

CONDEMNATION CLAUSES IN COMMERCIAL LEASES

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CHAPTER 8



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Charles McFarland has extensive experience representing property owners whose private property has been taken by the government for public use. His primary area of practice focuses on highway and roadway widening projects that impact retail, commercial, and industrial properties. He also has successfully represented clients affected by pipelines, electric transmission lines, flood control, and other public-use projects.

An honors graduate of the **University of Texas School of Law**, Charles was a partner at Vinson & Elkins, LLP and Joyce, McFarland + McFarland and before forming McFarland PLLC in 2015. In his 20-year career, Charles has obtained successful jury verdicts, awards, and judgments all over the State of Texas.

Charles became board certified by the Texas Board of Legal Specialization in Civil Trial Law by trying condemnation cases. He has been selected by his peers for inclusion in the publication Best Lawyers in America and Texas Super Lawyers for his expertise in the areas of Eminent Domain and Condemnation Law. Additionally, he holds the AV Preeminent Rating, Martindale-Hubbell's highest possible rating for ethical standards and legal ability.

Charles is a frequent guest speaker and panelist on the topic of Eminent Domain and is a contributing author to the American Bar Association and other publications. Among the professional organizations he serves both past and present are:

- Past President, Texas Association of Civil Trial and Appellate Specialists
- Chair, Damages Subcommittee of the Condemnation, Zoning and Land Use Litigation Committee of the Section of Litigation of the American Bar Association
- Keeton Fellow, University of Texas School of Law
- Fellow, Houston Bar Foundation, Texas Bar Foundation
- Member, American Bar Association, Houston Bar Association, Association of Trial Lawyers of America



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REPRESENTATIVE EXPERIENCE

Retail Matters

Favorable settlement as lead counsel against the State of Texas in highway widening case on US 290 (the Northwest Freeway) involving property improved with retail and industrial buildings

Favorable settlement as lead counsel against the State of Texas in highway widening case on US 290 (the Northwest Freeway) involving unimproved property with a retail/commercial highest and best use

Favorable settlement as lead counsel against the State of Texas in highway widening case on IH 45 South (the Gulf Freeway) involving property improved with restaurant pad sites retail shopping center

Favorable award as lead counsel against the State of Texas in highway widening case on IH 45 South (the Gulf Freeway) involving property improved with a restaurant and retail shopping center

Favorable settlement as lead counsel against the State of Texas in highway widening case on IH-610/US 290 Interchange involving property improved with retail automotive service facility

Favorable award as lead counsel against the State of Texas in highway widening case on IH-610/US 290 Interchange involving property improved with retail shopping center

Favorable jury verdict as lead counsel against the State of Texas for big box retailer in highway widening case in College Station, Texas

Favorable award as lead counsel against the State of Texas involving retail bank and office building in Pearland, Texas

Favorable jury verdict as lead counsel in highway widening case against the State of Texas involving multi-use retail property in Dallas, Texas

Favorable settlements as lead counsel in highway widening cases on IH-10 West (the Katy Freeway) against the State of Texas involving properties improved with a big box retailer and with an automotive retail store and repair center

Favorable awards and settlements as lead counsel in highway widening cases against the State of Texas involving properties improved with gas station/convenience stores in Houston, Lufkin, and Dallas

Favorable jury verdict as co-counsel in highway widening case against Harris County, Texas involving property improved with collision center in Houston, Texas

Favorable jury verdicts as co-counsel in highway widening cases on IH-10 West (the Katy Freeway) against the State of Texas involving properties improved with front-line retail space in a power center and a big box retailer in Houston, Texas



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Other Matters

\$5 million judgment as lead counsel against the State of Texas in highway widening case on US 290 (the Northwest Freeway) involving property improved industrial buildings and related improvements

\$9 million award in highway case along State Highway 99 (the Grand Parkway) against the State of Texas involving a master-planned community in Montgomery County, Texas

\$9.5 million award in pipeline condemnation case, on an offer of \$2.2 million. Favorable settlement followed order enjoining construction of pipeline by alleged common carrier.

Favorable settlement as lead counsel in highway widening case on IH-10 West (the Katy Freeway) against the State of Texas involving property improved with multi-family residential townhome development

Favorable jury verdicts and settlements as lead counsel in high-voltage electrical transmission line cases against CenterPoint Energy and the Lower Colorado River Authority involving rural acreage in Austin, Waller, Wharton, and Harris Counties

Favorable jury verdict as lead counsel in whole for flood control purposes against Harris County, Texas involving residential-use property in Houston, Texas

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CONDEMNATION CLAUSES IN COMMERCIAL LEASES

I. IN THE ABSENCE OF A CONDEMNATION CLAUSE, A TENANT IS ENTITLED TO COMPENSATION.

The basic, underlying premise of takings law is indemnification. The Texas Constitution provides:

No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . .

TEX. CONST. art. I, §17. "Compensation . . . implies full indemnity to the owner, *i.e.*, a full and complete equivalent (usually monetary) for the loss sustained by the owner for the land which has been taken or damaged." *Schlottman v. Wharton County*, 259 S.W.2d 325, 332 (Tex. Civ. App.—Fort Worth 1953, error dismissed w.o.j.).

The Texas Supreme Court has recognized that the tenant in a tenancy for years qualifies as a property owner under Texas Property Code who is entitled to compensation when its leasehold estate is taken or damaged. *Elliott v. Joseph*, 163 Tex. 71, 73-74, 351 S.W.2d 879, 884 (1961); *see also G. P. Show Productions, Inc. v. Arlington Sports Facilities Development Authority*, 873 S.W.2d 120, 123 (Tex. App.—Fort Worth 1994, no writ). Unless a contrary provision exists in the lease agreement, a lessee is entitled, as a matter of law, to share in a condemnation award when part of its leasehold interest is lost by condemnation. *Texaco Ref. and Mktg., Inc. v. Crown Plaza Group*, 845 S.W.2d 340, 342 (Tex. App.—Houston [1st Dist.] 1992, no writ). The tenant has a compensable claim for both a whole taking and a partial taking of its leasehold estate. *See Luby v. City of Dallas*, 396 S.W.2d 192, 198 (Tex. Civ. App.—Dallas 1965, writ refused n.r.e.) (whole taking); *Texas Pig Stands v. Krueger*, 441 S.W.2d 940, 944 (Tex. Civ. App.—San Antonio 1969, writ refused n.r.e.) ('It is well-settled that a leasehold is property, and the lessee is entitled to compensation when all or a part of the property leased is taken or damaged by eminent domain during the term of the lease.').

To adequately draft a condemnation clause, the real estate attorney must understand the tenant's rights in the absence of a condemnation clause. When all or a part of a leasehold is condemned, the tenant is entitled to compensation for its improvements to the leasehold. *Texas Pig Stands*, 441 S.W.2d at 944; *Board of Regents v. Fischer*, 498 S.W.2d 230, 233 (Tex. Civ. App.—Austin 1973, writ refused n.r.e.). There are three typical scenarios:

1. A partial taking where the tenant can continue to make a reasonable use of the leasehold;
2. A partial taking where the tenant cannot continue to occupy the leased premises; and
3. A whole taking, where all of the parties' rights to occupy the property are eliminated.

In the event of a partial taking in the absence of a condemnation clause, the tenant continues to pay full rent for the term of the lease and recovers compensation in the condemnation case for the diminished value of its leasehold interest, if any, measured by the difference in market value of its leasehold interest before and after the taking.¹ For a whole taking, the measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew if such right exists, less the agreed rent which the tenant would pay for the use and occupancy. *Luby*, 396 S.W.2d at 198.

The Appraisal Institute discusses the tenant's rights under a leasehold interest:

When a lease is created, the tenant usually acquires the rights to possess the property for the lease period, to sublease the property (if this is allowed by the lease and desired by the tenant), and perhaps to improve the property under the restrictions specified in the lease. In return, the tenant is obligated to pay rent, give the property back at the end of the lease term, remove any improvements the lessee has modified or constructed (if specified), and abide by the lease provisions. The most important obligation is to pay rent.

APPRAISAL OF REAL ESTATE 72 (14TH ED.). For a leasehold interest to have value, it must be marketable. The primary consideration is whether the rental rate is below market. A lease at a market rent or above-market rent has no value due to the principle of substitution. Restrictions on the use of the leased

¹ The Appraisal Institute defines leased fee and leasehold interests as follows:

Leased fee interest. The ownership interest held by the lessor, which includes the right to the contract rent specified in the lease plus the reversionary right when the lease expires.

