

Port Property And Terminal Lease Workshop

“The Nature and Structures of Marine Terminal Leases”



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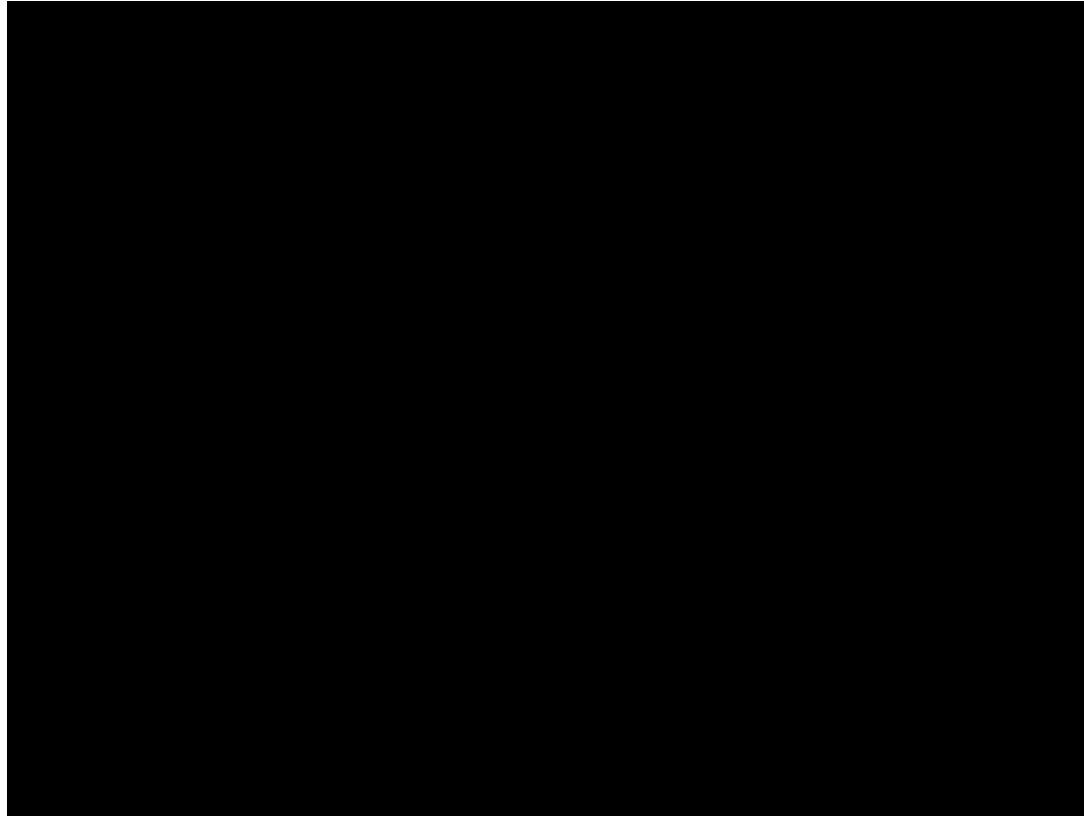
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General Lease Provisions - It's not your grandfather's lease any more

- ▶ While some leases are as old as your grandfather, when they come up for renewal or when they are negotiated anew, they may not look like the form leases of old.
- ▶ More complex provisions may be needed to address specialty areas, unique defined terms and specialized applications in new/evolving areas of law.
- ▶ New leases today may serve additional purposes in addition to setting forth the terms of the deal, the pricing and other traditional contract terms.
- ▶ Leases can also be structured to try to address citizen concerns, achieve a social purpose or to improve quality of the area/locale/environment.
- ▶ Leases can include provisions to try to address citizen opposition to new projects by including sustainability considerations, green infrastructure and environmental justice components.

Lease provisions may address environmental justice because:



Can your lease address potential community issues?

- ▶ Siting considerations can reference environmental justice as a factor to consider.
- ▶ Noise, lights and other factors can be referenced as a consideration by tenant to reduce impacts to the community.
- ▶ Including enhanced environmental protections in lease can show enhanced considerations to the community.

