

It is Patio Season! Navigating Patio Rights in Commercial Leases

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Introduction

As warmer weather arrives, restaurant patios or outdoor seating areas begin to fill once again with individuals eager to dine outdoors. For many operators, however, a patio is no longer simply a seasonal amenity or marketing tool. Increasingly, it is a critical component of the business itself.

While a decade ago a patio may have been viewed as a welcome bonus, many restaurant concepts today rely on outdoor seating to drive revenue, enhance customer experience and strengthen brand visibility. As a result, patio rights have become an increasingly important aspect of commercial lease negotiations.

Rent and Cost Allocation

Although patio areas are frequently excluded from minimum rent calculations, they often create additional costs. As a result, careful drafting is required to determine how these costs will be allocated.

Tenant Considerations

Given that patios are seasonal, weather-dependent and often subject to municipal approvals, tenants typically seek to limit their financial obligations to costs directly attributable to the patio area, such as the payment of utilities. Tenants may also seek to exclude patio-generated sales from percentage rent calculations or, at a minimum, determine whether any exclusions should apply.

Landlord Considerations

Landlords often seek to ensure that tenants bear any incremental costs associated with the patio, including increased operating expenses, utility consumption, maintenance costs and, where applicable, any increase in realty taxes attributable to the patio. Where percentage rent applies, landlords may also seek to include patio-generated sales when calculating gross revenue.

Operation, Maintenance and Repair Obligations

Once patio rights have been established, the parties must determine who will be responsible for operating and maintaining the patio and obtaining any necessary permits and licences.

Tenant Considerations

In many cases, tenants are responsible for obtaining governmental permits and licenses required to operate a patio at their own expense. From an operational perspective, tenants may accept responsibility for cleaning and maintenance of the patio furniture and trade fixtures but often seek to have the landlord remain responsible for structural repairs, common area maintenance and other property-wide obligations, such as snow and ice removal. In addition, tenants should consider whether music will be played within the patio area and, if so, ensure that the lease expressly permits such use and addresses any applicable restrictions relating to volume, hours of operation and nuisance complaints.

Landlord Considerations

Where the landlord is constructing the patio or undertaking broader site improvements, the landlord may agree to be responsible for obtaining the necessary governmental permits and approvals. Nevertheless, landlords often expect tenants to assume responsibility for the operation and maintenance of the patio, including cleaning, waste management, and seasonal maintenance obligations such as snow and ice removal. Landlords may also seek to impose operational controls governing the use of music and other amplified sound within the patio area to address noise, nuisance and compatibility concerns with neighbouring tenants and surrounding uses. In some cases, however, landlords may elect to retain responsibility for snow and ice removal in order to ensure consistency with property-wide maintenance standards and risk management practices.

Seasonal and End-of-Term Obligations

The negotiation of patio rights does not end once the patio is constructed and operational. The lease should also address what happens during seasonal shutdowns and at the end of the lease term.

Tenant Considerations

Tenants may seek to retain rights to store equipment on-site or leave certain improvements in place on the patio during the off-season.

Ideally, the lease should either indicate that the tenant is not responsible for removing its improvements at

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the lease expiry or identify which improvements, if any, must be removed at lease expiry. In some cases, tenants may negotiate for removal requirements to be determined at the time improvement approvals are granted, thereby reducing uncertainty and unexpected repair costs at the end of the term.

Landlord Considerations

Landlords are primarily concerned with ensuring that the patio remains safe, presentable and properly maintained throughout the year. As a result, landlords often require tenants to remove seasonal furniture, decor and equipment when the patio is not in operation.

Landlords also typically seek to preserve the right to require the removal of patio improvements and the restoration of the affected area at the tenant's expense. This is particularly important where installations are specialized, highly customized or may limit flexibility for future occupants.

Final Thoughts

As patios continue to evolve from a seasonal amenity into an integral part of many restaurant operations, careful planning and thoughtful drafting have become increasingly significant. Taking the time to address these issues at the outset may help avoid disputes later and ensure that both parties maximize the benefits of outdoor dining.

For more information regarding patio leasing considerations or assistance with negotiating and documenting patio rights, please contact any of the authors of this article or a member of our [Real Estate & Development Group](#).

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.