

Reviewing a Commercial Lease: A Practical Guide for the General Practitioner

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An investment in knowledge pays the best interest.

- Benjamin Franklin

Overview of Presentation

- I. Introduction to commercial leaseholds and relevant statutes in Texas.
- II. Scope and focus of presentation.
- III. Contemporary commercial leases and common terms defined.
- IV. Base rent examined.
- V. **Top Ten checklist: Critical Sections in a Triple Net commercial lease.**
- VI. Conclusion
- VII. Questions?

I. INTRODUCTION

A commercial lease is a legally enforceable agreement that sets forth contractual obligations between a lessor (“landlord”) and a lessee (“tenant”).

- The relationship and statutory duties between landlord and tenant of commercial rental property are codified in Title 8, Chapter 93 of the Texas Property Code. If there is a breach of the commercial lease by either party, Texas law provides for remedies and consequences.
- In Texas, a commercial lease that is subject to the Statute of Frauds, is enforceable if the lease is in writing and, at a minimum, signed by the party against whom enforcement is sought (with limited exceptions). *See* TEXAS BUSINESS AND COMMERCE CODE § 26.01, *et. seq.*, and TEXAS PROPERTY CODE § 5.021
- Oral leases are not prohibited, but they may be unenforceable in Texas courts.

Most commercial leases are effective for a term of years. However, some commercial leases may run month to month, depending on availability or the seasonal needs of a prospective tenant.



Be aware of the critical State of Frauds exception for oral leases of real estate with a term of one year or less. See Business and Commerce Code Section 26.01(b)(5) and (6).

II. SCOPE AND FOCUS



Commercial leases vary tremendously depending on a myriad of factors including, but not limited to, the parties involved, the transaction, the market type, the type of structure being leased, and other circumstances.



Primary scope of presentation is on general commercial building leases. Although industrial and retail leases are very common, there are significant differences between them to warrant a separate and substantive presentation on each.



Presentation focused on tenant's point of view as the landlord will usually have a standard lease form that is specifically drafted to cover its particular concerns.

III. CONTEMPORARY COMMERCIAL LEASES AND COMMON TERMS DEFINED

Type of Commercial Lease	Rent Basis	Often Used In	Language Identifiers
Percentage Lease	Base rent + Percent of Monthly Sales.	Retail businesses; Shopping malls; Restaurants.	"Natural breakpoint" "Artificial breakpoint" "Gross Sales"
Net Lease	Base rent + tenant pays some or all of taxes, insurance, or maintenance.	Any general commercial building lease.	"Net lease" "Additional Rent" "Common Area" "Taxes and Insurance"
Double Net Lease "NN"	Base rent + taxes and insurance.	Any general commercial building lease.	"Net lease" "Additional Rent" "Common Area" "Taxes and Insurance"
Tripe Net Lease "NNN"	Base rent + taxes, insurance, and maintenance.	Any general commercial building lease.	"Net lease" "Additional Rent" "Common Area" "Taxes and Insurance"
Fully Serviced Lease aka Gross Lease	Landlord directly pays all or most usual costs.	Office and some industrial and retail leases.	"Load Factor" "Rentable square feet"

Base Rent	The minimum rent due under the terms of a commercial lease that also requires the tenant to pay additional rent based on a percentage of gross sales or a pro rata share other net charges.
Building Owners and Managers Association (BOMA)	BOMA publishes internationally recognized standards for measuring office space on behalf of the commercial real estate industry.
Common Area Maintenance (CAM)	An additional rent, charged on top of base rent, and is mainly composed of maintenance fees for work performed on the common area of a property used by more than one tenant. One of the net charges billed to tenants in a commercial triple net (NNN) lease. Examples include parking lot repairs, security, and lighting.
Critical Area (Redlined Area)	An area specified by a tenant as critical to its operations. It usually includes all of the climate controlled lease area, a certain portion of parking and sometimes a view corridor to a major street. The critical area is typically identified by outlining it on a site plan of the leased premises. It is sometimes referred to as the “redlined area”.
Cold Shell	A commercial building with an unfinished interior and lacking heating, ventilating, and air conditioning (HVAC), and usually without lighting, plumbing, or ceilings.

