

**A COMPARATIVE STUDY OF THE UTILIZATION  
AND EFFECTS OF COMMERCIAL LEASES  
AND OPERATING LICENSES IN HAWAII**

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## FOREWORD

This study was prepared in response to Senate Concurrent Resolution No. 235, S.D. 1, H.D. 1, adopted during the Regular Session of 1988. The Resolution requested a report on the utilization and effects of operating licenses and commercial leases of a short-term or indeterminate nature where other than a standard lease is used. It was further resolved that the report address any oppressive business practices found arising out of these agreements and that a survey of other jurisdictions be conducted to determine if similar problems have been dealt with elsewhere.

The most difficult aspect of this study has been the lack of research material available for consideration. There was also a reluctance on the part of many individuals to discuss these issues because of the controversial nature of the subject matter and because of litigation contemplated and initiated during the course of the study.

The Bureau extends its sincere appreciation to the Central Merchants Association, its officers and members whose cooperation in providing information for the preparation of this study was invaluable. Thanks are also extended to the property managers and other individuals who assisted with information and documentation and the promise of confidentiality to each of them will remain inviolate. Special thanks are extended to Dennis Neilander, Principal Research Analyst, National Conference of State Legislatures, and to Milton R. Friedman, New York City, an acknowledged authority on the subject of this study. The research, assistance and advice provided by Mr. Friedman deserves a very special acknowledgment.

Samuel B. K. Chang  
Director

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## Chapter 1

### INTRODUCTION

During the 1988 Regular Session, the Fourteenth Legislature of the State of Hawaii adopted Senate Concurrent Resolution No. 235, S.D. 1, H.D. 1, a copy of which is included as Appendix A. This Resolution requested the Legislative Reference Bureau (hereinafter referred to as the "Bureau"), with the assistance of the Department of Commerce and Consumer Affairs (DCCA), to investigate, study, analyze, and report on the utilization and effects of operating licenses and commercial leases of a short-term or indeterminate nature where other than a standard lease is drawn up. The Resolution further directed that the report address any oppressive business practices found arising out of these agreements. The Resolution also authorized a survey of other jurisdictions which have similar shortages of land and similar problems as those referred to in the body of the Resolution, if the Bureau determined that such a survey would be helpful to make recommendations for future legislation.

The House Committees on Consumer Protection and Commerce and Legislative Management described the purpose of the Resolution as being to assess the need for legislative action to eliminate possible inequities with respect to commercial tenants of the type described in the Resolution.

#### Methodology

Researchers from the Bureau met with the Director and senior staff members of the Office of Consumer Protection (of the Department of Commerce and Consumer Affairs) for the initial purpose of determining if that department had received complaints of the nature referred to or involving the subject matter in S.C.R. No. 235. During these meetings, consumer protection staff members could recall only five or fewer inquiries or references to problems and complaints involving leases or rental agreements of a commercial nature and in all such cases, the matter was referred to the Real Estate Commission for proper disposition. The staff of the Real Estate Commission was unable to locate any record of any cases involving the issues raised by S.C.R. No. 235 being brought to their attention or being acted upon by that agency.

The Bureau also interviewed many merchants in the category defined by the Resolution and a substantial number of landlords or commercial property general managers in the area. Meetings and conferences were held with various officers and representatives of an association of merchants and other such interested parties. Appropriate inquiries were also made to federal, state, and local investigative agencies to determine if the subject matter of the Resolution had been brought to their attention to any degree.

Prior to any written communication outside the State of Hawaii, the Bureau contacted by telephone what was considered the most likely sources of comparable studies and surveys. These included the Practising Law Institute; the National Association of Government Affairs; the National Association of Realtors; the Office of the Attorney General in the states of

California, Florida, New Jersey, New York, and Massachusetts; and Mr. Milton R. Friedman, Attorney at Law, New York, the leading authority on commercial real estate leases.

Thereafter, by letter (attached as Appendix B), the Bureau made a blanket survey of every mainland state for such information or experience that could be found in each jurisdiction. Because of the nature of the subject matter and the split of authority as to whether the issue is one of real property or one of business practices, the surveys were sent to both the agency regulating real estate transactions and the agency concerned with business practices in each state.

### **Scope of the Study**

The salient point made by the Resolution and the accompanying committee report was that the purpose of the Resolution is to assess the need for legislative action to eliminate inequities, if any, with respect to commercial tenants without limitation to any particular geographic location.

Both the approach used and the conclusions reached in this undertaking must necessarily include a discussion of the historical background and development of what are now generally referred to as "operating licenses" and "commercial leases." This includes both the general rule of law as well as Hawaii statutes and appellate decisions.

The existing facts, as well as can be established from the interviews and documentation received, are analyzed and assessed and the rights of the parties under current decisions and statutes are discussed.

The Bureau views the objective of S.C.R. No. 235 as being the determination of whether the relationship between the referenced landlords and merchants is in fact replete with inequity and oppression and whether there is a need for corrective legislative action in this area of commercial affairs. The study will reach conclusions and make recommendations on these issues.

### **Organization of the Report**

The report is organized as follows:

Chapter 1 introduces the report and contains the methodology and scope of the study.

Chapter 2 is a statement of the facts gathered pursuant to the methodology.

Chapter 3 is a comparison of the International Market Place License and Operating Agreement with other written agreements in general and local use.

Chapter 4 is essentially a memorandum of law covering the legal issues under common law.

## INTRODUCTION

Chapter 5 is an analysis of applicable laws under existing Hawaii state statutes and appellate court decisions.

Chapter 6 is a discussion of the issues expressed in S.C.R. No. 235 as experienced in other jurisdictions.

Chapter 7 contains the conclusions and recommendations and is followed by the appendices.

## Chapter 2

### STATEMENT OF THE FACTS

#### Research Findings

This study responds to Senate Concurrent Resolution No. 235, S.D. 1, H.D. 1, which is attached as Appendix A. The resolution makes substantial reference to the affairs of the merchants located at the International Market Place and the original title sought to develop a landlord-tenant code of commercial leases. After substantial revisions in both the House and Senate, the resolution brought sharper focus on the problem of the utilization and effects of operating licenses and commercial leases of a short-term or indeterminate nature. The landlord-tenant code aspect was eliminated completely. The committee report made it clear that the purpose of the resolution was to direct attention to whether there was need for legislative action to eliminate possible inequities with respect to commercial tenants of the type described in the resolution. The research conducted throughout the course of this study was directed toward determining whether small businesses and merchants of the type located at International Market Place are generally subjected to exploitive, unfair or oppressive business practices with regard to their commercial leases or licenses.

Such a determination must necessarily include a complete analysis of the written agreements entered into by the parties. The analysis is contained in chapter 3 of this report. The discussion immediately following is a statement of the facts derived from the writer's personal interviews and conferences with the parties referred to in chapter 1. Although a number of contacts and attempts were made to obtain factual information from principals of WDC Ventures and International Market Place, no statement or documents were ever received.

During the early stages of the research, the merchants and their representatives supplied considerable factual information and a copy of the International Market Place License and Operating Agreement. However, during the latter stages the ease of contact with these persons and the availability of information ceased. It is believed that this change of attitude was a result of legal advice due to impending litigation. At any rate, additional information sought for this study was made available from the allegations contained in the complaints and exhibits filed pursuant to lawsuits brought in the state and federal courts.

The International Market Place is operated by the Waikiki Development Corporation (WDC) which was incorporated on September 13, 1954.<sup>1</sup> During these formative stages, the two most prominent names connected with this undertaking were Paul Trousdale and Clint Murchison.<sup>2</sup> Mr. Trousdale continues to be a principal figure in WDC to the present day. On December 30, 1954, WDC obtained a 55-year lease of approximately 17 acres of land in Waikiki from Queen's Hospital, a Hawaii eleemosynary corporation.<sup>3</sup> This lease included the area that is now known as the International Market Place.<sup>4</sup>



The International Market Place is bounded on the Makai side by Kalakaua Avenue and access to the area from the Mauka side is gained from Kuhio Avenue through the Kuhio Mall. Ewa of the International Market Place is Dukes Lane with the Waikiki Theatre at the Makai end, and the International Trade Center Building at the Mauka end. Diamond Head of the International Market Place is the Princess Kaiulani Hotel. A plot plan of the area is included as Appendix C.

During original development in 1955-56, the project was generally referred to as the International Village and Market Place.<sup>5</sup> Prior to that time the property was occupied by the Outrigger Canoe Club for use as a parking lot and contained a number of Matson houses.<sup>6</sup> The new project envisioned a five unit plan that would embrace the cultures of Hawaiian and South Seas Islands, Japan, China, Philippines, and India.<sup>7</sup> For the ensuing 15 years, this original plan was carried out by offering food, shopping and live entertainment in an island setting of grass, banyan trees, and thatched huts.<sup>8</sup> During the summer of 1969, the International Market Place was the subject of radical change by the construction of a series of low-rise structures and the grassy areas were covered with asphalt. "On the asphalt were placed a dozen or more oriental-styled push carts where everything from jewelry to scrimshaw (etched bone) is sold."<sup>9</sup> Except for the addition of several hundred carts and shops, the International Market Place has remained relatively unchanged during the past 20 years.

The following narrative is a summary of conferences held with officers and members of the Central Merchants Association, a trade organization of International Market Place merchants and vendors and other interested parties.

The initial merchants negotiated their agreements directly with the property managers. During recent years, it has become much more common to purchase a cart or shop from an existing merchant or vendor. Prior to the past two or three years, the negotiations for the purchase of a cart or shop was strictly a matter between the existing owner and the prospective purchaser. WDC Ventures did not participate in these negotiations and from all indications made no additional assessment or premium demand in approval of the transfer.

There is no evidence that WDC Ventures charged any premium or lump sum payment from a new merchant prior to the past two or three years. The practice of placing a premium on a new merchant's agreement and the requirement of payment of a percentage of the profit made by a merchant on resale, apparently began at approximately the same time. In addition to these policy changes by WDC Ventures, a moratorium on cart or shop resales was in existence for approximately one year ending in March, 1988. When transfers of ownership were again permitted, a condition of approval by WDC Ventures was the payment of 50 per cent of any gain realized by the seller.

During the time premiums have been placed on the International Market Place License and Operating Agreement, there is direct evidence of a high figure of \$40,000 for a food service outlet and a low figure of \$2,500 for a cart selling tourist souvenirs. Location within the complex appears to be the primary consideration in arriving at the premium figure.

## STATEMENT OF THE FACTS

Through conversations with the merchants and examination of the license and operating agreements, it was learned that the amount of minimum monthly rent for a cart vendor varies from a high of \$5,200 to a low of \$1,200. The location of the cart within the International Market Place is the one factor most determinative of the amount. Minimum monthly rent for merchant shops range from a high of \$10,000 to a low of \$2,500. For the most part, these figures are based on location but in some instances, the type of enterprise is considered.

The amount of the percentage license fee must also be considered in that the monthly payment to WDC Ventures is the greater of the minimum figure referred to above or a percentage of the gross sales as determined by the formula set out in the agreement. These figures range from 10 per cent to 15 per cent with a majority of the agreements at the 15 per cent figures. Most of the 10 per cent agreements are food service establishments and also provide for graduated increases of the percentage amount.

WDC Ventures also requires a security deposit with the amount quoted in each agreement. Of the various agreements available for inspection by the Bureau, very few provided a deposit of the same amount. Of the agreements examined, the highest security deposit required was \$28,480 and the lowest \$1,285. The basis for these figures could not be determined. It is rare that a security deposit is refunded to a merchant. It is probable that such deposits are credited to the account of the new owner in the event of a sale by the merchant.

The term or length of the various agreements under which the merchants operate are exclusively on a month-to-month basis for vendor carts and in some instances the small merchant shops are limited to month-to-month duration. Other agreements for small merchant shops are for much longer terms and in at least one instance, a period of 20 years.

The general form of these agreements are similar in their provisions, the only substantial difference being the items inserted in the blanks contained in the form. These matters generally include the following:

1. Name and address of merchant.
2. Legal entity or capacity of merchant.
3. Guarantor, if any.
4. Late payment charge (generally 12% per annum).
5. Description of merchant's other businesses within one mile of the International Market Place.
6. Description of the merchant's premises, usually in square feet, or space within the International Market Place.
7. A provision for payment for the merchant's failure to open.
8. A provision for the payment of a share of common expenses.

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9. A general statement of business use or merchandise to be sold.

The foregoing provisions are generally found in commercial contracts, and in varying forms, they are contained in the agreements hereafter used for comparison in this study.

### Chapter 3

#### COMPARISON OF THE INTERNATIONAL MARKET PLACE LICENSE AND OPERATING AGREEMENT WITH OTHER AGREEMENTS IN GENERAL AND LOCAL USE

In light of the concerns expressed in S.C.R. No. 235, S.D. 1, H.D. 1, the areas in the agreements of greatest concern can be grouped into the following categories:

- (1) Premiums payable to WDC Ventures;
- (2) Merchant's right to transfer or assign;
- (3) Minimum and percentage license fees;
- (4) Security deposits; and
- (5) Term of the agreement.

Questions such as whether the merchants at the International Market Place operate under oppressive business practices or suffer inequities in their commercial agreements become a question of degree. Accordingly, it may be helpful to compare the licensing agreements in force at the International Market Place with other agreements and practices in general and local use. This comparison is made by the Table that follows and concludes with a discussion of the application of both the written agreement and actual practices involving the five critical areas identified above.

As discussed in chapter 4, the agreement between the merchants and the International Market Place does not fall within the definition of what is generally considered a lease. The more probable characterization is that these agreements are licenses and commonly referred to as operating agreements or concessions. Litigation against the International Market Place has been initiated by some merchants in the United States District Court for the District of Hawaii contending, among other things, that some of the agreements were franchises under Hawaii state law, an issue which is beyond the scope of this study.

This chapter compares the various provisions of the agreement used at the International Market Place, included as Appendix D, with licensing or concession agreements in general and local use.

More specifically, the following table compares the 66 areas covered by the "International Market Place License and Operating Agreement" with provisions contained in licensing agreements used by two other shopping centers in the Waikiki area, as well as provisions in a standard form agreement contained in a legal publication which is recognized nationally.

As used in the table, the entries "same", "same general provisions" or "no similar provision" refer to the provision having that same number in the International Market Place agreement.

**Table 1**  
**Licensing Provisions**

| International Market Place License and Operating Agreement  | Form Book Agreement in General Use   | Agreement "A" in Local Use  | Agreement "B" in Local Use  |
|---|--|---|---|
| 1. Grant of License. Non-exclusive license to use the premises with specific denial of leasehold interest.  | 1. Grant of (exclusive or nonexclusive) right and privilege.   | 1. Provision for "demise and license" of designated "licensed premises".                                      | 1. Grant of exclusive license of designated area and lease of cart.   |
| 2. Term. As agreed.   | 2. Indefinite and terminable on notice as specified.   | 2. Same general provision.  | 2. Month-to-month, terminated by either party on 7 days' notice.  |
| 3. Minimum License Fee. As agreed, payable monthly in advance.  | 3. Minimum and percentage fee as agreed with payment to landlord daily.  | 3. Same, nonpayment on first day of month renders license null and void and merchant will immediately vacate. | 3. Same general provision.  |
| 4. Percentage License fee. Percentage of gross sales of previous month payable before 10th day of each month with credit of minimum license fee paid for preceding month. | 4. Landlord to return total sales to merchant less percentage due landlord and any expenses or advances to merchant. | 4. Same, no provision for credit of minimum fee.  | 4. Same provision for percentage of gross sales less customer refunds, sales between tenants, sales to employees, sales or excise tax, and postage. |
| 5. Failure to Open. Requires specified daily fee in lieu of percentage fee.   | 5. No similar provision.   | 5. No similar provision.  | 5. Minimum license fee payable although merchant fails to open.   |
| 6. Recapture. Failure to pay 125% of minimum license fee grounds to terminate agreement.  | 6. No similar provision.   | 6. No similar provision.  | 6. No similar provision.  |
| 7. Tax on License fees and Reimbursements. Merchant required to pay excise or similar tax imposed on landlord.  | 7. Same general provision.   | 7. Same general provision.  | 7. Same general provision.  |
| 8. Utility Charges and Services. Merchant to pay all metered utilities for his sole use and prorated share where jointly used.  | 8. Utilities and services to be provided by landlord.  | 8. Specified monthly charge rather than prorated.   | 8. Negotiable with each merchant.   |
| 9. Security Deposit. To secure compliance with refund at end of term if not in default. Landlord may transfer deposit to buyer in event of sale of landlord's interests.  | 9. No similar provision.   | 9. Same general provision.  | 9. Security deposit required and must be replenished if depleted by application to over due rent.   |

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| 10. Relocation. Landlord can require relocation on 30 days' notice and payment of costs of moving but merchant must pay cost of any remodeling of new location. Landlord can terminate license if merchant refuses to relocate. | 10. Landlord may require relocation on payment of renovations to new location.                             | 10. Relocation on mutual agreement only, otherwise merchant may terminate agreement. | 10. Landlord must approve.  |
| 11. Changes and Additions to Buildings. Landlord reserves right to alter, remove, or add buildings.   | 11. No similar provision.  | 11. No similar provision.  | 11. No similar provision.   |
| 12. Fixtures and Alterations. Requires new or reconditioned fixtures and landlord consent for any alterations.  | 12. Same general provision.  | 12. Same general provision.  | 12. Same general provision. |
| 13. Bonds. Bond or proof of ability to pay contractor required before any construction.   | 13. No similar provision.  | 13. No similar provision.  | 13. Same general provision. |
| 14. Removal and Restoration by Licensee. Removal of improvements during term requires landlord's consent. Merchant must remove at end of term and repair any damage.  | 14. Fixtures must be approved by landlord and cannot be removed if built into or fastened to the premises. | 14. No similar provision.  | 14. Same general provision. |
| 15. Maintenance of Building. Landlord to make structural repairs except when caused by negligence of merchant.  | 15. No similar provision.  | 15. No similar provision.  | 15. No similar provision.   |
| 16. Repairs by licensee. Merchant to make all but structural repairs.   | 16. Merchant shall pay all costs of filling premises for business.   | 16. No similar provision.  | 16. No similar provision.   |
| 17. Operation of Business. Requires good faith effort to obtain maximum gross receipts and gives landlord veto over methods of operation.   | 17. Same general provisions.   | 17. Requires sufficient stock and hours of operation to properly serve customers.    | 17. Same general provision. |

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| 18. Employee's Costumes and Conduct. Employees of merchants subject to general approval of landlord and merchant agrees to hold landlord harmless. | 18. Same general provision including right of landlord to terminate any employee of merchant.          | 18. Merchants' employees shall be neat and suitably dressed. | 18. No similar provision.   |
| 19. Picketing. Picket of merchant grounds to terminate or restrict merchant's activity.  | 19. No similar provision.  | 19. No similar provision.                                    | 19. No similar provision.   |
| 20. Storage. Space for storage or clerical work on premises denied or restricted.  | 20. Storage space provided at charge per square foot.  | 20. Same general provision.                                  | 20. No similar provision.   |
| 21. Rules and Regulations. Rules and regulations are part of agreement and merchant is in default for failure to comply.                           | 21. Employees of merchant to comply with all rules and regulations of landlord.                        | 21. Same general provision.                                  | 21. Same general provision. |
| 22. Compliance with Law. Merchant agrees to comply with applicable law and indemnify landlord for failure.   | 22. Same general provision.  | 22. No similar provision.                                    | 22. Same general provision. |
| 23. Recordation of Sales and Cash Registers. Merchant must record all sales and notify landlord in all matters pertaining to registers.            | 23. All customer records are property of landlord. Merchant must remit all receipts to landlord daily. | 23. Gross sales recorded on forms supplied by landlord.      | 23. No similar provision.   |
| 24. Gross Sales. Percentage license fee based on total retail selling price less customer credits, settlements for loss or damage and excise tax.  | 24. Percentage fee of gross sales less returns and allowances.   | 24. No similar provision.                                    | 24. Same general provision. |
| 25. Refund of Shopper's Purchases. Merchant will refund for purchases made by landlord's investigative shoppers.                                   | 25. No similar provision.  | 25. No similar provision.                                    | 25. No similar provision.   |
| 26. Reports by Licensee. Report and payment of percentage license fee due before 10th of month. Annual report due before February 28.              | 26. Landlord to receive total of gross sales daily with settlement on 15th of each month.              | 26. No provision for annual report.                          | 26. Same general provision. |

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| 27. Licensee's Records. Merchant to keep all business records for 3 years with landlord right to inspect.  | 27. All books and records are property of landlord.                                     | 27. No similar provision.   | 27. No similar provision.   |
| 28. Audit. Merchant must submit to audit.  | 28. No similar provision.   | 28. No similar provision.   | 28. Same general provision.   |
| 29. Right to Examine Books. No waiver of right by acceptance of payments.  | 29. No similar provision.   | 29. No similar provision.   | 29. Same general provision.   |
| 30. Common Areas. Description of areas provided.   | 30. No similar provision.   | 30. No similar provision.   | 30. No similar provision.   |
| 31. Right to Use Common Areas. Prohibits parking, soliciting business or distributing handbills in common areas.   | 31. Merchant has same use and entitled to same services as other merchants of landlord. | 31. Same general provision.   | 31. No similar provision.   |
| 32. Control of Common Areas by Licenser. Landlord reserves absolute control over common areas.   | 32. Same general provision.   | 32. Same general provision.   | 32. No similar provision.   |
| 33. Obstruction of Common Areas. Merchant must keep clear and free of obstruction.   | 33. Same general provision.   | 33. Same general provision.   | 33. Same general provision.   |
| 34. Payment of Real Property Tax, Assessments, Common Expenses and Other Expenses. Merchants to pay all property taxes and assessments, all management and maintenance costs and all insurance premiums. | 34. Merchant to pay all taxes and assessments on merchants business.                    | 34. Provision only that merchant pay monthly fee for common area expense and utilities. | 34. Merchant to pay insurance premiums. All other charges negotiable for each merchant. |
| 35. Compliance with Fire Insurance Policy. Merchant to comply with law and provisions of coverage.   | 35. Same general provision.   | 35. No similar provision.   | 35. No similar provision.   |
| 36. Insurance on Improvements, Fixtures and Merchandise. Merchant to maintain coverage.  | 36. Same general provision.   | 36. Same general provision.   | 36. Same general provision.   |



|     |  |     |  |     |   |     |   |
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| 37. | Plate Glass Insurance. Merchant to keep full value coverage.   | 37. | No similar provision.  | 37. | Same general provision.   | 37. | No similar provision.   |
| 38. | Liability Insurance. Public liability minimum of \$300,000/person-\$1,000,000/occurrence-\$100,000/property.   | 38. | Same general provision with minimum coverage negotiable.   | 38. | Same general provision.   | 38. | Personal liability \$1,000,000 per occurrence and property damage, \$300,000 per occurrence.          |
| 39. | Approval of Insurer and Copies of Policies. Landlord to get copy of policies and form, coverage and insurer must be acceptable with landlord named as insured with right of 10 days' notice of modification or cancellation.   | 39. | Same general provisions.   | 39. | Provides only that coverage be provided by company authorized to do business in Hawaii and 30 days' notice of cancellation. | 39. | Same general provision.   |
| 40. | Reciprocal Waiver of Licensor's and Licensee's Insurer. Subrogation waived.  | 40. | No similar provision.  | 40. | No similar provision.   | 40. | No similar provision.   |
| 41. | Assumption of Risk by Licensee. Merchant assumes risk of damage by water or 3rd parties and to any property kept on premises.  | 41. | Same general provisions.   | 41. | Same general provision.   | 41. | Same general provision.   |
| 42. | Indemnity. Merchant indemnifies landlord against loss resulting from operation of merchant's business.   | 42. | Same general provision.  | 42. | Same general provision.   | 42. | Same general provision.   |
| 43. | Destruction or Damages to Premises.<br>(a) Landlord may elect not to repair in event of destruction and terminate on 30 days' notice.<br>(b) Merchant must make repairs of casualty or continue minimum payments.<br>(c) License fees to be adjusted for partial loss. | 43. | (a) Agreement terminated on extensive damage rendering premises untenable.<br>(b) Landlord has option to make repairs in event of partial destruction.<br>(c) Proportional allowance on licensee's minimum fee if landlord rebuilds. | 43. | Merchant must continue payment of minimum fee even if premises destroyed.   | 43. | Merchant not relieved of obligations if premises destroyed and must repair at merchant's own expense. |

|     |   |     |  |     |  |     |                                      |
|-----|---|-----|--|-----|--|-----|--------------------------------------|
| 44. | Eminent Domain.   | 44. | Same provisions as for casualty defined in paragraph 43 above.                 | 44. | No similar provision.  | 44. | No similar provision.                |
|     | (a) Agreement terminated by full taking. Proration in event of partial taking. Landlord receives all payment from taking.   |     |  |     |  |     |                                      |
|     | (b) Merchant may terminate on partial taking but landlord receives all payment from taking.   |     |  |     |  |     |                                      |
|     | (c) Landlord will not claim separate award made to merchant.  |     |  |     |  |     |                                      |
|     | (d) No termination on temporary taking. Merchant entitled to payments from condemning authority.  |     |  |     |  |     |                                      |
| 45. | Restrictions on Assignments and Subletting. No assignment without landlord's consent. Consent may be conditioned on full disclosure, proof of financial responsibility and an increase in license fees. | 45. | Merchant has no right of assignment without prior written consent of landlord. | 45. | Assignment or subletting by merchant is void and terminates agreement. | 45. | Merchant has no right of assignment. |
| 46. | No Release of Licensee. Merchant remains liable after assignment.   | 46. | Release by written consent only.   | 46. | No assignment permitted.   | 46. | No similar provision.                |
| 47. | Off-set Statements. If landlord sells or mortgages, merchant must furnish statement of claims, defenses or modifications to agreement.  | 47. | No similar provision.  | 47. | No similar provision.  | 47. | No similar provision.                |
| 48. | Subordination and Attornment. Merchant must acknowledge lessor or mortgagee of landlord.  | 48. | No similar provision.  | 48. | No similar provision.  | 48. | No similar provision.                |

|   |   |  |  |
|---|---|--|--|
| 49. Covenant Not to Compete. Merchant will not engage in similar business within one mile.                          | 49. Same general provision, violation terminates agreement.   | 49. No similar provision.  | 49. No similar provision.  |
| 50. Access to Premises. Landlord may enter premises to repair, inspect or show.                                     | 50. Same general provision.   | 50. Same general provision.  | 50. Same general provision.  |
| 51. Utility Mains. May be located as necessary.   | 51. No similar provision.   | 51. Same general provision.  | 51. No similar provision.  |
| 52. Arbitration. As prescribed by Chapter 658, Hawaii Revised Statutes.   | 52. No similar provision.   | 52. No similar provision.  | 52. Same general provision.  |
| 53. Default by Licensee.  | 53. (a) Breach of agreement.  | 53. (a) Nonpayment.  | 53. (a) Failure to perform.  |
| (a) Insolvency, assignment for benefit of creditors, bankruptcy, appointment of receiver or levy against interests. | (b) Failure of payment.   | (b) Assignment.  | (b) Failure of payment.  |
| (b) Conviction of felony.   | (c) Bankruptcy.   | (c) Violation of rules and regulations.                                  |  |
| (c) Abandonment.  | (d) Insolvency.   |  |  |
| (d) Non-payment.  | (e) Assignment for benefit of creditors.  |  |  |
| (e) Falsifying statements.  | (f) Appointment of receiver.  |  |  |
| (f) Failure to perform.   | (g) Attachment of assets.   |  |  |
| 54. Remedies. Landlord has right of self-help, and re-let, has lien with power of sale. Merchant to pay all costs.  | 54. Landlord retains rights of self-help, right to withhold funds from final settlement and all other remedies at law or equity. Landlord has lien on all property of merchant. | 54. Landlord has right to terminate for defaults listed in paragraph 53. | 54. Landlord may terminate in 3 days for failure of payment, otherwise only after 3 days' notice from landlord to tenant in default. |
| 55. Nonwaiver. Waiver must be in writing. Waiver of one right not waiver of others.                                 | 55. Same general provision.   | 55. No similar provision.  | 55. No similar provision.  |

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| 56. | No Accord and Satisfaction. Acceptance of less than full amount owed not waiver of balance.       | 56. | No similar provision.                                | 56. | No similar provision.   |
| 57. | Return of Premises. On termination, merchant to deliver premises in good repair.                  | 57. | Merchant agrees to remove merchandise and equipment. | 57. | No similar provision.   |
| 58. | Holdover by Licensees. Merchant holdover to be considered month-to-month agreement on some terms. | 58. | No similar provision.                                | 58. | Agreement automatically renewed unless contrary notice given. |
| 59. | Liquidated Damages. Merchant holdover subject to double fees as liquidated damages.               | 59. | No similar provision.                                | 59. | No similar provision.   |
| 60. | Change of Name. Landlord reserves right to change name of international Market Place.             | 60. | No similar provision.                                | 60. | No similar provision.   |
| 61. | Notice. Considered given at time of mailing to address of record.                                 | 61. | Notice by registered mail.                           | 61. | No similar provision.   |
| 62. | Multiple Licenses. Obligations are joint and several. Notice to one is notice to all.             | 62. | No similar provision.                                | 62. | No similar provision.   |
| 63. | Binding Effect. Heirs, successors and assigns bound subject to paragraph 45.                      | 63. | No similar provision.                                | 63. | No similar provision.   |
| 64. | Entire Agreement. Document is entire agreement. Changes must be in writing.                       | 64. | No similar provision.                                | 64. | No similar provision.   |
| 65. | Captions. Have no limiting effect.  | 65. | No similar provisions.                               | 65. | No similar provision.   |
| 66. | Governing Laws. State of Hawaii.  | 66. | No similar provisions.                               | 66. | No similar provision.   |

## INTERNATIONAL MARKET PLACE LICENSE AND AGREEMENT

A review of the foregoing table reveals that many of the paragraphs are included or excluded purely as a matter of style of the drafter. Of the numbered paragraphs where no similar provision is found in other forms of agreement, the reason in some cases is because the basic topic is adequately covered in other paragraphs of the same agreement.

Other differences include paragraphs 11 and 15 which give the International Market Place the right to repair, alter, remove or add buildings. Due to the transitory nature of the improvements in the International Market Place, this would be necessary or desirable, whereas the other structures covered by the comparison agreements are of a considerably more permanent nature. In addition, as discussed in chapter 4, provisions such as these may also have been included to avoid any implication that the licensing agreement was really a lease.

Paragraphs 19 and 30 pertain to picketing and the common areas. Both the merchants and the customers of the International Market Place stand almost shoulder to shoulder in most areas and these provisions seem only logical under such circumstances and may well be of little or no importance in a different commercial environment.

The provisions covering subrogation rights in paragraph 40, off-set statements in paragraph 47, subordination and attornment in paragraph 48, and the change of name in paragraph 60 of the International Market Place Agreement have no similar statements in the other documents used for comparison. The likely reason for this is the difference in the ownership of the real property or the provisions in underlying agreements between the actual owners and the original lessee.

The International Market Place Agreement also contains provisions for arbitration in paragraph 52, non-waiver of rights in paragraph 56, and provisions that the captions in the agreement have no limiting effect in paragraph 65. These clauses seem to be fairly standard and in general use in drafting contracts. The failure to include these provisions in other agreements appears to be a matter of drafting style.

Paragraph 63 of the International Market Place Agreement provides that the agreement shall be binding on the heirs, successors, executors, administrators, and assigns of the parties, subject however to the restrictions contained in paragraph 45. The provisions of paragraph 63 are almost universally included in commercial agreements with the exception of licenses and personal services contracts. In these instances and where the agreement itself prohibits assignments as in the case of the comparison agreements, the clause for binding effect has no field of operation.

