

Potential Use of Hotels for COVID-19 Medical Care: What You Need to Know

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Hotel Owner Considerations

As the COVID-19 crisis continues and health care systems face capacity issues, governmental entities have turned to the option of repurposing hotel properties as temporary hospitals, acute care facilities and rehabilitation centers. Hotel owners should consider the items below when entering into an agreement with a governmental entity for this purpose.

1. *Form of Occupancy Agreement* – A license or other form of occupancy agreement (referred to throughout these considerations as an “OA”) may be preferable to a lease or sublease—a lease or sublease grants to tenants a more favorable real property interest than that of a license (or its equivalent), and a lease is more difficult to terminate. If, however, the hotel is co-opted by federal or local agencies (as opposed to voluntarily provided), this may not be an option. Whatever the form, best practices would dictate commencing with an owner form as opposed to a government form as each hotel property is unique (with unique manager and lender concerns that will be best and most efficiently addressed in a first draft owner form). If a form is provided by the government, there may be procurement provisions that require specialized legal review.
2. *Term* – Provide for a specific and limited term (the “OA Term”) (with extension rights that are subject to reasonable consent by owner and other reasonable conditions (but, provide in any lender/manager/ground lessor consent (discussed below) the flexibility to grant extensions without the need for consent from other interested parties)). There will need to be a mechanism for extending the OA Term to account for the uncertain duration of the COVID-19 crisis, but any right to extend should be limited and come with considerations. However, the parties should agree on an OA Term and early termination rights in both owner and counterparty, should changes so warrant and justify early termination.
3. *Hotel Owner Compensation* – This is a business decision on a case-by-case basis, however, any compensation at the very least needs to make the owner “whole.” Considerations for owner compensation need to include any fees and other consideration to be paid to interested existing parties, including any fees or other consideration agreed to be paid during the OA Term to any manager or franchisor

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(see 5 below), lender, master or ground lessor, as well as any ongoing owner (or manager-reimbursed) payment obligations, including real estate taxes, insurance premiums and permitting and licensing fees (not waived by the governmental agency during the OA Term (see 14 below)).

4. *Consents and Approvals* – Immediately engage lenders, managers/franchisors, ground or master lessors and other interested parties. All consents and any agreements that differ from or conflict with existing agreements should be documented in the consent agreement.
5. *Hotel Manager/Franchisor Compensation* – In consideration for manager’s consent and cooperation, managers (and in particular brand managers) will likely require some form of compensation during the OA Term. The manager consent should reflect the parties’ agreement on manager compensation, including base fees, any technical services fees applicable to any restoration to the brand standard upon termination of the OA and any agreement by manager to waive any other fees in the hotel management agreement (centralized services, marketing, etc.). As noted above, any agreement should be documented in the manager consent.
6. *Employees and Services of Hotel Manager* – Expect the hotel manager will not provide its employees or its services during the OA Term. If a physical portion of the hotel serves as part of the re-use while the remainder continues to operate to provide certain services (F&B, laundry, maintenance, etc.), then the counterparty to the OA will have to engage any such employees (which may practically include existing employees) and indemnify owner and manager for all costs, liabilities, claims, etc. related to their employment. The manager consent should document transitional services as the hotel re-opens.
7. *Hotel Employee Compensation* – Owner should consider requesting, as a condition to providing a hotel, that the governmental agency provide compensation and benefits to the hotel employees displaced by the OA.
8. *Consent of Lender* – As noted above, document any agreements and requirements of the lender in the lender consent. Consider any interim payment requirements be accounted for in the “rent” and other consideration to be paid under the OA. Any indemnity provided by the counterparty under the OA should cover any potential lender indemnity claims against owner related to the OA during the OA Term.
9. *Indemnity* – The OA should contain a broad indemnity (with a hold harmless and defense requirement) of the owner (and manager, lender and any ground lessor) related to the OA and any use and operation of the hotel during the OA Term. This indemnity should survive the OA Term. Sovereign immunity may prohibit the governmental agency from providing an indemnity, so counsel should be engaged to work around any enforcement issues.
10. *Waiver and Release of Claims* – The governmental entity must agree to waive all claims (known or unknown, foreseen or unforeseen) against the owner and other interested parties (manager, lender, ground lessor, etc.) and release owner from all liabilities during the OA Term. The governmental entity should be solely responsible for all personal injury and damage related to its use of the hotel property.
11. *Loss of Value* – Consider what, if any, relief or compensation can accrue to a cooperating owner if the hotel suffers from any loss of value or other adverse

impact to rate and occupancy resulting from the stigma of having served as a COVID-19 facility.

