



MEMORANDUM

Date: March 23, 2020
To: Clients
From: The Opus Law Firm, Justin White
RE: Covid-19 “Coronavirus” pandemic, rights and obligations in commercial leases

The foregoing summarizes general provisions in commercial leases that Landlords and Tenants may invoke for relief and/or enforcement of rights due to the Covid-19 “Coronavirus” pandemic and resulting effects on businesses.

Please note, this memorandum is for informational purposes only and shall not serve or be portrayed as legal advice, nor create a confidential attorney client relationship with the Opus Law Firm. Each lease has language exclusive to the parties and conditions and should be evaluated on a case-by-case basis. Please contact our office for legal advice and guidance specific to your particular lease and/or situation.

Lease Provisions	Example Lease Language	Landlord Position	Tenant Position
Force Majeure	Any prevention, delay or stoppage due to acts of God, inability to obtain services, labor or materials or reasonable substitutes therefore, governmental actions, and other causes beyond the reasonable control of the party obligated to perform, <i>except for Rent and other monetary obligations per the Lease</i> , shall excuse the performance of such party for a period equal to any such prevention, delay or stoppage, and if the Lease specifies a time period for performance of an obligation of either party, that time period shall be extended by the period of any delay.	A force majeure event (such as act of God, governmental action, or causes beyond reasonable control) does not excuse payment of rent or other monetary obligations under the Lease. It only excuses performance for a period of time equal to such stoppage. Whether the coronavirus outbreak constitutes a force majeure event under the Lease will depend on the language of the Lease, the relationship between the epidemic and nonperformance, and applicable law.	Most force majeure clauses are consistent with this provision, and do not excuse rent or other monetary obligations under the Lease. Tenant must look to the language of the provisions in its lease to determine whether this Covid-19 pandemic (a) is a qualifying event under the provision, and (b) if it is a qualifying event, what type of relief Tenant is entitled to.
Common Area Maintenance	Landlord shall maintain the Common Areas of the Project in good repair and safe condition consistent with other Class A Office/Retail Projects in the vicinity.	Landlords need to review their maintenance standards to ensure common areas are being cleaned and maintained to prevent the spread of the	Tenants should ask for Landlord’s standards to determine whether landlords are complying with best practices. A



		virus, especially where the lease provides that the Landlord has an obligation to provide a “safe” condition.	good example is published by the CDC.
Condemnation or Eminent Domain	<p>Permanent Taking – if all or part of the Premises or Building are taken by power of eminent domain or condemned by any competent authority for any public or quasi-public purpose, (a Taking), Landlord shall have the option to terminate the lease upon 90 days’ notice to Tenant, if more than 25% of the RSF of the Premises is taken or if less than 25% of the RSF is taken and Tenant is unable to conduct its business, or if parking or access is substantially interfered with, Tenant has the option to terminate the lease.</p> <p>Temporary Taking – in the event of a temporary taking of all or a portion of the premises for a period of 120 days or less, the Lease shall not terminate but the Base Rent and the Additional Rent shall be abated for the period of such taking (commencing on the date of such taking) in proportion to the remaining RSF of the Premises, provided that if the remaining portion of the Premises is not sufficient to allow Tenant to conduct its business, and Tenant does not conduct its business in the remaining portion, the Base Rent and Additional Rent shall be abated for the entire Premises for such time as Tenant continues to be prevented from using and does not use the Premises. Landlord is entitled to the entire award made in connection with a temporary taking.</p>	The party invoking this clause would have the burden of proving a taking has occurred. It would be difficult to do so without a successful claim against the government accused of effectively taking the premise. In the event that a “Taking” is proven, then the injured party would be able to pursue the taking authority for fair market value of the interest so taken.	<p>Tenant will have to establish that the circumstances preventing Tenant from the use of its Premises is a “Taking” as defined under the lease and pursuant to law.</p> <p>If proven, depending on whether the taking is permanent or temporary will dictate what remedies Tenant may exploit, including rent abatement, rent apportionment, and termination of the lease.</p>



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Insurance	Tenant shall procure, pay for and keep in full force and effect, at all times during the Lease Term – Business income/extra expense insurance sufficient to pay Base Rent and Additional Rent for a period of not less than 12 months.	To the extent rent abatements are given, or Tenants fail to pay, Landlords may look to its rental loss insurance.	Tenants should contact their carriers to see if their business interruption insurance covers payment of rent, and in some cases lost revenues for forced shut downs.
Services and Utilities – In General	[Landlord or Tenant] is responsible, at its sole cost and expense, for furnishing all services and utilities to the Premises, including HVAC, electricity, water, telephone, janitorial and security services, window washing and landscaping.	Landlord should look to the Lease to determine which party is required to provide janitorial and security services under the Lease as those are the most relevant in light of Covid-19. If Landlord is required to perform said services, it should do so to avoid a Landlord default or triggering an “abatement event or condition” under the Lease.	If Landlord fails to provide janitorial and security services, Tenant may seek rent abatement or other remedies under the Lease.
Services and Utilities - Interruption of Use	<p>Landlord shall not be liable for damages, by abatement of rent or otherwise, for Tenant’s failure to receive any service or utility for any reason, and any such failure or delay shall not constitute an eviction or disturbance of Tenant’s use and possession of the Premises or relieve Tenant from paying rent or performing its obligations under the Lease.</p> <p>Landlord shall not be responsible under any circumstances for loss of, or injury to, or interference with Tenant’s business, including loss of profits due to Tenant’s loss or failure to receive any services or utilities.</p>	Landlord will look to the Lease to establish that Tenant is not excused from paying rent or performing its obligations under the lease as a result of interruption and Landlord is not liable for damages to Tenant’s business as a result thereof.	Despite this language, Tenant may be entitled to rent abatement if Landlord’s failure meets the requirements of an “abatement event or condition” which is often provided in these provisions.
Services and Utilities – Abatement Conditions	If Tenant is prevented from using all or a portion of the Premises, including parking, and does not use all or a portion of the Premises for 3 consecutive business days or 7 business days in a calendar year, due	Even if Tenant provides proper notice and meets the time limitations required of an “abatement event or condition”, Landlords oftentimes have	If an abatement condition or event is triggered by Landlord’s failure, Tenant must strictly comply with the notice requirements and time limitations to



	<p>to (i) any service or utility not being provided to the Premises, (ii) because of the presence of Hazardous Materials in violation of applicable laws, (iii) an interruption in service as described in [the services section] and not covered by [the damage, destruction, and casualty provision]; (iv) Tenant does not have access to the Premises or Building not caused by Tenant or Tenant parties, AND such loss of use is covered by insurance Landlord is required to carry, then it shall be considered an “Abatement Condition” and the remaining abatement language below shall apply:</p> <p>Abatement Condition: Tenant shall deliver a “Cure Notice” to Landlord and Landlord has 3 business days to cure the failure. If Landlord fails to cure within those 3 business days, then Rent applicable to the affected portion of the Premises shall be abated from the date that is 3 business days prior to delivery of the Cure Notice. If rent is already paid, Landlord shall credit Tenant or reimburse Tenant within 10 business days the excess payment.</p> <p>If any Abatement Condition is not cured within 90 days after the Cure Notice is received, the Abatement Condition applies to the entire Premises, upon termination notice to Landlord and Lender within 30 days after the expiration of the 90 day period, Tenant may terminate the Lease and such termination will be effective upon Tenant’s vacation of the Premises, but in no event more than 2 years after the receipt of the termination notice.</p>	<p>broad rights and time to cure before triggering rent abatement or termination rights. Further, these provisions usually impose some sort of culpability on the Landlord, whereas the Covid-19 pandemic can be seen as a no-fault cause.</p>	<p>benefit from the abatement or termination rights.</p>
Failure to Pay Rent (Tenant Default)	The occurrence of any one or more of the following events shall constitute a	Landlord will cite this provision first and foremost	Tenant should look to other provisions in the