Leasehold interest. The right held by the lessee to use and occupy real estate for a stated term and under the conditions specified in the lease.

premises may also affect a leasehold's marketability and, therefore, its market value.

The valuation of leasehold interest in property requires an analysis of the lease:

In condemnation proceedings where the property sought is subject to a lease, the judge or jury first determines the market value of the entire property as though it belonged to one person. Then the fact finder apportions the market value as between the lessee and the owner of the fee.

Urban Renewal Agency of City of Lubbock v. Trammel, 407 S.W.2d 773, 774 (Tex. 1966). In that case, the jury was instructed that the leasehold estate was "the right to use, and occupy the land and improvements, described in the lease between lessor and lessee, for the balance of the lease term and renewal term, if any, upon the payment of the rentals and performance of the other terms of the lease." *Id.* at 777 n. 2.

II. WAIVER OF TENANT'S RIGHT TO COMPENSATION IN A CONDEMNATION CASE

A tenant's right to compensation may be waived, either in the lease or by conduct. In leases of commercial property involving sophisticated parties, the parties will typically address allocation of the condemnation award in a condemnation clause. This provision of the lease may affirm the allocation that would adhere under the common law, modify the tenant's rights to recovery, or eliminate these rights altogether. While there is something to be said for each of these arrangements, the most important thing from the real estate lawyer's perspective is that the terms accurately reflect the parties' agreement, with a full understanding of how a taking will impact the parties' rights. The impacts of a taking can be so severe to the tenant's interest that any ambiguity is very likely to result in litigation.

A. Terminating the Tenant's Leasehold Interest in the Lease

The most common modification to the parties' rights is a termination of the lease. Parties have a right to contract for termination of a lease in the event of condemnation. *J.R. Skillern, Inc. v. leVison*, 591 S.W.2d 598, 599 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.). Unless a lease provides that it terminates upon condemnation, the tenant will recover compensation for the unexpired term. *Motiva Enterprises, LLC v. McCrabb*, 248 S.W.3d 211, 214 (Tex. App.—Houston [1st Dist.] 2007, writ denied). But if a lease provides that it terminates upon condemnation, the lessee has no interest in the condemnation award. *Texaco Ref. & Mktg., Inc.*, 845

S.W.2d at 342; see also *Fort Worth Concrete Co. v. State*, 416 S.W.2d 518, 521 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.) ("A tenant whose lease provides for its termination upon the taking of the leased premises for a public use, is entitled to no compensation when it is condemned."). Thus, the tenant has a right to part of the condemnation award unless it waived that right in the lease or elsewhere. See *Texaco Ref. & Mktg., Inc.*, 845 S.W.2d at 342.

The mechanism of termination is important. In *Texaco Refining & Marketing*, the lease provided that Texaco as tenant had the sole option to terminate the lease in the event of condemnation. Instead, Texaco opted to extend the lease for five years, reserved the right to exercise any future options, and tendered monthly rent to Crown. Crown refused Texaco's continued rental payments, contending that the lease had terminated as of the date of taking based on the stipulated fact that the remaining property was too small for a gas station.² The appellate court held that because the lease did not automatically terminate upon condemnation, Texaco had the right to share in the condemnation award with Crown as a matter of law and did not waive that right.

The contrasting situation was presented in *Evans Prescription Pharmacy, Inc. v. County of Ector*, where the owners of a commercial building in Odessa, Texas, had entered into a ten-year lease agreement with a pharmacy. 535 S.W.2d 704, 704 (Tex.Civ.App.—El Paso 1976, writ ref'd). The lease provided that "[s]hould the leased property be taken by right of eminent domain, the lease shall be terminated." During the term of the lease, the County condemned the leased premises to expand a county hospital. The court held that because the parties had contracted for the automatic termination of the leasehold interest upon the exercise of the right of eminent domain, the pharmacy did not have a compensable interest in the condemnation proceeding.

Texaco Refining & Marketing and *Evans Prescription Pharmacy* are illustrative of two well-settled principles when dealing with a leasehold interest that has been subjected to condemnation: (1) when a lease does not terminate upon condemnation, unless a lessee has waived the right, a lessee has the right to share in the condemnation award with the lessor; and (2) when a lease does automatically

² Crown contended that Texaco had acted in bad faith by tendering rent and by exercising its renewal option for premises it admitted was too small to use as a gas station. The court disagreed, holding that Texaco bargained for these rights and was entitled to receive them. Moreover, Texaco had no duty to Crown to act in good faith in an ordinary commercial contract where there is no special relationship between the parties. *English v. Fischer*, 660 S.W.2d 521, 522 (Tex.1983).

terminate upon condemnation, a lessee has no compensable interest. *See, e.g., Texaco Ref. & Mktg., Inc.*, 845 S.W.2d at 342; *Evans Prescription Pharmacy, Inc.*, 535 S.W.2d at 706.

The following is an example of what a condemnation clause containing a contractual waiver of a tenant's recovery rights would look like:

If the whole or any part of the Leased Premises shall be taken by any public authority under the power of eminent domain (or conveyed by Lessor to such authority in lieu of such condemnation), the Lease shall terminate and be of no further force or effect as of the date the Leased Premises must be vacated pursuant to the condemnation order (or the date of any conveyance in lieu of such condemnation). It is expressly understood and agreed that Lessee shall have no claim or demand of any kind or character in or to any award made by reason of such condemnation.

The benefit of this condemnation clause is clarity. There is no question that the tenant is not entitled to recover under any circumstance and, therefore, nothing to litigate. The downside is that the lease automatically terminates even in situations where the tenant could continue to operate its business and pay rent. This may not be desirable for either party. Tenants do not like to have to relocate from a successful location, and landlords do not like to lose paying tenants.

For this reason, parties often negotiate for some flexibility in when and under what circumstances the lease will terminate in the event of a partial taking. Some leases have tried to incorporate a reasonableness standard:

If the whole or any part of the Leased Premises shall be taken by any public authority under the power of eminent domain (or conveyed by Lessor to such authority in lieu of such condemnation), **and by reason of such taking it is reasonably apparent that Lessee's business cannot be continued in operation on the portion of the Leased Premises which remains**, the Lease shall terminate and be of no further force or effect as of the date the Leased Premises must be vacated pursuant to the condemnation order (or the date of any conveyance in lieu of such condemnation). It is expressly understood and agreed that Lessee shall have no claim or demand of any kind or character in or to any award made by reason of such condemnation.

While this provision affords the parties the flexibility to continue the lease relationship, it does so at the

expense of clarity, and the potential for litigation is greatly increased. A better approach would be to tie the termination to objective criteria, such as a percentage loss of parking or building area. Clarity and litigation avoidance should be two of the most important criteria in drafting a condemnation clause.

Whether the parties to a lease altered Texas common law in this case depends upon the court's construction of the condemnation clause of the lease. The Texas Supreme Court has set out the standard rules by which Texas courts must construe contracts, including condemnation clauses in leases. "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "We must read all parts of the contract together, giving effect to each word, clause, and sentence, and avoid making any provision within the [contract] inoperative." *Slate Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010). "Courts must favor an interpretation that affords some consequence to each part of the instrument so that none of the provisions will be rendered meaningless." *Coker*, 650 S.W.2d at 394. Importantly, "[c]ourts strive to honor the parties' agreement and not remake their contract by reading additional provisions into it." *Gilbert Texas Construction IP v Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). Courts refrain from a construction that requires the insertion or addition of a qualifying phrase. *Praeger v. Wilson*, 721 S.W.2d 597, 601 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.).

In seeking the parties' intent through contract construction, courts will avoid a construction that is "unreasonable, inequitable, and oppressive." *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 530 (Tex. 1987); *Hicks v. Smith*, 330 S.W.2d 641, 646 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.). Moreover, "[c]ourts will not declare a forfeiture unless they are compelled to do so by language which can be construed in no other way." *Reilly*, 727 S.W.2d at 530; *Automobile Ins. Co. v. Teague*, 37 S.W.2d 151, 153 (Tex. Comm'n App. 1931, judgment adopted). "[T]he law does not look with favor on clauses causing forfeiture of the lessee's interest on condemnation." *Norman's Inc. v. Wise*, 747 S.W.2d 475, 477 (Tex. App.—Beaumont 1988, writ denied).

B. Case Studies of Condemnation Clauses

When a condemnation clause lacks clarity, the result can be litigation. It is useful to explore how reasonably-worded provisions ended up being the focus of contested litigation.

