Inside-Out(doors)

written by JUSTIN A. GOODMAN

The amenity that most justifies San Francisco rents is San Francisco itself. Our small businesses need all the help they can get to maintain operations and serve our communities.

When I chose "Surreal Estate" as the title for this quarterly column, I meant to playfully evoke the interplay between unconventional market strategies that emerge from one of the planet's hottest rental markets, and the sometimes bizarre regulations working to prevent the treatment of rental housing as a commodity.

My first column looked at laws attempting to get out ahead of current practices and predict the future of the market. (It printed in April, but my deadline was in the Before Times, back when the weirdest thing going on was the city trying to turn all residential hotel guests into rent-controlled tenants.)

"Surreal" lost its meaning by the second column, as a global pandemic warped the reality of our industry. SFAA-affiliated attorneys scrambled to understand what the law even was at the moment. Everything was happening all at once, but we were frozen in time as we sheltered in place.

With unprecedented unemployment numbers, my colleagues and I were blessed to have plenty of work to do, even as we were forced to do it from home. Litigation was stayed, and new regulations delayed and even eliminated parts of our practice area, but there were rent forbearance agreements to draft, buyout agreements to negotiate, new property management "best practices" to evaluate, laws to challenge, and of course, plenty to learn to keep our advice on the cutting edge.

For this third installment, I'm interested in what life (and our industry) looks like, as things gradually move forward. For me, that includes going back out in my neighborhood and supporting my local businesses. In fact, I'm writing this at one of my favorite restaurants. Or, more specifically, in their nearby "parklet."

Parklets are not new. They've been a San Francisco fixture for about a decade and emerged as the city aimed to reclaim underutilized street space (estimated to occupy up to 25% of our tiny landmass). An organization called Groundplay (a collaboration of the Planning Department, Public Works, SFMTA, and the Mayor's Office) oversees this grassroots approach to public space: instead of the city curating a park, a parklet sponsor (usually a local business) will take on the project of turning former parking spaces into neighborhood amenities. (This benefits residential tenants in particular. According to a study by Groundplay, 82% of homes near a parklet are apartments.)

While parklets exist in public space, businesses (especially restaurants) have an obvious incentive to make the investment. The proximity of the public space to the business generally expands the business's capacity without requiring it to pay for more indoor square footage. Many restaurants were therefore eager to pay tens of thousands of dollars for a parklet with additional seating right outside (even if their customers had to share the space with passers-by).

The parklet development process is straightforward. The sponsor submits the proposal and notifies the public. Neighborhood support is encouraged (but rarely difficult to marshal) as the sponsor obtains a permit for construction. Parklets are usually a couple of parking spaces in length. They may require the conversion of curb colors and removal of parking meters, but barring traffic problems, the city is happy to oblige as it transitions from car culture to "transit first."

The city's construction guidelines ensure that parklets are safe, sturdy, and clean. The city expects a relatively level base platform, flush with the curb, made out of weather-resistant materials (as opposed to materials like plywood). This also helps ensure ADA compliance. Parklets should be designed to minimize debris but allow drainage. The city encourages landscaping, self-contained solar lighting systems, and a variety of novel features—including interactive, educational elements for kids—that beautify and enhance the city's diverse neighborhoods.

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Mine is... a bit different. It's made from parade barriers. I'm sitting on what is clearly indoor furniture placed directly on the street, and my beer spills whenever I accidentally nudge the wobbly table. There are no plants, and nothing is encouraging me to be a scientist when I grow up. You know what? I'm starting to suspect that this fine establishment did not go through the usual rigors of the city's parklet approval and construction process.

But who could blame them? After San Francisco's false start in July, the Mayor reversed course on indoor dining amid a surge of new coronavirus cases in the Bay Area. Many business owners had invested in new safety protocols and equipment, only to be told at the last minute that they couldn't deploy them. Governor Newsom introduced a tiered reopening agenda in late August that authorized San Francisco to allow indoor dining at 25% capacity, but our local order still says "on hold."

Meanwhile, the Department of Public Health issued guidance for restaurants on outdoor dining. These contain a lot of familiar features (social distancing, facemasks, regular cleanings, and warning signs). Bars aren't yet permitted to open, indoors or outdoors (even though some of us need a little extra help coping with the pandemic, the fires, climate change, the election, the economy, the lack of sports and movie theaters, and having put on "the COVID 19" while all the gyms are closed).

To qualify as an "Outdoor Dining Establishment" in this new regime, the business must have a valid permit to operate as a food establishment, and must "provide real meal service in a bona fide manner." This vague standard excludes "TV dinners," but seems to authorize any establishment that can "prepare and serve" food on-site.

However, in addition to telling us that we're not allowed to play outside until we finish our dinner, the city is telling us that we have to eat. Some gastropubs are getting in trouble because their patrons only want to snack on some fries with their beers. It may

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only be a matter of time before San Francisco evolves its own version of a "Raines sandwich." The Raines Law was a 19th century New York teetotaling regulation which prohibited the sale of alcohol other than with food. Wily bartenders would serve drinks with a sandwich. The same sandwich. Every time. Picked up shortly after the drink was dropped off and deployed again with the next drink order.

We really have no idea when life will return to normal, or if we'll have to ebb and flow before we get there, but the expanded use of public space is going to be essential to the vitality of our neighborhoods—and to the rental housing industry. The city's slow streets initiative has entire blocks (not just parking spaces) closed to foot traffic and commercial use, expanding the utility of parklets. And hopefully the fire department will issue some specific guidance on the use of gas-powered heat lamps on sidewalks before our "warm" weather goes away.

After all, small local businesses—restaurants in particular—need all the help they can get. An August 27, 2020 *SFGate* article reported that San Francisco restaurant sales are down 91% since March. San Francisco's commercial eviction moratorium prevents landlords from evicting tenants without first providing an opportunity to work out a payment plan. But, like the residential rent moratorium, it calls for forbearance, not forgiveness. Even as businesses gradually reopen, they are unlikely to surge with cash to pay off both past due and current debts.

More importantly, unlike the average, month-to-month residential lease, commercial leases measure their terms (and rent obligations) in years. The contracts may not care that there's a global pandemic. In an ordinary market, one tenant's default is another's opportunity. But some commercial tenants are learning that, if you owe your landlord ten thousand dollars, it's your problem, but if you owe him a million dollars (through the rest of the lease term), it's the landlord's problem. A tenant owing years' worth of rent, but with no idea

of when business might operate as usual, might be inclined to give up and walk away.

Suddenly, the commercial real estate industry is hyper-focused on Force Majeure clauses—those that excuse performance following an "Act of God" event so unforeseeable that contracting parties should no longer be bound to their promises. For businesses that can no longer operate, a Force Majeure clause that discharges their obligations and lets them walk away from their term would save them hundreds of thousands of dollars. But these clauses are strictly construed, and were not written in anticipation of a global pandemic. There are other doctrines of contract law that might avoid some of the harsher consequences of default, but many are in uncharted territory.

As an attorney, it's not my role to make business judgments for my commercial landlord clients. The client decides the best way to use their assets and legal rights under the circumstances. But as a San Franciscan, I hope that commercial landlords will be open to collaborating with their small business tenants to maintain operations and continue to serve our communities—even if the return comes in years, rather than months. I sheltered in place in a small studio apartment. It has never been clearer to me that the amenity that most justifies San Francisco rents is San Francisco itself. We're all in this together, and we may need to compromise on our legal rights to carry each other to the other side.

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numbers

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