

Checklist for Commercial Leases

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12-10-1999

Tenant Checklist for Commercial Leases

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December 10, 1999

• Identification of the Parties

A tenant must confirm that the party with whom he is entering into a lease is the party who has the right to lease the real estate. First, title information should be reviewed to confirm the ownership of the property and the exact name of the title holder of record. Second, depending on the type of entity holding title, a tenant may want to review the organizational documents of the landlord and even require a resolution approving the lease and giving authority to the signatory to sign the lease on behalf of the landlord. A representation regarding authority to enter into the lease also would be appropriate.

For the protection of an individual signing on behalf of a tenant, the lease should show the person's representative capacity and either the tenant's governing documents or a resolution should make clear that he has the capacity to bind the tenant. It's worth mentioning that the proper name of the tenant should be confirmed.

• Commencement Date, Possession Date, Rent Commencement Date, and Termination Date

It is possible that one lease could have different dates for commencement of the lease, possession of the leased premises and commencement of rental payments. A tenant should be concerned with delaying rent payments until he is obtaining revenue from the leased premises, and may wish to take possession for renovation and stocking earlier than the rental commencement date. Consider whether a tenant wants to tie rent commencement to the opening for business of another particular tenant or the grand opening of the shopping center.

If possible, list a specific date for commencement and termination of the lease. If specific dates cannot be given at the time of signing, consider requiring a declaration signed by both parties setting forth the actual commencement date and the termination date. If such a declaration is not feasible, then perhaps the tenant could send a letter to the landlord setting forth the commencement date and the termination date. This letter can then be placed in the lease file for future reference.

• Description of Leased Premises

Review the description of the leased premises to make certain that the description is specific and there will not be a question later as to the area leased. Consider whether a survey or a drawing of the leased premises is necessary to clarify what is leased. Are there appurtenant rights which need to be described, such as access and utility easements?

If rent is being paid on a square footage basis, the square footage should be agreed to and included in the lease. If inclusion of this information is not possible because the building has not been built, then the method for calculating square footage should be agreed upon in the lease.

- **Permitted Use of Lease Premises**

Generally, the common law provides that a leased premises can be used for any lawful purpose unless limited by the lease. Some cases in jurisdictions outside of New Mexico have required that the use not be substantially different from the usual use of the premises. Therefore, it may benefit a tenant to have no mention of the permitted use. However, if the proposed use is out of the ordinary, a tenant should consider having a use clause which specifically includes the intended use along with broad language allowing "any lawful purpose." If a Landlord's lease includes a use clause, a tenant should try to negotiate a use broad enough to allow flexibility for an evolving business or for subletting or assignment.

- **Governmental Approvals**

A tenant should consider governmental approvals which are necessary before he can begin operations. The commencement of the lease should be made contingent upon obtaining the necessary governmental approvals. Include a provision that requires the landlord to cooperate in obtaining approvals. A tenant may want to include in the lease the landlord's approval for the tenant to obtain the necessary governmental approvals so that the tenant does not have to request a separate approval letter at the time of submittal to the governing body.

Approvals to consider are zoning approvals, building permits, necessary environmental permits, and sign permits.

- **Compliance with Law**

A tenant should obtain a representation from the landlord that the property which includes the leased premises currently complies with existing laws and regulations. As to future laws, it is extremely important that a tenant is aware of the meaning of a clause requiring a tenant's compliance with all applicable laws. Language that is too broad can require a tenant to renovate a structure to bring it into compliance with law. Usually, it is appropriate for a tenant only to be responsible for its operations complying with law.

Compliance with law provisions should be thoroughly reviewed with an eye toward the improvements a tenant is going to make on the premises as well as the operations in the premises. Will the tenant's improvements trigger requirements for structural changes under the Americans with Disability Act? Who will pay for those necessary changes? If there is a question about a tenant's actions triggering structural changes to comply with law, a tenant should negotiate either a dollar limit to her contribution or a right to terminate the lease if the cost of structural renovations are above a set dollar amount.

Some leases require that a tenant comply with insurance company requirements and even engineer requirements. A tenant should learn as much as possible about such requirements before entering into the lease and should try to limit the frequency and dollar amount of such requested compliance requirements.