1. Case Study No. 1: Chick-Fil-A Ground Lease

Eastfield Realty was the landlord; Chick-fil-A, Inc., had a leasehold interest in the property by virtue

of a ground lease. Pursuant to the terms of the ground lease, Chick-fil-A built its restaurant building and site improvements on the land leased from Eastfield Realty. The ground lease included a condemnation clause which addressed the parties' rights in the event of a total or partial taking of the land leased by Chick-fil-A. This clause, Section 8.02(a) provided, in its entirety:

If there is a total taking or a constructive total taking of the Premises in condemnation proceedings or by any right of eminent domain, ***this Lease shall terminate on the date of the taking*** and the Annual Rent shall be prorated to the date of the taking. For purposes of this Section 8.02, a "constructive total taking" means a taking of so much of the Premises that the remaining portion cannot be used by Tenant for the same purpose as before such taking or a taking of thirty percent (30%) or more of the Premises during the last three (3) Lease Years of the Term. ***The award or awards for such taking shall be the property of Landlord.*** Tenant shall have no claim against Landlord for such award or awards for the value of the unexpired portion of the Term, or otherwise except to the extent such award is attributable to Tenant's trade fixtures. (emphasis added).

The State filed its condemnation action to acquire 1.6960 acres owned by Eastfield Realty for the widening of IH-45 South, including a portion of the land leased by Chick-fil-A and a bisection of the Chick-fil-A building, requiring its demolition. The State deposited the amount of the award of Special Commissioners, establishing the date of taking. Chick-fil-A subsequently vacated the premises and stopped paying rent. The Chick-fil-A building was subsequently demolished.

Pursuant to the condemnation clause, the landlord contended that the ground lease terminated on the date of taking and that the award for the State's taking belongs to it. Chick-fil-A filed a cross-claim against its landlord claiming its entitlement to the compensation to be paid for "the market value of its restaurant building, furniture, fixtures, and equipment, and all site and other improvements, as well as any leasehold advantage." This claim was based on Section 8.02(c) of the ground lease, which provides:

Tenant shall have the right to participate in any condemnation proceeding to present its claim and obtain compensation for a taking of its leasehold improvements (including without limitation the Building) and fixtures and equipment, or any other items Tenant elects (including Tenant's leasehold estate), provided the value of landlord's estate is not thereby diminished.

Importantly, Section 8.02(a) did not incorporate Section 8.02(c) of the ground lease on which Chick-fil-A relied. The landlord argued that Section 8.02(c) could not be read out of context of the balance of the condemnation clause. The section of the ground lease that referenced and incorporated Section 8.02(c) was Section 8.02(b), which addresses partial takings, where the tenant elects to continue its possession of the remaining property subject to the ground lease. In the event of a partial taking, Section 8.02(b) says that the award or awards shall be distributed as follows:

first to Landlord those amounts expressly awarded for the Land taken, then to Tenant those amounts expressly awarded for the restoration of the remaining portions of the Premises and Tenant's claims made under Section 8.02(c) below, and the remainder to Landlord.

The case was not a partial taking under Section 8.02(b), and the landlord argued that Section 8.02(c) had no application. Chick-fil-A admitted that the case involved a constructive total taking and that the ground lease terminated as of the date of taking. Under the plain terms of the ground lease, constructive total takings were governed by Section 8.02(a), which did not reference or incorporate Section 8.02(c).

Section 8.02(a) was more direct: in the event of a constructive total taking, the ground lease terminated, the award or awards for a constructive total taking "shall be the property of the Landlord," and "Tenant shall have no claim against the Landlord for such award or awards for the value of the unexpired portion of the Term." However, the language of Section 8.02(c) that "Tenant shall have the right to participate in any condemnation proceeding to present its claim and obtain compensation for a taking of its leasehold improvements (including without limitation the Building)" allowed Chick-fil-A to argue that, despite the termination of the lease, it had a compensable interest in the building improvements for which it should be compensated.

2. Case Study No. 2: Equinox Combat Lease

In this case, the condemnation provision set forth in the landlord's proposed lease form was quite brief:

Section 8.1 If the whole or any part of the Leased Premises shall be taken by any public authority under the power of eminent domain (or conveyed by Lessor to such authority in lieu of such condemnation), and by reason of such taking it is reasonably apparent that Lessee's business cannot be continued in operation on the portion of the Leased Premises which remains, the Lease shall terminate and be of no further force or effect as of the date the Leased Premises must be vacated pursuant to the condemnation order (or the date of any conveyance in lieu of such condemnation). It is expressly understood and agreed that Lessee shall have no claim or demand of any kind or character in or to any award made to Lessor by reason of such condemnation.

The landlord's form lease provided for the automatic termination of the lease in the event of a significant taking impacting the tenant's ability to continue its business in the leased space.

During the course of negotiations, counsel for the landlord indicated that it would not accept any changes to the original language of Section 8.1. Nevertheless, through over nine revisions the condemnation clause was substantially revised from this original lease form. Under the lease as executed by the parties, the lease did not automatically terminate in the event the State's taking made it so that the tenant could not continue doing business on the remaining leased premises. Instead, the tenant had the sole option to terminate. Specifically, Section 8.1 of the Lease provides:

Section 8.1 If the whole or any part of the Leased Premises shall be taken, permanently or temporarily, by any public authority under the power of eminent domain (or conveyed by Lessor to such authority in lieu of such condemnation), and by reason of such taking it is reasonably apparent that Lessee's business cannot be continued in operation on the portion of the Leased Premises which remains, then ***Lessee may terminate this Lease*** and this Lease shall be of no further force or effect as of the date the Leased Premises or any part thereof must be vacated pursuant to the condemnation order (or the date of any conveyance in lieu of such condemnation). It is expressly understood and agreed that Lessee shall have no claim or demand of any kind or character in or to any

award made to Lessor by reason of such condemnation; provided, however, Lessee may pursue a separate claim for damages including, without limitation, moving expenses, unamortized Tenant Improvements, and inconvenience or business interruption related to such condemnation.

The tenant did not exercise its option to terminate the lease. Because the tenant did not exercise its option to terminate the lease, the lease did not terminate as a result of the taking. Therefore, the tenant was entitled to compensation for its lost leasehold interest.

Despite the unilateral nature of the tenant's option to terminate, the landlord contended that the tenant waived its right to compensation by virtue of the language that immediately follows the language granting the tenant the option to terminate the lease:

It is expressly understood and agreed that Lessee shall have no claim or demand of any kind or character in or to any award made to Lessor by reason of such condemnation.

The tenant argued that this language should be read to define the tenant's rights in the event it elected to exercise the termination option of the previous sentence. The landlord, however, read this provision in isolation to mean that the tenant has no claim or demand to any award made to the landlord, whether or not the tenant elects to terminate the lease. Under the landlord's interpretation, the tenant's election to terminate the lease or not terminate the lease would have no bearing whatsoever on the tenant's entitlement to compensation for its leasehold interest.

This construction of the lease would exact a forfeiture from the tenant. In reconciling contract provisions that conflict, courts favor a reasonable construction that avoids forfeiture. *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 530 (Tex. 1987); *Hicks v. Smith*, 330 S.W.2d 641, 646 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.). Moreover, it is a basic principle of contract construction that a court "must read all parts of the contract together, giving effect to each word, clause, and sentence, and avoid making any provision within the [contract] inoperative." *Slate Farm Lloyds*, 315 S.W.3d at 527. Further, courts "must favor an interpretation that affords some consequence to each part of the instrument so that none of the provisions will be rendered meaningless." *Coker*, 650 S.W.2d at 394. The landlord's proposed construction of the condemnation clause violates this basic principle by rendering the tenant's option to terminate inoperative and meaningless. According to the landlord, the tenant could not recover from the landlord for the market

value of its lost leasehold interest whether or not it exercises its option to terminate the lease. This construction failed to give effect to the provision of the lease giving the tenant the option to terminate.

