

June 27, 2018

## MEASURE TWICE AND CUT ONCE BOMA 2017 for Offices – Be Careful!

As most of our readers know, Building Owners and Managers Association International (BOMA) has developed standards (BOMA Standards) for measuring commercial space. BOMA Standards are widely adopted in the commercial real estate sector.

From time to time, BOMA Standards are revised to better deal with the intricacies of building facilities and uses. BOMA Standards for office buildings were substantially revised in 1996, 2010, and again in 2017. Unfortunately, in its attempt to deal comprehensively with the many physical conditions and uses within an office building, BOMA 2017 may be problematic.

### NEW DEFINITION OF OCCUPANT AREAS

BOMA 2017 defines **occupant area** as the total of the **tenant area** and the **tenant ancillary area** for each occupant. Under BOMA 2010, occupant area forms part of the rentable area for each space. Tenant area is basically the same as occupant area in BOMA 2010, except that it also includes **unenclosed occupant features**. These include any balcony or rooftop terrace of which an occupant has exclusive use.

Few tenants are willing to pay the same rate of rent for balcony and rooftop terrace space as they pay for enclosed, fully serviced, interior space. Landlords may accept a lower rent treatment of exterior space, or they can be persuaded to exclude those areas from rentable area. If this occurs, the floor areas of the **unenclosed occupant features** would still be included in the total rentable area of the building (the denominator used when calculating tenants' proportionate shares of certain costs) in leases that call for use of BOMA 2017. The result would be a shortfall to the landlord (because these floor areas remain included in the denominator of the proportionate share fraction).

**Tenant ancillary areas** include **extended circulation areas**, **interior door setbacks** and **ancillary retail space**. An **extended circulation area** is created when a corridor (off the main corridor on a floor) is established for the sole purpose of giving access to a specific leased premises. An **interior door setback** consists of the area between a portion of a demising wall that is set back and the extension of the walls on either side. **Ancillary retail space** is interior area (adjacent to premises) that is used as an exclusive indoor seating area or

merchandising area, and it also includes a deemed area around a kiosk (for customers attending the kiosk). Once again, because tenants generally are not willing to pay rent for tenant ancillary space at the same rate as for the space actually occupied by their premises, landlords may negotiate reductions or exclusions with particular tenancies. As outlined above, this can cause a shortfall in recovering certain "additional rent" items under a net lease.

### GROSSING UP ISSUES

A key feature of BOMA Standards for office buildings is that they provide for the measured floor area of each occupant area to be "grossed up" to include a share of the floor areas of certain common areas and facilities. Gross-ups are referred to as "load factors".

Under BOMA 2010, grossing up is done in either: (a) a two-step process (Method A), or (b) a one step process (Method B). (The lease must specify whether Method A or Method B would apply.)

If Method A is used, a portion of the floor areas of certain common areas and facilities on the same floor as the occupant area (such as elevator lobbies and corridors on multi-tenant floors, washrooms, equipment rooms and janitor rooms) is allocated to each occupant area. The portion allocated is based solely on floor area (as compared to the total floor areas of the occupant areas on the same floor). That's step 1. Step 2 is for the floor areas of building amenities and facilities that benefit occupant areas (such as ground floor lobbies, concierge areas, conference rooms, lounges, etc.) to be allocated to the occupant areas. This is allocated proportionally to the "step 1 grossed-up" floor areas. There is no discretion involved. The result of these two "grossing up" steps is the rentable area of each space (which is used to calculate rent).

By contrast, if Method B is used, a single "building load factor" (reflecting an apportionment of a single, notional total area of common areas and facilities for the building) is applied to each occupant area for purposes of establishing the rentable area of each occupant area. The same load factor applies to all occupant areas.

BOMA 2017 introduces the new concept of **inter-building areas**, which results in a separate type of gross up. Inter-building areas

are areas that provide a benefit to one or a limited group of occupants. There are two types:

- **inter-building amenity areas** are non-permanent areas that could be converted to occupant areas. (They include conference rooms, lounge areas, breakout rooms, prayer rooms, health and fitness rooms and similar amenities.)
- **inter-building service areas** are permanent areas that cannot be easily converted into occupant areas. (They include specialized mechanical rooms, service data rooms, rest rooms serving two or more floors, garbage rooms, loading dock areas, parking offices, security offices, emergency generator rooms and permanent dedicated restrooms.)

BOMA 2017 provides for grossing up by separating inter-building areas from the common areas and facilities that benefit all occupant areas. The floor areas of this latter category are allocated by either using Method A or Method B, but the allocation to occupant areas is to be based on **the landlord's determination concerning the extent to which particular occupant areas are benefitted by the inter-building areas.**

As with any matter involving discretionary apportionments, there is likely to be negotiation with tenants.

Once again, if a tenant succeeds in negotiating a reduction in rentable area, shortfalls may result.

It also isn't clear whether apportionments change from time to time as spaces are put to different uses. Tenants may be concerned about future apportionments and may seek protection in their leases.

### **CAPPED LOAD FACTORS**

The last BOMA 2017 item to address is that the standard expressly states that a **capped load factor** can be negotiated. (This was likely unnecessary, as parties are always free to negotiate whatever they want.) When capped load factors are agreed to, theoretically they should apply across the entire building or complex. Otherwise, if a capped load factor is set for an individual tenancy, the input values for the denominator of other tenants' proportionate share fractions will not be subject to the cap, potentially creating shortfalls in additional rent categories.

### **SUMMING IT ALL UP**

Considering the potential pitfalls associated with BOMA 2017, it seems likely that many landlords and tenants will prefer not to adopt it. Indeed, the industry often lags behind BOMA Standards. Some landlords and tenants have only recently adopted BOMA 1996. Clearly, adopting or modifying a measurement standard for any particular lease requires careful consideration of the nature, layout and uses of the tenant spaces and the common areas and facilities within a building.

## **ANNOUNCEMENTS**

Daoust Vukovich LLP is pleased to welcome to the firm the following associate lawyers: DANIEL WIENER and CLAIRE RENNEY-DODDS. Both Daniel and Claire will be practicing in the area of commercial leasing. Daniel is a graduate of the University of Ottawa Law School and was called to the Ontario Bar in 2011. Daniel can be reached at 416-479-9662 ([dwiener@dv-law.com](mailto:dwiener@dv-law.com)). Claire is a graduate of the University of the Witwatersrand School of Law (Johannesburg, South Africa) and was called to the Ontario Bar in 2016. Claire can be reached at 416-488-3568 ([crenney-dodds@dv-law.com](mailto:crenney-dodds@dv-law.com)).

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