Based on information from available sources, every merchant at the International Market Place operates under substantially the same form of agreement. It was reported that a suit filed on October 11, 1988, in state court (Hawaii First Circuit, Civil No. 88-3154-10) represents roughly 85 per cent of the International Market Place merchants. The complaint in the case alleges that "all of the month-to-month licenses except for, essentially, location, rent and commencement dates are the same," and that "all of the definite-term licenses are, essentially, the same except as to location, rent

and commencement date." Case No. 88-00706 DAE was filed September 23, 1988 in the United States District Court for the District of Hawaii on behalf of 10 food service merchants at International Market Place. This suit is based on a "License and Operating Agreement" signed by each merchant which is identical to the others except for provisions such as premium, rent, location and commencement date.

A close examination of the sources referred to above reveals that all of the food service merchants who are plaintiffs in the federal court action operate under a license and operating agreement identical to Appendix D. A comparison also reveals that each of the shop merchants with a definite term and who are plaintiffs in the state court action referred to above also operate under a license and operating agreement identical to Appendix D. Other cart vendors and shop merchants operate under a more recent or revised form of agreement and all are on a month-to-month basis. The differences in these two forms of agreements relate to the payment of taxes, assessments, utilities, and repairs and all other paragraphs of this revised form are identical to Appendix D.

Conversations with representatives of the Central Merchants Associations further revealed that some of the five basic areas of contention by the merchants listed above arise from alleged practices engaged in by WDC Ventures and some from the provisions of the License and Operating Agreement. Each of the five topics will be discussed in turn beginning with the premiums required by WDC Ventures on the signing of the agreement and on approval of a transfer or assignment of the agreement by the merchant. As previously indicated, this practice has existed for approximately 2 to 3 years. Although the two other agreements in local use used for comparison purposes referred to in the table contained no provision for a premium, it was learned from interviews with other property managers that the practice of charging a premium upon the signing of an agreement of this type is a common practice in Waikiki.

Generally, the charging of premiums and the requirement of additional payment for approval of transfer or assignment of the license is a standard practice and is known as a "recapture of profits clause" in similar type agreements. The severity of some of these clauses is seen in the guidelines suggested for the landlord's attorney found in the Practising Law Institute publication "Commercial Real Estate Leases 1988", Milton R. Friedman, chairman. Friedman cautions attorneys to include a provision in the agreement that if the tenant assigns or sublets, any profit realized by the tenant from charging a higher rent must be shared with the landlord. The concluding sentence at page 912, provides:

All consideration received by the tenant from an assignee or subtenant must be included as rent, including key money, bonus money, payments in excess of fair market value for services, assets, fixtures, inventory, accounts, goodwill, equipment, furniture, general intangibles, capital stock or equity ownership.

This indicates that the charge of an initial premium and on approval of a transfer or assignment is not uncommon, and there is no evidence that the

charges or requirements of WDC Ventures in this regard are any more or less onerous than other similar agreements or practices.

The second topic of merchant objection is the landlords' refusal to allow a transfer or assignment of the merchant's interest except upon terms which the merchants contend are exploitive. As discussed above, provisions for "recapture of profits clauses" would appear to be in general use. The percentage of profits or whether any transfer or assignment is allowed at all would appear to be a matter of negotiation between the parties. That WDC Ventures requires the payment of 50 per cent of any gain by the merchant to approve the assignment seems the most considerate of the agreements in local use. One of the local agreements referred to in the above table clearly provides that the merchant will not assign or sublet. The other agreement in local use states that any assignment is void and terminates the agreement immediately. The manager of one of Hawaii's large shopping centers reported that the agreement in use at that complex also provided for a 50 per cent recapture of profits.

The third question refers to the amount of the minimum license fee and the percentage license fees. The range of these fees was not seen as seriously objectionable by the merchants and vendors at International Market Place or any of the other parties interviewed. The minimum license fee of one similar Waikiki concern is \$1,800 and the percentage license fee is 12 per cent. A major variety store in the area's largest shopping center has no minimum fee but requires a percentage license fee between 30 and 35 per cent. Further interviews with property managers in Waikiki revealed that in some of the least desirable locations, minimum license fees are in the \$300 to \$500 range with no percentage fee charged at all.

The general range of the minimum and percentage fee in other jurisdictions is subject to a number of diverse factors. In all cases, the one factor of major concern is location. The other items for consideration are traffic volume, sales volume, merchant's "mark-up", cost of inventory and competition of both the merchant and the landlord.<sup>1</sup> These factors are generally used to arrive at the percentage fees for supermarkets at 1-1/2 to 2, apparel at 4 to 8, jewelry at 7 to 10, gifts at 8 to 10, millinery at 10 to 12, and parking lots at 40 to 60.<sup>2</sup> These percentage figures are a national average and for purposes of comparison, they are somewhat less than the 12 to 15 per cent charged at International Market Place.

Security deposits at the International Market Place generally are in the \$4,000 to \$6,000 range. In comparison, one similar local practice requires a security deposit of two months' minimum rent with a minimum rent of \$1,800 per month. A second local concern requires a security deposit of \$1,000.

The remaining area of major concern to the merchants is their lack of security, the term of the agreement and the provisions for termination. As discussed in chapter 4, one of the traditional characteristics of a license is that it is terminable at will by either party. Indeed this is the common law rule in the absence of an agreement to the contrary. The International Market Place Agreement anticipates either a month-to-month license or an agreement for a term of years. The form of the agreement contains blanks to

be filled in to reflect the term of the particular agreement. This same approach is used in all other agreements both local and in general use.

It is estimated that over 90 per cent of the merchants operate under a month-to-month agreement and under existing law either party can legally terminate the agreement on one month notice to the other. The other agreements for a period of years are not as critical on the subject of termination.

In comparison, one of the agreements in local use contains the same general provisions as does the International Market Place Agreement. The second agreement in local use provides for a month-to-month term but also states that either party can terminate on seven days' notice. The form of agreement in general use leaves the term and notice of termination for negotiation between the parties.

In summary, the policy and actual practices of WDC Ventures in the administration of the agreements at International Market Place do not appear to be far removed from that of other property managers and owners. Likewise, the comparison of the provisions of the written agreements contained in the above table indicates that the terms of the International Market Place Agreement are in many instances less oppressive, exploitive or unfair than the others used for comparison.

The complaints filed in the pending litigation of these matters make allegations of certain conduct and representations on the part of WDC Ventures and its officers and agents which the plaintiffs claim led them to expectations and actions to their substantial detriment. These issues are beyond the scope of this study.



## Chapter 4

### CERTAIN REAL PROPERTY RELATIONSHIPS AT COMMON LAW

The legal effect of the agreement between the merchants at the International Market Place and WDC Ventures must necessarily include a discussion of the rules of common law and their application to the "International Market Place License and Operating Agreement." The rights of the parties to these agreements will, in all cases, be governed by the rules of common law and existing Hawaii state statutes referred to in this study.

This chapter analyzes the specific terms of the agreement to determine if the document is properly viewed as a lease or a license and to generally discuss the effects of such document on the rights of the parties. The possibility that the relationship of the parties is based on something other than a lease or license is too remote to warrant any further definition than as contained below.

#### Definitions

Every person who enters upon real property does so as either an owner, lessee, licensee, invitee, adverse possessor, squatter or trespasser.<sup>1</sup> Taken in reverse order of paramount right, a trespasser is defined as one who intentionally enters on the property of another without consent or lawful authority either express or implied.<sup>2</sup> A squatter is one who settles on public land for the purpose of acquiring title but without proper compliance with regulations.<sup>3</sup> The definition of an adverse possessor is one who is in open and notorious possession and control of real property under color of title in opposition to the true owner.<sup>4</sup> An invitee is a person on the premises of another at the express or implied invitation of the latter for business purposes, for mutual advantage, or for purely social purposes.<sup>5</sup> A licensee is one who has a personal, revocable and unassignable privilege conferred either by writing or parol to do one or more acts on the land of another without possessing any estate or interest in the land.<sup>6</sup> A lessee is defined as one who holds an interest or estate in land which is conveyed by a lease giving possession of the land to the exclusion of others including the owner.<sup>7</sup> An owner of real property is the person in whom is vested the dominion over and title to the fee with the right to dispose of it as he pleases.<sup>8</sup>

#### Distinction Between Lease and License

The authorities are uniform in the conclusion that there is a broad distinction between a lease of land and a mere license. In most cases this distinction between a lease and license is made without regard to the possibility of the existence of an easement.<sup>9</sup> The probable reason for this result is that both a lease and an easement imply an interest in the land while a license does not give an interest in the land itself. Regardless of its title an instrument will generally be characterized by the manifest intent of the parties gleaned from consideration of its entire contents.<sup>10</sup> For the purposes of this study, the discussion will be directed toward the distinction between operating licenses and standard commercial leases as those terms are used in Senate Concurrent Resolution No. 235, S.D. 1, H.D. 1.

If there exists a single distinguishing factor between a license and a lease, it is that a lease conveys an interest in land and a license does not.<sup>11</sup> There are, however, other elements of both a license and a lease which give each a separate character and field of operation. The elements that distinguish a lease from other rights of entry include that a lease is undoubtedly a "conveyance", conveying a lesser interest than does a deed.<sup>12</sup> A lease is said to be a conveyance, grant or devise of realty for a designated period with the reversion to the grantor.<sup>13</sup> Other authorities refer to a lease as a contract for exclusive possession and profits of lands and tenements for a specified period or at will. Except to make repairs and collect rent, the landlord has no right of entry.<sup>14</sup>

Leases are further distinguished by the rule now established in nearly all jurisdictions that a lease embraces the doctrine of implied covenant of quiet enjoyment and peaceable possession<sup>15</sup> and is regarded as an encumbrance on the leased land.<sup>16</sup> If an agreement confers exclusive possession of the premises or a portion thereof as against the whole world, including the owner, it is a lease.<sup>17</sup>

Having in mind the foregoing attributes of the right to enter upon land pursuant to a lease, it is easily concluded that the application of these rules means that the distinctive feature of the transactions as a license vanishes at once. These elements of exclusive possession by the lessee, an interest in the land and covenants of quiet enjoyment and peaceable possession necessarily rule out any possible conclusion that an agreement containing one or more such provisions is a license.

The definition and nature of a license at common law and followed without exception in all jurisdictions is best stated that "A license in real property is defined as a personal, revocable, and unassignable privilege, conferred either by writing or parol, to do one or more acts on land without possessing any interest therein."<sup>18</sup> To further define the nature of a license, it is said to be "merely a permission"<sup>19</sup> or "privilege in favor of the licensee."<sup>20</sup> A license is a "trivial right"<sup>21</sup> and "a mere immunity from trespass."<sup>22</sup> One court characterized licenses as being merely a permit or privilege to do what otherwise would be unlawful.<sup>23</sup> A license is "founded on personal confidence"<sup>24</sup> and, indeed, one of the distinguishing characteristics is that a license may always be made by parol.<sup>25</sup> The authorities agree that a license is revocable at the pleasure of the licensor (i.e., the one who gave the license) and is indivisible, nonassignable, and not exclusive.<sup>26</sup> It is generally held that a transfer of the estate of the licensor revokes the license and that a license is destroyed by an attempted transfer by the licensee.<sup>27</sup> There is near uniformity in the cases that a licensee, as such, has no right of action against the licensor or third persons who obstruct the licensee's exercise of the license privilege.<sup>28</sup>

The primary distinguishing factor previously referred to, that a license does not convey an interest in land, is based on the fact that a license may rest in parol. Indeed, a license may arise by implication, through silence, or upon failure of the landowner to object.<sup>29</sup> Accordingly, a license does not create an interest in land sufficient to bring it within the statute of frauds.<sup>30</sup>

Thus, it is clear under the general rules of common law, that a licensee has few rights and little protection from the whims of the licensor and as hereinafter discussed, in the absence of a licensing agreement containing specific provisions to the contrary, the licensee is essentially without remedy under the common law for perceived abuses by the licensor.

### **Application of the Rules of Common Law to the International Market Place License and Operating Agreement**

The application of the rules of common law, as set out in this chapter, to the provisions of the agreement between the various merchants and WDC Venture, dba International Market Place, is necessary to determine the legal character of the relationship between the parties. The decisions are uniform in concluding that the instrument will be characterized by the manifest intent of the parties rather than its title "License and Operating Agreement." This is not to say that the designation "License and Operating Agreement" will exclude such a conclusion, but only that its legal import will rest on what provisions are contained within the document itself.

To determine whether the agreement is a "lease," the first element to consider is whether it "conveys and interest in land." This appears to be expressly negated by the provisions of paragraph 1 of the terms and conditions section of the agreement that "This License does not give you any leasehold interest in the real property comprising International Market Place." A thorough reading of all the provisions of the agreement fails to reveal any other words of grant or devise of realty so as to limit or qualify these express terms that there be no leasehold interest in the real property.

A second test to determine if an agreement is a lease, is whether there is a contract for exclusive possession even as against the owner. Again, the express terms of the agreement begin with this provision:

1. Grant of License. We grant you a non-exclusive license to use the Premises.

There is further reference in the agreement to a "non-exclusive" right to use the common areas. The clear intent of these provisions is that there is no agreement for exclusive possession and absent this element, the agreement would not likely be construed as a lease.

A third and final aspect to consider is the generally accepted common law rule that a lease contains an implied covenant of quiet enjoyment and peaceable possession. Or, to restate the rule in this context, if there is no implied covenant of quiet enjoyment and peaceable possession, then the agreement is not a lease. The application of this rule means simply that the landowner will not disturb the possession or attempt to recover possession of the premises.<sup>31</sup> There is little room for argument in favor of these implied covenants in view of the express terms of the agreement.

Paragraph 10 of the Terms and Conditions section gives the International Market Place "the right to relocate the various buildings," "the right to relocate the Premises [of the Merchant] to another area," "the right to make alterations or additions to the International Market Place, including the

removal of buildings or portions thereof." To enforce these provisions, the agreement provides that if the merchant should refuse, the International Market Place has "the right to terminate" the agreement.

All of the foregoing provisions contained in the agreement between the merchants and the International Market Place seem fully intended to avoid the implication of any of the leasehold elements. Therefore, under existing common law, the agreement contains no provisions to warrant a conclusion that the document is a lease. To the contrary, by its express terms the logical conclusion is that the agreement is not a lease.

Having reached the foregoing conclusion, the remaining alternative and that supported by the great weight of authority is that the agreement is a license and subjects the merchants to all the common law restrictions and limitations imposed by that type of commercial relationship.

If the statements contained in the Terms and Conditions section of the agreement are to be given any weight in establishing the manifest intent of the parties, then the opening sentence that "we grant you a non-exclusive license" and the closing paragraph reference to "this license", when considered with the repetitive designation of the agreement as a license and the designation of the parties as licensor and licensee, indicates that the intent of the parties in executing the agreement was to create a license. Under common law, this manifest intent, as in the interpretation of all contracts, is essentially the controlling factor which guides the courts in determining the rights of the parties under such agreements. If the use of these words and phrases is seen as establishing the intent of the parties, then the agreement is a license.

In more specific terms, by express provision that the agreement does not give the merchant "any leasehold interest in the real property," the indication is that there is only a "personal privilege" which is an attribute of a license, that the agreement can be revoked by either party at will or at least after 30 days' notice, is borne out by the fact of a monthly term which all the more leads to the conclusion that the agreement is a license. The restrictions and prohibitions on assignment contained in the agreement further indicate that the document is a license. This appears inescapable in view of the provisions that the merchant may not voluntarily or involuntarily assign or sublicense any portion of the premises without consent. Moreover, the agreement provides that any assignment to the contrary "will be void" and the merchant "will remain fully liable under the license".

Based on the foregoing, under common law, the merchants at International Market Place operate under a mere license and are subject to the express terms and conditions set out in the agreement. This conclusion necessarily excludes any of the implied covenants of quiet enjoyment and peaceable possession of a landowner to the holder of a leasehold interest.

In simple terms, the International Market Place merchants have no reasonable expectation under the document by which they operate to claim any right to tenure beyond a month-to-month basis.

## Chapter 5

### THE LAW IN HAWAII

#### Existing Hawaii Statutes and Their Application to Commercial Transactions

Statutes enacted by the Hawaii State Legislature pertaining to the landlord and tenant relationship are currently divided into a separate and distinct code governing agreements involving residential property and all other statutes which generally cover commercial landlord and tenant agreements. The former is cited as the Residential Landlord-Tenant Code and was initially enacted in 1972 as chapter 521, Hawaii Revised Statutes. Section 521-2 provides that the underlying purposes and policies of this chapter are:

- (1) To simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants of dwelling units;
- (2) To encourage landlords and tenants to maintain and improve the quality of housing in this State; and
- (3) To revise the law of residential landlord and tenant by changing the relationship from one based on the law of conveyance to a relationship that is primarily contractual in nature.

Section 521-8 provides definitions of various terms as used in chapter 521 and defines a dwelling unit as "a structure, or part of a structure, which is used as a home, residence, or sleeping place by one person or by two or more persons maintaining a common household, to the exclusion of all others." "Premises", under section 521-8, "means a dwelling unit." A "landlord" is defined as "the owner, lessor, sublessor, assigns or successors in interest of the dwelling unit" and a "tenant" is defined as "any person who occupies a dwelling unit for dwelling purposes under a rental agreement."

Under the express terms of chapter 521, these provisions of law are specifically directed toward "governing the rental of dwelling units and the rights and obligations of landlords and tenants of dwelling units." Chapter 521 does not apply to the agreements referred to in S.C.R. No. 235, S.D. 1, H.D. 1.

The remaining statutory law of landlord and tenant in Hawaii is found in chapter 666, Hawaii Revised Statutes, and consists almost exclusively of landlord remedies for possession and judgment for rent plus damages.<sup>1</sup>

In pursuing the remedy for possession, the landlord is required to bring the action in the district court<sup>2</sup> on the following statutory grounds:

- (1) Expiration of the tenancy;<sup>3</sup>
- (2) Noncompliance with conditions or covenants in the lease;<sup>4</sup>

- (3) Existence of an act or condition which constitutes a common nuisance as defined by section 712-1270;<sup>5</sup> or
- (4) Nonpayment of rent.<sup>6</sup>

If the landlord is successful, judgment is entered for possession and costs and a writ of possession is issued.<sup>7</sup> The effect of the writ is that any contract or relationship of the parties as landlord and tenant shall be deemed to be canceled and annulled.<sup>8</sup> However, if before the writ is actually issued, the claims of the landlord for rent are paid, then a writ of possession based on nonpayment will be stayed.<sup>9</sup>

Other sections of chapter 666 deal with the validity of oral leases of less than one year duration<sup>10</sup> and provisions that the landlords rights shall not be prejudiced by acceptance of rent during litigation for possession.<sup>11</sup> Amendments enacted in 1984 added provisions authorizing the court to require disputed rents be paid into court.<sup>12</sup>

All other sections of chapter 666 are procedural in nature and relate to jurisdictions, service, and return.<sup>13</sup>

### Applicable Court Decisions in Hawaii

In an unbroken line of decisions, the Supreme Court of Hawaii has held that where the relationship of landlord-tenant does not exist, the district court is without jurisdiction and the provisions of chapter 666 have no application.<sup>14</sup> Therefore, there arises the ultimate issue of whether the International Market Place agreement is properly characterized as a lease or a license under the Hawaii decisions. If the agreement is viewed as a license, then it is probable that the Hawaii courts would deem such to be outside the purview of both the commercial and residential landlord-tenant statutes. In such event, decisions as to the rights of the parties must necessarily be determined by the application of the principles of contract law.

The earliest reference to a license found in the Hawaii Supreme Court decisions was in 1861 in the case of Lot Kamehameha v. Nahaolelua and Kaiheekai, 2 Haw 378. In that case, the court observed that the question of intent on the part of the landowner is of vital importance in determining whether a license exists and if a license was intended, the landowner could revoke it at his pleasure and resume possession. In the case of McCandless v. John Li Estate, 11 Haw 777, (1899), the Hawaii court extended the definition of a license in saying:<sup>15</sup>

A "license" in the law of real property is an "authority to do a particular act or series of acts upon another's land without possessing any estate therein". It is a personal privilege, is not assignable, ceases upon the death of either party and is revoked by a sale of the land by the licensor.

In applying the rule thus stated, the court found that the agreement in question "expressly binds the executors, administrators and assigns of the parties",<sup>16</sup> passed a "right to use the land for a definite term for a specific

purpose"<sup>17</sup> and created "an 'interest' in the land."<sup>18</sup> In concluding that the agreement was a lease and not a revocable license, the court also noted that the written agreement was for a term of 15 years and "was to demise the pasturage of the land in question."<sup>19</sup> The court found a "grant" supported by a valuable consideration and held that the "evident intention of the parties" was to create an interest in land rather than a mere license, revocable by the landowner.<sup>20</sup>

In the case of Ideta v. Kuba, 21 Haw 751 (1913), the complainant contended that he had an easement to cross respondent's land to gain access to a bridge across Pauoa Stream. In reviewing the testimony, the court found that if any agreement existed at all, it was an oral agreement and under the statute of frauds, could never amount to an easement. The court concluded as follows:<sup>21</sup>

In our judgment the case presents an illustration of a simple parol license bare of any special or complicating features--a mere personal privilege--which under all the authorities is revocable at the will of the licensor.

These earlier cases exhibit the courts willingness to look to the manifest intent of the parties to determine the nature of the agreement. Likewise, more recent Hawaii cases reach the same conclusions. Following these well established rules of law, in the case of In Re Fasi, 63 Haw 624, 634 P.2d 98 (1981), the court held that the words "tenant" and "occupancy" connote "possession" and "an interest in land" as opposed "to 'permit' and 'license' which imply something less."<sup>22</sup>

If there remained room for doubt as to the elements of a lease as, opposed to a license under the rulings of the Supreme Court of Hawaii, the Court in the case of Kapiolani Park Preservation Society v. City and County of Honolulu, No. 12323, 751 P.2d 1022 (1988), resolved all such doubts. In its conclusion that the agreement in question was a lease, the decision makes reference to the specific terms contained in the agreement as follows:<sup>23</sup>

There are a plethora of decided cases distinguishing between leases, which convey an interest in the land, and mere licenses, of which concessions are an example. As we have pointed out, here we have a transfer of possession for a fixed term of 15 years of a definite parcel of real estate. The interest granted is not terminable at will. It is, however, assignable, with the consent of the transferor, the trustee. It is mortgageable. The improvements are to be constructed, maintained and, in the event of destruction, replaced by the transferee. In the event of default, rights are given to any mortgagee. There are even provisions concerning apportionment of proceeds on condemnation. The agreement generally has all of those provisions normally found in commercial leases.

The Supreme Court of Hawaii has addressed the issue for over a century and a review of these decisions reveals that in determining whether a particular agreement is a lease or a license, the court will consider the following factors:

1. Was there a transfer of Possession?
2. Is there a fixed term?
3. Is there a definite parcel of real estate?
4. Was there a grant of interest?
5. Is the agreement terminable?
6. Is the agreement assignable?
7. Is the interest mortgageable?
8. Were improvements to be constructed and maintained?
9. Who is liable for replacement of improvements in the event of destruction?
10. Are rights given to a mortgagee in event of default?
11. Is there apportionment of proceeds on condemnation?
12. Was there a demise?
13. Were there words to connote an interest in land?
14. Was there a manifest intent to create a lease or a license?

In previous cases, the Hawaii Supreme Court has considered these matters to determine if an agreement is a lease or a license but it is unlikely that the list is all inclusive. In fact, the court has clearly indicated that all of the provisions of an agreement will be reviewed to see if they are normally found in commercial leases or whether the particular agreement is a mere license.

In view of the conclusion reached in chapter 4 and the application of state appellate court decisions, chapter 666, Hawaii Revised Statutes, would find little, if any, practical application to the provisions of the agreement in use at the International Market Place. As previously stated, all such provisions relate to the procedure for possession and the termination of the landlord-tenant relationship. At the International Market Place, no such landlord-tenant relationship is seen to exist. Therefore, the logical conclusion is that such agreements are licenses.

As previously discussed, the rights of the parties to a lease are generally governed by real property principles and rules of law. Under a license, the basic rights of the parties are determined generally by the terms of the specific agreement the parties may have entered into as interpreted under the law of contracts. Although there may be various theories of law applicable to both real estate transactions and contracts, the basic distinction remains, that where there is a mere license, as in the case of the merchants of the International Market Place, the rights of the merchant should only be



derived from the express terms, or what can be deduced by necessary implication, of the agreement of the parties. Such parties to contracts have the right to insert any stipulations that may be agreed to, provided they are neither unconscionable nor otherwise illegal or contrary to public policy.<sup>24</sup> If the terms of the contract are so improvident, unreasonable or unconscionable as to be an abnegation of legal rights, the courts will refuse to enforce such terms.<sup>25</sup>

The Supreme Court of Hawaii has defined a party's remedy by saying:<sup>26</sup>

The test applicable in determining unconscionability is "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."

\* \* \*

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.

Thus, if the facts surrounding the agreements between WDC Ventures and the merchants at International Market Place make them unconscionable according to the guidelines set by the Hawaii Supreme Court, then remedy already exists under the present law to preclude the enforcement of those provisions.

## Chapter 6

### EXPERIENCE IN OTHER JURISDICTIONS

Senate Concurrent Resolution No. 235, S.D. 1, H.D. 1, directed the Bureau to survey other jurisdictions which have similar shortages of land and problems similar to those at the International Market Place.

Initial research revealed that practically all states have some form of residential landlord-tenant legislation and that many of these laws were patterned after the Uniform Residential Landlord-Tenant Code. Such is the case in Hawaii. (Chapter 521, Hawaii Revised Statutes). All of these statutes either by express terms, or necessary implication, exclude nonresidential or commercial transactions from their coverage.

Research efforts were directed mainly to uncover commercial landlord-tenant legislation. Contact was made with organizations such as the National Conference of State Legislatures, The Practising Law Institute, the National Realtors Association, and the Institute for Continuing Legal Education. After considerable effort by staff members of these institutions, no law, study or report, concerning this issue could be found.

The survey letter attached as Appendix B was sent to all states.

In all but seven instances, the responses were totally negative. A cross section of these negative responses based on geographic and demographic factors as well as the various types of responding state agencies is included in this study as Appendix E through J.

Of the remaining jurisdictions that reported some material thought to be responsive to the survey, only the states of Florida and Rhode Island have statutes specifically applicable to nonresidential or commercial tenancies. The Rhode Island statute contains the same general provisions as the Florida statute. The Florida nonresidential statute is cited as Chapter 83, Part I, Florida statutes (§§ 83.001-83.251) and is also included as Appendix K.

Although the Florida statute carries the label "nonresidential" and appears to be directed toward commercial transactions, an analysis of its provisions reveals that the statute is typical of legislative enactments on this subject which generally prevail throughout the United States. In defining the rights and remedies of parties other than residential landlords and tenants, the Florida and Rhode Island statutes are almost identical in purpose to the provisions of chapter 666, Hawaii Revised Statutes, which likewise governs nonresidential landlord-tenant relationships.

The nonresidential landlord-tenant statutes in Florida, Rhode Island, Hawaii and in the other jurisdictions reviewed are almost exclusively concerned with four areas:

- (1) Defining the various types of tenancies;
- (2) Listing the events of default by the tenant;

- (3) Describing the remedies of the landlord in the event of the tenant's default; and
- (4) Outlining the procedure for enforcing the rights of the parties.

**Legislation Designed to Eliminate Allegedly Unfair or Oppressive Commercial Landlord-Tenant Transactions in Other Jurisdictions**

Beyond these four areas, the survey and research in furtherance of this study revealed no other general statutes governing nonresidential or commercial landlord-tenant transactions.

Responses from California and New York indicated that attempts had been made in those states to regulate commercial landlord-tenant transactions at the local or municipal level. Most of these measures relate primarily to rent control but in some instances, their purpose was to regulate rental of commercial property generally. In all such attempts, the local enactments fell under the weight of state preemption. The prevailing rule is that local assertions of commercial rent-fixing power are inherently invalid absent clear delegation of such power by the State to local governments. This is the conclusion reached in a report of the Committee on Real Property Law of the New York City Bar dated December 30, 1987.

The reluctance of states to delegate rent control authority to local governments is seen in the fact that the New York State Assembly has yet to approve any such measure. There is however a bill, No. 10338, dated March 29, 1988, before the New York State Assembly which would grant the City of New York the authority to establish a binding arbitration plan to apply to all lease renewals of commercial premises where the landlord proposes a rent increase of more than twenty-five per cent of the average rent charged during the previous twelve months and to commercial premises where the landlord refuses to renew a lease. The legislative findings and intent in the bill relate very nearly to the concerns expressed in Senate Concurrent Resolution No. 235. A copy of the New York measure is included as Appendix L.

Issues involving commercial landlord-tenant transactions were of recent prominence in the state of California. During 1982-86, a series of three ordinances were enacted by the City of Berkeley directed specifically to the areas of Elmwood, Telegraph Avenue and West Berkeley. These ordinances were titled, in various form, as "Commercial Rent Mediation and Arbitration and Just Cause for Eviction Ordinance." The ordinance pertaining to Elmwood is attached as Appendix M, to Telegraph Avenue as Appendix N and to West Berkeley as Appendix O.

In direct response to these ordinances, the state of California enacted legislation effective January 1, 1988, which nullified all such local measures throughout the State. The appropriate sections of this state legislation are included as Appendix P.

The Berkeley ordinances, when viewed in connection with the thrust of Senate Concurrent Resolution No. 235, appear almost identical in design. The Elmwood Ordinance states as follows:

## COMMERCIAL LEASES AND OPERATING LICENSES IN HAWAII

The purposes of this chapter are to protect commercial tenants in the Elmwood district from rent increases which are not justified by landlord's cost increases; to enable those tenants to continue serving residents of the Elmwood district without undue price increases, expansion of trade (which may exacerbate parking problems), or going out of business; and to test the viability of commercial rent stabilization as a means of preserving businesses which serve the needs of local residents in Berkeley neighborhoods, outside the downtown business district.

The Telegraph Avenue ordinance states its purpose as follows:

The purpose of this chapter is to preserve the unique character of the Telegraph Avenue area commercial district and to prevent displacement of businesses by excessive rent increases and/or evictions.

The West Berkeley Area ordinance provides:

The purpose of this chapter is to preserve the unique and diverse character of the West Berkeley area and to prevent displacement of businesses by excessive rent increases and/or arbitrary evictions, but without completely halting the economic viability of the area, while the area plan is developed and implemented.

Thus, it is apparent from the foregoing provisions that the intent was to alleviate problems of a similar nature as those currently in existence at the International Market Place.

The analogy is more obvious when considered in the light of the "Findings" contained in these ordinances. Section 13.86.030 of the West Berkeley ordinance refers to the changes taking place in that area whereby space traditionally used by small businesses, artists and craftspeople is being converted to large retail, research or office complexes. These findings express the undesirability of any change because of the unique character and fabric of the existing use. This existing use is described as a valuable asset to the city in that diverse opportunities for self-employment and entry-level jobs are provided.

The findings of the Telegraph Avenue Ordinance (section 13.82.030), express alarm over the potential for the immediate displacement of small businesses in that area created by overwhelming rent increases or arbitrary evictions. High rents were mentioned more frequently than any other problem and the findings point out the fact that the area has a unique character and contains businesses which serve the diverse needs of residents and the excessive rent increases are likely to cause their displacement and eviction.

In response to these findings, all three Berkeley ordinances provide four basic areas of regulation:

- (1) Notice to the tenant from 45 to 180 days of rent increases or changes in the terms of the lease;

## EXPERIENCE IN OTHER JURISDICTIONS

- (2) Requirement of mediation and arbitration in the event of rent increases;
- (3) Establishment of standards and criteria for determining permissible rent increases; and
- (4) To prohibit retaliation against any party to exercising rights under the ordinance.