Continuous Operation Clause	A clause requiring that the tenant not cease operations for an extended period of time, usually more than 30 to 90 days.
Co-tenancy Agreement	A requirement that the lease terminates if another tenant vacates the shopping center or terminates their lease. Used if majority of traffic to the shopping center is dependent on a major anchor tenant.
Evergreen Leases	A lease that includes an option to renew that is <i>automatically</i> exercised at the end of each term unless one party expressly notifies the other that it <i>does not</i> want to continue the lease.
Exclusive Agreement	A requirement by a tenant that no other tenants within a particular area, usually a shopping center, sell certain goods or services sold by the tenant requesting the exclusivity.
Go-Dark Clause and Go-Dim Clause	Allows tenant to cease operations without default, while still paying rent. A go-dim clause allows a tenant to modify its hours of operation to reduce costs.

Net Lease	A commercial lease where one or more items of operating expenses are passed through to the tenant by the landlord.
Percentage Lease	A commercial lease that typically requires a tenant to pay “base rent” plus a percentage based on monthly sales volume only when a tenant has made a certain amount in a given month.
Possession Date	The date upon which a tenant takes physical possession of the space for the conduct of its business. May or may not correspond to the Rent commencement date.
Promotional Fund	A fund which large shopping center or mall tenants often must contribute to for the purpose of advertising the shopping center. Contribution is usually based on square footage of lease space.
Rent Commencement Date	That date upon which the tenant’s responsibility to pay the landlord for the use of the space begins. Often contingent upon the completion of improvements performed by the landlord or after a period of free rent has expired.

Rentable Area	Includes space tenant occupies and uses, and an additional allocation of certain areas and other space that are not for the exclusive and effective use of the tenant (i.e. lobbies, hallways).
Recapture Clause	A clause allowing a landlord to terminate a tenant's lease in the event of a request for approval of an assignment or a sublease. The recapture clause allows a landlord to determine whether rent under an assignment or sublease is more favorable than the rent being paid by the current tenant and then terminate the lease to capitalize on an increase in rent.
Subordination, Non-disturbance and Attornment Agreement (SNDA)	An agreement whereby a tenant under a superior lease subordinates its interest in the leased premises to a mortgagee (the subordination agreement) and agrees to recognize the mortgagee or another purchaser at a foreclosure sale as the landlord under the lease in the event of a foreclosure (the attornment agreement) and whereby the mortgagee agrees to maintain all of the rights of the tenant under the lease so long as the tenant is not in default (the non-disturbance agreement). The separate components of the typical SDNA can be mixed and matched together. The critical component for a tenant is the non-disturbance agreement.

Sublease	A sublease is a lease between a tenant who already holds a lease to a commercial space and someone (the sublessee) who wants to use part or all of the tenant's space. In a sublease, the tenant assigns certain rights that they already hold to the leased space, to the sublessee. Sublessees pay rent directly to the rightful tenant (sublessor).
Tenant Improvements	Renovations and remodeling done by a tenant to prepare for occupancy of the lease space for its purposes.
Tenant Improvement Allowance	Money paid by the landlord to off-set the tenant's cost of renovating the leased space for its purposes.
Triple Net Lease	A lease where the landlord passes through to the tenant and the tenant pays the taxes, operating expenses and insurance on the lease premises. Most common type of general commercial building lease.
Usable area	The space tenant occupies and uses exclusively.

IV. BREAKING DOWN BASE RENT

$$\text{[Rate]} \times \text{[Square Footage]} = \text{Base Rent}$$

The above equation produces an annual cost. Rates are generally discussed in annual cost. For example, when someone says the rate is \$25 per square foot, that is the annual cost. Accordingly, the formula to determine the minimum monthly rental payment is **Base Rent ÷ 12**.