The landlord argued that the clause “Lessee shall have no claim or demand of any kind or character in or to any award made to Lessor by reason of such condemnation” precluded any recovery by the tenant, whether or not the tenant exercised its option to terminate. This argument ignored the plain meaning of the words used in the lease and basic principles of condemnation law. The award in a condemnation case is not made to the landlord or any particular party; instead it is made jointly to all defendants or potential interest owners. When the property to be condemned is subject to a lease, the special commissioners must first determine the compensation as if the property were owned by a single owner and then, if they are able, apportion that value between the lessor and the lessee in accordance with the parties’ respective interests in the land. *See Urban Renewal Agency*, 407 S.W.2d at 774; *Aronoff v. City of Dallas*, 316 S.W.2d 302, 307 (Tex. Civ. App.—Texarkana 1958, writ ref’d n.r.e.). If the commissioners are unable to determine the amount of the award that each party is entitled to receive, the condemnation statutes permit the commissioners to enter a general award in a lump sum payable jointly to the lessor and lessee. *See Elliott*, 351 S.W.2d at (1961); *Harrell v. County of LaSalle*, 348 S.W.2d 853, 854 (Tex. Civ. App.—Eastland 1961, writ ref’d n.r.e.).

In the event of a joint condemnation award placed in the registry of the court to the order of the condemnees, the interest of each condemnee is established in and automatically attaches to that fund as security for any possible damage suffered by reason of the condemnee’s dispossession. *See Fort Worth Concrete Co.*, 400 S.W.2d at 317. The trial court has no authority to disburse any portion of the joint award to one condemnee to the exclusion of any other condemnee until there has been a final determination of each condemnee’s compensable interest, if any, in those funds. *Id.* Therefore, the Court could not finally dispose of the case until the parties’ respective compensable interests in the funds was determined. *Id.*; *Wynnewood Bank and Trust v. State*, 767 S.W.2d 491, 495 (Tex. App.—Dallas 1989, no writ). Until such determination, there was no “award made to Lessor” to which the landlord could claim exclusive entitlement.

“[A] court should examine the entire instrument in an effort to harmonize and give effect to all provisions of the contract so that none would be rendered meaningless.” *Hutchings v. Chevron U.S.A., Inc.*, 862 S.W.2d 752, 756 (Tex. App.—El Paso 1993, writ denied). In reading each part of Section 8.01 so that each part has meaning, it becomes clear that the parties intended that each party be compensated for what it lost to the taking. The landlord owned property

encumbered with a lease. It could not have sold the property to a third party without consideration of the lease. The tenant’s leasehold interest had value, and it was entitled to be paid for the loss of its leasehold interest that existed before the taking. “Unless a lease provides that it terminates upon condemnation, the tenant will recover compensation for the unexpired term.” *Motiva Enterprises, LLC*, 248 S.W.3d at 214; *City of Laredo v. R. Vela Exxon, Inc.*, 966 S.W.2d 673, 679 (Tex. App.—San Antonio 1998, pet. denied) (“A leasehold is property, and a lessee is considered an ‘owner’ and is entitled to compensation when all or part of the leased property is taken by eminent domain.”).

C. Termination of the Tenant’s Leasehold Interest Outside of the Lease

Even if the lease does not provide for a waiver of the tenant’s right of recovery, a tenant’s conduct may result in a waiver. For example, when a tenant moves out, stops paying rent, and gets its security deposit back from its landlord, courts will deem him to have surrendered the property and terminated the lease. *See Edwards v. Blissard*, 440 S.W.2d 427, 432 (Tex. Civ. App.—Texarkana 1969, writ ref’d n.r.e.). Similarly, when a tenant abandons the leased premises and the landlord re-enters, the court may find that a surrender as a matter of law has occurred. When a tenant surrenders possession of the leased property, and the landlord accepts this surrender, the tenancy and the rights or interests of the parties thereunder are extinguished by mutual agreement.

Courts routinely look to the conduct of the parties to determine if a lease has been surrendered. *See Edwards Bankers & Co. v. Spradlin*, 575 S.W.2d 585, 587 (Tex. Civ. App.—Houston [1st Dist] 1979, no writ) (holding that the tenant moving out and landlord repossessing the property were facts from which a jury could conclude that the lease had been terminated); *Edwards*, 440 S.W.2d at 432 (holding that where tenants removed themselves from the leased property, ceased paying rent, cashed a cashier’s check for rent that was returned them by the lessor, and did not protest when the lessor repossessed the land, this conduct “resulted in a surrender of [the] lease by operation of law”); *Myers v. Ginsburg*, 735 S.W.2d 600 (Tex. App.—Dallas 1987, no writ) (finding that the tenants surrendered the leased premises to the landlord when they vacated the property and returned the keys). Once a tenant surrenders the leased premises, the landlord can treat the lease as terminated.

The condemnation process can be drawn out, and the tenant receives notice to vacate long before the “date of taking,” established by the condemning authority’s deposit of the amount of the award of special commissioners months after the condemnation petition is filed. This is not *pro forma*. If a tenant

vacates the property and surrenders the lease prior to the date of taking, a court may hold that, regardless of the terms of the lease, the tenant did not have a compensable interest in the property as of the date of taking.

III. CONCLUSION

For the real estate lawyer, the worst-case scenario is litigation centering on a provision drafted by the lawyer. Thus, when negotiating a condemnation clause in a lease, a clear statement of the parties' rights and obligations in the event of a partial or whole taking is often a better result for both parties than a provision that is more favorable to one party or the other if the resulting lack of clarity increases the likelihood of litigation and the risks, costs, and attorneys' fees associated with it.

From the tenant's perspective, it would be better for the tenant to understand upfront that it is not going to receive any compensation in the event of a condemnation than for it to chase the possibility of compensation through litigation only to lose and be liable for the landlord's attorneys' fees. To the extent the issue is important to the landlord, any perceived unfairness can be ameliorated through reduced rent.

Similarly, from the landlord's perspective, it would be better to share the proceeds with the tenant, preferably on an objective, pre-determined basis, or to grant rent concessions in exchange for the right to receive all of the compensation from a taking, than to end up in protracted litigation over the tenant's right to recover, if any.

In the end, the parties to a lease are better-served by the motive of litigation avoidance than by trying to negotiate the most favorable condemnation clause achievable.

APPENDIX

(ii) EVEN IF THE LOSS OR DAMAGE TO WHICH THIS PROVISION APPLIES IS CAUSED SOLELY OR IN PART BY THE NEGLIGENCE OF LESSOR OR LESSEE.

ARTICLE VIII
Eminent Domain

Section 8.1 If the whole or any part of the Leased Premises shall be taken, permanently or temporarily, by any public authority under the power of eminent domain (or conveyed by Lessor to such authority in lieu of such condemnation), and by reason of such taking it is reasonably apparent that Lessee's business cannot be continued in operation on the portion of the Leased Premises which remains, then Lessee may terminate this Lease and this Lease shall be of no further force or effect as of the date the Leased Premises or any part thereof must be vacated pursuant to the condemnation order (or the date of any conveyance in lieu of such condemnation). It is expressly understood and agreed that Lessee shall have no claim or demand of any kind or character in or to any award made to Lessor by reason of such condemnation; provided, however, Lessee may pursue a separate claim for damages including, without limitation, moving expenses, unamortized Tenant Improvements, and inconvenience or business interruption related to such condemnation. For purposes hereof, it shall be deemed to be reasonably apparent that Lessee's business cannot be continued in operation on the portion of the Leased Premises which remains if: (i) any taking covers any portion of or interest in the Building; (ii) any taking reduces the number of parking spaces below the number of spaces reasonable required by Lessee or that required by applicable code, PROVIDED that Lessee has not exercised its option to terminate the Lease with respect to the Unimproved Tract pursuant to Section 2.2 above; (iii) any taking in which access to the Building is materially impaired, or access to the parking within the Leased Premises is materially impaired; or (iv) any taking which otherwise materially impairs the operation of Lessee's business in the Leased Premises.

ARTICLE IX
Access to Leased Premises

Section 9.1 Lessor or its representatives shall have the right to enter upon the Leased Premises at all reasonable hours and with no less than twenty-four (24) hour written notice to Lessee (except in emergencies when telephonic notice is sufficient) for the purposes of inspecting the same or of making repairs, additions or alterations thereto, or for the purpose of exhibiting the same to prospective tenants or purchasers (but only during the last sixty (60) days of the Term). The exercise of such rights by Lessor or its representatives shall be done in a reasonable manner so not to disturb Lessee's use or possession of the Leased Premises.

