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Landlords, Tenants And Accessibility: When It's Time To Draft Lease Provisions, Part 2 of 2

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Landlords and tenants have been negotiating the allocation of the burdens and benefits of the Americans with Disabilities Act of 1990 (42 U.S.C. s. 12101 et.seq.) for more than ten years. Often, the negotiation is conducted without a clear understanding of the issues raised by the ADA. Last month, in part one of this series, David Kessler of Kessler McGuiness & Assoc. discussed the current requirements of the ADA and its Massachusetts counterpart, the Massachusetts Architectural Access Board regulations, with respect to landlords and tenants. Part two will suggest ways in which commercial landlords and tenants can more clearly express their agreements with regard to ADA and MAAB when they negotiate their leases. The ADA provides that as between landlord and tenant, the lease may allocate responsibility for ADA compliance. Landlords and tenants should be aware, however, that if either party to the lease does not perform its agreed-upon obligations, ADA enforcement action nonetheless may be taken against the other party.

Negotiating the provisions of a lease regarding the ADA and MAAB involves answering several basic questions. First, what is the status of the building at the time the lease is entered into; is it ADA- and MAAB-compliant or not? Second, will the tenant improvements that will be made to the premises prior to commencement of the lease term trigger further ADA or MAAB compliance requirements? Third, will any further alterations to the building made during the term trigger additional ADA or MAAB requirements? Finally, and most importantly, in each case, if compliance work is required, who will perform the compliance work and who will pay for it? The provisions of the lease should be drafted in accordance with the answers to these questions.

We will discuss appropriate lease provisions for a fact situation that involves a multitenant office building first occupied before January 26, 1993. Buildings first occupied after that date were required to comply with the ADA's requirements when they were built. Assuming that the use of the space is not being changed, these buildings should not present ADA/MAAB concerns, other than with respect to the tenant build-out itself.

In any lease negotiation, the practical reality of the leasing market will greatly affect the outcome. In a strong landlords' market, even landlords that are generally fair and even-handed may be unwilling to include representations and warranties as to the condition of a building or even obligate themselves for things that seem to a tenant as though they should be customary. Sometimes, the best a tenant can do is to include a statement in the lease that the tenant will not be responsible for stated obligations.

Existing Conditions

The ideal situation for a tenant is to have the landlord represent in the lease that as of the lease date the common areas of the building (including areas that would be common areas if the tenant was not leasing the entire floor) are ADA/MAAB compliant. In the more usual situation, where the landlord is not willing to make this representation, a tenant should request a provision such as the following:

Landlord shall make any alterations that may be required to bring the hallways, corridors, parking areas, enclosed or unenclosed halls, walkways, restrooms, drinking fountains, telephones, and other common areas of the Building, including all paths of travel to and from such common areas and the Premises, into compliance with Title III of the Americans With Disabilities Act (the "ADA"), all comparable state or local laws, or any rules, regulations or guidelines implementing the foregoing (collectively, the "Accessibility Laws"), including the removal of all architectural barriers, where such removal is required by law. Where removal of barriers is not required by law, Landlord shall provide alternative and/or auxiliary aids and services as required by the Accessibility Laws.

If the tenant is unable to include an express obligation to this effect in the lease, the tenant should at least obtain an express provision that the tenant will not be obligated to perform compliance work in any of the common areas or to pay for any compliance work performed or triggered by anyone else.

In some situations, if a prospective tenant is not able to get appropriate assurances as to ADA/MAAB from the landlord, the tenant should perform an access audit of the common areas of the building and the premises to ascertain existing conditions.

Initial Improvements

The work performed to prepare the premises for the tenant will be subject to accessibility requirements. This should be taken into account both in design and in cost estimates for the tenant improvement work. The tenant improvement work may trigger barrier removal and, perhaps, path of travel obligations in the common areas, either as a result of the ADA's "20 Percent Requirement" (if the landlord is performing, or perhaps even paying for, the work) or MAAB's $100,000 or 30 Percent trigger (each of which was discussed last month). Due to the possibility (also discussed last month) that work performed within the preceding three-year period may be aggregated with the current work, it may be advisable to review the building inspector's records for the building to ascertain the extent of alterations during that period.

A tenant should expect boilerplate provisions in the lease that will require the tenant to use and operate the premises in compliance with applicable laws (including ADA and MAAB) and that any alterations made by the tenant must comply with applicable laws (including ADA and MAAB). A landlord commonly will want to ensure that a tenant's work will not give rise to unanticipated and potentially substantial costs for ADA or MAAB compliance work, or if it does, that the tenant will pay for the work. The ADA regulations include a provision that work by a tenant inside the premises by itself will not trigger compliance requirements in common areas outside the tenant's control. This is not true for MAAB. A landlord will often include in its form lease a provision like the following:

If, as a result of any alteration or improvements made by Tenant, Landlord is obligated to comply with the ADA or any other law or regulation, and such compliance requires Landlord to make any improvement or alteration to any

portion of the Property, as a condition to Landlord's consent [to the alterations or improvements], Landlord shall have the right to require Tenant to pay to Landlord, prior to the construction of the alteration or improvement by Tenant, the entire cost of any improvement or alteration Landlord is obligated to complete by such law or regulation.

Operating Costs

Tenants need to be aware that even where the landlord has agreed to be responsible for compliance, the tenant may wind up paying for a portion of the cost through the operating expense or "CAM" pass-through provisions of the lease. Leases will usually include costs of legal compliance somewhere in the middle of a list of ten or twenty operating expenses that the landlord can pass through to tenants, or will otherwise define "operating expenses" broadly enough to include them. This is where the costs for barrier removal and path of travel work will go if the landlord is required to perform them and has not charged the costs to a specific tenant. A tenant should ask for a clause specifically excluding these costs from operating expenses. The tenant's fallback position is that at least the costs of bringing the building into compliance with laws (including ADA and MAAB) will not be passed through as operating expenses to the extent they arise from work required to correct noncompliance of the building at the commencement of the lease term and work done by or for other tenants. This should be combined with a tenant-favorable provision, which is of wider applicability, that capital expenditures should be excluded from operating costs, or, to the extent not excluded, should be appropriately amortized.

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