- **Rent**

It is preferable to include rent in a specific dollar amount. Where rent is to be calculated periodically, such as with percentage rent, it is important that the tenant run a few hypothetical scenarios to determine that the formula is workable.

If rent is to escalate over time, consider the factors to be used in escalating. Many leases tie escalation to the Consumer Price Index (CPI), but if the rent components do not fluctuate with the CPI, then it may be an inaccurate way of estimating the actual increase in cost to the landlord. In extremely long term leases, it is possible to require an appraisal of the property, but such a practice would not be efficient in many cases.

• **Tenant Improvements/Ownership of Additions or Fixtures**

A tenant may request an allowance to perform renovations necessary for the tenant's business. A landlord may require that a portion of that allowance be repaid if tenant moves out before a particular time. Usually, the plans for tenant improvements must be approved by the landlord. If they exist at the time of signing the lease, approval of the plans can be included in the terms of the lease.

Rather than argue at the termination of the lease whether additions made by a tenant are fixtures, the lease should clearly spell out the right of tenant to remove the items it has added to the premises. Be as specific as possible with this language. Most leases use the phrase "trade fixtures", but use of such phrase could present an ambiguity at the time of termination. The more costly the additions, the more important the tenant's right to remove them at the termination of the lease.

• **Repairs, Maintenance and Common Area Expenses**

Even in a lease which is considered "triple net", often a landlord will agree to make repairs to the structure, such as roof repairs. Review repair provisions to determine what should fairly be allocated to the tenant and what should be paid by the landlord. Should a tenant have to pay to paint the exterior of a building? Should a tenant have to repair loading dock doors?

Repairs should be carefully distinguished from replacement. For instance, a tenant may be responsible for repairs to the heating and cooling system, but it should be clear that the tenant is not responsible for replacing the unit if it is not repairable. Sometimes landlords and tenants negotiate cost sharing in the instance where equipment has to be replaced. If there are repairs which are the responsibility of the landlord, the tenant will want to maintain the right to make those repairs if the landlord fails to do so. Consider whether the tenant can deduct the cost of those repairs from rent owed to the landlord.

A tenant should be concerned both for what expenses he will be required to reimburse the landlord and how those expenses will be calculated. A tenant should require a categorization of expenses to be paid by the tenant rather than a general provision that the lease is "net" or "triple net". Often a tenant's share of expenses is calculated by a pro rata share of the total leaseable area of the building or buildings being leased. Make certain that the tenant's share will not increase if other space is vacant. Calculations based on total leased space will likely result in a tenant paying for a share of expenses for vacant space. Calculation based on total leaseable space will likely result in the landlord paying for the expenses of the vacant space. If there is a question, specific language stating that the tenant will not pay for a portion of expenses for vacant space should be included.

Even if a tenant negotiates to pay only her pro rata share of expenses based on total leaseable area, a landlord may insist on a different calculation for expenses which vary with occupancy, such as the cost of utilities, cleaning, repairs and maintenance. Variable expenses will be lower when fewer tenants are occupying a building. For instance, if there is only one tenant occupying 30% of the building, it may not be fair for that one tenant to pay only 30% of the cleaning expense. These equities should be considered in negotiations.

A tenant paying taxes as part of expenses may want the right to protest taxes rather than relying on the landlord, who is not paying taxes, to protest them.

A tenant may negotiate a ceiling on expense reimbursements. Consider whether the tenant should require an absolute dollar limit or use a base year and only allow a certain percentage increase over the base year.

Look for language which allows a landlord to charge an administrative fee in addition to actual expenses. Such fees are generally charged as a percentage of expenses. If an administrative fee is allowed, make the lease clear as to what expenses the administrative fee will be applied and what percentage the administrative fee is.

A tenant should include a right to audit the expense records of the landlord and the ability to recover the expenses for the audit, if it is determined that the landlord overstated the tenant's share by more than an agreed upon percentage.

- **Signs**

A lease silent as to sign requirements may allow a tenant to raise any signs he desires, but numerous other provisions in a landlord's standard lease which may limit rights to improvements including signs, could limit a tenant's rights. Negotiating sign provisions at the time of the lease will alleviate future questions about rights. Also, in most shopping centers there is a central sign or signs on which a tenant may wish to be included. Consider having dimensions and art work, if required, approved by the landlord at the time the lease is negotiated.