ARTICLE X
Landlord's Lien

Section 10.1 Lessor agrees to subordinate its contractual and statutory landlord's lien rights provided herein or by law to any contractual lien or security interest hereafter granted by Lessee to a third party lender upon all goods, equipment, removable trade fixtures,

ARTICLE VIII

CASUALTY AND CONDEMNATION

8.01 Casualty. (a) If all or any part of the Premises is destroyed or damaged by fire or other casualty (a "casualty"), Tenant shall immediately notify Landlord thereof and shall repair and reconstruct the Building and any other improvements to a condition substantially equivalent to its original condition and substantially in accordance with the Tenant Plans but in any event in compliance with then applicable laws, rules, regulations and codes. Notwithstanding the preceding sentence, Tenant shall only be obligated to repair and reconstruct the Building to the extent of the net insurance proceeds received by Tenant plus any deductible maintained by Tenant in connection therewith, so long as (i) Tenant has maintained the insurance required in accordance with Section 9.01 hereof, and such insurance coverage is then currently effective, and (ii) if such insurance proceeds are insufficient to repair and reconstruct the Building, and Tenant elects not to repair and reconstruct the Building, all such insurance proceeds paid to Tenant in connection with the Building shall be delivered to Landlord upon such election, and Tenant may elect to terminate this Lease upon sixty (60) days' written notice to Landlord after such casualty. Notwithstanding the foregoing, in the event a third party architect mutually selected by Landlord and Tenant determines that the reconstruction of the Building cannot reasonably be completed within one (1) year from the date of the casualty, either Landlord or Tenant may terminate this Lease upon written notice to the other party given within sixty (60) days after the casualty.

(b) Notwithstanding the provisions of Section 8.01(a) above, if, during the last three (3) Lease Years of the Term, or any Renewal Term, the Premises is destroyed or damaged to the extent that, in Tenant's reasonable judgment, the Premises are not usable in their damaged condition for the conduct of Tenant's business, then Tenant shall have the election, exercisable by notice to be given within sixty (60) days after the casualty, to terminate this Lease as of the date of such casualty. If this Lease is so terminated following a casualty, all proceeds of insurance covering the Premises shall be paid to and remain the property of Landlord, all Rent shall be prorated accordingly, and all prepaid unaccrued Rent shall be refunded to Tenant, less any sums Tenant owes Landlord. In the event such damage occurs during the last three (3) Lease Years of the Term and Tenant elects not to terminate the Lease pursuant to this Section 8.01(b) and repairs and restores the Building, Tenant shall be deemed to have exercised its first renewal option pursuant to Section 2.02(b)(i), and upon expiration of the initial Term, the first Renewal Term shall commence in accordance with the further provisions of Section 2.02(b) hereof.

(c) Tenant shall not be entitled to any abatement of Rent, and this Lease shall not be terminated because of any casualty, except in the case of the termination of the Lease as provided in Section 8.01(a) or 8.01(b).

8.02 Condemnation. (a) If there is a total taking or a constructive total taking of the Premises in condemnation proceedings or by any right of eminent domain, this Lease shall terminate on the date of the taking and the Annual Rent shall be prorated to the date of the taking. For purposes of this Section 8.02, a "constructive total taking" means a taking of so much of the Premises that the remaining portion cannot be used by Tenant for the same purpose as before such taking or a taking of thirty percent (30%) or more of the Premises during the last three (3) Lease Years of the Term. The award or awards for such taking shall be the property of Landlord. Tenant shall have no claim against Landlord for such award or awards for the value of the unexpired portion of the Term, or otherwise except to the extent such award is attributable to Tenant's trade fixtures.

(b) If there is less than a constructive total taking of the Premises, this Lease shall terminate as to the portion of the Premises so taken, Annual Rent shall be abated proportionately, and the definition of Premises shall be adjusted accordingly. Tenant shall promptly restore, repair, replace and rebuild the remaining portions of the Building to substantially their former condition or with such additions or alterations as Tenant may elect to make in conformity with Article VII. The award or awards payable for any taking of the type described in this Section 8.02(b), less the reasonable costs of determination thereof, shall be distributed as follows: first to Landlord those amounts expressly awarded for the Land taken, then to Tenant those amounts expressly awarded for the restoration of the remaining portions of the Premises and Tenant's claims made under Section 8.02(c) below, and the remainder to Landlord.

(c) Landlord and Tenant shall cooperate in the prosecution of any claim for damages arising by virtue of any proceeding described in this Section 8.02. Tenant shall have the right to participate in any condemnation proceeding to present its claim and obtain compensation for a taking of its leasehold improvements (including without limitation the Building) and fixtures and equipment, or any other items Tenant elects (including Tenant's leasehold estate), provided the value of Landlord's estate is not thereby diminished.

8.03 Rent on Termination. If this Lease is terminated under any provision of this Article VIII, Rent shall be payable through the date of casualty or the date that possession is taken by the taking authority, and Landlord will refund to Tenant any prepaid unaccrued Rent, less any sums Tenant owes Landlord.

ARTICLE IX

INSURANCE

9.01 Tenant's Insurance. (a) From the date Tenant commences the construction of the Building or installation of the Tenant Improvements, Tenant shall maintain, without expense to Landlord, all risk coverage insurance on the Building, all Tenant Improvements, additions made to the Premises after initial completion, and all of Tenant's furniture, fixtures and equipment in the Premises, in an amount equal to one hundred percent (100%) of the replacement cost thereof (and Tenant shall cause its contractor to maintain full builder's risk coverage during construction); and the policy for insurance shall name Landlord as loss payee. In the event any insurance proceeds become payable with respect to the above items, Landlord shall deliver to Tenant promptly after Landlord's receipt, all insurance proceeds paid to Landlord with respect to the Tenant's furniture, fixtures and equipment. Any insurance proceeds paid to Landlord with respect to the Building and the Tenant Improvements shall be paid to Tenant pursuant to customary construction loan disbursement procedures in the event Tenant is obligated, or has elected, to restore the Building and the Tenant Improvements pursuant to the terms and conditions of this Lease. Tenant shall also maintain all risk coverage insurance on its merchandise.

(b) From the date of this Lease, Tenant shall, at its own expense, maintain a policy or policies of commercial general liability insurance with the premiums thereon fully paid on or before the due date. The policy or policies shall provide for proper limits, but in no event shall the insurance have limits of less than One Million Dollars (\$1,000,000) for personal or bodily injury or death of any person, Three Million Dollars (\$3,000,000) for any single occurrence and One Million Dollars (\$1,000,000) for property damage in any one occurrence -- with umbrella coverage (or a combination of primary and umbrella coverage) to Five Million Dollars (\$5,000,000). The aforesaid limits may be met through a combination of Tenant's primary coverage and umbrella and/or excess coverage. The policy or policies shall name Landlord as an additional named insured. Tenant shall be permitted to maintain a self-insured retention with respect to its commercial general liability coverage up to the amount of One Hundred Fifty Thousand Dollars (\$150,000.00).

(c) In the event Tenant utilizes company vehicles, Tenant, without expense to Landlord, shall provide automobile bodily injury and property damage insurance covering its vehicles with proper limits, but not less than One Million Dollars (\$1,000,000) for bodily injury or death to any number of persons and Five Hundred Thousand Dollars (\$500,000) for property damage arising out of any one accident.

(d) Tenant shall comply with all applicable Workers' Compensation laws and provide Workers' Compensation insurance, if required, for all persons employed by it for any purpose on the Premises or in connection with the business conducted pursuant to this Lease and shall pay any and all contributions, taxes and costs of such insurance and benefits payable thereunder that are required to be withheld and/or paid by any employer under the provisions of any applicable present or future law, ruling and regulation.

(e) All policies of insurance that Tenant must provide pursuant to the provisions of this Lease shall be issued by solvent insurance carriers licensed to do business in the State of Texas and, except Workers' Compensation insurance, having a Best's rating of XIII: B+, or better, shall be in form satisfactory to Landlord, and may be maintained as part of blanket

ARTICLE 10 - DAMAGE, DESTRUCTION AND EXPROPRIATION

10.01 DAMAGE AND DESTRUCTION

If during the Term the Property or the Leased Premises shall suffer any structural failure or collapse or be damaged or destroyed by any cause whatsoever, whether insured against or not, including without limitation, fire, lightning, storm, acts of God, riots, wars, insurrections or other perils, the following provisions shall have effect:

- (a) If the Leased Premises are rendered partially unfit for occupancy by Tenant, the rent hereby reserved shall abate in part only in the proportion that the part of the Leased Premises so rendered unfit is of the whole of the Leased Premises until the Leased Premises have been repaired or restored;
- (b) If the Leased Premises are rendered wholly unfit for occupancy by Tenant, the rent hereby reserved shall abate until the Leased Premises have been repaired or restored;
- (c) Notwithstanding the provisions of clauses (a) and (b) of this Section 10.01, if the Leased Premises are not capable with reasonable diligence of being repaired or restored within one hundred eighty (180) days of the occurrence of the damage or destruction, then either Landlord or Tenant may terminate this Lease by written notice to the other given within thirty (30) days of the date of such occurrence, and if such notice is so given this Lease shall terminate effective as of and from the date of such occurrence and Tenant shall within fifteen (15) days of such notice surrender the Leased Premises to Landlord and the rent shall be apportioned and shall be payable by Tenant only to the date of such occurrence and Landlord may re-enter and repossess the Leased Premises. If within the said period of thirty (30) days neither Landlord nor Tenant give notice terminating this Lease as aforesaid, then upon the expiration of such thirty (30) day period Landlord shall promptly repair and restore the Leased Premises;
- (d) If the Leased Premises are capable with reasonable diligence of being repaired or restored within one hundred eighty (180) days of the happening of such damage, then Landlord shall restore and repair the Leased Premises promptly within the aforesaid one hundred eighty (180) days. If, however, Landlord fails to substantially complete the repair or restoration within such one hundred eighty (180) day period, Tenant shall have the option to terminate this Lease by providing Landlord with written notice at any time not later than thirty (30) days after the end of such one hundred eighty (180) day period; and
- (e) The above to the contrary notwithstanding, if such damage occurs within the last year of the Term (or the extended Term, as the case may be), Landlord may terminate this Lease unless Tenant exercises its renewal option.

10.02 CONDEMNATION

If the Leased Premises, or any portion thereof, shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose, either permanently or temporarily, which constitutes a material taking in Tenant's reasonable opinion, either party may, at its option, upon written notice to the other party hereto, declare that as of the taking of possession, the Term is

expired. If such notice is so given, this Lease shall terminate effective as and from the date of such acquisition or condemnation and Tenant shall, within sixty (60) days of such notice, surrender the Leased Premises and the rent shall be apportioned and shall be payable by Tenant only to the date of such acquisition or condemnation.

ARTICLE 11 - REMEDIES

11.01 RIGHT TO RE-ENTER

In the event that Tenant becomes bankrupt or insolvent, takes the benefit of or becomes subject to any statute that may be in force relating to bankrupt or insolvent debtors, or any creditor seizes or takes control of Tenant's property at the Leased Premises or if any petition is filed against Tenant to declare Tenant a bankrupt or to delay, reduce or modify Tenant's debts or obligations, or in the event of any failure of Tenant to pay any rent due hereunder when due and such default continues for five (5) days following written notice of delinquency from Landlord, not to exceed two (2) times in any calendar year, or any material and continuing failure to perform or to observe any other of the terms, conditions or covenants of this Lease to be observed or performed by Tenant for at least thirty (30) days after written notice thereof has been provided by Landlord to Tenant with reasonable specificity of such failure (provided that such failure shall not be considered a default if such failure cannot reasonably be remedied within such thirty (30) day period and Tenant has within such thirty (30) day period commenced, and thereafter continues, good faith efforts to remedy such failure), or if re-entry is permitted under any other terms of this Lease, then Landlord, besides any other rights or remedies it may have, shall have the immediate right of re-entry and may remove all persons and property from the Leased Premises and such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of Tenant.

11.02 RIGHT TO RE-LET

- (a) Should Landlord elect to re-enter as herein provided, or should it take possession pursuant to legal proceedings or pursuant to any notice provided for by law, it may either terminate this Lease or it may from time to time without terminating this Lease, relet the Leased Premises or any part thereof for such term or terms (which may be for a term extending beyond the Term of this Lease) and at such rental or rentals and upon such other terms and conditions as Landlord in its sole discretion may deem advisable; upon each such reletting all rentals received by Landlord from such re-letting shall be applied to amounts due from Tenant to Landlord hereunder. For the purposes of such reletting, Landlord is authorized to make any repairs, changes, alterations or additions in or to the Leased Premises that may be necessary or desirable. If Landlord shall fail to relet the Leased Premises or if the same are relet and a sufficient sum shall not be realized from such reletting to satisfy the rent and other charges provided for in this Lease to be paid after paying: (i) the unpaid rent due hereunder earned and unpaid at the time of reletting plus interest thereon at the Maximum Rate thereon, (ii) the cost of recovering possession, (iii) all of the costs and expenses of such repairs, changes, alterations and additions, and (iv) reasonable brokerage fees and expense of such reletting, then Tenant shall pay to Landlord as damages the sum equal to the amount of rental and other charges reserved in this Lease for such period or periods, or if the Leased Premises have been relet, Tenant

property of Tenant. Upon the occurrence of an event referred to in the preceding sentence, Landlord may, by notice in writing to Tenant, terminate this Lease as of the date of such occurrence.

- 14.5 Notwithstanding that the prior express written consent of Landlord to any of the aforesaid transactions may have been obtained, the following shall apply:
- (i) In the event of an assignment or subletting, contemporaneously with the granting of Landlord's aforesaid consent, Tenant shall cause the assignee or subTenant to expressly assume in writing and agree to perform all of the covenants, duties and obligations of Tenant hereunder and such assignee or subTenant shall be jointly and severally liable therefor along with Tenant;
 - (ii) No usage of the Premises which differs from the permitted usage by Tenant shall be permitted, and all other terms and provisions of this Lease shall continue to apply after any such assignment or subleasing; and
 - (iii) In any case where Landlord consents to an assignment, sublease, grant of a concession or license or mortgage, pledge or hypothecation of the leasehold, Tenant will nevertheless remain directly and primarily liable for the performance of all of the covenants, duties and obligations of Tenant hereunder (including, without limitation, the obligation to pay all rent and other sums herein provided to be paid), and Landlord shall have the right to enforce the provisions of this instrument against the Tenant and any subTenant or assignee, all without demand upon or proceeding in any way against any other person.
- 14.6 Tenant acknowledges that in addition to any other rights of Landlord as set forth in this Lease or at law, as a condition to Landlord's granting such consent pursuant to this Article XIV (if Landlord does, in fact, consent to any such proposed assignment, subletting, concessions or other occupancy rights, it being acknowledged by Tenant that Landlord is under no obligation to so consent), Landlord may require an increase in the Minimum Rent payable hereunder (or on an annual basis for each Calendar Year during the Term hereof remaining after Landlord grants such consent) and/or Landlord may require that this Lease be amended so as to provide for the payment of (or an increase in the percentage of) "Percentage Rent", as that term is expressly defined in this Lease (and if Percentage Rent is not so defined, then as such term is ordinarily understood in commercial retail leases), together with reporting and payment requirements determined by Landlord in its sole discretion.
- 14.7 Notwithstanding anything to the contrary contained in this Article XIV, Landlord shall have the option by giving written notice to Tenant within thirty (30) days after receipt of Tenant's notice of any proposed assignment or sublease, to recapture the portion of the Premises to be conveyed under said assignment or sublease (the "Subject Space"). Such recapture notice shall cancel and terminate this Lease with respect to the Subject Space as of the date stated in Tenant's notice as the effective date of the proposed assignment or sublease (or at Landlord's option, shall cause the assignment or sublease to be made to Landlord or its agent, in which case the parties shall execute the assignment or sublease documentation promptly thereafter). If this Lease shall be canceled with respect to less than the entire Premises, the rent reserved herein shall be prorated on the basis of the number of rentable square feet retained by Tenant in proportion to the number of rentable square feet contained in the Premises, this Lease as so amended shall continue thereafter in full force and effect, and upon request of either party, the parties shall execute written confirmation of the same.

ARTICLE XV EMINENT DOMAIN

- 15.1 If all or any part of the Premises be taken during the Term by right of eminent domain or condemnation, then this Lease shall terminate, and all right, title and interest of Tenant in this leasehold estate shall vest entirely in Landlord at the time of the taking, as that term is hereinafter defined. However, should twenty percent (20%) or less of the total square feet of the Premises be taken under said power, then Landlord may elect to continue this Lease in effect by notice given to Tenant within sixty (60) days from date of said taking and in this event, Minimum Rent shall be proportionately reduced for the balance of the Term, and consistent with the provisions of Section 23.2 hereof, Landlord shall then restore the Premises, to the extent that same is practicable and efficient, to the condition that same existed prior to such taking (but specifically excluding any improvements made to the Premises by Tenant for which Landlord is not directly compensated). Landlord shall additionally have the right to terminate this Lease if ten percent (10%) or more of the land upon which the Shopping Center is located, or ten percent (10%) or more of the Shopping Center Building in which the Premises are located, be taken by eminent domain, condemnation, or voluntary conveyance in lieu thereof in which event the provisions of the foregoing sentence shall be applicable.
- 15.2 All sums awarded or agreed upon between Landlord and the condemning authority for the taking of the fee, whether as damages, compensation, or otherwise, are hereby set over, assigned and are vested in Landlord free of all claims, right, title and/or interest of Tenant, and all of such sums of every nature will be the property of the Landlord.
- 15.3 A voluntary conveyance by Landlord to any authority under threat of taking under the power of eminent domain or condemnation in lieu of formal proceedings shall be deemed a taking within the meaning of this Article XV. Landlord is hereby vested with the sole and exclusive right to enter into any form of conveyance and upon such terms, provisions and conditions as Landlord in Landlord's sole discretion may deem advisable or appropriate under the then existing circumstances, free and clear of any claim, right, title, interest or equity on the part of the Tenant.
- 15.4 The taking of any easement or right-of-way shall not impair or affect this Lease in any manner whatsoever, whether by voluntary conveyance or by formal proceedings, and Tenant shall have no right, title, interest or equity in the proceeds received in connection therewith by Landlord.

