

Other Issues

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A. Construction Provisions (Including ADA issues)

For the most part, the landlord is not responsible for the condition of the premises at the start of the lease term. This is in stark contrast to residential property which has implied warranties for habitability and housing codes. The commercial tenant must usually take the property as is. Therefore, the tenant should make a careful inspection of the premises and discuss how improvements will be made and paid for if any are undertaken. This general rule does not apply if the premises have not yet been built. However, there are statutes that require the landlord to provide certain safety requirements. When there is construction involved on an existing building it would be prudent to obtain Builder's Insurance as mentioned under the Insurance section.

Tenants do not generally have a right to alter or repair the premises absent any specific provision. This prohibition covers material changes in the nature or character of the building. It is sometimes relaxed for long term tenants. Most commercial leases will have some sort of provision to address alterations, repair and improvements. Minor changes are usually permitted. If the minor changes are done without consent, the landlord will still probably not have any enforceable actions.

Construction and improvements often involve delays, so both parties should be clear (in writing) about when occupancy begins so there are no disputes about rent. These dates are often set out in "commencement letters." Landlords should also take into consideration delays and how to administer services during the construction.

A sample alterations and improvements provision:

Tenant shall not alter or make any improvement to the Premises without the prior written consent of Landlord. Landlord's consent

may be conditioned upon Landlord being provided with plans and specifications for the proposed alteration or improvement, information regarding the identity of the persons who will perform the work or provide the materials, and security against mechanic's liens, all of which must be acceptable to Landlord. All such work must be done in a workmanlike fashion using new, first-grade materials. Tenant shall be responsible for the reasonable costs incurred by Landlord in reviewing any plans and specifications to be submitted pursuant to this section and for the reasonable costs incurred in observing the construction of the subject improvements to determine whether the Building and its structure are being adversely affected. All such alterations and improvements shall, at Landlord's option, become the exclusive property of Landlord at the expiration of the Term.

Tenant shall not permit any mechanics or other lien to be levied against the Land or Building unless Tenant shall in good faith contest the same, in which event Tenant shall provide Landlord with security to protect Landlord's interest in the Land and Building. Any such security shall be in an amount at least one hundred twenty five percent (125%) of the amount of such lien and reasonably satisfactory to Landlord. Nothing herein shall be construed as a consent by Landlord that would subject Landlord's estate in the Land or Building to any lien or liability under the mechanic's lien laws of the State of Minnesota.

B. Brokerage Consideration

The landlord is more likely than the tenant to hire a broker, and the landlord covers the broker's commission. Many leases contain provisions protecting the landlord from brokers that it has not hired. Additionally, a landlord may want ensure that the tenant has not used the services of a broker to protect against broker's fees brought against it.

A sample brokerage provision:

Tenant warrants that is has not engaged or dealt with any broker in connection with this Lease and Tenant agrees to indemnify, defend and hold Landlord harmless from and against any claim for a broker's fee or finder's fee asserted by anyone other than those specified above, on account of any dealing with Tenant in connection with this Lease.

C. Quiet Enjoyment

Nearly every lease has an implied covenant of quiet enjoyment. The covenant stipulates that the tenant will be allowed to use the premises quietly and peacefully without the lease or premises being unduly interrupted by the landlord or anyone with a superior title to the landlord. It is not a breach of the covenant of quiet enjoyment to bring an eviction proceeding against the tenant. However, it is a breach of the covenant if the landlord simply evicts the tenant without any notice or formal proceedings. There may be other claims in such a case as well.

The covenant of quiet enjoyment is independent of other covenants in the lease unless otherwise stated in the lease. Therefore, absent a conditional provision, if the tenant is in violation of some other covenant, it can still bring a claim against the landlord if the landlord breaches the covenant of quiet enjoyment. Tenants should try and make any such conditional language operative only after default.

Eminent domain does not interfere with quiet enjoyment. If the premises are disturbed because of eminent domain, the tenant cannot bring action for breach of the quiet enjoyment covenant. Furthermore, if the lease does not have a duty to repair provision, quiet enjoyment alone does not compel a landlord to repair the premises.

Covenants of quiet enjoyment may also be expressly stated in the lease. These expressed covenants do not normally give the tenant more protection than the implied covenant. By putting an express covenant, the implied covenant is superseded. This has the possible effect of limiting the tenant's protection. If the express covenant is not as broad as the implied one, then the tenant is only protected under the limited terms laid out

in the express covenant found in the lease. Tenants should carefully examine any expressly stated covenants to quiet enjoyment.

D. Boilerplate Provisions

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