

Before Expanding Their Operations Outdoors, Retailers Should Explore a Few Key Factors

June 1, 2020

Holland & Knight Alert

[Kyla O'Brien Baker](#) | [Matt Joe](#) | [Kathryn W. Oberto](#)

Highlights

- Attracting customers to dine, shop and exercise while observing social distancing guidelines and capacity restrictions will be a challenge for many retailers reopening their doors amid the COVID-19 pandemic.
- In an attempt to facilitate the divergent interests of operating profitably while protecting public health, retailers are considering expanding their operations outdoors as a safer way to reopen for business. However, there are many aspects of property ownership, development and zoning that may restrict such outdoor uses.
- This Holland & Knight alert provides several considerations that may assist retailers in determining whether the use of outdoor space is practical for their particular businesses.

As business owners across the United States look to reopen their doors to customers in the coming weeks, they will face many obstacles. Attracting customers to dine, shop and exercise while observing social distancing guidelines and capacity restrictions will be a challenge for retailers, especially to do so in a manner that promotes profitability and operating efficiencies. In an attempt to facilitate the divergent interests of operating profitably while protecting public health, retailers are considering expanding their operations outdoors as a safer way to reopen for business amid the COVID-19 pandemic.

From Tampa to San Jose to Cincinnati to Boston, cities and property owners are evaluating closing streets and converting sidewalks, drive aisles, parking fields and other common areas for retail use as outdoor dining, shopping and exercise space. While this would allow customers to maintain greater physical separation, there are many aspects of property ownership, development and zoning that may restrict such outdoor uses. Before simply closing exterior areas currently used for other purposes to put up some tables and chairs, a retailer should contemplate several key factors.

The following considerations may assist retailers in determining whether the use of outdoor space may be practical for their businesses in their particular circumstances.

Leases

Because retail space commonly is leased, each retail tenant should review the terms of its lease before opening for business on a sidewalk, drive aisle, parking area or any other area outside of its leased premises. It is common for retail leases to identify the leased premises as only the indoor, in-line space of a building or a building pad, without adjacent sidewalks or parking areas. Even a ground lease (which typically allows for use of certain areas outside of the building pad), typically has restrictions on use of the exterior of the leased premises. If the lease does not provide specific rights to use sidewalks, drive aisles, parking areas and other areas outside of the leased premises, the retail tenant would not have the legal right to use such outdoor areas for its business, and may be subject to legal consequences should it proceed to do so, such as liability for breach of its lease, trespass or ejection.

In addition, leases often provide that use of any areas outside of the leased premises are prohibited or limited to

Holland & Knight

seasonal sales (e.g., holiday sales). There also may be restrictions regarding use of certain areas of the shopping center, or operating during certain hours or for specific durations. If a lease provides the foregoing restrictions, then operating in such outdoor areas would be governed by those terms of the lease.

Although a lease may prohibit or limit a retailer's use of outdoor areas, landlords and tenants could negotiate amendments to their leases to allow for use of such outdoor areas. The determination of whether to expand a tenant's rights to include outdoor operations should include analysis of liability, indemnification and insurance issues. Landlords and tenants should carefully consider whether their respective leases adequately protect their interests in these regards.

Restrictive Covenants

In addition to leases, other encumbrances can impact a retailer's use of outdoor areas of its property. Retail developments and other mixed-use projects typically also are subject to restrictions in a wide variety of other instruments affecting the property, such as declarations of covenants, deed restrictions and/or other leases in a shopping center. Similarly to restrictions in leases, restrictions in these documents may affect the hours of operation, locations of outdoor sales or other business operations, parking ratios and square footage of certain types of uses within the project.

By way of example, a development may permit no more than 10,000 square feet of retail uses in a declaration of covenants, and the development already may contain 9,750 square feet of space utilized for retail uses. If a retailer expanded its leased premises to include an additional 500 square feet of outdoor retail space, such operation may violate the square footage restrictions within the development. Attention to detail is required to determine the specific limitations and restrictions, as the terms of the declaration may be drafted in a way that allows outdoor space to be excluded from the calculation, in effect restricting only enclosed, indoor space.