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Center Building Elevations, and Landlord shall make appropriate changes and resubmit the Shopping Center Building Elevations for Tenant's approval.

8.5 **Right to Perform Repairs.** If a party to this Lease fails to perform its responsibilities of repair and maintenance pursuant to **Section 8.1** or other work required by this Lease, the other party may perform the required maintenance, repair or work after giving the non-performing party at least 30 days written notice of the required action, except in cases of emergency repairs required to protect persons or property. But in the event of such emergency repairs the other party will attempt to notify the non-performing party as soon as possible of the action being taken. The non-performing party shall reimburse the other party for the costs of such repairs or work and, as to Tenant, such amounts may be deducted from the Rent thereafter to become due.

9. **LIENS, INDEMNIFICATION AND LIABILITY.**

9.1 **Liens.** Tenant shall pay for work done on or for services rendered or material furnished to the Demised Premises, and shall keep the Demised Premises free from any liens arising by, through or under Tenant, except that Tenant may withhold payment of any claim in connection with a good faith dispute over the obligation to pay. If Tenant fails to discharge any such lien after 30 days within notice from Landlord, Landlord may do so. Amounts paid by Landlord to discharge the lien shall bear interest and be repaid by Tenant on demand.

9.2 **Indemnification of Landlord.** Tenant shall indemnify Landlord from any loss, liability, claim of liability or expense (including reasonable attorneys' fees and litigation expenses) arising out of or related to any violation of law or negligent action or inaction of Tenant, its agents, independent contractors, employees, customers, suppliers or invitees, any condition of the Building or of the Demised Premises that is the responsibility of Tenant under this Lease.

9.3 **Indemnification of Tenant.** Landlord shall indemnify Tenant from any loss, liability, claim of liability or expense (including reasonable attorneys' fees and litigation expenses) arising out of or related to any violation of law or negligent action or inaction of Landlord, its agents, independent contractors, employees, or invitees pursuant to this Lease, or any condition of the Shopping Center Buildings or Shopping Center that is the responsibility of the Landlord under this Lease.

10. **CONDEMNATION.**

10.1 **Substantial Taking.** If the entire Demised Premises is condemned, or if such a substantial portion of the Demised Premises, means of access or adjacent roadway is taken that the Demised Premises is rendered unsuitable for Tenant's business operations, in Tenants' sole discretion, then this Lease shall terminate as of the date upon which possession is taken by the condemning authority.

10.2 **Partial Taking.** If a partial taking by condemnation of the Demised Premises, means of access or roadway occurs, and **Section 10.1** does not apply, the net condemnation proceeds shall be made available to Tenant to make necessary repairs and alterations to the

Demised Premises (as appropriate) so as to permit Tenant to continue its operations and to restore the Demised Premises or other property not so taken. Rent shall be abated during the period of restoration to the extent the Demised Premises is not reasonably usable for Tenant's use. Any net condemnation proceeds from the taking that are not used to repair, alter and restore the Demised Premises shall belong to Landlord. After restoration, Rent shall be reduced for the remainder of the then current Lease term by the same percentage change as the difference in the fair rental value of the Demised Premises immediately preceding, compared to immediately following, the taking by condemnation. If the parties cannot agree upon the adjustment to Rent under this paragraph after good faith negotiation, the adjustment to Rent will be determined by arbitration in the manner provided in **Section 10.4**.

10.3 **Condemnation Proceeds.** Landlord and Tenant shall each be entitled to prosecute its claim in the condemnation proceeding and, subject to the provisions of **Section 10.2**, to retain any award made to it in such proceeding. Landlord shall be entitled to all damages and compensation attributable to its fee simple interest in the Demised Premises, and Tenant shall be entitled to all damages and compensation attributable to its interest in the Building and its leasehold interest in the Demised Premises.

10.4 **Arbitration Procedure.** If the parties cannot agree upon the adjustment to Rent pursuant to **Section 10.2**, either party may request that the fair market rental values be determined by arbitration. The arbitration will be by three arbitrators, with the arbitrators' fee divided equally between the parties. Landlord and Tenant will each select as arbitrator an independent realtor-appraiser having knowledge with respect to commercial shopping center real estate values and practices in the geographic area in which the Shopping Center is situated, and the two arbitrators shall select a third arbitrator having the above qualifications. The arbitrators will be instructed to determine the fair market rental value of the Demised Premises before and after the condemnation. The arbitration shall be conducted according to the rules and procedures of the American Arbitration Association, and the award shall have the effect provided therein.

10.5 **Transfer in Lieu of Condemnation.** Sale of property to a purchaser with the power of eminent domain in the face of a threat or the probability of the exercise of the power shall be treated as a taking by condemnation.

11. **ASSIGNMENT AND SUBLEASING.** Tenant may assign this Lease or sublet all or portions of the Demised Premises at any time without Landlord's consent. No assignment or sublease shall release Tenant from Tenant's obligations under this Lease unless Landlord expressly agrees to such a release.

12. **DEFAULT.**

12.1 **Tenant's Default.** If Tenant is in default of any of its obligations under this Lease and the default is not cured within 30 days after Tenant's receipt of written notice from Landlord, which notice states the nature of the default with reasonable particularity, Landlord may terminate the Lease, in addition to all remedies available at law or in equity.

Lease, and Tenant waives any rights now or hereafter conferred upon Tenant by present or future law or otherwise to quit or surrender this Lease or the Premises, or any portion thereof, to Landlord or to any suspension, diminution, abatement or reduction of rent on account of any such damage or destruction.

(d) If (i) the insurance proceeds available to Tenant for Casualty Restoration are not, in the reasonable judgment of Tenant, adequate to pay all of the costs of the Casualty Restoration, or (ii) the Casualty Restoration is not, in the reasonable judgment of Tenant, legally permitted or possible under applicable law, or (iii) within three (3) years prior to expiration of the Term of this Lease, the Tenant Improvements shall be destroyed or damaged to such an extent that Tenant is unable to operate its business and the Improvements and the Casualty Restoration thereof can not, in the reasonable judgment of Tenant, be completed within sixty (60) days of the commencement of Casualty Restoration, Tenant may, at any time within ninety (90) days of the date of such damage or destruction, terminate this Lease by notice in writing to Landlord specifying the date for termination. Tenant shall accompany such notice with its payment of all Annual Rent and Additional Rent and other charges payable by Tenant hereunder, justly apportioned to the date of such termination. In the event of any such termination by Tenant under this subsection (d), Tenant, at Tenant's expense within forty-five (45) days after Landlord's request, shall remove all debris from the Land and deliver the Land in clean and safe condition. If this Lease is so terminated following a casualty, all proceeds of insurance covering the Building, except the amount to be placed in the Casualty Escrow Account (as defined below) in accordance with subsection (c) below, shall be paid to and remain the property of Tenant provided Tenant shall raze and dispose of the Building within forty-five (45) days of Landlord's request. In the event Tenant does not raze and dispose of the Building within such forty-five (45)-day period in accordance with the preceding sentence, Landlord shall have the right to raze and dispose of the Building, and Tenant shall promptly reimburse Landlord for the cost of such razing and disposing after Landlord's request therefor if the Casualty Escrow Account (as defined below) is unavailable due to such proceeds being unavailable in accordance with subsection (f) below or otherwise.

