



Commercial Leasing

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Consent to Sublease

Issues to Consider from the Subtenant's Perspective

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Substantial portions of commercial space are commonly available via sublease. In comparison with a direct lease (which customarily becomes effective upon execution and delivery by the Landlord and the Tenant), a sublease usually only becomes effective if and when the Sublandlord and Subtenant execute and deliver the Sublease and the Master Landlord executes and delivers a Consent to Sublease. Typically, after what may have been a lengthy and arduous Sublease negotiation between the Subtenant and the Sublandlord, the Master Landlord will provide the Sublandlord and Subtenant with the Master Landlord's standard form of Consent to Sublease, which the Master Landlord will require them to sign as a condition to granting the Master Landlord's consent. Most Master Landlord's standard forms of Consent to Sublease are rather basic and routinely fail to capture many issues that could be important to a Subtenant. Accordingly, a Subtenant should take these last steps in the Sublease documentation phase seriously and carefully review the Consent to Sublease and consider the issues described in this article before finalizing the Consent to Sublease. Also, this article offers a sample, arm's length negotiated Consent to Sublease provision.

Consent

Surprisingly, some Master Landlord forms of Consent to Sublease fail to recite that the Master Landlord consents to the Sublease. Subtenants should make sure consent language is included.

Master Landlord Certifications

Subtenants should try to use the Consent to Sublease negotiation phase to explore whether and to what extent the Master Landlord will provide various certifications. These certifications are similar to statements one might seek in a lease-related estoppel certificate. Subtenants should consider some or all of the following Master Landlord certifications:

- Neither the Sublandlord nor the Master Landlord is in default under the Master Lease.
- The Master Lease is in force and has not been amended (and attach a copy as an Exhibit).
- Neither the Master Lease nor the Sublease is subordinate to any mortgage encumbering the Sublease Premises (and no other third-party approvals or consents are required). If there is a superior mortgage, the Subtenant will need to evaluate whether the Subtenant can (or should) obtain a non-disturbance agreement from the mortgagee.
- The Sublease Premises are in as good condition as when the Sublandlord originally took possession as the Tenant under the Master Lease (and there is no damage to the Sublease Premises that needs repairs).
- The Master Landlord has not assigned the Master Lease or the rents thereunder.
- The Sublandlord has not exercised any option to terminate the Master Lease.

Copies of Notices

Subtenants should seek to require that the Master Landlord agree to deliver directly to the Subtenant copies of any notices sent to the Sublandlord as the Tenant under the Master Lease. If the Master Landlord resists delivering copies of all notices, a compromise position may be to limit the Master Landlord's obligations to deliver only copies of notices of default.

Subtenant Cure Rights

Assuming the Subtenant is successful in requiring the Master Landlord to deliver to the Subtenant copies of notices of default, in order to add some protection against termination of the Master Lease (and, therefore, the Sublease), Subtenants should try to secure the right to cure any Sublandlord defaults as the Tenant under the Master Lease. Subtenants should try for (but not expect to receive frequently) additional time periods to cure beyond the time periods to cure that are provided to the Sublandlord as the Tenant under the Master Lease. Generally, obtaining Subtenant cure rights that run simultaneously with the Sublandlord's cure rights as the Tenant under the Master Lease is a reasonable outcome.

Master Lease Amendments

Subtenants should try to prevent the Master Landlord from amending the Master Lease, particularly if such amendment would have the possibility of diminishing the Subtenant's rights or increase the Subtenant's obligations under the Sublease or with respect to the Sublease Premises.

Non-Disturbance Agreement

If the Master Lease is terminated prior to the expiration of the Sublease, Subtenants should seek to prevent the Sublease and the rights of the Subtenant thereunder from being disturbed by the Master Landlord for the duration of the term of the Sublease. If the Master Landlord resists offering non-disturbance to the Subtenant through the end of the term of the Sublease, a compromise position may be to limit the Master Landlord's agreement not to disturb the Subtenant's subtenancy of the Sublease Premises under the Sublease to some reasonable time period (such as six months or a year). Additional factors that will likely influence the outcome of this issue include the length remaining in the term of the Sublease, the size of the Sublease Premises (in comparison with the Premises demised under the Master Lease) and at what level the Subtenant is paying rent under the Sublease in comparison with the rent required to be paid by the Sublandlord to the Master Landlord under the Master Lease.

