

Lease Condemnation, Insurance, and Indemnity Provisions

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Condemnation Clauses

Lease Language (*typical provision*)

Drafted 100 years ago

By someone who didn't practice eminent domain

Copied and pasted repeatedly into subsequent leases

Almost no one reads the condemnation clause in a lease agreement

Welcome to Windows NT 4.0 Service Pack 6 Setup.

Before installing this Service Pack, we recommend that you close all other applications, backup your system, and update your Emergency Repair diskette. When Service Pack Setup completes, you will need to shutdown and restart Windows NT.

To continue, please read the following license agreement and indicate your acceptance:

SUPPLEMENTAL END USER LICENSE AGREEMENT FOR MICROSOFT SOFTWARE

IMPORTANT: READ CAREFULLY - The Microsoft Corporation ("Microsoft") operating system components which you are about to install, including any "online" or electronic documentation ("OS COMPONENTS"), are subject to the terms and

- Accept the License Agreement (must accept before installing the Service Pack)
- Backup files necessary to uninstall this Service Pack at a later time (requires approximately 60MB additional disk space)

Standard Lease Clauses

Lease Language (*BOMA Standard Form*)

9.1 *Eminent Domain.*

If a condemning authority takes title by eminent domain or by agreement in lieu thereof to the entire Building or a portion sufficient to render the Premises unsuitable for Tenant's use, then either party may elect to terminate this Lease effective on the date that possession is taken by the condemning authority. If this Lease is not terminated, then Base Rent shall be reduced for the remainder of the term in an amount proportionate to the reduction in area of the Premises caused by the taking. All condemnation proceeds shall belong to Landlord, and Tenant shall have no claim against Landlord or the condemnation award because of the taking.

Issues with this language?



1. Who decides if the partial taking constitutes *“a portion sufficient to render the Premises unsuitable for Tenant’s use?”*



2. What is the point of allowing either party to *“terminate this Lease effective on the date that possession is taken by the condemning authority?”*



3. Why does landlord get all the compensation?



4. Is rent abatement for a partial taking a sufficient remedy? What about if the tenant loses parking or access or visibility?



5. What about temporary construction easements?

Issues to watch for

Does the language accurately reflect the law of Washington?

Landlord shall be entitled to any and all lost income, rent, award, or any interest whatsoever in or upon any such sum of just compensation, which may be paid or made in connection with any such public or quasi-public use or purpose, and Tenant hereby assigns to Landlord any interest it may have in or claim to all or any part of such sums.

Issues to watch for

Does the provision fairly allocate just compensation?

Leasehold interest (below market?)

Fixtures and improvements

Severance damages

Relocation reimbursement (including trade fixtures)

If any substantial part of the Building shall be taken or appropriated by any public or quasi-public authority under the power of eminent domain or conveyance in lieu thereof, and regardless of whether the Premises or any part thereof are so taken or appropriated, Landlord shall have the right, at its sole option, to terminate this Lease. Landlord shall be entitled to any and all income, rent, award, or any interest whatsoever in or upon any such sum, which may be paid or made in connection with any such public or quasi-public use or purpose, and Tenant hereby assigns to Landlord any interest it may have in or claim to all or any part of such sums, other than any separate award which may be made with respect to Tenant's trade fixtures and moving expenses; Tenant shall make no claim for the value of any unexpired Term.

Issues to watch for

Does the lease handle full and partial takings differently?
Rent reduction or abatement for partial taking

13.02 Entire Taking. If the entire Premises are taken by eminent domain, this Lease shall automatically end on the earlier of the date title vests or the date Tenant is dispossessed by the condemning authority.

13.03 Partial Taking. If the taking of a part of the Premises materially interferes with Tenant's ability to continue its business operations ... then Tenant may end this Lease If there is a partial taking and this Lease continues, then the Lease shall end as to the part taken and the Rent shall abate and be equitably reduced on a pro rata basis.

Issues to watch for

Does the Lease address TCE's?

13.08 Temporary Condemnation. If part or all of the Premises are condemned for a limited period of time, this Lease shall remain in effect. The Rent and Tenant's obligations for the part of the Premises taken shall abate during the Temporary Condemnation in proportion to the part of the Premises that Tenant is unable to use Landlord shall receive the entire award of just compensation for the Temporary Condemnation, except that Tenant shall be entitled to receive any portion of the award for interruption of business and damage to personal property.

Issues to watch for

When may the lease be terminated and by **whom**?

