

Leasing And Liability Issues Regarding Flood Risks

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Review Your Current Leases

- Tenant Insurance Requirements
- Tenant Insurance Certificates/Policies
- Maintenance and Repair Obligations
(Building vs. Premises)
- Liability, Indemnity and Release Provisions

Review Your Current Leases

- Damage/Destruction
- Utility and Other Services
- Right to Enter Premises
- Force Majeure

Tenant Insurance Requirements

➤ Commercial General Liability

- Against liability incidental to the use of or resulting from any accident occurring in or upon the Premises, covering bodily injury and property damage liability
- Does it include Contractual Liability insuring Tenant's indemnity obligations?

Tenant Insurance Requirements

➤ Property/Hazard Coverage

- Protecting Tenant against loss of or damage to Tenant's alterations, improvements, carpeting, fixtures, inventory and other business personal property to the full replacement value of the property
- May cover entire Building depending on Tenant's Occupancy (*e.g.*, ground leases)

Tenant Insurance Requirements

➤ Flood Insurance

- Commercial Flood Insurance not available
- Federal Flood Insurance
 - Takes effect 30 days after purchasing
 - Benefits are Capped

Tenant Insurance Requirements

➤ Business Interruption

- Insuring 6-12 months of rent payments
- Net Profits
- Other Fixed Charges and Expenses

Tenant Insurance Certificates/Policies

- Make sure you have copies of Certificates of Insurance/Policies for each policy required under the Lease
- Name the Landlord as additional insureds on Liability Policies and Business Interruption
- Name Landlord as Loss Payee on Property Policies

Tenant Insurance Certificates/Policies

- Must Landlord's Lender be named?
- Non-Cancellable without Notice
- Use clauses and ensuring that Tenant's use will not invalidate insurance
- May Landlord Obtain Coverage if Tenant Has Not?

Landlord Insurance

- What Does Landlord's Mortgage Require?
- Commercial Liability
- Rental Loss/Business Interruption

Landlord Insurance

➤ Property/Hazard Coverage

➤ Flood Coverage

- Make sure all policies are in the proper owner's name!
- . . . and that all appropriate agents, managers, lenders, etc. are Additional Insureds!

Maintenance and Repair Obligations

- Landlord shall repair and maintain the structural portions of the roof, foundation and exterior walls, including the basic plumbing, air conditioning, heating and electrical systems which do not serve the Premises exclusively

Maintenance and Repair Obligations

- Tenant shall keep the Premises in good condition and repair, including windows, glass, plate glass, doors, skylights, interior walls and finish work, floors and floor coverings, electrical systems and fixtures, plumbing work and fixtures and heating, ventilating and air conditioning equipment, and in compliance with all applicable governmental laws

Maintenance and Repair Obligations

- Does Lease allow closure of Common Areas (is Notice Required)?
- Storage of Hazardous Materials in a safe location

Liability, Indemnity and Release Provisions

- Typical clauses include a Release of Landlord from Certain Liabilities
 - *e.g., “. . . all claims against them for any damage to any property or any injury to any person in or about the Premises or the Shopping Center by or from any cause whatsoever . . .”*
- But, includes an Exception to the extent that the damage arises from Landlord’s Negligence/Gross Negligence

Liability, Indemnity and Release Provisions

- *Typical clauses include an Indemnity from the Tenant for certain personal injury and property damage occurring in or about the Premises, but is usually limited by some causation requirement*
 - *Tenant's negligence, Tenant's act or omission, breach of covenants in Lease, failure to comply with law, etc.*

Liability, Indemnity and Release Provisions

- *Leases often contain a separate Release for damage caused by things out of Landlord's control*
 - *e.g., rain/water leakage of any character from the roof, windows, walls, basement, pipes, plumbing works or appliances, obstructions of or bursting pipes or sprinklers, etc.*
 - *Any exceptions for negligence/gross negligence?*

Damage/Destruction

- What are Mortgage Requirements?
 - May Bank require that insurance proceeds be used to pay off loan?
- What are Landlord's and Tenant's Repair Obligations?
- Does Lease distinguish between Partial and Complete Destruction?