These ordinances received strong opposition at the local level and their ultimate fate was to be struck down by state legislation. Impressions received from conversations with the Berkeley City Attorney<sup>1</sup> and with staff members of the Senator who sponsored the state legislation,<sup>2</sup> were that the only area of general agreement was that merchants should receive adequate notice of the termination of their lease and that the landlord give adequate notice of the refusal to renew a lease. It is evident from the legislative action that "Notice" was the only area of state concern. This is clear from two sentences contained in the 1987 California enactments attached as Appendix P which provide:

No public entity shall enact any measure constituting commercial rental control, nor shall any public entity enforce any commercial rental control, whether enacted prior to or on or after January 1, 1988." Calif. Civil Code Sec. 1954.27

A public entity may by enactment of a statute, charter or charter amendment, or ordinance, establish a requirement for notice relating to the termination of a lease of commercial real property due to the expiration of its term. Calif. Civil Code Sec. 1954.31

The legislative findings bolster these statutory expressions and the reader is referred to the entire text of such findings contained in California Civil Code section 1954.25.

These state statutes were enacted by overwhelming margins in both houses of the California Legislature and from all indications, the prevailing view was that these issues should not be addressed at the local level under any circumstances and a substantial element held the view that there existed no need for legislative action at all.<sup>3</sup>

The survey yielded two other enactments pertaining to commercial relationships somewhat of the nature under consideration. The Alaska Gasoline Products Leasing Act, attached as Appendix Q, was enacted to define the relationships and responsibilities involved in leases between gasoline service stations and oil company distributors. Provisions of the Alaska statute include the following:

- (1) That the oil company distributor provide to the service station operator the material facts concerning the history and future plans for the subject location. (Alaska Statutes section 45.50.800).
- (2) That the oil company distributor is required to deal in good faith and not impose unreasonable standards for service station operator

performance, amount and type of purchases or operating hours. (Alaska Statutes section 45.50.810(a)).

- (3) That at least 45 days notice of lease termination be given. (Alaska Statutes section 45.50.810(b)).
- (4) That the lease shall not be terminated by the oil company distributor without good cause. (Alaska Statutes section 45.50.810(c)).
- (5) That upon termination by the oil company distributor, the service station operator shall be compensated the fair market value of the business. (Alaska Statutes section 45.50.820).

The remaining response was from the state of Tennessee where during the last legislative session a bill entitled "Small Business Protection Act of 1988," was introduced but failed to pass. The measure sought to protect smaller shopping center tenants from actions of the larger or "anchor" tenants, and is included in this study as Appendix R. The legislative findings indicate that where a major retail store in a shopping center closes and the vacancy continues for a prolonged period, the impact on smaller retailers is substantial. To address this problem, the proposed bill would require that the lessor terminate any lease where the space had not been used for regular retail sales for a period of 12 months or more. (House Bill No. 2347, Tennessee General Assembly, 1988).

The survey of other jurisdictions was designed to locate circumstances where the relationship between commercial interests were similar to those which exist at the International Market Place and to determine first, if such circumstances were seen as a problem for legislative action, and second, what action, if any, was taken. As previously discussed, the concern for alleged exploitive business practices in the field of operating licenses and commercial leases of the character used at the International Market Place has been extremely narrow in other jurisdictions. (Note that the Alaska statute regarding service stations concerns leases rather than licenses.) In the matter of corrective action, except for the provisions for notice in California, legislation in other jurisdictions is nonexistent.

## Chapter 7

### FINDINGS AND RECOMMENDATIONS

#### Findings

1. Instances of abuse or unfair advantage being taken of small business merchants or vendors by landowners or property managers in Hawaii prior to 1988 were relatively unreported and unknown to public officials.
2. During 1988, the only allegations of oppressive, unfair or exploitive business practices arising out of leases or license agreements are those made by the merchants and vendors at the International Market Place and only then after the issue of authorizing a convention center at that location came before the Legislature.
3. The written agreements between WDC Ventures dba International Market Place and the merchants doing business at that location do not appear to be abusive or unfair in their provisions and in some instances the terms and conditions are less demanding and more favorable to the merchants than the form of similar agreements in general and local use.
4. Existing Hawaii statutes and Hawaii Supreme Court decisions provide ample remedies for alleged wrongs in commercial landlord-tenant relationships as well as remedies for unconscionable agreements. Additional legislation in this area is not needed at this time.
5. The survey of other jurisdictions to locate similar issues was essentially negative and responses from this and all other sources were to the conclusion that the governing of commercial license or lease relationships is generally not a state legislative issue, but an issue controlled by private contract law and ensuing case law.

#### Recommendations

The Bureau believes there is no immediate need for corrective legislative action on the subject of commercial landlord-tenant or license relationships. However, the research for the purpose of this study does indicate a need for monitoring activity and trends in this field. To this end, the Bureau recommends that the Department of Commerce and Consumer Affairs establish a clearinghouse to receive complaints of alleged oppressive, unfair or exploitive business practices arising out of commercial lease licenses. The Department should publicly announce the office and address to which complaints of this nature may be sent, compile, verify and document the complaints, and make periodic reports of all such information received, together with recommendations for corrective action, if necessary, to the Legislature.

## FOOTNOTES

### Chapter 2

1. Waikiki Development Corporation, Unprocessed private collection, 1960, Public Archives Division, State of Hawaii.
2. Ibid.
3. Ibid.
4. Ibid.
5. Honolulu Advertiser, January 16, 1955, p. A-1.
6. Honolulu Advertiser, June 14, 1955, p. A-1.
7. Honolulu Advertiser, January 16, 1955, p. A-1.
8. Honolulu Advertiser, August 19, 1969, p. A-4.
9. Ibid.

### Chapter 3

1. S. McMichael, Leases-Percentage, Short and Long Term, Chapter 7 (6th ed.; 1974), pp. 42-43.
2. Ibid., pp. 46-47. The range of percentage fees is revised annually by Builders magazine and the figures listed are slightly lower than those reported during 1988. The current percentage lease tables are contained in Commercial Real Estate Leases 1988, Milton R. Friedman, Chairman, Practising Law Institute, pp. 936-939.

### Chapter 4

1. 1A G. Thompson, Real Property sec. 215 (1980 replacement).
2. Black's Law Dictionary, 5th ed. (1979).
3. Ballentine's Law Dictionary, 3d ed. (1969).
4. 3 Am Jur. 2d Adverse Possession, sec. 1.
5. Ballentine's Law Dictionary, 3d ed. (1969).
6. 53 C.J.S. Licenses, sec. 88.
7. 3 M. Friedman on Leases sec. 37.1 (2d ed. 1983).
8. Black's Law Dictionary, 5th ed. (1979).
9. 3 M. Friedman on Leases sec. 37.1 (2nd ed. 1983).
10. 3 H. Tiffany, Real Property sec. 829 (3d ed. 1939).
11. 25 Am Jur. 2d Easements and Licenses, sec. 123.
12. 49 Am Jur. 2d Landlord and Tenant, sec. 2.

13. State v. Evans, 346 Mo. 209, 139 S.W. 2d 967 (1940).
14. 3 M. Friedman on Leases sec. 37.1 (2nd ed. 1983).
15. 49 Am Jur. 2d Landlord and Tenant, sec. 330.
16. 51 C.J.S. Landlord and Tenant, sec. 202(1).
17. 51 C.J.S. Landlord and Tenant, sec. 202(6).
18. 25 Am Jur. 2d Easements and Licenses, sec. 123.
19. 3 H. Tiffany, Real Property sec. 829 (3d ed. 1939).
20. 3 R. Powell, Real Property sec. 428 (1987).
21. 3 M. Friedman on Leases sec. 37.1 (2nd ed. 1983).
22. 1A G. Thompson, Real Property sec. 215, (1980 replacement).
23. American Coin Meter, Inc. v. Poole, 31 Colo. App. 316, 503 P.2d 626 (1972).
24. 1A G. Thompson, Real Property sec. 215 (1980 replacement).
25. 25 Am Jur. 2d Easements and Licenses sec. 124.
26. 1A G. Thompson Real Property sec. 215 (1980 replacement). 25 Am Jur. 2d Easements and Licenses, secs. 123, 126. 3 H. Tiffany, Real Property secs. 829, 833.
27. Ibid.
28. 3 H. Tiffany, Real Property sec. 829.
29. 25 Am Jur. 2d Easements and Licenses, secs. 123, 126. 3 H. Tiffany, Real Property sec. 830. 1A G. Thompson Real Property sec. 217. 3 M. Friedman on Leases sec. 37.1 (2nd ed. 1983).
30. 25 Am Jur. 2d Easements and Licenses, sec. 123.
31. 49 Am Jur. 2d Easements and Licenses, sec. 330.

### Chapter 5

1. Hawaii Rev. Stat., secs. 666-1, 666-7, and 666-11.
2. Hawaii Rev. Stat., sec. 666-6.
3. Hawaii Rev. Stat., secs. 666-1 and 666-2.
4. Hawaii Rev. Stat., sec. 666-1.
5. Hawaii Rev. Stat., sec. 666-3.
6. Hawaii Rev. Stat., sec. 666-2.



7. Hawaii Rev. Stat., secs. 666-11 and 666-12.
8. Hawaii Rev. Stat., sec. 666-13.
9. Hawaii Rev. Stat., sec. 666-14.
10. Hawaii Rev. Stat., sec. 666-4.
11. Hawaii Rev. Stat., sec. 666-5.
12. Hawaii Rev. Stat., sec. 666-21.
13. Hawaii Rev. Stat., secs. 666-7, 666-8, and 666-9.
14. Kaaihue et al. v. Crabbe, 3 Haw. 768 (1877), Coney v. Manele, 4 Haw. 154 (1879), In Re Hobron, 6 Haw. 407 (1883), Harrison v. McCandless, 22 Haw. 129 (1914), Yanagi v. Oka, 24 Haw. 176 (1918), Shimamura v. Easley, 37 Haw. 248 (1945), In Re Hawaiian Homes Commission, 43 Haw. 218 (1959).
15. McCandless v. John Ii Estate, 11 Haw. 777, 788-789 (1899).
16. Ibid., p. 789.
17. Ibid.
18. Ibid.
19. Ibid.
20. Ibid.
21. Ideta v. Kuba, 21 Haw. 751, 755.
22. In Re Fasi, 63 Haw. 624, 629 (1981).
23. 751 P.2d 1022 at 1028.
24. 17 Am Jur. 2d Contracts sec. 192.
25. Ibid., Restatement, Contracts 2d ed. sec. 208.
26. City and County of Honolulu v. Midkiff, et al., Trustees, 62 Haw. 411 at 418-419 (1980).

## Chapter 6

1. Telephone interview with Manuela Albuquerque, Berkeley City Attorney, September 6, 1988.
2. Telephone interview with Douglas Gillis, senior aide to California State Senator, Barry Keene, August 15, 1988.
3. Ibid. Telephone interview with Oscar Wright, California Small Business Advocate, September 21, 1988.

THE SENATE  
FOURTEENTH LEGISLATURE, 19<sup>88</sup>  
STATE OF HAWAII

S.C.R. NO.

235  
S.D. 1  
H.D. 1

## SENATE CONCURRENT RESOLUTION

REQUESTING THAT THE LEGISLATIVE REFERENCE BUREAU CONDUCT A STUDY OF THE UTILIZATION AND EFFECTS OF OPERATING LICENSES AND COMMERCIAL LEASES OF A SHORT-TERM OR INDETERMINATE NATURE.

WHEREAS, the search for a viable convention center site in Waikiki has led to the consideration of the International Market Place as a possible alternative; and

WHEREAS, during the deliberation process, awareness of the numbers of merchants that would be displaced and possibly put out of business without a fair settlement for their investments became very apparent; and

WHEREAS, this awareness came about through the efforts of representatives of approximately 500 merchants located in the International Market Place and Duke's Lane; and

WHEREAS, of these merchants, many paid as much as \$50,000 for the space to conduct business, with an additional \$15,000-\$18,000 for a cart or stall, plus monthly rents of \$1,800-\$3,700 on a month-to-month lease, with no guarantee of renewal and no premiums refunded at the termination of a business; and

WHEREAS, in the past, the landlord has demanded up to 50 per cent of equity to transfer leases, making it untenable for these individuals to sell their businesses; and

WHEREAS, the majority of these merchants are Hawaii's newest citizens, proud people who have struggled, often working seven days a week, 15 hours a day, to support their extended families, and who are vulnerable to exploitation because they are new to this country and are unaware of local laws; and

WHEREAS, displacement or forced sales of their businesses, in many cases, would lead to disastrous losses, forcing substantial numbers of these merchants, many of whom come from a

culture where governmental assistance is frowned upon, to seek public assistance in order to survive; and

WHEREAS, the uncertainty of not knowing how to provide for a living in any other area of business has caused a high degree of stress and depression during this long, uncertain period of deliberation over a convention center site; and

WHEREAS, both the public and the private sector should be sensitive to problems and concerns of small businessmen and merchants, and damaged by these described practices; and

WHEREAS, commercial leases and/or operating licenses should be fair and non-exploitive as a standard business practice; and

WHEREAS, it is the purpose of this Concurrent Resolution to assess the need for the legislature to take action to eliminate these kinds of inequities with respect to commercial tenants of the type described in this Resolution; now, therefore,

BE IT RESOLVED by the Senate of the Fourteenth Legislature of the State of Hawaii, Regular Session of 1988, the House of Representatives concurring, that the Legislative Reference Bureau (Bureau), with the assistance of the Department of Commerce and Consumer Affairs (DCCA) is requested to investigate, study, analyze, and report on the utilization and effects of operating licenses and commercial leases of a short term or indeterminate nature where other than a standard lease is drawn up; and

BE IT FURTHER RESOLVED that the report shall address any oppressive business practices found arising out of these agreements; and

BE IT FURTHER RESOLVED that the Bureau, with the assistance of DCCA, is authorized to survey other jurisdictions which have similar shortages of land and similar problems if, in their determination, it would be helpful to make recommendations for future legislation; and

BE IT FURTHER RESOLVED that the Bureau submit a report of its findings and recommendations to the Legislature no later than twenty days prior to the convening of the Regular Session of 1989; and

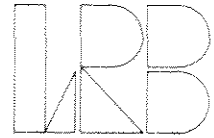
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S.D. 1  
H.D. 1

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Director of the Legislative Reference Bureau and the Director of Commerce and Consumer Affairs.

Samuel B. K. Chang  
Director

## Appendix B



LEGISLATIVE REFERENCE BUREAU  
State of Hawaii  
State Capitol  
Honolulu, Hawaii 96813  
Phone (808) 548-6237

August 26, 1988

3944-A

Dear

The Hawaii State Legislature has directed our office to study the utilization and effects of operating licenses and commercial leases of a short term or indeterminate nature.

The Legislature's concern arises from the alleged unfair and exploitive position of the landlords in various resort and tourist areas of the State. The concern is that merchants and vendors in these areas, generally small businesses, can be at the absolute mercy of the landlord in the terms and conditions of the lease or licensing agreements.

As part of this study, we are attempting to find out what measures, if any, have been taken by other jurisdictions in this area. Accordingly, we would appreciate your sending us copies of any studies, laws or regulations that you may have dealing with commercial leases and/or operating licenses.

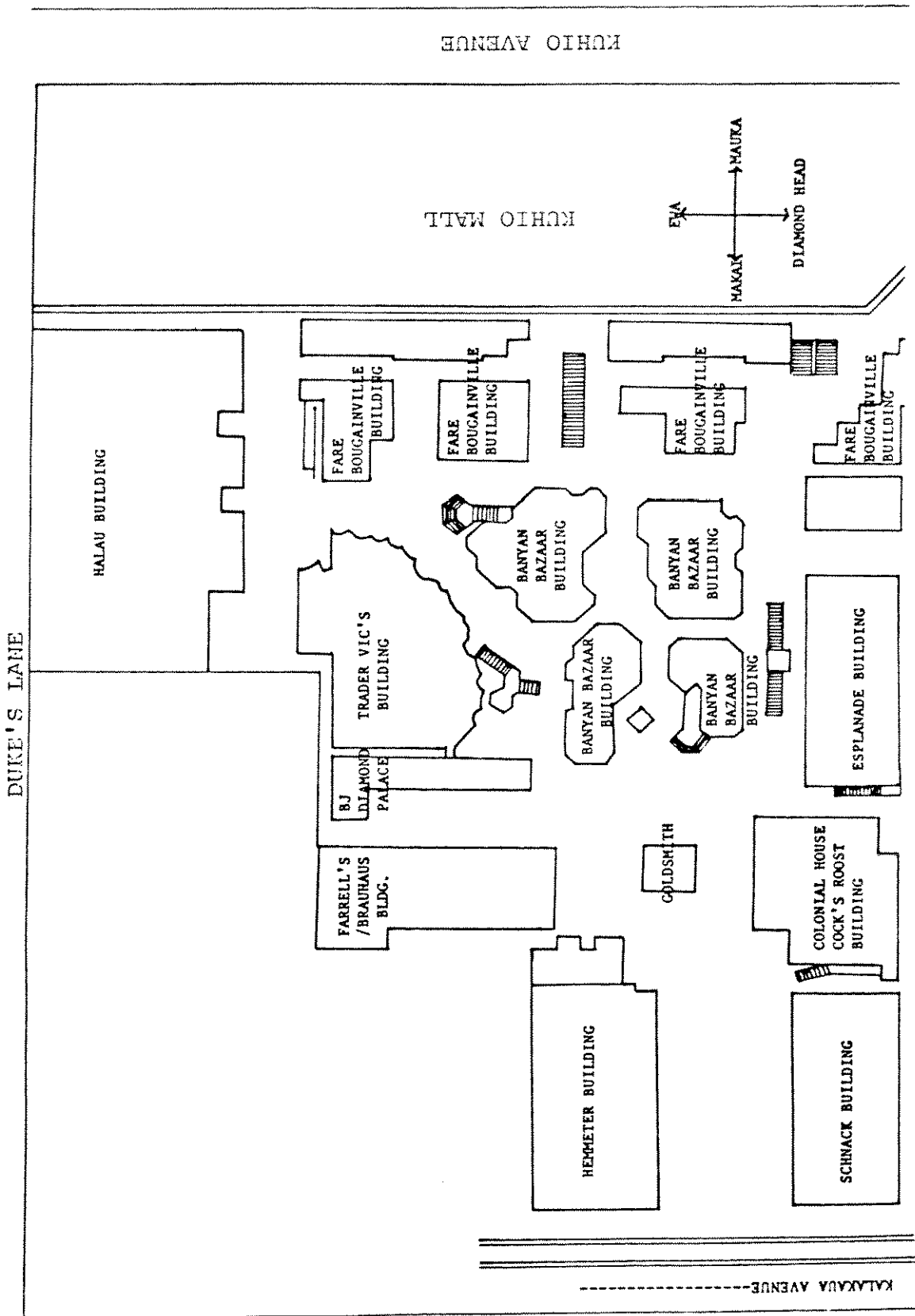
We will gladly reimburse you for any duplicating costs which you might incur and I will sincerely appreciate any assistance you can give me in this study.

Very truly yours,

Jerry L. Coe  
Researcher

JLC:at

# Appendix C Plot Map of International Market Place



## Appendix D

### International Market Place License and Operating Agreement

#### INTERNATIONAL MARKET PLACE LICENSE AND OPERATING AGREEMENT

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## TERMS AND CONDITIONS

1. Grant of License. We grant you a non-exclusive license to use the Premises, which you shall use only for the Business Use described on the first page of this License. We also grant you and your employees, suppliers, and customers a non-exclusive right to use the common areas of International Market Place for access to the Premises. But you must comply with all the terms and conditions of this License. This License does not give you any leasehold interest in the real property comprising International Market Place.

2. Term. The term of this License is set forth on the first page. You agree to remain open for business, fully stocked and staffed, for the term of this License.

3. Minimum License Fee. You will pay to us the Minimum License Fee in advance on the first day of each month, without demand or notice.

4. Percentage License Fee. You will pay to us a Percentage License Fee no later than the 10th day of each month (including the month following the termination of this License). The amount of the Percentage License Fee will be determined on the basis of the gross sales for the previous month. You will be entitled to a credit against the Percentage License Fee in the amount of the Minimum License Fee paid by you for the preceding month.

5. Failure to Open. If you do not open for business fully stocked and staffed on or before the Open Date, then you shall pay the Additional License Fee in addition to the Minimum License Fee. The Additional License Fee shall take the place of the Percentage License Fee which might have been earned during the period that you failed to open.

6. Recapture. If the total license fees paid by you during any 12-month period under this License is less than 125% of the Minimum License Fees payable under this License, we will have the right to terminate this License within six (6) months after the expiration of the 12-month period. It is in our interest as well as the interest of

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all licensees in International Market Place to have increased customer traffic as is reflected by each licensee's gross sales. Therefore, even if you pay and we accept sums in excess of the license fees otherwise payable under this License, we will still have the right to terminate this License. If we terminate this License under this paragraph, we will, if otherwise appropriate, compensate you for permanent construction costs paid by you to the extent and as provided in Paragraph 11.

7. Real Property Taxes and Assessments. You agree to pay to the Department of Taxation, State of Hawaii, your Pro Rata Share of all real property taxes assessed on the land and improvements in the International Market Place. You also agree to pay to the applicable governmental authority your Pro Rata Share of each annual installment during the term of this License of any assessment levied against the real property in the International Market Place or against any fee simple, leasehold, or license interest therein.

8. Tax on License Fees. You agree to pay to us each month any gross excise tax or similar tax imposed on us on account of the payment of license fees or other charges under this License, including all gross excise or similar tax imposed on account of reimbursements under this paragraph.

9. Utility Charges and Service. We agree to provide electricity, gas, water and other utility services required by you to operate your business to the boundary of the Premises, provided we can obtain those services from a public utility or municipal department. You will be required to install, at your expense, meters to record the amount of any utility furnished solely to the Premises. You are responsible for paying, before they become delinquent, all charges for electricity, gas, water, telephone and all other utilities and all charges for waste removal service from the Premises. If there is one meter for any utility used by you or other licensees in the International Market Place, then you must pay to us, on a monthly basis, a portion of the charge for that utility. The portion which you must pay for

the first month of this License will be determined by the company, agency or authority providing the utility by allocating the total charge for the utility between you and the other licensees using the common meter. Thereafter, the portion which you must pay will be based on the actual cost of the utility as determined by a check meter.

10. Security Deposit. When you sign this License, you will pay us the Security Deposit. The Security Deposit will be held by us to assure your compliance with the terms and conditions of this License. If you default under this License, we may cancel this License and keep your Security Deposit without limiting our other rights and remedies. We may also use the Security Deposit to reimburse ourselves for any loss or damages which we incur because of your breach of this License. If you are not in default under this License at the end of the Term, we will refund your Security Deposit to you. We will not pay you any interest on your Security Deposit. If we sell our ownership interest in International Market Place, you agree that we may deliver the Security Deposit to the purchaser and that we will no longer be liable to you for the Security Deposit.

11. Relocation. The purpose of the plot plan attached to this License is to show the approximate location of the Premises. We reserve the right to relocate the various buildings in the common areas shown on the plot plan. We also reserve the right to relocate the Premises to another area within the International Market Place provided: (a) the cost of moving your business will be paid by us; (b) as much as practicable, the new premises will be comparable in size and type of construction to the Premises vacated; and (c) we give you 30 days notice of any relocation. Further, if (x) a Construction Rider is attached to this License, (y) you paid a portion of the permanent construction costs of the Premises (exclusive of your trade fixtures), and (z) we have agreed upon the amount of such costs, then we will equitably compensate you for a portion of those costs. All costs of remodeling the new premises are to be paid by you. If you refuse to relocate, we have the right to terminate this License.

12. Changes and Additions to Buildings. We reserve the right to make alterations or additions to the International Market Place, including the construction of additional buildings, additional stories on existing buildings or other improvements.

13. Fixtures and Alterations. All fixtures installed by you must be new or completely reconditioned. You may not make any alterations, additions or improvements to the Premises or install any fixtures, signs, floor coverings, lighting, plumbing fixtures, shades or awnings, or make any changes to the store front without obtaining our written consent and the consent of our architect. When you request our approval, you must provide us with plans and specifications prepared by a licensed architect. You will obtain our consent before placing on any door, wall or window of the Premises any sign, canopy or advertising matter. You will also obtain our consent before installing any sound system or speakers.

14. Bonds. Prior to commencing any alterations, improvements or other construction in the Premises, you must provide us with evidence that you are financially able to pay the contractor. You must also provide us with a copy of a bond in an amount, form and with a surety acceptable to us. The bond shall name us as obligees and shall insure the completion of the proposed work free and clear of all liens.

15. Removal and Restoration by Licensee. All movable alterations, decorations, additions and improvements made by you (or by us on your behalf) may not be removed during the term of this License without our consent. Upon termination of this License, you must remove all such items, repair any damage to the Premises, and leave the Premises in a clean and orderly condition.

16. Maintenance of Building. We will make repairs to the basic structural shell of the buildings in the International Market Place, excluding entrance and exit doors, balconies and frames, shop fronts and glass. We will not be responsible for repairing damage or destruction which is caused by a casualty which is not required to be insured against under this License. If we need to make repairs

16. Repairs by Licensee. You agree to maintain the Premises in good condition at all times. Without limitation, you will maintain and repair the exterior entrances and balconies, all glass and show window moldings, all partitions, doors, fixtures, equipment, lighting and plumbing fixtures, and any air conditioning system. Maintenance will include periodic painting of the interior as required by us. You will replace any furniture, equipment and fixtures which may be damaged, destroyed, lost or worn out and the replacements will become part of the Premises. If you fail to maintain or repair the Premises, we may either terminate this License or make the repairs. If we make the repairs, you must reimburse us for the costs of the repairs plus an additional 25% on such costs to cover our overhead as soon as we give you the bill. You will also pay us interest on the total cost at the rate of 12% per annum from the date we complete the repairs until you pay us for them.

17. Operation of Business. You agree to actively conduct and carry on your business in International Market Place during the hours and on the days which we require so as to maintain the maximum gross receipts which may be produced from the operation of such business. You will sell merchandise which is fitting for the development and maintenance of International Market Place as a resort shopping area. You will keep the Premises clean and attractive at all times. You agree that we have the right to require you to remove or redo any displays of merchandise, signs, or other items on or about the Premises that are objectionable to us. You will not permit any sale, auction, fire or bankruptcy sales on the Premises without our written consent.

18. Employees' Costumes and Conduct. Your employees will wear costumes appropriate to your business and approved by us. We have the right to require you to remove any employee who is objectionable to us. You agree that any employment contract or agreement of employment of any person on the Premises will be made with reference to and subject to this paragraph. You agree to hold us

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harmless against all actions, suits, damages (including reasonable attorney's fees) and claims brought or made by any person resulting from the exercise of our rights under this paragraph.

19. Picketing. If a picket line is established on or near the Premises or if there is any other activity resulting from labor disputes or activities involving you or your business which interferes with the operations of International Market Place, we may either (a) terminate this License or (b) require you to cease doing business on the Premises for such period of time as we consider advisable and reduce the Minimum License Fee payable by you during that period.

20. Storage. You will store on the Premises only goods which you intend to offer for sale at the Premises. You will use only that portion of the Premises which is reasonably necessary for clerical or other non-selling purposes in connection with your business in the Premises.

21. Rules and Regulations. You will comply with all rules and regulations established from time to time by us. We will give you notice of such rules and regulations and any changes to them either by delivering or mailing them to you or by posting them in International Market Place. The rules and regulations are part of this License. If you do not comply with the rules and regulations, you will be in default under this License.

22. Compliance with Laws. You will comply with all laws, rules, regulations and ordinances applicable to your business, the Premises or International Market Place. You agree to indemnify us against all actions, suits, damages (including reasonable attorney's fees) and claims brought or made because of your failure to comply with those rules, regulations, ordinances, and/or laws.

23. Recordation of Sales and Cash Registers. You agree to record at the time of sale in the presence of the purchasers all sales, whether for cash or credit, in a cash register having a non-resettable cumulative total, a tape and a readily visible indicator as to the amount rung, which can be serviced on Oahu by an established agency. If we

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agree in writing, you may use a register containing serially numbered sales slips with other features which are approved by us. You agree to give each customer a receipt or sales slip with your name and address on it for each sale. We have the right to examine the cash register totals during business hours. You may not remove any cash register for repair or other purpose without immediately giving us written notice. Authorized repair agents will be requested to furnish us with a letter showing the date the register is brought in, the date the register is returned, and the register reading before and after repair. Any repair agency employed by you to repair or replace any cash register used by you is authorized, by this License, upon our request to disclose any information obtained by them while making repairs or replacement.

24. Gross Sales. The term "gross sales" means the total retail selling price of all food, merchandise, entertainment and services (including packing, postage and taxes) sold by you, your employees, or your sublicensee or concessionaire upon or from any part of International Market Place and all of the receipts from any business conducted in International Market Place. The term includes (a) sales for cash or credit even if the sums for credit sales are not collected by you and (b) all sales on mail, telephone or other orders received by you at International Market Place. For purposes of computing the Percentage License Fee, you may exclude from the computation of gross sales: (i) returns, refunds, and credits made to customers for merchandise returned; (ii) all sums and credits received in settlement of claims for loss or damage to merchandise; (iii) postage and employee discounts and (iv) Hawaii State Gross Excise Tax.

25. Refund of Shopper's Purchases. We hire "shoppers" to insure that all customers are given courteous and proper business treatment by all licensees in International Market Place and to insure that each customer is given a receipt as required by this License. At our request, you will take back merchandise purchased by such shoppers and refund to us the retail price and tax paid for the

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merchandise within three (3) months from the date of the purchase. All sales to such "shoppers" will be deducted from the gross sales for the purpose of computing the Percentage License Fee.

26. Reports by Licensee. You will give to us on or before the 10th day of each month a written statement signed by you and certified to be true and correct, showing in detail satisfactory to us the amount of gross sales for the preceding month. With the report, you will pay to us the Percentage License Fee on the gross sales for the preceding month. Each year, no later than February 28, you will give us a written statement showing in detail satisfactory to us, the amount of gross sales during the preceding calendar year. The written statement must be certified by an independent certified public accountant or firm approved by us. All statements are to be in the form and style and contain such details and breakdown as we may reasonably require.

27. Licensee's Records. For the purpose of determining the amount payable as Percentage License Fees, you agree to keep at a location on Oahu disclosed to and satisfactory to us, for not less than three (3) years following the end of each calendar year, records which will show the inventories and receipts for merchandise and daily receipts from all sales on or from International Market Place. You also agree to keep for at least three (3) years following the end of each calendar year the gross income, sales and occupation tax returns pertaining to sales on or from International Market Place and all applicable original sales records. The sales records will include, among others: (a) cash register tapes, including tapes from temporary registers; (b) serially numbered sales slips; (c) the originals of all mail orders received by you at International Market Place; (d) the original records of all telephone orders received by you at International Market Place; (e) the original records showing that merchandise returned by customers was purchased at International Market Place by the customers; (f) records of any merchandise taken out on approval; (g) settlement report sheets of transactions with

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sublicensees of concessionaires; (h) any other sales records which would normally be examined by an independent accountant according to accepted auditing standards in performing an audit of your sales; and (i) the records specified in (a) through (h) for permitted sublicensees or concessionaires. We have the right to examine your records during regular business hours.

28. Audit. We may require, upon 48 hours prior notice to you, a complete audit of your entire business affairs and records relating to International Market Place for the period covered by any statement which you have given to us according to this License. If the audit discloses that you owe us two percent (2%) or more in excess of the Percentage License Fees computed by you and paid to us for such period, (a) you will be required to pay us promptly for the cost of the audit and (b) we may terminate this License upon five (5) days' notice to you. In any case, you must pay any deficiency to us immediately, regardless of whether the deficiency exceeds two percent (2%) of the Percentage License Fees already paid.

29. Right to Examine Books. Our acceptance of any payments of the Percentage License Fees shall not be a waiver of our rights to examine your books and records in order to verify the amount of gross sales made by you.

