

Protect Yourself When Temporarily Filling Retail Space with Nonprofits

Here is an innovative way to boost traffic and sales at your shopping center while giving back to your community. Let local charitable or nonprofit organizations temporarily use vacant space in your center to collect donations, sell or distribute merchandise, or give out information about their programs. If you decide to do this, you can donate the space or rent it to the charity or nonprofit organization at a below market rent.

However, be aware that if you let a charity or nonprofit organization use space in your center, you must adequately protect yourself. Even if the arrangement is short-term, accidents and damage can still occur in the space. Therefore, it is critical that you get the charity or nonprofit organization to shield you from liability and agree to certain rules before coming to your center.

We will tell you how a charity or nonprofit organization in your center can benefit the center. And we will give you a checklist of five safeguards to include in your license agreement or lease with that type of entity. Also, we will give you Model Language to help you add these protections to your license agreement or lease.

Benefits of Charity or Nonprofit in Space Temporarily

Schostak Brothers & Company, a Michigan-based company that owns several centers throughout the Midwest, learned firsthand about the benefits of letting charities and nonprofit organizations occupy spaces at its centers temporarily.

For a few weeks in December 2006, a goodwill charity licensed space at one of Schostak's

centers, says Linda Busse, Schostak's director of corporate communications and marketing. The charity used the space to distribute staple items and holiday gifts to people suffering economic hardship.

The center's tenants were asked to participate in the program by donating goods to the charity's inventory, she says, and many tenants agreed to do so. As a result, the center attracted positive press in the local media, and the center and its tenants were proud to have done something good for the community. Schostak is considering allowing the charity to return to that center in December 2007, notes Busse.

Schostak previously ran the "Stores of Dreams" program, in which three of its centers committed to donating vacant space to nonprofit organizations for one month apiece. Those selected were a literacy organization, a humane society, a children's group, a soup kitchen, a "clothing depot" that collected and distributed clothes to the poor, and a halfway house for teens, says Busse.

Charities and nonprofit organizations can benefit centers that have vacancies. It is better to fill those spaces—even temporarily—than to have them dark, Busse points out. And if participating charities and nonprofit organizations succeed at your center, they may want to become rent-paying tenants.

Who Provides What

The charities or nonprofit organizations licensing space at Schostak's centers were responsible for staffing the space during their month, says Busse. In return, the

centers donated the space and picked up other costs—such as utility and CAM costs. The centers also trained the charities' employees in how to use cash registers and keep their money safe. The centers even provided security guards to accompany the charities to the bank, says Busse.

Busse found that the charities were great to work with. Their staffs were extremely dedicated to working with her company, moving forward with the deal to license space, and making their brief stay at the centers a success, she explains.

The centers got local TV stations to promote the Stores of Dreams program, and the charities and nonprofit organizations, through public service announcements. Schostak discovered that by giving local charities and nonprofit organizations a temporary forum to reach thousands of people at no cost, the company helped the charities, the nonprofit organizations, and the local community as a whole.

Also, the publicity surrounding the program attracted more people to the centers—which may have increased sales, says Busse. Plus, people who worked for the charities

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and nonprofit organizations shopped at the other tenants' stores while they were at the centers, she notes. Other nonprofit organizations have since called Schostak and asked to be put on its list to occupy vacant space at its centers, should space be available in the future, she adds.

FIVE SAFEGUARDS FOR CHARITY/ NONPROFIT LICENSE

Though a charity or nonprofit organization may pay no—or below market—rent or a license fee, you still need to sign a short-term lease or license agreement with each one, advise Busse and Santa Monica, Calif., attorney Susan Fowler McNally. Use the following checklist of five safeguards when licensing or renting space to a charity or nonprofit organization.

The checklist and the accompanying Model Language assume that you will sign a license agreement, so they refer to the charity or nonprofit organization as a “licensee,” you as the “licensor,” and the space as the “license area.” But you can easily adapt the Model Language if you sign a short-term lease. See the box below to learn why it is better to sign a license agreement. As always, speak with your attorney about adapting and using our Model Language in your lease or license agreement.

☑ Make License ‘Personal’

Make the license agreement “personal” to the charity or nonprofit organization that is named as the licensee and that signs the agreement. After all, you made a special deal with this particular charity or nonprofit organization—and you may not want the benefits of that deal transferred by assignment or sublease to anyone else, says Busse.

