

## Landlord's perspective on 10 commercial lease provisions

The following is a short summary of 10 lease provisions for a landlord to consider when drafting or negotiating a commercial lease.

■ **Covenant of quiet enjoyment.** The covenant of quiet enjoyment is an implied covenant that is intended to allow the tenant to enjoy the use of the premises without being disturbed by the landlord or those with superior title against the landlord. The landlord needs to limit in express terms its liability with respect to the covenant, such as reserving the right to make changes to the building and to enter the leased premises.

■ **Guaranty.** The tenant may not necessarily be the entity with whom the landlord negotiates the lease, but rather a subsidiary or an affiliate of such entity, and the actual tenant may not have the financial stability that the landlord requires based upon the level of risk the landlord expects to incur under the lease. It may, therefore, be desirable for the landlord to obtain a guaranty to secure the tenant's payment of all rent due and the tenant's performance of all terms, conditions and covenants under the lease.

■ **Subordination.** The lease should provide that, by its terms, the lease will be subordinate to an existing or future deed of trust or mortgage without further documentation, unless required by the landlord's lender. A tenant often will request that the landlord obtain a nondisturbance agreement from the lender, so the landlord may want to state that it will use reasonable efforts to obtain such agreement; the landlord should not state that it will use best efforts because that



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may require a change in its loan documents.

■ **Indemnification.** The tenant may want to provide limitations on the indemnities requested of the tenant by the landlord, and the tenant may request a reciprocal

indemnity from the landlord. In negotiating the indemnification provisions, the landlord should keep in mind that purely reciprocal indemnification provisions do not work because the landlord and the tenant do not have the same interest in the property. The landlord should limit its indemnity to its actions and to the actions of those under its control.

■ **Insurance.** The landlord always should consult with its risk management advisers or insurance provider with respect to the insurance provisions of the lease, including the insurance clauses relating to the landlord and the tenant, and the provisions relating to damage and destruction, indemnification, exculpation, waiver of subrogation and environmental matters. The lease should allow the landlord to set the parameters for the types and amounts of insurance that the tenant carries, along with the ability to obtain insurance if the tenant fails to do so, with the tenant reimbursing the landlord for such cost. The lease should give the landlord the right to

review the tenant's insurance coverages and amounts periodically and require such increases as the landlord deems reasonably necessary.

■ **Assignment and sublease.** Since the law requires that the landlord be reasonable in giving its consent to an assignment or a sublease, the landlord should specify what the landlord can consider in providing or denying its consent, such as being comfortable regarding the financial condition of a proposed assignee or subtenant.

■ **Default and remedies.** An event of default by the tenant generally includes the failure to pay rent when due, a breach of the lease covenants and conditions, abandonment or vacation of the leased premises, a taking of the leased premises due to creditor or other proceedings, voluntary or involuntary bankruptcy proceedings, and the failure to take possession as provided in the lease. For a tenant's default, the landlord generally will provide for the right to terminate the lease, with the tenant remaining liable for amounts due under the remaining lease term, or the right to take possession and relet the leased premises, with the tenant remaining liable for the amounts due under the lease less the net proceeds from such reletting. In addition to such remedies, the landlord also should reserve the right to obtain other damages because the amounts due under the lease may not cover all of the landlord's damages.

■ **Tenant's use.** Although the landlord provides insurance for the building, the lease should include a provision prohibiting the tenant from using or con-

ducting activities in the leased premises that would impair or increase the cost of the landlord's insurance coverage, or make it impossible for the landlord to obtain insurance.

■ **Operating expenses.** Except for services that the tenant pays for separately, the lease should provide that all costs for services, operations, maintenance and repairs that the landlord provides for the tenant's benefit are passed on to the tenant, and the landlord may require that the tenant reimburse the landlord for excess and after-hours usage of utilities and services. The landlord may desire to limit its liability for failure to supply utility or other services due to circumstances beyond its reasonable control. The landlord also may want to provide a time limit for any audit right of the tenant, both during and upon the expiration of the lease term.

■ **Common areas.** The lease should specify what areas are under the common control of the landlord. The landlord needs to retain sufficient control over the common areas so that the landlord can do and perform those acts required under the lease and those acts that are necessary and desirable in the landlord's business judgment, such as modifying the parking areas.

The above list only provides a brief summary of certain items for the landlord to contemplate. There are other aspects of a lease that require careful thought and consideration, including the impact of various federal, state and local laws.▲