- **Parking Requirements and Critical Area**

Having ample parking can be critical to the success of a retail business. It is also important to other types of uses. A tenant may want to include a requirement in the lease that a certain number of parking spaces will be maintained for its use. A tenant may want to designate which parking spaces will be maintained. Usually such designation is done by including an exhibit which shows the tenant's critical area, including the interior leased space, parking and possibly a view corridor to a major street or entrance. A tenant will want to have that critical area protected from any changes by the landlord or any other person. Any change in the critical area should allow the tenant to terminate the lease.

- **Assignment and Subletting**

In New Mexico, if a lease is silent about transfers of the tenant's interest, either assignment or subletting, both are permitted without the landlord's consent or even notice to the landlord. Some leases address assignment but not subletting. In New Mexico, there is a distinction between the two concepts, and a restriction as to one is not necessarily a restriction as to the other.

Review the provision to determine whether the tenant is still liable upon assignment. If the lease is silent as to liability upon assignment, the common law rule is that a tenant remains secondarily liable. A release from liability can be negotiated. A tenant may be able to include certain net worth thresholds for a transferee which would allow the tenant's release.

According to New Mexico law, if approval of the landlord is required for a transfer, a landlord must not withhold such approval unreasonably. In order to avoid a later debate about what is reasonable, a tenant may wish to include specific items to be considered in determining whether an assignee is acceptable. Categories of inquiry include the financial status of the transferee and the proposed use of the premises. A tenant will likely prefer that the list be as short and objective as possible, and a landlord may wish to have a long list of subjective standards for approval.

The lease language should also be specific as to the approval process. There should be a time limit for the landlord to grant or deny approval or at least include language that requires the landlord not to unreasonably delay approval or denial. It is doubtful that failure to deny a transfer during a

stated time period will be deemed approval, but a tenant may negotiate payment of damages caused by a landlord's delay.

Beware of recapture clauses. Some landlords want the right to terminate the lease upon a request for transfer. Such a release can be good for a tenant trying to vacate a particular location, but a landlord will only exercise such a clause when there would be a windfall to the tenant by such a transfer.

In order to allow corporate restructuring, restrictions on transfer should carve out transfers to entities controlled by, controlling or under common control with the existing tenant. Additionally, a tenant may negotiate for blanket approval of a transfer to an entity buying substantially all of the assets of the tenant in a particular region.

Most case law has determined that prohibitions on assignment do not apply to sale of stock or merger of a tenant into another entity. However, if such transactions are likely possibilities, a tenant may wish to address those transactions at the time of the lease negotiations rather than having to request approval later.

- **Subordination, Non-Disturbance and Attornment**

Every landlord contemplating future mortgage financing will require that a tenant agree to sign a subordination agreement in favor of one or more mortgage lenders. The landlord will also require that a tenant attorn to a mortgagee who comes into possession of the property. Attornment provides that the tenant recognize the lender as the landlord under the lease.

A tenant should insist on a non-disturbance agreement in exchange for subordinating the lease and attorning to the mortgagee. If a senior mortgage already exists on the property, the tenant may wish to request a non-disturbance agreement from the mortgagee. The non-disturbance provision should state that the lease will remain in effect and the mortgagee will recognize the tenant as a lessee so long as the tenant is not in default under the lease. Usually, the tenant will have to release the mortgagee from any defaults of the landlord, except to the extent those defaults continue after the time the mortgagee takes possession. For instance, a mortgagee will not agree to be responsible for any expense overcharges occurring before the mortgagee was in possession.

A tenant requiring a non-disturbance agreement in a lease does not guaranty that a landlord can obtain such an agreement from a mortgagee. If there is an existing mortgage, it would be wise to review it to determine whether it provides for the mortgagee to sign a non-disturbance agreement. If it is not practical to wait for a lender's non-disturbance agreement before entering into a lease or in the case of future mortgages, the landlord should be required to use best efforts to obtain a non-disturbance agreement. The tenant should be made aware of the risk that the mortgagee will not sign a non-disturbance agreement and the consequences of the mortgagee not signing.