30. Common Areas. The common areas include parking areas, driveways, entrances and exits thereto, retaining walls, sidewalks and ramps, landscaped areas, exterior stairways, walkways, malls, courts, comfort stations and any other areas and improvements provided by us from time to time for the general use by you, other licensees of International Market Place, and your employees and customers.

31. Right to Use Common Areas. The common areas may be used by you and other licensees of International Market Place in connection with your business in International Market Place. At no time shall you or your customers or employees park any vehicle in the loading parking areas for longer than the allowable time posted or provided in the Rules and Regulations. You and your employees shall not

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solicit business or distribute handbills or other advertising materials in the common areas.

32. Control of Common Areas by Licensor. We will at all times have exclusive control and management of the common areas. We have the right to establish, modify and enforce rules and regulations with respect to all common areas. We may close the common areas for repairs and construction, may construct other buildings or improvements in the common areas, and may add to or change the area, level, location or arrangement of any common areas or facilities. We may close temporarily or take other action which we feel necessary to prevent a dedication of any common area or the accrual of rights to any person or the public in the common areas. We may also take such action as we feel necessary to prevent the unauthorized use of the common areas.

33. Obstruction of Common Areas. You will keep all common areas free and clear of any obstructions resulting from your business. You will permit the use of the common areas for only normal access by your customers, employees and service-suppliers.

34. Payment of Real Property Taxes, Assessments, Common Expenses and Other Expenses. The licensees of International Market Place are responsible for paying, in accordance with the International Market Place Merchants' Trust, (a) all real property taxes assessed on the land and improvements in the International Market Place; (b) each annual installment of any assessment levied against the real property in the International Market Place or against any fee simple or leasehold interest therein; and (c) all expenses in connection with the management and maintenance of International Market Place, including without limitation liability and fire insurance premiums for coverage of the common areas and expenses of maintenance and repair of the basic structural shell of the buildings. You agree that the Contract for License and Operating Agreement which you executed is part of this License and that you will pay the expenses as agreed to in the Contract.

35. Compliance with Fire Insurance Policy. You agree that you will not keep, use, or sell at International

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Market Place any article which may be prohibited by the standard form of fire insurance policy. You will also pay any increase in premiums for fire and extended coverage insurance that may be charged on account of the type of merchandise which you sell on the Premises. If you install any electrical equipment, you will, at your own expense, make whatever changes are necessary, including changes to the electrical lines in the International Market Place, to comply with the requirements of the Insurance Underwriters or any governmental authorities.

36. Insurance on Improvements, Fixtures and Merchandise. You agree to maintain, during the term of this License, fire and extended coverage insurance on your furniture, fixtures, improvements and merchandise.

37. Plate Glass Insurance. You agree to keep insured any and all plate or other exterior glass in the Premises in the full insurable value.

38. Liability Insurance. You will, at your own expense, purchase and maintain a policy of public liability and property damage insurance with respect to the Premises and your business. The limits of the public liability insurance must be no less than required by financially sound business practice but in no event less than \$300,000 per person, \$1,000,000 per accident and \$100,000 for property damage.

39. Approval of Insurer and Copies of Policies. Whenever this License requires you to obtain insurance, a copy of the insurance policy or certificate of insurance is to be delivered to us promptly. The form and coverage of the policy and the insurer issuing the policy must be acceptable to us. Each policy shall name us as an additional insured and shall provide that it may not be modified or cancelled without first giving us ten (10) days' prior written notice.

40. Reciprocal Waiver of Licensors' and Licensee's Insurer. You, for your insurer, and we, for our insurer, waive the right of our respective insurers to subrogation against each other for insured loss caused by the negligence of the customers or employees of the other.

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41. Assumption of Risk by Licensee. We will not be liable to you for any damage caused by electricity, plumbing, gas, water, sprinkler or other pipes and sewerage system or the bursting, leaking, or overflowing of any tank or waste or other pipes in or around the Premises or International Market Place, nor for any damage which is caused by water coming into International Market Place from any source. We also will not be liable for any damage caused by the acts or negligence of other licensees or occupants, their employees or customers, the public, or other occupants of International Market Place or adjacent property. All property which you keep at International Market Place shall be kept at your risk only.

42. Indemnity. You agree to indemnify us against any claims arising out of damage or loss to property kept at International Market Place, including subrogation claims by your insurance carriers. You also agree to indemnify us against all claims, demands, actions and suits for loss or damage, including property damage, personal injury or wrongful death claims made in connection with the use or occupancy of International Market Place or the operation of your business. You agree to reimburse us for all costs and expenses, including reasonable attorney's fees, which we incur in connection with the defense of any such claims.

43. Destruction or Damages to Premises.

a. Repairs by Licensor. If, through no fault or neglect of yours, the Premises is partially or totally destroyed by fire or other casualty insurable under standard extended coverage insurance, we will repair the basic structure in which the Premises is located, subject to any delay or inability to do so from causes beyond our control. However, we may elect to terminate this License and not repair the damage if (i) more than 33-1/3% of the building in which the Premises is located is destroyed so as to become wholly or partially untenable, (ii) the insurance money received by us is insufficient to pay fully for the costs of repair, or (iii) the building in which the Premises is located is damaged by a casualty which is not insurable under a standard fire and extended coverage policy. If we elect to

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terminate this License, we must notify you in writing within 30 days after the casualty. You will then be required to pay the license fees up to the date of damage and thereupon this License will terminate without further notice.

b. Repairs by Licensee. If the Premises is damaged (whether or not insured), you must immediately repair all plate glass, exterior signs, trade fixtures, equipment, display cases and other improvements originally installed by you (or by us on your behalf). However, if the damage occurs within 60 days from the date this License will expire, you may elect not to repair the damage, provided you give us written notice within 10 days after the casualty. Even if you make a permitted election not to rebuild, this License will remain in full force and effect and you must continue to pay the Minimum License Fees for the remainder of the term of the License.

c. Continuation of Business and Abatement of License Fees. After any damage to the Premises, you agree to continue operation of your business to the extent practicable. You will not be entitled to any damages on account of any inconvenience or loss incurred by you as a result of our making repairs which we are required or elect to make. During the time that we are making such repairs and provided you make written demand within 10 days after the damage, describing in reasonable detail your request, the Minimum License Fees will be abated in an amount equal to the proportion thereof which the number of square feet of gross floor area in the Premises rendered untenable bears to the total number of square feet of gross area in the Premises immediately prior to the damage. Once the repairs to the basic structure in which the Premises is located have been completed, the full Minimum License Fees will again be payable. Except as stated above, there will be no reduction, change or abatement of any rent or other charge payable by you under this License.

#### 44. Eminent Domain.

a. Automatic Termination of License. If all of the Premises is taken under a power of eminent domain, then this License will automatically terminate. If only part of

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the Premises is taken, this License will terminate as to the portion taken but will continue in full force and effect as to the remainder of the Premises, unless otherwise terminated as provided below. The Minimum License Fees will be reduced in the proportion that the floor area taken bears to the total floor area of the Premises prior to the taking. We will make all repairs and alterations to the Premises required by such taking. All damages which are payable on account of the taking will belong to us.

b. Option to Cancel. If only a portion of the Premises is taken and you cannot make use of the rest, you may, within 30 days after you are notified of the filing of the eminent domain action, cancel this License as of the date the condemning authority takes possession. If more than 50% of the floor area of the Premises is taken, either of us may terminate this License as of the date the condemning authority takes possession by giving notice to the other on or before the date the Premises must be surrendered to the condemning authority. All damages which are payable on account of the taking will belong to us.

c. Licensee's Damages. You shall have the right to claim and recover from the condemning authority, but not from us, any compensation which may be separately awarded or recoverable by you on account of any cost you incur in removing your merchandise, furniture, fixtures and equipment from the Premises.

d. Temporary Taking. If all or a portion of the Premises is taken without the condemnation of the fee simple title also, this License will not terminate and you will not be excused from full performance of your agreements under this License. You will be entitled to claim damages against the condemning authority and our right to recover compensation will be limited to compensation for our reversionary interests, if any. This License will not be subject to forfeiture if the agreements which do not call for the payment of money are not performed while you do not have possession of the Premises as a result of the condemnation. If the condemning authority does not maintain the Premises or perform any covenant not calling for the payment of

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money, you will have 90 days after you regain possession of the Premises to perform those obligations. During the time you do not have possession of the Premises because of the condemnation, you will pay to us, in lieu of the Minimum and Percentage License Fees and in addition to any other payments required of you under this License, a monthly license fee equal to the average aggregate monthly license fees paid by you from the commencement of the term of this License until the condemning authority took possession. We will have the right to require you to assign to us all compensation and damages payable to you to be held without liability for interest as security for the full performance of your covenants under this License. Such compensation and damages will be applied, first, to the payment of license fees, taxes, assessments, insurance premiums and all other sums payable under this License as they become due. The remainder, if any, will be paid to you.

45. Restriction on Assignment and Sublicensing.

You may not, voluntarily or involuntarily, without our prior written consent, assign or mortgage this License or sublicense any portion of the Premises, including any concessionaire or other agreement to place vending machines in the Premises. Our consent to one assignment, mortgage, sublicense or other occupation or use by another person shall not be considered a consent to any subsequent assignment, sublicense, mortgage, occupation or use by another person. Any assignment, mortgage, sublicense, or other such agreement without our consent will be void. We may, as a condition to giving our consent, require (a) full disclosure of the terms and conditions of the assignment or the conveyance; (b) proof of the financial responsibility of the assignee, sublicensee, or other person acquiring the rights; and (c) an increase in the Minimum and Percentage License Fees. Any change in the present ownership or control of your business, whether voluntary or involuntary or as a result of any sale of assets, transfers of stock, merger, consolidation, management contract or otherwise shall be considered an assignment within the meaning of this provision.

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46. No Release of Licensee. If you assign or convey any interest in this License, you will remain fully liable under this License and will not be released from performing any of the terms, covenants, and conditions of this License.

47. Off-Set Statements. You agree to deliver to our mortgagee or any prospective purchaser of our interest in International Market Place, if requested, a statement of any claims you have against us, a certification (if it be the case) that this License is in full force and effect and unmodified (or stating the modifications) and that there are no defenses or offsets to this License (or stating those claimed by you).

48. Subordination and Attornment. This License is subject and subordinate to all ground leases and mortgages which may now or hereafter effect all or a portion of the real property which is part of International Market Place. If required by any lessor or mortgagee, you will execute a certificate requested by the mortgagee or lessor which confirms this subordination. You hereby appoint us as your attorney-in-fact to execute any such certificate on your behalf.

49. Covenant Not to Compete. You agree that, during the term of this License, you will not own, manage or control directly or indirectly or participate in the profits, management or control of any retail business which is located within a radius of one (1) mile from International Market Place if such retail business is similar to and competing with the Business Use described on the first page of this License. This agreement does not include any existing retail business owned, managed or controlled by you on the date of this License which you list on the first page of this License.

50. Access to Premises. We will have the right to enter the Premises during business hours for the purpose of repairing, inspecting or showing the Premises to prospective purchasers. We may store materials to make repairs on the Premises without reducing the license fees and without any liability to you for loss or interruption of business or

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use of the Premises. During 6 months prior to the expiration of the term of this License, we may show the Premises to prospective licensees and place notices on the Premises.

51. Utility Mains. If required by engineering design, good practice or code requirements, we may put utility mains or other facilities serving other portions of the International Market Place within the Premises. We will place the mains or other facilities so as to cause as little interference with your business as possible. We have the right to locate cooling towers on the roof over your Premises.

52. Arbitration. Any disagreement which, under this License, is expressly made subject to determination by arbitration will be submitted to and determined by three (3) arbitrators in the manner described in Chapter 658 of the Hawaii Revised Statutes, as amended. Either party may notify the other of the desire to arbitrate such disagreement, appointing one (1) arbitrator in the notice. The other party shall have ten (10) days after receipt of the notice to appoint a second arbitrator. If the other party does not do so, the party who has already named an arbitrator may request any Judge of the Circuit Court of the First Circuit of the State of Hawaii to appoint the second arbitrator. The two arbitrators so appointed will select a third arbitrator or, if they do not, either party may request such Judge to appoint the third arbitrator. The decision of any two of the arbitrators will be final and binding upon both parties unless set aside or modified as provided by the above statute. Each party will pay its own expense and attorney's fees, but the compensation of the arbitrators will be paid equally by both parties.

53. Default by Licensee. You will be in default under this License if you (a) become insolvent or make an assignment for the benefit of creditors, file or have filed against you a petition in bankruptcy or any similar law, if a receiver or trustee of your property is appointed, or if an execution or attachment is levied against your interests hereunder or your business; (b) are convicted of a felony; (c) abandon the Premises; (d) fail to pay any sum payable

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under this License (including contributions to the maintenance or advertising and promotional funds described in the Contract for License and Operating Agreement) within three (3) days after the sums are due whether or not we demand payment; (e) falsify any statements or reports required under this License or in any other manner attempt to defraud us; or (f) fail to perform or keep any other term, covenant or condition under this License.

54. Remedies. If you are in default under this License, we will have the right to terminate this License at any time without notice to you and with or without legal process. We will also have the right to reenter and take possession of the Premises. If we do so, we may either terminate this License or, without terminating this License, make whatever alterations and repairs are necessary in order to grant another license to a third party to use the Premises for a term which may extend beyond the term of this License. Any license fees which we receive under the license to such third party will be applied, first, to the payment of any sums you owe under this License other than license fees; second, to the payment of costs incurred by us in issuing a new license (including brokerage fees, attorneys' fees and the costs of alterations); and, finally, to the payment of license fees due and unpaid. We will also have the right to enter and take possession of any of your property at International Market Place. Without being guilty of trespass, we may use whatever force is necessary to enter the Premises and/or take or remove the property from International Market Place. Any property which we remove may be stored by us for your account and at your expense. We will not be responsible for the safekeeping of the property which is stored. You waive any claims against us for loss, damage, or injury which may be caused by our exercising our rights under this License. We will have a lien against all of your property at International Market Place or property removed by us for storage, whether or not exempt from execution. The lien will be security for the payment of the license fees and other sums payable under this License and for any damages caused by your breach of this License. We may take

(9)

possession of such property and sell the property at a public or private sale, with or without notice to you, and apply the proceeds of the sale toward the cost of the sale and any sums which you owe to us under this License, including reimbursement for damages incurred by us. You will pay us a late charge as set forth above for each Minimum or Percentage License Fee payment not paid within three (3) days of its due date. If you default under this License, you will pay us all costs which we incur in connection with your default, including reasonable attorney's fees. If you fail to pay us any sums due under this License, and we incur fees for the services of a collector or an attorney, you shall reimburse us for the collector's or attorney's reasonable fees and court costs.

55. Nonwaiver. If we waive one default by you under this License, it will not mean that we have waived any other or future breach by you. Our acceptance of license fees due under this License will not constitute a waiver of any breach by you other than the failure to pay the license fees which we are accepting. Any waiver of any provision of this License must be in writing and signed by us.

56. No Accord and Satisfaction. Acceptance by us of a payment made by you which is less than the amount you owe us will not be considered satisfaction of the sums which you owe us. We may accept a check or payment without prejudice to our rights to recover any unpaid sums owing to us even if the check or payment or a letter accompanying the check or payment states that our acceptance of the check or payment will be full payment of the sums.

57. Return of Premises. When this License is terminated for any reason, you agree to peaceably deliver possession of the Premises to us in good condition and free and clear of all liens. All of your property, including trade fixtures and other improvements, will be removed from the Premises by you and you will repair any damage caused by their removal. If you do not remove the trade fixtures and improvements within 10 days of termination of this License, we may either keep such fixtures and improvements or remove them at your expense. If we remove such fixtures and

improvements or repair and clean the Premises because you did not do so, you will pay us for our costs plus an additional 25% on such costs to cover our overhead as soon as we give you the bill. You will also pay us interest on the total cost at the rate of 12% per annum from the date of completion until paid.

58. Holdover by Licensee. If you remain on the Premises after the expiration of the term of this License with our written consent, our agreement will be considered a license agreement from month-to-month at the license fees and upon the terms and conditions specified in this License.

59. Liquidated Damages. If you remain on the Premises after this License terminates without our written consent, we may require you to pay, as liquidated damages for each day you remain, an amount equal to double the amount of the daily Minimum License Fees and other fees and charges payable under this License computed on a 30-day basis.

60. Change of Name. We reserve the right to change the name of the complex from International Market Place to any other name. You will have no claim for any damages, inconvenience or breach arising out of such name change.

61. Notice. All notices to be given by us to you under this Agreement may be delivered to you if you are an individual, to any of your officers if you are a corporation or to any partners if you are a partnership. Notice may also be given to you by mail addressed to you at the address shown on the first page of this License even if you are no longer at that address. You may give any notice to us by delivering to one of our officers or by mailing it to us at this address:

Halau Building, Suite 200  
2330 Kalakaua Avenue  
International Market Place  
Honolulu, Hawaii 96815

If our address changes, we will notify you in writing, and, thereafter, you must send all notices to the new address. Any notice which is sent by registered mail to the addresses stated above shall be considered to have been served on the other party on the date the notice is mailed.

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62. Multiple Licensees. If there is more than one licensee under this License, all obligations under this License will be joint and several and any notice given by us to any one of you shall be construed as notice to all of you.

63. Binding Effect. The covenants and conditions in this License, subject to Paragraph 45, shall be binding upon and for the benefit of the heirs, successors, executors, administrators and assigns of the parties to this License.

64. Entire Agreement. This License is our entire agreement. It may not be changed except in writing which is signed by both you and us.

65. Captions. The captions in this License are for convenience only and do not limit this License.

66. Governing Laws. This License is subject to and shall be construed by the laws of the State of Hawaii.

\_\_\_\_\_  
Licensee(s) (Initial)

  
\_\_\_\_\_  
Licensor (Initial)

CONSTRUCTION RIDER

1. Construction by Licensee. You are to make improvements to the Premises at your cost in accordance with plans and specifications approved by us. All construction must be performed by a licensed contractor. You must commence construction within 10 days of our approval of the working plans and specifications or within 10 days of the commencement of the term of this License, whichever is later. All work must be completed and you must open for business on or before the Open Date; otherwise we may terminate this License.

2. Statement of Costs. Within 60 days after the commencement of the term of this License, you must provide to us a statement of the actual costs of all permanent construction which has been approved by us, exclusive of your trade fixtures. If we dispute such costs and if we cannot reach an agreement within 30 days after the statement is submitted to us, the dispute will be submitted to arbitration in accordance with Paragraph 52 of the License.

3. Bond Against Liens. Prior to commencing any construction, you must furnish to us a bond as provided in Paragraph 13 of the License.

DATED:

WDC VENTURE dba  
INTERNATIONAL MARKET PLACE

By   
Its ATTORNEY-IN-FACT

By   
Its ASSISTANT MANAGER

\_\_\_\_\_  
Licensee(s)

\_\_\_\_\_  
Licensor

(11)

Appendix E

Survey Response From Colorado

# STATE OF COLORADO

## DIVISION OF REAL ESTATE

1776 Logan Street - 4th Floor  
Denver, Colorado 80203  
Telephone (303) 894-2166

### Department of Regulatory Agencies

Steven V. Berson  
Executive Director



Roy Romer  
Governor

Michael B. Gorham  
Director

Harry C. Reagan  
Deputy Director

September 23, 1988

Jerry Lee Coe, Researcher  
Legislative Reference Bureau  
State of Hawaii  
State Capitol  
Honolulu, Hawaii 96813

Dear Mr. Coe:

I am writing in response to your letter concerning alleged unfair and exploitive rental practices.

To the best of my knowledge, Colorado has no legislative restrictions which specifically regulate the practice of landlords in this area. This, of course, would not preclude action based on statutorily prohibited anti-competitive or unfair/fraudulent trade practices. Certain isolated municipalities have, in the past, imposed rent controls in Colorado, but not necessarily in order to address the concerns expressed in your letter.

I hope this information addresses your question adequately and is of assistance to you.

Very truly yours,

COLORADO REAL ESTATE COMMISSION

  
Harry C. Reagan  
Deputy Director

HCR:mjn

Appendix F

Survey Response From Minnesota



HUBERT H. HUMPHREY, III  
ATTORNEY GENERAL

**STATE OF MINNESOTA**

OFFICE OF THE ATTORNEY GENERAL

**ST. PAUL 55155**

September 23, 1988

ADDRESS REPLY TO:

200 FORD BLDG.  
117 UNIVERSITY AVE.  
ST. PAUL, MN 55155  
TELEPHONE: (612) 296-7575

Legislative Reference Bureau  
State of Hawaii  
State Capitol  
Honolulu, HI 96813

ATTN: Jerry L. Coe

Dear Mr. Coe:

Thank you for your correspondence dated August 26, 1988 seeking information relating to commercial lease agreements.

Unfortunately, I am unaware of any Minnesota state law that specifically regulates commercial leases. It is my understanding that commercial leases are regulated by private contract law. The only statutes that regulate leases in general are those which apply to residential housing only.

If you have any questions, please feel free to contact me.

Sincerely,

*Wendy Coy*  
WENDY COY  
Investigator  
Consumer Division

(612) 297-4717

WC:jj



Appendix G

Survey Response From Nevada



RICHARD H. BRYAN  
GOVERNOR

LARRY D. STRUVE  
DIRECTOR  
DEPARTMENT OF COMMERCE

STATE OF NEVADA  
CAPITOL COMPLEX  
DEPARTMENT OF COMMERCE  
REAL ESTATE DIVISION  
201 S. FALL STREET  
CARSON CITY, NEVADA 89710  
(702) 885-4280

R. LYNN LUMAN  
ADMINISTRATOR  
REAL ESTATE DIVISION

August 31, 1988


Jerry L. Coe, Researcher  
Legislative Reference Bureau  
State of Hawaii  
State Capitol  
Honolulu, HA 96813

Dear Mr. Coe:

In response to your inquiry, I have no similar situations to those you've described which are cause for Nevada to address those concerns.

I'm sorry I could not be of more assistance regarding this issue.

Very truly yours,

  
R. Lynn Luman  
Administrator

RLL:js



September 2, 1988

Jerry L. Coe  
Legislative Reference Bureau  
State Capital  
Honolulu, Hawaii 96813

Dear Mr. Coe:

Our office has received your letter of August 26, 1988, in which you inquire as to whether the State of Ohio has any laws or regulations dealing with commercial leases and/or operating licenses.

In Ohio, residential leases are governed under the laws contained within the Landlord and Tenant Act. However, there are currently no state laws or regulations within Ohio which cover the terms or conditions of commercial leases or operating licenses.

If our office can be further assistance, please feel free to contact us.

Sincerely,

MARGARET S. RITENOUR  
Superintendent  
Ohio Division of Real Estate

MJR:TAG:sln



Appendix I  
Survey Response From New York



STATE OF NEW YORK  
DEPARTMENT OF STATE  
ALBANY, N.Y. 12231-0001

GAIL S. SHAFFER  
SECRETARY OF STATE

August 31, 1988

Jerry L. Coe, Researcher  
Legislative Reference Bureau  
State of Hawaii  
State Capitol  
Honolulu, Hawaii 96813

Dear Mr. Coe:

I regret that we are unable to assist you in your study of the utilization and effects of operating licenses and commercial leases of a short term or indeterminate nature.

While New York State has a number of geographical locations which might encounter that type of problem, we are unaware of any government or private studies, laws, or regulations addressing the subject.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gail A. Bates".

Gail A. Bates  
Director  
Division of Licensing Services

GB/fm

Appendix J

Survey Response From Vermont

JEFFREY L. AMESTOY  
ATTORNEY GENERAL

BRIAN L. BURGESS  
DEPUTY ATTORNEY GENERAL



ADDRESS REPLY TO:  
CONSUMER ASSISTANCE PROGRAM  
TERRILL HALL - UVM  
BURLINGTON, VERMONT 05405

STATE OF VERMONT  
OFFICE OF THE ATTORNEY GENERAL  
PUBLIC PROTECTION DIVISION  
TEL: (802) 656-3183

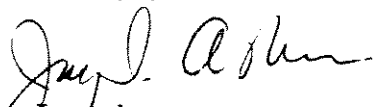
September 1, 1988

Jerry L. Coe, Researcher  
Legislative Reference Bureau  
State of Hawaii  
State Capitol  
Honolulu, Hawaii 96813

Dear Mr. Coe:

Your letter of August 26, 1988 to Edwin Hobson has been referred to me for a response. The State of Vermont does not, to my knowledge, have regulations concerning short term operating licenses and commercial leases. To my knowledge, this has not been a problem in the State of Vermont.

Very truly yours,

  
Jay I. Ashman  
Assistant Attorney General

JIA/nm

## Appendix K

### Florida Nonresidential Landlord and Tenant Statutes

F.S. 1987

LANDLORD AND TENANT

Ch. 83

#### CHAPTER 83

#### LANDLORD AND TENANT

##### PART I NONRESIDENTIAL TENANCIES (ss. 83.001-83.251)

##### PART II RESIDENTIAL TENANCIES (ss. 83.40-83.67)

##### PART III SELF-SERVICE STORAGE SPACE (ss. 83.801-83.809)

#### PART I

#### NONRESIDENTIAL TENANCIES

- 83.001 Application.
- 83.01 Unwritten lease tenancy at will; duration.
- 83.02 Certain written leases tenancies at will; duration.
- 83.03 Termination of tenancy at will; length of notice.
- 83.04 Holding over after term, tenancy at sufferance, etc.
- 83.05 Right of possession upon default in rent; determination of right of possession in action or surrender or abandonment of premises.
- 83.06 Right to demand double rent upon refusal to deliver possession.
- 83.07 Action for use and occupation.
- 83.08 Landlord's lien for rent.
- 83.09 Exemptions from liens for rent.
- 83.10 Landlord's lien for advances.
- 83.11 Distress for rent; complaint.
- 83.12 Distress for rent; form of writ.
- 83.13 Distress for rent; levy of writ.
- 83.135 Distress for rent; dissolution of writ.
- 83.14 Distress for rent; replevy of distrained property.
- 83.15 Distress for rent; claims by third persons.
- 83.18 Distress for rent; trial; verdict; judgment.
- 83.19 Distress for rent; sale of property distrained.
- 83.20 Causes for removal of tenants.
- 83.21 Removal of tenant.
- 83.22 Removal of tenant; service.
- 83.231 Removal of tenant; judgment.
- 83.241 Removal of tenant; process.
- 83.251 Removal of tenant; costs.

**83.001 Application.**—This part applies to nonresidential tenancies and all tenancies not governed by part II of this chapter.

**History.**—s. 1, ch. 73-330.

**83.01 Unwritten lease tenancy at will; duration.**—Any lease of lands and tenements, or either, made shall be deemed and held to be a tenancy at will unless it shall be in writing signed by the lessor. Such tenancy shall be from year to year, or quarter to quarter, or month to month, or week to week, to be determined by the periods at which the rent is payable. If the rent is payable weekly, then the tenancy shall be from week to week; if payable monthly, then from month to month; if payable quarterly, then from quarter to quarter; if payable yearly, then from year to year.

**History.**—ss. 1, 2, ch. 5441, 1905; RGS 3567, 3568; CGL 5431, 5432; s. 34, ch. 67-254.

**83.02 Certain written leases tenancies at will; duration.**—Where any tenancy has been created by an instrument in writing from year to year, or quarter to quarter, or month to month, or week to week, to be determined by the periods at which the rent is payable, and the term of which tenancy is unlimited, the tenancy shall be a tenancy at will. If the rent is payable weekly, then the tenancy shall be from week to week; if payable monthly, then the tenancy shall be from month to month; if payable quarterly, then from quarter to quarter; if payable yearly, then from year to year.

**History.**—s. 2, ch. 5441, 1905; RGS 3568; CGL 5432; s. 2, ch. 15057, 1931; s. 34, ch. 67-254.

**83.03 Termination of tenancy at will; length of notice.**—A tenancy at will may be terminated by either party giving notice as follows:

(1) Where the tenancy is from year to year, by giving not less than 3 months' notice prior to any annual period;

(2) Where the tenancy is from quarter to quarter, by giving not less than 45 days' notice prior to the end of any quarter;

(3) Where the tenancy is from month to month, by giving not less than 15 days' notice prior to the end of any monthly period; and

(4) Where the tenancy is from week to week, by giving not less than 7 days' notice prior to the end of any weekly period.

**History.**—s. 3, ch. 5441, 1905; RGS 3569; CGL 5433; s. 34, ch. 67-254.

**83.04 Holding over after term, tenancy at sufferance, etc.**—When any tenancy created by an instrument in writing, the term of which is limited, has expired and the tenant holds over in the possession of said premises without renewing the lease by some further instrument in writing then such holding over shall be construed to be a tenancy at sufferance. The mere payment or acceptance of rent shall not be construed to be a renewal of the term, but if the holding over be continued with the written consent of the lessor then the tenancy shall become a tenancy at will under the provisions of this law.

**History.**—s. 4, ch. 5441, 1905; RGS 3570; CGL 5434; s. 3, ch. 15057, 1931; s. 34, ch. 67-254.

**83.05 Right of possession upon default in rent; determination of right of possession in action or surrender or abandonment of premises.**—

(1) If any person leasing or renting any land or premises other than a dwelling unit fails to pay the rent at the time it becomes due, the lessor has the right to obtain possession of the premises as provided by law.

(2) The landlord shall recover possession of rented premises only:

(a) In an action for possession under s. 83.20, or other civil action in which the issue of right of possession is determined;

(b) When the tenant has surrendered possession of the rented premises to the landlord; or

(c) When the tenant has abandoned the rented premises.

(3) In the absence of actual knowledge of abandonment, it shall be presumed for purposes of paragraph (2)(c) that the tenant has abandoned the rented premises if:

(a) The landlord reasonably believes that the tenant has been absent from the rented premises for a period of 30 consecutive days;

(b) The rent is not current; and

(c) A notice pursuant to s. 83.20(2) has been served and 10 days have elapsed since service of such notice.

However, this presumption does not apply if the rent is current or the tenant has notified the landlord in writing of an intended absence.

**History.**—s. 5, Nov. 21, 1828; RS 1750; GS 2226; RGS 3534; CGL 5398; s. 34, ch. 67-254; s. 1, ch. 83-151.

#### **83.06 Right to demand double rent upon refusal to deliver possession.—**

(1) When any tenant refuses to give up possession of the premises at the end of his lease, the landlord, his agent, attorney or legal representatives, may demand of such tenant double the monthly rent, and may recover the same at the expiration of every month, or in the same proportion for a longer or shorter time by distress, in the manner pointed out hereinafter.

(2) All contracts for rent, verbal or in writing, shall bear interest from the time the rent becomes due, any law, usage or custom to the contrary notwithstanding.

**History.**—ss. 4, 6, Nov. 21, 1828; RS 1759; GS 2235; RGS 3554; CGL 5418; s. 34, ch. 67-254.

**83.07 Action for use and occupation.**—Any landlord, his heirs, executors, administrators or assigns may recover reasonable damages for any house, lands, tenements, or hereditaments held or occupied by any person by his permission in an action on the case for the use and occupation of the lands, tenements, or hereditaments when they are not held, occupied by or under agreement or demise by deed; and if on trial of any action, any demise or agreement (not being by deed) whereby a certain rent was reserved is given in evidence, the plaintiff shall not be dismissed but may make use thereof as an evidence of the quantum of damages to be recovered.

**History.**—s. 7, Nov. 21, 1828; RS 1760; GS 2236; RGS 3555; CGL 5419; s. 34, ch. 67-254.

**83.08 Landlord's lien for rent.**—Every person to whom rent may be due, his heirs, executors, administrators or assigns, shall have a lien for such rent upon the property found upon or off the premises leased or rented, and in the possession of any person, as follows:

(1) Upon agricultural products raised on the land leased or rented for the current year. This lien shall be superior to all other liens, though of older date.

(2) Upon all other property of the lessee or his sub-lessee or assigns, usually kept on the premises. This lien shall be superior to any lien acquired subsequent to the bringing of the property on the premises leased.

