

LANDLORD'S CONSENT TO ASSIGNMENT OR SUBLET BY TENANT

Commercial lease agreements typically contain a provision that conditions the tenant's right to assign or sublet upon the landlord's consent. A fairly typical example would be the following:

ASSIGNMENT AND SUBLETTING: Tenant shall not have the right to assign or pledge this Lease or to sublet the whole or any part of the Premises whether voluntarily or by operation of law, or permit the use or occupancy of the Premises by anyone other than Tenant, and shall not make, suffer or permit such assignment, subleasing or occupancy, without the prior written consent of Landlord....

(taken from lease provision in RREEF Management Co. v. Camex Productions, Inc., 190 Ariz. 75, 79, 945 P.2d 386, 390 (App. 1997)). Where the tenant seeks to assign or sublet, the landlord will typically invoke the requirement for consent and take the position that the landlord has the discretion to give or not give its consent, or condition its consent, on whatever grounds it deems appropriate.

The requirement for landlord consent, however, does not give the landlord the right to withhold consent without a legitimate reason for doing so, or to impose arbitrary or unreasonable conditions. In Arizona, the rule is that even where a tenant's ability to assign or sublease is conditioned upon the landlord's consent, the landlord cannot arbitrarily or unreasonably withhold such consent absent a clear provision in the lease giving the landlord the absolute right to do so. Campbell v. Westdahl, 148 Ariz. 432, 437, 715 P.2d 288, 293 (App. 1985); Tucson Medical Center v. Zoslow, 147 Ariz. 612, 614-15, 712 P.2d 459, 461-62 (App. 1985). These cases adopted the formulation of the Restatement (Second) of Property § 15.2 (1977), which states: "A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent."

Thus, there is a "standard of reasonableness" presumptively imposed on the landlord in withholding its consent to the assignment of the lease. Campbell, 148 Ariz. at 437, 715 P.2d at 293. A reason for refusing consent, in order for it to be reasonable, must be "objectively sensible and of some significance." Zoslow, 147 Ariz. at 616, 712 P.2d at 462. Examples of proper reasons might include the assignee's financial ability, the

assignee's ability to perform, whether any percentage rent under the lease might substantially decrease, and the suitability of the assignee's proposed use for the premises. The last factor may be especially significant in a shopping center or other property involving other tenants for which the landlord strives to maintain a certain "tenant mix."

An example of an improper reason, on the other hand, would be the landlord's attempt to extract more money. Arizona courts have held that a landlord's refusal to consent to an assignment because the landlord is unhappy with the low rent provided under the existing lease is unreasonable. See, e.g., Campbell, 148 Ariz. at 438, 715 P.2d at 294 (App. 1985) (citing Magna Inv. & Dev. Corp. v. Brooks Fashion Stores, Inc., 137 Ariz. 247, 669 P.2d 1024 (App.1983), overruled on other grounds).

In negotiating lease provisions, tenants will often request language clarifying that the landlord's consent may not be "unreasonably withheld," to avoid any later dispute regarding whether a standard of reasonableness applies. In turn, landlords may include provisions whereby the parties agree that certain factors may reasonably be considered by the landlord in determining whether to give consent. Landlords may also include language providing that any proposed assignee must agree to assume and operate subject to the conditions of the lease, including any restrictions on use (i.e., type of business to be operated). For example:

Lessee may assign this lease or sublet the whole or any part of the leased premises if the use thereof is for retail or service purposes, and the use thereof will not conflict substantially with any other existing exclusive granted by lessor to any other tenant then in the shopping center, provided lessor has previously notified lessee in writing of such exclusive. If lessee assigns this lease, lessee shall remain liable as a surety to lessor for full performance of lessee's obligations.

See Carter v. Safeway Stores, Inc., 154 Ariz. 546, 548, 744 P.2d 458, 460 (App. 1987). As well, landlords will, or should, include language clarifying that consent is required for any assignment or sublet or other "transfer" in whole or in part, of the demised premises.

In any case, tenants and landlords alike should review their lease agreements to determine whether and to what extent the landlord's consent is required for sublet or assignment of the premises. In many cases the grounds for withholding or conditioning consent are specifically provided in the lease. In many other cases, however, consent of the landlord is required but not further specified. Absent a provision specifically giving the landlord sole and absolute discretion to consent to or reject the assignment or sublet, the landlord is subject to a standard of reasonableness and must be prepared to articulate valid and legitimate reasons for denying or conditioning consent to a tenant's assignment or sublet of the leased premises.