- **Estoppel Certificate**

Estoppel certificates are intended to give a landlord's lender or potential purchaser an accurate picture of the contractual relationship between the landlord and tenant. The estoppel provision of the lease should include the specific information which the tenant will be required to provide on the certificate. The customary items on an estoppel certificate are (i) recognition that the lease attached to the estoppel is in full force and effect, specifying any modifications or amendments; (ii) a statement that the landlord is not in breach of the lease or a specification of the breaches of the landlord, (iii) a statement of what advanced rent has been paid; and (iv) the amount of any security deposit.

Often a lease will also provide a time frame within which an estoppel certificate must be returned by a tenant. When the tenant receives an estoppel certificate later, the lease provisions should be reviewed so that the tenant doesn't give more than is required by the lease and so the tenant

complies with the timing and other requirements of the lease.

- **Insurance and Waiver of Subrogation**

It is customary for a tenant to carry insurance on the tenant's personal property. Whether the landlord or the tenant covers the structure for casualty losses can depend on whether it is a build to suit lease with one building completely occupied by the tenant or whether it is a shopping center or office building occupied by more than one tenant. In the first instance, the landlord may require the tenant to carry the casualty coverage on the structure. In the second instance, it is more likely that the landlord will carry the insurance on the structure, although the cost of the insurance may be passed through to the tenants through expense provisions in the lease.

The tenant will generally be required to carry public liability insurance for the leased premises, and the tenant should make certain the landlord is carrying public liability insurance for any common areas. The landlord should name the tenant as an additional insured on the the common area liability policy. A landlord will want the tenant to carry the cost of plate glass coverage, coverage for heating and air conditioning systems, and dram shop liability, if alcoholic beverages are being sold.

A waiver of subrogation rights of casualty insurers should also be considered. Such a waiver will allow the parties to rely on their insurance coverages without the insurance companies then requesting reimbursement from the non-insured party. A waiver may require an endorsement on the parties' property damage policies, but it will probably not raise the premium. The tenant's insurance company should be consulted with regard to these provisions. Consider requiring proof of a waiver of subrogation endorsement from the landlord because a waiver of subrogation may not be effective without such an endorsement.

- **Destruction of Premises**

A destruction clause should include a requirement that the landlord rebuild the premises. If there is a mortgage on the property, a tenant will want to make certain that the landlord's insurance proceeds can be used for rebuilding rather than being automatically applied to the payment of the mortgage. If insurance proceeds for destruction over a certain percentage of the premises is applied to the mortgage, then the lease should terminate at the same level of destruction. Make certain that rent is abated even in the case of partial destruction. Full rent should be abated for the period of repairs in which a tenant cannot operate. Then, rent should be abated on a pro rata basis so that the square footage rental remains the same.

- **Condemnation**

Condemnation provisions are often overlooked as doomsday scenarios which are not important. However, a well-drafted condemnation provision can avoid future litigation and provide important rights to a tenant should a road widening project or some other project result in a taking of the leased premises. The condemnation provision should address at what percentage of taking a tenant may terminate the lease. Do you want to set an objective standard such a percentage of square feet or do you want a more subjective standard of when a taking prevents a tenant from using the leased area for the purpose set forth in the lease? It is more typical to use the latter standard, but it can result in a dispute about what will result in destroying the usefulness.

It is common for a tenant to have a redlined or critical area which cannot be changed. This area usually encompasses the heated space along with a certain number of parking spaces and possibly a view corridor to an important street. Condemnation of any of this space should result in a tenant's right to terminate the lease. If a tenant determines not to terminate the lease even in the face of a portion of critical area being taken, then the tenant may want the right to redraw the critical area and obtain other parking spaces. In the case of a partial condemnation not affecting the critical area, the lease should provide for rent abatement on a pro rata basis.

The condemnation provision should require the landlord to give notice of any potential condemnation upon landlord's actual knowledge. Include a time limit for such notice and make failing to give timely notice a default under the lease. The lease should also state when the right to terminate arises. Is it at the time of notice of condemnation, when title passes, or when possession occurs? This can be an important provision because the public knowledge of a condemnation can adversely affect a tenant's business before possession actually occurs.

Often condemnation provisions drafted by landlords require a tenant to assign to the landlord all of the tenant's rights in condemnation proceeds, except for damage to personal property. A tenant should consider whether he wants to obtain compensation from the condemnation proceeds for moving expenses, unamortized costs of capital investment in the tenant's improvements to the leased property, and any value that is lost by having a lower than market rent and having to move.