(e) Unless such proceeds are unavailable in accordance with subsection (f) below, a portion of the insurance proceeds equal to one hundred five percent (105%) of the estimated cost to raze and dispose of the Building shall be placed in escrow (the "Casualty Escrow Account") with a third party who is not affiliated with Landlord or Tenant. In the event Tenant does not either repair and reconstruct or raze and dispose of the Building in accordance with this Section, Landlord shall have the right to raze and dispose of the Building. If Landlord razes and disposes of the Building, Landlord shall be reimbursed for the cost and expense of such razing and disposal from the Casualty Escrow Account. Any amount remaining in the Casualty Escrow Account after Landlord is reimbursed shall be paid to Tenant. In the event that Tenant repairs and reconstructs the Building or razes and disposes of the Building in accordance with this Section, all of the funds in the Casualty Escrow Account shall be paid to Tenant upon completion of such reconstruction or such razing.

(f) Notwithstanding any provisions of this Lease to the contrary, all rights and obligations of Tenant and Landlord with respect to insurance proceeds and Casualty Restoration shall be subject and subordinated to the rights of any lender to Tenant under applicable loan documents. In the event that any lender to Tenant requires that insurance proceeds be paid to such lender instead of used by Tenant for Casualty Restoration, such proceeds shall be deemed unavailable to Tenant for purposes of subsections (d) or (e) above; provided, however, in the event such proceeds exceed the outstanding amount of such lender's loan, the excess proceeds shall be released in accordance with this Section 8.01.

8.02 Condemnation. (a) If there is a total taking or a constructive total taking of the Premises in condemnation proceedings or by any right of eminent domain, this Lease shall terminate on the date of the taking and the Annual Rent shall be prorated to the date of the taking. For purposes of this Section 8.02, a "constructive total taking" means a taking of so much of the Premises that the remaining portion is not, in the reasonable judgment of Tenant, adequate (including consideration of reasonable access and parking, including any reasonable substitute parking provided by Landlord) by Tenant for the same purpose as before such taking or a taking of thirty percent (30%) or more of the Premises during the last three (3) Lease Years of the Term. Notwithstanding the termination of this Lease provided for in the immediately preceding sentence, the award or awards for such taking shall be distributed to the parties in proportion to the value of their respective interests in the Premises and the improvements

constructed thereon. In any proceedings concerning a taking, the parties shall represent their own interests and shall present and prosecute their own claims for damages insofar as possible. If the parties are not permitted to proceed as separate parties, they shall jointly select counsel to present and prosecute their claim, and all costs thereof shall be paid by the parties in proportion to the amount of the award, settlement or sale proceeds that each receives.

(b) If there is less than a total taking or constructive total taking of the Premises, this Lease shall terminate as to the portion of the Premises so taken and Annual Rent shall be adjusted proportionately, and the definition of Premises shall be adjusted accordingly. Tenant shall promptly restore, repair, replace and rebuild the remaining portions of the Building to substantially their former condition or with such additions or alterations as Tenant may elect to make in conformity with Article VII. Notwithstanding the termination of this Lease as to the portion of the Premises taken, the award or awards for such taking shall be distributed to the parties in proportion to the value of their respective interests in the Premises and the improvements constructed thereon.

(c) Each of Landlord and Tenant reserves the right to contest the taking and the amount of the award to Landlord and to Tenant, respectively. Landlord and Tenant shall cooperate in the prosecution of any claim for damages arising by virtue of any proceeding described in this Section 8.02. Any apportionment of the final award or settlement of damages entered into by Landlord and Tenant shall be binding upon the parties. If no such apportionment is made, the parties shall agree on the value of their respective interests and distribution shall be made in accordance with such agreement. In the event Landlord and Tenant are not able to agree on the value of their respective interests, then the parties shall mutually select a third-party appraiser or other qualified person who shall determine the value of the respective interests. Landlord and Tenant agree to be bound by such third party's decision. For any taking involving only a portion of the Land, and not the Building, the entire award shall be the property of Landlord.

8.03 Rent on Termination. In the event of any termination of this Lease, or any part thereof, as a result of any such taking, Tenant shall pay to Landlord all Annual Rent and all Additional Rent and other charges payable hereunder with respect to that portion of the Premises so taken with respect to which this Lease shall have terminated justly apportioned to the date of such termination. In the event that this Lease is not terminated as a result of such taking, Tenant's obligations under this Lease shall continue in full force and effect, and from and after the date of delivery of possession to the condemning authority pursuant to the taking, Annual Rent shall be adjusted so that the Annual Rent after delivery of possession to the condemning authority pursuant to the taking shall be in an amount equal to the product of (i) Annual Rent immediately prior to the date of delivery to the condemning authority multiplied by (ii) a fraction, the denominator of which is the number of square feet contained in the Land immediately prior to the delivery of possession to the condemning authority and the numerator of which is the number of square feet contained in the Land immediately after the delivery of possession to the condemning authority.

ARTICLE IX

INSURANCE

9.01 Tenant's Insurance. (a) From the date Tenant commences the construction or installation of the Building, Tenant shall maintain, without expense to Landlord, all risk coverage insurance on the Building, all Tenant Improvements, additions made to the Premises after initial completion, and all of Tenant's furniture, fixtures and equipment in the Premises, in an amount equal to one hundred percent (100%) of the replacement cost thereof, excluding foundations and excavation costs (and Tenant shall cause its contractor to maintain full builder's risk coverage during construction); and the policy for insurance shall name Tenant or its lender as loss payee. Tenant shall bear the entire risk of loss with respect to the Premises and all improvements and personal property located thereon or therein, and Landlord shall have no responsibility for same. Tenant's obligations to restore the Premises in the event of a casualty or condemnation shall not be diminished by the failure of Tenant to maintain the insurance required hereunder. Tenant shall also maintain all risk coverage insurance on its merchandise.

(b) From the date of this Lease, Tenant shall, at its own expense, maintain a policy or policies of commercial general liability insurance with the premiums thereon fully paid

to be a waiver by Landlord of any of its rights under this Lease. Further, it is covenanted and agreed that no waiver at any time of any of the provisions hereof by Landlord shall be construed as a waiver of any of the other provisions hereof and that a waiver at any time of any of the provisions hereof shall not be construed as a waiver at any subsequent time of the same provisions. The consent or approval by Landlord to or of any action by Tenant requiring Landlord's consent or approval shall not be deemed to waive or render unnecessary Landlord's consent or approval to or of any subsequent similar act by Tenant.

Section 23. Holding Over. In the event Tenant remains in possession of the Premises after the expiration or termination of this Lease without the execution of a new lease, then Tenant, at Landlord's option, shall be deemed to be occupying the Premises as a tenant at will at a base rental equal to one hundred fifty percent (150%) of the rent then in effect and shall otherwise remain subject to all the conditions, provisions and obligations of this Lease insofar as the same are applicable to a tenancy at will. No holding over by Tenant after the expiration or termination of this Lease shall be construed to extend the term or in any other manner be construed as permission by Landlord to hold over. Tenant shall indemnify Landlord (y) against all claims for damages by any other tenant to whom Landlord may have leased all or any part of the Premises effective upon the termination or expiration of this Lease, and (z) for all other losses, costs and expenses, including reasonable attorneys' fees, incurred by reason of such holding over.

Section 24. Attorneys' Fees and Other Expenses. In the event either party hereto defaults in the faithful performance or observance of any of the terms, covenants, provisions, agreements or conditions contained in this Lease, the party in default shall be liable for and shall pay to the nondefaulting party all expenses incurred by such party in enforcing any of its remedies for any such default, and if the nondefaulting party places the enforcement of all or any part of this Lease in the hands of an attorney, the party in default agrees to pay the non-defaulting party's reasonable attorneys' fees in such connection.

Section 25. Eminent Domain. If all or any part of the Premises shall be taken by condemnation or under threat of condemnation, either Landlord or Tenant, at its option, may terminate this Lease. If Landlord or Tenant does not so terminate this Lease, then this Lease shall continue in full force and effect as to the remainder of the Premises not taken. Landlord shall be entitled to any and all condemnation proceeds for the taking of the Premises.

Section 26. Landlord's Entry. Landlord may enter in and upon the Premises from time to time to inspect same, to show same to prospective purchasers or, during the last ninety (90) days of the term, tenants and for any other purposes, provided that such entry (except in the case of emergency) shall be made only during reasonable business hours and in a manner so as not to unreasonably interfere with Tenant's use of the Premises.

Section 27. Notices. All notices required or permitted hereunder shall be in writing and may be given or served by depositing such notice with the United States postal service, certified mail with return receipt requested, postage prepaid, or by delivering same in person, addressed as follows:

