

JAMES A. GRAASKAMP COLLECTION OF TEACHING MATERIALS
II. CLASSES AT THE UNIVERSITY OF WISCONSIN--MADISON
H. Business 555/527: Commercial Property Development
and Management
3. Assorted Lecture Notes, Undated

527 MONDAY LECTURE NOTES

I. Introductory details

- A. Gene Glick will be interviewing on Thursday, March 2nd in the Business school. Signup sheet.
- B. Hand out architectural materials to prepare for Monday, March 6th.

II. The office lease.

A. Identification of parties

B. Description of premises and optional areas

C. Definition of rent

- 1. Base rent
- 2. Escalator clause
- 3. Escalator index year and audit
- 4. Service charges

D. Term of lease and renewals

- 1. Date of occupancy
- 2. Conditions of occupancy and penalties
- 3. Overstay and automatic renewal
- 4. Prior written notice
- 5. Use of calendar dates rather than ordinate numbers
- 6. Subleasing and assignment

E. Conditions of termination

- 1. In event of casualty loss
- 2. In event of eminent domain
- 3. Death or disability of tenant
- 4. Change of conditions clause for tenant
- 5. Penalties for tenant as liquidated damages
- 6/ Bankruptcy of either party

F. Performance standards for landlord

- 1. Failure to perform - Abatement or optional right to terminate
- 2. Specification as to utility capacity
- 3. Specification for air temperature and humidity control
- 4. Specification for window washing, including venetian blinds, etc.
- 5. Specification for wall-washing and repainting
- 6. Specification of janitorial services, security systems, hours of elevator service, etc.

G. Insurance Agreements

- 1. Hold harmless clauses
- 2. Public liability responsibilities of tenant
- 3. Fire liability of tenant
- 4. Insurance of tenant improvements

H. Sign, window, and display controls (including curtains)

I. Constraints on use and tenant selection

1. Restraints on use of tenant space - broadly or narrowly defined
2. Tenant wishes relative to approval of other tenants in the building
3. Remedies

J. Special features and responsibilities

1. Reservation of parking stalls
2. Use of name on building or on tenant directory in lobby
3. Right of landlord to relocate tenant
4. Responsibility for commercial lease insurance
5. Responsibility for legal costs

K. Tenant improvement allowance from landlord

1. Design fees
2. Partitioning
3. Ceiling system
4. Floor system
5. Special utilities
6. Interior decorating
7. Moving expenses
8. Commissions to be paid

L. Subordinations

555
Spring
1984

1. Graduate students should bring there notes on market comp. to the computer terminal session.
2. Guest speakers in Property Development will be Richard Hilliker and Steve Born.
3. Finish slides on Abby and Makahai Inn.

OWNER-CONTRACTOR LAW

I. Owner Viewpoint

A. Pre-bid or pre-contract qualification

1. By reputation and reference
2. By specialty
3. By bonding power
4. By assignment of specific supers
5. Public agencies may write qualifications to pre-select specific supplies or subs.

B. Control of blueprints for bidding

1. Bidding areas of responsibility rather than specific plans (trade center)
2. Invitation of alternative methods for price advantage
3. Design-price competition

C. Contract provisions

1. Assignability
2. Reference of drawings and specs. into contract
3. Work-change orders
4. Payment procedure
 - a. Who approves construction in place and degree of completion
 - b. Who makes disbursement
 - c. Evidences of payment by contractor
5. Hold-back procedure
6. Definition of completion (occupancy, acceptance, percent paid etc.)
7. Definition of performance standards and workmanship
8. Definition of scheduling and penalties
9. Incentives for speeding completion or reducing costs
10. Limit of liability for consequential losses
11. Definition of accounting procedures and auditor
12. Definition of insurance procedures
13. Conditions for replacing a general or subcontractor
14. Specification of manpower in terms of number, source, workrules, etc.
15. Establishing arbitration procedures

II. Basic insurance problems of the contractor

A. Physical property insurance

1. Specific vs. allrisk coverage
2. Builders risk coverage (reporting for automatic increase forms)
3. Construction is covered in place or on site when billed
4. Installation floater covers goods enroute or before billing in absence of builders risk.

B. Equipment Floater-Scheduled form with deductible

1. Leased or owned
2. Insurance clause under lease provides for recourse for lessees negligence
3. Contractor-lessee must endorse his equipment floater for secondary coverage on leased items
4. Tool crib-bailee for workmens tools

C. Public liability

1. Comprehensive general is anything but
2. Accident vs. occurrence
3. Negligence is only one form of tort-does not include nuisance, statutory liability, assumed liability or intentional acts
4. Direct vs. vicarious liability
5. Design vs. execution exclusion
6. Care custody and control exclusion
7. On-or-off road vehicles
8. Elevator exclusion
9. Statutory liability exclusion (dynamite)
10. Doctrine of attractive nuisance

D. Non-insurance benefits of liability coverage

1. Legal retainer to investigate and defend
2. Safety methods engineering
3. Intervening neutral third party
4. Medical pay without fault for public relations
5. Long term competitive advantage for good management through experience rating

GENERAL CONTRACTING BIDDING PROCESS

- A. Private owners may proceed anyway they choose but often bidding is by invitation. Public agencies generally must advertise and solicit bids subject to pre-qualification requirements.
- B. Contractors should place a deposit refundable upon return of drawings and specifications. Typically, a contractor should have at least 5 complete sets. Large general contractors set up a plan room in their own office for the use of subcontractors.
- C. Time required for bidding ranges from 2 weeks for a small home to 45 days for a larger project or longer for major projects. Adequate bidding time should produce lower costs and bid opening dates should be chosen not to conflict with other major project dates in the area.
- D. Instructions to bidders is the first part of specification and will generally give the owner all kinds of perogatives, the right to reject all bids, to postpone date of bid opening, choose the lowest responsible bidder.
 - 1. A responsible bidder is established on the basis of reputation and track record. Default by the contractor, proof of dishonesty, or litigation or conflict in earlier projects is grounds for disqualification.
 - 2. The Bureau of Contract Information in Washington D.C. maintains a national pool of information on general contractors and major subcontractors.
- E. Bid alternatés may be required to provide quotations for alternative methods, materials, or units of construction and may be added or deducted to a bid.
- F. Bid allowances are dollar amounts specified by specifications for certain items like electrical fixtures and finished hardware. Generally, they cover only the invoice cost of unspecified materials and not the costs to install overhead or profit.
- G. Bid security is generally required to guarantee that a contractor upon being declared a successful bidder will enter into the contract. Generally this is a bid bond although a certified check may be used. The latter ties up more money but is refunded in full when bid is rejected or contract is signed.
- H. A proposal must be submitted at the proper place and at the proper time, and if feasible, the contractor may deliver his sealed bid in person at the time bids are opened. If that is not possible he may submit a written contract several days in advance of the bid opening and provide a telegraphic modification prior to bid opening if he receives additional information. Each contractor is expected to give the results of his bidding to his surity company to build a file on his perfomance record.
- I. Bid ethics presumeably control shopping of bids--that is, revealing to one bid competitor the price offered by another or changing subcontractors after winning the initial bid.
 - 1. There is considerable lack of ethics in this regard and much last minute changing of quotations.
 - 2. To control this bids from subcontractors may be submitted to a depository operated by The Contractors' Association which in turn gives them to the general contractor after a deadline.