Innovative Lease Provisions addressing new areas of focus can include:

- ▶ Requirements or incentives for tenants to reduce air pollution emissions by:
- ▶ Requiring vessels to use shore side power
- ▶ Reduce vessel speed
- ▶ Use low emission yard equipment
- ▶ Purchase green commodities
- ▶ Install solar panels

Lease provisions increasingly address water resource issues:

- ▶ Specific requirements to address tenant stockpiles, storage pile maintenance, storm water retention and reuse of water for dust control
- ▶ Lease requirements for a water management plan, drainage plans from storage piles or stockpiles
- ▶ Treatment before discharge
- ▶ Recycling
- ▶ Water stewardship, wet suppression systems
- ▶ Treatment ponds

Leases May Incorporate Best Management Practices - Material Control

- ▶ Attention to issues at transfer points
- ▶ Address fugitive particulate matter from bulk stockpiles, including dustfall monitoring
- ▶ Storage requirements, including covered storage, for materials
- ▶ Best Management Practices standards referenced in lease in variety of media
- ▶ Construction and development provisions - during tenant initial construction and development activities on Property, leases can include requirements relating to erosion control, sediment discharges and other impacts, by requiring Storm Water Pollution Prevention Plans to avoid negatively property during earth-disturbing activities.

Leases May Shift Some of the Burden of Policing to Tenants - Tenant Questionnaires

- ▶ Include in lease an obligation that tenant must complete a questionnaire annually to submit to landlord. The form questionnaire is attached to the lease as an exhibit which is made into a tenant obligation and enforceable as part of the lease.
- ▶ The questionnaire may require tenant to affirmatively identify information to landlord - such as uses, permits, materials used on the property, spills, releases, etc. If these things change from year to year, the tenant has to reflect that on the completed questionnaire submitted annually.

Annual Tenant Questionnaires identify new information with less output of resources

- ▶ Puts the onus on tenant to advise/update Landlord at least once a year about the condition of the property and does not require manpower from Landlord's staff. Failure to properly identify or fill out the questionnaire is a breach of the lease, which provides a remedy to Landlord.
- ▶ Transfers the burden of the time and resources to police the tenant operations from Landlord to the tenant and can help landlord obtain annual information without having to expend large amounts of internal resources.

Talking about terms - problem: internal inconsistency and vague terms

- ▶ Samples of typical lease terms show internal inconsistencies - form leases need to be updated and clarified periodically. Here, in the original lease term, the lessee is at the same time told that it must immediately cause any subtenant to cease improper use. However, later in the same paragraph it provides that lessee may have a reasonable period of time to cause the subtenant to cease improper use.
- ▶ 1.3.2 Lessee shall not use the Premises for any purpose other than the Permitted Uses. If, in the reasonable opinion of Lessor, the Premises or any part thereof is being used for any use or purpose other than the Permitted Uses, Lessee shall immediately cease, and cause any subtenant, assignee, licensee or occupant of the Premises to cease, such improper use following receipt of notice from Lessor to Lessee. Lessee's failure to comply with such notice shall constitute an immediate default by Lessee of this Agreement ... provided, however, that if any assignee, subtenant, licensee or occupant of the Premises is using the Premises for any purpose other than the Permitted Uses, Lessee shall have a reasonable period of time to cause the cessation of such improper use.

Revision to Strengthen Lessor's Rights

- ▶ In this revised provision below, the edits have strengthened the Lessor's right to make the determination by making it in the Lessor's sole discretion and providing a time limit to ensure that any subtenant ceases improper use (5 days) instead of having an indefinite "reasonable period of time" to cause the subtenant to stop.
- ▶ 1.3.2 Lessee shall not use the Premises for any purpose other than the Permitted Uses. If, in **Lessor's sole discretion**, the Premises or any part thereof is being used for any use or purpose other than the Permitted Uses, **Lessee shall immediately cease such improper use** following receipt of notice from Lessor to Lessee. If any assignee, subtenant, licensee or occupant of the Premises is using the Premises for any purpose other than the Permitted Uses, **Lessee shall have five calendar days to cause the cessation of such improper use**. Lessee's failure to comply with such notice, or cause any subtenant, assignee, licensee or occupant to comply within the proscribed time period shall constitute an immediate default by Lessee of this Agreement.

Talking About Terms - Issue: Lack of Context

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“If the Leasehold Improvements should be damaged by fire, explosion, windstorm, flood or other casualty but the same are not made untenable, ... then, this Lease shall continue in full force and effect and **Lessee shall promptly and diligently repair and restore the Leasehold Improvements to substantially the same condition existing prior to such damage destruction....”**

Revisions can add context by first establishing the baseline conditions, then updating them.