Damage/Destruction

➤ Is Landlord Obligated to Repair?

- Is damage covered by insurance?
- How long will repairs take to complete?
- Must Landlord give Notice of Intent to Repair?

Damage/Destruction

- Does Tenant get Rental Abatement?
- Does either Party have Right to Terminate?
Under What Circumstances?
- Are there any Options to Renew or Options to Purchase?
- Landlord should not be obligated to repair Tenant's property

Utility and Other Services

- Is Landlord liable for any interruption or failure of Utility Services on or to the Premises?
- What about interruptions to Access?
- Does Tenant have any Abatement Rights?
- Termination Rights?

Right to Enter Premises

- During emergencies, Landlord should not be required to give notice to Tenants prior to entry
- If Lease contains no exception, give Tenants notice now

Force Majeure

- Excuses one or both parties from performing obligations in the Lease when failure is caused by events beyond such party's reasonable control
 - Acts of God, war, civil commotion, labor disputes, strikes, fire, flood or other casualty, shortages of labor or material, government regulation or restriction and weather conditions

Force Majeure

- Extends time for performing obligations by a period of time equal to the duration of such events
 - Landlord's obligation to provide utilities
 - Landlord's obligation to repair Damage
 - Does not apply to inability to pay Money Due

Residential Landlord/Tenant Issues

- › Residential Landlord Tenant Act, RCW 59.18
- › Landlord must maintain the premises to substantially comply with any applicable code
- › Landlord must maintain the structural components in reasonably good repair so as to be usable and capable of resisting any and all normal forces and loads to which they may be subjected
- › Landlord must keep any shared or common areas reasonably clean, sanitary, and safe from defects increasing the hazards of fire or accident
- › Landlord must maintain the dwelling unit in reasonably weathertight condition

Residential Landlord/Tenant Issues

- Tenant must provide notice to repair defective condition
 - 24 hours, where the condition deprives the tenant of hot or cold water, heat, or electricity, or is imminently hazardous to life
 - 72 hours, where the condition deprives the tenant of the use of a refrigerator, range and oven, or a major plumbing fixture supplied by the landlord
 - 10 days in all other cases
 - If completion is delayed due to circumstances beyond the landlord's control, landlord shall remedy the defective condition as soon as possible

Residential Landlord/Tenant Issues

➤ Tenant Remedies if not Repaired:

- Tenant may terminate without further obligation
- Tenant may submit to the landlord an estimate of the cost to perform the repairs and after notice and failure to repair within applicable time period, the tenant may cause it to be repaired (some limitations)

Residential Landlord/Tenant Issues

➤ Tenant Must:

- Keep that part of the premises as clean and sanitary as the conditions of the premises permit
- Shall not unreasonably withhold consent to the landlord to enter into the dwelling unit
- The landlord may enter the dwelling unit without consent of the tenant in case of emergency or abandonment
- Except in the case of emergency or if it is impracticable to do so, Landlord shall give Tenant at least 2 days' notice of intent to enter and shall enter only at reasonable times

Residential Landlord/Tenant Issues

- Landlord shall not be required to pay relocation assistance to any displaced tenant in a case in which the condemnation or no occupancy order affects one or more dwelling units and results from conditions arising from a natural disaster

Purchase and Sale Issues

- Who Bears the Risk of Loss?
- May Either Party terminate the Purchase and Sale Agreement?
- May Purchaser elect to close despite a casualty and have Seller turn over insurance proceeds?

Liability Issues for Property Owners

- Inverse Condemnation may occur when surface water is collected by artificial means, channeled and deposited on private property, thereby causing permanent or recurring damage
- Trespass requires that through intentional or negligent action one causes the intrusion (of water) onto the property of another

Liability Issues for Property Owners

- There may be defenses or immunities available depending on the particular facts and situation
- Have been involved in water damage cases involving directing of water onto the property of another
- Will not know what law may apply or whether any liability may attach until after flooding occurs

Thank You!

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