition of common area artwork, though artwork maintenance costs may be passed through.
- **Changes to Common Areas.** Nothing will get tenants talking like significant common area changes. Though the cost of a lobby redesign may not be passed through to tenants, it is likely within a landlord's right to undertake such work. However, it is important to note that many tenants seek to limit certain land-lord rights to change the common area, particularly changes that would affect access to or visibility of the leased premises. Leases often require that modifications to the common areas be in keeping with the building standard.
- **Common Area Use Rights.** Though leases provide that tenants have the right to use common areas, leases should be clear that landlords have control over these spaces. Landlords may exercise this control by retaining the right to close, eliminate or



designate periods of exclusive use for certain common areas. Landlords also have the right to impose rules and regulations regarding the use of common areas, including rights to impose charges for certain common area usage. Some leases seek to make a tenant's rights to use common areas contingent upon the tenant's satisfaction of its obligations under the lease. Under this scenario, it is possible that a land-lord could prevent a tenant from using a common area amenity while the tenant is in default. This provision should be carefully reviewed in connection with the remedies under the lease so that a ten-ant's access rights are consistent with its rights under the remedies provision.

An office building can boast the most impressive common areas in its market, but if the scope, rights, obligations and cost allocations are not clear to both landlord and tenant, they can lead to dis-agreements that can spoil their appeal. It is critical for both landlord and tenant to address these issues clearly in the lease so that common areas do not become the source of dispute.

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