- ▶ “The state and condition of the Premises and any improvements, structures and facilities located thereon at the Effective Date shall, for purposes of this Agreement, be the condition as established by the base line survey (“Base Line Survey”), performed by representatives of Lessor and Lessee at the commencement of the Initial Term under the Lease and Operating Agreement between Lessor and Lessee.”
 - ▶ But in a lease which could run 70 years, more than a baseline is needed.
- ▶ “If requested by Lessor, Lessee shall cause to be performed annually at its sole cost and expense an assessment or audit of the Leased Premises of such scope and type requested by Lessor. ... All information, test results or reports that may be generated in the course of such assessment shall be promptly furnished to Lessor.”

Increased certainty can be achieved by better defining the parties' responsibilities.

- ▶ “Landlord shall be responsible for any environmental liability arising from conditions or circumstances occurring on the Leased Premises prior to the Effective Date.”
- ▶ “Tenant shall be responsible for any environmental liability arising from conditions or circumstances occurring on the Leased Premises during the Term of this Lease.”
 - ▶ Again this seems straightforward but, how do we lessen future disputes?
- ▶ “As soon as practicable after the Site Delivery Date, Landlord and Tenant shall cause such mutually agreed and nationally recognized environmental consultant to perform an environmental site assessment of the Leased Premises in accordance with ASTM's environmental assessment standards (the “*Environmental Site Assessment*”), and it will be used as a baseline for determining the condition of the Leased Premises as of the Site Delivery Date.”

- ▶ Here, the issue is having some documentation on determining the baseline condition of the Leased Premises.
- ▶ As soon as practicable after the Site Delivery Date, Landlord and Tenant, **at Tenant's sole expense**, shall cause such mutually agreed and nationally recognized environmental consultant to perform **a Phase II** environmental site assessment of the Site in accordance with ASTM's environmental assessment standards (the "***Environmental Site Assessment***"), and it will be used as a baseline for determining the condition of the Site as of the Site Delivery Date. **Tenant shall furnish Landlord with copies of the Environmental Site Assessment within thirty (30) days of the date on which Tenant receives final copies of the Environmental Site Assessment, and they will be used for determining the baseline condition of the Leased Premises as of the Site Delivery Date, unless Landlord provides written notice, within thirty (30) days of Landlord's receipt of final copies of the Environmental Site Assessment, of Landlord's disagreement with the Environmental Site Assessment.**

- ▶ Additional lease provisions provide the Landlord with the option to obtain a second Phase II ESA to contribute to the baseline conditions.
- ▶ This is better, but are there additional ways to improve on it? By defining the conditions which will be the responsibility of the Lessor, then adding a presumption that other environmental conditions founds later will be the responsibility of the lessee, subsequent disputes can be reduced.
- ▶ The identification of any environmental conditions or risks in the Environmental Site Assessment shall constitute agreed evidence of the existence of such environmental conditions or risks at, on, or under the Leased Premises as of the Effective Date. Any environmental conditions or risks concerning the Leased Premises which are identified in the Environmental Site Assessment are referred to herein as the “*Identified Environmental Conditions*”.
- ▶ Any environmental conditions or risks at, on, or under the Leased Premises which are first discovered during the Term of this Lease (after the effective date of the Environmental Site Assessment) will be presumed to have been caused during the Term of this Lease unless they are included in the Identified Environmental Conditions.

Definitions - Can you improve defined terms?

- ▶ Lease A provided an obligation for the Lessee to take steps to remedy environmental conditions if “hazardous waste” was discovered on the leased property. “Hazardous Waste” was defined as follows:
 - ▶ Hazardous Waste shall mean any substance defined as Hazardous Waste in Article 2 of Chapter 6.5 of Division 20 of the California Health and Safety Code, as amended.
- ▶ While the definition of Hazardous Waste under the California Statute is broader than the RCRA definition, it still contains exclusions for certain wastewaters.

- ▶ By tying the Lessee's obligations to a defined term like "Contamination" and defining it more broadly can provide broader coverage and is less likely to miss materials which may have a detrimental effect on the leased property. Instead of tying the tenant obligations to Hazardous Waste, they can be tied to "Contamination."
- ▶ An example of a definition of "Contamination" - "Contamination" includes but is not limited to the presence, suspected presence, or threat of one or more Hazardous Substances in the Environment: (a) which has or may result in pollution, contamination, degradation, impacts, damage, threat or injury caused by, related to, arising from, or in connection with or concerning Hazardous Substances, (b) that may affect, or pose an actual or potential threat or impact to, human health or the Environment, or (c) which is not allowed by Environmental Laws or which is not in compliance with Environmental Laws.
- ▶ By further defining Hazardous Substances, Environment and Environmental Laws, there can be more clarity in the lease language.