Rate is sometimes a fixed amount, sometimes it changes on a periodic basis, but in almost all cases it will increase if there is an option to extend the lease beyond the initial term of the lease.

Square Footage may be defined as usable (USF), rentable (RFP), or gross (GSF) depending on the lease at issue. It is vital to confirm the square footage stated in the commercial lease is accurate and up to date.

Beyond base rent, there are other vital areas in a commercial lease that require comprehensive analysis and review...

Top Ten Sections in a Triple Net Commercial Lease that Matter

Identification of the parties and leasehold.



- 1.1 **LANDLORD:** *Confirm that the correct names of individuals/corporate entities who have authority are listed on the lease agreement.*
- 1.2 **TENANT:** *Most landlords will demand that the principals sign guarantees, but it is unusual for the landlord to require principals be actual tenants.*
- 1.3 **TENANT TRADE NAME:** *To maintain maximum flexibility, avoid any requirement by landlord that the tenant strictly maintain the same business name as it was using at the time of entering the lease.*
- 1.4 **SHOPPING CENTER:** The commercial shopping center, commonly referred to as _____, as shown on the site plan attached hereto as Exhibit A (the "**Site Plan**") and located or to be located upon the land more particularly described on Exhibit B (the "**Land**"), together with such additions and extensions or reductions as Landlord may, from time to time designate, as included within the Shopping Center. *Confirm building/location of premise to be leased is accurately reflected in the exhibits.*
- 1.5 **PREMISES:** Certain premises within the Shopping Center identified on the Site Plan containing approximately _____ square feet to be measured in accordance with Section 2.1. *Confirm square footage of tenant's space listed in the lease is correct.*
- 1.6 **PERMITTED USE:** The Tenant shall open for business and operate continuously throughout the Term for the operation of a _____ for the sale/service/production of _____.
Confirm that the permitted use clause encompasses the tenant's present and future needs. Determine if there is a minimum amount of days per week tenant must be open for business.
- 1.7 **EXCLUSIVE USE:** Subject to the terms and conditions set forth in Section ____, Tenant shall have certain exclusive use rights.
Determine if the terms of the exclusive use agreement is appropriate.

The leasehold: Commencement, possession, option and termination.



- 1.8 **LEASE TERM:** The Lease Term (sometimes referred to as the "**Term**") shall commence on the Commencement Date and shall continue until expiration of the _____ full calendar month thereafter, unless sooner terminated or renewed as provided herein.

Determine the commencement date. Does it differ from the possession date? If there is a difference, confirm date when the initial lease term and/or rent begins. Confirm if remedies are available to the tenant if the space is not ready by the rent commencement date?

- 1.9 **RENEWAL TERM:** Subject to the terms and conditions set forth in Section 2.8, Tenant shall have the right to renew the Term for one (1) period of either five (5) years of seven (7) years each

Determine if the tenant has an option to extend the lease beyond the initial term. If so, confirm the number and length of each option term. Is the increase in rent for each option term reasonable? Is the increase in rent based upon a fixed amount, the prevailing market value, or the Consumer Price Index (CPI)? What are the requirements to exercise the option? Make sure that past defaults that are cured by Tenant won't impede Tenant's ability to exercise the option. Is the option limited to the original tenant or can it be assigned? Always require that options be exercised in writing and noticed within a specific period. Landlords will try to avoid providing renewal options or strictly limiting those they do give. Tenants should negotiate to have very open options.

- 21.1 **Surrender.** At the expiration or termination of this Lease, Tenant shall deliver to Landlord the Premises with all improvements located therein in good repair and condition, broom-clean, reasonable wear and tear excepted, and shall deliver to Landlord all keys to the Premises and all keys to any interior locks. Should any of Tenant's property remain within the Premises after the expiration or termination of this Lease, it shall be deemed abandoned, and Landlord shall have the right to claim from Tenant all expenses arising out of Tenant's failure to remove the property. Tenant waives all claims against Landlord for any damage to Tenant resulting from Landlord's storing, removing, or disposing of any such property.

