

# Small Business Lease Negotiation Workshop

With Transactional Law Clinics of  
Harvard Law School

Wednesday April 8<sup>th</sup>, 2020

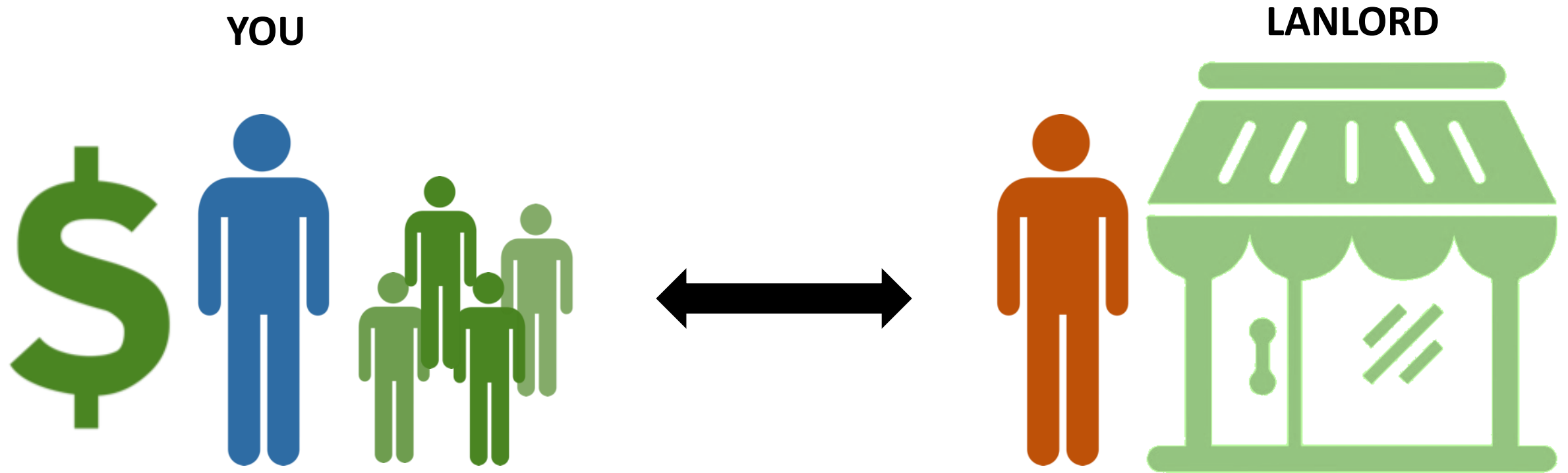
10:00 AM to 11:30 AM





The material in this presentation does not constitute legal advice. This presentation has been produced by students in the Transactional Law Clinics of Harvard Law School and has been prepared as general information about commercial leases. This presentation does not cover all issues related to the topics discussed. The specific facts that apply to your matter may make the outcome different than you might anticipate based on the material presented. Please consult an attorney with regard to your specific circumstances. This presentation is not intended to provide legal advice and, as such, the content does not constitute legal advice. Use of this presentation does not create any lawyer-client relationship between the user and the Transactional Law Clinics of Harvard Law School, or any member thereof.

# What is a Commercial Lease?: The Parties



# Lease Agreement v. Tenancy Agreement

- Commercial Lease Agreement
  - A writing is required; formal
  - All provisions are legally enforceable
  - Usually between 1 to 10 years
- Commercial Tenancy Agreement aka At-Will Agreement
  - No writing is required; informal
  - Many provisions may not be legally enforceable
  - Usually a month to month agreement



# Landlord's Access to Premises

- Commercial Lease Agreement:
  - Refer to the Landlord's Access Provision
  - Should state whether your landlord is allowed to enter the premises, and
  - Whether or not he or she must notify you before doing so and how much time is required.
- Commercial Tenancy Agreement
  - There is usually no provision related to this.
  - But under MA law, a landlord must give you reasonable notice.
  - However, "reasonable" is not defined.



# Commercial vs Residential Leases



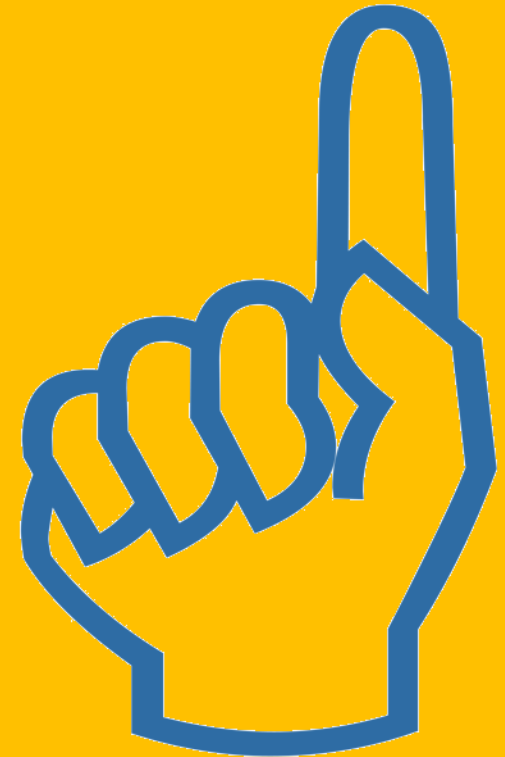
# Three Requirements for Success:

- ☐ Know yourself.
- ☐ Know your landlord.
- ☐ Know your stuff.



# ✓ Know Your Self

- What kind of lease is best suited for your kind of business and risk preference?
- What kind of risks are you comfortable with?
- What kind of monthly bills do you want to have?
- What do you need to receive out of this deal (e.g., parking space)?





# ✓ Know Your Landlord

- Is your landlord hands-on or hands-off?  
What are his or her priorities?
- How to figure this out? Ask and research!
  - Ask other tenants.
  - Search for landlord's information, building department website, past permits.
- Ask for the history of maintenance/repairs:
  - Prior tenant's history of repairs.
  - The most common repairs and their average cost in the area.



# ✓ Know Your Stuff

- The terms of commercial leases are not set in stone. They are negotiable!
- Read the lease, know your rights and obligations, even for snow removal.
- Know what kind of insurance you need to obtain, both for business and the lease.
- Understand the differences between lease options (e.g., net vs. gross leases; options to renew).
- Make sure your business type is appropriate for the building's zoned uses.
- Use available resources like East Somerville Main Streets!



# Types of Rent Payment Arrangements

- **Gross Lease (AKA Full Service Lease)**

- Tenant is responsible only for paying a higher monthly rent.
- Landlord is responsible for paying taxes, insurance, maintenance.

- **Percentage Lease**

- Tenant pays a base rate and percent of gross sales to landlord.
- Common for retail tenants.



# Net Leases — Tenant Responsibilities

	Property Taxes	Insurance	Common Area Maintenance	Building Structure
Single Net (N)	✓			
Double Net (NN)	✓	✓		
Triple Net (NNN)	✓	✓	✓	
“Absolute” Triple Net (AKA Bondable Lease)	✓	✓	✓	✓

- To limit risk, try to negotiate a cap on expenses.

# Things to Think About Before Negotiating



## COMMERCIAL LEASE AGREEMENT

This COMMERCIAL LEASE AGREEMENT ("Lease") is entered into and dated as of [Month] [Date], [Year] ("Effective Date"), between [Landlord's Name] ("Landlord") and [Tenant's Name] ("Tenant").

TENANT:

[Tenant's Name]

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## COMMERCIAL LEASE AGREEMENT

This COMMERCIAL LEASE AGREEMENT ("Lease") is entered into and dated as of [Month] [Date], [Year] ("Effective Date"), between [Landlord's Name] ("Landlord") and ABC Enterprises, Inc. ("Tenant").

TENANT:

ABC ENTERPRISES, INC.

By: *John Doe*

Name: John Doe

Title: President of ABC Enterprises, Inc.

# Things to Think About Before Negotiating



somerville zoning

Search results for "somerville zoning" (About 569,000 results (0.51 seconds))

[www.somervillema.gov/planningandzoning](http://www.somervillema.gov/planningandzoning)

**Planning and Zoning | City of Somerville**

SomerVision and our neighborhood planning projects help us understand the needs of residents, while our **zoning** code aims to keep development aligned with ...

[www.somervillezoning.com](http://www.somervillezoning.com)

**Somerville Zoning Ordinance: Somerville Zoning Ordinance**

Article 14 – Nonconformance Article 15 – Administration. For more information please visit the Planning & Zoning Division at **Somerville** City Hall, 93 Highland ...

