

Innovative Lease & Sale Provisions

- **Representing the Tenant**

Capital Expenditures - Sometime owners will attempt to renovate their properties to make them more attractive to a new tenant and perform the upgrade near the end of an existing lease term, at the existing tenant's cost. This clause will allow the cost of the renovation to be objectively and fairly shared by the existing tenant and the landlord:

“.....the cost thereof shall be prorated between the Parties and Tenant shall only be obligated to pay, each month during the remainder of the term of this lease, on the date on which Base Rent is due, an amount equal to the product of multiplying the cost of such replacement by a fraction, the numerator of which is one, and the denominator of which is the number of months of the useful life of such replacement, as such useful life is specified pursuant to Federal income tax regulations or guidelines for depreciation thereof (including interest on the unamortized balance as is then commercially reasonable in the judgment of Landlord's accountants), with Tenant reserving the right to prepay its obligation at any time.”

If the landlord wants to re-roof the building in the last six months of the existing tenant's term, and the useful life of the roof is 20 years, your tenant/client will pay, in monthly installments, on 1/40th of the cost the new roof.

Termination Rights - If the credit of your tenant is strong, they have leverage. One provision that will provide the tenant with flexibility should their need for space change during the term is to be provided with the right to get out of the agreement before the end of the term. This clause may be useful in assuring the tenant that they have that right.

At any time after the last day of the _____ the Lease Year, but prior to the last day of the _____ of the Lease Year, Tenant shall have the option, upon notice to Landlord (the “Termination Notice”), to terminate the Lease or a portion of the Premises leased hereunder (in either event, such cancelled premises to be referred to hereinafter as “Cancelled Premises”) pursuant to the terms of this Section ____, which termination shall be effective as of the last day of the month occurring twelve (12) months after the month in which Tenant delivers the Termination Notice to Landlord (the “Termination Date”). Tenant's delivery of the Termination Notice to Landlord shall be accompanied by an amount equal to the “Lease Termination Fee,” as that term is defined in this Section ____.

Offset Rights - When a landlord does not perform on it's obligations to maintain a property, often tenants have been left without recourse to take care of the obligation themselves and pass the cost on to the landlord. You may wish to insure that the lease allows....

- a) *the tenant the right to fulfill the landlord's obligations if they are not met within an agreed upon time frame after appropriate written notice by the tenant, and then deduct the cost from future rent due to the landlord under the lease*
- b) *You might also suggest that the lease specifically state that the tenant's obligation to pay rent is a covenant dependent upon the landlord's performance of its obligations.*

- **Representing the Landlord**

Late Payments & Bounced Checks - On occasion, tenants will pay their rent after the 10th of the month, will pay several month's late or bounce their checks. To provide incentive to pay on time, try providing the tenant with incentive to meet his obligation with the following language in their agreement:

"If the Tenant is in default under this Lease more than _____ times within any twelve-month period, irrespective of whether or not such default is timely cured then, without limiting Landlord's other rights and remedies provided for in this Lease or at law or in equity, the Security Deposit shall automatically be increased by an amount equal to the greater of:

- a) _____ times the original Security Deposit, or
- b) _____ months Minimum Rent, which shall be paid by Tenant to Landlord forthwith on demand."

Bounced checks? Try using the language shown above, but changing the text to require that the tenant, after it's first NSF payment, submit all future payments in the form of cashier's check or money order (don't accept cash because if your commercial bank rejects the deposit because the money is laundered, you won't be able to get another payment from your tenant because he will likely claim he did not know that the money was laundered).

Other incentives? Insure that the lease grants the landlord the right to charge the largest late payment penalty allowed by law.

What about having an automatic debit plan with your bank? Only limitation is that the tenant and landlord must use the same bank.

To give the tenant the incentive to pay as soon as possible, once his payment is late, why not impose the largest per diem penalty allowed by law? (say 5% of the monthly lease consideration for every day after the Base Rent was considered late)

Note - remember to distinguish between when rent is due and late.

- **Representing Both Parties**

When brokers represent landlords, sellers, tenants and buyers, it is common to submit or receive proposals to or from more than one prospect. To insure that the parties to our negotiations know that we are (or may be) negotiating with other tenants and buyers or on alternate properties, place in your proposal (or response) the following language....

“Other Offers - (your client) reserves the right to negotiate with other parties concurrent with these negotiations”.

It may seem like a small matter, but in many jurisdictions in the U.S., not disclosing to the other side of the transaction that you are negotiating (or wish to have the right to negotiate) with someone else can increase your and your client’s liability in the event that claim is made by the party that is unable to consummate the transaction. This clause can help brokers and either party to the transaction (courtesy of William Feldman, SIOR).

- **Broker Protections**

Drafting the Agreement - In most transactions involving non-institutional landlords and sellers, the brokers draft the lease or the purchase and sale agreement. It saves time and money, but unfortunately exposes the broker to unexpected liability. The clause below may be able to mitigate some of that liability...

“Landlord and Tenant understand, agree and acknowledge that:

- a) This lease has been freely negotiated by both parties; and
- b) That, in any controversy, dispute, or contest over the meaning, interpretation, validity, or enforceability of this Lease or any of its terms or conditions, there shall be no inference, presumption, or conclusion drawn whatsoever against either party by virtue of that party having drafted this lease or any portion thereof”.

- **Representing Sellers**

Letters of Intent - Often a seller knows of a viable buyer and wants to provide him with incentive to pursue the purchase of the property. To this end, try this clause...

“To induce the buyer to proceed to negotiate with seller to purchase the property, seller agrees to withdraw the property from the market and seller will not entertain offers to purchase the property nor negotiate with any other party to sell the property (during the period of this negotiation) or (until ____).

If either party hereto fails and/or refuses to negotiate in good faith, the other party may terminate this LOI and recover from the other party liquidated damages in the sum of \$_____ or it's out-of-pocket costs incurred in the course of negotiations, including, without limitation fees for attorneys', consultants, architectural and engineering work and all related costs. If any legal action is brought to recover such liquidated damages or out of pocket costs, the prevailing party in such action shall be entitled to recover its reasonable expenses for legal work and related costs.

(Note - if you include a liquidated damages provision, the text should be bold, in capital letters, in at least 10 point type and the provision must be signed separately or initialed by both parties to the contract. You may prefer to consider providing for other types of possibilities, including injunctive relief (such as to prevent the seller from negotiating with and selling to a third party), or special damages (such as lost profits or loss of bargain).