	<p>“Default” hereunder by Tenant: Tenant fails to make any payment of Rent, as and when due, where such failure shall continue for a period of ten (10) days after written notice thereof from Landlord to Tenant.</p>	<p>in the event Tenant fails to pay its rent as required under the Lease and to seek remedies.</p>	<p>Lease that excuse monetary obligations under the Lease (e.g., taking, interruption, temporary closures).</p>
<p>Abandonment (Tenant Default)</p>	<p>The occurrence of any one or more of the following events shall constitute a “Default” hereunder by Tenant: Tenant abandons or vacates the Premises.</p>	<p>Landlord may assert a Tenant Default under the Lease and invoke its remedies as a result thereof if Tenant is deemed to have “abandoned” the Premises as a result of the requirement to “stay home” and “social distancing.”</p>	<p>Tenant may claim a government mandate to “stay home” or “social distancing” as an exception.</p>
<p>Continued Occupancy (common in retail leases)</p>	<p>Tenant acknowledges that its continued occupancy of the Premises and the regular conduct of its business for the Permitted Use are of the utmost importance to Landlord in avoiding the appearance and impression generally created by vacant space in commercial buildings...Tenant therefore covenants that it will occupy and utilize the entire Premises in the active conduct of its business for the Permitted Use during the whole of the Lease Term hereof and will conduct such business in a reputable, diligent and energetic manner, and maintain a full stock of inventory and a full staff of employees (as may be applicable to Tenant’s Permitted Use). Notwithstanding any provision of this Lease to the contrary, Tenant may close for business for such reasonable times as may be necessary to perform: (i) a remodeling or rebuilding of the Premises, (ii) up to five days in any calendar year for maintenance and repairs to the Premises, (iii) up to two days in each calendar year to conduct an inventory; or (iv) to the extent Tenant may be prohibited from being open for business by applicable law,</p>	<p>Landlord may have an argument that Tenant has breached this provision by failing to “continuously occupy” the Premises if it has closed down as a result of a “stay home” or “social distancing” mandate.</p>	<p>Many leases have exceptions to continued occupancy in light of a “force majeure” event. Tenants should look to the force majeure clause for the definition of a qualifying event to excuse said shut down.</p>



	ordinance or governmental regulation or by reason of Force Majeure.		
Access to Premises	Notwithstanding any provision in the Lease to the contrary, Tenant shall have access to the Project and Premises 24/7/365.	Most leases provide that "Access" to the premises is subject to other provisions in the Lease. Other provisions in the lease provide qualifications and limitations to this access right.	Tenant it may argue that should be guaranteed uninterrupted access to their leased space.
Covenant of Quiet Enjoyment	During the Lease, Tenant has the right to peaceably and quietly enjoy the Premises subject to the Lease terms, without interference by any person lawfully claiming by or through Landlord.	Most leases provide qualifying language directly in this provision thereby making the right subject to all other terms of the Lease, which may provide exceptions to this right.	Tenant may argue it has the right to the use and enjoyment of its Premises. This right is inherent in all leases and Tenant may seek equitable damages for avoidable interference with this right.
Compliance with Laws	If laws are imposed on Landlord or Tenant by any governing body establishing or enforcing health or safety standards for employers, employees or tenants - (i) Tenant agrees, at its sole cost and expense, to comply with such laws if they relate to Tenant Maintenance Items [look at what falls within Tenant's Maintenance obligations], Tenant Improvements or Alterations; and (ii) Landlord shall comply with all laws, including those relating to Landlord Maintenance Items [look at what falls within Landlord's Maintenance obligations], unless such laws are triggered by Tenant Improvements or Alterations, in which case such compliance shall be at Tenant's sole cost.	Landlords should look to its legal compliance requirements to ensure it is meeting any new and ongoing requirements in light of the pandemic.	Tenants may seek relief under this provision if Landlord fails to meet its legal compliance obligations. Likewise, Tenant must comply with any enumerated Tenant compliance requirements, such as government mandated closures.