[Zoning Overhaul](#) · [Zoning Infographics](#) · [Zoning and Sustainability](#)

[www.somervillezoning.com/zoning-overhaul](http://www.somervillezoning.com/zoning-overhaul)

**Zoning Overhaul – Somerville Zoning Ordinance**

The Zoning Overhaul will generate a completely new zoning ordinance that will replace the existing **Somerville Zoning** Ordinance. The goal is to provide ...

**SomervilleZoning.com**

City of Somerville  
**Zoning Overhaul**

PROPOSED CODE WHAT IS ZONING? ABOUT THE OVERHAUL KEY CHANGES/INFORMATICS EVENTS

**Proposed Code**

Help us reinvent zoning in Somerville

Somerville is rewriting its Zoning Ordinance from the ground up. Your feedback is needed to ensure this new ordinance reflects our community values while being the clearest, most predictable, and user-friendly zoning in the United States.

This page features the current draft of the new Somerville Zoning Ordinance. Like a beta release of computer software, this document will be updated and improved prior to formal submission to the Board of Aldermen later this year. A change log and previous drafts will always remain at the bottom of this page to keep you updated.

To find out what district your property is located in under this new proposal, follow the Zoning Atlas link in the table below or select Zoning Maps under Proposed Code in the menu bar above.

Article 2: Overview & Guide explains how the 'building type' based system of the proposed Ordinance functions, describes each line item from the building type tables, provides instruction for how to measure

Maintained by the City of Somerville's Planning Department

Email us your feedback at: [planning@somervillema.gov](mailto:planning@somervillema.gov)

Language Options

EN ES PT HI

Follow us for regular updates!

The Somerville City Council adopted a new Somerville Zoning Ordinance and Official Zoning Atlas on December 12, 2019.

**SomervilleZoning.com** is the new home of the Somerville Zoning Ordinance and provides a digital copy of the document and Atlas, guidance

