The issues can be resolved, but it isn’t always easy.

Both the landlord and tenant approach big box lease negotiations from positions of strength. The landlord owns and is willing to lease the real estate location that the big box tenant wants. The prospective big box tenant knows that it is the anchor, or one of the anchors, of the landlord’s shopping center, which gives it a certain amount of clout. The typical big box lease has an initial term of 10 to 15 years, meaning the landlord and tenant are contractually bound to each other for an extended period of time. Therefore, the details of the lease are very important. This article will discuss certain select issues arising in big box space leases (not ground leases), identify the landlord and tenant perspective as to each issue, and offer possible resolutions for practitioners to consider.

1. Issue Discussion: Who is the tenant? Is the proposed tenant entity the parent, subsidiary or affiliate? If the proposed tenant is not the parent company, can the landlord get a lease guaranty? In some cases the tenant entity will indicate that it, and not the parent, owns all of the assets of the business and is unwilling to have its parent guaranty the lease. In this case, the landlord will be concerned that at some future time its tenant entity will
no longer have all the assets of the business and has become in effect a shell entity. What can the landlord do to protect itself?

**Tenant’s Perspective:** The tenant, for liability, tax, or business reasons, will prefer that the tenant entity not be the parent company, but that it be either a single-purpose entity or an affiliate or subsidiary of the parent company.

**Landlord’s Perspective:** The landlord wants a tenant entity or a guarantor that has sufficient financial strength and assets to fulfill the lease obligations. The landlord should conduct a credit check on the proposed tenant entity to determine whether it satisfies this requirement. If not, the landlord should insist on a guaranty from the parent or some other entity.

**Possible Resolution:** Both the landlord and tenant should be satisfied if the lease provides as follows:

- A representation and warranty that the tenant entity is a wholly owned subsidiary or affiliate of the parent, its net worth is of an amount acceptable to the landlord, it owns or controls all or substantially all of the assets of the business (of the tenant) and that substantially all of the business is conducted, owned, managed and operated by the tenant entity;
- Once every 12 months the CFO of the parent and tenant entity shall certify that these representations are still true and correct (“Certificate”); and
- In the event the CFO does not deliver the Certificate, the parent shall execute a guaranty of the lease (in a previously agreed to form attached as an exhibit to the lease). The parent must execute the lease, but only for the specific and limited purpose of agreeing to have its CFO deliver the Certificate and if necessary to agree to execute the guaranty. Another possibility is to have the parent company execute a guaranty at the time of the lease execution. This guaranty would be contingent and operative only if the CFO does not deliver the Certificate.

2. **Issue Discussion:** How should the lease define the lease premises and should the lease premises include adjacent parking? While a tenant may want certain benefits and protections in the adjacent parking field, it may not want to actually lease it and incur the additional rent expense, other costs, and possible liabilities.

**Landlord’s Perspective:** To lease the parking field to the tenant will over encumber the parking field and limit what the landlord can do with that parking field in the future.

**Tenant’s Perspective:** The tenant wants to maximize customer parking near its store and protect the visibility of its store front and signage. Therefore, the tenant will want the landlord to agree not to build in that parking field and not to reduce the number of parking spaces.

**Possible Resolution:** The lease premises should only include the building and not include any of the parking field adjacent to the lease premises. The landlord should grant to the tenant and its invitees a non-exclusive easement to use (for parking related uses) the entire parking field in the shopping center. This easement would be together with other tenants in the shopping center. Of course the tenant will want the landlord to agree not to build in that field and not to reduce the parking spaces below a specified parking ratio. This is advantageous to the landlord, who will retain the ability to do other things in that parking field. It is very important that the attorney for the landlord consult its business person to determine if there are future
plans to develop or make changes to the parking field. If so, the next question is whether the landlord should specifically address those future plans in the lease or rely on the lease being drafted tightly enough to limit the restrictions that the tenant imposes on the parking field, but allows the landlord enough flexibility to do those things in the parking field in the future without specific inclusion and consent (and probable negotiation) in the lease.

3. Issue Discussion: How should the “Shopping Center” be defined in the lease? Should the tenant put restrictions on the outparcels?

Landlord’s Perspective: First, the attorney must keep in mind an important distinction between the undefined term “shopping center” which would include all the tenants and occupants in the shopping center and the defined term “Shopping Center” as used in the lease. Land that the landlord does not own or control should be excluded from the definition of Shopping Center. Typically it is the defined term Shopping Center (sometimes called “Landlord’s Tract”) that governs all of the landlord’s obligations and tenant’s rights under the lease. The landlord must be very careful to not agree to things that are dependent on land that may be in the shopping center (undefined term) but is not owned or controlled by the landlord. Therefore, it is imperative that the attorney include only the land that the landlord does own or control in the definition of Shopping Center. This typically would exclude land that is owned by a department store or anchor store, which is usually subject to an operating agreement with the landlord. Also, it is prudent to exclude any land that presently is or is contemplated to be an outparcel for future sale or lease.

Tenant’s Perspective: The anchor tenant will probably try to restrict outparcels to require self-contained parking and possible building height restrictions in order to preserve visibility to its lease premises. Tenants often attempt to restrict the size of a building on an outparcel. Many tenants will try to impose restrictions on all outparcels that are in the Shopping Center and those outparcels that are in close proximity to the Shopping Center, regardless of whether any particular outparcel is located so as to have a rational relationship to its lease premises.

Possible Resolution: Other than possible height restrictions, visibility protections, and self-contained parking requirements, the landlord should resist building size restrictions on outparcels. Agreeing to size restrictions will affect rental income. The landlord should only consider restricting those outparcels that are located close to the lease premises and bear some relationship to the tenant’s parking and visibility issues. The restrictions should be very specific and narrowly drafted. This will allow the landlord maximum flexibility going forward. Overly broad restrictions will benefit neither the landlord nor the tenant since there is a likelihood that such restrictions will have to be interpreted, clarified or modified at some time in the future.

4. Issue Discussion: Who should prepare and negotiate the construction exhibit in the lease? In the lease, the terms, conditions and exhibits dealing with construction matters can be very technical and many times attorneys will attempt to delegate these negotiations to the construction people. This is the wrong approach.

Landlord’s Perspective: With a big box lease it is common practice for the tenant to prepare the construction exhibit, often as part of the initial lease draft. The landlord must be diligent to make certain that the construction exhibit works in the context of the landlord’s practices and procedures, construction timelines, and budgets.