

**STANDARDS FOR DETERMINING WHAT CONSTITUTES REASONABLE
GROUNDS FOR LANDLORD WITHHOLDING CONSENT OR CONDITIONING
CONSENT TO A REQUEST BY TENANT TO SUBLEASE OFFICE SPACE**

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I. Introduction

My part of the presentation is intended to provide an overview of the standards under which a commercial landlord may refuse or condition consent to a request by a commercial tenant to sublease all or part of its office space in which the parties have agreed in the lease that landlord's consent cannot be unreasonably withheld. The presentation does not cover leases in which the parties agree that landlord's consent may be withheld in its sole discretion; nor will I be discussing whether there is an implied duty of landlord to act reasonably in "silent consent" clauses (i.e., leases that require landlord's prior consent but are silent as to sole discretion or not unreasonably withheld); nor does it cover leases that state with specificity the grounds under which landlord's refusal or conditioning of consent is deemed reasonable; nor does it cover retail or residential leases. Rather, the typical clause that is the subject of this discussion is contained in a lease for commercial office space and states:

Tenant shall not assign this Lease or sublet all or any part of the Premises without the prior written consent of the Landlord, which consent shall not be unreasonably withheld.

Specifically, this presentation will focus on requests by tenants to sublease the premises, not assign their interest in the lease.

II. General Discussion

A. Tenants generally believe that a suitable sublessee is any party which (i) is ready, willing and able to sublease the space and (ii) meets commercially reasonable standards. Landlords tend to look closely at the subtenant and the impact the existence of the sublease might have on landlord's business/profitability.

B. Whether or not landlord unreasonably withholds consent, and therefore may be subject to damages, will be judged on the basis of the particular facts and circumstances of the case. The court will determine whether *this particular landlord* breached its lease by unreasonably denying a request by *this particular tenant* to subleasing *this particular space* to *this particular subtenant*.

C. The fundamental question is: Has the landlord demonstrated *reasonable grounds* under the specific circumstances for withholding or conditioning consent? It is up to the trier of fact to apply a meaning to what are *reasonable grounds* for refusing consent based on the evidence presented.

D. The term "reasonable" in this context means that the grounds for refusing consent:

a. cannot be: arbitrary, which was defined in a Texas case Webb v. Dameron, 219 S.W.2d 581 (Tex.Civ.App., Amarillo 1949) as a decision made without "a fair, solid and substantial cause or reason." The court in this case further stated that although a decision is wrong, it is not necessarily arbitrary.

b. cannot be: based upon personal taste, sensibility or convenience. [Broad & Branford Place Corp. v. J.J. Hockenjos Co., 132 N.J.L. 229, 39 A.2d 80 (Sup.Ct. 1944)].

E. Most decisions place the burden of proving that the landlord acted unreasonably on tenant and the Restatement supports this position. Further, tenant has the burden of furnishing information to landlord to demonstrate that the subtenant is acceptable and landlord is not bound to request information from the tenant to assist the landlord in making its decision. See D'Oca v. Delfakis, 636 P.2d 1252 (Ariz. Ct. App. 1981).

F. Landlord has a duty to process the information given by the tenant in a timely manner and failing to do so may result in a finding of unreasonable withholding of consent. In Parr v. Triple L&J Corp., 107 P.3d 1104 (Colo. Ct. App. 2004), the Court rejected defendants' argument that they did not refuse consent, but rather delayed giving a response to tenant, and held that delaying consent is tantamount to withholding.

III. Specific Scenarios/Case Law

A. Objective standards of measurable criteria that relate to the landlord's interest in preserving the value of its property will likely pass the "reasonableness" test. If any of the objective standards are not met such that the landlord is not assured of all the benefits of the bargain under the prime lease OR if the existence of the sublease could have a detrimental effect on the value of the property, then it is reasonable for landlord to refuse consent.

1. In Fernandez v. Vazquez, Fla.App. 397 So.2d 1171 (1981), the Court cited the objective standards to be considered:

a. financial responsibility of the proposed subtenant.

b. the "identity" or "business character" of the subtenant or its suitability to the particular building:

(i) is the subtenant someone with whom the landlord has been involved in legal disputes;

(ii) is the tenant already a tenant in the building and would subleasing mean that other vacant space not leased;

(iii) is the subtenant not in keeping with the standards of the building or is a government agency or department;

(iv) would the subtenant's use place a greater burden on parking or elevators.

c. the need for alteration of the premises. (Note: In Time, Inc. v. Sidney Tager, 260 N.Y.S.2d 413, 46 Misc.2d 658 (1965), the court found for the landlord of the Time-Life Building who had no objection to the identity of the subtenant but yet refused consent because landlord had an interest in not having its building subdivided into smaller spaces.)

d. the legality of the proposed use;

e. the nature of the occupancy – office, factory, clinic.

B. Refusing consent based on subjective standards will likely fail the “reasonableness” test. These involve any refusal to consent or conditioning of consent as a negotiating tactic to improve the landlord’s economic position or as a means to gain economic advantage over what landlord has bargained for under the prime lease. Subjective standards also involve refusal based on the personal taste of the landlord. Examples of subjective standards include:

1. conditioning consent on:

- a. increasing rent to market rent of building.
- b. tenant paying landlord excess rent over the prime lease rent.
- c. requiring that sublease rent not be less than the market rent of the building.
- d. payment by tenant of a fee unrelated to economic risk.

