

Unique Retail Considerations of Branch Bank Leasing

Article By:

Real Estate

Major lending institutions are reemphasizing traditional community-branch banking. Thus, as ubiquitous as the retail bank branch might now seem, signs suggest that more are on the way, as letters of intent and leases are being signed. In this context, bank tenants will be best served by legal counsel that understand that their client, while a retail tenant, has specific, banking-driven needs.

In many, perhaps most, ways, the branch bank is a retail establishment governed by conventional "**retail rules**." Well before the lease-negotiation phase, selecting the site of the bank follows the "**location-is-everything**" principle. Using New York City as an example and backdrop, retail bank locations that are close to subway stops often offer the most attractive opportunities, as do avenue corners. Of course, a branch bank is a great convenience in one's office building and often adds value as a building amenity that may translate into higher rents for the office floors. Following yet another retail rule of thumb, locating a bank near a daytime revenue generator - such as a supermarket - is usually a smart decision.

Besides the "location, location, location" doctrine, there are other general retail concepts that apply no less, and perhaps more, to branch bank locations. For example, like many other retailers, retail banks strongly rely on exterior signage to attract customers. However, since one bank is often similar in appearance to another, banks must maximize their **signage rights** in as many ways as possible, and the lease agreement must clearly set forth those various tenant rights. From identifiable building signage colors and logos to prominent placement on a pylon or monument, a branch bank tenant, and its counsel, should aim to allow the tenant to seek the maximum signage available, even at the risk of requesting a variance. In addition, having the ability to modify sign displays to match a bank tenant's changing corporate sign programs is virtually a necessity. Bank leasing directors are especially appreciative if the lease allows the tenant to make such sign modifications without the landlord's consent.

As another example, the **tenant's use clause** is a lease provision upon which almost all tenants concentrate. After all, these provisions directly control the retailer's business activities at a particular location. For a retail bank, however, the use clause not only describes the type of use, it must also capture the numerous (and evolving) banking and financial categories, products and services that may be created or offered in the future. As a result, it is not uncommon for a landlord's form of bank branch lease, which honestly sought to capture its potential tenant's business use in two or three full sentences, to morph into a multi-paragraph use section by the time the lease is finalized.

However, when representing bank tenants, simply following established retail principles, even zealously on some issues, is not enough. There are certain banking-specific concerns, even pitfalls, about which bank counsel must be aware.

Consider the use clause again. Although, as described above, a bank's use clause should be carefully negotiated and drafted, in some cases, bank counsel's insistence that an exclusive use clause be added to a lease is unwarranted. For example, in New York State, a 1973 statute clearly prohibits entering into an exclusive use for the benefit of a banking organization, whether expressly or impliedly, and any such undertaking between a property owner and a bank is deemed null and void.

Or consider the location-is-everything principle again. No matter how attractive a particular location might be, there are some sites that are simply not suitable for a retail bank. Although it is not a pitfall that cannot be overcome by a simple **zoning analysis**, bank tenant counsel must know if their client's use is expressly prohibited by applicable zoning. For example, there are many sections of Madison Avenue in Manhattan that either restrict banking uses or limit their frontage pursuant to local zoning ordinances. Needless to say, it would be embarrassing for a lease to be partly negotiated and then terminated due to a finding that the site was restricted by a zoning regulation of this type.

In addition to preliminary retail considerations, such as site location and the basic (but essential) use clause, other significant issues arise as the lease process unfolds. Some of these issues raise general retail questions - and hopefully they are answered by tested retail solutions. However, some of these other issues have unique facets that flow from the nature of the branch bank lease.

Consider the **build-out phase** of the lease process. It is almost always a paramount issue for a tenant, since it is both a monetary and a timing issue. But for a bank tenant, these issues are often heightened, as the branch bank may require improvements that are significantly more expensive (on a square-footage basis) than those required by most other retailers. In fact, vault space, storefront and entrance work are not uncommon elements of a bank's required build-out, as are the installation of mezzanines and internal elevators. This may explain why, for retail-bank deals, free-rent periods appear to be the more typical concession (as opposed to work allowances). From the landlord's perspective, it is easier to absorb a free-rent period than to pay, by way of an allowance, for an expensive build-out of the premises.