(3) Upon all other property of the defendant. This lien shall date from the levy of the distress warrant hereinafter provided.

**History.**—ss. 1, 9, 10, ch. 3131, 1879; RS 1761; GS 2237; RGS 3556; CGL 5420; s. 34, ch. 67-254.

**83.09 Exemptions from liens for rent.**—No property of any tenant or lessee shall be exempt from distress and sale for rent, except beds, bedclothes and wearing apparel.

**History.**—s. 6, Feb. 14, 1835; RS 1762; GS 2238; RGS 3557; CGL 5421; s. 34, ch. 67-254.

**83.10 Landlord's lien for advances.**—Landlords shall have a lien on the crop grown on rented land for advances made in money or other things of value, whether made directly by them or at their instance and requested by another person, or for which they have assumed a legal responsibility, at or before the time at which such advances were made, for the sustenance or well-being of the tenant or his family, or for preparing the ground for cultivation, or for cultivating, gathering, saving, handling or preparing the crop for market. They shall have a lien also upon each and every article advanced, and upon all property purchased with money advanced, or obtained, by barter or exchange for any articles advanced, for the aggregate value or price of all the property or articles so advanced. The liens upon the crop shall be of equal dignity with liens for rent, and upon the articles advanced shall be paramount to all other liens.

**History.**—s. 2, ch. 3247, 1879; RS 1763; GS 2239; RGS 3558; CGL 5422; s. 34, ch. 67-254.

**83.11 Distress for rent; complaint.**—Any person to whom any rent or money for advances is due or his agent or attorney may file an action in the court in the county where the land lies having jurisdiction of the amount claimed, and the court shall have jurisdiction to order the relief provided in this part. The complaint shall be verified and shall allege the name and relationship of the defendant to the plaintiff, how the obligation for rent arose, the amount or quality and value of the rent due for such land, or the advances, and whether payable in money, an agricultural product, or any other thing of value.

**History.**—s. 2, ch. 3131, 1879; RS 1764; GS 2240; RGS 3559; CGL 5423; s. 34, ch. 67-254; s. 1, ch. 80-282.

**83.12 Distress for rent; form of writ.**—A distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed. The writ shall enjoin the defendant from damaging, disposing of, secreting, or removing any property liable to distress from the rented real property after the time of service of the writ until the sheriff levies on the property, the writ is vacated, or the court otherwise orders. A violation of the command of the writ may be punished as a contempt of court. If the defendant does not move for dissolution of the writ as provided in s. 83.135, the sheriff shall, pursuant to a further order of the court, levy on the property liable to distress forthwith after the time for answering the com-

plaint has expired. Before the writ issues, the plaintiff or his agent or attorney shall file a bond with surety to be approved by the clerk payable to defendant in at least double the sum demanded or, if property, in double the value of the property sought to be levied on, conditioned to pay all costs and damages which defendant sustains in consequence of plaintiff's improperly suing out the distress.

**History.**—s. 2, ch. 3131, 1879; RS 1765; GS 2241; s. 10, ch. 7838, 1919; RGS 3560; CGL 5424; s. 34, ch. 67-254; s. 2, ch. 80-282.

**83.13 Distress for rent; levy of writ.**—The sheriff shall execute the writ by service on defendant and, upon the order of the court, by levy on property distrainable for rent or advances, if found in his jurisdiction. If the property is not so found but is in another jurisdiction, he shall deliver the writ to the proper sheriff in the other jurisdiction; and the other sheriff shall execute the writ, upon order of the court, by levying on the property and delivering it to the sheriff of the county in which the action is pending, to be disposed of according to law, unless he is ordered by the court from which the writ emanated to hold the property and dispose of it in his jurisdiction according to law. If the plaintiff shows by a sworn statement that the defendant cannot be found within the state, the levy on the property suffices as service on him.

**History.**—s. 3, ch. 3721, 1887; RS 1765; GS 2241; RGS 3560; CGL 5424; s. 34, ch. 67-254; s. 3, ch. 80-282; s. 15, ch. 82-66; s. 8, ch. 83-255.

**83.135 Distress for rent; dissolution of writ.**—The defendant may move for dissolution of a distress writ at any time. The court shall hear the motion not later than the day on which the sheriff is authorized under the writ to levy on property liable under distress. If the plaintiff proves a prima facie case, or if the defendant defaults, the court shall order the sheriff to proceed with the levy.

**History.**—s. 4, ch. 80-282.

**83.14 Distress for rent; replevy of distrained property.**—The property distrained may be restored to the defendant at any time on his giving bond with surety to the sheriff levying the writ. The bond shall be approved by such sheriff, made payable to plaintiff in double the value of the property levied on, with the value to be fixed by the sheriff, and conditioned for the forthcoming of the property restored to abide the final order of the court. It may be also restored to defendant on his giving bond with surety to be approved by the sheriff making the levy conditioned to pay the plaintiff the amount or value of the rental or advances which may be adjudicated to be payable to plaintiff. Judgment may be entered against the surety on such bonds in the manner and with like effect as provided in s. 76.31.

**History.**—s. 3, ch. 3131, 1879; RS 1766; s. 1, ch. 4408, 1895; RGS 3561; CGL 5425; s. 34, ch. 67-254; s. 16, ch. 82-66; s. 9, ch. 83-255.

**83.15 Distress for rent; claims by third persons.**—Any third person claiming any property so distrained may interpose and prosecute his claim for it in the same manner as is provided in similar cases of claim to property levied on under execution.

**History.**—s. 7, ch. 3131, 1879; RS 1770; GS 2246; RGS 3565; CGL 5429; s. 34, ch. 67-254; s. 17, ch. 82-66.

**83.18 Distress for rent; trial; verdict; judgment.**—If the verdict or the finding of the court is for plaintiff, judgment shall be rendered against defendant for the amount or value of the rental or advances, including interest and costs, and against the surety on defendant's bond as provided for in s. 83.14, if the property has been restored to defendant, and execution shall issue. If the verdict or the finding of the court is for defendant, the action shall be dismissed and defendant shall have judgment and execution against plaintiff for costs.

**History.**—RS 1768; s. 3, ch. 4408, 1895; GS 2244; RGS 3563; CGL 5427; s. 14, ch. 63-559; s. 34, ch. 67-254; s. 18, ch. 82-66.

**83.19 Distress for rent; sale of property distrained.**

(1) If the judgment is for plaintiff and the property in whole or in part has not been replevied, it, or the part not restored to the defendant, shall be sold and the proceeds applied on the payment of the execution. If the rental or any part of it is due in agricultural products and the property distrained, or any part of it, is of a similar kind to that claimed in the complaint, the property up to a quantity to be adjudged of by the officer holding the execution (not exceeding that claimed), may be delivered to the plaintiff as a payment on his execution at his request.

(2) When any property levied on is sold, it shall be advertised two times, the first advertisement being at least 10 days before the sale. All property so levied on shall be sold at the location advertised in the notice of sheriff's sale.

(3) Before the sale if defendant appeals and obtains supersedeas and pays all costs accrued up to the time that the supersedeas becomes operative, the property shall be restored to him and there shall be no sale.

(4) In case any property is sold to satisfy any rent payable in cotton or other agricultural product or thing, the officer shall settle with the plaintiff at the value of the rental at the time it became due.

**History.**—ss. 5, 6, ch. 3131, 1879; RS 1769; GS 2245; RGS 3564; CGL 5428; s. 34, ch. 67-254; s. 19, ch. 82-66; s. 10, ch. 83-255.

**83.20 Causes for removal of tenants.**—Any tenant or lessee at will or sufferance, or for part of the year, or for one or more years, of any houses, lands or tenements, and the assigns, under tenants or legal representatives of such tenant or lessee, may be removed from the premises in the manner hereinafter provided in the following cases:

(1) Where such person holds over and continues in the possession of the demised premises, or any part thereof, after the expiration of his time, without the permission of his landlord.

(2) Where such person holds over without permission as aforesaid, after any default in the payment of rent pursuant to the agreement under which the premises are held, and 3 days' notice in writing, requiring the payment of the rent or the possession of the premises, has been served by the person entitled to the rent on the person owing the same. The service of the notice shall be by delivery of a true copy thereof, or if the tenant be absent from his last or usual place of residence, by leaving a copy thereof at such place.

**History.**—s. 1, ch. 3248, 1881; RS 1751; GS 2227; RGS 3535; CGL 5399; s. 34, ch. 67-254; s. 20, ch. 77-104.

**83.21 Removal of tenant.**—The landlord, his attorney or agent, applying for the removal of any tenant, shall file a complaint stating the facts which authorize the removal of the tenant, and describing the premises in the proper court of the county where the premises are situated and is entitled to the summary procedure provided in s. 51.011.

**History.**—s. 2, ch. 3248, 1981; RS 1752, GS 2229, RGS 3536, CGL 5400; s. 1, ch. 61-318, s. 34, ch. 67-254

**83.22 Removal of tenant; service.**—

(1) After at least two attempts to obtain service as provided by law, if the defendant cannot be found in the county in which the action is pending and either he has no usual place of abode in the county or there is no person 15 years of age or older residing at his usual place of abode in the county, the sheriff shall serve the summons by attaching it to some part of the premises involved in the proceeding. The minimum time delay between the two attempts to obtain service shall be 6 hours.

(2) If a landlord causes, or anticipates causing, a defendant to be served with a summons and complaint solely by attaching them to some conspicuous part of the premises involved in the proceeding, the landlord shall provide the clerk of the court with two additional copies of the complaint and two prestamped envelopes addressed to the defendant. One envelope shall be addressed to such address or location as has been designated by the tenant for receipt of notice in a written lease or other agreement or, if none has been designated, to the residence of the tenant, if known. The second envelope shall be addressed to the last known business address of the tenant. The clerk of the court shall immediately mail the copies of the summons and complaint by first-class mail, note the fact of mailing in the docket, and file a certificate in the court file of the fact and date of mailing. Service shall be effective on the date of posting or mailing, whichever occurs later; and at least 5 days from the date of service must have elapsed before a judgment for final removal of the defendant may be entered.

**History.**—s. 2, ch. 3248, 1981; RS 1753, GS 2229, RGS 3537, CGL 5401; s. 1, ch. 22731, 1945, s. 34, ch. 67-254; s. 2, ch. 83-151, s. 3, ch. 84-339

**83.231 Removal of tenant; judgment.**—If the issues are found for plaintiff, judgment shall be entered that he recover possession of the premises. In addition to awarding possession of the premises to the plaintiff, the court shall also direct, in an amount which is within its jurisdictional limitations, the entry of a money judgment in favor of the plaintiff and against the defendant for the amount of money found due, owing, and unpaid by the defendant, with costs. However, no money judgment shall be entered unless service of process has been effected by personal service or, where authorized by law, by certified or registered mail, return receipt, or in any other manner prescribed by law or the rules of the court; and the plaintiff in the judgment for possession and money damages may also be awarded attorney's fees and costs. If the issues are found for defendant, judgment shall be entered dismissing the action.

**History.**—s. 8, ch. 6463, 1913; RGS 3549, CGL 5413; s. 34, ch. 67-254; s. 1, ch. 87-195

**Note.**—Former s. 83.34

**83.241 Removal of tenant; process.**—After entry of judgment in favor of plaintiff the clerk shall issue a writ to the sheriff describing the premises and commanding him to put plaintiff in possession. However, in the case of the removal of any mobile home tenant or the mobile home of any tenant for the reason of holding over after the expiration of the tenant's time, the writ of possession shall not issue earlier than 30 days from the service of the petition for removal upon the defendant.

**History.**—s. 9, ch. 6463, 1913; RGS 3550, CGL 5414; s. 34, ch. 67-254; s. 1, ch. 70-360

**Note.**—Former s. 83.35

**83.251 Removal of tenant; costs.**—The prevailing party shall have judgment for costs and execution shall issue therefor.

**History.**—s. 11, ch. 6463, 1913; RGS 3552, CGL 5416; s. 34, ch. 67-254

**Note.**—Former s. 83.37

## PART II

### RESIDENTIAL TENANCIES

- 83.40 Short title.
- 83.41 Application.
- 83.42 Exclusions from application of part.
- 83.43 Definitions.
- 83.44 Obligation of good faith.
- 83.45 Unconscionable rental agreement or provision.
- 83.46 Rent; duration of tenancies.
- 83.47 Prohibited provisions in rental agreements.
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- 83.49 Deposit money or advance rent; duty of landlord and tenant.
- 83.50 Disclosure.
- 83.51 Landlord's obligation to maintain premises.
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- 83.535 Flotation bedding system; restrictions on use.
- 83.54 Remedies; enforcement of rights and duties; civil action.
- 83.55 Remedies; right of action for damages.
- 83.56 Remedies; termination of rental agreement.
- 83.57 Remedies; termination of tenancy without specific term.
- 83.58 Remedies; tenant holding over.
- 83.59 Remedies; right of action for possession.
- 83.595 Remedies; choice of remedies upon breach by tenant.
- 83.60 Remedies; defenses to action for rent or possession; procedure.
- 83.61 Disbursement of funds in registry of court; prompt final hearing.
- 83.62 Remedies; restoration of possession to landlord.
- 83.625 Power to award possession and enter money judgment.
- 83.63 Remedies; casualty damage.
- 83.64 Retaliatory conduct.
- 83.66 Right of tenant to obtain franchised or licensed cable television service.
- 83.67 Prohibited practices.



Appendix L

Proposed New York State Landlord  
and Tenant Measure

STATE OF NEW YORK

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10338

IN ASSEMBLY

March 29, 1988

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Introduced by M. of A. KOPPELL -- read once and referred to the Committee on Housing

AN ACT to amend the administrative code of the city of New York, in relation to arbitration procedures for establishing commercial rents

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Legislative findings and intent. The legislature hereby  
2 finds that pressures on New York city's commercial market have caused  
3 this market to weigh too heavily in favor of the landlord. The closing  
4 of many small businesses, not-for-profit organizations, art groups,  
5 manufacturing concerns and major industries as a result of these pressures is having a negative effect on the viability of New York  
6 neighborhoods. These pressures are causing instability in the city's  
7 commercial rental market. It is the intent of this legislation, therefore, to create a situation where the commercial tenant and landlord may  
8 bargain on the proposed rent as equal bargaining parties with the option  
9 of instituting arbitration procedures should an agreement not be  
10 reached.  
11

12  
13 § 2. Title twenty-six of the administrative code of the city of New  
14 York is amended by adding a new chapter nine to read as follows:

15 CHAPTER 9

16 COMMERCIAL RENT, BINDING ARBITRATION PLAN

17 § 26-801 Scope. This chapter shall apply to all lease renewals of commercial premises where the landlord proposes a rent increase of more  
18 than twenty-five percent of the average rent charged during the previous  
19 twelve months and to commercial premises where the landlord refuses to  
20 renew a lease.

21  
22 § 26-802 Definitions. a. "Arbitrator" shall mean the person chosen by  
23 the American Arbitration Association, or any other recognized arbitration  
24 organization, to resolve a dispute between a landlord and tenant  
25 concerning lease renewals or the rent to be charged for the commercial  
26 premises.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD12209-02-8

1 b. "Commercial premises" shall mean premises occupied for non-  
2 residential purposes, including, but not limited to retail stores,  
3 professional services, offices, manufacturing, assembling, processing,  
4 cultural and not-for-profit uses.

5 c. "Landlord" shall mean any owner, lessor, sublessor or other person  
6 entitled to receive rent for the use or occupancy of any unit, or an  
7 agent thereof.

8 d. "Mediator" shall mean any person, agreed on between the parties to  
9 the dispute or chosen by the American Arbitration Association or any  
10 other recognized mediation or arbitration association, to act as an in-  
11 termediary between the parties. The mediator shall not offer a binding  
12 decision concerning the matter in dispute.

13 e. "Negotiation" shall mean the process of conferring with one another  
14 through conferences, discussions and compromise, to arrive at a mutually  
15 agreeable settlement.

16 f. "Panel" shall mean the arbitrators, if more than one, who are mem-  
17 bers of the team hearing the case.

18 g. "Rent" shall mean any consideration, including any deposit, pas-  
19 salong, bonus or gratuity, demanded or received in connection with the  
20 use or occupancy of any rental unit.

21 h. "Service" shall mean those facilities which enhance the use of the  
22 rental unit, including, but not limited to, repairs, replacement, main-  
23 tenance, painting, heat, hot and cold water, utilities, elevator ser-  
24 vise, security devices and patrols, furnishings, storage, janitorial and  
25 landscaping services, refuse removal, insurance protection, parking  
26 spaces, and services to, and facilities in common areas of the building  
27 or parcel in which the rental unit is located.

28 i. "Space" shall mean the physical area of the business location.

29 j. "Tenant" shall mean tenant, sub-tenant lessee, sublessee, or any  
30 other person entitled to the use or occupancy of any rental unit.

31 § 26-803 Manner of service. All papers which, by the terms of this  
32 chapter, or any regulations promulgated thereunder, are required to be  
33 served, shall be served by a process server, or shall be sent by first  
34 class mail and certified mail, return receipt requested.

35 § 26-804 Rental guidelines. a. Qualified right of renewal. All leases  
36 of commercial space may be renewed at the option of the tenant in good  
37 standing. Such lease renewals shall be for minimum terms of five years,  
38 provided however, that at the tenant's option, a lease of shorter dura-  
39 tion may be selected.

40 A tenant shall lose the right of renewal and a landlord may refuse to  
41 renew a lease only on the following grounds:

42 (1) The current tenant has negligently failed to maintain the tenancy  
43 in repair and, as a direct result of the present tenant's action or  
44 inaction, the state of repair of holdings has deteriorated so as to  
45 clearly demonstrate the tenant's failure to comply with obligations of  
46 the lease. The tenant who signed the lease is responsible for the ac-  
47 tions of any sublessee with regard to the issue of renewal. Any contract  
48 between the tenant and a subtenant dealing with responsibility of main-  
49 tenance is void on the issue of renewal.

50 (2) The tenant has persistently delayed rent payments without cause.  
51 In order for the the landlord to be excused from renewal under this  
52 ground, the landlord must have served the tenant at least three prior  
53 notices during the life of the lease to the tenant for demand of payment  
54 within thirty days, and then prove that the lessee has not paid within  
55 the thirty day period. The landlord shall not serve such notice unless  
56 the rent payment was in arrears for a minimum of ten days.

1     (3) The tenant uses the present location for reasons substantially  
2 different from those described in the lease.

3     (4) The tenant conducts any form of illegal activity on the premises.

4     (5) The tenant has substantially breached any of his or her obliga-  
5 tions under the current lease.

6     (6) On the termination of the current tenancy, the landlord intends to  
7 demolish or substantially reconstruct the premises comprised in the  
8 holding or a substantial part thereof or to carry out substantial work  
9 or construction on the holding or part thereof which he or she could not  
10 reasonably do without obtaining possession of the premises. The landlord  
11 must have been the landlord of record for at least three years prior to  
12 the termination date in order to use this ground. The landlord shall  
13 notify the tenant of his or her decision to demolish or substantially  
14 reconstruct the premises at least one year prior to the termination of  
15 the lease. In the event that the lessor fraudulently invokes this  
16 justification for refusal to renew a commercial lease, the defrauded  
17 lessee may collect treble damages for any loss suffered as a result of  
18 such action.

19     (7) On the termination of the current tenancy, the landlord intends to  
20 occupy the commercial premises for the purposes of a business to be car-  
21 ried on by him or her therein. The landlord must have been the landlord  
22 of record for at least three years prior to the termination date in or-  
23 der to use this ground. The landlord shall notify the tenant of his or  
24 her decision to reoccupy the premises at least one year prior to the  
25 termination of the lease. In the event that the lessor fraudulently in-  
26 voke this justification for a refusal to renew a commercial lease, the  
27 defrauded lessee may collect treble damages for any loss suffered as a  
28 result of such action.

29     (8) The current tenancy was created by the sub-letting of the property  
30 and the original tenant did not notify the landlord by certified mail of  
31 the sub-tenant's existence. This ground is void if the landlord and ten-  
32 ant had agreed in the lease to allow sub-leasing rights and all obliga-  
33 tions of the prime tenant on the issue, were in compliance.

34     (9) The tenant is committing, or permitting to exist, a nuisance in  
35 the building or is causing substantial interference with the comfort,  
36 safety or enjoyment of the premises for the other tenants.

37     (10) The tenant is in gross or persistent violation of the New York  
38 city tax code or of any license obligations.

39     b. Compensation. If the landlord does not renew the tenancy pursuant  
40 to paragraph six or seven of subdivision a of this section, the tenant  
41 is entitled to just compensation. In the event the lease contains no  
42 provision for such compensation, then an arbitrator or a three member  
43 arbitration panel shall be chosen pursuant to guidelines set forth in  
44 paragraph two of subdivision c of this section. The arbitrators shall  
45 determine a fair compensation for the tenant's loss of the use of the  
46 commercial premises.

47     c. Procedure for refusal to renew. (1) The landlord is to notify the  
48 tenant a minimum of one year before the termination of the lease, that  
49 the landlord is not going to renew the lease and to state the reason or  
50 reasons for such denial in detail. The landlord is to furnish the tenant  
51 with all pertinent data supporting such reason or reasons. If the ten-  
52 ant still wishes to challenge the refusal and apply for a renewal of the  
53 lease then the tenant is to notify the landlord within twenty-one days  
54 after the receipt of the landlord's notice. The landlord shall then  
55 notify the arbitrators within fourteen days after receipt of the tenant  
56 notice that a hearing is requested to determine whether the landlord's

1 grounds for refusal are valid. The landlord and the tenant are to fur-  
2 nish the arbitrators with all relevant documentation. An arbitration  
3 hearing will be scheduled within twenty-one days from receipt of notifi-  
4 cation, and shall take place in the borough where the commercial pre-  
5 mises is located. The panel shall conduct a preliminary meeting prior to  
6 the hearing to review the data and familiarize themselves with the case.  
7 The matters they shall determine during the preliminary meeting shall  
8 include, but not be limited to, the need to inspect the space and the  
9 need to hire an expert consultant such as a real estate appraiser or ac-  
10 countant to certify the accuracy of the data. The panel has the right to  
11 conduct an inspection of the space after it notifies both parties at  
12 least three days in advance of the inspection and informs them of their  
13 right to be present during the inspection.

14 (2) The panel shall consist of either one or three members, to be  
15 determined by the parties to the dispute or, if they cannot agree on the  
16 number of panel members, by the American Arbitration Association or  
17 other recognized arbitration organization, based on the nature of the  
18 case. The landlord and tenant shall choose from a list of approved arbi-  
19 trators or, if they cannot agree on the selection of the member or mem-  
20 bers of the panel, the American Arbitration Association or other recog-  
21 nized arbitration organization shall determine the member or members.

22 The landlord and tenant will each be given no more than one day to  
23 present their case. They shall be allowed to present testimony, wit-  
24 nesses, pictures, videos, documents and any other relevant data. Each  
25 party shall be allowed to confront and cross-examine adverse witnesses.  
26 The panel will have the power to rule on evidence other than that pre-  
27 sented by the two parties. The panel shall notify both parties of its  
28 decision within twenty-one days of the hearing and the decision shall be  
29 final and binding upon both parties. The panel shall render a determina-  
30 tion no later than twenty-one working days after the hearing has  
31 concluded. Such determination shall be based on (i) New York city laws  
32 governing commercial spaces; and (ii) the terms of the lease; and (iii)  
33 any other factors that the panel shall deem relevant.

34 If the panel decides in favor of the landlord, then the tenant will  
35 have until the end of the current lease to vacate. If the panel decides  
36 in favor of the tenant, then the landlord is to notify the tenant at  
37 least one hundred eighty days before the expiration of the lease that  
38 the landlord is ready to meet with the tenant to renegotiate the lease.  
39 If the parties cannot agree on the rent to be charged for the commercial  
40 premises, they shall submit to the requirements of subdivision d of this  
41 section.

42 d. Procedure for unopposed lease renewals. (1) The landlord shall  
43 notify the tenant by both regular and registered mail, at least one hun-  
44 dred eighty days prior to the expiration of the lease, of his or her  
45 willingness to renegotiate the lease agreement. If the landlord and ten-  
46 ant agree, they may renegotiate a new lease at any time.

47 The negotiation period officially starts on the date of the first  
48 meeting between the landlord and tenant. If the one hundred eighty day  
49 period runs over the expiration date of the old lease, then the tenant  
50 is to continue rent payments at the old rate until the parties reach an  
51 agreement on a new lease or until a decision is rendered by the panel.

52 The first ninety days of the one hundred eighty day period is for the  
53 purpose of negotiations. Alternatively, either party may compel the  
54 other party to the dispute to use the ninety days, or any part thereof,  
55 for the purposes of mediation. If either the landlord or tenant chooses  
56 mediation, he or she shall notify the other party that a mediation ses-

1 sion is requested. The parties shall choose a mediator who is agreeable  
2 to both the landlord and tenant, or if no such person is agreeable, then  
3 the American Arbitration Association or another recognized arbitration  
4 or mediation association shall appoint a mediator. The mediator shall  
5 notify the landlord and tenant, no more than ten days after his or her  
6 appointment, of the date, time, place and rules of the hearing. The  
7 mediator shall follow customary rules and may render an opinion concern-  
8 ing the dispute, however, the mediator's opinion shall not be binding on  
9 the parties.

10 If, after ninety days of negotiations or mediation sessions, the lan-  
11 dlord and tenant do not reach an agreement on a new lease, and the rent  
12 price demanded by the landlord exceeds twenty-five percent of the  
13 average rent charged during the previous twelve months of the existing  
14 lease then the landlord is to notify the arbitration organization that a  
15 hearing is requested. The panel shall notify both parties within twenty-  
16 one days of receipt of the request of the date, place, time and rules of  
17 the hearing.

18 The landlord and the tenant are to furnish the arbitration panel with  
19 all relevant documentation. An arbitration hearing shall be scheduled  
20 within twenty-one days of receipt of the landlord's notice and shall  
21 take place in the borough where the commercial premises is located. The  
22 panel shall meet before the hearing to review the data and familiarize  
23 themselves with the case. The matters they shall determine shall in-  
24 clude, but not be limited to, the need to inspect the space and the need  
25 to hire expert consultants such as a real estate appraiser or an ac-  
26 countant to certify the accuracy of data. The panel has the right to  
27 conduct an inspection of the space after it notifies both parties at  
28 least three days in advance of the inspection and informs them of their  
29 right to be present during the inspection.

30 (2) The hearing before the panel shall be tape recorded. The tape  
31 recording shall be transcribed upon the request of any party who posts  
32 in advance the estimated cost of the transcription. Either party may  
33 provide, at their expense, a reporter to transcribe the hearing. The of-  
34 ficial record of the hearing shall include all documents introduced into  
35 evidence, offers of proof and the decision of the panel. The landlord  
36 and tenant will each be given one day to defend their rent figure  
37 through the use of various forms of documentation, including charts,  
38 pictures, witnesses, videos and comparable rent data to help support  
39 their claims. Each party shall be allowed to confront and cross-examine  
40 adverse witnesses.

41 The panel shall be permitted to rule on evidence other than that pre-  
42 sented by the two parties. They can choose to go to the premises in  
43 question or to investigate any aspect of the case to help them arrive at  
44 a decision.

45 The arbitrators shall render a determination no later than twenty-one  
46 days after the hearing has been concluded. Such determination shall be  
47 based on (i) the cost of maintenance and operation of the entire  
48 property including land and building, excluding all service debt such as  
49 mortgages, (ii) the amount paid directly by the owner of rates assessed  
50 against the building, (iii) the kind, quality and quantity of services  
51 furnished, (iv) a reasonable return on capital, comparable to the risk  
52 of the investment excluding amortization or interest paid or accrued,  
53 (v) the condition of the space, (vi) current interest rate on bank depo-  
54 sits and U. S. Government Bonds, (vii) the current inflation rate and  
55 the individual components of the inflation index, (viii) the lease  
56 history and any relevant sublease history, (ix) capital improvements

1 made by tenant, (x) the extent to which a business contributes to the  
2 uniqueness and diversity of the community, (xi) the extent to which a  
3 business provides basic necessities and services essential to everyday  
4 living, (xii) the longevity of the business, (xiii) the location of the  
5 business, (xiv) the extent to which the business is bound to its partic-  
6 ular location, (xv) the prior willingness of each party to submit to  
7 negotiations or mediation, (xvi) the size of the space, (xvii) the per-  
8 centage of workers who are neighborhood residents, disabled, senior  
9 citizens, minorities or participants in city, state or federal job  
10 training programs. The panel shall consider that each small business and  
11 landlord relationship is unique and should be dealt with as such.

12 Within twenty-one days of the hearing, the panel shall send its deci-  
13 sion to the parties involved by certified mail. The panel's decision  
14 shall be final and binding on both parties. If, however, the tenant is  
15 unable to pay the rent set by the panel, then the landlord and tenant  
16 shall not enter into a new lease agreement or renew the existing lease.  
17 In the event that the landlord and tenant do not enter into a new lease  
18 agreement or they do not renew the existing lease and the landlord sub-  
19 sequently agrees on a rent price with a prospective tenant, the lan-  
20 dlord must first offer the existing tenant the option of renewing his or  
21 her lease at the rent agreed on between the landlord and the prospective  
22 tenant.

23 The tenant has a right to remain in the premises at a rent no greater  
24 than one hundred twenty-five percent of the rent charged during the  
25 final twelve months of the existing lease or until the landlord finds a  
26 prospective tenant and reaches an agreement on rental and other lease  
27 terms with that prospective tenant. Once an agreement on the rent to be  
28 charged and other lease terms has been made with a prospective tenant  
29 the landlord must first offer the current tenant the option of renewing  
30 his or her lease at the rent price and terms agreed on between the lan-  
31 dlord and the prospective tenant.

32 If the tenant declines that rental amount, then he or she has ninety  
33 days, from the date notice is received, to remove his or her property  
34 from the commercial premises. The tenant will be allowed to remain in  
35 possession at twenty-five percent above the old rent during the ninety  
36 day period.

37 If the arbitration panel rule in favor of the landlord and the tenant  
38 declines the option of first refusal, the landlord and tenant may at any  
39 time negotiate by mutual consent a lease for a term of less than five  
40 years and for an amount different from that set by the arbitrators. This  
41 special agreement will be allowed if present in writing to the panel.  
42 The costs of arbitration shall be borne equally by landlord and tenant.

43 § 26-805 Administration. This program shall be administered by an in-  
44 dependent private company that specializes in arbitration under a one  
45 year contract that must be reviewed by the appropriate government agency  
46 before renewal.

47 § 26-806 Security deposits. Security deposits shall not exceed an  
48 amount equal to three months rent. All security deposits shall be placed  
49 in interest-bearing accounts at a federally insured bank chartered by  
50 New York state. Interest shall be paid at least annually. The amount of  
51 interest paid to the tenant shall equal the interest paid by the fed-  
52 erally insured bank less one percent for the landlord's administrative  
53 costs.

54 § 26-807 Passalongs. No lease or lease renewal for a commercial pre-  
55 mises shall contain a provision for rent increases above the base rent  
56 agreed upon, with the exception of increased costs resulting from in-

1 creased real property taxes. Any rent increases to pass along the cost  
2 of increased real property taxes shall be apportioned among the commer-  
3 cial tenants strictly according to the percentage of square feet in the  
4 building.

5 § 26-808 Retaliation. No landlord shall in any way retaliate against  
6 any tenant for the tenant's assertion or exercise of any right under  
7 this chapter. Such retaliation may subject the landlord to a suit for  
8 actual and punitive damages, injunctive relief, and attorney's fees. Any  
9 proven form of retaliation by the landlord will be cause for the panel  
10 to rule in favor of the tenant if a hearing is in progress.