Assignment

While it is unreasonable in most scenarios for a Subtenant to expect the Master Landlord or Sublandlord to agree that the Subtenant will have a free right to assign the Subtenant's interest in the Sublease (or sub-sublease the Sublease Premises), Subtenants should try to retain the right to assign the Subtenant's interest in the Sublease to any successor to the Subtenant by merger or consolidation. Subtenants should expect to be required to provide notice to the Sublandlord and the Master Landlord, but should not be required to secure either party's consent. Additionally, Subtenants should try to include language confirming that the use of the Sublease Premises by the Subtenant's affiliates (and the like) shall not be a violation of the Master Lease or the Sublease or considered an assignment thereof or a sub-sublease of the Sublease Premises.

Approvals

Depending on the nature of the Subtenant's subtenancy, the Subtenant should evaluate whether the Subtenant should secure certain Master Landlord approvals. For example, in any type of Sublease in which the Subtenant's use is not clearly within the scope of permitted uses under the Master Lease, the Subtenant should secure the Master Landlord's approval of the Subtenant's use described in the Sublease. In the context of a Sublease of office space, to the extent applicable, the Subtenant should secure the Master Landlord's approval of the Subtenant's proportionate share of the building directory, keycards and other access devices, parking, and office suite signage. In a retail context, the Master Landlord sign approvals are important to the Subtenant.

Conclusion

As a Subtenant, even if you have been through a long and fatiguing Sublease negotiation, avoid the temptation of rushing to sign the Master Landlord's form of Consent to Sublease without thoroughly evaluating the issues described in this article. Most Master Landlord forms of Consent to Sublease do not prioritize many of the issues which could be important to a Subtenant. Armed with this article, Subtenants now have the tools available to review the Consent to Sublease carefully and should be able to balance the parties' respective rights and obligations better.

Sample 'Consent to Sublease' Provision (Arm's Length Negotiation)

Master Landlord hereby consents to the sublease of the Sublease Premises between Sublandlord and Subtenant pursuant to that certain Sublease dated as of _____, 20__ (the "Sublease"), a copy of which Sublease is attached hereto and made a part hereof as Exhibit A. Master Landlord certifies that, as of the date of Master Landlord's execution hereof, Sublandlord (as Tenant) is not in default or breach of any of the provisions of the Master Lease, that the Master Lease has not been amended or modified, that the Premises are in as good condition as when Sublandlord originally took possession as Tenant under the Master Lease (and there is no damage to the Premises that needs repairs) and Sublandlord has not heretofore exercised any option to terminate the Master Lease. Master Landlord hereby agrees to deliver simultaneously to Subtenant, at the addresses set forth in the Sublease, copies of any notices of default sent to Sublandlord as Tenant under the Master Lease and that Subtenant shall have the right, but not the obligation, to cure any defaults by Sublandlord as Tenant under the Master Lease. Further, notwithstanding anything contained herein or in the Master Lease or Sublease to the contrary, in the event the Master Lease is terminated for any reason whatsoever prior to the expiration of the Sublease, Master Landlord hereby grants to Subtenant a right of first offer to lease the Premises, for the remaining balance of the term of the Sublease, upon the same terms and conditions contained in the Sublease (except the Base Rent shall be adjusted to equal the fair market value as reasonably determined by Master Landlord). Promptly after learning that the Master Lease has been terminated, Master Landlord shall give Subtenant written notice of same, together with Master Landlord's determination of the Base Rent. Subtenant may then exercise such right of first offer by giving written notice of its acceptance of such offer within ten (10) business days after the date of Master Landlord's notice. In such event, the parties shall promptly execute an attornment and non-disturbance agreement (or the like) incorporating the changes contemplated by this Section __. If Subtenant declines or fails to exercise its right of first offer, Master Landlord shall thereafter be free to lease all or any portions of the Premises to any third parties at any time without regard to the restrictions in this Section __ and on whatever terms Master Landlord may decide.

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