

Creative Solutions is a bi-monthly column offering creative solutions to unusual problems in drafting leases for retail space. Please email your questions or problems you are encountering and your Creative Solutions to Glen Cornblath, gcornblath@ksc-law.com.

Most shopping center form leases have a clause something like this: “Tenant shall not suffer, allow or permit any noise to emanate from the Premises.” This seems perfectly reasonable. It protects the quality of the shopping center and the ability of each tenant to create its own environment. But now you’re working on a deal with the tenant whose marketing strategy and image requires making noise which can be heard in the common areas, the parking lots, and maybe even other tenants’ premises. What do you do?

First, landlord and tenant should determine exactly what the tenant needs. While the tenant may want its music and promotional noise to be heard in other spaces in the center, it will probably understand that other tenants don’t. The leasing people for both landlord and tenant need to place the tenant in an appropriate place in the shopping center, ideally in an outlot, so the tenant can pursue its marketing strategy while allowing other tenants to pursue theirs.

Next, the tenant should agree to comply with laws regarding noise level and accept liability for any claims due to excessive noise, whether the claims are from customers or employees. Make sure the indemnity provisions of the lease are clear regarding this unusual use; don’t rely on general language that a court might later determine “never contemplated” liability for excessive noise.

Finally, landlord and tenant need to figure out some way for the landlord to protect the interests of the other tenants when the noise gets to be just too much. Both sides will benefit from some clarity regarding what is expected versus what is excessive.

Here is suggested language (without the indemnity provisions) that might meet both sides’ objectives:

Landlord acknowledges that from time to time, the front door to the Premises may be left open and music from within the Premises may be audible outside the Premises. Tenant shall not allow such music to be audible beyond the portion of the parking lot cross hatched on Exhibit ___, or within the premises of any other tenant of the Shopping Center. The volume of such music must at all times comply with all applicable laws, statutes, ordinances, rules and regulations and must be such that it is not a public nuisance. If Landlord notifies Tenant in writing that Tenant is in violation of any obligation under this paragraph, Tenant shall have six (6) hours from the time of the first such notice in any calendar year and two (2) hours from the time of any subsequent notice in the same calendar year to cure such violation.

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