Bid depositories have not generally worked well because the majority of members within a trade area are always vulnerable to the maverics or a temptation to price fixing.

H

- J. The bidding proposal may have a number of format technicalities in terms of dating the proposal as of the day of bid opening, number of signatures, witnesses, seals, registration numbers, acknowledgements of receipt of changes in drawings or other communications during ~~the~~ bidding period, etc. add the owner has the option to reject the bid on a technicality.
- K. Contractor may withdraw his bid but forfeits his bid security. If there has been a substantial mistake which would ruin the contractor or a misunderstanding, the courts may permit withdrawal if it was without negligence. A subcontractor must pay damages for the difference to the next highest bid if he withdraws.
- L. The bid is based on 5 sets of documents and the general contracting agreement brings these segments together by reference and functions as a formal execution by stating the work to be done, the price to be paid, completion time for the project, possible liquidated damages and signatures. The first 5 documents are:
 - 1. General conditions
 - 2. Special conditions
 - 3. Technical specifications
 - 4. Drawing
 - 5. Addenda and changes

II. Variety of problems and conflicts need to be anticipated between the owner and contractor.

- A. Change conditions refer to some physical and significant difference of the site from that indicated by the contract. The contractor is responsible to visit the site and anticipate the unexpected but the owner is obliged to provide all the information and site data at his disposal, and then the contractor must make his own judgments. Some contracts provide for extra compensation for change conditions, such as those requiring blasting, but the owner must be notified in writing and the contractor must keep detailed and separate cost records in order to collect.
- B. Suspension, delay or interruption of work may be occasioned by a change order or some failure of the owner to act. Contracts seldom provide for compensation ^{for} consequential costs. On the other hand, extensions of time for the contractor may be at the option of the owner except where delay is caused by a natural disaster, strikes, government, accident, and delays in material and equipment delivery.
- C. The definition of acceptance, completion, and final payment require the owner to accept the building in writing but may be redefined to include possession and substantial performance which is meeting the spirit of the contract if not the letter where defects are unintentional and not so extensive as to prevent the owner from receiving what he bargained for. Warranty periods are generally fixed at one year, are not grounds for withholding payment, and are generally included in the performance bond.
- D. As one might expect, a contract prepared by the owner and the owner's architect has few rights and many obligations ~~where~~ ^{for} a contractor so his only defense may be arbitration costs calling for compulsory arbitration under Construction ~~and~~ Industry Rules administered by the American

Arbitration Association.

1. The architect can make binding decisions on questions of fact related to materials, standards of workmanship, or technical aspects of drawing and specs.
2. Arbitration or the courts deal with interpretation of clauses, claims for extra work or damages, breach of contract or other matters of law.

555 - Commercial Development
OFFICE LEASE LECTURE NOTES

I. Introduction

- A. A lease is a risk management device which is designed to stabilize the set of assumptions which might have been implicit in the minds of the party at the time the contract was made.

II. The office lease.

A. Identification of parties

B. Description of premises and optional areas

C. Definition of rent

1. Base rent
2. Escalator clause
3. Escalator index year and audit
4. Service charges

D. Term of lease and renewals

1. Date of occupancy
2. Conditions of occupancy and penalties
3. Overstay and automatic renewal
4. Prior written notice
5. Use of calendar dates rather than ordinate numbers
6. Subleasing and assignment

E. Conditions of termination

1. In event of casualty loss
2. In event of eminent domain
3. Death or disability of tenant
4. Change of conditions clause for tenant
5. Penalties for tenant as liquidated damages
6. Bankruptcy of either party

F. Performance standards for landlord

1. Failure to perform - Abatement or optional right to terminate
2. Specification as to utility capacity
3. Specification for air temperature and humidity control
4. Specification for window washing, including venetian blinds, etc.
5. Specification for wall-washing and repainting
6. Specification of janitorial services, security systems, hours of elevator service, etc.

G. Insurance Agreements

1. Hold harmless clauses
2. Public liability responsibilities of tenant
3. Fire liability of tenant
4. Insurance of tenant improvements

H. Sign, window, and display controls (including curtains)

I. Constraints on use and tenant selection

1. Restraints on use of tenant space - broadly or narrowly defined
2. Tenant wishes relative to approval of other tenants in the building
3. Remedies

J. Special features and responsibilities

1. Reservation of parking stalls
2. Use of name on building or on tenant directory in lobby
3. Right of landlord to relocate tenant
4. Responsibility for commercial lease insurance
5. Responsibility for legal costs

K. Tenant improvement allowance from landlord

1. Design fees
2. Partitioning
3. Ceiling system
4. Floor system
5. Special utilities
6. Interior decorating
7. Moving expenses
8. Commissions to be paid

L. Subordinations

SEA PINES PLANTATION

- Slide #1 Hilton Head Island is located on the Atlantic Seaboard off South Carolina's coast. It is surprisingly accessible for all the privacy it offers, thanks to the James F. Byrnes Bridge which linked the island to the mainland in 1956.
- #2 A closer look reveals Sea Pines' proximity to Savannah, Georgia, yet an island's characteristic isolation sets Hilton Head apart...
- #3 and creates a natural feeling of arrival (or getting away) simply by crossing the intercoastal waterway.
- #4 A lush, garden-like drive to Sea Pines Plantation, rather than drawing attention away from the island's natural atmosphere, re-enforces the theme, suggesting an adventurous departure from everyday life and the beginning of a new world beyond this gateway.
- #5 The map reveals an island with wide sandy beaches along the Atlantic Ocean while the back of the island on Calibogue Sound is laced with coves, tidal creeks, and tidal flats of marsh grass. The initial entrance to the south portion of the island originally developed is at R and is shown on the next slide. The alternative gate is at C and one must have a residents pass, a room key, or purchase a pass. Guards in white pith helmets provide a sense of exclusiveness but little security as anybody can purchase a pass for \$1.00. Greenwood Drive parallels the Old Plantation Road and wildlife sanctuary which is the old plantation headquarters. In the heart of the development are three golf courses for inland homes and along the ocean are

Slide #5 continued

cul de sacs for beachfront houses. The Lighthouse Road (in yellow) is the main crossroad leading to Harbour Town and to the center of resident social life, the Plantation Club.

