SHOPPING CENTER MANAGEMENT INSIDER®

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Set 15 Conditions in Your Sublet Consent

If your lease is like most, it requires the tenant to get your written consent if it wants to sublet all or a portion of its space to a third party. But when giving your written consent to a sublet, make sure the consent includes key protections. Without those protections, you risk giving away too much to the tenant or the subtenant. For example, if the consent doesn't say that it applies only to the current sublet, a tenant could argue, and a court may agree, that you've consented to future sublets as well.

To avoid this and many other problems, clearly describe in the written consent the conditions under which you're authorizing the sublet, says Chicago attorney Richard S. Rosenstein. He suggests putting 15 conditions in your written consent. There's a Model Consent on pp. 3–4 that you can adapt and use that includes those conditions.

Get Signatures of All Parties

Your written consent, like our Model Consent, should be signed by you, the tenant, and the subtenant to show that all parties accept your conditions, says Rosenstein. So if one of the other parties later violates the written consent, you can sue that party for damages or ask a court to force the party to follow the consent's conditions, he explains.

***Insider* Says:** If there's a lease guarantor, require him to acknowledge in the consent that he agrees to be bound by its conditions, says Rosenstein.

15 CONDITIONS FOR SUBLET CONSENT

Make sure your written consent, like our Model Consent, includes the following 15 conditions:

❑ No Release for Tenant

Say in your written consent that neither the tenant nor the subtenant is released from any liabilities or obligations that it has under the lease or sublease, says Rosenstein [Consent, par. 1]. Otherwise, the tenant could argue, for example, that it no longer must indemnify you and defend you if you're sued by someone who was injured in the sublet space, he explains.

❑ No Waiver of Your Lease Rights

Say that by signing the sublet consent, you're not waiving any of your lease rights, says Rosenstein [Consent, par. 1]. Otherwise, the tenant might argue that

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believe the tenant's lease requires the tenant to include membership fees in its gross sales, contact the tenant and ask if it's including such fees in its gross sales calculation.

If the tenant admits that it doesn't include these fees in its gross sales calculation, tell it that it's violating its lease and instruct it to start including such fees immediately. If the tenant says it's including membership fees but you still suspect the tenant is underreporting its gross sales, you may want to audit the tenant, suggests Lamy. ■

Insider Source

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GET-TOUGH ACTION LETTERS

Make Restaurant Tenant Address Rooftop Grease Problem

Like many managers, you may have restaurant or food court tenants that improperly maintain their grease exhaust system, causing the grease vapor in the air vented from their space to contaminate your roof. And rooftop grease contamination can cause many problems for you, warns Joseph Baribeau, an expert in rooftop grease and other environmental hazards.

Although restaurants should be responsible for making sure their grease-contaminated air is properly vented, many fail to do so, advises Chicago attorney Carole L. Pechi. We'll tell you what problems rooftop grease contamination can cause and what steps you should take if rooftop grease becomes a problem. Also, we'll give you a Model Letter (see p. 8) you can send to a restaurant tenant to get it to address the rooftop grease problem.

Problems Caused by Rooftop Grease Contamination

Most building, fire, and health codes—as well as industry standards—require restaurants to have proper hood exhaust systems and equipment over their cooking surfaces, says Baribeau. These systems are designed to collect the grease vapor generated from cooking and vent it outside the building—usually through an exhaust fan or ventilator typically located on the center's rooftop, he explains. But the exhaust fan or ventilator must have the proper equipment in place, such as an approved grease collection device or "trap," or a grease containment system, designed to collect and trap fats, oil, and grease. Such equipment must meet industry standards. And it must be properly installed and maintained. For example, the grease trap must be periodically serviced in order for the containment system to work properly. Otherwise, Baribeau warns, grease can spill onto and collect on your roof and cause the following hazards and problems:

- The roof will wrinkle, delaminate, blister, crack, or soften—depending upon the material the roof is made of, says Baribeau. This can cause leaks and other roof failures and possibly void your roof's warranty;
- Grease spills create a slip-and-fall hazard for employees and contractors who work on the roof. If a slip-and-fall occurs, you could find yourself facing a costly lawsuit;
- Since grease is flammable, grease spills on your roof create a potential fire hazard and most likely violate the local fire or building code;
- Grease attracts all types of pests and rodents, which may then infest the rest of your center; and
- If a grease trap isn't designed to collect and trap the volume of fats, oil, and grease generated by a typical commercial kitchen, it may be difficult to clean and maintain. And it may quickly fill with grease and rainwater, which could then overflow onto the roof and eventually runoff into storm drains, causing water pollution and other environmental hazards, says Baribeau.

