



## A Fresh Look at CAM Charges From the Perspective of Landlord and Tenant

*Robert J. Shansky*  
*Daniel Glimcher*  
 Jones Day  
 New York, NY

### General Observations

This article will examine, from the perspective of landlords and tenants, the issues involved in the drafting, review and negotiation of provisions in retail leases addressing the operation, maintenance, repair and replacement of common areas in large shopping centers or enclosed malls. The provisions of retail leases dealing with common area maintenance expenses ("CAM Charges") in strip centers, shopping centers, enclosed malls and high-rise mixed-use projects developed in commercial condominiums have become more varied and complex than ever before. Therefore, it is helpful for landlords and tenants in all ranges of the spectrum—from in-line store operators with little bargaining power to anchor tenants with a superior bargaining position—to revisit the issues related to CAM Charge provisions. Such review will enable the parties to evaluate the economic ramifications of those provisions and their willingness, in the case of landlords, or their ability, in the case of tenants, to negotiate such provisions.

This article will assume the use of a retail lease in a "first class" enclosed mall ("Project"). It will also assume that the tenant is not a restaurant, fast-food operation or coffee shop, although those types of tenants would undoubtedly be in such a Project. Special lease provisions dealing with issues related to the preparation and serving of food and beverages, both from an infrastructure and operational viewpoint, would be specific to those types of uses. Such tenants are

often located in food courts within the Project, and specific lease provisions would be necessary to address the unique issues and the share of CAM Charges specifically related to such locations.

The landlord's objectives in addressing CAM Charges and common area issues will be determined, based on the definition of "common areas" in the Project. Common areas will typically include those areas of the Project that will be used in common by the landlord,

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tenants, their respective employees, contractors, business guests and the public. Common areas would typically include parking areas, walkways, roadways, promenades, landscaping, signs, public sanitary facilities, loading docks, elevators, escalators, stairs, ramps, the roof (this may not be included where the shopping center is comprised of multiple buildings), downspouts, lighting facilities, any fire or service corridor and similar areas of the Project that are for the general use, convenience and benefit of the public, tenants, their business guests, employees and other invitees.

At times, landlords will need the ability to repair, alter, modify or perhaps add to, relocate or reconfigure the common areas of the Project. Landlords may also temporarily want to restrict or limit access to portions of the

common areas. Subsequently, landlords will want to pass on to tenants the costs associated with such activities, while at the same time remaining cognizant of the overall rent structure so as to avoid making the cost of doing business in the Project prohibitive for the tenants of the Project.

Tenants, whether in-line or major, will want the standard of maintenance of the common areas to be clearly specified. In a first-class mall, tenants may try to use comparable malls operated by the landlord or malls operated by an unaffiliated landlord in the vicinity of the Project to set an objective standard. Tenants will also want to be clear that their share of CAM Charges is equitably allocated; that only appropriate costs are included; and, lastly, that there be some predictability regarding the increases in CAM Charges in subsequent lease years. Tenants will also want to be assured that any changes, repairs or reconfigurations of common areas do not impair access to, or visibility of, their leased premises.

### Definition of CAM Charges

CAM Charges may be defined in a lease in general, all-inclusive language, or they may be described in greater detail. A detailed list of items may include costs incurred in connection with the ownership, operation, maintenance, lighting, repairing and replacing of the common areas including, more specifically and without limitation, the following:

1. Maintenance, repair and replacement of common areas (some maintenance obligations or assessments may extend to off-site roadways or improvements);