11 § 26-809 Assignment. No lease entered into after the effective date of  
12 this chapter may contain any provision prohibiting or limiting the  
13 tenant's right to assign the lease to a purchaser of the tenant's busi-  
14 ness, except that a lease provision may condition such assignment on the  
15 purchaser's ability to comply with the terms of the lease. In addition,  
16 there may be a lease provision conditioning such assignment on the  
17 payment to the landlord of any necessary and reasonable expenses caused  
18 the landlord by the assignment. No other payment to the landlord shall  
19 be required or made for his or her consent to the assignment.

20 § 26-810 Waiver. No provision in any lease, rental agreement, or  
21 agreement made in connection therewith, which waives or diminishes any  
22 right of the tenant under this chapter, is valid.

23 § 26-811 Evaluation. At the end of each year, any arbitration organi-  
24 zation employed pursuant to this chapter shall report to the New York  
25 city council on the effectiveness of this chapter in carrying out the  
26 purposes set forth in this chapter. This report shall also identify any  
27 other positive or negative effects of this chapter.

28 § 26-812 Violations. The tenant is to immediately notify the landlord  
29 of any violations of any law, regulation, code or other regulatory  
30 standard. The landlord is to immediately notify all tenants of any and  
31 all such violations against the building.

32 § 26-813 Penalties. a. A tenant may obtain injunctive relief mandating  
33 arbitration against any landlord who fails to submit voluntarily to  
34 arbitration.

35 b. (1) For purposes of this subdivision, "negotiating in good faith"  
36 means a meaningful attempt to reach an agreement.

37 (2) The mediator or arbitrator, at any time during negotiations  
38 between the landlord and tenant, may determine that the landlord is not  
39 negotiating in good faith. When the mediator or arbitrator or the arbi-  
40 tration panel determines that the retail landlord has failed to negoti-  
41 ate with the retail tenant in good faith, then the tenant shall be en-  
42 titled to maintain an action for damages not to exceed fifty thousand  
43 dollars in any court of competent jurisdiction or he or she may elect to  
44 extend his, or her current lease for a period of up to three years.

45 c. Any and all legal expenses incurred by one party as a result of his  
46 or her attempt to compel the other party to comply with the provisions  
47 of this chapter may be awarded by the arbitrator or a court of competent  
48 jurisdiction, to the appropriate party.

49 § 3. This act shall take effect immediately.

## Appendix M

### City of Berkeley Commercial Landlord and Tenant Ordinance for Elmwood District

#### PUBLIC PEACE, MORALS AND WELFARE

~~based upon the owner's intent to withdraw the accommodation from rent or lease. In addition, if the tenants of a rental unit have vacated the unit as a result of a notice of intent to withdraw the accommodation from rent or lease, and the owner fails to make any payment specified herein, the owner shall be liable to the tenants for three times the amount of the payment as well as reasonable attorney fees.~~  
(Ord. 5751-NS § 1 (part), 1986.)

#### **13.77.060 Recordation of notice regarding continued applicability of controls.**

Within twenty days of receipt of a notice issued by an owner pursuant to Section 13.77.050A., the city or its designated agency may cause to be recorded with the county recorder a notice which shall recite the fact that the city of Berkeley has determined to apply the constraints adopted pursuant to Government Code Section 7060.2 to successors in interest to the subject property. The notice shall specifically describe the real property where the accommodations are located, the date upon which the owner will withdraw the accommodations from rent or lease and the dates during which the constraints adopted pursuant to Government Code Section 7060.2 shall apply. If the date upon which the accommodations are to be withdrawn is subsequently altered or modified, the city or its designated agency may record an amended notice. The filing of the notice described in this subsection shall not be construed as a finding by the city or its designated agency that the actual or proposed withdrawal of the accommodations has been approved by the city or its designated agency. (Ord. 5732-NS § 1 (part), 1986.)

#### **13.77.070 Fees payable to the city.**

The city or its designated agency shall establish fees which shall be paid by any owner who exercises the privilege to withdraw accommodations from rent or lease. The city or the designated agency shall set the fee so as to recover all costs of administering this chapter. The fees shall be paid prior to the service of the notice set forth in Section 13.77.050A.1. Failure to pay the fees prior to service of the notice shall invalidate the notice. (Ord. 5732-NS § 1 (part), 1986.)

#### ~~13.77.080 Eviction requirements.~~

~~In any action to recover possession of an accommodation subject to the terms of this chapter, it shall be a defense if the owner has not fully satisfied all of the requirements of this chapter including, but not limited to, compliance with all notice requirements, payment of fees to the city or its designated agency, and payment of relocation benefits to displaced tenants. (Ord. 5751-NS § 1 (part), 1986; Ord. 5732-NS § 1 (part), 1986.)~~

#### **13.77.090 Severability.**

If any provision of this chapter is held by a court of competent jurisdiction to be invalid, this invalidity shall not affect other provisions of this chapter which can be given effect without the invalid provisions and therefore the provisions of this chapter are severable. (Ord. 5732-NS § 1 (part), 1986.)

#### Chapter 13.80

#### ELMWOOD COMMERCIAL RENT STABILIZATION AND EVICTION PROTECTION PROGRAM<sup>12</sup>

##### Sections:

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**13.80.010 Title.**

This chapter shall be called the Elmwood Commercial Rent Stabilization and Eviction Protection Ordinance. (Ord. 5468-NS § 1, 1982.)

**13.80.020 Purposes.**

The purposes of this chapter are to protect commercial tenants in the Elmwood district from rent increases which are not justified by landlord's cost increases; to enable those tenants to continue serving residents of the Elmwood district without undue price increases, expansion of trade (which may exacerbate parking problems), or going out of business; and to test the viability of commercial rent stabilization as a means of preserving businesses which serve the needs of local residents in Berkeley neighborhoods, outside the downtown business district. (Ord. 5468-NS § 2, 1982.)

**13.80.030 Scope.**

This chapter shall apply to all commercial premises (both office and retail), rented or available for rent, only in the Elmwood district of the city of Berkeley. The boundaries of this district are as follows: Stuart Street on the north, Webster Street on the south, Piedmont Avenue on the east, and Benvenue Avenue on the west. (Ord. 5468-NS § 3, 1982.)

**13.80.040 Definitions.**

In this chapter, the following words and phrases have the following meanings:

A. "Landlord" means any owner, lessor, sublessor, or other person entitled to receive rent for the use or occupancy of any rental unit, or an agent thereof; provided, however, that the word "landlord" shall not include any governmental agency;

B. "Rent" means any consideration (including any deposit, bonus, or gratuity) demanded or

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received in connection with the use or occupancy of any rental unit.

- C. "Rental unit" means any property, building, structure, or part thereof, or land appurtenant thereto, which is covered by Section 13.80.030 of this chapter, together with all services connected with the use or occupancy thereof.
- D. "Services" means those services and facilities which enhance the use of the rental unit, including but not limited to repairs, replacement, maintenance, painting, heat, hot and cold water, utilities, elevator service, security devices and patrols, furnishings, storage, janitorial and landscaping services, refuse removal, insurance protection, parking spaces, and services to and facilities in common areas of the building or parcel in which the rental unit is located.
- E. "Tenant" means a tenant, subtenant, lessee, sublessee, or any other person entitled to the use or occupancy of any rental unit.
- F. "Consumer Price Index" means the All Items Consumer Price Index for All Urban Consumers, San Francisco-Oakland, California, as published by the United States Department of Labor, Bureau of Labor Statistics.

(Ord. 5468-NS § 4, 1982.)

**13.80.050 Maximum Rent.**

- A. No landlord of any rental unit covered by this chapter shall request, demand, receive, or retain more than the maximum rent allowed by this section. The maximum rent shall be the "base rent" plus any "allowable adjustments."
- B. Base rent. Except as provided herein, base rent shall be the lawful periodic rent in effect on October 1, 1981 (the approximate time the current campaign for commercial rent stabilization in the Elmwood district began).
  - 1. If, on October 1, 1981, the rental unit was held under a lease which provided for fixed rental payments of varying amounts (e.g., rents escalating with a Consumer Price Index), then the base rent shall be the amount of the final lawful periodic rental payment required by such lease.
  - 2. If, on October 1, 1981, the rental unit was held under a lease which provided rental payments whose amounts were de-

termined by gross sales, in whole or in part (whether or not there is a fixed minimum rent), the monthly base rent shall be the total amount of rent lawfully payable for the final twelve months of such lease, divided by twelve, unless the landlord notifies the tenant in writing at least thirty days before the lease expires that the landlord chooses to continue the same provisions for determining rent as were provided by such lease. If the landlord so notifies the tenant, then such provisions shall continue, provided, however, (1) that the rent shall not be subject to the "allowable adjustment" allowed by this section, (2) that the landlord may thereafter abandon this method of determining rent and use the other method provided by this subsection (13.80.050B,2) to determine the base rent (adding any "allowable adjustments" to determine the "maximum rent"), but only upon ninety days prior written notice to the tenant, and (3) that the landlord must abandon the gross sales method of determining rent and shall use the other method provided by this subsection (13.80.050B, 2) to determine the base rent (adding any "allowable adjustments" to determine the "maximum rent", if the rental unit fails to sell or produce substantially the same types of goods or services to the community as it did on October 1, 1981.

- 3. If, on the date this chapter becomes effective, the rental unit was held under a lease or rental agreement providing for fixed rental payments, and such rent has not been raised in the twelve months prior to that date, then the base rent shall be increased by the percentage of base rent which equals the following amount: five percent times the number of years (rounded off to the nearest year) between the date the rent on the rental unit was last raised (before enactment of this chapter) and the date this chapter becomes effective.
- 4. The base rent for any rental unit newly constructed after October 1, 1981, or not rented on October 1, 1981, shall be the lawful periodic rent actually charged for the first twelve months after the unit is rented. This method of establishing base

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rent shall not be allowed, however, if the parcel on which such new unit is built contained, on October 1, 1981, a rental unit covered by this chapter, which a newly constructed unit has replaced.

### C. Allowable adjustments.

1. The allowable adjustments shall be the unit's proportionate share of increases in periodic costs, to the landlord, since the end of the period used for determining the base rent under subsection B, or since the last allowable adjustment, whichever is later. Such costs shall include costs of maintenance and operating expenses, property taxes, fees in connection with the operation of the property, and improvements (amortized over the useful life of each improvement). Increased costs due to increased principal or interest charges on a loan shall not be allowed, however, where such increased charges result from a larger loan being taken on the property (as contrasted with increased charges resulting from increases in prevailing rates of interest), whether due to refinancing by the landlord or purchase financing by a new landlord.
2. No allowable adjustment shall be based on increased costs incurred with the intent to evade any of the purposes of this chapter.
3. The allowable adjustment shall not include an increase in any cost which the tenant is already required to pay by the terms of the lease on the rental unit (such as property taxes and insurance).
4. Allowable adjustments shall become effective only if the landlord gives the tenant at least thirty days prior written notice that the landlord is imposing the adjustment and thereby raising the rent. Such notice shall be served according to the provisions of Code of Civil Procedure section 1162 or by any reasonable manner agreed upon by the parties. The notice must specify the base rent, the costs which have risen, including the amortization period used for any improvements, their amounts and the method of apportionment among units. The notice must advise the tenant that,

upon the tenant's request within ten days, the landlord will furnish documentary evidence of the base rent and increased costs. If such request is made, the landlord shall furnish such documentary evidence within ten days after such request. If the landlord fails to furnish such evidence within ten days, the notice of allowable adjustment shall become null and void. The tenant's failure to request such evidence shall not be deemed a waiver of his right to later contest the validity of the rent increase.

- D. If a rental unit is hereafter subdivided into two or more rental units, then the base rents of the new units shall be determined by apportioning the base rent of the old unit and any allowable adjustments among the new rental units according to the square footage of each unit. If two or more rental units are hereafter consolidated into one rental unit, then the base rent on the new unit shall be the total of the base rents and any allowable adjustments on the former units.

(Ord. 5468-NS § 5, 1982.)

### 13.80.060 Extraordinary rent increase.

- A. If the application of this chapter, or any section or part thereof, would operate to violate the United States or California Constitution by denying a landlord a fair and reasonable return on investment or by confiscating the landlord's property, then such chapter, section, or part thereof shall apply to such landlord only to the extent that it does not deny him a fair and reasonable return on investment or confiscate his property.
- B. If a landlord believes a rent greater than is allowed by Section 13.80.050 is necessary to provide him with a fair and reasonable return on investment, such landlord shall petition for and obtain a declaration from the board of adjustments that such rent is permitted by this section, before increasing rent pursuant to this section.
- C. The board of adjustments shall enact regulations relating to its duties under this section, including the definition of "fair and reasonable return on investment."

(Ord. 5468-NS § 6, 1982.)

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**13.80.070 Services, lease provisions and assignments.**

- A. No landlord shall reduce or eliminate any service to any rental unit covered by this chapter, unless a proportionate share of the cost savings due to such reduction or elimination is passed on to the tenant in the form of a decrease in rent. Nor shall any landlord delete or modify any provision of any existing or proposed lease or rental agreement, to the disadvantage of a tenant, unless the fair value of such deletion or modification is passed on to the tenant in the form of a decrease in rent.
- B. No lease entered into after the effective date of this chapter may contain any provision prohibiting or limiting the tenant's right to assign the lease to a purchaser of the tenant's business, except that a lease provision may condition such assignment on the purchaser being at least as capable of complying with the lease as the tenant, and a lease provision may condition such assignment on the payment to the landlord of any necessary and reasonable expenses caused the landlord by the assignment. No other payment to the landlord shall be required or made for his consent to the assignment. Any consideration paid to the tenant, directly or indirectly, for the transfer (by assignment, sublease, or otherwise) of any lease or sublease of any rental unit or part thereof shall be treated as part of the rent for the first month of occupancy after the transfer and, as such, shall be subject to the limitations on rent imposed by this chapter.

(Ord. 5468-NS § 7, 1982.)

**13.80.080 Dispute resolution.**

- A. In case of any dispute over the meaning or application of any provision of this chapter (except Section 13.80.090), a landlord, tenant, or any other interested party or neighborhood organization may petition the board of adjustments for resolution of the dispute. Where the city attorney determines that the city of Berkeley or any neighborhood thereof is an interested party, the city attorney may petition or otherwise appear on behalf of such party.
- B. Within a reasonable time after the effective date of this chapter, the board of adjustments shall adopt rules and regulations designed to

assure prompt and fair resolution of disputes which may arise under this chapter. Such rules and regulations shall include provisions assuring that timely notices of petitions and hearings shall be given to all affected parties. Such rules and regulations may include a schedule of reasonable fees to cover the cost of dispute resolution, and may indicate which party shall be responsible for such fees. The board of adjustments may thereafter amend, repeal, and supplement its rules and regulations as it deems appropriate to assure prompt and fair resolution of disputes.

- C. The board of adjustments may delegate its powers to hold hearings and render decisions under this section to groups of one or more members of the board, or to hearing officers, with or without the right to appeal to the full board, if such delegation will help to assure prompt and fair resolution of disputes.
- D. In any case in which the validity of any proposed or actual rent increase under the chapter is in dispute, the burden of proof shall be on the landlord to establish all facts which show that the rent increase is allowed by this chapter.
- E. The board of adjustments may issue orders to enforce its regulations and decisions.
- F. The decision of the board of adjustments shall be final, subject to the right of any party to seek judicial review in any court of competent jurisdiction. Such review may be sought by any affected landlord, tenant, the city of Berkeley, or any interested party or neighborhood organization, whether or not such party participated in the board of adjustments proceedings.
- G. The board of adjustments may, from time to time as it deems appropriate, adopt regulations which interpret various provisions of this chapter.
- H. If the board of adjustments becomes aware that any purpose of this chapter is being evaded or that it is not operating fairly toward landlords, tenants, or the community, the board shall promptly notify the city council and may recommend that appropriate amendments to this chapter be placed on the ballot.
- I. The board of adjustments shall have the powers and duties necessary to fulfill the purposes of this chapter.

(Ord. 5468-NS § 8, 1982.)

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### 13.80.090 Evictions.

In any action to evict any tenant from any rental unit covered by this chapter, the landlord shall plead and prove that the landlord is in compliance with subsection 13.80.050A of this chapter, and that the action is being brought for one or more of the following reasons, which were stated in the notice of termination:

- A. The tenant has failed to pay the lawful rent to which the landlord is entitled, and failed to comply with a valid notice to pay or quit served pursuant to Code of Civil Procedure section 1161;
- B. The tenant has substantially violated an obligation imposed by the lease or rental agreement (other than an obligation to surrender possession at the end of a term or upon notice) and has failed to cure such violation within ten days after having received written notice thereof from the landlord;
- C. The tenant is committing or permitting to exist a nuisance in the building or parcel, or is causing a substantial interference with the comfort, safety or enjoyment of the building or parcel by the landlord or other tenants;
- D. The tenant is using the rental unit for some illegal purpose;
- E. The tenant, who had a lease or rental agreement whose term has expired, has refused (after receiving a request in writing) to execute a written extension or renewal thereof for a further term of like duration, containing provisions which are not inconsistent with this chapter and are materially the same as those in the previous lease or rental agreement;
- F. The tenant has refused to allow the landlord reasonable access to the premises to make necessary repairs or improvements, or to show the rental unit to a prospective purchaser, mortgagee, or tenant;
- G. The landlord in good faith seeks to recover possession in order to remove the rental unit from commercial use, after having obtained all the necessary permits to do so; provided, however, that if the landlord evicts for this reason and, within one year thereafter, the rental unit is being used for any commercial use, it shall be presumed that the landlord's stated purpose in evicting was false, in any action by the tenant against the landlord for abuse of process or malicious prosecution of a civil action;
- H. The landlord in good faith seeks to recover possession in order to repair code violations or improve the premises, after all necessary permits have been obtained, if it is not feasible to perform such repairs or improvements while the tenant remains in possession; provided, however, that when the repairs or improvements are completed, the landlord shall so notify the tenant and allow the tenant thirty days in which to decide whether or not to return to the premises.  
(Ord. 5468-NS § 9, 1982.)

### 13.80.100 Retaliation.

No landlord shall in any way retaliate against any tenant for the tenant's assertion or exercise of any right under this chapter. Such retaliation shall be a defense in any action to evict the tenant and shall be subject to suit for actual and punitive damages, injunctive relief, and attorney's fees. The tenant need not exhaust any remedy before the board of adjustments prior to raising such defense or filing such suit. In any action wherein such retaliation is at issue, where the action was filed within six months of the tenant's assertion or exercise of rights, the burden shall be on the landlord to prove that the dominant motive for the act alleged to be retaliatory was some motive other than retaliation. (Ord. 5468-NS § 10, 1982.)

### 13.80.110 Remedies.

- A. If a landlord attempts to increase rent under subsection 13.80.050C, and any of the information in the notice of rent increase or supporting documentary evidence is false, inaccurate, misleading, or incomplete in any material way, then the notice of rent increase shall be null and void. If, in addition, it is proved that the landlord acted knowingly and willfully in providing such false, inaccurate, misleading or incomplete information or evidence, then the landlord shall pay the tenant, as a penalty, three times the amount of rent demanded in the notice of rent increase.
- B. Any affected tenant shall recover actual damages whenever the landlord receives or retains any rent in excess of the maximum amount allowed under this chapter, and whenever the landlord violates any eviction provision of this chapter. If, in addition, it is

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proved that such act was in bad faith, the landlord shall pay the tenant, as a penalty, three times the actual damages.

- C. If a tenant fails to bring a civil or administrative action within one hundred twenty days of any violation of this chapter, then such action may be brought on the tenant's behalf by the city of Berkeley or any interested party or neighborhood organization, which shall retain one-half of any amount awarded in such action or received in settlement of such action.
- D. No exhaustion of the administrative remedies provided in Section 13.80.080 shall be required as a precondition to invoking any remedy provided by this section.
- E. In any action wherein any party succeeds in obtaining any remedy, in whole or in part, under this section, such party shall be awarded reasonable attorney's fees. If a party asserts a remedy under this section and fails to obtain any relief whatsoever, then the prevailing party shall be awarded reasonable attorney's fees.

(Ord. 5468-NS § 11, 1982.)

**13.80.120 Waiver.**

No provision in any lease, rental agreement, or agreement made in connection therewith, which waives or diminishes any right of the tenant under this chapter, is valid. (Ord. 5468-NS § 12, 1982.)

**13.80.130 Application to pre-existing leases.**

- A. This chapter shall not operate to change any provision in any fixed-term (as opposed to month-to-month) lease executed before October 1, 1981, and in effect on the date this chapter is enacted. Whenever such a lease expires, however, this chapter shall thereupon apply to the affected rental unit; provided, however, that if such lease is renewable at the landlord's or tenant's option, and such option is exercised, this chapter shall not apply to the rental unit until the renewed lease expires.
- B. Notwithstanding the provisions of subsection A above, any lease in effect on the date this

chapter is enacted, which lease was executed since one year prior to October 1, 1981, which increased the rent over the prior rent by more than the increase in the Consumer Price Index from the date the prior rent became operative to the date such lease was executed, shall have its rent reduced immediately to the prior rent, plus such increase in the Consumer Price Index. The purpose of this subsection is to preserve certain businesses which have recently received such high rent increases that they would but for this subsection find it necessary to take steps contrary to the purposes of this chapter, as set out in Section 13.80.020. This subsection shall not operate to deprive any landlord of a fair return on investment.

(Ord. 5468-NS § 13, 1982.)

**13.80.140 Partial invalidity.**

If any provision of this chapter or any application thereof is held invalid, such invalidity shall not affect any other provision or application of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable. (Ord. 5468-NS § 14, 1982.)

**13.80.150 Effective date.**

This chapter shall become effective on the date it is enacted. (Ord. 5468-NS § 15, 1982.)

**13.80.160 Evaluation.**

At the end of each year this chapter is in effect, the comprehensive planning department shall report to the city council on the effectiveness of this chapter in carrying out the purposes set out in Section 13.80.020. This report shall also identify any other positive or negative effects of the chapter and may make recommendations concerning whether the chapter should be left in operation or repealed and whether the scope of the chapter should be expanded to include other neighborhood shopping districts in the city of Berkeley, outside the downtown business district. (Ord. 5468-NS § 16, 1982.)

## Appendix N

### City of Berkeley Commercial Landlord and Tenant Ordinance for the Telegraph Hill District

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##### Chapter 13.82

##### COMMERCIAL RENT MEDIATION AND ARBITRATION FOR THE TELEGRAPH AVENUE AREA<sup>12A</sup>

###### Sections:

- 13.82.010 Title.
- 13.82.020 Purpose.
- 13.82.030 Findings.
- 13.82.040 Definitions.
- 13.82.050 Coverage and exemptions.
- 13.82.060 Rent increases subject to mediation and arbitration.
- 13.82.070 Standards of reasonableness to be applied in arbitration for determining permissible rent increases.
- 13.82.080 Fair return.
- 13.82.090 Just cause for eviction.
- 13.82.100 Frequency of rent increase; notice of rent increases.
- 13.82.110 Mediation and arbitration process.
- 13.82.120 Powers and duties of the arbitrator.
- 13.82.130 Powers of the planning commission and city council.
- 13.82.140 Retaliation.
- 13.82.150 Remedies.
- 13.82.160 Construction of this chapter.
- 13.82.170 Partial invalidity.
- 13.82.180 Provisions of chapter not exclusive.
- 13.82.190 Reports on the mediation and arbitration program.
- 13.82.200 Effective date.

###### 13.82.010 Title.

This chapter shall be called the Telegraph Avenue Area Commercial Rent Mediation and Arbitration Ordinance. (Ord. 5708-NS § 1, 1986.)

###### 13.82.020 Purpose.

The purpose of this chapter is to preserve the unique character of the Telegraph Avenue area commercial district and to prevent displacement of businesses by excessive rent increases and/or evictions. (Ord. 5708-NS § 2, 1986.)

###### 13.82.030 Findings.

- A. On December 11, 1984, the city council appointed an ad hoc committee to study the problems of the Telegraph Avenue area commercial district.
- B. That committee recommended that the city council take immediate action to enact a moratorium on rents, while the planning commission prepared recommendations for longer term approaches to the problems of the area.
- C. On February 26, 1985, in response to the potential for the immediate displacement of small businesses in the Telegraph Avenue area created by overwhelming rent increases or arbitrary evictions, the city council adopted an Urgency Ordinance (No. 5640-N.S.) regulating rents, evictions, and use changes in the Telegraph Avenue commercial area for a ninety day period. The ordinance limited rent increases to the percentage increase in the Consumer Price Index since the prior rent increase. It required that evictions be for "just cause" as defined in the ordinance and required that all changes in use be subject to the city's use permit approval process.
- D. At the time the foregoing urgency ordinance was adopted, the city council also directed the planning commission to study the pattern of rent increases and evictions and to develop a plan for the regulation of specific types of uses in the district. Pursuant to that request the Telegraph Avenue area committee was created.
- E. The urgency ordinance was subsequently extended twice to February 28, 1986 to permit the planning commission and the Telegraph Avenue area committee to complete their recommendations. In October 1985, the ordinance was amended to permit administrative issuance of use permits which would not have a significant impact on the area.
- F. In the summer of 1985, a study was conducted of area merchants and landlords. The study included detailed interviews of approximately one hundred ninety merchants (tenants) and forty commercial land owners. The study indicated that:

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1. The median rent for the area was approximately one dollar and twenty-five cents per square foot per month, but that the current market rent was at least double that amount;
  2. Seventy percent of the tenants have leases of five years or less including sixteen percent who are month-to-month tenants;
  3. High rents were mentioned more frequently than any other problem as the most serious problem facing businesses in the area.
- G. The commercial district has a unique character and contains businesses which serve the diverse needs of Berkeley residents.
- H. Businesses important to the character of the commercial district and the community have suffered excessive rent increases and are likely to be subjected to displacement and eviction.
- I. The new businesses in the area are changing the unique character of the district, and as a result the district is becoming more homogeneous.
- J. A major factor contributing to the above trend is that the amount of commercially zoned space in the district is limited thereby creating a virtual monopoly for landowners. As a result, said landowners can raise rents to levels in excess of the amounts which are affordable to many businesses which are needed to serve Berkeley residents and maintain and foster the district's diversity.
- K. In order to maintain the district's character, it is necessary to continue the current interim use regulations, to develop a longterm plan for use regulations in the area, and to enact a rent mediation and arbitration ordinance.
- (Ord. 5708-NS § 3, 1986.)

**13.82.040 Definitions.**

- A. "Landlord" means any owner, lessor, sublessor, or other person entitled to receive rent for the use or occupancy of any rental unit, or agent thereof.
- B. "Rent" means any consideration (including deposit, bonus or gratuity) demanded or received in connection with the use or occupancy of any rental unit.
- C. "Rental unit" means any property, building, structure, or part thereof, or land appurtenant thereto, which is covered by

Section 13.82.050 of this chapter together with all services connected with the use or occupancy thereof.

- D. "Services" means those services and facilities which enhance the use of the rental unit, including but not limited to repairs, replacement, maintenance, painting, heat, hot and cold water, utilities, elevator service, security devices and patrols, furnishings, storage, janitorial and landscaping services, refuse removal, insurance protection, parking spaces, and services to and facilities in common areas of the building or parcel in which the rental unit is located.
- E. "Tenant" means a tenant, subtenant, lessee, sublessee, or any other person entitled to use or occupancy of any rental unit.
- F. "Consumer Price Index" means the All-Items Consumer Price Index for All Urban Consumers, San Francisco-Oakland, California as published by the United States Department of Labor, Bureau of Labor Statistics.
- G. "Change of retail or commercial use" is a material change in the type of retail or commercial goods or services offered on a site. "Change of retail or commercial use" shall be presumed whenever there is a transfer or change of any lease of commercial space, except in the circumstance that the new owner or leaseholder does not change the name of the establishment and does not change the line or type of commercial goods or services offered in that space.
- H. "Newly constructed units" means units newly constructed, as opposed to units which are rehabilitated or are created as a result of conversions or reallocations of space within existing structures. -
- I. Any other terms not defined herein shall follow the definitions included in the applicable city of Berkeley ordinances.
- (Ord. 5708-NS § 4, 1986.)

**13.82.050 Coverage and exemptions.**

- A. Boundaries. The "Telegraph Avenue Area" includes the area within the following boundaries: College Avenue on the east, Ellsworth Street on the west, Bancroft Avenue on the north, and Derby Street on the south and shall include rental units on both sides of these streets.
- B. Types of Rental Units. This chapter shall



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apply to all commercial premises (both office and retail) rented or available for rent in the Telegraph Avenue Area of the city of Berkeley, except as set forth in subsections C. and D.

- C. Office Sharers. Tenancies which currently and prior to the adoption of this chapter have involved substantial business interrelationships with the landlord, in addition to renting, are exempt from this chapter. (Sharing of office staff, equipment, and/or phones by the landlord and tenant would be evidence of qualification for this exemption, but not the basis for an automatic qualification for this exemption.) This section shall be construed to effectuate its substantive purpose.

- D. Any other exemptions required by state or federal law.

(Ord. 5708-NS § 5, 1986.)

**13.82.060 Rent increases subject to mediation and arbitration.**

- A. Except as hereinafter provided, any rent increase occurring subsequent to February 28, 1986 shall be subject to mediation and arbitration.
- B. Rent Increases Not Subject to Mediation and Arbitration.

1. Increases, after the expiration of a lease of one year or longer, where the increase as a percentage of the initial rent in the expired lease is less than or equal to the percentage change in the C.P.I. since the commencement date of the lease, but in no case more than the lesser of forty cents per square foot or fifty percent above the current rent.
2. Increases authorized by a written agreement between the landlord and tenant, provided that agreements executed after February 28, 1986 include a waiver which is separately signed by the tenant. Said waiver shall state that: "Under Berkeley Ordinance No. 5708-N.S., Telegraph Avenue Area Commercial and Office Tenants Have the Right to Arbitrate Increases. I Understand That by Signing This Agreement, I Waive My Right to Object to the Rent Increases Authorized by This Agreement."
3. Increases that are equal to the amount

authorized by an unexecuted renewal option, if the percentage or dollar amount of said increases was set forth in the renewal option (as opposed to a renewal option under which the renewal rent was to be determined by mediation or appraisal or some other method which did not set forth a precise rent).

4. Increases due to increases in sales or income under a percentage of gross or income rental provision.
5. Initial rents for newly constructed units.
6. Initial rents following a "change of commercial or retail use."

(Ord. 5708-NS § 6, 1986.)

**13.82.070 Standards of reasonableness to be applied in arbitration for determining permissible rent increases.**

- A. Criteria. The following factors, to the extent that they are applicable and relevant, shall be considered in determining a reasonable rent increase for the current year and the subsequent five years. Particular weight shall be given to the first criterion. The guidelines for rent increases subsequent to the first year may tie the increases to an index, cost factors, increases in rents of subtenants and other factors deemed appropriate by the arbitrator.

1. The extent to which a business contributes to the uniqueness and diversity of the Telegraph Avenue area and to the availability of goods and services in the Telegraph Avenue area and the city.
2. The location of the business.
3. The size of the rented space.
4. Services provided by the landlord and tenant.
5. The condition of the unit.
6. Accelerators in the present or most recently expired rental agreement.
7. Liabilities relating to the use of the rented space created by the landlord or tenant.
8. Market rents for similar types of commercial uses.
9. The history of performance or lack of performance of lease obligations by the parties.
10. The terms of the existing or most recently expired lease.
11. The amortized cost of capital improvements by the landlord or tenant to the premises.

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12. The good will built up for the business by the tenant.
  13. Changed circumstances since the prior lease was executed.
  14. The market rent for comparable commercial spaces.
  15. The median rent for the area.
  16. The overall purposes of this chapter.
  17. Increases in rent received by the tenant from subtenants.
  18. All other relevant factors.
- B. Phase-In of Substantial Rent Increases. Consistent with the purposes of this chapter, the arbitrator may require that substantial rent increases be phased in over a period of up to four years.  
(Ord. 5708-NS § 7, 1986.)

**13.82.080 Fair return.**

- A. Notwithstanding any other provision of this chapter, the landlord shall be entitled to a fair return.  
(Ord. 5708-NS § 8, 1986.)

**13.82.090 Just cause for eviction.**

No landlord shall be entitled to recover possession of any rental unit covered by this chapter except upon one of the grounds set forth below.

- A. Failure to Pay Rent. The tenant has failed to pay the lawful rent to which the landlord is entitled and has failed to comply with a valid notice to pay or quit served pursuant to Civil Code Section 1161.
- B. Substantial Lease Violation. The tenant has substantially violated an obligation imposed by the lease or rental agreement (other than an obligation to surrender possession at the end of the term or upon notice) and has failed to cure said violation within a reasonable period after having received written notice thereof from the landlord.
- C. Nuisance. The tenant is committing or permitting to exist a nuisance in the building or parcel, or is causing a substantial interference with the comfort, safety, or enjoyment of the building or parcel by the landlord or other tenants;
- D. Illegal Purpose. The tenant is using the rental unit for an illegal purpose.
- E. Refusal to Renew Lease. The tenant who had a lease or rental agreement whose term has expired, has refused (after receiving a written

request in writing) to execute a written extension or renewal thereof for a further term of like duration, containing provisions which are not inconsistent with this chapter and are materially the same as those in the previous lease or rental agreement.

- F. Refusal to Provide Access. The tenant has refused to allow the landlord reasonable access to the premises, either: (1) to make repairs necessary to correct code violations cited by the city of Berkeley, after all necessary permits have been obtained, or (2) to perform maintenance or improvements which will not significantly interfere with the operation of the tenants business, after all necessary permits have been obtained, or (3) to show the rental unit to a prospective purchaser, mortgagee, or tenant.

In the event that code required repairs are performed, to the extent reasonably feasible, they shall minimize disruption to the tenant. This section shall not be interpreted to allow landlord access where such access could not have been obtained in the absence of this chapter.

- G. In the event the tenant is displaced as a result of repairs or destruction of the premises, said tenant shall have the right to relet the replacement premises. The rental level for said rerelease shall be subject to the arbitration provisions of this chapter.
- H. Owner Occupancy for Pre-1982 Leases. The term of the lease has expired, and the lease or rental agreement was entered into before June 8, 1982, and the landlord in good faith wishes to occupy the premises to operate the same or similar business. For the purposes of this section, the landlord must be an owner of record, holding more than fifty percent ownership interest in the premises.  
(Ord. 5827-NS § 1, 1987; Ord. 5708-NS § 9, 1986.)

**13.82.100 Frequency of rent increases; notice of rent increases.**

- A. Notice of a Proposed Rent Increase. A landlord who wishes to raise the rent shall give the tenant one hundred eighty days notice of the proposed increase. Said notice shall be sent by registered mail and shall state that if the tenant does not file a petition in opposition to said increase within forty-five calendar days of mailing, said tenant may not

invoke the mediation and arbitration process for the purpose of disputing said increase.

This subsection A shall not apply to rents for new tenants moving into vacant units.

- B. **Effective Date of Rent Increase.** Providing that the petition is timely filed, that portion of the rent increase that exceeds the portion exempted from dispute subject to Section 13.82.060B of this chapter, shall not take effect unless and until such time as an arbitrator allows such increase or portion thereof pursuant to the provisions of this chapter. However, the arbitrator shall have the authority to award all or part of rent increases requested by the landlord prior to the arbitration decision.

(Ord. 5708-NS § 10, 1986.)

### **13.82.110 Mediation and arbitration process.**

- A. **Petitions by Tenant.** Any tenant who is subject to a rent increase which is not exempt under the provisions of this chapter may file a petition for mediation and arbitration on a form provided by the city of Berkeley. A petition may be filed any time after notice of a proposed increase has been given, subject to the limitations of Section 13.82.100A of this chapter.

- B. **Petitions by Landlords.** Any landlord who seeks a determination of the applicability of any provision of this chapter or who seeks a rent increase for a unit subject to the provisions of this chapter may invoke the arbitration process by filing a petition on a form provided by the planning and community department of the city of Berkeley. A petition for a rent increase may be filed on the earlier of the following: forty-five days after notice of a proposed increase or when the tenant has indicated an intent to dispute the proposed increase.

The arbitrator may permit the right of production of documents by either side and such other discovery as the planning commission may determine by regulation.

- C. **Mediation Procedure.** Prior to undertaking arbitration, the parties to a dispute under this chapter shall submit the dispute to mediation under the Commercial Mediation Rules of the American Arbitration Association (AAA). Said rules shall govern the mediation, except as otherwise provided by the provisions of this chapter or regulations

adopted by the planning commission pursuant to this chapter.

### **D. Arbitration Procedure.**

1. **Arbitrations pursuant to this chapter** shall be governed by the Commercial Arbitration Rules of the American Arbitration Association, except as otherwise provided by the provisions of this chapter or regulations adopted by the planning commission pursuant to this chapter.
2. **Representation.** Either party may be represented by an attorney or any other person designated by the party.
3. **Appeal to superior court.** A party may appeal to superior court within sixty days of a decision by the arbitrator, pursuant to Civil Code of Procedure Section 1094.5. The standard of review shall be whether there was substantial evidence to support the decision of the arbitrator.
4. **Cost of arbitration.** The costs of arbitration shall be borne by the parties in a manner determined by the arbitrator.
5. **Length of arbitration.** Arbitration hearings shall be limited to three days, unless the parties stipulate that the hearing may be longer or the arbitrator determines that a longer hearing is required due to the complexity of the case or in order to provide due process to the parties.

(Ord. 5708-NS § 11, 1986.)

### **13.82.120 Powers and duties of the arbitrator.**

The arbitrator shall have the power to determine all equitable and legal issues arising under the ordinance, except to the extent not permitted by state or federal law. Said powers shall include, but not be limited to the following:

- A. To determine the allowable rent increase in the year of the dispute and the subsequent five years. Increases above the initial rent set by the arbitrator may be tied to the Consumer Price Index or set in any other manner deemed reasonable by the arbitrator.
- B. To determine that the rent increase requested by the landlord may not be disputed pursuant to this chapter because there has been a "change in commercial or retail use."
- C. To determine whether any or all parts of the ordinance apply in a particular case.

(Ord. 5708-NS § 12, 1986.)

### **13.82.130 Powers of the planning commission and city council.**

- A. The powers and duties of the planning commission shall be as follows:

1. To adopt rent increase standards, guidelines, rules and regulations and amendments thereto for the operation

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and administration of this chapter, which are consistent with the goals and purposes of this chapter, after a public hearing. Said standards, guidelines, rules, regulations, and/or amendments thereto shall go into effect thirty days after they first appear on the city council agenda, unless within said thirty day period, the council determines otherwise.

2. To make recommendations to the city council regarding substantive changes in the ordinance.
- B. The powers of the city council shall include the power to adopt rent increase standards, guidelines, rules and regulations and amendments thereto for the operation and administration of this chapter, which are consistent with the goals and purposes of this chapter, after a public hearing.

(Ord. 5708-NS § 13, 1986.)

**13.82.140 Retaliation.**

No landlord shall in any way retaliate against any tenant for the tenant's assertion or exercise of any right under this chapter. Such retaliation shall be a defense in any action to evict the tenant and shall be subject to suit for actual and punitive damages, injunctive relief, and attorneys' fees. (Ord. 5708-NS § 14, 1986.)

**13.82.150 Remedies.**

- A. Any affected tenant shall recover actual damages whenever the landlord receives or retains any rent in excess of the maximum amount allowed under this chapter and whenever the landlord violates any eviction provision of this chapter. If, in addition, it is proved that such act was in bad faith, the landlord shall pay the tenant as a penalty, three times the actual damages.
- B. The city attorney may bring an action for injunctive and other appropriate relief to enforce this chapter and shall be entitled to recover reasonable attorney's fees and costs if he/she prevails.

(Ord. 5708-NS § 15, 1986.)

**13.82.160 Construction of this chapter.**

The individual terms and provisions of this chapter shall be construed in a manner consistent with the purposes of the ordinance. (Ord. 5708-NS § 16, 1986.)

**13.82.170 Partial invalidity.**

If any provision of this chapter or any application thereof is held invalid, such invalidity shall not affect any other provision or application of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable. (Ord. 5708-NS § 17, 1986.)

**13.82.180 Provisions of chapter not exclusive.**

The provisions of this chapter shall be in addition to any other provisions of law. (Ord. 5708-NS § 18, 1986.)

**13.82.190 Reports on the mediation and arbitration program.**

- A. Every twelve months, the city staff in consultation and cooperation with the planning commission shall prepare a report for the city council on the operation of the ordinance.
- B. Within two years after the adoption of this chapter, the city staff in consultation and cooperation with the planning commission shall prepare a review and analysis of the operation of the ordinance for the city council.

(Ord. 5708-NS § 19, 1986.)

**13.82.200 Effective date.**

The effective date of this chapter shall be March 1, 1986. (Ord. 5708-NS § 20, 1986.)

**Chapter 13.84**

**RELOCATION SERVICES AND  
PAYMENTS FOR RESIDENTIAL  
TENANT HOUSEHOLDS<sup>13</sup>**

**Sections:**

- |                  |  |
|------------------|--|
| <b>13.84.010</b> | <b>Findings.</b>   |
| <b>13.84.020</b> | <b>Purpose.</b>  |
| <b>13.84.030</b> | <b>Definitions.</b>  |
| <b>13.84.040</b> | <b>Eligibility for relocation services and assistance.</b>         |
| <b>13.84.050</b> | <b>Owner responsibilities.</b>                                     |
| <b>13.84.060</b> | <b>Relocation payment procedures and appeal process.</b>           |
| <b>13.84.070</b> | <b>Procedures and appeal process for relocation resulting from</b> |

## Appendix O

### City of Berkeley Commercial Landlord and Tenant Ordinance for the West Berkeley Area

#### WEST BERKELEY AREA INTERIM COMMERCIAL RENT AND LEASE TERM MEDIATION AND ARBITRATION AND JUST CAUSE FOR EVICTION ORDINANCE

- ~~be held vacant at no cost to the household for a period of thirty-five days after the mailing of the notice of availability.~~
- D. Within five days of receipt of notice of availability of the unit or room, a household wishing to move back must personally notify the owner in writing or by registered mail if it wishes to move back.  
(Ord. 5756-NS § 2 (part), 1986; Ord. 5725-NS § 1 (part), 1986.)

#### 13.84.110 Penalties.

- A. Any person violating any provision or failing to comply with any of the requirements of this chapter shall be deemed guilty of an infraction as set forth in Chapter 1.20 of the Berkeley Municipal Code.  
(Ord. 5756-NS § 2 (part), 1986; Ord. 5725-NS § 1 (part), 1986.)

#### 13.84.120 Private right of action.

Any person or organization who believes that the provisions of this chapter have been violated shall have the right to file an action for injunctive relief and/or damages. Treble damages may be awarded for willful failure to comply with the payment obligation established by this chapter.  
(Ord. 5756-NS § 2 (part), 1986; Ord. 5725-NS § 1 (part), 1986.)

#### 13.84.130 Severability.

- A. If any provision of this chapter is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, the remaining provisions of the chapter shall not be invalidated.  
(Ord. 5756-NS § 2 (part), 1986; Ord. 5725-NS § 1 (part), 1986.)

#### Chapter 13.86

#### WEST BERKELEY AREA INTERIM COMMERCIAL RENT AND LEASE TERM MEDIATION AND ARBITRATION AND JUST CAUSE FOR EVICTION ORDINANCE<sup>14</sup>

#### Sections:

- 13.86.010 Title.  
13.86.020 Purpose.  
13.86.030 Findings.  
13.86.040 Definitions.

- 13.86.050 Coverage and exemptions.  
13.86.060 Rent increases and lease term changes subject to mediation and arbitration.  
13.86.070 Notice of rent increases or lease term changes subject to mediation and arbitration.  
13.86.080 Just cause for eviction.  
13.86.090 Fair return.  
13.86.100 Standards of reasonableness to be applied in arbitration for determining permissible rental or lease agreements.  
13.86.110 Mediation and arbitration process.  
13.86.120 Powers and duties of the arbitrator.  
13.86.130 Powers of the planning commission and city council.  
13.86.140 Retaliation.  
13.86.150 Remedies.  
13.86.160 Expiration.

#### 13.86.010 Title.

This chapter shall be called the West Berkeley Area Interim Commercial Rent and Lease Term Mediation and Arbitration and Just Cause for Eviction Ordinance. (Ord. 5767-NS § 1, 1986.)

#### 13.86.020 Purpose.

The purpose of this chapter is to preserve the unique and diverse character of the West Berkeley area and to prevent displacement of businesses by excessive rent increases and/or arbitrary evictions, but without completely halting the economic viability of the area, while the area plan is developed and implemented. (Ord. 5767-NS § 2, 1986.)

#### 13.86.030 Findings.

- A. Industrial spaces traditionally used by small businesses and artists and craftspeople are being converted in large numbers to regional retail operations and large office and research complexes. These changes are occurring in concentrated areas of West Berkeley without an area plan or appropriate zoning in place.
- B. These businesses are unique to the character and fabric of West Berkeley and are a

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valuable asset to the city. They provide Berkeley residents with diverse opportunities for self-employment and entry-level jobs. Evictions, de facto evictions (caused by unprecedented rent increases), and nonrenewal of leases are accelerating, causing displacement of established businesses.

- C. Many West Berkeley businesses contribute to the economic and cultural well being of Berkeley and also enhance the commercial and recreational attractiveness of Berkeley.
- D. The city intends to adopt an area plan, new long-term land use policy and rezoning to deal with this problem.
- E. Urgency Ordinance No. 5766-N.S. did not adequately provide for evictions when the landlord and tenant have knowingly agreed to them or for mediation and arbitration of modification of leases as a mechanism for preserving the economic vitality in the area pending the formation of an area plan.
- F. The immediate preservation of the public peace, health and safety requires these interim procedures pertaining to arbitrary eviction and rent increases and substantial modifications of leases in the West Berkeley area be enacted to curb uncontrolled displacement while the area plan is being completed and new long-term land use policy and rezoning are put in place.

(Ord. 5809-NS § 1, 1987; Ord. 5767-NS § 3, 1986.)

### 13.86.040 Definitions.

- A. "Landlord" means any owner, lessor, sublessor, or other person entitled to receive rent for the use or occupancy of any rental unit, or agent thereof.
- B. "Rent" means any consideration (including deposit, bonus or gratuity) demanded or received in connection with the use or occupancy of any rental unit.
- C. "Rental unit" means any property, building, structure, or part thereof, or land appurtenant thereto, used for nonresidential purposes, which is covered by Sections 13.86.060 or 13.86.080 of this chapter together with all services connected with the use or occupancy thereof.
- D. "Services" means those services and facilities which enhance the use of the rental unit, including but not limited to repairs,

replacement, maintenance, painting, heat, hot and cold water, utilities, elevator service, security devices and patrols, furnishings, storage, janitorial and landscaping services, refuse removal, insurance protection, parking spaces, and services to and facilities in common areas of the building or parcel in which the rental unit is located.

- E. "Tenant" means a tenant, subtenant, lessee, sublessee, or any other person entitled to use or occupancy of any rental unit.
- F. "Newly constructed units" means units newly constructed, as opposed to units which are rehabilitated or are created as a result of conversions or reallocations of space within existing structures.
- G. "Market rent" means the rental income that a property would most probably command in the open market as indicated by current rents being paid and asked for comparable space.
- H. "Change of commercial use" means material change in the type of retail or commercial goods or services offered on a site. "Change of commercial use" shall be presumed whenever there is a transfer or change of any lease of commercial space, except in the circumstance that the new owner or leaseholder does not change the name of the establishment and does not change the line or type of commercial goods or services offered in that space.
- I. Any other term not defined herein shall follow the definitions included in the applicable city of Berkeley ordinances.

(Ord. 5767-NS § 4, 1986.)

### 13.86.050 Coverage and exemptions.

- A. Boundaries. The "West Berkeley area" includes the area within the following boundaries that is zoned manufacturing of special industrial: San Pablo Avenue on the east, the south city limits on the south, the north city limits on the north and the I80 freeway on the west.
- B. Office sharers. Tenancies which currently and prior to the adoption of this chapter have involved substantial business interrelationships with the landlord, in addition to renting, are exempt from this chapter. (Sharing of office staff, equipment, and/or phones by the landlord and the tenant would be evidence of qualification for this exemption, but not the basis for an automatic qualification for this

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exemption.) This section shall be construed to effectuate its substantive purpose.

- C. Any other exemptions required by state or federal law.  
(Ord. 5767-NS § 5, 1986.)

**13.86.060 Rent increases and lease term changes subject to mediation and arbitration.**

- A. Except as hereinafter provided, any rent increase or substantial lease term change occurring subsequent to June 30, 1986 shall be subject to mediation and arbitration. Any new lease to an existing tenant in which the terms are substantially changed (for example, from gross rent to net rent or addition of an express agreement to vacate at the conclusion of the lease) is subject to mediation and arbitration.
- B. The following rent increases shall not be subject to mediation and arbitration:
1. Increases above the initial rent of an expired lease that are less than or equal to the cumulative percentage increase in the Consumer Price Index since the commencement of the lease or of the total of cumulative increases of five percent per year since the commencement of the lease, whichever is greater.
  2. Increases authorized by a written agreement between the landlord and tenant, provided that agreements executed after enactment of this Ordinance include a waiver which is separately signed by the tenant. Said waiver shall state that: UNDER BERKELEY ORDINANCE NO. 5767-NS., WEST BERKELEY AREA COMMERCIAL AND OFFICE TENANTS HAVE THE RIGHT TO ARBITRATE INCREASES. I UNDERSTAND THAT BY SIGNING THIS AGREEMENT, I WAIVE MY RIGHT TO OBJECT TO THE RENT INCREASES AUTHORIZED BY THIS AGREEMENT.
  3. Increases that are equal to the amount authorized by an unexecuted renewal option, if the percentage or dollar amount of said increases was set forth in the renewal option (as opposed to a renewal option under which the renewal rent was to be determined by mediation

or appraisal or some other method which did not set forth a precise rent).

Increases due to increases in sales or income under a percentage of gross or income rental provision.

Initial rents for newly constructed units.  
Initial rents following a "change of commercial or retail use."

(Ord. 5767-NS § 6, 1986.)

**13.86.070 Notice of rent increases or lease term changes subject to mediation and arbitration.**

- A. Any landlord of commercial property in the area covered by this chapter who wishes to include lease provisions subject to mediation and arbitration as defined in Section 13.86.060 of this chapter is required to send by registered mail to the tenant at least one hundred eighty days prior to the effective date notice of his or her intention of such increase or change of lease terms at the expiration of a lease. Except as provided for in subsections B and C of this section, failure to provide such notice within time limits stated above would constitute noncompliance with this chapter, and the landlord would forfeit his or her right to reclaim such premises, substantially change lease terms or raise the rent for a period not to exceed one hundred eighty days from the date notice is sent.
- B. Where a lease expires less than one hundred eighty days from enactment of this chapter and a new lease has not been executed, the landlord must provide notice to the tenant prior to expiration of the existing lease and the tenant allowed to remain in the premises at the rent and lease terms in effect at the expiration of the lease until a new lease is signed or resolution of any mediation and arbitration process entered into under the provisions of this chapter.
- C. 1. Where a lease expired after June 30, 1986 but before this chapter goes into effect and a new lease has not been executed the landlord must provide notice to the tenant within ninety days from the enactment of this chapter and the tenant allowed to remain in the premises at the rent and lease terms in effect at the expiration of the lease until a new lease is signed or resolution of any

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mediation and arbitration process entered into under the provisions of this chapter.

2. Where a lease expired after June 30, 1986 but before this chapter goes into effect and the renewal lease has been executed which includes terms subject to mediation and arbitration under this chapter, the tenant may within ninety days of enactment of this chapter, invoke mediation and arbitration for renegotiation of the lease by providing notice to the landlord as provided in this chapter.
- D. Such notice would include the following information:
1. Landlord's and tenant's names, addresses and business phones.
  2. Rental and lease terms proposed.
  3. Property address affected by the notice.
  4. Reason for requested rent increase, decrease or change in lease terms.
  5. That if the tenant does not file a petition in opposition to said increase or change in lease terms within forty-five calendar days of mailing, the tenant may not invoke the mediation and arbitration process for the purpose of disputing said increase or lease term changes. That if the landlord does not file a petition in opposition to rent decreases or lease term changes proposed by the tenant as provided for in subsection C.2 within forty-five calendar days of mailing, the tenant will be allowed to remain in the premises at the rent and lease terms in effect at the expiration of the previous lease until a new lease is signed or resolution of any mediation and arbitration process.
- This subsection shall not apply to rents or lease terms for new tenants moving into vacant units.
- E. Providing that the petition is timely filed, substantial lease term changes and that portion of the rent increase that exceeds the portion exempted from dispute subject to Section 13.86.060 of this chapter shall not take effect unless and until such time as an arbitrator allows such lease term changes or increase or portion thereof pursuant to the provisions of this chapter. However, the arbitrator shall have the authority to award

all or part of lease term changes or rent increases requested by the landlord or tenant prior to the arbitration decision.

(Ord. 5767-NS § 7, 1986.)

### 13.86.080 Just cause for eviction.

No landlord shall be entitled to recover possession of any rental unit covered by this chapter except upon one of the grounds set forth below.

- A. Failure to pay rent. The tenant has failed to pay the lawful rent to which the landlord is entitled and has failed to comply with a valid notice to pay or quit served pursuant to Civil Code Section 1161.
- B. Substantial lease violation. The tenant has substantially violated an obligation imposed by the lease or rental agreement (other than an obligation to surrender possession at the end of the term or upon notice unless such provision is expressly agreed to as provided in subsection H below) and has failed to cure said violation within a reasonable period after having been sent by registered mail written notice thereof from the landlord.
- C. Nuisance. The tenant is committing or permitting to exist a nuisance in the building or parcel, or is causing a substantial interference with the comfort, safety, or enjoyment of the building or parcel by the landlord or other tenant.
- D. Illegal purpose. The tenant is using the rental unit for an illegal purpose.
- E. Refusal to renew lease. The tenant who had a lease or rental agreement whose term has expired, has refused (after having been sent by registered mail a written request) to execute a written extension or renewal thereof for a further term of like duration, containing provisions which are not inconsistent with this chapter and are substantially the same as those in the previous lease or rental agreement.
- F. Refusal to provide access. The tenant has refused to allow the landlord reasonable access to the premises, either: (1) to make repairs necessary to correct code violations cited by the city of Berkeley, after all necessary permits have been obtained, or (2) to perform maintenance or improvements which will not significantly interfere with the operation of the tenant's business, after all



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necessary permits have been obtained, or (3) to show the rental unit to a prospective purchaser, mortgagee, or tenant.

In the event that code required repairs are performed, to the extent reasonably feasible, they shall minimize disruption to the tenant. This section shall not be interpreted to allow landlord access where such access could not have been obtained in the absence of this chapter.

- G. In the event the tenant is displaced as a result of repairs or destruction of the premises, said tenant shall have the right to relet the replacement premises. The rental level for said relet shall be subject to the arbitration provisions of this chapter.
- H. At the conclusion of the term of a lease or rental agreement in which the tenant agreed, expressly in the lease, to relinquish the premises at a date certain. Such agreement executed after enactment of this Ordinance shall state that: I UNDERSTAND THAT BY SIGNING THIS AGREEMENT, I HAVE AGREED TO VACATE THE PREMISES ON.....(date) UNLESS THE LANDLORD AND TENANT NEGOTIATE A NEW LEASE.

(Ord. 5767-NS § 8, 1986.)

**13.86.090 Fair return.**

- A. Notwithstanding any other provision of this chapter, the landlord shall be entitled to a fair return.

(Ord. 5767-NS § 9, 1986.)

**13.86.100 Standards of reasonableness to be applied in arbitration for determining permissible rental or lease agreements.**

- A. Criteria. The following factors, to the extent that they are applicable and relevant, shall be considered in determining a reasonable rent rate for the period of time the chapter is in effect.
1. To preserve the unique and diverse character of the West Berkeley area and to prevent displacement of businesses by excessive rent increases and/or evictions while the area plan is developed and implemented.
  2. The location of the business.
  3. The size of the rented space.

4. Services provided by the landlord and tenant.
5. The condition of the unit.
6. Rent increases in the present or most recently expired rental agreement.
7. Liabilities relating to the use of the rented space created by the landlord or tenant.
8. The history of performance or lack of performance of lease obligations by the parties.
9. The terms of the existing or most recently expired lease.
10. The amortized cost of reasonable capital improvements by the landlord or tenant to the premises.
11. The good will built up for the business by the tenant.
12. Changed circumstances since the prior lease was executed.
13. The market rent for comparable commercial spaces.
14. Market rents for similar types of commercial uses.
15. Existing rent for comparable uses and spaces in the area.
16. Availability of reasonable relocation opportunities in West Berkeley or in reasonably close proximity to West Berkeley.
17. Rent received by the tenant from subtenants.
18. Landlord's need to reclaim space to occupy for his or her own business use.
19. All other relevant factors.

(Ord. 5767-NS § 10, 1986.)

**13.86.110 Mediation and arbitration process.**

- A. Prior to undertaking formal mediation and arbitration, the parties must participate for at least one day in mediation with a West Berkeley Community Mediation Committee designated by the planning commission, if such a committee is in operation at the time. A party who fails to participate relinquishes his or her right to petition for mediation and arbitration under the provisions of this chapter. Any West Berkeley Community Mediation Committee shall include one person selected by the president of the planning commission and two persons from the mailing list of the West Berkeley Plan

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Committee (one selected by the landlord and one selected by the tenant).

- B. Petitions by tenant. Any tenant who is subject to a rent increase or lease term changes which are not exempt under the provisions of this chapter may file a petition for mediation and arbitration on a form provided by the city of Berkeley. A petition may be filed any time after notice of a proposed increase and/or lease term changes has been given, subject to the limitations of Section 13.86.070 of this chapter.
- C. Petitions by landlords. Any landlord who seeks a determination of the applicability of any provision of this chapter or who seeks a rent increase and/or lease term changes for a unit subject to the provisions of this chapter may invoke the arbitration process by filing a petition on a form provided by the planning and community development department of the city of Berkeley. A petition for a rent increase and/or lease term changes may be filed on the earlier of the following: forty-five days after notice of a proposed increase and/or lease term changes or when the tenant has indicated an intent to dispute the proposed increase or lease term changes.

The arbitrator may permit the right of production of documents by either side and such other discovery as the planning commission may determine by regulation.

- D. Formal mediation and arbitration procedure.
  - 1. Prior to undertaking arbitration, the parties to a dispute under this chapter may submit the dispute to mediation under the Commercial Mediation Rules of the American Arbitration Association (AAA). Said rules shall govern this chapter or regulations adopted by the planning commission pursuant to this chapter.
  - 2. Arbitrations pursuant to this chapter shall be governed by the Commercial Arbitration Rules of the American Arbitration Association, except as otherwise provided by the provisions of this chapter or regulations adopted by the planning commission pursuant to this chapter.
  - 3. Representation. Either party may be represented by an attorney or any other person designated by the party.

- 4. Appeal to superior court. A party may appeal to superior court within sixty days of a decision by the arbitrator, pursuant to Civil Code of Procedure Sec. 1094.5. The standard of review shall be whether there was substantial evidence to support the decision of the arbitrator.
- 5. Cost of mediation and arbitration. The costs of mediation shall be shared equally by the parties. The costs of arbitration shall be borne by the parties in a manner determined by the arbitrator.
- 6. Length of arbitration. Arbitration hearings shall be limited to three days, unless the parties stipulate that the hearing may be longer or the arbitrator determines that a longer hearing is required due to the complexity of the case or in order to provide due process to the parties.

(Ord. 5767-NS § 11, 1986.)

### 13.86.120 Powers and duties of the arbitrator.

The arbitrator shall have the power to determine all equitable and legal issues arising under the chapter, except to the extent not permitted by state or federal law. Said powers shall include, but not be limited to the following:

- A. To determine the allowable rent increase and/or lease term change in the year of the dispute. Increases above the initial rent and/or lease terms changes set by the arbitrator may be set in any manner deemed reasonable by the arbitrator.
- B. To determine that the rent increase and/or lease term changes requested by the landlord may not be disputed pursuant to this chapter because there has been a "change in commercial or retail use."
- C. To determine whether any or all parts of the chapter apply in a particular case.

(Ord. 5767-NS § 12, 1987.)

### 13.86.130 Powers of the planning commission and city council.

- A. The powers and duties of the planning commission shall be as follows:
  - 1. To adopt rent increase and lease term standards, guidelines, rules and

## TITLE 13 FOOTNOTES

regulations and amendments thereto for the operation and administration of this chapter, which are consistent with the goals and purposes of this chapter, after a public hearing. Said standards, guidelines, rules, regulations, and/or amendments thereto shall go into effect thirty days after they first appear on the city council agenda, unless within said thirty day period, the council determines otherwise.

2. To make recommendations to the city council regarding substantive changes in the chapter.
  3. To establish a West Berkeley Community Mediation Committee to handle each petition received.
- B. The powers of the city council shall include the power to adopt rent increase and lease term standards, guidelines, rules and regulations and amendments thereto for the operation and administration of this chapter, which are consistent with the goals and purposes of this chapter, after a public hearing.

(Ord. 5767-NS § 13, 1986.)

### 13.86.140 Retaliation.

No party shall in any way retaliate against the other party for the other party's suit for actual and punitive damages, injunctive relief, and attorney's fees. (Ord. 5767-NS § 14, 1986.)

### 13.86.150 Remedies.

- A. Any affected tenant shall recover actual damages whenever the landlord receives or retains any rent in excess of the maximum amount allowed under this chapter and whenever the landlord violates any eviction provision of this chapter. If, in addition, it is proved that such act was in bad faith, the landlord shall pay the tenant as a penalty, three times the actual damages.
- B. The city attorney may bring an action for injunctive and other appropriate relief to enforce this chapter and shall be entitled to recover reasonable attorneys' fees and costs if he/she prevails.

(Ord. 5767-NS § 15, 1986.)

### 13.86.160 Expiration.

This chapter will expire upon the adoption and implementation of the West Berkeley Area Plan. (Ord. 5809-NS § 2, 1987. Ord. 5767-NS § 16, 1986.)

## TITLE 13 FOOTNOTES

1. For statutory provisions regarding impersonating an officer, see Penal Code § 146a.

For city offices and departments generally, see Title 2 of this code.

2. For statutory provisions defining knowingly giving a false crime report as a misdemeanor, see Penal Code § 148.5.

For police department, see Ch. 2.64 of this code.

3. For statutory rules of professional conduct regarding solicitation, see Bus. and Prof. Code § 6076(2)(3); for statutory provisions regarding unlawful solicitation, see Bus. and Prof. Code §§ 6150-6154.

4. Reserved.

5. For statutory definitions of disorderly conduct, see Penal Code § 647; for statutory provisions prohibiting obstructions of streets, etc., see Penal Code § 647(c).

For streets and sidewalks generally, see Title 16 of this code.

6. For statutory provisions regarding noise and disturbances of the peace, see Penal Code § 415.

For advertising regulations generally, see Ch. 9.08 of this code.

7. For statutory provisions regarding unlawful assemblies, see Penal Code §§ 407-409; for statutory provisions regarding failure to disperse unlawful assembly, see Penal Code § 727.

For vehicles and traffic generally, see Title 14 of this code.

8. For statutory provisions regarding trespass as a misdemeanor, see Penal Code § 602.

For vehicles and traffic generally, see Title 14 of this code.