15. Condemnation. The parties hereto agree that if the leased premises, or any part thereof, shall be taken or appropriated for public use by any public or quasi-public authority during the term of this lease, that this lease shall terminate as of the date of such appropriation and all condemnation proceeds shall be the sole property of Lessor; it is further agreed that if this lease is terminated because of such taking of the property, that the monthly rental for the month in which the condemnation taking occurs shall be prorated between the parties hereto.

Issues to watch for

When may the lease be terminated and by *whom*?

This Lease will terminate upon the earliest to occur of the following:

Upon notice by Landlord to Tenant if all or any material portion of the Leased Premises is condemned.

Upon notice by Tenant to Landlord if all or any material portion of the Leased Premises is condemned.

But what if the Port is the
condemnor?

Issues Peculiar to Ports

Ports also have the power to condemn property.

Your leases should distinguish between a *Port* condemnation and a condemnation by any other entity.

This makes it even more imperative that you don't rely on the cut-paste from other leases.

RCW 53.08.010 – Port power to condemn

- **Acquisition of property—Levy of assessments.**

- A port district may acquire by purchase, for cash or on deferred payments for a period not exceeding twenty years, **or by condemnation**, or both, all lands, property, property rights, leases, or easements necessary for its purposes and may exercise the right of eminent domain in the acquirement or damaging of all such lands, property, and property rights, and may levy and collect assessments upon property for the payment of all damages and compensation in carrying out its purposes, and **such right shall be exercised in the same manner and by the same procedure as provided for cities of the first class** insofar as consistent with this title, and in connection therewith the county treasurer shall perform the duties of the treasurers of such cities.

RCW 8.12.030 – City power to condemn

- **Condemnation authorized—Purposes enumerated.**

- Every city and town and each unclassified city and town within the state of Washington, is hereby **authorized and empowered to condemn land and property, including state, county and school lands** and property for streets, avenues, alleys, highways, bridges, approaches, culverts, drains, ditches, public squares, public markets, city and town halls, jails and other public buildings, and for the opening and widening, widening and extending, altering and straightening of any street, avenue, alley or highway, and to damage any land or other property for any such purpose or for the purpose of making changes in the grade of any street, avenue, alley or highway, or for the construction of slopes or retaining walls for cuts and fills upon real property abutting on any street, avenue, alley or highway now ordered to be, or such as shall hereafter be ordered to be opened, extended, altered, straightened or graded, or for the purpose of draining swamps, marshes, tidelands, tide flats or ponds, or filling the same, within the limits of such city, and to condemn land or property, or to damage the same, either within or without the limits of such city for public parks, drives and boulevards, hospitals, pesthouses, drains and sewers, garbage crematories and destructors and dumping grounds for the destruction, deposit or burial of dead animals, manure, dung, rubbish, and other offal, and for aqueducts, reservoirs, pumping stations and other structures for conveying into and through such city a supply of fresh water, and for the purpose of protecting such supply of fresh water from pollution, **and to condemn land and other property and damage the same for such and for any other public use after just compensation having been first made or paid into court for the owner in the manner prescribed by this chapter.**

Issues to watch for when the Port condemns



1. Start early when condemning – do not assume tenant will “work with you.”



2. Landlord typically gets the just compensation in lease clauses – but in this case, the condemnor is also the landlord – needs to be addressed.



3. Grant funding agencies often do not like Ports using termination provisions against the lessees (consider termination at Lessee’s option only)



4. What about when a lessee owns the improvements – and the Port owns the ground under them?



5. The law often assumes separate condemnor and condemnee – so if not addressed in the lease, it becomes a danceto apply the law in Port takings.

Drafting a Better Provision

Lease Language (*drafting a better provision*)

When reserving tenant right to relocation reimbursement, include language that tenant is entitled only if (and to the extent that) condemning agency so determines.

Should landlord have option to terminate lease agreement. Why would they need to? Tenant's option only perhaps.

Require landlord and tenant to consent to each other's settlements?

Indemnity Clauses

Leasing Indemnity Clause

- “Indemnify” vs. “Defend” vs. “Hold Harmless”

- Typical Lease Indemnification:

Tenant’s Standard of Care.

Exception for Landlord’s Conduct.

Additional Tenant Indemnity Considerations:

- Types of Claims
- Survival of expiration or earlier termination
- Defense Costs; approval of counsel
- Comparative negligence



Restrictions on a Port's authority to Indemnify


- Washington caselaw and Attorney General Opinions suggest that a Port does not have the express statutory authority to indemnify a lessee.

Barendregt v. Walla Walla School District (1980)

- Court of Appeals, Division III
- Holding: Penitentiary did not have authority to bind the State to indemnify the school district from lawsuits involving personnel hired to teach at the penitentiary.
- Finding: An agency lacks the power to indemnify unless the authority is granted by statute.


Kramarevcky v. DSHS (1993)

- WA Supreme Court
- Citing *Barendregt* case.
- When an agency has no statutory authority to take an action, the party dealing with the agency is automatically charged with the knowledge of the lack of authority.



- 2013 Attorney General Opinion on authority of Irrigation Districts (AGO 2013, No. 2)

- Answer: Irrigation Districts do not have the express statutory authority nor the implied authority to enter into contracts indemnifying another party (Bureau of Reclamation).



- Finding: RCW does not give authority to assume the financial risk of indemnifying the United States for injuries or damages for which the United States is otherwise liable.

Port Powers under RCW 53.08

PDF

RCW 53.08.080

Lease of property—Authorized—Duration.

A district may lease all lands, wharves, docks and real and personal property owned and controlled by it, for such purposes and upon such terms as the port commission deems proper: PROVIDED, That no lease shall be for a period longer than fifty years with option for extensions for up to an additional thirty years, except where the property involved is or is to be devoted to airport purposes the port commission may lease said property for such period as may equal the estimated useful life of such work or facilities, but not to exceed seventy-five years: PROVIDED FURTHER, That where the property is held by the district under lease from the United States government or the state of Washington, or any agency or department thereof, the port commission may sublease said property, with option for extensions, up to the total term and extensions thereof permitted by such lease, but in any event not to exceed ninety years.

[1989 c 298 s 2; 1983 c 64 s 1; 1973 c 87 s 1; 1961 ex.s. c 8 s 1; 1959 c 157 s 1; 1955 c 65 s 9. Prior: 1953 c 243 s 1; 1943 c 166 s 2, part; 1921 c 183 s 1, part; 1917 c 125 s 1, part; 1913 c 62 s 4, part; 1911 c 92 s 4, part; Rem. Supp. 1943 s 9692, part.]

Practice Tips: How to Treat Indemnity Provisions in your Lease

- Options:

1) Port does / does not grant indemnity.

2) Savings Clause

- Port indemnifies Tenant for negligence or intentional misconduct, to the extent permitted by law.

3) Severability Provision

- Any provision which proves to be invalid, void or illegal in no way impairs or invalidates any other leasing provisions.

4) Other?

Insurance Clauses

Double Net Lease (net-net)

Triple Net: property taxes, insurance and maintenance.

Port's property insurance:

Lessee to reimburse for its pro rata share in square feet.

Types of Tenant's Insurance:

- a. Commercial General Liability (CGL);
- b. Auto Liability;
- c. Worker's Compensation;
- d. Business Interruption Insurance; and
- e. Pollution Liability Insurance?

Other Insurance Provisions

- Alternative Insurance Coverage
- Evidence of Insurance (Certificate)
- Notice of Cancellation
- Waiver of Subrogation
- Periodic Reviews (increases over time)



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
09/15/2022

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER: Insurance Agent Agency Address Agent Contact Information		CONTACT NAME:	
		PHONE A/C, No, Ext): 855-566-1011	FAX A/C, No, Ext):
		E-MAIL ADDRESS: Support@coterieinsurance.com	
INSURED: Business Name Mailing Address		INSURER(S) AFFORDING COVERAGE	
		INSURER A: Insurance Company Name	NAIC # XXXXX
		INSURER B:	
		INSURER C:	
		INSURER D:	
		INSURER E:	
		INSURER F:	

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTD	TYPE OF INSURANCE	ADDL NSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS	
X	COMMERCIAL GENERAL LIABILITY			Policy Number	xxx/xx/xxxx	xx/xx/xxxx	EACH OCCURRENCE	\$1,000,000
	CLAIMS MADE		X OCCUR				DAMAGE TO RENTED PREMISES (Ea occurrence)	\$50,000
A	Hired Non-Owned Auto			Policy Number	xxx/xx/xxxx	xx/xx/xxxx	MED EXP (Any one person)	\$5,000
							PERSONAL & ADV INJURY	\$1,000,000
							GENERAL AGGREGATE	\$2,000,000

GENL AGGREGATE LIMIT APPLIES PER:

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