<u>Facilities</u>	<u>Activities</u> (Locations listed left)
A. Hilton Head Inn	Golf F,K
B. Sea Pines Academy	Tennis F, H, K
C. Sea Pines Ocean Gate	Swimming A, E, F, G, H, K
D. Playing Fields	Sailing And Boating A,H,K
E. Turtle Lane Beach Park	Horseback Riding L
F. Plantation Club	Skeet and Trap N
G. South Beach Park	Fishing H, K, M
H. South Beach	Information A, C, F, K, Q, R, H
J. Baynard Ruins	Dining A, F, K, V, U
K. Harbour Town	Shopping A, K, S, U
L. Lawton Stables	Medical S
M. Palmetto Bay Marina	Churches T, W
N. Skeet and Trap	Schools B, X
P. Newhalls Nature Walk	Entertainment A, F, K, V, Y
Q. Sea Pines Office	Art Exhibits A, K
R. Sea Pines Woodland Gate	Historic Sites J
S. Shopping Center	Museum K
T. Episcopal Church	Quarter Deck K
U. Coligny Plaza Shopping Center	
V. Treehouse Restaurant and Pub	
W. Baptist Church	
X. Children Center (Montessori School)	
Y. Purple Turtle	

#6 The main entrance gate lies between the boulevard lanes and is mostly for show rather than security.

#7 This is why Fraser allows the island to sell itself. The tone of development is subdued...

#8 homes fronting on the beach are set back among the trees, and are architecturally designed to blend with them.

#9 Sea Pines has the highest percent of architecturally designed...

#10 contemporary...

- #11 single family homes...
- #12 of any major residential community. In order to prevent obtrusive design, preliminary floor plans must be reviewed by Sea Pines' Design Committee for approval. Fraser retains 100% ownership of Sea Pines Investment Company voting stock, and so controls to a great extent the common property as well as the structures Sea Pines manages directly.
- #13 Notice especially the widespread use of natural materials, for the shingles, siding and fencing, and natural colors that make the structure part of its surroundings.
- #14 The abundance of mature trees and shrubs not only enhance the aesthetic value of each property,
- #15 but screen neighboring homes from one another...
- #16 to create a more relaxed, private atmosphere in an area where structures are actually closer to one another than they appear. Additional landscaping, the garden in the foreground here...
- #17 and along the roadside here, emphasizes Fraser's positive efforts and his homeowners' pride in their adopted environment.
- #18 Creeks and lagoons are woven into cluster home landscape plans with bridges and flowers. Note the sign "Do Not Feed or Molest the Alligators".
- #19 Fraser's development concept for Sea Pines aims at a tripple goal of "proper land use planning, development of recreational facilities and retention of the natural environment."

Slide #19 continued

All three goals appear here. This green is part of a network of four golf courses spread throughout the Plantation, which increases the opportunity to develop villas with fairway views along the courses' perimeters.

#20 Here, the villas cluster around a cul de sac, making use of optimum view with a minimum of roadway extending to the villas.

#21 Viewed from the air, the proximity of the villas to each other becomes apparent; the abundance of trees and neighboring open space make these clustered homes seem much less crowded,

#22 when viewed from this perspective. As for retaining the native environment, it is not unusual to find an alligator making his way leisurely from one lagoon to another across a fairway. A golfer's main concern in that case is whether his well shot Titlest becomes the alligator's afternoon snack.

#23 The clubhouse in the background hosts the annual Heritage Golf Classic each autumn; the island is a major stop on the PGA circuit, in fact, golf was a valuable marketing tool for Mr. Fraser. It was the golf facilities which first drew Sea Pines investors and homeowners to the Plantation...

#24 word-of-mouth placed Hilton Head Island in the eye of wealthy America, and Fraser's grand strategy: to make his project "enduringly attractive," kept his island in the rich public's eye, as more homes were sold. The lighthouse behind the 18th green marks the entrance to one of Sea Pines' two main communities, Harbour Town.

- Slide #25 The lighthouse came with the island but the harbor had to be manufactured. It is located on the inland side of the island within sight of the inter-coastal waterway.
- #26 The yacht basin during construction reveals its organization as a roundhouse for boats, each one backing stern first to a floating dock which rides up and down the circular seawall on heavy steel guides.
- #27 Here is an artist's conception of Harbour Town. The waterfront community consists of 450 units, including small apartments, studios, private townhouses and villas which are available for rent.
- #28 Village townhouses face inward, toward interior courtyards and walled gardens. Vibrant colors and activity within Harbour Town contrast to the outward emphasis of the Plantation's spacious lawns and views of woods and beaches.
- #29 The actual product is much like the rendering. Shops and townhouses surround the marina and the circular park with playgrounds and strolling areas which allow the idle passerby to observe the idle rich on their boats.
- #30 The park area is a beehive of activity with tumbling classes for kids and cocktails under the trees for adults.
- #31 Everywhere there are lavish playgrounds for the kids including this one placed so parents can browse expensive shops at their leisure.
- #32 Wish you were a kid again?

- #33 Even here wood and sand combine to form playthings natural to the island.
- #34 A concentration of shops, offices, restaurants and artist's studios within the village provides a commercial and cultural focus for the entire Plantation. Enclosing the harbor and overlooking nearby fairways are individually-owned townhouses, constructed and sold by Sea Pines.
- #35 From the top of the commercial building one can see the harbor side...
- #36 and the partially concealed cul de sac for service vehicles and cars.
- #37 The cul de sac with the red brick parking center looks reasonable, and repeats the circular motif.
- #38 But delivery trucks and traffic to the townhouses on the shore...
- #39 lead to congestion but it is well shielded from the inner shopping court.
- #40 In Fraser's own words: "Harbour Town is deliberately designed to reflect that part of man's nature that seeks to leave his isolation and join with other people. It will be a delightful village environment."
- #41 Harbour Town's sister port, South Beach, is being built on a smaller scale; it covers 150 acres on the southernmost tip of the island. Villas range from \$40,000 to 85,000. All units are constructed to take full advantage of beach and lagoon views,

Slide #41 continued

and eventually there will be over 450 units with some 50 to 60 villas, apartments and cottages scheduled for construction each year. Note particularly the position of the Lagoon Villas, the Port Villas, the Beach Villas and Braddock House... ..