PUBLIC PEACE, MORALS AND WELFARE

9. For state Dangerous Weapons Control Law, see Penal Code § 12000 et seq.
10. For state Dangerous Weapons Control Law, see Penal Code § 12000 et seq.  
For police department, see Ch. 2.64 of this code.
11. Ord. 5261-NS, pertaining to rent stabilization and eviction for good cause program was approved at the municipal election held on June 30, 1980.  
Ord. 5467-NS, pertaining to the Tenants Rights Amendment Act of 1982 was approved at the municipal election held on June 8, 1982.
12. Ord. 5468-NS, pertaining to the Elmwood commercial rent stabilization and eviction protection program was approved at the municipal election held on June 8, 1982. (See also Footnote 14.)
- 12A. See Footnote 14.
13. Ord. 5756-NS pertaining to relocation services and payments for residential tenant households is applicable to all building permits issued on or after April 8, 1986.
14. SB 692 passed by the 1987 California Legislature preempts enforcement of Chapters 13.80, 13.82 and 13.86, effective January 1, 1988.

## Appendix P

### California Commercial Rental Control Statutes

#### § 1950.5

#### CIVIL CODE

~~(e) The amendments to this section made during the 1985 portion of the 1985-86 Regular Session of the Legislature which are set forth in subdivision (e) are declaratory of existing law.~~

~~(Amended by Stats.1985, c. 1291, § 1; Stats.1985, c. 1555, § 2; Stats.1986, c. 564, § 1.)~~

~~1985 Amendment. Rewrote the section.~~

~~Amendment of this section by § 2 of Stats.1985, c. 1291, failed to become operative under the provisions of § 3 of that Act.~~

~~Amendment of this section by § 1 of Stats.1985, c. 1555, failed to become operative under the provisions of § 3 of that Act.~~

~~1986 Legislation~~

~~The 1986 amendment included within provisions regulating security deposits: payments, fees, charges or deposits to~~

~~remedy future tenant defaults in obligations to restore, replace, or return personalty or appurtenances exclusive of ordinary wear and tear; required landlords to transmit information concerning security deposits to terminating tenants in an itemized notice to the tenant by personal delivery or mailing, as specified, and required landlords to provide notice to their transferees which itemize lawful deductions made by the landlord from security deposits.~~

#### § 1951.2. Termination of lease; remedy of lessor

##### Notes of Decisions

*Damages calculations* 2.5

*Time termination effective* 1.5

*Waiver and estoppel* 9

##### 2.5. Damages calculations

~~Where reletting of premises had occurred before time of award in action under this section, there was in fact no award of future rents in case and subsection providing conditions for award of damages for future unpaid rent did not apply, and thus damage award fell squarely within subsection concerning unpaid rent occurring between termination of lease at time of judgment. *California Safety Center, Inc. v. Jax Car Sales of California, Inc.* (App. 2 Dist.1985) 211 Cal.Rptr. 39, 164 C.A.3d 992.~~

~~The language "at the time of award" contained in this section refers not to time of unlawful detainer award but to time of award under statute governing remedies. *California Safety Center, Inc. v. Jax Car Sales of California, Inc.* (App. 2 Dist.1985) 211 Cal.Rptr. 39, 164 C.A.3d 992.~~

##### 9. Waiver and estoppel

~~Lessor and defaulting lessee may enter into consensual arrangement relieving lessee of further obligation under lease in exchange for lessee's voluntarily quitting premises or other consideration; in such case, lessor may waive right to rents under lease for periods after surrender of premises and be estopped from asserting that right. *Desert Plaza Partnership v. Waddell* (App. 4 Dist.1986) 225 Cal.Rptr. 775, 180 C.A.3d 805.~~

##### 1.5. Time termination effective

~~Filing of unlawful detainer action did not terminate lease under California law, and debtor lessee was thus properly permitted to assume lease in bankruptcy case filed after state court unlawful detainer action had been filed; declining to follow *Matter of Escondido West Travelodge*, 52 B.R. 376 (Bkrtcy.S.D.Cal.). In re *Windmill Farms, Inc.*, 9th Cir.BAP (Cal.) 1987, 70 B.R. 618.~~

~~If termination is valid, lease is terminated under California law when landlord, after complying with appropriate statutory notice requirements, files unlawful detainer action in state court; termination of lease does not occur only when there has been final judicial determination of validity of termination. *Matter of Escondido West Travelodge*, D.C.Cal.1985, 52 B.R. 376.~~

#### § 1951.4. Remedy provided by lease; provisions

##### Law Review Commentaries

~~Leasehold transfers and the covenant of good faith and fair dealing. *Ernest Z. Park* (1985) 13 West.St.U.L.Rev. 171.~~

#### § 1954. Entry of dwelling by landlord; conditions

##### Cross References

~~Rental housing developments, entry or inspection by local public entity, see *Health and Safety Code* § 50760.~~

### CHAPTER 2.6. COMMERCIAL RENTAL CONTROL [NEW]

#### Section

1954.25. Legislative findings.

1954.26. Definitions.

1954.27. Rental control enactment or enforcement by public entity; limitations on construction of chapter.

1954.28. Permissible regulation by or agreements with public entities.

Underline indicates changes or additions by amendment

**Section**

- 1954.29. Zoning and planning and business licenses; effect of chapter on public entity powers.  
 1954.30. Effect of chapter on powers of public entity.  
 1954.31. Public entity enactment relating to lease termination upon expiration of its term; contents; construction; application.

*Chapter 2.6 was added by Stats.1987, c. 824, § 2.*

**§ 1954.25. Legislative findings**

The Legislature finds that the price charged for commercial real property is a matter of statewide concern. Price controls on commercial rents discourage expansion of commercial development and entrepreneurial enterprise. These controls also discourage competition in the open market by giving artificial price benefits to one enterprise to the disadvantage of another. Because the impact of these controls goes beyond the local boundaries within which the controls are imposed, the adverse economic consequences become statewide.

In order to prevent this statewide economic drain from occurring, the Legislature hereby enacts a uniform system with respect to commercial rents, which shall apply to every local jurisdiction in the state. This legislative action is needed to prevent the imposition of artificial barriers on commercial rents, as well as to define those areas not included within the definition of commercial real property.

In making these findings and in enacting this chapter, the Legislature expressly declares its intent that this chapter shall not apply or be interpreted to apply to local rental controls on residential real property.

(Added by Stats.1987, c. 824, § 2.)

**1987 Legislation**

Section 1 of Stats.1987, c. 824, provides:

"This act shall be known and may be cited as the Costa-Keene-Seymour Commercial Property Investment Act of 1987."

**§ 1954.26. Definitions**

As used in this chapter, the following terms have the following meanings:

(a) "Owner" includes any person, acting as principal or through an agent, having the right to offer commercial real property for rent, and includes any predecessor in interest to the owner.

(b) "Price" includes any charge or fee, however denominated, for the hiring of commercial real property and includes any security or deposit subject to Section 1950.7.

(c) "Public entity" has the same meaning as defined in Section 811.2 of the Government Code.

(d) "Commercial real property" includes any part, portion, or unit thereof, and any related facilities, space, or services, except the following:

(1) Any dwelling or dwelling unit subject to the provisions of Section 1940.

(2) Any accommodation in any residential hotel, as defined in Section 50519 of the Health and Safety Code, or comparable accommodations which are specifically regulated by a public entity in structures where 20 percent or more of the accommodations are occupied by persons as their primary residence.

(3) Any hotel unit not otherwise specified in paragraph (1) or (2) that is located in a structure with 20 or more units or in which 20 percent or more of the accommodations were occupied as of August 5, 1987, by persons as their primary residence, if, in either circumstance, the unit was subject to rental controls on August 5, 1987, provided that any control exercised thereafter is in accordance with the system of controls in effect on August 5, 1987.

(4) Any space or dwelling unit in any mobilehome park, as defined in Section 18214 of the Health and Safety Code.

(e) "Rent" means to hire real property and includes a lease or sublease.

(f) "Commercial rental control" includes any action of a public entity taken by statute, charter, ordinance, resolution, administrative regulation, or any other governmental enactment to establish, continue, implement, or enforce any control or system of controls, on the price at which, or the term for which, commercial real property may be offered for rent, or control or system of controls which would select, mandate, dictate, or otherwise designate a specific tenant or specific person or entity

**Asterisks \* \* \* indicate deletions by amendment**

## § 1954.26

## CIVIL CODE

with whom the owner must negotiate on the formation, extension, or renewal of a tenancy; or any other enactment which has such a purpose.

(g) "Tenant" includes a lessee, subtenant, and sublessee.

(h) "Term" means the period of time for which real property is rented or offered for rent, and includes any provision for a termination or extension of such a period or renewal thereof, except that nothing in this chapter supersedes the specific provisions of this code or of the Code of Civil Procedure which of themselves establish, prescribe, limit, or define the term for which real property may be rented.

(i) "Impasse notice" means a written notice which states either of the following:

(1) That the owner has not received from the tenant an offer of any terms for an extension or renewal of the lease which are acceptable to the owner, or an acceptance by the tenant of any offer of terms by the owner, and that an impasse with respect to any agreement on a lease extension or renewal has been reached.

(2) That the owner is not willing to extend or renew the lease.

(j) "Negotiation notice" means a written notice by a tenant in privity of estate, and in privity of contract with the owner, stating either of the following:

(1) That the tenant offers to extend or renew the lease on terms set forth in the notice.

(2) That the tenant solicits an offer for the extension or renewal of the lease from the owner.

(k) "Deliver" means to deliver by personal service or by placing a copy of the notice in the mail, postage prepaid, by certified mail, return receipt requested, addressed to the party at the address for the receipt of notices under the lease.

(l) "Developer" means any person who enters into an agreement with a redevelopment agency for the purpose of developing specific commercial real property within a redevelopment project area with the intention of acquiring ownership of that property, even if that person does not own that property when the agreement is executed.

(Added by Stats.1987, c. 824, § 2.)

## § 1954.27. Rental control enactment or enforcement by public entity; limitations on construction of chapter

(a) No public entity shall enact any measure constituting commercial rental control, nor shall any public entity enforce any commercial rental control, whether enacted prior to or on or after January 1, 1988.

(b) However, nothing in this chapter shall be construed to do any of the following:

(1) Relieve any party to a commercial lease or rental agreement of the duty to perform any obligation thereunder.

(2) Preclude express establishment in a commercial lease or rental agreement of the price at which real property may be offered to a subtenant or sublessee.

(3) Impair any obligation of any contract entered into prior to January 1, 1988.

(4) Affect any provision of, or requirement for mitigation of damages under, Sections 1951 to 1952.6, inclusive.

(5) Limit any adjustment of price required or permitted by law due to constructive eviction.

(6) Enlarge or diminish in any way any power which a public entity may have with respect to regulation of rental rates or the ownership, conveyance, or use of any property specified in paragraph (1), (2), or (3) of subdivision (d) of Section 1954.26.

(7) Relieve any party of any requirement or mandate to arbitrate, or deprive any party of any right to arbitrate or compel arbitration, which mandate or right exists pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure, titled "Arbitration," Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure, titled "Judicial Arbitration," Title 1 (commencing with Section 1823) of Part 3 of the Code of Civil Procedure, titled "Pilot Projects," or any other provision of state law.

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## § 1954.29

(8) Affect in any way, or preclude the inclusion of, any provision in a lease creating any lawful option, right of first refusal, or any covenant to renew or extend the lease or sell the real property or any interest therein.

(9) Relieve any person of any duty or deprive any person of any right or cause of action which may exist pursuant to Section 51, 53, or 782.

(Added by Stats.1987, c. 824, § 2.)

### § 1954.28. Permissible regulation by or agreements with public entities

Nothing in this chapter limits or affects public entities with respect to any of the following:

(a) The Eminent Domain Law, Title 7 (commencing with Section 1230.10) of Part 3 of the Code of Civil Procedure.

(b) Abatement of nuisances. However, except as to conditions expressly defined as nuisances by statute, authority to abate or bring actions to abate nuisances shall not be used to circumvent the limitations of this chapter with respect to conditions not manifesting the quantum and character of unreasonableness and injuriousness to constitute a nuisance under law.

(c) The Airport Approaches Zoning Law, Article 6.5 (commencing with Section 50485) of Chapter 2 of Part 1 of Division 1 of Title 5 of the Government Code.

(d) Any contract or agreement by which an owner agrees with a public entity to offer any real property for rent at a stipulated or maximum price or under a specified formula for ascertaining a stipulated or maximum price, in consideration for a direct financial contribution; any written contract between a redevelopment agency and an owner or developer of commercial real property within a redevelopment project area; or any written development agreement entered into pursuant to Article 2.5 (commencing with Section 65864) of Chapter 4 of Division 1 of Title 7 of the Government Code. Any contract or agreement specified in this subdivision is not enforceable against an owner who became an owner (1) without actual knowledge of the contract or agreement, and (2) more than 30 days prior to the recording with the county recorder of a written memorandum of the contract or agreement specifically describing its terms and identifying the real property and the owner. The county recorder shall index these memorandums in the grantor-grantee index.

(e) Article 2 (commencing with Section 5020) of Chapter 1 of Division 5 of the Public Resources Code, relating to historical resources.

(f) The Subdivision Map Act, Division 2 (commencing with Section 66410) of Title 7 of the Government Code.

(g) Any contract or agreement entered into by a public entity relating to the transfer, lease, or license of commercial real property owned or leased by that public entity, except any requirement enacted pursuant to Section 1954.31.

(Added by Stats.1987, c. 824, § 2.)

### § 1954.29. Zoning and planning and business licenses; effect of chapter on public entity powers

Nothing in this chapter shall, with respect to a public entity:

(a) Grant, enlarge, or diminish any power (1) which it may possess under the provisions of, and for the purposes of, Division 1 (commencing with Section 65000) of Title 7 of the Government Code, (2) with respect to charter cities, planning, or zoning powers granted under Section 5 of Article XI of the California Constitution, or (3) any power which it may possess to mitigate the impact caused by the construction, reconstruction, demolition, or alteration of the size of any commercial real property. However, this subdivision does not apply to any actions taken for the clear or systematic purpose of circumventing this chapter.

(b) Grant, repeal, enlarge, or diminish any authority to require a business license, whether for regulation or revenue.

(Added by Stats.1987, c. 824, § 2.)

**Asterisks \* \* \* indicate deletions by amendment**



## § 1954.30

## CIVIL CODE

### § 1954.30. Effect of chapter on powers of public entity

Nothing in this chapter grants or augments any authority of a public entity which it does not possess independent of this chapter, nor diminish any power of a public entity except as expressly provided in this chapter.

(Added by Stats.1987, c. 824, § 2.)

### § 1954.31. Public entity enactment relating to lease termination upon expiration of its term; contents; construction; application

A public entity may by enactment of a statute, charter or charter amendment, or ordinance, establish a requirement for notice relating to the termination of a lease of commercial real property due to the expiration of its term.

(a) The enactment shall contain provisions dealing with any or all of the following:

(1) The delivery of a negotiation notice by a tenant.

(2) A requirement for an owner to deliver an impasse notice at any time after delivery of the negotiation notice, except that:

(A) The requirement shall be inapplicable unless the tenant has been required to deliver a negotiation notice not less than 270 days before the expiration of the lease, and has done so.

(B) The mandate for delivery of an impasse notice shall not occur earlier than 180 days before expiration of the lease.

(C) No impasse notice shall be required if the parties have executed a renewal or extension of the lease.

(D) Provision shall be made that the notice will include, in a form of type which will distinguish it from the body of the text of the balance of the notice, a disclosure reading, either:

(i) The giving of this notice does not necessarily preclude further dialogue or negotiation on an extension or renewal of the lease if the parties choose to negotiate, but the delivery of this notice discharges all obligations of \_\_\_\_\_ (the owner) under provisions of \_\_\_\_\_ (the enactment) and Section 1954.31 of the Civil Code; or

(ii) By giving this notice \_\_\_\_\_ (the owner) declares that he or she does not intend to negotiate further on any extension or renewal of the lease.

(3) Establish that a bad faith failure to comply with the enactment is subject to a remedy for actual damages.

(4) Any remedy under the enactment or Section 1954.31 shall be available only by an action brought by the owner or the tenant.

(b) The enactment shall contain (or shall be deemed to contain), a provision that:

(1) A tenant may not exercise any right pursuant to the enactment of this chapter, unless the tenant has performed the terms of the lease in such manner as would entitle the tenant to exercise any option he or she might possess under the lease.

(2) No right or cause of action accruing to a tenant pursuant to the enactment of this chapter, may be assigned other than to a person who is a lawful assignee of the lease, is in lawful possession of the premises under the lease, and is in compliance with paragraph (1).

(3) Nothing in the enactment or this chapter creates or imposes, nor shall be construed to create or impose, a duty to extend or renew, or to negotiate on an extension or renewal, of any lease; nor shall the delivery or receipt of any notice provided for by the enactment or by this chapter, constitute a waiver of any rights to continued performance under the covenants under the lease or to actions for possession.

(4) The delivery of any notice pursuant to the enactment or this chapter shall create a rebuttable presumption affecting the burden of proof, that the notice has been properly given.

(c) No enactment shall provide, or be deemed to provide:

(1) For any extension of the term of any lease without the mutual, written consent of the owner and the tenant.

(2) For any requirement on either party to offer to extend or renew or to negotiate an extension or renewal of the lease.

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(3) Bar any action brought to recover possession whether by ejectment, unlawful detainer, or other lawful means.

(4) Any remedy under the enactment of this chapter, other than that which may be provided pursuant to paragraph (3) of subdivision (a).

(d) The provisions of any enactment adopted pursuant to this section shall not apply to:

(1) Any lease or rental agreement which is not in writing, which constitutes a tenancy at will, which is for a term of less than one year or for an unspecified term, which is a month-to-month tenancy or a tenancy at sufferance.

(2) Any lease, the term of which expires within 270 days after the effective date of the enactment. (Added by Stats.1987, c. 824, § 2.)

#### ~~CHAPTER 3. HIRING OF PERSONAL PROPERTY~~

##### § 1955. Obligations of lessor

###### Notes of Decisions

###### 1. Construction and application

This section did not apply to damage caused by collisions, and, thus, car lessors could make lessee liable for collision

damage to car regardless of cause. *Truta v. Avis Rent A Car System, Inc.* (App. 1 Dist.1987) 238 Cal.Reptr. 806, 193 C.A.3d 802.

#### CHAPTER 4. IDENTIFICATION OF PROPERTY OWNERS

##### Section

1962.7. Failure to comply; service of process; mailing to address at which rent is paid. [New]

##### § 1961. Application of chapter

This chapter shall apply to every \* \* \* dwelling structure containing one or more units \* \* \* offered to the public for rent or for lease for residential purposes \* \* \*.

(Amended by Stats.1987, c. 769, § 1.)

###### 1987 Legislation

The 1987 amendment rewrote the section to apply to structures containing one or more units, instead of structures in excess of two units.

##### § 1962. Disclosures by owner or rental agent to tenant; agent failing to make disclosure as agent of owner

(a) Any owner of a dwelling structure specified in Section 1961 or a party signing a rental agreement or lease on behalf of the owner shall disclose therein the name and usual street address at which personal service may be effected of each person who is:

(1) Authorized to manage the premises.

(2) An owner of the premises or who is authorized to act for and on behalf of the owner for the purpose of service of process and for the purpose of receiving and receipting for all notices and demands.

(b) In the case of an oral rental agreement the owner or a person acting on behalf of the owner for the receipt of rent or otherwise, on written demand, shall furnish the tenant with a written statement containing the information required by subdivision (a).

(c) The information required by this section shall be kept current and \* \* \* this section shall extend to and be enforceable against any successor owner or manager, who shall comply with this section within 15 days of succeeding the previous owner or manager.

(d) A party who enters into a rental agreement on behalf of the owner who fails to comply with this section \* \* \* is deemed an agent of each person who is an owner:

(1) For the purpose of service of process and receiving and receipting for notices and demands.

~~Asterisks \* \* \* indicate deletions by amendment~~

## Appendix Q

### Alaska Gasoline Products Leasing Act

§ 45.50.604

TRADE AND COMMERCE

§ 45.50.800

~~Sec. 45.50.604. Penalties. A person who violates a provision of AS 45.50.600 — 45.50.606 or a regulation adopted by the state director of civil defense under AS 45.50.600 — 45.50.606 is punishable by a fine of not more than \$500, or by imprisonment for not more than six months, or, in the alternative, is subject to a civil penalty not more than \$5,000. (§ 5 ch 144 SLA 1962)~~

~~Revisor's notes. — Formerly AS 45.80.050. Renumbered in 1980.~~

~~Sec. 45.50.606. Definitions. In AS 45.50.600 — 45.50.606 "civil defense aid" means a product, service, structure, or improvement intended for use by civilians as a protection against a result of an attack by a foreign power on the United States and includes but is not limited to a protective shelter or improvement. (§ 1 ch 144 SLA 1962)~~

~~Revisor's notes. — Formerly AS 45.80.060. Renumbered in 1980.~~

### Article 6. Alaska Gasoline Products Leasing Act.

| Section   | Section   |
|---|---|
| 800. Disclosures to be made by distributors and refiners before conclusion of agreement | 825. Right of first refusal of surviving spouse                     |
| 810. Violations   | 830. Court to determine fair market value when parties cannot agree |
| 820. Obligation of distributor to repurchase upon termination, etc., of agreement       | 840. Definitions  |
|   | 850. Short title  |

~~Cross references. — For failure to comply with AS 45.50.800 — 45.50.850 as an unlawful trade practice, see AS 45.50.471(b); for legislative findings in connection with the enactment of this article, see § 1, ch. 234, SLA 1976 in the Temporary and Special Acts.~~

**Sec. 45.50.800. Disclosures to be made by distributors and refiners before conclusion of agreement.** Before entry into a lease agreement, a refiner or distributor shall disclose to the dealer facts which would reasonably be considered material to the dealer's decision to enter into the lease. These facts shall include, but not be limited to,

- (1) ownership of property of the retail outlet;
- (2) if the real property is not owned by a refiner or distributor, then the nature of the relationship between the real property owner and the refiner or distributor and the length of the underlying lease (if applicable);

(3) the last known addresses of dealers operating the retail outlet for the last five years;

(4) the gasoline gallonage history, if any, of the station for the last five years;

(5) any sales goals or quotas the refiners or distributors intend to apply to the station;

(6) the nearest gasoline outlet owned, controlled or operated by the refiner or distributor and any plans the distributor or refiner has to open new retail outlets within the trade area of the retail outlet; and

(7) any plans the refiner or distributor has for the future of the subject retail outlet. (§ 2 ch 234 SLA 1976)

**Sec. 45.50.810. Violations.** (a) A person may not, directly or indirectly, through officers, employees or agents,

(1) require the dealer at the time of entering into the lease agreement to relieve any person from liability imposed by AS 45.50.800 — 45.50.850;

(2) require the dealer to agree to waive the right to a jury trial or any right of counterclaim the dealer may have;

(3) restrict or inhibit directly or indirectly the right of free association for any lawful purpose of the dealer;

(4) except as to the initial inventory, require a dealer to purchase or otherwise lease goods or services of a refiner or distributor or from an approved source of supply unless and to the extent that the refiner or distributor satisfies the burden of proving that such restricted purchasing agreements are reasonably necessary for lawful purposes justified on business grounds and do not substantially affect competition; in determining whether a requirement to purchase is lawful, the court shall be guided by the decisions of the courts of the United States in interpreting and applying the antitrust laws and the Federal Trade Commission Act of the United States;

(5) impose unreasonable standards of performance on the dealer;

(6) require a dealer to participate financially in the use of any premium coupon or giveaway or rebate in the operation of the business; however, a distributor may require the dealer to distribute premiums, coupons or giveaways to customers which are provided to the dealer at the expense of the refiner or distributor or when the promotion is self-liquidating;

(7) fail to deal with the dealer in good faith;

(8) require the dealer to keep the retail outlet open for business more than 12 consecutive hours a day or more than six days a week; however, this paragraph may not be construed to prevent a retail outlet from being open when required to be open to conform to a state or federal law or regulation; or

(9) require a dealer to purchase or rent a product or service for more than a fair and reasonable price.

(b) A refiner or distributor may not, directly or indirectly, through any officer, agent or employee, terminate, cancel or fail to renew a dealer lease without first giving written notice setting out all of the reasons for the termination or cancellation or intent not to renew to the dealer at least 45 days in advance of the termination, cancellation or failure to renew except

(1) when the alleged grounds are voluntary abandonment by the dealer of the lessee relationship, then the above notice may be given five days in advance of the termination, cancellation or failure to renew;

(2) when the alleged grounds are the conviction of the dealer in a court of competent jurisdiction of a felony;

(3) when the lease specifically establishes a period of notice of less than 45 days in which either party may terminate the lease.

(c) Except as provided in (d) of this section, a refiner or distributor may not terminate, cancel or fail to renew a dealer lease without good cause. Good cause shall include without limitation:

(1) the failure of a dealer to comply with the lawful material provisions of a lease between the distributor or refiner and the dealer and to cure each default after being given written notice and a reasonable opportunity to cure the default;

(2) an adjudication that the dealer is a bankrupt or insolvent or if the dealer makes an assignment for the benefit of creditors or a similar disposition of assets of franchise business or voluntarily abandons the business or is convicted of or pleads guilty or no contest to a charge of violating any law relating to any business;

(3) the good faith business decision of the lessor that the lessor no longer requires a retail outlet at that location for the marketing of gasoline; and

(4) the dealer's failure to sign the new agreement if at the time of renewal of the lease the distributor or refiner and the dealer cannot agree upon new terms and the terms offered by the refiner or distributor do not violate any other laws of the state or of the United States and the terms are essentially the same as those offered to other dealers in similar retail outlets and do not discriminate against the subject dealer.

(d) A refiner or distributor shall be permitted to provide in the lease for its termination without cause during a reasonable trial period, not to exceed one year, if the dealer involved has not already been a dealer of a refiner or distributor for that period of time.

(e) A refiner or distributor may not engage in price discrimination between dealers if the effect of the discrimination may be substantially to lessen competition unless that discrimination is based upon quantity purchased or transportation costs or capital investment of

the dealer. Nothing in this section prevents a refiner or distributor from offering a lower price or furnishing a service or facility to a dealer when the offer is made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by that competitor. (§ 2 ch 234 SLA 1976)

**Sec. 45.50.820. Obligation of distributor to repurchase upon termination, etc., of agreement.** If the refiner or distributor terminates, cancels or fails to renew under AS 45.50.810(c)(1), (2), or (3) or for any good cause other than under AS 45.50.810(c)(4), the refiner or distributor shall compensate the dealer for the fair market value of the business, excluding goodwill. Refiners or distributors terminating, cancelling, or failing to renew under AS 45.50.810(c)(4) shall compensate the dealer for the fair market value of the business, including goodwill. Valuation other than goodwill shall include the fair market value of the dealer's inventory supplies, equipment and furnishings purchased from the refiner or distributor exclusive of personalized materials which have no value to the refiner or distributor and inventory supplies, equipment and furnishings not reasonably required in the conduct of the business. Compensation shall be made within 60 days from the date of termination unless it is necessary that a lawsuit be filed under AS 45.50.830 or the dealer fails to comply with the bulk sales provisions of AS 45.06. The refiner or distributor may offset against accounts owed by the dealer under this section any amount owed by the dealer to the refiner or distributor. (§ 2 ch 234 SLA 1976)

**Sec. 45.50.825. Right of first refusal of surviving spouse.** Unless provided otherwise by the lease, upon the death of the lessee the lease shall terminate and the surviving spouse shall have the right of first refusal of the new lease if the surviving spouse has been an active participant in the business and is qualified. (§ 2 ch 234 SLA 1976)

**Sec. 45.50.830. Court to determine fair market value when parties cannot agree.** If under AS 45.50.820 the distributor or refiner has good cause and the distributor or refiner and the dealer cannot agree on the fair market value of the business, then either party may initiate an action in the superior court where the retail outlet exists. Reasonable attorney fees and the appraiser fees shall be awarded to the dealer if the amount awarded to the dealer by the jury or the court is 10 per cent higher than the final offer, if any, made by the refiner or distributor before the filing of the lawsuit. If the amount awarded to the dealer by the jury or the court is 10 per cent lower than the final offer, if any, made by the refiner or distributor before the filing of the lawsuit, reasonable attorney fees and the appraiser fees shall be awarded to the refiner or distributor. (§ 2 ch 234 SLA 1976)

**Sec. 45.50.840. Definitions.** In AS 45.50.800 — 45.50.830, unless the context otherwise requires,

(1) "dealer" means a person primarily engaged in the sale of gasoline to the motoring public through a retail outlet leased from the refiner or distributor or its agent by the person and operated by the person;

(2) "distributor" means a person or corporation other than a refiner engaged in the sale, assignment, or distribution of gasoline to four or more dealer-operated retail outlets;

(3) "gasoline" means all products commonly or commercially known or sold as gasoline;

(4) "lease" means an oral or written contract or agreement or series of agreements, either express or implied, in which the dealer is required directly or indirectly to purchase 50 per cent or more of the dealer's supply of gasoline from a distributor or refiner and in which the dealer is granted authority to occupy premises owned, leased or in any way controlled, directly or indirectly, by the refiner or distributor;

(5) "refiner" is a company, corporation or individual who owns or controls, or controls through a substantially owned subsidiary, partnership, or joint venture, a refinery used for the production of gasoline, diesel or other motor vehicle fuels. (§ 2 ch 234 SLA 1976)

**Revisor's notes.** — Reorganized in 1986 to alphabetize the defined terms.

**Sec. 45.50.850. Short title.** AS 45.50.800 — 45.50.850 may be cited as the Alaska Gasoline Products Leasing Act. (§ 2 ch 234 SLA 1976)

#### ~~Article 7. Sound Recordings.~~

##### **Section**

900. Reproduction and sale of sound recordings without consent

**Sec. 45.50.900. Reproduction and sale of sound recordings without consent.** (a) A person who (1) reproduces for sale, sells, offers for sale, or knowingly advertises for sale any sound recording that has been reproduced without the written consent of the owner or (2) advertises, offers for sale or resale, or sells or resells a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, without clearly and conspicuously disclosing on the outside cover, box or jacket the actual name and full address of the manufacturer and the name of the actual performer or group, is guilty of a misdemeanor and, upon conviction, is punishable by (1) confiscation of the unlawful stock of the reproduced recording and (2) by imprisonment for a period

## Appendix R

### Tennessee Small Business Protection Act of 1988

Introduced 2/3/88  
(SB 2393)

HOUSE BILL NO. 2347

by

Frensley

AN ACT to enact the Small  
Business Protection Act  
of 1988 and to amend  
Tennessee Code  
Annotated, Titles 13 and  
66.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. This act shall be known and may be cited as the  
"Small Business Protection Act of 1988".

SECTION 2. The general assembly finds that the closing of  
retail stores occupying significant amounts of space in retail  
shopping centers or malls, customarily known as "anchor tenants"  
has a disruptive effect on shopping patterns in such centers, and  
that the continued vacancy of such premises over a prolonged  
period of time adversely impacts other retail operations in the  
same center, especially small retailers. The general assembly  
further finds that among the adverse effects are a blighting  
influence on the entire center which renders the entire center,  
less attractive to customers and thereby results in a decline in  
retail sales by small retailers with the consequence of lower tax  
collections, decreased employment, and increased business  
failures. For these reasons, the general assembly hereby declares  
that it is in the public interest to encourage occupancy in retail  
shopping centers by removing artificial restraints on the transfer  
of leases and to promote full and free access to commercial retail  
space by businesses which will provide employment and tax revenues.

SECTION 3. In the event that space leased to an anchor  
tenant in a retail shopping center has not been used by such  
tenant for regular retail sales to the public for a period of  
twelve (12) months or more, then the lessor shall terminate such  
lease and offer the premises for use by another business. If the  
lessor does not take this action, then the owner or manager of the  
center shall do so.

SECTION 4. If any provision of this act or the application  
thereof to any person or circumstance is held invalid, such  
invalidity shall not affect other provisions or applications of  
the act which can be given effect without the invalid provision or  
application, and to that end the provisions of this act are  
declared to be severable.

SECTION 5. This act shall take effect upon becoming a law,  
the public welfare requiring it.