Consequently, the lease provisions regarding tenant's work should carefully protect against the **free-rent concession** expiring before the work is completed and the bank is open for business. The lease should therefore provide that after a specified notice period, the landlord is deemed to have approved submitted work plans if those plans could not actually be attached to the lease. Similarly, if any building violations could delay the tenant from timely obtaining necessary work permits, the landlord should be notified regarding these violations as early as possible, and the lease should require that the landlord remove the violations as a condition to delivery, failing which, the free-rent period should be extended accordingly. In addition, given the expense of a branch bank build-out, an "SNDA," recognizing the tenant's rights in the event of a foreclosure against the landlord's interest, becomes an indispensable means of protecting the bank's costly investment.

Other issues that arise during negotiations of retail bank build-out provisions involve matters of **security and technology** - two uniquely important concerns for branch bank tenants. A bank's security needs are manifold and raise many questions. From the ability of security guards to monitor the premises to security for after-hours patrons of ATM machines, to the need for vaults and other "secure areas" - these needs raise many questions that should be clearly addressed in the final lease product. For example, will the landlord prohibit visible security personnel in its building? Will the

landlord have approval rights over the location of security cameras? Will the floor load support the ATM machines and the vault? And, with regard to the specific technologies that support many of these security needs, will the landlord deliver the premises with the necessary electrical power (sometimes up to 600 amps), stubbed to the necessary locations, so that all of the tenant's functions can operate properly? The sooner these inevitable questions are raised and resolved with the landlord, the better the ultimate outcome.

After answering such questions, attention shifts to the rent commencement date and its triggering contingencies. To be sure, many leases have conditions precedent that must be satisfied prior to delivery or the obligation to pay rent. Most often, conditions of this type are landlord work requirements. But while the retail bank lease typically contains a landlord work condition (by an outside completion date), it may also require other banking-specific contingencies. As an example, a federal requirement that all national banks file with the **Office of the Comptroller of Currency** for approval of a particular location necessitates that the subject lease be predicated upon the tenant obtaining such approval. Although this contingency is seemingly a formality in many states, it may nevertheless give a landlord pause since a failure to obtain the **OCC** approval within a designated time may allow the bank to terminate the lease.

Lastly, even after the contingencies are satisfied, the work is completed, and delivery is accepted, elementary retail points may assume greater importance for the retail bank lease. The commencement date certificate, a simple item, serves as a revealing example. While all parties to every lease may want to memorialize the date of delivery, the term's commencement date, and other significant dates, for some branch bank tenants, this is a necessity - a necessity because some bank tenants have already signed many hundreds of leases. As a result, keeping accurate records of the term's commencement and expiration dates and other important dates can become a lease-operations nightmare if the proper documentation, simple that it might be, is not signed and delivered. The same appreciative leasing director, pleased with the ability to freely make sign modifications, will also be grateful to counsel upon finding a signed commencement date certificate in the file (and **SNDA**, no doubt) when trying to determine the date by which a renewal option is to be exercised.

Thus, in many ways, a bank branch tenant is a retail tenant, only more so. It has all of the typical retail tenant issues, but due to certain unique, inherent business characteristics, some of those issues are particularly acute. Whether that uniqueness is the result of the multifaceted aspects of the bank's operations, the particular and expensive build-out, or the sheer number of retail premises, the branch bank lease maintains something of a hybrid existence. That is, in a branch bank lease, traditional retail provisions share lease pages with derivative but banking-oriented concepts. Legal counsel for these special tenants would serve their clients well by recognizing this duality and by making sure that the leases they craft carefully address both sets of issues.

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