- **Exclusive Agreement and Proximity to Leased Premises of Tenant's Other Locations**

An exclusive agreement provides that a landlord will not allow another tenant to sell a particular product or offer a particular service within an agreed upon area, such as a shopping center. A tenant should assess both the exclusive rights she is requesting and the exclusive rights that the landlord has already granted. Be aware that exclusive clauses can be granted in the future, which can affect a pre-existing tenant unless the lease provides otherwise. Also, consider the expansion of business lines in relation to the exclusive rights granted.

A landlord's corollary to an exclusive agreement is language preventing other tenant locations within a particular radius of the leased premises. The size of the radius should be carefully considered and any existing locations within that radius should be excluded from the restriction.

- **Environmental Provisions**

Liability for environmental problems with leased property can apply to both landlords and tenants. It is important to have clear provisions in a lease dividing such liability. A tenant should insist on a representation as to the environmental status of the property at the time of leasing. Check the environmental clause language related to the tenant's use to make certain that it does not prohibit the use of hazardous materials on the leased premises altogether, without limiting the definition of hazardous materials to exclude janitorial and office supplies and any other supplies which are used in the operation of the tenant's business. Depending on the type of business of the tenant, a more appropriate lease provision may include a right to use hazardous materials in compliance with applicable law.

A tenant will want to obtain an indemnification for any costs of environmental cleanup resulting from contamination not caused by the tenant. Be aware of boilerplate clauses limiting a landlord's liability to the interest of the landlord in the property being leased. Such an interest can be quickly depleted in the instance of environmental contamination.

The landlord will require a similar indemnification from tenant for the cost of environmental clean up resulting from the tenant's actions or those of his agents or invitees. Be aware of indemnification language which attempts to put the burden on the tenant for contamination which migrates from other property or is caused by someone other than the landlord or its agents or invitees.

- **Default Provisions and Remedies**

A tenant should negotiate for notice of and a right to cure any defaults. Usually, a landlord will insist on a shorter notice period for monetary defaults, and some landlords may not agree to notice at all for monetary defaults. Notice for nonmonetary defaults ought to be 30 days or longer if the cure cannot be completed in 30 days and the tenant begins the cure within the 30 day time period.

Beware of a default resulting from ceasing operation in the leased premises. A tenant should maintain as much flexibility as possible to go dark in a location. In addition to a default provision related to ceasing operation, there may be a covenant of continuous operation. Such a covenant will have the same impact as a default based on ceasing operations because the lease will likely define a default as a breach of any covenant.

A landlord's remedies usually will include taking over the leased premises and obtaining damages. It is preferable to specify that the landlord has an obligation to mitigate its damages.

- **Termination Rights**

Evaluate instances where a landlord might agree to allow a tenant to terminate the lease? If tenant determines that the site no longer meets her needs, a tenant may be willing to pay a few months rent for the right to terminate.

A shopping center tenant may want to terminate a lease if another tenant or tenants vacate their property. A landlord, if willing to allow such a right, may require a payment to allow such an early termination.

- **Renewals**

A tenant may want a shorter initial term with additional renewal terms. If negotiating renewal terms, consider whether the tenant wants to have the renewal occur automatically unless terminated or whether the tenant wants to give notice of renewal. If renewal terms are included, consider whether remodeling will be required and negotiate an allowance or method for computing an allowance for remodeling and/or redecorating.

- **Notice Provisions**

Notice provisions are often given little notice. A landlord may not have revised the notice provisions since the prevalent use of fax machines and overnight courier service. Consider whether the tenant wants to send and receive fax notices. If yes, fax notice should be limited to regular business hours or it should be deemed to have been sent on the following day. The sending party should have to produce a confirmation that the fax was sent, and even then, faxes sometimes do not get to their intended recipient. Perhaps a mailed copy should be required in addition to a fax. Overnight courier service, such as Federal Express or Airborne, is fairly reliable, but a tenant may not wish for this to be the only way he can send and receive notices. Remember that registered mail is only for inherently valuable items like jewelry. Don't require that notice be sent by registered mail. Certified mail can be declined or never picked up. Notice sent by certified mail should be deemed received a specified number of days after mailing. If more than one person is receiving notice, such as a client and his lawyer, it should be clear whose receipt controls for purposes of deeming notice given. Make certain the notice provision provides a mechanism for changing the notice address.