#42 This is a rendering of the Lagoon Villas, completely landscaped, garden townhouses built for private ownership, lining the interior of South Beach. They are one-story units with two or three bedrooms and two baths, each with a private entry garden.

#43 Here is an early design for a cluster of Port Villas, deluxe townhouses which line the shores of Braddock's Cove, along the sheltered inner portion of the peninsula that forms South Beach.

#44 The reality of South Port today is only a little different from the artists' hopes as indicated by these New England style service buildings for the sailboat marina. Braddock Bay is shallow but a good practice area for kids learning to sail.

#45 Sailboats are kept well off the tidal mud flat...

#46 but tides can be considerable...

#47 behind these service buildings and cold drink refreshment areas...

#48 is a dry land marina for motor boats and sailboats which would look out of place among the seagoing yachts at Harbour Town. The townhouses in the background are more moderately priced, beginning at \$35,000 as opposed to the \$100,000 homes along the golf courses.

- #49 Another cluster will soon fill the sand area in the foreground.
- #50 South Port also has its own elaborate children's playard adjacent to...
- #51 a large swimming pool and sun deck facility for the residents of South Port.
- #52 Port Villas are two-story, two to three bedroom units with balconies or decks overlooking the Cove, these are separated by dividers for added privacy.
- #53 Slightly larger than Port Villas, Beach Villas similar to the homes seen here across a salt marsh, are located along five acres of Atlantic beachfront...
- #54 and a landside view of the villas, revealing staggered construction and young birches which both relieve the cluster's length.
- #55 For vacationers there is a proposed Braddock House, an apartment complex that tapers up from garden villas, through two-story townhouse villas, on up to six floors of one and two bedroom apartments, topped by penthouses. Set inland behind the Beach Villas, these units command an unspoiled ocean panorama from their height.
- #56 Single family homes are also appearing in South Port such as this cathedral ceiling bungalow...
- #57 or this popular style of two or three clusters to form a single home...
- #58 The Plantation Club, which provides active people of South Beach and the rest of Sea Pines with in- and out-door swimming and tennis.

- #59 Active life is the theme for South Beach as well as Harbour Town; South Port Center is the community's social hub, with the Dock House, offering a small shop which serves convenience foods, party and fishing supplies, and the Dockside Cafe.
- #60 A quiet life is also available at Sea Pines. A wildlife refuge covers 25% of the Plantation; left virtually untouched, the sanctuary offers fine fishing and sightseeing, as well as hunting when it is in season.
- #61 A large stable and riding paddock adjoin the wilderness area so the old plantation trails serve as bridle paths.
- #62 Signing is always a low key motif based on a cross bush as this entrance to a new Hilton Head subdivision - The Shipyard...
- #63 or this street sign hung from an oar which is very difficult to read in the shade or at night...
- #64 or this identification marker.
- #65 With its "distinctive coastal architecture and sound legal controls," Sea Pines "no unplanned sprawl" policy has provided a haven for families in the \$25,000 and up income market, whether they seek single family dwellings ... or ...
- #66 secluded cluster living in a beautiful setting...
- #67 Charles Fraser's Sea Pines Plantation.

555 Lecture
SHOPPING CENTER LEASING

- I. The ultimate function of the shopping center is to create a synergistic retailing environment - that is where one and one are greater than two. For that reason a shopping center developer should be primarily a retail marketing man and secondarily a real estate man.
 - A. The developer must be an expert in "shuttle diplomacy" because he must simultaneously negotiate with his mortgage lender, major tenant retailers, small tenant retailers, investors, architects, and general contractors. Many of these contracts are affected by local zoning, state fire codes, and federal (EPA) requirements.
 - B. The maximum mortgage commitment will be 90% of net income available for debt service divided by the mortgage constant. To stabilize net income it is necessary to shift all future variance in operating expenses to the tenants.
 - C. To obtain the lowest constant it is necessary to rent at least 50-60% of GLA to AAA national credit risk.
 - D. The national credit risks think they are essential to the loan and to the success of the center and therefore will not pay the full carrying cost of their space. If cash break even is \$5/sq. ft. of GLA, perhaps they want their base rent at \$3. As a result the developer must charge an equal number of sq. ft. to small tenants at \$7. Thus the small tenant is subsidizing the large tenant.
 - E. As if the subsidy weren't bad enough, the large tenant wants to run everything to his advantage by controlling both the retailers association and the developer by means of complex controls in the lease.
 - F. Since the developer will commit virtually all net income from base rents to debt service to increase leverage, he cannot afford to absorb increasing expenses and must look to above average sales for everybody so that the percentage clause in the leases will operate to produce net income in excess of base rents.
- II. Given a good site the developer needs to nail down his anchor tenants, those two or three large volume popular retailers who will give an important dimension of value merchandise for every price range. Price lines are to overlap but implement one another. (consider West Town - Sears, Penney's, Prange's, and Manchester's)
 - A. The ground area between the anchors or majors becomes highly valuable for specialty retailers and is known as the "sandwich."
 1. Gross acreage bought at \$2/sq.ft. may be sold in part to the anchors at \$3/sq.ft. so that the sandwich is worth \$20/sq.ft.
 2. Anchors are sold a building pad, cross easements to parking, subject to covenant controlling architecture, membership in the merchant's association, and other agreements.
 3. See approved clauses for Gimbels FTC decision in Real Estate Law Report.
 4. Note the evolution from building for a major tenant at a loss, to selling him a pad, to the anchor as a developer, to specialty centers with no majors.

- B. In May, 1972, the FTC alleged restraint of free competition in Gimbels shopping center leases and in February, 1974, a consent order prohibited a variety of agreements between majors and developers, which directly or indirectly restrained smaller tenants because of Gimbels bargaining power.
- C. While the FTC is opposed to protecting major tenants from little tenants a recent New York decision indicated it was legal for little tenants to be protected from big ones if the clause predated new laws to the contrary.
- D. For shopping center synergy to work and the percentage clause to pay-off, the developer and mortgage lender want more than collection of base rent.
 - 1. Modern covenants have explicit provisions to remain open, fully stocked, fully staffed, with a good faith merchandising effort. Specification of minimum standards can be a hassle.
 - 2. However, the percentage clause itself creates an implied covenant to do business so long as base rent is lower than fair market rent.
 - 3. The implied covenant also considers how specific the lease is in terms of use, assignment, limits on the landlord relative to leasing to competitors, good faith, and the profitability to the tenant of changing locations, etc.
- E. The developer's dependency on the overage lease leads to additional controls which may be quite elaborate, including:
 - 1. Specification of cash register magnetic tape systems.
 - 2. Audit procedures and quarterly deposits in advance of yearly audit.
 - 3. Controls on telephone sales and delivery points by coding of order slips.
 - 4. Radius clauses banning competitive chain stores within a certain distance of the center (Hilldale - West Town struggle).
 - 5. Controls on major tenants who lease excessive space to anticipate future sales growth which would not justify overage rents on total area but would produce overage rents in smaller GLA. Developer must know retail sales potential to avoid over or under leasing.
- F. One way to achieve higher rents from major tenants is to grant some an exclusive or a preferred position on the mall.

