

SAMPLE PROVISIONS FOR MEDICAL FACILITY LEASING



T. ANDREW DOW is a Shareholder with Winstead PC, a national law firm with +325 attorneys. Mr. Dow serves as Co-Chair of Winstead's Real Estate Industry Group and Chair of the Healthcare Industry Group. He has a widely recognized reputation for balancing both legal issues and his clients' business objectives. His practice involves a wide variety of commercial real estate transactions, including the development, leasing, acquisition, disposition and financing of all types of real estate (including office buildings, healthcare facilities, shopping centers, hotels, resort developments, golf course communities, mixed use projects and the like). Mr. Dow has also authored articles on real estate and spoken at numerous seminars on a variety of matters related to the development and leasing of real estate, particularly in the healthcare and hospitality industries. He currently sits on the Editorial

Board of Healthcare Real Estate Advisors and is heavily involved on the planning committee for the annual Building Owners and Managers Association's (BOMA) Medical Office Buildings (MOB) Healthcare Real Estate conference.



RICHARD R. GOLDBERG is a retired Partner with Ballard Spahr LLP, in Philadelphia, whose practice in the Real Estate Department was concentrated in the areas of real estate development, financing, leasing, and acquisition. In nearly five decades as a practicing lawyer, including 18 years at Ballard Spahr, he handled a series of deals for landmark properties, large shopping malls, and hotels. Mr. Goldberg served as counsel to the Loews Corporation in the development and financing of its conversion of the historic PSFS office building in Philadelphia into a state-of-the-art hotel. He served as lender's counsel for the financing and refinancing of office buildings, apartment complexes, and shopping centers, including the largest mall in New Jersey. Adept at structuring complex financing, Mr. Goldberg represented lenders in providing secured credit lines to real estate investment trusts with

properties located in multiple states, and in mezzanine loans and complex preferred equity structures. Before joining Ballard Spahr, Mr. Goldberg served as Vice President and Associate General Counsel of The Rouse Company for 23 years.

Historically, commercial real estate has been divided into four major asset classes: office, industrial, retail and multi-family. However, during the past couple of decades, healthcare real estate has evolved into a major real estate asset class of its own. In fact, the healthcare real estate market is already larger than the industrial market and now rivals the retail real estate market in sheer size and scope. While many have viewed this new asset class narrowly as comprised of only medical office buildings ("MOB's"), the healthcare real estate asset class is actually much broader, including many different types of facilities along the so-called "continuum of care" (such as, for example, wellness/fitness centers, community clinics, ambulatory surgery centers, rehabilitation hospitals, long-term acute care hospitals, assisted living facilities and the like).

A developing trend among hospitals, health systems and other healthcare providers is the outsourcing of the real estate ownership and management of healthcare facilities, which allows the providers to free up capital resources for use toward their core mission. This trend has attracted the interest of traditional real estate developers and has spurred the creation of many healthcare real estate specific developers and investors. A natural result of this trend is a proliferation

of healthcare real estate transactions in general and leases in particular. Because healthcare continues to be one of the fastest growing sectors of our economy, the continued growth in outpatient delivery of healthcare services (and the need for capital by the providers of these services) will continue to drive massive real estate development and investment in the healthcare sector.

Another emerging trend has medical uses now showing up in historically non-medical environments (e.g. retail shopping centers and mixed-use developments). This can create issues not only for the provider tenant, but also for the landlord and other non-medical tenants in the development. As a result, any real estate or health care attorney will benefit from understanding how medical use leases differ from traditional office, industrial or retail leases.

The future remains bright for real estate professionals in the healthcare industry, since healthcare spending is expected to reach 20 percent of the United States gross domestic product by the year 2015. For those able to navigate the pitfalls, medical facility development and leasing can provide opportunities, even in difficult economic times. This webinar is intended as

an introduction to medical facility lease transactions, with particular emphasis being placed on ground leases from hospitals or hospital systems to third party developers/investors and space leases in MOB's and other facilities involving medical uses.