What are the tenant's obligations after surrender? Are these obligations reasonable? Determine the termination date of the lease. What are the landlord's and tenant's rights to terminate early? Confirm the timeframe for landlord's obligations to inspect after surrender and to refund the security deposit to tenant. A landlord's obligations with respect to security deposits of commercial tenants are outlined in Texas Property Code §§ 93.004-93.011. A landlord is presumed to act in bad faith if it fails to return a security deposit or to provide an itemized list of deductions on or before the 60th after the date the tenant surrenders the premises to the landlord. See Texas Property Code § 93.011(d).

SECTION 13.03.

Surrender of Premises.

At Owner's request, at the expiration of the tenancy hereby created, Tenant shall surrender the leased premises in a vanilla shell condition as described herein: All interior partition walls removed except for the restrooms; tape, mud and float walls to repair any damage, fire caulk, sand and paint all walls white; strip all floor coverings down to the concrete slab and float all floors to a smooth level concrete finish which is ready for final floor preparation: HVAC unit(s) and all components thereof to be in good working order to Owner's sole satisfaction and code compliant; all electric, gas and water services and all components thereof to be in good working order to Owner's sole satisfaction and code compliant; if leased premises currently has a drop ceiling, all damaged or water stained tiles are to be replaced; all light fixtures and sprinkler heads to be fully operational and code compliant. In the event Owner determines the HVAC unit(s) are not surrendered in good working order or had not been replaced in compliance with Section 13.01 hereof, Tenant shall be required, at Tenant's sole cost and expense, to replace said HVAC unit(s) with new commercial grade HVAC unit(s) of equal or greater cooling and heating capacity. Notwithstanding the foregoing, in the event Tenant occupies the leased premises for more than five (5) calendar years, Tenant shall be required to replace the HVAC unit(s) to the leased premises with new commercial grade HVAC unit(s) of equal or greater cooling and heating capacity within sixty (60) days of the Termination Date of the Lease, unless said HVAC unit(s) had already been replaced within three (3) years prior to the Termination Date. If Tenant fails to leave the leased premises in a vanilla shell condition (as required by the previous three (3) sentences) as of the expiration or earlier termination of the term hereof, then, at Owner's option, Tenant shall be treated as a holdover tenant (subject to the terms of Section 1.05 hereof) until the date that Tenant has completed any work necessary to return the leased premises to the required vanilla shell condition and has provided written notice thereof to Owner. Notwithstanding the foregoing, Owner shall have the right, but not the obligation, at any time after the expiration or earlier termination of the term hereof, to perform on Tenant's behalf the work necessary to restore the leased premises to the required vanilla shell condition, in which event Tenant shall reimburse Owner for all such expenses within ten (10) days after demand therefor. Tenant shall surrender all keys for the leased premises to Owner at the place specified by Owner and shall inform Owner of all combinations on locks, safes and vaults, if any, in the leased premises. At Owner's request, Tenant shall remove all its trade fixtures and any alterations or improvements as provided in SECTION 12.02 hereof, before surrendering the leased premises as aforesaid and shall repair any damage to the leased premises caused thereby. Tenant's obligation to observe or perform this covenant

Suggested Revision:

Tenant shall leave the Premises clean, and in the same condition it found it (reasonable wear and tear excepted).

Base rent and additional rent.

Time Period	Annual Rent/PSF	Monthly Rent	Annual Rent
Months 1-3:	\$0.00	\$0.00	\$0.00
Months 4-15	\$20.00	\$8,150.00	\$97,800.00
Months 16-27	\$21.00	\$8,557.50	\$102,690.00
Months 28-39	\$22.00	\$8,965.00	\$107,580.00
Months 40-51:	\$23.00	\$9,372.50	\$112,470.00
Months 52-63:	\$24.00	\$9,780.00	\$117,360.00

SECTION 2.01. Minimum Rent.