III. To hold variable expenses to a minimum the developer combines construction techniques and leasing provisions.

- A. For design control the developer provides only a shell of floor, fire walls, and ceiling.
 - 1. Hilldale concretees provide exterior pattern, flexibility in locating fire walls and parapet walls, fire protection, chases for utilities, and speed of construction.
 - 2. Tenants must provide air conditioning units and all mechanicals, store fronts, and interior lay-outs, and maintain them at their own expense.
 - 3. Responsibility for maintenance of high cost landscaped areas like parking, mall, and exterior landscaping is responsibility of Merchants Association which has power to assess its members.

4. Other obligations of landlord are subject to escalator clause or metering of utilities to tenants.
 5. Naturally the tenants want to be protected from excessive maintenance for landscaping, unnecessary sidewalk areas, costs of heating and cooling the mall, etc. For example, in the South it may be cheaper to use an open mall with heavy landscaping to produce shade and an updraft from photosynthesis.
 6. Design covenants must create excitement in the mall but some degree of uniformity to imply a cohesive center and lead the shopper expectantly into other areas of the center.
- B. The average percentage lease depends on:
1. Increasing penetration into total shopper population.
 2. Increasing frequency of visits.
 3. Increasing time spent per visit.
 4. Increasing average dollar purchase per visit.
- C. Since each store has its own special primary area, diversity of needs met will increase market penetration.
- D. Reducing anxiety in traffic and simplifying lay-out so that the visitor unconsciously reads his location from the architecture increases frequency, but traffic patterns must not separate the pedestrian from his car nor must they be congested by the non-shopper, such as the drive-in bank or super market customer. Common errands must be separated from shopping trips.
- E. Length of stay and average purchase are a function of physical and mental comfort so that:
1. Leases must control temperature and humidity.
 2. Conversations must be muffled by acoustics.
 3. Safety and security must be unobtrusively guaranteed.
 4. Entertainment of shopping cannot lag by boring shopper with blank walls or vacant shops, tiring him with long walks, or depressing him with low ceilings and glare.
 5. Texture should be residential in character or elegantly neutral to provide back-drop for merchandise.
 6. Retail display is essentially theater art so that lighting should enhance colors, including flesh color and lay-outs invite exploration by the shopper while preserving the shoppers' flight zone.
- F. The total sensory experience must be controlled and adjusted by the developer to even out pedestrian flow at all levels and corners of the center and increase the shopper's mental state of well being.

REAL ESTATE INVESTMENT AND LEASING

- I. Recently there has been much scepticism about leasing of tools and equipment. Lessors of business machines and motor vehicles have continued strong because of special points in regard to rapid obsolescence and maintenance.
- A. Leasing companies have shrunk from 800 firms in 1960 to 300 firms in 1963, and the growth rate of the remainder has slowed perceptibly.
 - B. Firms which have generated cash from earnings can self finance or borrow from banks, and the latter is almost always cheaper than leasing.
 - C. Many companies originally turned to leasing to stretch their credit beyond normal bounds and are returning to bank credit as the accountants have insisted on recognizing leases as liabilities.
 - D. Another factor favoring leasing was the practice in government "cost plus" contracts of allowing leasing costs as an expense, where if the equipment is owned/ only normal depreciation is allowed. At the end of the contract the contractor would be left with more equipment than he needs, and in the meantime, leasing would be more expensive than borrowing and raise the base on which profit could be taken. Moreover, the cost of capital is not included in the cost of the contract but must be repaid from the percentage of allowed profit. By concealing the interest in a rent payment, the contractor can both shift his costs and make a higher profit.
 - E. Government has begun questioning this practice so that a major factor for leasing is now in doubt.
 - F. Only in real estate has leasing gained acceptance, and this is for a unique set of circumstances. Real estate is long term and durable and land values do not generally "wear out." Moreover, many forms of institutional investors which are tax exempt are willing to make long term leases at interest rates lower than mortgage rates because of the speculative values inherent in the remainder interests in the lease property.
 - G. You are all familiar with the basic mechanics of the sale and lease-back arrangement. Today I would like to talk about how taxes shape the terms of leases in real estate.
- II. Payments between tenant and landlord include not only rent but also security deposits, service charges, amortization of improvements, equipment leasing, and cancellation payments. The landlord needs to know how and when these payments are taxable income to him and the tenant needs to know that his payments are deductible as expenses.
- A. The first well-known pitfall is the option to purchase, which must be such that rent cannot be considered payments on a deferred sale contract. The general criteria is the relationship of rent and option price to fair market value. For example,

if Jones owns a property worth \$100,000 which he leases for 5 years at \$20,000, and further gives his tenant the option to purchase the property at the end of the fourth year for \$20,000, the deal would be highly suspect. The rent is high, the price low, and the total equal to the value of the property

2) econ. realities would dictate exercise of option of short term lease w/only option to purchase not renew

B. If the lease is called a sale, the tenant can deduct part of his payments as interest and under the new revenue code the nominal landlord would have to report interest income. Since the tenant would desire a high deduction and the landlord low taxable income, their interests are conflicting so that many leases now include a provision that should there be any question of interest imputed to the contract, the provision sets the rate at the minimum interest.

IMPUTED INTEREST

C. Since rent provides all kinds of opportunity for shifting income among relatives, corporation stockholders, trusts and trust beneficiaries, the IRS treats any distribution of rent as income to the recipients.

1. For example, rent is always taxable to the lessor and the lessor is the person holding legal title. If a corporation holds title and rent is paid directly to an officer or stockholder, it is taxed as income to the corporation and salary or dividend to the recipient.

2. An apartment given rent free without regard to services rendered means that the landlord can lose a portion of his deduction for maintenance for free rent means he is no longer in the business of renting apartments. The relative receives a gift subject to the rules of gift taxes while a stockholder may receive a dividend to the extent that the rent he pays is below that of market rent.

3. Rent is deductible only as a business expense for the tenant so rent for a private residence is not deductible. A professional man who uses part of his residence as an office may deduct a proportionate share of his rent.

D. The tenant who wishes to preserve the deductibility of payments must match cash payments with annual permissible deductions.

1. If the tenant pays several years rent at once, only that part appropriate to the year is deductible.

2. He may include the fair market value of services rendered or the fair market value of property improvements as part of his rent, but the lessee must include these in his gross income.

3. Payments made under a net lease agreement such as real estate taxes, mortgage payments, insurance, etc. are also deductible as rent.

- 4. However, the IRS distinguishes between advance rentals and security deposits. An advance rental is money which belongs to the landlord and is taxable in the year received. On the other hand a tenant can only take a deduction in the period for which the rent applies.
- 5. A security deposit is not taxable on receipt because it is like money held in a trust. To gain this advantage it is necessary to avoid leases which would apply the security payment as the last month's rent.
- 6. The same is true of an option^{fee} to purchase. If the option is returnable if the property is not purchased, it is not handled as income.

E. In the buying and selling of lease# premiums paid by the lessee are taxable as income to the landlord but are considered as capital investments for the tenant. In reverse if a tenant pays a premium to cancel a lease it is an expense for him but a capital gain for the landlord. If the landlord cancels the lease then the cost must be amortized over the unexpired term of the lease if he uses the property himself. If he builds a new building or makes a new lease the cost of canceling the old lease must be amortized over the life of the building or the lease.

III. Lease property almost always involves facilities of some sort, and landlord and tenant are primarily concerned with who will have the benefit of the depreciation.

Handwritten note: *capital expenditures*

- A. Improvements made by the owner are generally capital expenditures which must be recovered over the useful life of the property. Only a few categories of expenses such as those for conservation and those for mineral exploration and development are available. At a cost of financing these improvements the owner receives valuable tax offsets and higher rent.
- B. If improvements are made by the tenant the landlord has no taxable income nor change in basis even though the improvement reverts to him. Any increment in value would be taxable as capital gain only if the property were sold.
- C. The lessee would depreciate improvements over the useful lives of the improvements or the period of the lease. (renewal options)
- D. Where the tenant improves the property as a substitute for rent as in a lease where the tenant agrees to build a cabin for not less than \$6,000. These improvements will be deemed rent and like rent would be taxed as an advance rental when the cabin was built. Casey recommends using a modest but reasonable rent and improvements should not be recognized in the lease as rent as kind. Alterations by a landlord to suit the tenant are capital expenditures by the landlord. On the other hand leasehold improvements by the tenant can be written off over the life of the lease, etc.
- E. However, depreciation is greatly affected by renewal options and cases where tenant and landlord are related.

1. Since 1958 if the initial term of the lease remaining after completion of improvements is less than 60% of the useful life of the improvements, then renewal options on the lease must be included in the period of amortization - unless you can prove it is more probable that the lease will not be renewed.
2. For example, if a building has a 35-year life on land which you have leased for 21 years with a renewal for ten years more, the 21 year balance to run is 60% of the 35-year life of the building.

*consider
renewal
20
minimum
Term
to 2?*

F. Where tenant and landlord are related persons, improvements must be amortized over their remaining useful life without regard to the terms of the lease. While related persons include relatives, it is actually a legal term which also means such relationships as :

1. An individual and a corporation more than 80% of the stock which is owned by the individual.
2. Two corporations if more than 80% of the stock of each is owned by the same individual and one of the corporations is a personal holding company or a foreign personal holding company.
3. A grantor and a fiduciary of any trust.
4. A fiduciary of a trust and a fiduciary of another trust, if the same person is a grantor of both trusts.
5. A fiduciary and beneficiary of the same trust.
6. A fiduciary of a trust and a beneficiary of another trust, if the same person is a grantor of both trusts.
7. A fiduciary of a trust and a corporation if more than 80% of the stock of the corporation is owned by the trust or by the grantor of the trust.
8. A person and a tax exempt organization (one qualifying under IRC 501) if the person controls the organization or members of his family do.
9. Corporations of an affiliated group which are eligible for filing a consolidated return.

IV. The precedent of the renewal principle for options has also been used for purchase options. Court has held that there is a reasonable probability that the lessee will exercise his option to buy, improvements must be depreciated over their useful life. This carries several implications:

- A. Investment on a leasehold should not be more than you could reasonably anticipate you would recover within the original period of the lease. Overimprovement together with a short initial lease period implies intent to purchase.

- B. It may be more favorable to take a long term lease where the initial term is 60% of the useful life of the improvement to write off investment in this initial period than to take a short lease with a purchase option.
- C. Since useful life is measured from the time of completion of the improvement, it may be necessary to make the initial lease longer than 60% of the useful life of the improvement to provide a cushion time for contingencies and construction.
- D. By the same token, if a shorter period of amortization is desired it may be desirable to use less permanent forms of construction, frame often enjoying a 35 year life compared to masonry with 40 year life. There are other structures which are assigned shorter useful lives. For example, the tenant could do landscaping and other forms of site improvement to take advantage of the 20 year life.
- E. If the tenant decides to buy the fee he must allocate his purchase price between the market value of the land at the time of purchase and the present value of the landlord's right to recover the improvements at the end of the lease.
1. The amount allocated to this present value is added to the former tenant's cost basis to be recovered via depreciation.
 2. If the former tenant has been amortizing rather than depreciating the cost of his improvements, he must adjust his depreciation to his basis divided by useful life.
- F. A purchaser of a fee subject to a leasehold can depreciate improvements just as the original lessor if the lessor built the improvements.
1. In addition where the improvements were built by the tenant and these improvements are expected to survive the term of the lease, the purchaser may allocate part of his purchase price to the reversionary value of these improvements. He can't take depreciation for them until they actually revert, however.
 2. There is one case where the purchaser argued that while there would be some useful value in lessee improvements, current economic rent for these improvements was less than contract rent. Therefore, the price paid for the fee included a premium which ought to be amortized over the remaining life of the lease. As a result the taxpayer was able to depreciate the amount he had paid for the building twice, or nearly so.
- G. A lessee may also write off improvements with deductions for abandonment or obsolescence.

→ 10 to 15 yr lease
20 yr. shop center

1. In theory abandonment is property that has lost all useful value and the user must show irrevocable intent not to use or sell the property. ~~For~~ cost of removal is less than value of the deduction, improvements would be ripped out. This is possible where a location is abandoned with term remaining on the lease.
2. Obsolescence is a process occurring over a period of several years and permits an addition to regular depreciation when the useful life of the improvement has been shortened by economic change.

V. Purchase and sale of leaseholds is possible where there is a difference between contract and economic rent. The problem is distributing the leasehold purchase price through amortization over the life of the lease.

OR CONDEMNATION

- A. ~~The cost capitalized must be more than 75%~~
- A. The capital cost of the leasehold must be allocated between the value of the initial term and any renewal options. If the price paid for the initial term rental advantage is more than 75% of the total price, the entire price may be amortized. If not then renewal periods must be considered.
The
 - B. ~~With~~ reasonable certainty test may still be used to justify short amortization if renewal is unlikely.
 - C. It is also possible to allocate the purchase price in part between improvements and then depreciate the improvements.
 - D. If the improvements were built by the seller you can allocate the leasehold cost between extra values in land and extra values in the building, and then depreciate the building.
 - E. As a tenant selling the leasehold at a profit, it is necessary to assign the lease rather than sublet if you desire a capital gain tax treatment.
 - F. Casey suggests that buying and selling leaseholds is a way to secure capital gain. In areas where land is high in relation to building costs, building developers will sell nondepreciable land and lease back with deductible rent for a fixed term plus several renewal options. The owner of the land will have a high rent to recover capital and then successive reductions in each renewal period.

This creates opportunity to buy an aging leasehold and acquire large deductions (amortization plus rent). The purchaser of the leasehold would buy while perhaps 15 years of the original term remain, having obtained an appraisal that at least 75% of cost is attributable to the original term, permitting him to write off his costs in that period. With the renewal period, a reduced rent will mean increased income if income power or inflation holds up rents. The new net earnings figure can then be converted into capital gain by selling the lease.

- VIII. The tenant who is kicked out in exchange for a cancellation payment has received a capital gain, taxable in the year of receipt. The landlord however, must deduct the payment according to his intentions;
- A. If landlord cancels to use the property himself, then he must amortize the cancellation payment over the unexpired term of the lease. The cancellation payment is considered the cost of an asset which he would not otherwise have had.
 - B. If he demolishes the old building and builds a new one for other tenants, the cancellation payment is also the cost of a new asset, namely a new building and it must be amortized over a building's useful life.
 - C. If the tenant puts up a building, the new asset is a ground lease and the initial term of the lease determines the depreciation period.
 - D. However, there are some opportunities for deducting the cancellation payment over the remaining term of the old lease. The tax court has indicated that when cancellation of an old lease is not a condition for the new lease, the landlord may amortize over the remaining term of the old lease

SALE-LEASEBACK NOTES

- I. The sale-leaseback has been glamorized recently for a number of reasons which need examination. Some advantages are overrated and some disadvantages are not always recognized.
 - A. The primary purpose of a sale-leaseback from the seller point of view is to convert a frozen asset into cash and create a rent tax deduction. To be a mortgage it must provide for an option to repurchase at the end of the lease period. As a general rule the IRS will accept an option price equal to the value of the property at the time it is exercised as a bona fide transaction. But the IRS may upset any lease that looks too much like a mortgage.
 - B. A good case is that of Frenzel, TZ Memo 1963-276. Frenzel owned extensive warehouse resources leased to industrial tenants. His biggest tenant was 3-M, which offered in 1957 to lease additional space if Frenzel would construct it. He had no available fund and tried to arrange 100% finance from a bank on the strength of a 10-year lease from a prime tenant. Bank refused more than 2/3 on a mortgage but later agreed to a sale-leaseback at a purchase price of \$1.2 million. The rent amortized a full purchase price on a 5% annual return, quarterly payment, 10-year basis. The initial lessee had three 5-year renewal options. Renewal rent would represent 3% annual return on purchase price and lessee could repurchase the property at the end of any renewal term for 10% of the purchase price.
 - C. The tax court looked at the entire transaction and said it was a mortgage for the following reasons:
 1. Repurchase Option - An expert testified that at the end of ten years, the property would be worth \$100,000, just about the same as the option price of \$120,000. However, he didn't consider the 3M lease in the valuation since there was no certainty it would be renewed. But the Court said that since the property was specially constructed for 3M, and it had been a tenant of Frenzel's for many years, renewal was highly probable and this would increase the renewal value four to five times.
 2. Net Lease - The 3M lease was a gross lease, so that Frenzel paid for taxes, insurance and maintenance. The leaseback was on a net basis so that Frenzel remained responsible for the property. The leaseback also provided (a) that Frenzel would hold the buyer harmless from all claims for injury or damage and (b) there would be no termination of rent in the event of a destruction of the premises. The result of this was that Frenzel retained all the risks and duties of ownership; the only benefit to him from the sale was the cash payment.
 3. Lack of Easement - Access to the property sold required passage over other property retained by Frenzel. The buyer, however, did not insist on an easement, thus indicating it did not regard itself as the real owner.
 4. Payment of Fees - Frenzel was obliged to pay all the buyer's expenses, including attorney's fees, a provision common in financing rather than sale agreements.
 5. Treatment by Buyer - On its records, the bank treated the transaction in the form of a mortgage rather than a sale.

- D. Financial leasing, as opposed to service leasing, is nothing more than a means of financing and so its peripheral advantages must be carefully scrutinized. For purposes of discussion these advantages might be classified as follows:
1. Advantages which are overstressed
 2. Advantages which avoid ownership
 3. Advantages found in laws and regulations
 4. Advantages of financial leverage
 5. Advantages of financial position appearance
- E. Arguments for lease which are overstressed include:
1. Greater flexibility than possible with ownership in event that that the asset becomes unprofitable. But is it easier to sell for salvage or to break a long term, non-cancel lease?
 2. Economical expert servicing. Isn't full cost of this included in leasing cost?
 3. Creates cost savings by introducing equipment otherwise not available. Isn't it not available for lack of capital and doesn't the lease provide capital in lieu of long term debt, earning retention, or investor equity?
 4. Accounting economy because it avoids the responsibility of ownership for the preparation of depreciation schedules, fixed assets schedule, insurance valuations, personal property inventories, and so on. However these headaches are only shifted, and the cost of these responsibilities are hidden in the rent.
- F. Leasing offers advantages within laws and regulations prescribing the area in which management can maneuver, often because the board of directors or government analysts do not recognize leasing as a form of capital finance.
- Leasing
1. Enables management as lessee to avoid capital expenditure control and procedural red tape.
 2. Enables a firm or a division to stay within its capital budget.
 3. Offers a firm federal, state, and local tax advantage.
 4. Avoids the indenture restrictions and conditions which accompany long term debt.
 5. Lease charges are reimbursable costs under federal government contract while the cost of financing of debt or equity is not. (Arm Service Procurement regulation 15-205.34.) State franchise taxes on corporate capital including debt of more than one year maturity also overlook lease capital asset.
- G. The following advantages are not really advantages of leasing but rather of not using equity financing:
1. Releasing frozen assets for working capital
 2. Acquiring modern equipment on the expectation of future earnings
 3. Avoids dilution of ownership
 4. Hedges against inflation
- H. Leasing has certain advantages for improving financial position and extending feasible leverage. However there are occasions when leased property would be better recognized on the balance sheet. Utilities and railroads might do better and do more leasing if leased assets were included in their rate base.