2. Utilities serving the common areas including water, gas, sewage, electricity, refuse disposal, air-conditioning, heat and other utilities;
3. Illumination and maintenance of signage;
4. Salaries, wages and benefits of on-site management personnel;
5. Maintenance and repair of directories;
6. Cleaning, lighting, snow removal and landscaping of common areas;
7. Security control and fire protection;
8. Premiums, deductibles and other costs for insurance to the extent maintained by the landlord for liability, casualty, property damage, including without limitation for liability, casualty property, including terrorism, earthquake (if appropriate), vandalism, plate glass breakage, liability for defamation or false arrest (unless increased or claimed due to landlord negligence or misconduct);
9. Property taxes;
10. Maintenance, repair and replacement of equipment, including the operation, maintenance and repair of mechanical equipment such as elevators, escalators and other equipment;
11. Total compensation and benefits for people involved in the performance, operation, administration or technical support for the Project;
12. Reasonable depreciation, operation, maintenance of utility systems, water and sprinkler mains, and security alarm systems;
13. Paper and other restroom supplies;
14. Landlord administrative fees, which may be defined as a fixed percentage of CAM Charges; and
15. An allocation of charges that may be payable under a reciprocal easement or similar operating agreement.

A lease may include a list of items that will expressly be excluded from CAM Charges. Tenants will usually

attempt to negotiate additional specific exclusions from the CAM Charges definition. However, especially in a large Project, such attempts are often unsuccessful, except in the case of major tenants. Tenants may seek to exclude certain charges, including without limitation, the following:

1. Ground lease rents, if applicable;
2. Costs that would be CAM Charges, but that are specifically paid by major tenants to the landlord;
3. Depreciation, other than as expressly included in CAM Charges;
4. The cost of investigating, the remediation of, or the correction of an adverse environmental condition;
5. Some amount of insurance deductibles or self-insurance retention;
6. Costs above a certain monetary threshold, unless they are amortized over an appropriate period;
7. Capital expenses incurred in connection with expansion of the Project and construction of additional common areas of improvements outside the Project;
8. Financing and debt service costs;
9. Costs of enforcing lease terms;
10. Some amount of the administrative fee if such administration is performed by a landlord-affiliated entity or by the landlord;
11. Costs incurred due to a landlord default, late payment or penalty interest;
12. Leasing commissions and any costs of lease negotiations with actual or prospective tenants;
13. Costs reimbursed from insurance or condemnation proceeds;
14. Executives' salaries; and
15. Work performed in any tenant's space.

**Landlord Billing and Collection of CAM Charges**

A landlord may bill and collect CAM

Charges in several ways—most commonly, by having each tenant paying its proportionate CAM share. A tenant's proportionate share may be calculated based on the ratio of the gross leasable area of the leased premises to the gross leasable area of the Project. (Major tenant space may be excluded if tenants are paying their share of CAM Charges on specific terms under their leases.) In a new Project that may not be fully leased upon the grand opening, or in a Project that has substantial vacancies, a tenant will seek to include a "gross up" provision, if there is not one in the lease, to assure that the tenant is not paying a disproportionate share of CAM Charges (e.g., if the Project is not 80% leased, then CAM Charges would be computed as though the Project was 80% leased). The landlord may also charge a fixed dollar amount per leasable square foot plus increases above the fixed amount. The landlord may negotiate with the tenant to a fixed percentage annual increase cap on CAM Charges calculated on a cumulative basis. If the landlord uses a percentage increase cap on CAM Charges, it will exclude from that percentage cap, far in advance, items that are out of a landlord's control and impossible to budget accurately (e.g., snow removal, insurance, security costs, utility expenses).

A landlord's statement of CAM Charges will usually be conclusive, especially with in-line tenants, although the landlord will generally provide a detailed breakdown of the calculation of the tenant's CAM Charges. With a large or major tenant, the tenant may negotiate the ability to contest CAM Charges and audit a landlord's records related thereto. If such rights are obtained by a tenant, the usual lease audit provisions would be included: e.g., that the contest would need to be asserted with some specificity; that the audit would need to be conducted by a recognized national or regional accounting firm; that any resolution

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at the closing, often consists of an irrevocable, standby letter of credit in an amount equal to the cost of construction remaining to be performed as of closing (plus a cushion of 10–25 percent) less the retailer's contributions or the funding of a construction escrow in a like amount. Alternatively, the retailer and developer may agree that a like portion of the purchase price will be held back at closing to secure the developer's obligations. The developer may propose other alternatives, such as a guaranty or set-aside letter, which are less burdensome for the developer but not as protective as the other alternatives. Regardless of the form, the retailer must have security that the developer can meet its financial obligations and that funds will be available to complete the work in the event the retailer elects to take over construction.