Tenant agrees to pay to Owner at the office of Owner, or at such other place designated by Owner, without any prior demand therefor and without any deduction or set-off whatsoever, and as fixed minimum rent (the "Fixed Minimum Rent") the sum of \$ 2,025.83 in advance upon the first day of each calendar month commencing on the Commencement Date through the last day of the first lease year; \$ 24,309.96 per annum. Effective as of the first day of the second (2nd) lease year and as of the first day of each lease year thereafter during the term hereof, the Fixed Minimum Rent then in effect shall be increased by the product of (i) ~~four percent (4%)~~ and (ii) the Fixed Minimum Rent in effect immediately prior to such increase, and the monthly installments of Fixed Minimum Rent shall be upwardly adjusted accordingly.

Confirm that base rent is calculated correctly. Does the monthly rental payment exceed the fair rental value of the property by a wide margin? Determine if the lease provides for any period of free rent. Has rent for the first and last months of the lease been prorated accordingly if occupancy by tenant is less than a full month? Determine if there is a reasonable grace period and written notice before a late fee is imposed. Is the late fee reasonable?

SECTION 2.05. Late Charge.

Tenant shall pay a "late charge" of \$ 506.46 per month on any Fixed Minimum Rent, ~~percentage rent~~, additional rent, amount or charges of the character described in SECTION 2.04 hereof when said sums are not RECEIVED BY OWNER AT THE ADDRESS IT HAS GIVEN TENANT FOR PAYMENT by the 1st of the month, to cover the extra expenses may include, but are not limited to, administrative and accounting efforts and expenditures, collection efforts by Owner's collection department and correspondence with Tenant and efforts to obtain and insure performance of Tenant's obligations hereunder. The parties acknowledge that the foregoing efforts and changes are not capable of exact determination, and that the late charge provided for in this Section represents a reasonable estimate of the amounts necessary to compensate Owner for its efforts and expenditures in handling late payments by Tenant. As such, the parties hereto agree that the said late charges are enforceable liquidated damages and are not penalties.



Additional Rent: Common Area Maintenance (CAM)

The “Common Area” of the building are those parts of the building designated by landlord for the common use of all tenants, and may include (if provided) the parking areas, sidewalks, landscaped areas, curbs, loading areas, private streets and alleys, landscaping, and signs erected or maintained by landlord advertising or identifying the building.

In Texas, a landlord “may not assess a charge, excluding a charge for rent or physical damage to the leased premises, to a tenant unless the amount of the charge or the method by which the charge is computed is stated in the lease, an exhibit or attachment that is part of the lease, or an amendment to the lease.” See Texas Property Code § 93.012(a).

Determine tenant’s contribution to CAM charges. How are CAM charges calculated and are they allocated fairly? Confirm tenant’s right to examine landlord’s records to verify calculations. Confirm if CAM contributions are paid monthly or annually. Are CAM contributions capped, fixed, or can they increase each year? Be wary of any administrative fee above 5 percent.

CAM charges should not include the build-out of any premises for any tenants, capital replacement of portions of the building (roof & HVAC), any property management fees, any real estate or leasing commissions, any costs incurred in remediating hazardous materials, or advertising and promotional expenditures in connection with leasing the building.

Additional Rent: Taxes

Taxes assessed against the building and any costs incurred by the landlord contesting or obtaining consultants relative to any tax assessments are passed on to the tenant (pro rata share) in a triple net lease. These taxes may include property taxes, municipal utility district taxes, and school district taxes (collectively “real estate taxes”). Ask to see landlord’s real estate taxes for the last three preceding years.

$$\text{Pro Rata Share} = \left(\frac{\text{Premises Square Footage}}{\text{Defined Area (or denominator) square footage}} \right) \times 100$$

Defined Area: Leased vs. Leasable Space.

- *Leased* space calculation determined by dividing the amount of space leased by tenant by the amount of space actually leased in the building. Results in all tenants paying 100% of the taxes assessed against the building.