- II. Leasing plays a big part in retail and industrial real estate. For example consider the long term lease agreements recognized in the annual reports of the Big Three in department stores:
- A. January 31, 1961 Sears & Roebuck reported long term leases with minimum fixed rentals of \$23,417,000 per year.
 - B. December 31, 1961 F. W. Woolworth showed minimum annual rentals of about \$44,300,000.
 - C. Montgomery Ward reported in February 1961 667 long term leases with aggregate minimum annual rental of \$11,000,000 per year.
- III. For a number of reasons articles on the leasing decision see the following:
- A. William D. McEachron, "Leasing: A Discounted Cash-Flow Approach, "The Controller, XXIX (May, 1961)213-19;
 - B. Edward A. Ravenscroft, "Return on Investment: Fit the Method to Your Need," Harvard Business Review, XXXVII (March-April 1960), 97-109;
 - C. Thomas N. Spaeth, "Discounting Differential Cost in Machine Replacement-- An Outline," N.A.A. Bulletin, XLI (June 1960), 13-20 ;
 - D. Allen Sykes, "Lease or Buy -- An Exercise in Economic-Accounting Arithmetic," Accountancy, LXXI (March 1960), 153-56;
 - E. Richard F. Vancil, "Lease or Borrow--New Method of Analysis," Harvard Business Review, XXXIX (September-October 1960), 122-36;
 - F. Richard F. Vancil, "Lease or Borrow--Steps in Negotiation," Harvard Business Review, XXXIX (November-December 1961), 138-59.

ANALYSIS of the MARKET & the INDIVIDUAL LEASE

James Graaskamo

Leases - Their Various Clauses and Their Importance

1. Definitions
 - A. Specific space and location to be leased
 - B. Specific business entity as lessor
 - C. Specific business entity as lessee
 - D. Specific description of real estate elements to be leased
(Definition of shell provided by landlord and finishes provided by tenant)
 - E. Specific exemptions of tenant improvements to remain tenant property
- II. Conditions for Commencement of Lease
 - A. Conditions permitting cancellation by landlord (lessor)
 1. Failure to obtain specified financing prior to construction
 2. Death or disability prior to a certain date
 3. Impossibility of performance due to acts of God, government, regulation, labor conditions, etc.
 - B. Conditions permitting cancellation by tenant (lessee)
 1. Completion according to specification
 2. Completion according to scheduled time
 3. Conditions relative to other occupancies
 - C. Remedies of landlord
 1. Forfeiture of tenant deposits or escrow funds
 2. Liquidated damage provisions
 3. Guarantees by others
 4. Penalty rents, assessments, etc.
 - D. Remedies of tenant
 1. Postponement of commencement date
 2. Rental abatement
 3. Cancellation of lease at option of tenant
 4. Penalty payments in contract assessed to the landlord
 5. No penalties other than suit for damages
- III. Conditions for termination of lease
 - A. Death or disability at option of lessee estate
 - B. Scope of "change in conditions" clause

- C. Guaranteed occupancy and operations clause
- D. Cancellation liquidated damages formula
- E. Bankruptcy receivership of business termination clause
- F. Assignability clause
- G. Implied good faith effort of percentage lease
- H. Permitted uses clause
- I. Casualty loss event
- J. Condemnation events
- K. Specific conditions subsequent explicitly identified as grounds for termination
- L. Subordination position

IV. Rental Formula

- A. Basic minimum rent
- B. Formula for rental adjustment over time
- C. Renewal options, if any, and base rent
- D. Calculation of prominent area charges and tenant participation in same
- E. Real estate tax escalator clause
- F. Insurance premium stop loss clause
- G. Utility expense stop loss clause
- H. General maintenance and replacement assessments for HVAC, parking, lighting, etc.
- I. Audit of sales and overage rents
- J. Conditions for rental abatement due to casualty loss, remodeling, road construction, or business interruption due to riot, strike, civil commotion, or disruption of public services

ABA--ANALYSIS OF THE COMMERCIAL LEASE

Leases - Their Various Clauses and Their Importance

I. Definitions

- A. Specific space and location to be leased
- B. Specific business entity as lessor
- C. Specific business entity as lessee
- D. Specific description of real estate elements to be leased
(Definition of shell provided by landlord and finishes provided by tenant)
- E. Specific exemptions of tenant improvements to remain tenant property

II. Conditions for Commencement of Lease

- A. Conditions permitting cancellation by landlord (lessor)
 - 1. Failure to obtain specified financing prior to construction
 - 2. Death or disability prior to a certain date
 - 3. Impossibility of performance due to acts of God, government, regulation, labor conditions, etc.
- B. Conditions permitting cancellation by tenant (lessee)
 - 1. Completion according to specification
 - 2. Completion according to scheduled time
 - 3. Conditions relative to other occupancies
- C. Remedies of landlord
 - 1. Forfeiture of tenant deposits or escrow funds
 - 2. Liquidated damage provisions
 - 3. Guarantees by others
 - 4. Penalty rents, assessments, etc.
- D. Remedies of tenant
 - 1. Postponement of commencement date
 - 2. Rental abatement
 - 3. Cancellation of lease at option of tenant
 - 4. Penalty payments in contract assessed to the landlord
 - 5. No penalties other than suit for damages

III. Conditions for termination of lease

- A. Death or disability at option of lessee estate
- B. Scope of "change in conditions" clause

(over)

- C. Guaranteed occupancy and operations clause
- D. Cancellation liquidated damages formula
- E. Bankruptcy receivership of business termination clause
- F. Assignability clause
- G. Implied good faith effort of percentage lease
- H. Permitted uses clause
- I. Casualty loss event
- J. Condemnation events
- K. Specific conditions subsequent explicitly identified as grounds for termination
- L. Subordination position

IV. Rental Formula

- A. Basic minimum rent
- B. Formula for rental adjustment over time
- C. Renewal options, if any, and base rent
- D. Calculation of prominent area charges and tenant participation in same
- E. Real estate tax escalator clause
- F. Insurance premium stop loss clause
- G. Utility expense stop loss clause
- H. General maintenance and replacement assessments for HVAC, parking, lighting, etc.
- I. Audit of sales and overage rents
- J. Conditions for rental abatement due to casualty loss, remodeling, road construction, or business interruption due to riot, strike, civil commotion, or disruption of public services