**For more information please visit the Planning & Zoning Division  
at Somerville City Hall, 93 Highland Avenue**

# Things to Think About Before Negotiating



## **Somerville City Council, Administration Pass City's First Zoning Overhaul in 30 Years**

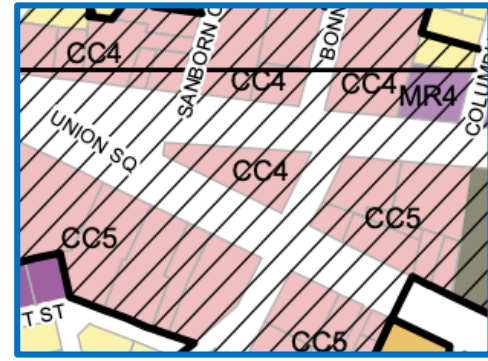
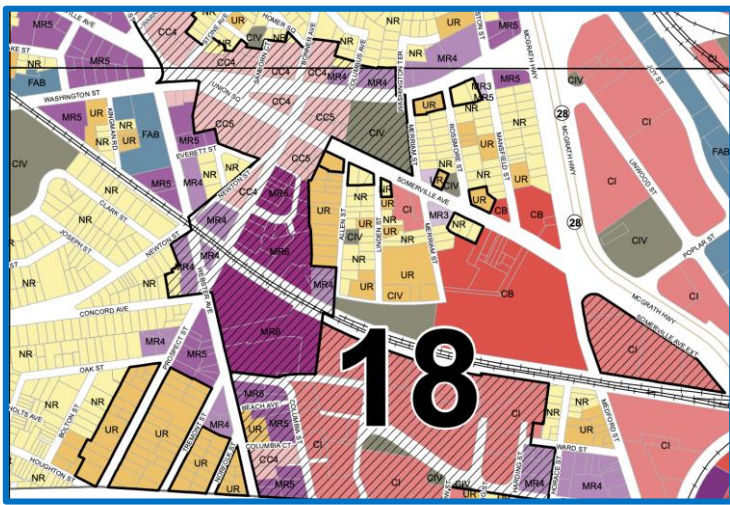
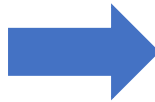
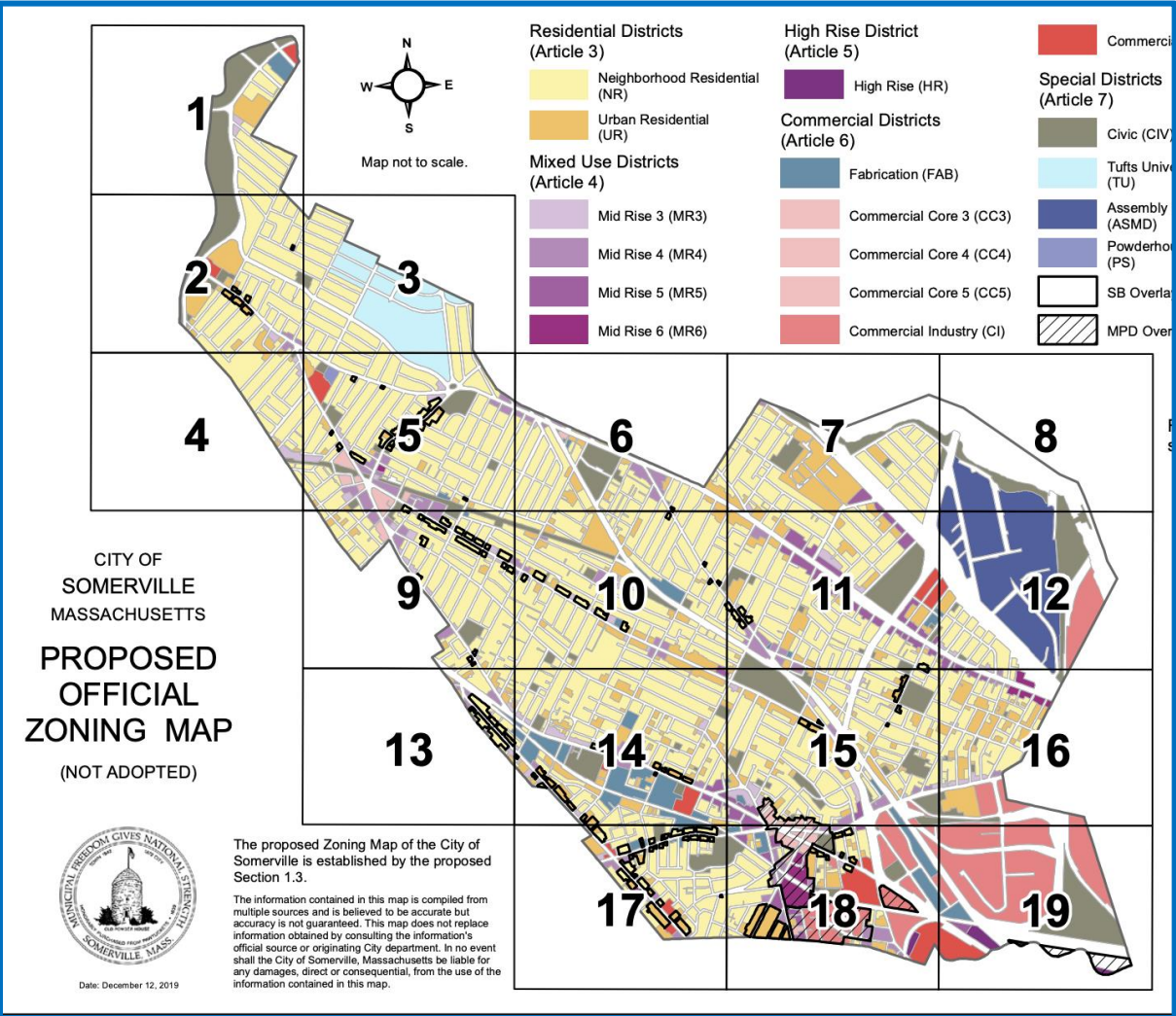
Historic new ordinance uses national best practices to implement SomerVision. Somerville is the first and largest municipality in the Boston metropolitan region to adopt a citywide form-based code.

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Friday, December 13, 2019



# Things to Think About Before Negotiating





# Things to Think About Before Negotiating



## 9. USE PROVISIONS

General



**Table 9.1.1 Permitted Uses**

Use Category Specific Use	NR	UR	MR3	MR4	MR5	MR6	HR	FAB	CC	CI	CB	CIV	Use Specific Standards
<b>Arts &amp; Creative Enterprise</b>													
Artisinal Production	SP	SP	P	P	P	P	P	P	P	P	P	N	§9.2.2.a
Arts Exhibition	N	N	P	P	P	P	P	P	P	P	P	N	§9.2.2.b
Arts Sales or Services	SP	SP	P	P	P	P	P	P	P	P	P	N	§9.2.2.c
Co-Working	N	N	P	P	P	P	P	P	P	P	P	N	§9.2.2.d
Design Services	SP	SP	P	P	P	P	P	P	P	P	P	N	§9.2.2.e
Shared Workspaces or Arts Education	SP	SP	P	P	P	P	P	P	P	P	P	N	§9.2.2.f
Work/Live Creative Studio	N	N	N	N	N	N	N	SP	N	N	N	N	§9.2.2.g

P - Permitted

SP - Special Permit Required

N - Not Permitted

# Things to Think About Before Negotiating



## Contact ^

**Nicholas Antanavica**

Director of Inspectional Services Department

### Hours

**Please note: The service window closes 15 minutes before the office does.**

Monday - Wednesday

8 a.m. - 4 p.m.

Thursday

8 a.m. - 7 p.m.

Friday

8 a.m. - 12 p.m.

### Phone

(617) 625-6600 ext 5600

FAX: (617) 666-2624

### Email

[isd@somervillema.gov](mailto:isd@somervillema.gov)

### Address

Inspectional Services

1 Franey Rd.

Somerville, MA 02145



# Things to Think About Before Negotiating



# Things to Think About Before Negotiating



## Health Licenses

- ☒ Food Establishments
- ☒ Health License Fee Schedule
- ☒ Guide to Excluding and Restricting Food Employees
- ☒ Food Employee Reporting Agreement
- ☒ Dumpsters
- ☒ Pools
- ☒ Body Art
- ☒ Tanning
- ☒ Tobacco
- ☒ Mobile Food
- ☒ Catering
- ☒ Workers Compensation Affidavit
- ☒ Food Plan Review

## Weights & Measures Licenses

- ☒ Scales
- ☒ Oil Trucks
- ☒ Taxicabs
- ☒ Gas Stations

## Special Event Licenses

- ☒ Temporary Food Event Guidelines
- ☒ Public Events
- ☒ Farmers Markets
- ☒ Special Alcohol Licenses
- ☒ Special Farmer Wineries @ Farmers Markets

## Alcohol/Restaurant Licenses

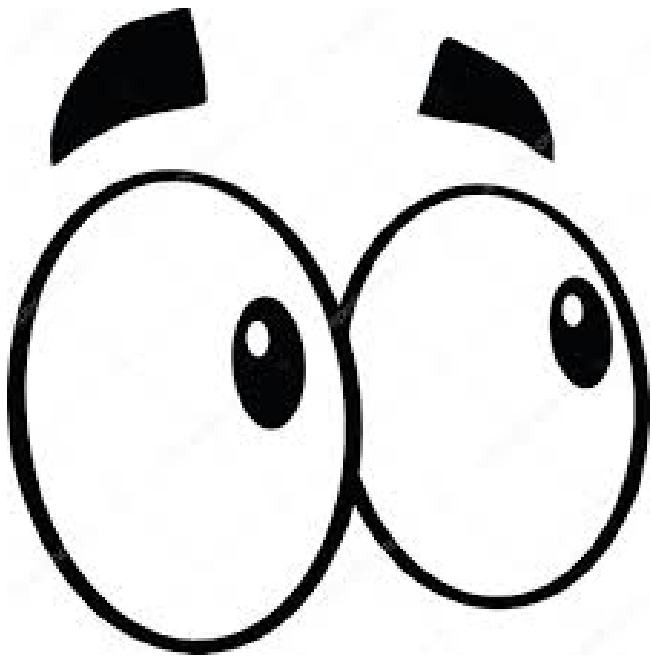
- ☒ Restaurants (with alcohol)
- ☒ Common Victualers (restaurants without alcohol)
- ☒ Farmer Pourers (Breweries, Distilleries, and Wineries)
- ☒ Inns (with alcohol)
- ☒ Inns (without alcohol)
- ☒ Private Clubs (with alcohol)
- ☒ Private Clubs (without alcohol)
- ☒ Educational Institutions (with alcohol)
- ☒ Package Stores
- ☒ Entertainment (without on-premises food services)
- ☒ .....and Amendments to these licenses

## Business Licenses

When applying for these types of licenses select Business License as the license type.

- |   |   |  |
|---|---|--|
| <input checked="" type="checkbox"/> Auctioneers                 | <input checked="" type="checkbox"/> Flammables Storage                  | <input checked="" type="checkbox"/> Osteopaths                                   |
| <input checked="" type="checkbox"/> Automatic Amusement Devices | <input checked="" type="checkbox"/> Fortune Tellers                     | <input checked="" type="checkbox"/> Outdoor Parking Lots                         |
| <input checked="" type="checkbox"/> Billiards                   | <input checked="" type="checkbox"/> Garages for Auto Repair and Storage | <input checked="" type="checkbox"/> Outdoor Seating or Goods on Public Sidewalks |
| <input checked="" type="checkbox"/> Bottle Redemption Centers   | <input checked="" type="checkbox"/> Grants of Location                  | <input checked="" type="checkbox"/> Physicians                                   |
| <input checked="" type="checkbox"/> Bowling Alleys              | <input checked="" type="checkbox"/> Hawker Peddlers                     | <input checked="" type="checkbox"/> Public Events                                |
| <input checked="" type="checkbox"/> Bus Routes                  | <input checked="" type="checkbox"/> Junk Dealers                        |  |

# Things to Think About Before Negotiating



# Things to Think About Before Negotiating



# The Basics of the Agreement

- Parties
- Lease Term
- Rent (Rent Adjustment)
- Security Deposit



# Lease Term

- How long do you need to lease the space?
  - Long Term – Better for established businesses.
  - Short Term – Better for risk averse tenants & start-ups.
- Do I want or need a renewal option?
  - Main benefit: Option to exit with the right to stay
- Will I need time to make initial improvements?





# Rent: Base + Additional Charges

- Base Rent
  - The base rent provision of your lease should make this amount clear.
  - The landlord cannot change this amount unless that ability is written into the lease. See Rent Adjustment on the next slide.
- Additional Charges
  - In addition to the base rent, if you are in a single, double, or triple lease then you may be subject to additional fees.
  - Such fees may be related to paying your portion of the landlord's utility, operating, and real estate tax expenses.



# Rent: Rent Adjustment + Security Deposit

- Rent Adjustments
  - Examine whether your lease allows the landlord to raise your rent either for:
  - (1) increased property taxes, operating costs, utilities, etc.; or
  - (2) exercising your right to renew the lease. There may be a condition that your monthly rent will increase if you exercise this right.
- Security Deposit
  - Money that is given to a landlord prior to move-in that serves as proof of the tenant's intent to move-in and promise to care for the property; usually refundable.



# Scenario: You get a notice of increased rent.

- DO NOT: Ignore the notice
- DO: Read the notice and determine why the rent is being increased
- DO NOT: Sign and return the notice
- DO NOT: Pay increased rent without reviewing your lease and seeking assistance



# Default and Eviction

- If you don't fulfill your end of the lease agreement, you will be in default.
- Can be for non-monetary breaches (e.g., making illegal alterations, unpermitted subleases) or monetary breaches (failure to pay rent).
- Sometimes, lease will require landlord give tenant a notice to cure, giving the tenant the right to fix the problem.
- If found in default, the landlord may have the right to collect all the remaining months' rent at once, called "acceleration."



# What if the Landlord Doesn't Pay the Mortgage?

- If the landlord has a mortgage and fails to pay, the property may be foreclosed. The bank will become the new owner.
- Many leases give the new bank owner the option to cancel the lease. That lease provision is called “subordination.”
- How to get around this? Get a SNDA.
  - Subordination: Tenant agrees to give new owner priority over lease rights.
  - **Non-disturbance:** Tenant has the right to continue operating under the lease, provided that the tenant is not in default.
  - Attornment: The tenant recognizes the new owner as the landlord.



# COVID-19: Evictions and Nonpayment: Federal Eviction Moratorium on “Covered Properties”

On March 27th, the federal government enacted the "CARES Act" which

- Enacted a 120-day moratorium on evictions and fees related to non-payment of rent for covered properties; and
- Enacted a 30 day notice period for nonpayment (overriding the Massachusetts 14 day notice).
  - There is no visible exception for renters who continue to earn income through the crisis.

# COVID-19: What are “Covered Properties”

The term “covered property” means any property that has a

- (i) Federally backed mortgage loan; or
- (ii) Federally backed multifamily mortgage loan.

The definition of “federally backed” includes the following language:

- (B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development . . . or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

# COVID-19: Effects on Massachusetts \$

- Federal Guidance
  - For "covered" residential properties: Massachusetts' 14 day notice is overridden by the federal 30 day notice requirement, and eviction filings will be halted for 120 days
- MA Laws/Guidance
  - **All residential nonpayment cases are stalled until April 22 at the earliest. This means no eviction case will proceed.**
  - **Somerville moratorium, appears to prevent physical action of eviction but not filing in court for it**
  - **Commercial properties don't yet have a comprehensive MA bill that officially establishes a moratorium on evictions, but one is being considered**
    - State relief may be on the way, stay tuned!
  - **MA recommends that all non-essential maintenance should be deferred.**
    - Some municipalities (e.g., Worcester) have already stopped sanitary code enforcement except for immediate dangers to health and safety.



# The Premises

## 2. PREMISES

**2.1 Building; Premises.** The leased premises comprise [number] square feet of [retail or office] space located on the [number] floor of the commercial building (the “Building”) located at [Address] (the “Premises”) together with the right to use in common, with others entitled thereto, the Common Areas (as defined below).

**2.2 Project.** The Building of which the Premises is a part, the Common Areas, the land upon which the Building is located, and all other buildings and improvements thereon or thereunder are herein collectively referred to as the “Project.”

★ **2.3 Condition.** Except as may be otherwise expressly set forth herein, Tenant shall accept the Premises “as is” in their condition as of the commencement of the Lease Term, and Landlord shall be obligated to perform no work whatsoever in order to prepare the Premises for occupancy by Tenant. Tenant, upon delivery of the Premises, shall at its sole cost and expense complete any improvements that may be required for Tenant’s use of the Premises (“Initial Improvements”). All such work related to the Initial Improvements shall be performed in accordance with Section 13.2.



- Do you see every part of the property you plan to use?
- Is the square footage correct?
- Is there an “as is” clause?

# The Premises

- “The Premises shall be delivered to Tenant in good, clean, and tenantable condition, with all Building systems working, and in compliance with all applicable laws in effect as of the Occupancy Date.”



# Use of Premises

- Do not be overly specific
- Example: “...for the purposes of retail sales and related services.”



## 10. USE OF PREMISES

**10.1 Permitted Use.** Tenant shall occupy and use the Premises *substantially for* the purposes of [insert purposes of use].

“substantially”

# Nuisance Provisions

- What happens if your Landlord thinks you are being a nuisance?
- What counts as a nuisance?
- Suggested provision example:  
“Provided, however, that the sale of alcoholic beverages shall not be deemed a nuisance in and of itself.”



# Exclusive Use Provisions

- Prohibits the landlord from leasing to another similar tenant.
  - If another business starts doing business in competition with you, the landlord must take action to end it.
- While this limits the landlords' freedom, when you succeed, they succeed!
- What happens if the landlord violates the provision?



# Assignment and Subleases

- Assignment: You give all the rights and duties under the lease to another party.
  - The other party steps into your shoes, but you are still responsible to the landlord.
- Sublease: You give all or a portion of the rental space to another party for a specified time period.
- Many leases do not permit tenants to assign or sublease their space. Others require landlord's consent to do so.
- If consent required, try to obtain a “not unreasonably withheld or delayed” clause.



# Common Areas

## 8. COMMON AREAS

**8.1 Common Areas Defined.** The term “Common Areas” is defined as all areas and facilities outside of the Premises and within the exterior boundary line of the Project that are designated by Landlord from time to time for the general non-exclusive use of Landlord, Tenant, and the other tenants of the Building and their respective employees, suppliers, customers, contractors and invitees, including, but not limited to, common entrances, lobbies, corridors, stairwells, parking areas including the driveway, the yard, the basement, roadways and sidewalks.

**8.2 Management and Control.** All Common Areas shall be subject to the exclusive control and management of Landlord or such other persons or nominees as Landlord may designate to exercise such management or control in whole or in part. Landlord and Landlord’s nominees and assignees shall have the right to establish, modify, amend and enforce *reasonable* rules and regulations with respect to the Common Areas, provided that all such rules and regulations shall apply equally and without discrimination to all persons entitled to use of said Common Areas. Tenant shall abide by such rules and regulations, shall cause its employees, agents, and contractors to so abide, and to use its *commercially reasonable* efforts to cause its customers, invitees and licensees to so abide. Landlord shall have the right to *reasonably* increase or reduce the Common Areas, to *reasonably* rearrange the improvements in the Common Areas, and to make such *reasonable* changes therein and thereto from time to time which, in Landlord’s opinion are



"commercially  
reasonable"

"reasonably"

A stylized illustration of a building with a lightning bolt striking it, set against a yellow circular background. The building is depicted in a simplified, blocky style with a lightning bolt striking the center. The background is a large yellow circle that partially overlaps the white background of the slide.