- **Landlord's Lien**

A landlord has a lien on all personal property of a tenant to secure the payment of rent. Waiver of this statutory lien can be imperative if the tenant has financing secured by inventory. It is far easier to negotiate waiver of the landlord's lien at the time of entering into the lease than negotiating it when a lender requires a waiver after the lease has already been signed.

- **Integration**

Integration clauses should be reviewed in light of the other documents surrounding the lease. If there are separate documents setting forth the work the landlord is going to perform on the premises or other documents between the parties, it may serve the tenant's interest to specifically

include these ancillary agreements in an integration clause rather than having a question later whether the documents merged into the final lease. Likewise, if negotiations have changed for the better since a letter of intent, which may include indemnifications or other tenant requirements not included in the final lease, the integration clause needs to make clear that such a document has merged into the final lease.

- **Severability of Illegal Provisions**

Landlords and tenants alike often blindly include severability provisions in the boilerplate of the lease. Consider whether the tenant wants a lease to remain in effect if particular provisions of the lease are found invalid. What if the landlord's requirement to perform certain construction, maintenance and repairs on the property was held invalid? Would the tenant want to be forced to maintain the lease without those provisions?

- **Recordation of a Memorandum of Lease**

Recording a memorandum of lease should protect a tenant from any possible sale or lease of the property and a subsequent claim that the purchaser or lessee has rights prior to the tenant. Shopping center and mall leases often are not recorded, but it should be considered at the time of negotiating the lease.

- **Trade Name/Right to Change Name**

To maintain maximum flexibility regarding the leased space, avoid any requirement of landlord that the tenant maintain the same business name as she was using at the time of entering into the lease.

- **Payment of Brokers**

Include a provision confirming the use or non-use of brokers in the deal and allocating the payment of broker's commissions.

- **Exhibits**

Insist that all exhibits be attached to the lease at the time of signing. Many, many leases are signed without all exhibits and despite good intentions, they never get attached to the document. If there is a reason why an exhibit is going to be attached later, make the lease clear as to the method for approval and attachment of the exhibit.

If the exhibits include forms of documents which are going to be signed separately, such as a memorandum of lease or a non-disturbance agreement, include a notation on the exhibit that it is not for execution. Often parties who are signing leases without counsel present sign exhibits, and it can result in the unintended signing of document which is meant to be signed a later date.

Appendix A

Glossary of Selected Lease Terms

Base Rent: Rent paid based on a set amount. It is often calculated by the square footage of the leased premises.

Common Area Maintenance (CAM): The maintenance and repair of the areas of the shopping center or building used in common by more than one tenant. Tenants are generally required to pay their share of common area maintenance, which consists of things like security, parking lot repairs, snow removal, and lighting.

Continuous Operation Clause: A clause requiring that the tenant not cease operations for an

extended period of time, usually more than 60 to 90 days. This clause will prohibit the tenant from ceasing operations but continuing to pay base rent.

Cotenancy Agreement: A tenant requirement that his lease terminates if another tenant vacates his premises or terminates his lease.

Critical Area (Redlined Area): An area specified by a tenant as critical to its operations. It usually includes all of the heated leased 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 called the redlined area.

Exclusive Agreement: A requirement by a tenant that no other tenants within a particular area, usually a shopping center or mall, sell certain goods or services being sold by the tenant requesting the exclusive. A corollary to the tenant exclusive agreement is a requirement by a landlord that a tenant not have another place of business within a specified radius of the leased premises.

Going Dark: Ceasing operations, while still paying base rent.

Gross Lease: A lease whereby a tenant pays only rent, and the landlord pays all expenses of operating the leased premises out of the rental amount. Sometimes landlords include rights to charge for expenses over a particular dollar limit. That dollar limit is referred to as a stop.

Gross Leaseable Area or Rentable Square Footage: The total area leased, including utility rooms, bathrooms, columns. Not the usable area. Most often the Gross Leaseable Area is used to calculate rent and expense charges. Square footage can be calculated in different ways, and the parties should agree on either the square footage or the method for calculating square footage before the lease is signed.

Net Lease: A lease where one or more items of operating expenses are passed through to the tenant by the landlord.