Commencing on the Possession Date and continuing throughout the entire term of this Lease, Tenant shall pay to Owner as additional rent, Tenant's proportionate share of Common Charges for each year or portion thereof. Tenant's proportionate share of Common Charges shall be equal to a fraction, the numerator of which being equal to the floor area of the leased premises and the denominator of which being equal to the total leased first floor area,

- *Leasable* space calculation determined by dividing the amount of space leased by tenant by the total leasable area of the building. Vacancies do not affect the tenants’ tax liabilities.

5.4 Calculation of Tenant's Pro Rata Share. For purposes of this Lease, the phrase "**Tenant's Pro Rata Share**" shall mean a percentage, the numerator of which is the square footage of the Premises, and the denominator of which is the gross leasable retail area of the Shopping Center from time to time.

Additional Rent: Insurance

- Calculated on a pro rata basis.
- Generally covers the total annual insurance premiums which accrue on all fire and extended coverage insurance, boiler insurance, public liability and property damage insurance, rent insurance, and other insurance which may be carried by Landlord with respect to the shopping center during any calendar year during the term of the lease.
- May also include the amount of any deductibles payable with respect to insurance carried by landlord relating to the Shopping Center.

- Does not cover separate commercial general liability insurance requirements that Tenant must maintain on the leased premises such as bodily injury, personal injury, and property damage.

(a) Commercial General Liability. Bodily Injury, Personal Injury, and Property Damage with the following minimum coverages:

General Aggregate (<i>applicable to each location</i>)	\$1,000,000.00
Products/Completed Operations Aggregate	\$1,000,000.00
Personal and Advertising Injury	\$1,000,000.00
Fire Legal Liability	\$50,000.00
Medical Payments	\$5,000.00

- Policy limits and maximum deductible required by landlord should be reasonable.
- Be aware of any excess liability insurance requirements by landlord.
- Advise client to consult experienced commercial insurance broker to determine appropriate limits and deductibles.

SNDA Agreement and Mutual Waiver of Subrogation

- In Texas, landlords will often provide in their commercial lease forms that tenant agrees to subordinate its rights to any present or future mortgagee (typically a bank), and to attorn to any purchaser upon foreclosure.
- Tenant should obtain a non-disturbance clause with any existing or future mortgagee to ensure that if the landlord defaults on its financing and the mortgagee forecloses the lease will remain in place so long as the tenant is not in default.
- A mutual waiver of subrogation benefits both landlord and tenant. Without a waiver of subrogation, a party may become obligated to pay the other party's insurer for damages to the building or leased premises. For maximum protection, the tenant should confirm that the landlord's insurance policy includes the waiver of subrogation language or permits waiver of subrogation by the landlord.

11.4 Waiver of Subrogation Rights. Landlord and Tenant each waives all rights of recovery, claim, action or cause of action against the other, its agents, officers or employees for any loss or damage that may occur to any person, the Premises or Shopping Center, or any personal property of such party therein, that are caused by or result from risks insured under any insurance policies maintained or required to be maintained by the parties hereto under the terms of this Lease or in force at the time of any such damage, **REGARDLESS OF CAUSE OR ORIGIN, INCLUDING NEGLIGENCE OF THE OTHER PARTY HERETO**, its licensees and invitees, and covenants that no insurer shall hold any right of subrogation against such other party.