TAKE THREE STEPS IN RESPONSE TO PROBLEMS

Here are three steps you should follow if you discover that a restaurant has a rooftop grease problem:

Step #1: Check Lease

Check if the lease contains language specifically addressing grease disposal and venting requirements, says Pechi. Although some restaurant leases spell out exactly how a restaurant tenant should dispose of and vent grease generated in its space, many owners prefer to address such issues in the center's rules and regulations rather than in the lease, she notes. But most leases *do* have language requiring tenants to comply with the center's rules and regulations, including those on grease disposal, says Pechi.

You also want to make sure the lease has language requiring the restaurant to comply with all local, state, and federal laws, adds Pechi. Such language is standard in most leases, she notes. This language can

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GET-TOUGH ACTION LETTERS
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be useful if a restaurant is creating a grease problem on your roof. That's because, if the restaurant is violating the law, it's also violating its lease, explains Pechi. Specifically, you want to make sure the tenant complies with the following:

Federal environmental laws and regulations. For example, the Environmental Protection Agency has water pollution regulations that apply to various industries—including the food service industry, says Baribeau. These regulations require restaurants to control the runoff of fats, oil, and grease that spills onto roofs and into storm drain systems, he explains.

State environmental laws. Individual states may have their own environmental laws that apply to restaurants—and these laws may be stricter than federal standards.

Local building, fire, and health codes. Local building, fire, and health codes often have specific requirements for restaurant exhaust systems, including their rooftop exhaust fans, ventilators, and grease traps. For example, a section of the National Fire Protection Association's code—often the basis for local building and fire codes—requires grease traps to be "noncombustible, closed, rain-proof, [and] structurally sound," notes Baribeau.

MODEL LETTER

Get Tough with Restaurant Tenant that Ignores Oral Warning to Address Rooftop Grease Problem

This Model Letter, put together with the help of Chicago attorney Carole L. Pechi, is an example of a letter you can send to a restaurant tenant that has ignored your oral warning to address a rooftop grease problem. The letter says that the restaurant's failure to properly dispose of and vent its grease is a lease violation. It also says that if the restaurant doesn't correct the violation, it will be in default of the lease, and you may address the problem yourself and charge it the related costs and/or take legal action. You can adapt this letter and send it to your restaurant tenants as needed. But first show it to your attorney.

Sept. 4, 2003

Jane Tenant
XYZ Restaurant, ABC Center
1234 Main St.
Anytown, USA 99999

Dear Ms. Tenant:

On Aug. 28, 2003, we told you that we had discovered grease contamination on ABC Center's roof that appears to be caused by your exhaust system. We informed you that your grease traps were filled with grease and rainwater and were overflowing onto the roof and into the storm drains. We also informed you that the traps were leaking. Although we requested that you address the problem, to date you have failed to do so.

This failure constitutes a violation of Section 9.6 of your lease, which requires you to comply with ABC Center's rules and regulations. Rule 17 in the center's rules and regulations specifically requires you to install and properly maintain grease collection devices or traps on your space's exhaust system.

Please take immediate steps to correct this rooftop grease problem by Sept. 12, 2003, and continue to do so thereafter. Failure to comply with the foregoing shall constitute a default under the terms and conditions of your lease. Should such a default continue, we reserve the right to address the rooftop grease problem ourselves and charge you the related costs, and/or take legal action to protect our interest under the lease.

Yours truly,
John Manager

Step #2: Give Oral Warning

If you find language in the lease supporting your position that the restaurant is violating its lease, call or visit the tenant. Explain that you've discovered grease contamination on your roof that appears to be caused by grease or grease vapors from the restaurant's hood exhaust system and/or grease containment system, explains Pechi. Point out that, according to its lease, the tenant is responsible for properly disposing of and venting its grease, she says. And explain how the tenant is violating its lease.