Percentage Rent: Rent based on a gross sales breakpoint or other performance measure.

Promotional Fund: A fund which shopping center or mall tenants often must contribute to for the purpose of advertising the shopping center. The contribution is usually based on square footage of leased space.

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 idea is for the landlord to maintain the exclusive right to all profits derived off of the leased premises. 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 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). These separate components of the typical agreement can be mixed and matched together. The critical piece for a tenant is the non-disturbance provision.

Tenant Improvements: Renovations and remodeling done by a tenant to prepare for occupancy of the leased space.

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 leased premises.

Appendix B

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Appendix C

Table of Recent New Mexico Cases Addressing Commercial Lease Issues

Boss Barbara, Inc. v. Newbill, 97 N.M. 239, 638 P.2d 1084 (1982)

Consent to assignment cannot be unreasonably withheld, even if the lease does not include a provision requiring reasonableness. See also, Economy Rentals, Inc. v. Garcia, 112 N.M. 748, 819 P.2d 1306 (1991).

Burke v. Permian Ford-Lincoln-Mercury, 95 N.M. 314, 621 P.2d 1119 (1981)

A tenant holding over after expiration of lease does so under the same terms and conditions as the lease.

C.R. Anthony Company v. Loretto Mall Partners, 112 N.M. 504, 817 P.2d 238 (1991)

In determining whether provisions of a contract are ambiguous, a court may consider the circumstances surrounding the making of the contract, the relevant usage of trade, course of dealing, and course of performance. See also, Mark V., Inc. v. Mauekas, 114 N.M. 778, 845 P.2d 1232 (1993).

Cafeteria Operators, L.P. v. Coronado-Santa Fe Associates, L.P. and A.P., 124 N.M. 440, 952 P.2d 435 (Ct. App. 1987); Cert. den'd 124 N.M. 311, 950 P.2d 284 (1997).

A management fee to cover the landlord's costs in managing common area maintenance (CAM) could not be added to CAM charges where the lease provided that the owner would provide CAM services on a non-profit basis.

Easterling v. Peterson, 107 N.M. 123, 753 P.2d 902 (1988)

A landlord's acceptance of rent with knowledge of an existing lease is waiver of landlord's right to declare a forfeiture for breach of the lease.

Galbaldon v. ERISA Mortgage Company, Vol. 38 No. 44 New Mexico Bar Bulletin 27 (1999)

A landlord does not owe a duty to investigate its potential tenant's business practices and no cause of action for negligent entrustment will lie against a non-possessory landlord.

Gourdi v. Berkelo, 122 N.M. 675, 930 P.2d 812 (1996)

Although a landlord maintaining a right to reenter and make repairs has a continuing duty of reasonable inspection, if a reasonable inspection would not have revealed a latent defect, a landlord is not responsible for damages arising from such defect.

Golden Cone Concepts v. Villa Linda Mall, 113 N.M. 9, 820 P.2d 1323 (1991)

A limitation of liability for representations not expressly in the lease did not bar a claim for fraud in the inducement. A landlord has a duty to disclose to a prospective tenant information about the leased premises which are peculiarly within the landlord's knowledge.

Medina v. Sunstate Realty, Inc., 119 N.M. 136, 889 P.2d 171 (1995)

Contracts may be modified orally or by conduct of the parties, even if the contract includes a provision requiring that it only be modified in writing.

Mesilla Valley Mall Co. v. Crown Industries, 111 N.M. 663, 808 P.2d 633 (1991)

Surrender of a lease occurred where landlord leased property to a non-profit entity for free because such a lease was for the landlord's benefit and not for the benefit of the tenant.

P.S.G. Limited Partnership v. August Income/Growth Fund VII, 115 N.M. 579, 855 P.2d 1043 (1993)

A lease is both a conveyance of real property and a contract specifying numerous rights of the parties. The real property conveyance can be terminated, but the contract provisions relating to liabilities of parties can survive. Termination of a lease did not extinguish the landlord's right to collect liquidated damages measured by the unpaid rent of the for the remainder of the lease term.

Superior Concrete Plumbing, Inc. v. David Montoya Construction, Inc., 108 N.M. 401, 773 P.2d 346 (1989)

The doctrine of merger applies only to successive agreements that encompass the same subject matter and contain inconsistent terms.