

“AS IS, WHERE IS”: LEVELING THE FIELD BETWEEN TENANTS AND LANDLORDS

By Jim Hochman & David Liebman, SIOR

Many brokers of industrial leases negotiate “second generation space,” meaning space in a building that is or has been previously occupied and no longer new. Many of these deals don’t involve a landlord-sponsored build out; and depending on the unit size or a below-market asking rent, are offered on an “As Is, Where Is” basis. Rather than a tenant assuming all risks and expenses of building code violations and the costs of cure; dangerous and defective conditions; deterioration or failure of building systems—especially HVAC—during the lease term; and yes, even environmental issues (presence of asbestos, mold, or contaminated soil), what due diligence can brokers exercise when presented with the “as is, where is” property?

In a purchase and sale, physical inspections of the property, environmental due diligence, and more, are all steps in the process which a buyer—and its lender—will follow. In a lease, especially a short-term lease or for a smaller space, some tenants hesitate to spend money and time on due diligence. While, as a tenant rep, you don’t want to stand in the way of a deal, you also must work to protect your tenant from harm, and you surely don’t want to see a suit alleging your own professional negligence. What, then, is a broker to do in these circumstances?

Start with the easy—and less expensive—first step. The Freedom of Information Act (“FOIA”), 5 USC § 552, and most state laws which follow it, outline mandatory disclosure procedures for government entities on written request (See 5 ILCS 140/1 et seq. for the Illinois FOIA counterpart). Simply put, any party may reasonably request copies of a governmental agency’s records.

Start your tenant client’s due diligence with a FOIA request to the building and zoning departments and the fire marshal of the applicable government entity: village, town, city, etc. There may be a nominal expense for copies, but it is often surprising what is obtained: plans, permit applications, notices of building code violations, even pending litigation or foreclosures on the property. At this point, your tenant client hasn’t spent real money or time, but past and present cited building code and other violations are made available.

Environmental due diligence can be costly and time consuming. Check your state’s environmental protection agency for a searchable website of open and closed EPA files by property PIN, address, even by zip code. For example, in Illinois¹ you may find FOIA forms, a permit portal, land databases for site remediation programs (searchable by zip code), NFR letters, underground storage tank incidents, and the like. Time

spent on the “web,” by you, or better, by your client, may be time well spent.

In other ways, the government may well be of help. Your client’s best friend may be an inspection by the building department, the local fire marshal, and others, at nominal cost, and in most cases, is time well spent.

A professional inspection, usually at some cost, will provide the comfort and information to arm you and your tenant to request landlord repairs or rent concessions, or at least document the property’s condition at lease commencement. This protects the tenant before occupancy and acceptance of responsibility for its condition, both now and at the end of the lease term when the space is vacated.

Finally, what is your client’s recourse if a landlord fails to disclose a latent defect which later requires repair, or worse, causes harm? Under some circumstances, a landlord’s failure to disclose a latent defect of which that landlord has knowledge may well be fraud and a fraud claim may prevail over that lengthy “as is” disclaimer. But that’s clearly a lawsuit we all want to avoid.

In short, DO NOT accept “As Is, Where Is” as a fait accompli. Be proactive for your tenant! ♥

¹ <https://www2.illinois.gov/epa/Pages/default.aspx>