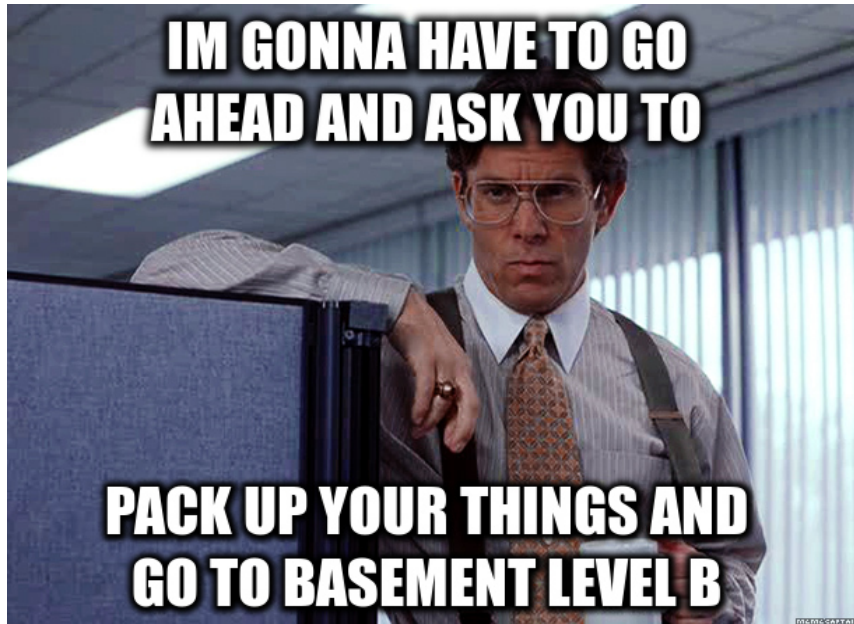
Assignment, Subletting, and Recapture

- Texas Property Code § 91.005 sets forth that, “During the term of a lease, the tenant may not rent the leasehold to any other person without the prior consent of the landlord.” Texas courts have interpreted this to mean that tenants are required to obtain the landlord’s consent to assign their lease or sublet any part of the leased premises. However, the express terms of a lease may override this statutory provision if it expresses “a clear intent to allow the lessee to assign without prior consent.” 718 *Associates, Ltd. v. Sunwest, N.O.P., Inc.*, 1 S.W.3d 355, Tex. App. – Waco, 1999, pet. denied.
- Assignor tenant remains liable for obligations under the lease, including all back rent, if new tenant fails to pay or perform pursuant to the terms of the lease.
- A landlord’s right to recapture property is frequently triggered by a tenant requesting assignment of a lease.

Confirm the circumstances upon which the recapture clause becomes activated. If the landlord has a recapture right, the tenant may want to reserve the right to withdraw the proposed assignment if the landlord exercises the recapture right.



Relocation



Tenant should resist any lease provision that gives the landlord an unfettered right to relocate the tenant during the lease term. If a relocation clause is required by the landlord, confirm the written notice requirement by landlord to tenant is reasonable.

Negotiate for landlord to pay all costs associated with relocating the tenant to another space. Define parameters of acceptable relocation sites. Determine whether termination of the lease can be triggered by tenant if landlord gives written notice to tenant of relocation intention.



Maintenance, Repairs and Alterations

- Confirm landlord's maintenance obligations with respect to the building in which the leased premises are located (usually foundation, roof, exterior walls and structural portions of the building).
- Identify the timeframe landlord has to complete maintenance and repairs. Is this reasonable? Be aware of any notice provisions relating to maintenance and repairs. What remedies (automatic default or rent abatement) are available to the tenant if the landlord fails to complete maintenance and repair obligations within the stated time periods?
- Determine tenant's obligations with respect to the repair, maintenance, and replacement of HVAC units on the leased premises. Determine tenant's obligations with respect to the repair, maintenance, and replacement of roof/ceilings, plumbing, and sprinkler systems of the leased premises.
- Determine if tenant alterations or improvements to the leased premises require landlord approval. Does the landlord require specific contractors to do the work? Is there a list of pre-approved contractors and architects? What is the penalty for not using a pre-approved contractor? Is it reasonable?



Notice Provision

Review the Notice provision(s) contained in the lease. What are the methods for notice and delivery (i.e. fax, email, certified mail, national courier service)? When is notice deemed received? Confirm the notice address is accurate and make certain the notice provision provides a mechanism for changing the notice address.

Sample Notice Provision:

Any notice or document required or permitted to be delivered hereunder shall be delivered by either (i) a national courier service, (ii) certified mail, return receipt requested, or (iii) facsimile or electronic mail, so long as an original of such notice is sent on the same day by the method set forth in either (i) or (ii) above. Notices delivered by courier service shall be deemed received upon actual delivery (or refusal of delivery); notice delivered by certified mail shall be deemed received upon the earlier of actual delivery or three (3) days after posting; and notice delivered by facsimile or electronic mail shall be deemed received upon transmission so long as an original of such notice is sent on the same day by the method set forth in either (i) or (ii) above.



