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CAM COSTS, CAPS, AUDITS AND NEW IDEAS: THE VIEW FROM BOTH SIDES OF THE TABLE

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1. Operating Costs Definition.

The definition of Operating Costs¹ determines what types of common area maintenance or similar expenses are recoverable by a landlord from its tenants. Landlords generally want the Operating Costs definition to be as broad as possible, including all costs and expenses relating to or arising from the ownership, operation, maintenance, repairing, insuring and inspecting of the shopping center and any on and off-site improvements serving the shopping center. To the extent possible, landlords also want the area for which Operating Costs are reimbursed to include all portions of the shopping center, not just the common areas.

A landlord favorable definition of Operating Costs might read as follows:

"Operating Costs" is defined as all costs, expenses and liabilities of every kind and nature incurred by Landlord for maintenance, operation, repair, replacement, protection, policing, managing, equipping, lighting, painting, landscaping, insuring and cleaning the Common Areas and all other portions of the Shopping Center, including all on or off-site facilities and utilities currently existing or hereinafter constructed serving the Shopping Center or required to be maintained by the Shopping Center, including without limitation, costs, expenses, and liabilities relating to: (a) parking areas, sidewalks and utility facilities; (b) any and all insurance, including without limitation, insuring all improvements, liability insurance, including without limitation, bodily injury, property damage, workers compensation, rent loss insurance and all other insurance carried by Landlord from time to time, including costs of deductibles or self insured retentions; (c) water and sewer facilities; (d) storm water drainage; (e) marketing costs and expenses; (f) property owners association charges or fees; (g) lighting, including without limitation, related electricity costs; (h) trash removal, including without limitation, trash compactors existing or subsequently installed; (i) security, if any; (j) utility costs and expenses; (k) roofs of the improvements and buildings at the Shopping Center; (l) reasonable reserves; (m) holiday or seasonal decorations; (n) snow and ice removal; (o) marketing costs and expenses; (p) Common Area pest control; (q) landscaping, including without

¹ Note: the terms "Operating Costs" and "CAM Charges" are used interchangeably herein.

limitation, sprinkler systems; (r) rental expenses and depreciation applicable to owned equipment or machinery used in maintenance or operation of the Shopping Center; (s) taxes or fees payable by Landlord for any pylons, equipment or other facilities; (t) a fixed administrative fee in the amount of fifteen percent (15%) of the total Operating Costs (exclusive of reserves); (u) Shopping Center signage, including without limitation, related electricity costs; and (v) compensation, including without limitation, salaries, insurance, unemployment and social security taxes for personnel managing, maintaining, operating or providing services relating to the Shopping Center.

If the Shopping Center or any part thereof is enclosed or includes any enclosed common areas, then the definition of Operating Costs should also expressly include air conditioning, heating, fire protection and ventilation, maintenance, operation, repair, replacement, protection, policing, managing, equipping, lighting, painting, landscaping, insuring and cleaning of the enclosed areas, facilities and equipment, including without limitation, floors, lighting, ceilings and common area sprinklers.

Note that if the landlord intends to pass through the costs and expenses of the roof, exterior walls and foundations, and if the definition of Operating Costs simply includes the operation, ownership, etc., of the "common areas," the landlord will need to expressly include the roof, exterior walls and foundations in Operating Costs, as these do not constitute actual common areas.

Tenants generally want the definition of Operating Costs to be as narrowly tailored as possible. A tenant favorable clause will include only the reasonable costs and expenses actually incurred by a landlord relating to the operation, maintenance and repair of the common areas of the Shopping Center. Tenants generally do not want the term "replacement" included, as tenants do not want to pay for capital improvements to the shopping center. Landlords generally resist removal of this term. Alternatively, this issue can be addressed in the exclusions with respect to capital expenditures. Additionally, tenants want the area for which the tenants are being charged to include only areas used in common by all tenants of the shopping center, exclusive of any leasable areas and areas not for common use.

A favorable definition of Operating Costs for a major tenant might read as follows:

"Operating Costs" is defined as the reasonable costs and expenses, excluding any duplication, incurred and paid by Landlord in the ordinary and necessary operation, maintenance and repair of the Common Areas. Operating Costs shall be determined in accordance with generally accepted accounting principles on the accrual method of accounting consistently applied.

This definition should be accompanied by a list of exclusions from Operating Costs, as discussed below. The tenant's ability to obtain exclusions will be the result of the desirability of the shopping center and the credit and size of the tenant.

2. Exclusions.

Depending upon the definition of Operating Costs, the Tenant will want express exclusions from the Operating Costs. An example of a tenant favorable list of exclusions for a major tenant might read as follows:

Notwithstanding the foregoing, Operating Expenses will not include:

1. Any excess premiums for insurance coverage arising or resulting from extra-hazardous activities of any tenant or occupant of the Shopping Center, or their agents, employees or contractors, other than Tenant;
2. Costs or expenses arising from failure by Landlord to timely pay bills or other obligations, including without limitation, any late charges, penalties or interest relating thereto, except to the extent arising from default of Tenant;
3. Except to the extent Tenant is required to pay Taxes under a Section of the Lease, governmental charges, taxes, assessments of any kind or any income taxes, including without limitation, Landlord's franchise taxes or margin taxes;
4. The cost of, or any related amortization or depreciation of the cost of, acquiring, constructing, remodeling, refurbishing or expanding the Shopping Center or any portion thereof, including without limitation buildings, improvements, common areas, parking areas or any related facilities or services;
5. Costs or expenses arising from any bad debt of Landlord;
6. Reserves of any kind or nature;
7. Costs or expenses payable by any tenants or occupants directly to third parties;
8. Costs or expenses of leasehold improvements, leasing commissions, lease negotiations, advertising, brokerage commissions, architectural or engineering services;
9. Costs or expenses related to any leasable area in the shopping center, including without limitation, relating to any maintenance or repair, renovations, remodeling or costs incurred in obtaining new tenants or keeping existing tenants;
10. Costs or expenses arising from the negligence or willful misconduct of Landlord or any tenant or other occupant other than Tenant, or their agents, employees or contractors;
11. Costs or expenses arising from the breach by Landlord of this Lease or any other lease with any other tenant or occupant in the Shopping Center;
12. Capital expenditures;
13. Any costs or expenses relating to any loan, lien or mortgage encumbering all or any portion of the Shopping Center, including without limitation, any principal, interest, amortization, fees or other payments relating thereto, or any mortgage taxes or expenses;
14. Costs or expenses arising in connection with disposition of all or any portion of the Shopping Center, or any improvements located thereon;
15. Costs or expenses of compliance with any court orders, judgments, court decrees, governmental laws, rules, regulations, codes or other governmental requirements, including without limitation, "The Americans with Disabilities Act;"

16. Cost of clean-up, removal, abatement or other remediation of any Hazardous Substances located on or about the Shopping Center, including without limitation, any improvements thereto, any governmental charges, penalties or impositions relating to or arising out of Hazardous Substances or the cost of compliance with any governmental ordinance, rule, law, regulation or requirement regulating or relating to any Hazardous Substances;
17. Any amounts: (a) reimbursed by eminent domain proceeds or settlements, insurance proceeds or settlements; (b) reimbursed pursuant to any warranties; (c) otherwise received from any other tenant(s) or occupant(s) of the Shopping Center; or (d) which Landlord would likely have obtained if Landlord had pursued its rights with diligence or had maintained insurance required to be maintained under this Lease;
18. Costs or fees relating to any merchants' associations or similar types of associations;
19. Costs or expenses applicable to any additional or special services rendered to other tenants or occupants of the Shopping Center not rendered to Tenant;
20. Salaries or benefits of any employees or officers of Landlord of higher rank than manager of the Shopping Center, or the costs of employees not located on-site or overhead expenses not directly related to the Shopping Center;
21. Any costs or expenses arising from violations by Landlord or any other party other than Tenant of any governmental ordinance, law, rule, regulation or requirement, including without limitation, any penalties, fees, interest or fines arising from such violation(s);
22. Costs, rent or other payment amounts due or arising under any ground lease, master lease or sale/leaseback transaction;
23. Costs or expenses arising from or related to any audits except to the extent incurred in generation of Operating Costs statements;
24. Costs or expenses arising as a result of improper or faulty construction, defective workmanship, defective components or equipment, design defects, or latent defects, including any maintenance, repairs or replacements relating thereto;
25. Costs of insurance for liability or personal property covering or insuring any leasable space, other than the Premises, whether or not such leasable space is occupied;
26. Costs or expenses of enforcing, amending, terminating or extending any leases or occupancy agreements, or any obligations of any tenants or occupants under leases or occupancy agreements, including without limitation, attorneys' fees or court costs relating thereto;
27. Duplications of Operating Costs;
28. Management fees, administrative charges, or similar charges; or
29. Profits or sums paid to affiliates, subsidiaries or other related entities of