# Improvements, Alterations and Additions

- Do you want your Landlord to make any improvements to the Premises before the lease begins?
- Do you want to make any initial improvements yourself?
- What is the “Commencement Date?”
- Will you pay a lower rent while initial improvements are being made?



A stylized illustration of a building with a lightning bolt striking it, set against a yellow circular background. The building is depicted in a simplified, blocky style with a lightning bolt striking the center. The background is a large yellow circle that partially overlaps the white background of the slide.

# Improvements, Alterations and Additions

- “Tenant shall not make alterations or additions to the Premises without Landlord’s written consent, **which consent shall not be unreasonably withheld, conditions or delayed.**”



# Maintenance & Repairs

## 12. MAINTENANCE AND REPAIRS

### 12.1 Tenant's Obligations.

- (a) Tenant shall maintain the Premises in good condition, ***reasonable wear and tear and damage by fire and other casualty excepted***, and whenever necessary, to replace plate glass and other glass therein, acknowledging that the Premises are now in good order and the glass whole, ***provided that such obligations shall not extend to any of the mechanical, electrical, plumbing and life safety systems serving the Premises or the Building, which shall be the obligation of Landlord to maintain.*** Tenant shall not permit the Premises to be overloaded, damaged, stripped, or defaced, nor suffer any waste.
- (b) If Tenant fails to keep the Premises in good condition and repair, ***reasonable wear and tear and damage by fire and other casualty excepted***, Landlord may, ***upon reasonable prior written notice to Tenant***, make any necessary repairs. If Landlord makes such repairs, Landlord may bill Tenant for the cost of such repairs and such amount shall be payable by Tenant within ten (10) days after demand by Landlord.

### 12.2 Landlord's Obligations.

- (a) Landlord shall maintain the Building of which the Premises are a part and the Project in the same condition as it is at the commencement of the Lease Term or as it may be put in during the Lease Term, reasonable wear and tear, damage by fire and other casualty only excepted, unless such maintenance is required because of Tenant or those for whose conduct Tenant is legally responsible. The removal of snow and ice from the roof of the building and the sidewalks bordering upon the Premises shall be Landlord's responsibility.



# Maintenance & Repairs

- Mass. Ann. Laws ch. 186 § 19:  
**Notice to landlord of unsafe condition; tort actions for injuries resulting from uncorrected condition.**
- See *Bishop v. TES Realty Trust*, 459 Mass. 9 (2011).



# Maintenance & Repairs

- “Such obligations shall not extend to any of the mechanical, electrical, plumbing and life safety systems serving the Premises or the Building, which shall be the obligation of the Landlord to maintain.”
- “If Tenant fails to keep the Premises in good condition and repair, **reasonable wear and tear and damage by fire and other casualty excepted**, Landlord may, **upon reasonable prior written notice to Tenant**, make any necessary repairs.

# Maintenance & Repairs

## 12.2 Landlord's Obligations.

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# Maintenance & Repairs

Tenant shall give Landlord notice of any repair required to be performed by Landlord pursuant to this Section 12.2 within ten (10) days after the later of the date (i) the need for such repair arises, and (ii) Tenant becomes aware of such required repair. Landlord shall have a reasonable time in which to complete the repair after receipt of such notice. *Provided, however, that in the event of an emergency, or if Landlord fails to respond to Tenant's repair request within a reasonable period of time, Tenant may make repairs necessary to resolve the emergency or otherwise without prior notice to Landlord, and shall notify Landlord immediately, but in any event no later than three (3) days of making such repairs. Any costs incurred by Tenant for such repairs shall be applied dollar-for-dollar against the Base Rent due immediately following the date such costs were incurred.*

- “Notwithstanding the foregoing, Tenant shall not be responsible for the repair of any latent defect in the original construction of the Building or installation of any Landlord installed improvements regardless of time of discovery, and Landlord shall repair the same within a reasonable time, but in no event later than thirty days after discovery of the defect.”

# Thank You



## Q&A

# Need Further Assistance?

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- Harvard Law students (advocates) working under attorney supervisors
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  - Zoning appeals



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