SAMPLE 1 – ACCESSIBILITY CONSULTANT PROVISION

Tenant acknowledges that, depending upon the scope of the alterations, the Texas Department of Licensing and Regulation may require a review (“Accessibility Review”) of the Premises, the Building and the Campus for compliance with the Americans with Disabilities Act and the Texas Elimination of Architectural Barriers Act (“Accessibility Laws”). Tenant further acknowledges that the Accessibility Laws do not provide detailed guidance as to their application and therefore professional judgment is necessary to determine compliance. To provide for uniformity for the Campus, Landlord has designated an accessibility consultant (“Campus Accessibility Consultant”) that is familiar with the Campus for use by the tenants of Buildings within the Campus for any necessary Accessibility Review. IF AN ACCESSIBILITY REVIEW IS REQUIRED IN CONNECTION WITH ANY ALTERATIONS, TENANT SHALL RETAIN, AT TENANT’S SOLE COST AND EXPENSE, THE CAMPUS ACCESSIBILITY CONSULTANT TO PERFORM THE ACCESSIBILITY REVIEW. Tenant also may request Landlord to instead allow Tenant to use an accessibility consultant other than the Campus Accessibility Consultant for the Accessibility Review provided that Tenant demonstrates to Landlord that such accessibility consultant has appropriate experience, reputation and qualifications. Tenant may use such alternative accessibility consultant for the Accessibility Review with Landlord’s prior written approval thereof. In the event that Tenant retains an accessibility consultant other than the Campus Accessibility Consultant for the Accessibility Review without Landlord’s prior written approval, the same shall be a default under the Lease, and Tenant acknowledges that Landlord may need to retain the Campus Accessibility Consultant, its architect or other professionals to confirm whether or not any modifications to the Premises, the Building or the Campus are necessary to comply with Accessibility Laws and administrative hearings or other proceedings may be necessary to ultimately determine whether or not any such modifications are required. In the event of such default Tenant shall reimburse Landlord for any costs incurred by Landlord as a result thereof, including any costs incurred by Landlord to hire the Campus Accessibility Consultant, its

architect or other professionals and costs incurred in connection with such administrative hearings or other proceedings.

SAMPLE 2 – COMPLIANCE WITH LAWS PROVISION

Compliance with Hospital and Regulatory Requirements

Tenant shall ensure that all services provided by Tenant or any other persons or entities in the Tenant premises are conducted in compliance with all applicable laws and regulations. All persons or entities providing physician services in the Tenant premises must provide medical services reasonably related to a service line of a Hospital and be either (a) a physician that holds medical active or courtesy staff privileges at a Hospital who: (1) has an unrestricted and unlimited license to practice medicine in the State of [____], (2) is not, and has not been within the previous ten (10) years, an Excluded Person (as defined below), and (3) has not been convicted of any felony; or (b) a physician group practice that is a partnership, professional corporation, professional limited liability company, or other entity whose employed or contracted physicians providing services at the Improvements each satisfy the requirements of an individual physician pursuant to subsection (a) above. An “Excluded Person” shall mean a health care provider who, in the previous 10 years, has been identified on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs (“EPLS”, located at <http://epls.arnet.gov/>) by designation of the U.S. Department of Health and Human Services (or its successor agency) or other federal agency declaring that the Person is excluded from receiving Federal contracts or certain types of Federal financial and nonfinancial assistance and benefits in any federal health care program including Medicare, Medicaid, CHAMPUS, and any other plan or program that provides health benefits, either directly or through insurance, or otherwise is funded directly in whole or in part by the United States government or a state health care program. Tenant will comply with all current and future federal, state, municipal and other laws, ordinances, rules and regulations applicable to the Tenant’s premises, including without limitation, all environmental laws and regulations.

SAMPLE 3 – MEDICAL WASTE INSERTS TO HAZARDOUS SUBSTANCES PROVISION

Tenant shall not cause or permit the use, generation, release, manufacture, refining, production, processing, storage or disposal of any Hazardous Substances on, under or about the Leased Premises, or the transportation to or from the Leased Premises of any Hazardous Substances, except as necessary and appropriate for its Permitted Use in which case the use, storage or disposal of such Hazardous Substances shall be performed in compliance with the Environmental Laws.

Hazardous Substances shall also include Medical Waste (as hereinafter defined). As used herein, the term "Medical Waste" shall mean and include those wastes which are generated in the diagnosis, treatment or immunization of humans or related research, or in the preparation and administration of chemotherapy agents, together with all such other wastes which are defined pursuant to any medical or biological waste regulations which have been or may hereafter be promulgated by any governmental agency or authority with jurisdiction over the Premises or the Tenant's use thereof or business conducted therein, and as further set forth in any laws now or hereafter applicable to the Tenant or the Premises.

SAMPLE 4 – ELECTRICITY/SUPPLEMENTAL AIR CONDITIONING (INSERT TO LANDLORD RIGHT OF ENTRY PROVISION)

Landlord will be responsible in making any entry under this Lease in a manner so as not to unreasonably impair Tenant's use and enjoyment of the Leased Premises (Landlord acknowledging that patient care may be conducted in the Leased Premises and will respect the privacy rights of patients).