Landlord to the extent exceeding the market cost of any such materials or services.

Landlords prefer that Operating Costs exclusions be as narrow as possible. The exclusives list can be very heavily negotiated. Discussion of exclusions relating to capital expenditures, management fees, wages, salaries, benefits and green cost allocations are set forth below:

a. Capital Expenditures: Landlords generally want capital expenditures to be fully included in recoverable Operating Costs. The landlord's view is that capital expenditures help to maintain a high quality shopping center, reduce the expense repairs and directly benefits tenants. Tenant's view is that capital expenditures are expenses of ownership representing investments in the shopping center. One compromise position to the capital expenditures issue is to include only depreciation of capital expenditures amortized over a specified period of time or the item's useful life, not the capital expenditures itself. Another approach is to include a pass-through of depreciation relating to specific items which are of concern to the landlord. For example, the landlord and tenant could agree to pass through the depreciation of repaving of the parking lot. The tenant may not want this capital expenditure pass-through to occur more than once every specified number of years. Additionally, the landlord will want to pass through the depreciation of capital expenditures on equipment which will reduce the Operating Costs of the shopping center. Depending upon the size of the tenant and the tenant's credit, the tenant may take a strong stance on not assuming any pass through of replacement or capital repairs to the roof, the foundation or the structural elements of the shopping center. These are generally considered by tenants to be landlord obligations. However, many landlords will, at a minimum, want to pass through non-capital repairs of these items, especially roof repairs.

b. Management Fees: The landlord will want the management fee to be as high as possible, and may want to charge an administrative fee in addition to the management fee, especially if the landlord has a management company, other than the landlord, managing the shopping center. A broadly worded definition of Operating Costs may allow the landlord to capture both a management fee and an administrative fee, unless expressly excluded. The landlord generally requires a management fee that is a percentage of all of the Operating Costs. Depending on the size and nature of the center, this range is generally from five percent (5%) to fifteen percent (15%). Fifteen percent (15%) is considered to be high by most tenants. Depending on the tenant's negotiating leverage, tenants want the management fee to be a percentage only of controllable, not uncontrollable, costs. If there is both a management fee and an administrative fee, the tenant will not want to pay a percentage of the administrative fee in the management fee.

c. Wages, Salary and Benefits: The landlord will want to pass through all costs of management of the shopping center. The tenant will want to limit the salary, wages and benefits to positions not higher than shopping center manager, and will want those to be passed through only to the extent the applicable personnel are devoted to management of the shopping center.

d. Green Cost Allocation: The move toward green leasing has not been as great as anticipated in the retail real estate market. There may

be an increase in this area with increased economic health. Currently, absent a tenant policy of sustainability, tenants are generally unwilling to pay for the initial costs of certification. Accordingly, retail developers are reluctant to incur costs that cannot be recovered. To see landlord favorable language for pass-throughs of repairing, replacing and re-commissioning and certifying buildings to comply with the various sustainability ratings you may wish to refer to BOMA International's "Lease Guide, Guide to Writing a Commercial Real Estate Lease, Including Green Lease Language," published in 2008.