- ▶ A broad definition of “Hazardous Substances” may be designed to try to capture things that may be excluded from statutory definitions:
- ▶ “Hazardous Substances” includes, but is not limited to: (a) any chemical, material, mixture, constituent, waste, water or substances defined as or included in the definition of “hazardous substances,” “hazardous wastes,” “hazardous materials,” “toxic substances,” “solid wastes,” “industrial wastes,” “industrial solid or hazardous wastes,” “wastes” or words of similar import, under Environmental Laws, or considered toxic, explosive, corrosive, reactive, flammable, radioactive, or ignitable, (b) any lead or lead-based paint, pesticide, polychlorinated biphenyls (“PCBs”), dioxins, hydrocarbon, petroleum substances, petroleum additive or petroleum product (including but not limited to lead), diesel, fuels, gasoline, natural gas or natural gas products, dry cleaning products or solvents (as well as any and all ingredients, degradation or daughter products or byproducts or constituents thereof of any of the foregoing), (c) any other chemical, material, waste or substance, (or constituent thereof), which is in any way regulated under the Environmental Laws or by any Governmental Entity, including mixtures thereof with other materials, and including any regulated building materials such as asbestos and lead, or (d) any other chemical, material, waste, water, or substance (or constituent thereof), concerning or that may affect or pose an actual or potential threat or impact to human health and the Environment.

- ▶ Other examples of broad definitions: “Environment” includes, but is not limited to, the waters of the United States, the waters of any state, contiguous zone or ocean waters, and any other surface water, groundwater, drinking water, water supply, property, premises, land, subsurface, subsurface strata, sediment, soil, air or atmosphere, as well as all humans, animals, organisms, plants or natural resources located in, under or near thereon.
- ▶ “Environmental Laws” includes, but is not limited to, all federal, state and local statutes, laws, ordinances, regulations, codes, permits, licenses, authorizations and rules, and other provisions having the force and effect of law, in each case as amended, and including any judicial or administrative orders, determinations, writs, injunctions, judgments and decrees relating to human health or safety, Hazardous Substances or the Environment, including without limitation such laws as the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), as amended, 42 U.S.C. § 9601, et seq.; and the Resource Conservation and Recovery Act of 1976 (“RCRA”), as amended, 42 U.S.C. § 6901, et seq., as well as all laws relating to the generation, production, presence, use, distribution, handling, storage, treatment, disposal, transportation, testing, processing, discharge, release, threatened release, control, investigation or cleanup of Hazardous Substances, or the protection of human health, safety, natural resources or ecological impacts.

New fixes for old language - examples:

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- ▶ *Pollution Liability - dealing with long-term lease.* Pollution Legal Liability covering bodily injury, property damage and other losses caused by pollution conditions occurring during the Term, including pollution of any body of water, with limits of not less than \$10,000,000.00 (new language underlined) per occurrence for Lease Years 1 -10, \$13,000,000 per occurrence for Lease Years 11 - 20, \$15,000,000 per occurrence for Lease Years 21-30, \$18,000,000 per occurrence for Lease Years 31-40, \$20,000,000 per occurrence for Lease Years 41 - 50, \$23,500,000 per occurrence for Lease Years 61-70, and \$27,500,000 per occurrence for Lease Years 71- 80. Coverage shall include, but not be limited to, environmental cleanup, remediation and disposal.

Additional Lease considerations

- ▶ Does lease language about the “Property” include submerged lands or waterways surrounding or adjacent to the Leased Premises? Does it need to?
- ▶ Does lease language require Tenant to comply with all requirements of Landlord’s stormwater permit?
- ▶ Does lease language address if and where undergrounds storage tanks can be installed?
- ▶ Does lease language limit storage of hazardous substances within X distance of sensitive/defined areas?
- ▶ Does lease language talk about “environmental conditions or risks at, on or under property? Does it need to include the additional concept of conditions at, on, under or that have migrated from the leased premises” to account for off-site migration?