Step #3: Send Get-Tough Letter

If the tenant fails to heed your oral warning, send it a get-tough letter. Your letter, like our Model Letter, should:

- Remind the tenant of your earlier oral warning;
- Say that the failure to heed your warning is a violation of the tenant's lease, and give the lease sections—and the relevant center rules and regulations, if appropriate—that it's violating. Also, if you believe the tenant is breaking the law, cite the law you believe it's breaking;
- Give the tenant a date by which it must correct the rooftop grease problem;

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■ Warn the tenant that its continued failure to correct the situation would be a lease default; and

■ Inform the tenant that, if necessary and if permitted by the lease, you'll take action to address the problem yourself—and charge the tenant for your related costs—and/or take legal action.

If Tenant Doesn't Comply

In most cases, your get-tough letter should persuade your restaurant tenant to address the rooftop grease problem. If the tenant doesn't comply with your get-tough letter, you can, as a last resort, send the tenant a default notice. If the tenant then fails to correct the situation within the lease's cure period, start an eviction proceeding against the tenant. But that's a drastic step you may not want to take, says Pechi. ■

Insider Sources

Joseph Baribeau: President, Coastal Enviro-Solutions, Inc., PO Box 281612, San Francisco, CA 94128; 1-800-300-6661; cesi@netwiz.net; www.greasecontrol.com.

Carole L. Pechi, Esq.: Of Counsel, Piper Rudnick, 203 N. La Salle St., Ste. 1800, Chicago, IL 60601-1293; (312) 368-4000; carole.pechi@piperrudnick.com.

WINNERS & LOSERS

▶ Ordinance Restricting Certain Retailers Is Constitutional

To preserve its "special environment" and "village atmosphere," a city passed an ordinance placing restrictions on "Formula Retail" businesses, which it defined as chain retailers that are required to maintain standardized services, goods, decor, logos or trademarks, uniforms, and so on. A group of property owners sued the city, claiming that the ordinance was unconstitutional because it discriminated against interstate or national retailers.

A California appeals court ruled that the ordinance was constitutional. The court said the ordinance didn't discriminate because "the definition of a Formula Retail [business] applies to local as well as national businesses." And the court noted that the city had a legitimate interest in promoting an "economically viable and diverse commercial area" [Coronadans Organized for Retail Enhancement v. City of Coronado].

▶ Radius Restriction Barred Buyer from Selling Groceries Only at Planned Store

A grocery store lease contained a radius restriction that barred the owner from leasing space or selling land to another grocery store at or within five miles of the center. The owner sold a section of the center's parking lot to a buyer that planned to build and operate a discount store with a grocery department. The deed for the land required the buyer to comply with the terms and restrictions of the grocery store's lease. The buyer asked the grocery store and the owner to acknowledge that the deed wouldn't restrict its planned store, but they refused. So the buyer sued the grocery store and owner, asking the court to rule that the proposed store wouldn't violate the deed.

A North Carolina appeals court ruled that the radius restriction barred the buyer from selling groceries only at the planned store. The court said that, as it related to property outside the center, the radius restriction was a personal promise given by the owner in exchange for consideration from the tenant that was enforceable only against the owner. So the buyer could open a grocery store within five miles of the center. But as it related to land *at* the center—such as the land bought by the buyer—the radius restriction was enforceable against the buyer and, thus, did bar it from selling groceries at the planned store [Wal-Mart Stores, Inc. v. Ingles Markets, Inc.].

▶ Owner Could Terminate Lease After Tenant Failed to Get Necessary Documents

The owner/operator of a sandwich shop signed a lease and license agreement with a tenant that would take over running the business. On the day the tenant was to take over, two tenant employees began work. But before the shop opened, the owner asked the employees for proof that the tenant had gotten certain necessary documents, including a license, food service permit, sales tax certificate, and insurance. The employees didn't have such proof because the tenant had failed to get the necessary documents. The owner refused to let them open, returned the tenant's deposit, and declared the tenant in violation of the lease. So the tenant sued the owner for violating the lease, claiming that it was entitled to notice of the violation and a chance to "cure"—that is, fix—it.

A Georgia appeals court dismissed the lawsuit, ruling that the owner could terminate the lease because the tenant had failed to get the necessary documents. The court said that under the lease, the owner could terminate the lease—without notice—if the tenant failed to open for business on a certain date. The court rejected the tenant's argument that

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