

## lease due diligence

There are any number of searches and enquiries that can be made to complete due diligence in any type of transaction, including negotiating lease documentation. The business of the landlord and the tenant, the "hot button" issues between the parties, and the nature of the lease arrangement will shape the extent of the due diligence that is required in a particular transaction. Below is a summary of a number of searches that are commonly considered when conducting lease due diligence.

### title search

A search of title may be completed to confirm the legal description of the property and to ensure that the landlord owns the property. Where the landlord is a property manager or some other entity that is not the owner of the property, you may want to consider including a representation in the lease agreement that the particular entity has the authority to act on behalf of the landlord with respect to the negotiation and execution of the lease. Alternatively, a tenant may request a written confirmation by the landlord that the other entity is authorized to act as its agent for the purpose of entering into the lease.

A search of the property may also reveal if there are any use restrictions that may limit the anticipated use by a tenant. It is important to note that not all tenants register an exclusive right on title. A tenant should request a list of any exclusive uses from the landlord at the offer stage. There are situations where an existing tenant with an exclusive use may grant an exception to an incoming tenant. Any such exception should be documented by

obtaining an authorization from the existing tenant with the exclusive use and the lease should reflect the exception as well.

If any mortgages, charges, liens, or other security interest appear on the search of title, a tenant should consider requesting that the landlord obtain a non-disturbance agreement ("**NDA**") from the secured party. An existing mortgagee has priority and could refuse to recognize a subsequent lease. A NDA provides comfort to the tenant in situations where the mortgagee enforces upon its security as the NDA provides that the mortgagee will not disturb or interfere with the tenant's possession or other rights of the tenant under the lease so long as the tenant is not in default. A search may also reveal if there are any construction liens or default on taxes, which gives the tenant insight into the financial position of the landlord.

## corporate searches

Corporate searches can be completed against both the landlord and the tenant to ensure the proper spelling of names and that the company is an active company. It may be that the landlord or the tenant is a partnership. If the entity is a limited partnership, a search can be conducted to obtain a limited partnership report that confirms the name of the limited partners and the general partners. It is important to note that partnerships cannot hold title to real property in Ontario. Therefore, when conducting a search where the landlord is a partnership, the owner of the real property will be the name of the general partner(s) and it is the general partner(s) that should execute the lease documentation for and on behalf of the limited partnership.

## zoning

A search of the current zoning by-law, any site specific zoning by-laws, and the official plan can be completed to determine what uses are permitted on a specific property and also those uses that are prohibited. When completing zoning searches, be aware of both the primary use of the space and any ancillary uses. Certain

provisions within the lease may have to be modified to permit ancillary use(s) of a premises.

Where the tenant will be leasing space in a building or development that has been in existence for some time and its use will be identical to other tenants in the location, often the tenant will not want to incur the cost of completing a review of the applicable zoning legislation. However, when dealing with newly constructed buildings, a review of relevant zoning legislation may be appropriate as a tenant cannot take comfort in the fact that it will be using the premises for the same use as a previous tenant or other existing tenants in the location. Additionally, when a tenant is leasing space in a newly constructed space, the tenant may want to make enquiries with the landlord regarding the party responsible for development charges or costs for other infrastructure. This information will be important when the parties are negotiating the operating cost section of the lease.

Signage is an item that is important to many tenants, but there are often restrictions on the size, location, and type of signs that are permitted. Signage is normally a larger concern for retail tenants. From the landlord's perspective, consideration should be given to which tenants already have signage rights to determine whether there is any additional space on a pylon sign or on the outside of a multi-tenanted building. Zoning legislation also often includes restrictions on the number of signs that can be located on a property.

## condition of the building and the premises

A tenant should consider the condition of the building itself as part of its due diligence. An enquiry can be made to the local building department to determine if there are any open permits for work being completed on or in the building. If there are open permits, a tenant may want to make sure the permit does not apply to its premises, especially where the tenant will be completing improvements that may require its own permit. As well, a tenant may want to consider carving out the costs to close such building

permits from the operating costs that the incoming tenant will be responsible for paying. Additionally, where a tenant will make significant improvements to the premises, the tenant may want to make enquiries with the local historical board to ensure that the building is not designated as historical or, if it is, that such improvements are permitted.

Where the tenant will take premises as-is or will be responsible for repair, maintenance, and replacement of the premises or parts of the building, the tenant will want to be aware of any major repairs that may need to be completed and how much such repairs will cost. If a tenant agrees to take on repair and maintenance obligations with respect to any 'big ticket' items (e.g. roof, loading docks, HVAC, doors, etc.), a tenant should consider making enquiries with the landlord to ensure that any warranties or guarantees are transferrable to the tenant.

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#### [a cautionary note](#)

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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