As with all other aspects of this analysis, the applicability of such restrictions is unique to each development, and individual review is required to determine whether any of the restrictions impact operations involving outdoor space.

Municipality Influence

Before expanding outdoors, a retailer also should consider whether it will face opposition from local municipalities or other authorities having jurisdiction over the project. While some cities are taking conversion of outdoor space into retail use into their own hands, most cities have not. Certainly, retailers would need the approval of cities, counties and/or other permitting agencies to open for business in a public roadway, but approval from such authorities may also be needed to operate on a private sidewalk, drive aisle or parking lot. In addition, municipalities may have restrictions pursuant to applicable zoning laws, development orders, planned unit development restrictions or special use permit requirements. These restrictions may also include limitations on the size and extent of outdoor seating, noise ordinances, signage restrictions and minimum parking ratios.

For example, if a retailer's establishment abuts a *public* sidewalk, then applicable open-container laws may prohibit the consumption of alcoholic beverages on that sidewalk. While some jurisdictions may have relaxed open-container regulations, many jurisdictions expressly prohibit or extremely limit the ability to permit consumption in public areas. If the retailer's business abuts only *private* sidewalks, then consumption of alcoholic beverages may not be as strictly regulated. Generally speaking, permitting the consumption of alcoholic beverages in outdoor areas requires approval from state or local liquor licensing agencies, as well as municipalities, to coordinate administration of open-container laws by local law enforcement agencies. Further, zoning laws may restrict the use of sidewalks regardless of whether the sidewalk areas are public or private. Only ancillary use of sidewalks may be permitted by applicable zoning laws.

The applicability of permitting and licensing requirements in each jurisdiction must be analyzed on a case-by-case basis to determine what is (and is not) permitted.

Holland & Knight

Next Steps

Given that a retailer's options depend on the language of each lease and restrictive document, as well as the applicability of municipal codes or other governing restrictions, further review of the specific language of leases, restrictive documents and municipal codes/restrictions will be necessary to determine the feasibility of operating in outdoor space. For more information or questions about your organization's applicable restrictions, contact the authors of this alert or another attorney in Holland & Knight's [Real Estate Practice](#).

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the authors of this alert for timely advice.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.



Kyla O'Brien Baker is an Orlando real estate attorney who focuses her practice on leasing, acquisition, disposition, development and management of commercial real estate. Ms. Baker represents purchasers, sellers, landlords, tenants, developers, owners, managers, lenders and borrowers in a wide range of commercial real estate matters.

407.244.5167 | Kyla.Baker@hklaw.com



Matthew T. Joe is a partner in Holland & Knight's Atlanta office and co-chair of the firm's Commercial Real Estate Leasing Team. He focuses his practice on managing commercial real estate transactions involving the acquisition, disposition, construction, development, leasing, financing and management of all classes and types of commercial real estate. He utilizes a practical, business-oriented approach in solving legal problems and structuring real estate transactions with an emphasis on achieving the client's business objectives.

404.898.8133 | matthew.joe@hklaw.com



Kathryn W. Oberto is a partner in the Orlando office of Holland & Knight. Ms. Oberto has extensive experience representing landlords and tenants in the commercial leasing of shopping centers and outparcels, restaurants, high-rise office buildings, mixed-use projects, raw land and industrial/warehouse facilities. She also represents buyers, developers and sellers in the acquisition, development (including infrastructure development) and disposition of commercial properties; lenders and borrowers in connection with the acquisition, construction and permanent financing and re-financing of commercial properties; and the development and registration of condominium and timeshare projects, including the preparation and negotiation of all documents for the filing, processing and approval of both new condominium projects as well as condominium conversions.

407.244.1161 | kathryn.oberto@hklaw.com