A landlord may seek to pass through the costs of reporting and compliance with respect to green certification, but not pass through the cost of initial certification itself. Moreover, if the landlord expenditures result in reduction in Operating Costs to tenants, then it is reasonable for the tenants to pay for equipment that results in such cost reductions. In the case of capital expenditures, such costs can be amortized over the useful life of the equipment. The cost of amenities, such as bike racks, which do not result in a cost reduction to the tenant, are the subject of negotiation. The negotiations generally revolve around who benefits from the green certification, the landlord or the tenant. The tenant's position is that the certification allows the landlord to more easily lease the shopping center. However, if the tenant has a policy of sustainability, then that policy can be useful to a tenant from a marketing perspective. This type of a policy will likely make a tenant more willing to partner with the landlord in the certification and sustainability costs.

To the extent that governmental codes require a green certification, the landlord's position for cost recovery is strengthened, as such expenditures are costs of doing business in the impacted market.

3. Pro Rata Share:

The pro rata share is generally expressed as the percentage derived from a fraction. The pro rata share calculation should be stated with particularity. A typical pro rata share provision might read as follows:

Tenant's Pro Rata Share will be a fraction, the numerator of which is the total number of leasable square feet located in the Premises, and the denominator of which is the total leasable square feet located in all of the buildings located within the Shopping Center, whether or not occupied.

There is frequently a definition contained in the Lease as to what constitutes leasable square feet, and some difference of opinion as to whether non-sales areas, such as mezzanines and basements, should be included in the numerator. Additionally, landlords will want to include a tenant's exclusive patio space in the numerator. High credit tenants may be able to resist this inclusion.

The tenant will require clarification that the denominator includes all square footage, whether or not such space is occupied. The tenant's initial pro rata share is generally also stated in the lease. Some tenants require the landlord to represent the number of leasable square feet contained in the shopping center as of the date of the lease.

In the event that the shopping center is a mixed use property, it may be appropriate to allocate the different common areas to different types of uses. For example, the lobbies, elevators and hallways in office space or residential space may not be used by the retail tenants. Accordingly, such

common area costs could be allocated solely to the office or residential tenants, and not the retail tenants. Other common areas may be used by all of the different property uses, and should be allocated to all such uses. In such circumstances, the lease would contain a common area definition allocated to all of the uses, and a specific common area definition such as the "Retail Common Areas." The retail common areas would include the number of square feet of retail space in the shopping center.

The issue of removal of buildings or removal of leasable square feet from the shopping center affects the amount of the pro rata share. If a building or leasable square footage of the shopping center is removed, the landlord will want the tenant's pro rata share to increase to pick up the additional Operating Costs. The landlord wants to ensure that all of the Operating Costs for the shopping center are allocated to the remaining tenants. If one tenant is not required to increase its pro rata share when leasable square footage is removed from the shopping center, the landlord may have Operating Costs that cannot be fully passed through to the tenants. The tenant, on the other hand, is concerned about paying for a disproportionate share of the square footage of the common areas, which depending upon the size of the shopping center, could include common areas that are not used by the tenant's premises. Accordingly, if possible, the tenant will want to limit the increase in the tenant's pro rata share to a specified percentage increase, or possibly to a maximum percentage of the Operating Costs. This ability is usually limited to major tenants. Such a limitation might read as follows:

Notwithstanding anything to the contrary, Tenant's Pro Rata Share of Operating Costs will not exceed _____% of the total amount of the Operating Costs for the Shopping Center, exclusive of any items excluded under Section ___ of this Lease.

However, the tenant will want to make sure that if the leasable square footage increases, the tenant's pro rata share decreases. Frequently a landlord will require the increase and decrease of the tenant's pro rata share to be reciprocal.

4. Exclusions From Pro Rata Share.

a. Anchor Tenants/Department Stores: Depending upon the desirability of the shopping center, landlords may require exclusion of department stores or anchor tenants from the denominator of the pro rata share calculation. Frequently this exclusion is an express exclusion of department stores. Alternatively, the exclusion may simply be of all anchor tenants equal to or in excess of a specified leasable square footage, such as 80,000 or 100,000 leasable square feet.

In the event of such exclusions, the non-excluded tenants will be subsidizing the excluded tenants' Operating Costs. If such department store or anchor tenant makes contributions to Operating Expenses, landlords will generally agree to credit those contributions against the tenant's pro rata share of Operating Costs. Tenants try to insert a floor on the exclusion, so that the denominator in the pro rata share calculation does not fall below 80% to 90% of the actual gross leasable square footage of the shopping center.

b. Outlots. Outlots which maintain their own common areas are frequently excluded from the denominator of the pro rata share calculation. The tenant should inquire whether the common areas of

the applicable outlots are self-sufficient. For example, some outlots are not self-parked under applicable codes, but require parking located off of the outlot to meet code parking requirements. In such cases, the outlot tenant should be paying for the extra parking required for such outlot's use.

c. Other Exclusions. Other exclusions may be made for certain tenants to the extent of a specified type of maintenance performed and paid for by such tenants. For example, a tenant may pay its own insurance costs, in which event the tenant's leasable area would be excluded solely for purposes of such costs. If this is done in an equitable manner, it should be acceptable to the tenant.

5. Annual Operating Costs Statement and True Ups.

The lease should provide for delivery of a statement setting forth the actual Operating Costs for the applicable calendar year, fiscal year or the twelve (12) month period over which Operating Costs are calculated. The lease generally provides for delivery of such statement within a specified period of time after expiration of the applicable twelve (12) month period. The tenant may want the statement to contain reasonable specificity as to the charges and to be certified as accurate and complete by an officer of the landlord.

Major tenants may request from certain landlords supporting documentation. Certain major tenants may be able to obtain a DVD containing all supporting documentation for the applicable Operating Costs. Other landlords may not be equipped to provide such form of supporting documentation.

The landlord and the tenant will have different opinions as to the timing of delivery of the statement of actual Operating Costs. Tenants may require receipt of the statement as soon as sixty (60) days after expiration of the applicable calendar or fiscal year to which Operating Costs apply. Landlords may require up to one hundred fifty (150) days from expiration of such period.

The lease should contain a provision for repayment of any overpayments of the estimated Operating Costs by the tenant or payment of the balance of any underpayment of Operating Costs by the tenant within a specified period of time after delivery of the landlord's statement of actual Operating Costs. The tenant will be required to pay any underpayment within a specified period of time. The landlord will be required to refund any overpayment, or, at the landlord's option, the landlord sometimes retains the right to apply any overpayment to estimated Operating Costs or to rent next coming due under the lease. Such provision might read as follows:

If for any calendar year Tenant's Estimated Operating Costs collected for the prior year, as a result of payment of Tenant's Estimated Operating Costs, are in excess of Tenant's Operating Costs actually due during such prior year, then, so long as Tenant is not in default hereunder, Landlord shall refund to Tenant any overpayment, or, at Landlord's option, apply such amount against rental due or to become due hereunder. Likewise, Tenant shall pay to Landlord, on demand [**Alternative:** within thirty (30) days from receipt of written demand for same], any underpayment with respect to the prior year, which obligation of Tenant shall survive the expiration or earlier termination of this Lease.

The landlord should require a time limit after which the tenant's right to dispute Operating Costs automatically terminates. Landlords can try to limit such timeframe to as little as sixty (60) days after delivery of the Operating

Costs reconciliation statement. Tenants may request up to three (3) years for such limitation to apply.

Additionally, tenants should request that any Operating Costs not included in the Operating Costs reconciliation statement are waived, or at a minimum provide for a timeframe after which any such Operating Costs which are not included are waived. This would limit the landlord's ability to later recover Operating Costs which the landlord omitted from the Operating Costs reconciliation statement.

6. CAM Caps.

a. Controllable vs. Uncontrollable:

- i. The basic definition is typically: "All CAM Charges other than the costs of taxes, insurance and utilities."
- ii. Other possible uncontrollable costs are:
 - snow and ice removal;
 - security;
 - union labor costs and increases in minimum wage/prevaling; market wage;
 - costs of complying with new laws;
 - catch-all: "anything else that is not within Landlord's control."
- iii. One negotiated point is the possible requirement (imposed by the tenant) that certain uncontrollable costs (e.g., security) must be competitively bid to be excluded from the cap.
- iv. Another negotiated point is whether certain costs (e.g., security) can be considered "uncontrollable" only to the extent that there is an increase in the scope of services.

b. Types of Caps:

i. Year-to-year.

Notwithstanding the foregoing, (a) the Common Area Maintenance Charge shall not exceed \$ _____ per month during the first Lease Year, and (b) Controllable CAM Charges shall not increase in any subsequent Lease Year by more than 1.05 times the Controllable CAM Charges for the preceding Lease Year.

Note: From Landlord's perspective, beware of caps based on first year's expense. First year's expenses may be abnormally low because less maintenance is required as to new construction.

Note: Definition of lease year may be relevant as to cap as to first year's CAM costs if the lease year is abnormally long (e.g., first January 31 following the first anniversary of the lease term).

ii. Cumulative.

Notwithstanding any provision to the contrary, in computing the amount of Common Area Maintenance Charges for 2010 and each following year during the Term, the amount of

Controllable CAM Charges shall not exceed the amount of Controllable CAM Charges for the year 2009 increased at the rate of 5% per annum computed on a cumulative (but not compounding) basis. For example, if actual Controllable CAM Charges increase by 3% in 2010, increase by 4% in 2011 and 9% in 2012, the difference between the maximum 5% increase and the actual 3% (in 2010) and 4% (in 2011) may be carried forward to be used in future years, and the amount of Controllable CAM Charges that Tenant must pay pursuant to this Lease shall be limited to a 8% increase in 2012.

iii. Cumulative and Compounding.

Notwithstanding any provision to the contrary, in computing the amount of Common Area Maintenance Charges for 2010 and each following year during the Initial Term and for each year of any Renewal Term following the first year of such Renewal Term, the amount of Controllable CAM Charges shall not exceed the amount of Controllable CAM Charges for the year 2009, as to the Initial Term, or the first year of the Renewal Term, as to any Renewal Term, increased at the rate of 5% per annum computed on a compounding and cumulative basis (e.g., if the Controllable CAM Charges for the year 2009 are equal to \$1,000.00, then (i) the Controllable CAM Charges for the year 2010 shall be no more than \$1,050.00, (ii) the Controllable CAM Charges for the year 2011 shall be no more than \$1,102.50, and (iii) the Controllable CAM Charges for the year 2012 shall be no more than \$1,157.63).

c. Disguised Caps:

i. Most Favored Nation Clause.

Landlord covenants to Tenant that, with respect to any lease in the Shopping Center existing as of the date hereof, and any lease which may be executed hereafter, CAM Expenses shall not include any cost which is excluded in any other such lease, whether by virtue of an exclusion to CAM Expenses or a cap on CAM Expenses. If Landlord breaches this provision, then Landlord shall be obligated to enter into a written modification of this Lease with Tenant in order to modify Tenant's Lease to make it comparable to that of the lease with the more favorable terms. This Article's provisions are expressly limited to CAM Expenses payable by Tenant

ii. Exclusion from CAM similar to the following: "Costs for which a tenant, operator or owner other than tenant does not pay a pro rata share." This may be subject to dispute in an audit if another tenant does not have to pay certain costs because they exceed that other tenant's cap.

7. Audit Rights.

a. Pro Tenant Example:

Tenant reserves the right to inspect and audit Landlord's records with respect to Common Area Maintenance Costs and to set forth specific objections thereof. If such inspection and audit reveals charges of

Common Area Maintenance Costs were overstated, Landlord shall remit the overstated amount to Tenant with interest from the date of overpayment to Landlord until the date paid to Tenant at the Interest Rate which sum shall be paid, with interest as aforesaid, within fifteen (15) days of demand therefor. In addition, if such overstated amount equals or exceeds three percent (3%) of the entire Common Area Maintenance Costs for that calendar year, Landlord shall also pay the reasonable costs of such inspection and audit to Tenant with such payment. Tenant may, after the expiration of such fifteen (15) days (and without any additional notice or cure period), withhold any and all installments of Annual Minimum Rental, Additional Rental and other charges payable by Tenant pursuant to this Lease and apply the same to the payment of such indebtedness.

b. Pro Landlord Example:

Provided that there does not then exist an Event of Default hereunder, Tenant may contest the CAM Expense statement by providing written notice to Landlord within X months after Tenant receives such statement. If no such contest is made by written notice to Landlord, delivered within such X-month period, such CAM Expense statement shall be binding upon Tenant in all respects. If Tenant timely contests such CAM Expense statement, Tenant shall have the right to inspect and examine, at reasonable times during normal business hours, Landlord's books of account and records pertaining to the CAM Expenses, all at Tenant's sole cost and expense. Such audit shall be conducted at the offices of the Building manager where such records are kept within thirty (30) days after the date of Tenant's notice and shall not be conducted at a time or in a manner so as to interfere with Landlord's operations. Such audit shall be conducted by a certified public accountant retained by Tenant, at its expense, whose compensation is not contingent upon the results of such accountant's audit or the amount of any refund received by Tenant. Tenant shall notify Landlord of the results of such audit in writing. Landlord may have an agent or employee present during such inspection and audit. Landlord shall have the right to dispute the results of Tenant's audit. Any such dispute shall be resolved by an certified public accountant mutually acceptable to Landlord and Tenant, or if Landlord and Tenant cannot agree on the identity of any such accountant, an accountant selected by the American Arbitration Association in accordance with its then current rules and regulations applicable to commercial arbitration. If the audit by Tenant shall ultimately result in Landlord and Tenant agreeing that Tenant has overpaid Landlord for its share of CAM Expenses, such overpayment shall be applied to the next accruing installment(s) of Additional Rent due from Tenant, as set forth in paragraph of this Agreement, until such credit is depleted. Tenant hereby agrees to keep the results of any such audit confidential, and to require Tenant's auditor and its employees and each of their respective attorneys and advisors to likewise keep the results of such audit in strictest confidence. In particular, but without limitation, Tenant agrees that: (i) Tenant shall not disclose the results of any such audit to any past, current or prospective tenant of the Shopping Center, and (ii) Tenant shall require, that its auditors, attorneys and anyone associated with such parties shall not disclose the results of such audit to any past, current or prospective tenant of Landlord in the Building; provided, however, that Landlord hereby agrees that nothing in items (i) or (ii) above shall preclude Tenant from disclosing the results of such audit in any judicial or quasi-judicial proceeding, or pursuant to court order or discovery request, or to any current or prospective

assignee or sublessee of Tenant, or to any agent, representative, or employee of Landlord who or which request the same.

c. Common Issues:

- i. Who performs the audit? Use of tenant's employees v. independent CPA? Contingency fee auditor?
- ii. Confidentiality concerns--exceptions regarding prospective lenders and purchasers and disclosure in connection with litigation.
- iii. Landlord's obligation to pay the cost of Tenant's audit.
- iv. Landlord's right to dispute results of audit and resolution of any dispute.
- v. Finality of CAM statement if Tenant fails to audit within stated time period -- private statute of limitations. Tenant may want the ability to reopen past years' statements outside of the agreed upon limitation period if material or repetitive errors are discovered in later years' audits.
- vi. Provisions to minimize disruption with Landlord's business (e.g., not at year or quarter end or other periods during which Landlord's accounting department is busy).
- vii. Should Landlord be required to provide copies of all invoices outside of an audit by Tenant?
- viii. Payment of interest on overpayments.

8. Audits and Auditors.

- a. According to some CAM auditors, 70%-80% of CAM or Operating Expense statements contain errors.
- b. According to certain CAM auditors, the following are often predictive of errors and overcharges:
 - i. Transfer of the property to a new entity, especially in connection with a portfolio acquisition. New often implement their own accounting practices and methodologies. New owners may not have records of prior lease years. Portfolio owners may be more likely to audit to a "standard" lease rather than to each negotiated lease.
 - ii. Change of property manager.
 - iii. Substantial capital improvements made within the past year.
 - iv. Increased vacancy in the building/center, if there is a "gross up" clause in the lease. Vacancy frequently leads to errors and overcharges as a result of the landlord's process of projecting the building's expenses to reflect what they would have been at full occupancy.
- c. Use of CPA firm vs. CAM Auditor.

d. Desk Audit vs. on-site audit.

9. CAM Takeover Provisions.

a. Pro Tenant Example:

Notwithstanding anything contained herein to the contrary, Tenant reserves the right, for any reason whatsoever, at anytime upon thirty (30) days prior written notice to Landlord (and without any additional notice or cure period) to assume the duties of Landlord to maintain the Common Areas located within Tenant's Self Help Common Area. In such event, Tenant shall not during such period be required to make any contributions to the Common Area costs as hereinabove defined, however, Landlord shall maintain or cause the maintenance of the remaining portions of the Common Area servicing the buildings shown on the Site Plan in accordance with the provisions of this Lease. At any time after Tenant assumes the maintenance of the Common Areas pursuant to the provisions hereof, Tenant may elect for Landlord to reassume such maintenance; in such instance Tenant shall provide not less than thirty (30) days advance written notice of such election and Tenant shall thereafter commence it proportionate share contributions to the Common Area Maintenance Costs as hereinabove provided.

b. Pro Landlord Example:

In the event that Landlord has defaulted in its obligation to maintain and repair the Common Areas in accordance with the terms of Section of this lease and fails to cure such default within ten (10) days [or has repeatedly defaulted in its obligations to maintain and repair the Common Areas], Tenant may assume the duties of Landlord to maintain the Common Areas located within Tenant's Self Help Common Area. Tenant shall be required to maintain and repair the Tenant's Self Help Common Area in accordance with the terms of Section of this Lease. In such event, Tenant shall not during such period be required to make any contributions to the Common Area costs except that Tenant shall be required to continue to pay its pro rata share of those costs relating to Landlord's maintenance of those elements of the Common Areas located outside of Tenant's Self Help Common Area which continue to benefit Tenant (e.g., the cost of maintaining detention ponds if there are no detention ponds located in Tenant's Self Help Common Areas). At any time after Tenant assumes the maintenance of the Common Areas pursuant to the provisions hereof, Tenant may elect for Landlord to reassume such maintenance; in such instance Tenant shall provide not less than thirty (30) days advance written notice of such election and Tenant shall thereafter commence it proportionate share contributions to the Common Area Maintenance Costs as hereinabove provided.

c. Common Issues:

- i.. Unconditional right v. default based right.
- ii. Importance of establishing standard to allow Landlord to meet its obligations as to common areas in favor of other tenants.
- iii. Beneficial component concept - Tenant's obligation to continue to pay its pro rata share of those costs that it will still benefit

from.

- iv. Right to give back CAM function to Landlord.
- v. Tie in to the concept of the flexible definition of pro rata share.

"Tenant's Proportionate Share" shall be a fraction the numerator of which is the total Rentable Area in the Demised Premises and the denominator of which is the total Rentable Area of all buildings in the Shopping Center at the time when the respective charge was incurred (excluding, however, areas leased by Exempt Tenants and areas for which any such real estate charges or insurance expenses, or both, are wholly paid by a party or parties other than Landlord). As used herein, the term "Exempt Tenants" shall mean tenants or owners whose leases or operating agreements do not require such tenants or owners to pay their full pro rata share of real estate charges and/or insurance expenses.

10. Gross Leases to Avoid CAM Disputes.

a. Base year v. stop:

- i. Is base year representative?
- ii. Depoliticizes the definitional aspects of CAM--as long as definition is consistent from one year to the next, no real problems should exist.

b. Fixed CAM. Fixed CAM avoids extensive negotiation with respect to CAM Charges. It is generally stated as a fixed annual amount with an annual escalator. Fixed CAM can result in an overpayment or underpayment by the tenant of actual CAM Charges, so the amount must be carefully evaluated by both the landlord and the tenant prior to execution of the applicable lease.

**Nothing contained in this article
is to be considered as the rendering of legal advice for specific cases,
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