Landlord shall furnish to Tenant at all times the following utilities and other services, to the extent reasonably necessary for Tenant's use of the Leased Premises for the Permitted Use, or as may be required by law or directed by governmental authority: Electrical current necessary to meet Tenant's electricity needs for the operation of Tenant's business as Tenant initially contemplates, as described in the Approved CD's ("Initial Electrical Requirement"). In the event that Tenant desires to utilize equipment which requires electrical capacity in excess of the Initial Electrical Requirements: (a) if such additional electrical requirements necessitate an upgrade to the electrical infrastructure serving

the Leased Premises, if so requested by Tenant, Landlord shall install such upgrade (and Tenant shall reimburse Landlord the cost thereof); and (b) if Tenant's electricity usage exceeds the Initial Electrical Requirements, then Tenant shall reimburse Landlord from time to time throughout the Lease Term the cost of such excess electricity to the extent Tenant's electricity usage exceeds the Initial Electrical Requirements, provided that in connection with any such demand for reimbursement Landlord shall provide Tenant with documentation reasonably supporting its calculation thereof. Landlord shall have the right, at Tenant's cost and expense, to require that any additional equipment not shown in the Approved CD's be separately metered, in which case, Tenant shall pay the cost of such additional electricity consumed in excess of the Initial Electrical Requirement in connection with such additional equipment.

If any lights, density of staff, machines or equipment used by Tenant in the Leased Premises changes after the construction of the Tenant Improvements and after the initial equipping and commencement of Tenant's operations in the Leased Premises as initially contemplated by Tenant in the Approved CD's (with respect to machines or equipment) in a manner which would materially affect the temperature otherwise maintained by the Building's air-conditioning system or generate substantially more heat in the Leased Premises, then Landlord shall have the right to install any machinery or equipment that Landlord considers reasonably necessary in order to restore the temperature balance between the Leased Premises and the rest of the Building, including, without limitation, equipment that modifies the Building's air-conditioning system. All costs expended by Landlord to install any such machinery and equipment and any additional costs of operation and maintenance in connection therewith shall be borne by Tenant, who shall reimburse Landlord for the same as provided in this Section.

SAMPLE 5 – LANDLORD'S LIEN

Tenant hereby grants to Landlord a lien and security interest in all property of Tenant now or hereafter placed in or upon the Premises for payment of all Rent due under this Lease; provided, however, Landlord specifically waives any lien or security interest in the Special Equipment and further agrees to subordinate its security interest in any other property of Tenant to the security interest of any other lender or equipment

lessor of Tenant. Landlord will execute a waiver or subordination confirming the foregoing on terms reasonably acceptable to Landlord. No security agreement or equipment lease with respect to the Special Equipment or any other property of Tenant shall allow such creditor access to the Premises unless such creditor has entered into such an agreement with Landlord. Such lien and security interest will constitute a security agreement under and subject to the "Uniform Commercial Code", as enacted in the State in which the Premises are located, and shall be in addition to and cumulative of Landlord's liens and rights otherwise provided by law or by other terms and provisions of this Lease. Landlord may enforce this Landlord's lien and security interest immediately upon a breach of this Lease by Tenant, or if Tenant vacates or is threatening to or in the process of vacating the Premises. All costs incurred by Landlord in the removal, storage, and disposition of such property shall be deducted from the proceeds of any sale, and if such proceeds are not sufficient to cover such costs and all other sums due from Tenant to Landlord hereunder, Tenant will reimburse Landlord for any deficiency upon demand. Landlord will not be liable for trespass or conversion or any other claim for damages or constructive eviction by Tenant in connection with any such entry onto the Premises to exercise its rights granted hereunder. Tenant agrees to execute, as debtor, such financing statement or statements as Landlord may now or hereafter

request. Tenant hereby authorizes Landlord to file any such financing statement without the necessity of Tenant's signature if Landlord so desires. Such property shall not be removed from the Premises without the prior written consent of Landlord, other than in the ordinary course of Tenant's business, until all unpaid Rent shall first have been paid and all the covenants, agreements, and conditions of this Lease have been fully complied with and performed by Tenant.

SAMPLE 6 - SPECIAL EQUIPMENT

No x-ray machines or other electrical, electronic, electromagnetic or other similar medical equipment, including equipment utilized for imaging services (the "Special Equipment"), shall be installed or used in the Premises except in strict accordance with the terms hereof. All Special Equipment shall be installed by Tenant at Tenant's sole cost and expense. All Special Equipment shall be electrically filtered and insulated so that there is no interference in the Building with telephonic, video, fiber optic, data processing, radio, television or other similar communication, transmission or reception currently or hereafter used in the Building. Landlord and Tenant acknowledge and agree that regardless of the manner of attachment of the Special Equipment to the Premises, the Special Equipment shall remain the personal property of Tenant. 📌