



THE CITY OF KEY WEST

Post Office Box 1409 Key West, FL 33041-1409 (305) 809-3700

MEMORANDUM

To: Key West Bight Management District Board

From: Larry Erskine
Marilyn Wilbarger, RPA, CCIM

Date: January 9, 2015

Reference: Tenant Losses Due to Interference or Disruption

Virtually every commercial lease deals with the possibility of casualty damage however some commercial leases also contemplate losses due to various conditions that may affect the Tenant's ability to operate their business from the demised premises as described in the following sample lease clause that addresses other types of interference:

Any changes, additions or alterations to the Premises, the Property, the Building or the Shopping Center shall not (a) unreasonably impair access to, visibility of or frontage of the Premises; (b) materially affect the conduct of Tenant's customary business therein; or (c) unreasonably detract from Tenant's signage, create confusion regarding the business conducted in the Premises, or adversely affect the presentation of Tenant's exterior signage and storefront in a material way. In the event of any such unreasonable interference, in addition to Tenant's other rights and remedies under applicable law and this Lease, the Base Rent and Annual Additional Rent shall be equitably abated based on the degree of interference with Tenant's business

This lease clause also implies that if there is partial disruption, there is a proportionate abatement of rent. Since an allocation on a square foot basis may not adequately cover all situations (e.g. smoke damage, interference with access, etc.), another approach is to key the amount of abatement to the actual decrease in tenant's business activities or income.

Some leases provide that the tenant is required to procure business interruption and even employee retention coverage to insure their losses however the coverage that is available does not typically include known perils such as those created by construction or other planned events that may cause interference.

The City standard lease does not address Tenant losses from business disruption, or the methodology that would be employed to determine an equitable adjustment together



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with a dispute resolution mechanism such as arbitration should the parties fail to come to an agreement.

Therefore, it appears as though the most equitable solution is to address each Tenant's losses individually as opposed to a determining a blanket policy that cannot possibly address every type and degree of potential loss. Factors to be considered may include:

- Full or partial closure
- Length of interference or disruption (# of Days)
- Loss of income
- Inventory losses
- Employee layoffs and employers unemployment obligations due to closure
- Advertising losses
- Re-opening expenses

Additionally, consideration may also include the length of notice period, public meetings, or other communication received from the City to enable the Tenant to plan around the disruption.