Default and Remedies

The leading discussion of common law landlord remedies for breach of a commercial lease is found in Speedee Mart Inc., v. Stovall, 664 S.W.2d 174,177 (Tex. App. – Amarillo 1983). Sets forth the following four landlord remedies:

- (i.) maintain the lease in full force and effect and sue on the lease for the rent as it comes due;
- (ii.) repossess and retain the property for landlord's own purposes and recover the present value of the rent under the lease, reduced by the reasonable cash market value of the lease for the unexpired term;
- (iii.) repossess the property and lease it to another tenant and recover the contractual rent reduced by the amount to be received from the new tenant; or
- (iv.) declare the lease forfeited, thus relieving the tenant of further liability.



Default and Remedies continued...

The remedies afforded to a commercial tenant when a landlord defaults under a commercial lease are generally limited by the terms of the commercial lease. Texas case law supports the ability of the tenant to complain of the landlord's failure to comply with express provisions of the lease. Of course, most landlords try to avoid any express obligations under a lease, but normally, landlords will agree to some or all of the following express covenants:

- (i.) provide tenant undisturbed possession of the premises so long as the tenant complies with its obligations under the lease (covenant of quiet enjoyment);
- (ii.) furnish services to the premises, such as utilities, HVAC, janitorial and security;
- (iii.) to not unreasonably withhold consent to a sublease or assignment;
- (iv.) not lease other property of the landlord to someone in competition with tenant; or
- (v.) repair certain portions of the premises within the landlord's control.

Default and Remedies continued...

- In the event of a breach by either party, does the lease provide for a cure period after notice of the breach? Is the cure period reasonable? Determine what specific damages are available to the prevailing party against the defaulting party under the lease.
- Does the landlord have the right to apply all or part of the security deposit to cure any default? If yes, tenant will usually have to replenish the security deposit.
- Does the lease contain mandatory dispute resolution provisions such as an arbitration or mediation clause? Confirm if the governing law and/or jurisdiction makes geographical sense.

SECTION 22.03. Governing Law and Jurisdiction.

Owner and Tenant agree that this Lease shall be governed by and construed in accordance with the domestic laws of the State of New York without giving effect to any choice or conflict of law provision or rule (whether of the State of New York or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of New York.

Owner and Tenant further agree that any action, suit or proceeding arising out of or relating to this Lease, or the parties' relationship arising out of the Lease, shall be adjudicated exclusively in New York State Supreme Court, Monroe County, New York, and the parties expressly, specifically, and

Miscellaneous Details



#10

- Is tenant entitled to a panel on the sign pylon? Usually requires execution of a separate pylon sign agreement. A separate initial charge and a monthly rental fee may be required.
- Determine if tenant requires certain sections of the parking area for its exclusive use. If so, these parking areas should be redlined in the site plan.
- Determine definition of “hazardous materials” in the lease and confirm if tenant’s operation includes any hazardous materials. If so, what are tenant’s obligations for storage and disposal of such materials?
- If tenant is “building out” the premises, confirm tenant’s allowance amount and verify if it include soft and/or hard costs. If there is a performance bond, determine if it is appropriate.
- Under what circumstances can tenant terminate the lease or abate rent on casualty or condemnation? Tenant should ensure that condemnation includes taking of parking or access.
- Confirm tenant’s payment of utilities to the premises. Determine if landlord reserves the right to install a sub-meter for any utility services provided to the premise.

Conclusion

On the surface, a commercial lease represents a fairly straightforward arrangement – an agreement to let a party use and occupy space in exchange for payments of rent. However, the details of a commercial lease are its most problematic aspect because of the amount of variables that may be present. Always read the entire lease, any attached riders, addendums or supplemental agreements to protect your client from unintended financial liability.

Questions?

