

Negotiating Commercial Leases

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Introduction

Like most commercial transactions, commercial leases come in various sizes, shapes and forms. They include such varied arrangements as retail shopping center leases, office building leases, industrial warehouse leases, agricultural leases, single tenant building leases, long-term ground leases, as well as many other types of leases. Depending on the type of lease, the issues which are most important will vary. For example, in a short term retail shopping center lease, much time and effort may be expended by the parties in negotiating CAM charges, percentage rent and parking arrangements; on the other hand, in a long-term ground lease, much time and effort may be expended negotiating the provisions relating to the financing of the construction of the building by a third party lender.

Accordingly, we have attempted to summarize the basic concepts and problems often encountered in many different kinds of commercial leases. First, we will provide three standard clauses which a tenant is likely to encounter in an office building lease and examples of the types of changes likely to be proposed by the tenant. Second, we will outline ten important issues for each of the landlord and the tenant and certain traps for the unwary.

Of course, as noted above, the type of commercial lease, the relative bargaining position of the parties and the specific facts and circumstance of each particular situation usually determine which lease provisions are appropriate for that particular situation. We hope the issues we have identified will be helpful to the reader in analyzing commercial leases; however, nothing herein shall be deemed an official position of our Firm or our clients with respect to any particular lease.

EXCERPTS FROM OFFICE BUILDING LEASE

Alterations and Additions.

Tenant shall not make or permit the making of any material alterations, improvements or additions in or to the Premises without first obtaining the written consent of Landlord, which consent shall not be unreasonably withheld. All alterations, additions and improvements made to or fixtures placed in the Premises (other than movable office furniture and equipment not attached to the Building) will be deemed a part of the Building and the property of Landlord when placed in the Premises. Landlord may insist that any alterations, improvements or additions to the structural components or to the roof of the Building or to plumbing, electrical or other building systems be made or built by a contractor approved in advance by Landlord, which approval shall not be unreasonably withheld.

Insurance, Indemnity and Exculpation.

(a) Tenant must procure and maintain throughout the Term and any extensions or renewals of the Term commercial general liability insurance (including blanket contractual liability coverage), which shall cover (to the extent coverage is provided by standard forms of available commercial general liability insurance) any claims for bodily injury, death and/or property damage occurring in or resulting from any occurrence in the Premises, including injury, death and/or damage caused by the condition of or any defect in the

Premises. The policies evidencing such insurance must be in broad form reasonably satisfactory to Landlord, must name Landlord as an additional insured, must be issued by insurance companies reasonably acceptable to Landlord, and must afford immediate protection to the limit of not less than \$1,000,000 per accident. With respect to each policy evidencing such liability insurance, Tenant shall obtain any available endorsements reasonably required by Landlord of Tenant and of all or substantially all other tenants in the Building. Tenant shall also deliver the policy or a certificate evidencing the same to Landlord prior to occupying the Premises, and Tenant shall deliver a certificate of renewal from the applicable insurer at least ten days prior to the expiration of the policy. In addition, Tenant shall, if possible, obtain and deliver to Landlord a written obligation on the part of each of its insurance companies to notify Landlord at least 10 days prior to any cancellation of or material change to such insurance.

(b) Tenant shall indemnify and hold Landlord harmless from all fines, suits, costs and liability of every kind arising because of: (i) any violation or nonperformance by Tenant of any representation or covenant contained in this Lease which continues beyond any applicable cure period; (ii) any bodily injury, death and/or damage to property (excluding damage to the Building itself or to other improvements to the Land) occurring in or resulting from any occurrence in the Premises during the Term; and (iii) any bodily injury, death and/or property damage that is proximately caused by the negligence or willful misconduct of Tenant or any of its agents, employees, or contractors. Landlord shall indemnify and

hold Tenant harmless from all fines, suits, cost and liability of every kind arising because of: (i) any violation or nonperformance by Landlord of any representation or covenant contained in this Lease which continues beyond any applicable cure period; (ii) any bodily injury, death and/or damage to property (excluding damage to Tenant's personal property within the Building) occurring in or resulting from any occurrence in the Common Area during the Term; and (iii) any bodily injury, death and/or property damage that is proximately caused by the negligence or willful misconduct of Landlord or any of its agents, employees or contractors. To the extent Tenant or any of its agent, employees or contractors, on the one hand, and Landlord or any of its agents, employees or contracts, on the one hand, are jointly or concurrently negligent, then in such event Tenant and Landlord agree to indemnify and hold each other harmless to the extent of each such party's relative fault.