2. refusing consent because the proposed subtenant was a tenant in another building owned by the landlord. In Krieger v. Helmsley-Spear, Inc., 62 N.J. 423, 302 A.2d 129 (1973), the court found for the tenant holding that it was unreasonable for landlord to refuse consent because the proposed subtenant was a tenant of another building owned by landlord and would create a vacancy in that other building. The court found that “the clause is for the protection of the landlord in its ownership of that particular building, not general economic protection.”

3. refusing consent to sublease space for a specific use that is counter to the landlord’s principles. In American Book Company v. Yeshiva University Development Foundation, Inc., 297 N.Y.S.2d 156 (1969), the tenant requested consent to sublease space to Planned Parenthood-World Population. The landlord refused on the grounds that doctrinal differences would make it difficult to co-exist in the same building. The Court held that the institution is bound by the same standards of commercial responsibility as any other commercial property owner.

IV. Best Practices for Landlords

A. Standards for Approval. Include in the lease sublease section a provision listing the standards for approval which, if any are not met, it shall be deemed reasonable for landlord to withhold its consent, including: (a) Tenant is in default at the time of the request; (b) the subletting would cause Landlord to be in violation of its obligations under another lease to which Landlord is a party; (c) Landlord has sued or been sued by the proposed subtenant; (d) the proposed subtenant has a smaller net worth than Tenant had on the date of the Lease; (e) the sublease will result in there being more than one subtenant of the Premises; (f) the proposed subtenant's business will impose a burden on the Building's parking facilities or elevators, greater than the burden imposed by Tenant; (g) the proposed subtenant refuses to enter into a written sublease agreement providing that it will comply with all of the terms and conditions of this Lease for the term of the sublease; (h) the use of the Premises by the proposed subtenant will not be identical to the use conducted by Tenant; (i) the subtenant is a governmental or quasi-governmental agency or department; (j) any guarantor of this Lease refuses to consent to the subletting; (k) the proposed subtenant is an existing tenant of the Building or is negotiating with Landlord for the lease of space in the Building; (l) the subtenant is involved in a business which is not in keeping with the then current standards of the Building; or (m) Landlord is marketing space in the Building at the time of Tenant's request and the terms of a proposed subletting is at a rent less than the fair market rental rate in the Building at the time of Tenant's request to sublet.

B. Excess Rent. Incorporate a sublease fee provision whereby landlord is entitled to receive from tenant, as additional rent, 50% (or 100% if all or a substantial part of the premises is being sublet) of all amounts received by tenant from the subtenant (including sublease rent, key money and payment by the subtenant to the tenant in excess of market value for services, e.g., sharing of mail rooms and photocopy machines, and sale of office furniture and equipment to the subtenant) in excess of the amounts payable to landlord under the prime lease, after first deducting all of tenant's costs incurred in connection with the sublease, e.g., brokerage commissions, legal fees, alterations paid by the tenant, cash inducements, rent subsidies, lease assumption costs and moving allowances.

Sample Clause:

Landlord shall be entitled to receive from Tenant (as and when received by Tenant) as an item of additional rent one-half of all amounts received by Tenant from the subtenant in excess of the amounts payable by Tenant to Landlord hereunder (the "Sublease Fee"). The Sublease Fee shall be reduced by the reasonable brokerage commissions and legal fees actually paid by Tenant in order to sublet a portion of the Premises. "Sublease Fee" shall mean all Base Rent, additional rent or other consideration of any type whatsoever payable by the subtenant in excess of the Base Rent and additional rent payable by Tenant under this Lease. Sublease Fee shall also include, but not be limited to, key money paid by subtenant to Tenant in connection with the sublease, and any payment in excess of fair market value for services rendered by Tenant to the subtenant or for assets, fixtures, equipment, or furniture transferred by Tenant to the subtenant in connection with such sublease.

C. Recapture Provision. Incorporate a landlord recapture right which grants landlord the option to terminate the lease with respect to the portion of the entire premises sought to be sublet with appropriate adjustment of rent and right to construct partitions to sever the spaces.

Sample Clause:

Notwithstanding anything to the contrary contained in this Lease, Landlord shall have the option, by giving written notice to Tenant within thirty (30) days after receipt of any request by Tenant to sublease space in the Premises, to terminate this Lease with respect to said space as of the date thirty (30) days after Landlord's election. In the event of a recapture by Landlord, if this Lease shall be canceled with respect to less than the entire Premises, the Base Rent, and additional rent and the number of parking spaces Tenant may use shall be adjusted on the basis of the number of rentable square feet retained by Tenant in proportion to the number of rentable square feet contained in the original Premises, and this Lease as so amended shall continue thereafter in full force and effect, and upon request of either party, the parties shall execute written confirmation of same. If Landlord recaptures only a portion of the Premises, it shall construct and erect at its sole cost such partitions as may be required to sever the space to be retained by Tenant from the space recaptured by Landlord. Landlord may, at its option, lease any recaptured portion of the Premises to the proposed subtenant or to any other person or entity without liability to Tenant.