Site development agreements are among the most complicated agreements negotiated in connection with the development of a shopping center. While the retailer is often willing to allow the developer to perform the site work, the retailer must be mindful of its remedies in the event that the developer fails to perform its obliga-

tions. The site development agreement must adequately address the retailer's concerns that the project be completed on schedule and that the total amounts paid by the retailer be predictable. With respect to the retailer's remedies for the developer's failure to perform, liquidated damages can be a valuable tool in addressing both of these concerns. In addition, retailers should seek takeover rights in the event that the site work is not proceeding so as to be completed in time for the retailer's planned opening. Lastly, the site development agreement should provide some security for the retailer as to the developer's ability to fund the cost of any site work not completed at closing. ■

**JAMES B. JORDAN**, a Partner in Sutherland Asbill & Brennan LLP in Atlanta, focuses on development and leasing matters relating to a broad range of real estate product types. He regularly represents clients engaged in buying, selling, developing and leasing retail, office and industrial projects.

**JALIYA STEWART** is an Associate in the Real Estate Practice Group in the Atlanta office of Sutherland Asbill & Brennan LLP.

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## GA Limits Attorney Fees

Stat. Ann. § 42-150bb; Fla. Stat. Ann. § 83.48; Idaho Code § 12-121; Mont. Code Ann. § 25-10-301; Or. Rev. Stat. § 20.096; Tex. Civ. Prac. & Rem. Code Ann. § 38.001; Wash. Rev. Code Ann. § 4.84.030.

The novel and unprecedented result of the *RadioShack* case is that the landlord is now stuck recovering only \$17,288.98 of hundreds of thousands of dollars in attorney fees actually incurred and, more importantly, contracted for by the parties. So, the logical question is: Can a landlord prevent this from happening?

The conclusion of this article will

discuss what options are available to landlords in Georgia when they are faced with recovering attorney fees. ■

**DAVID L. PARDUE** is a Partner who leads the litigation team in Atlanta's Hartman, Simons, Spielman & Wood, LLP. His broad litigation practice has encompassed nearly every complex business litigation problem. His career has included successful results in state and federal courts in Florida, Georgia, Alabama, New Jersey and other states.

**JILL R. JOHNSON** is an Associate in Atlanta's Hartman, Simons, Spielman & Wood, LLP. She practices in the area of general commercial litigation.

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would be subject to confidentiality requirements; and that, if the audit did not disclose an error above a certain threshold, the tenant would have to pay the landlord's costs in connection with conducting the audit.

A landlord will customarily collect CAM Charges from tenants on a monthly basis, based on its estimated expenses for the current year, together with annual statements and reconciliations, which are prepared promptly or within a certain time period after the end of the preceding lease year. Tenants may seek to fix the landlord's estimate based on the previous year's CAM Charges by making adjustments for inflation or by a specific percentage amount.

### Conclusion

Being aware of the major issues involved in provisions dealing with CAM Charges will give counsel to a retail shopping center tenant or landlord the ability to negotiate the most favorable terms for clients, as well as the ability to evaluate and counsel clients regarding the economic effect and exposure presented by these provisions. ■

**ROBERT J. SHANSKY** is a Partner in the New York office of Jones Day. His practice includes a broad range of commercial real estate transactions, including development and retail leasing on behalf of both landlords and tenants.

**DANIEL GLIMCHER** is an Associate in the New York office of Jones Day. His practice includes a broad range of commercial real estate transactions, including development and retail leasing on behalf of both landlords and tenants.

The views expressed in this article are those of the authors and not necessarily the views of the law firm.