(c) Tenant accepts responsibility for keeping all personal property and equipment in the Premises adequately insured and for maintaining adequate business interruption insurance. Tenant waives for itself and its insurers all rights of recovery against Landlord, Landlord's agents, officers and employees, for any damage or loss, whether caused by the negligence of such parties or otherwise, to the personal property and equipment in the Premises and for any theft thereof and for any interruption of Tenant's business in the Premises. Because the preceding sentence will preclude any recovery by Tenant or Tenant's insurers against Landlord and the other parties listed in the preceding sentence for

damage to or theft of Tenant's property in the Premises or for any interruption of Tenant's business in the Premises, Tenant agrees immediately to notify its insurers of the terms of this Paragraph. Landlord will not be liable to Tenant, its employees, agents, licensees, invitees or insurers for bodily injury, death or property damage occasioned by the acts or omissions of any other tenant of the Building or of other tenants' agents, employees, licensees, or invitees within the Building. Further, Landlord will not be liable to Tenant for any property damage, bodily injury or inconvenience caused by the condition, maintenance, repair or alteration of the Building or Land, or the failure to provide maintenance or repairs, except to the extent caused by Landlord's gross negligence or willful misconduct.

Assignment and Subletting.

(a) Tenant acknowledges that, without the prior written consent of Landlord which shall not be unreasonably withheld, Tenant does not have the right or power under this Lease to assign or in any manner transfer this Lease or any estate or interest hereunder. Further, Tenant shall not, without the prior written consent of Landlord, which consent shall not be unreasonably withheld: (i) permit any assignment of this Lease or any estate or interest hereunder, voluntarily or by operation of law; (ii) sublet the Premises or any part thereof; (iii) grant any license, concession or other right of occupancy of any portion of the Premises; or (iv) permit the Premises to be possessed by any parties other than Tenant. Consent by Landlord to one or more assignments or sublettings will not operate as a waiver of Landlord's rights as to any subsequent assignments and sublettings. Tenant and any

guarantor of Tenant's obligations under this Lease shall not be liable for the payment of the rent herein specified and for compliance with all of Tenant's other obligations hereunder upon any assignment of this Lease. If an event of default should occur when this Lease is assigned or any part of the Premises are sublet, Landlord, in addition to any other remedies provided in this Lease or available at law, may at its option collect directly from any assignee or subtenant all rents becoming due to Tenant and apply them against any sums due from Tenant. Tenant hereby authorized and directs any assignee or subtenant to make such payments of rent directly to Landlord upon receipt of notice from Landlord. No collection by Landlord from any assignee or subtenant will constitute a novation or a release of Tenant or any guarantor of Tenant's obligations from the further performance of Tenant's obligations. Nor will Landlord's receipt of rent from any assignee, subtenant, or occupant of the Premises constitute a waiver of Tenant's covenant against assignment and subletting.

(b) With any request for Landlord's consent to an assignment of this Lease or subletting of any part of the Premises, Tenant shall submit, in writing, the name of the proposed assignee or subtenant, the commencement date of such assignment or subletting and the nature and character of the business of the proposed assignee or subtenant.

(c) If Landlord grants any request of Tenant to assign this Lease or sublet any part of the Premises, such assignment or subletting will be subject to all terms and conditions of this Lease, including conditions as to use and occupancy of the Premises.

(d) Any transfer of Tenant's outstanding voting stock will not be deemed an

assignment subject to this Paragraph, whether the transfer is by sale, assignment, bequest, inheritance, operation of law, or other disposition. Further, any merger or other corporate reorganization involving Tenant shall not be deemed an assignment subject to this Paragraph, provided that the surviving corporation or other entity which is the successor in interest to Tenant shall have a net worth following such merger or corporate reorganization equal to or greater than the net worth of Tenant immediately prior to such merger or corporate reorganization, and provided, further, that the surviving corporation or other entity shall expressly assume all of Tenant's obligations under this Lease no later than 20 days following any request therefor by Landlord.