12. *Liens* – The governmental entity must agree to remove any and all liens of whatever origin filed or recorded against the hotel property resulting in any way from the use, operation, maintenance or renovation of the hotel property.
13. *Assignment, Subletting or Sublicensing* – The governmental entity should be prohibited from assigning, subleasing or sublicensing the OA.
14. *Zoning, Licenses and Permits* – The governmental entity must agree to cooperate to ensure that zoning requirements and the hotel owner’s or manager’s obligations under liquor licenses, elevator permits and all other property-related approvals, licenses and permits will be stayed or waived during the OA Term such that no permits, licenses, approvals and the like are impacted or impaired during the OA Term.
15. *Tax Abatement or Waiver* – Owner should consider and seek an abatement or waiver of all taxes or other governmental fees owed during the OA Term.
16. *Eviction Laws* – The governmental entity must agree to the waiver of any eviction laws that may be applicable to the occupancy of the hotel property.
17. *Operation and Maintenance* – The governmental entity must agree to maintain the hotel property in at least the same condition as it is at the commencement of the OA Term. The governmental entity will be solely responsible for the cost of repairs and for maintaining utilities and other services provided to the hotel property. Owner should consider incorporating the operation and maintenance requirements of the hotel management agreement (where applicable) into the OA or otherwise require the governmental entity to follow the instructions of the hotel manager regarding maintenance and repairs.
18. *Service Contracts* – Any fees to terminate temporarily or permanently any service contracts should be paid by the counterparty. The counterparty should be required to enter into separate service and utility contracts.
19. *Equipment and Supplies* – The governmental entity should be required to replace any hotel equipment and supplies that it uses before returning the hotel property to the hotel owner.
20. *Alterations* – The governmental entity must be prohibited from making permanent alterations to the hotel property.
21. *Hazardous Material* – The OA should have prohibitions and broad indemnities regarding the presence and storage of hazardous material at the hotel property. The governmental entity must be solely responsible for disposing of medical waste and must indemnify owner and interested parties against all liability related to the disposal of hazardous waste.
22. *Condition of Hotel Property upon Return* – The governmental agency should have the exclusive obligation at its sole cost and expense to return the hotel property to its previous condition at the end of the OA Term. This should include a thorough cleaning and sanitation of the hotel property and include a certificate, from the appropriate governmental agency, that such sanitation and remediation has been completed in compliance with all laws and to the satisfaction of owner and manager. The restoration must be performed both in consultation with owner and

pursuant to the manager's requirements to ensure a return to the brand standard. The counterparty must agree to coordinate with the manager and to pay the manager its standard technical services fee to ensure completion to the brand standard.

23. *Intellectual Property (IP) and Branding* – Owner should consult with the brand regarding IP and branding to ensure that the use of the hotel during the OA Term does not infringe or violate in any way the brand requirements regarding its IP, including, if required by the brand, removing all IP and branding from the hotel at counterparty's sole cost during the OA Term.
24. *Publicity and Confidentiality* – The OA should remain confidential. Sensitive guest information and other confidential material should be removed from the hotel property before the occupancy by the governmental entity. All publicity related to the hotel and its temporary occupancy and restoration through re-opening and thereafter should be subject to the strict control of the owner.
25. *Insurance* – Owner should confirm with manager whether and to what extent the hotel's insurance policies need to be maintained during the OA Term to retain coverages. All insurance should be coordinated and all interested parties should be added as additional insureds in any policy carried by the counterparty. All insurance requirements should be reviewed by owner's and manager's risk consultants.
26. *Third Party Leases* – Any costs associated with temporary lease suspensions or terminations should be the counterparty's sole cost and expense.
27. *Security* – Owner should consult with manager to consider prohibiting the governmental entity from accessing certain parts of the hotel property, such as restaurants, bars and gym facilities. Consider how to monitor the security system and closed circuit cameras. Consider the security demands that should be imposed on the counterparty.

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