To make the license personal, add the following language to your license agreement:

Model Language:

Licensor hereby grants to Licensee, on the terms and conditions set forth herein, a personal nontransferable, revocable license to set up a temporary exhibition in the License Area so designated by the Licensor.

☑ Limit Permitted Uses

Keep the use clause in the license agreement very specific and narrow so the charity or nonprofit organization does not end up using the license area in ways that you don't expect or want. For instance, you don't want a soup kitchen to turn itself into a fine-dining restaurant, thereby angering other restaurant tenants at your center or violating their exclusives. Carefully spell out how the charity or nonprofit organization can use the license area, and what, if any, items it can sell, says Busse.

Model Language:

The Licensee may use the License Area for the sole purpose of collecting donations, distributing information on [insert charity's/ nonprofit's name], and selling [insert items charity/nonprofit may sell].

☑ Set Business Hours

Require the charity or nonprofit organization to be open for business in the license area during your center's normal business hours, says Busse. A charity or nonprofit organization will not bring much to your center if its license area is dark when the rest of your tenants are open, she warns.

Model Language:

Licensee shall operate the License Area during Center's normal business hours.

☑ Require Charity/Nonprofit to Indemnify You if It Holds Over

Make sure that the license agreement's indemnification clause requires the charity to indemnify—that is, defend and reimburse—you for claims made by a third party that can't get into the license area because the charity or nonprofit organization refuses to leave when the license ends, says McNally. Otherwise, you could get badly hurt if, for example, you have relet the license area to another party and that party sues you or elects to terminate its lease when you can't deliver the space.

Also, consider requiring the charity or nonprofit organization to pay you and profits you have lost because it held over, she adds.

Add the following language to the license agreement's indemnification clause where it mentions the types of claims for which a license will indemnify you, advises McNally:

Model Language

...and any claims made by any succeeding tenant founded upon Licensee's failure to surrender the License Area upon the termination or expiration of the License in accordance with Clause [insert # of surrender clause] hereof, and any lost profits to Licensor resulting therefrom.

Continued.

» License Agreement or Lease?

You will have to decide whether to sign a license agreement or a short-term lease with charities or nonprofit organizations that you will temporarily give space to at your center. Because the charities will use the space only for a short period of time, it is best to use a license agreement, says **Santa Monica, Calif., attorney Susan F. McNally**. With a license agreement, you are called the “licensor,” and the charity is referred to as the “licensee,” not the tenant. Also, the space is referred to as the “license area.”

Because a licensee, in theory, does not have the same interest in the center that a tenant has, you can terminate the agreement almost immediately, if necessary. With a lease, you would have to go through a lengthy and expensive eviction proceeding. However, beware, if a license agreement looks too much like a lease, and a charity argues that it is a lease and a court agrees, you will lose your quick termination right.

☑ **Require Charity/Nonprofit to Accept License Area 'As Is'**

Require the charity or nonprofit organization to accept the license area "as is," says McNally. You don't want to spend any money building out the license area for a charity or nonprofit organization that will be paying below market or no rent and occupying the license area short-term, she explains.

Also, bar the charity or nonprofit organization from making any alterations to the license area without your prior written consent, McNally says. You don't want to worry about undoing its alterations when the license ends, she adds.

Model Language:

Licensee hereby accepts the License Area in an "as is" physical condition, without any warranty, credit, agreement, or allowance from Licensor with respect to the condition or improvement thereof. Licensee shall not make or permit any alterations, improvements, or modifications in or to the License Area or the Fixtures, without Licensor's prior written consent.

Don't Forget to Notify Tenants

Once you have lined up the charities and nonprofit organizations, but before you sign licenses with them, notify the center's tenants of your plans. Let them know how long the charities or nonprofit organizations will stay at you center and what they will be doing there, advises Busse. Also, tell your tenants which items, if any, the charities or nonprofit organizations will sell.

However, don't ask whether any tenants object to the sale of those items. There is no point in asking for trouble. Wait for any tenants to volunteer objections. A tenant might have a problem with a charity or nonprofit organization selling an item that competes with products it sells—especially if the tenant has an exclusive to sell such items. Given the short time that the charity or nonprofit organization will be selling the item in question, you will probably be able to reach a mutually acceptable resolution.

Busse notes that Schostak has never had a tenant complain about a charity's or nonprofit organization's sale of competing items, because the charities and nonprofit

organizations occupy space for such a short time. However, if you have a problem with your center's tenants and can't work it out with them, tell the charity or nonprofit organization not to sell that particular item, advises McNally. And put the prohibition in the license agreement.

CLLI Source

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