



## THIRD IN A FIVE-PART SERIES

# Improving Leasing Practices in an Evolving Business Environment

NEGOTIATING "AS IS" V. "TURNKEY" CONDITIONS | BY RICHARD WOLLOCH, ESQ.



**Commencement:** The three factors that typically fall under the rubric of lease commencement are: delivery of possession of the premises by landlord; the tenant's initial preparation for opening for business, which includes regulatory and construction permits and approvals; and the commencement of rent, which includes tenant construction allowances and rent abatements.

Ideally, the landlord would like to deliver physical possession of the premises to the tenant as soon as possible and in their 'AS IS' and 'WHERE IS' condition. Conversely, the tenant should require that the landlord deliver physical possession of the premises to the tenant once the tenant has obtained the construction permits and approvals, with the premises free of all tenancies,

occupants and contents and in 'broom-clean' condition.

As a tenant, you will also want the landlord to deliver the exterior components (excluding the storefront, which is considered cosmetic), the structural components, the roof, the floor slab (excluding the floor covering, such as vinyl composition floor tile or carpet), utilities, and major mechanical

systems (electrical, plumbing, drainage, sewerage, heating, ventilating and air conditioning [HVAC] and sprinklers), serving the premises in good working order. The foregoing is a wish list, and often the landlord will require the tenant to take responsibility for the HVAC and sprinklers. You do not want to have to take care of the premises before you are ready to perform your initial alteration, so see how long you can put off the obligation to accept delivery of possession of the premises from the landlord.

At the very outset of the lease term, the tenant will need to have the premises altered in order to accommodate the tenant's business operations. You will need a vault, a 'cage,' a customer service area, and amenities and/or an administrative area for your employees. You will also need a storefront and exterior signage. If you arrange for the landlord to perform this work for you, the cost of this work is typically translated into rent, with some amount of incremental profit factored into the increased rent. This is referred to as a 'turnkey' operation because once the landlord has completed the initial alteration, all the tenant will have to do is turn the key, open the lock and get to work. On the other side of the spectrum, the tenant will perform the initial alteration of the premises. If you are taking the premises in their 'AS IS' and 'WHERE IS' condition, you should ask the landlord for a rent concession or tenant allowance in consideration for improving the premises without the landlord's involvement. The middle ground of some landlord work and some tenant work is frequently the norm. The scope of work and the financial concessions offered by the landlord are hotly negotiated. This much is certain: If you do not ask, you are likely to receive little in the way of landlord work or rent concessions. No matter who performs the initial alteration of the premises, you cannot permit the

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landlord to have the ultimate discretion with respect to the work that you need to have performed in order to operate the premises. The easiest way to prevent this situation is to simply attach a sketch or exhibit to the lease that accurately and

to use the premises or perform the work necessary to convert the premises to the tenant's intended use, the premises will have absolutely no value to the tenant, in which event the tenant should have the right to terminate the lease if he or she

does not receive all of the permits and approvals by a certain date. The landlord will probably want the same termination right. The landlord termination right should not trouble the tenant, provided that the tenant has the oppor-

tunity to supersede the landlord's termination election.

The landlord will want to receive rent as soon as possible after the execution of the lease. The tenant will not want to start paying rent until he or she is able to open for business, since the tenant usually expects to pay rent out of money from business operations at the premises. The usual solution among parties of equal bargaining power is that rent payments will

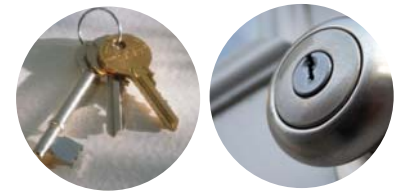
concisely describes the scope of work intended by the tenant. Both parties should initial or sign the plan or exhibit to confirm the landlord's approval to the scope of the tenant's work, which should include the tenant's proposed signage.

The tenant's ability to proceed with the lease should be conditional on the receipt of all required building permits and approvals and all required regulatory permits and approvals. If the tenant is unable

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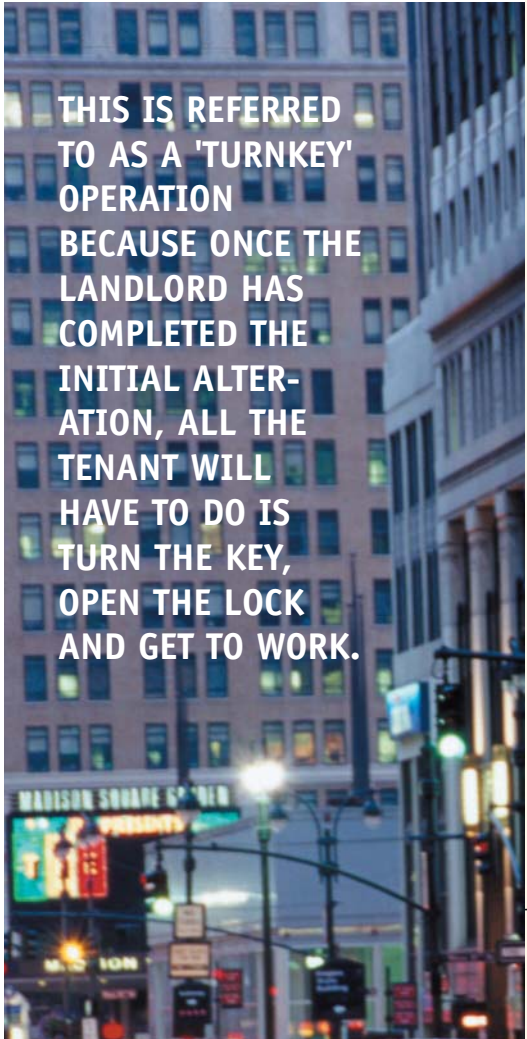
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commence on the date on which the tenant opens for business or a defined period after the tenant has received certain permits and approvals. That period should approximate the time necessary to complete the tenant's initial alteration of the premises. To the extent that the parties do not view themselves as possessing equal bargaining power, this period becomes a matter of negotiation. In some jurisdictions, regulatory approvals from the state banking department may take as long as one year to obtain. No landlord is likely to have the patience for that sort of situation. If the landlord is adamant about receiving rent from you well in advance of when you will be able to obtain these regulatory approvals, you may ease some of the financial burden by spreading the payment of the 'premature' rent over an extended period, such as the first 12 months of the lease term. ■

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**THIS IS REFERRED  
TO AS A 'TURNKEY'  
OPERATION  
BECAUSE ONCE THE  
LANDLORD HAS  
COMPLETED THE  
INITIAL ALTER-  
ATION, ALL THE  
TENANT WILL  
HAVE TO DO IS  
TURN THE KEY,  
OPEN THE LOCK  
AND GET TO WORK.**