COMMERCIAL REAL ESTATE LEASING (Law 5430)
Professor Wilson Freyermuth
Fall Semester 2018
TTh 3:00-4:15, Room 112
Office — 215 Hulston Hall
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Course Information and Policies

COURSE DESCRIPTION: Commercial Real Estate Leasing is a three-credit-hour skills-development practicum that involves the study of selected topics involved in the negotiation, drafting, and interpretation of commercial real estate leases. The class will introduce students to the various parties involved in the process of commercial real estate leasing, their respective interests, and the dynamics of the negotiation and drafting process in which these parties attempt to ensure that the lease agreement appropriately memorializes their respective interests.

COURSE MATERIALS: The casebook is COMMERCIAL LEASING: A TRANSACTIONAL PRIMER (2d ed. 2011), by Daniel B. Bogart (Chapman University School of Law) and Celeste Hammond (John Marshall Law School, Chicago). The book uses a representative commercial office lease form (promulgated by the American Bar Association) as a basis for studying the critical provisions of the lease, the leasing transaction, and the negotiation/drafting of the lease document.

I do not expect that we will cover every chapter in the casebook. At the end of this Syllabus, you will find a list of the topics that I expect to cover and the likely order of coverage, although this may be subject to change as the semester proceeds. For the first class on Tuesday, August 21, 2018, we will discuss Chapter 1 (The Letter of Intent). The reading assignment and discussion questions for the first class appear also appear at the end of this Syllabus.

LEARNING OUTCOMES: In compliance with Standard 301(b) of the American Bar Association’s Standards and Rules of Procedure for Approval of Law Schools, the following statement reflects the expected learning outcomes for this course.
In the Commercial Real Estate Leasing course, students will:

- Review and/or learn the relevant provisions of law governing the creation and enforcement of contracts for the leasing of real estate.
- Become familiar with the identity, roles, and interests of the various participants in a commercial lease transaction (e.g., broker, mortgage lender, developer-landlord, tenant, and their respective lawyers).
- Become familiar with the structure and content of commonly-used commercial lease agreements, particularly those involving office, retail, and industrial uses.
- Gain knowledge that will be useful for passing the Real Property portion of the bar examination, which includes coverage of landlord-tenant issues.
- Practice and develop skills useful in the negotiation, review, revision, and drafting of commercial leases and related transactional documents.
- Learn the appropriate (and inappropriate) uses of form documents.

Assessment in this course will be FORMATIVE in nature. It will consist of graded skills-based assignments including negotiation, document review, document drafting and revision. The first five of these assignments will focus narrowly on discrete portions of a commercial lease. For each of the first five assignments, you will revise and resubmit your work product based on comments on your initial draft. Some (but not all) of the first five assignments will be done with an assigned partner (either working together in teams, or negotiating against each other on behalf of the landlord or tenant, as assigned). The sixth and final assignment will be a comprehensive review of entire commercial lease.

ACADEMIC INTEGRITY: Academic integrity is fundamental to the activities and principles of a university. All members of the Law School community must be confident that each person’s work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest, whether or not the effort is successful. The Law School community regards breaches of the academic integrity rules as extremely serious matters. Sanctions for such a breach may include grade sanctions (up to and including failing the course) and disciplinary sanctions ranging from probation to expulsion. I encourage you to make sure that your work in this and other courses complies in all respects with the Law School’s Honor Code. If you have any question regarding whether your conduct complies with the Honor Code, you should contact me for clarification.

COURSE GRADE: The final grade in this course will be based upon the following:

A. **Class Participation.** I expect students to have read the assigned materials and discussion problems and to be prepared to discuss them. Further, some of the class periods will involve review and critique of student work on the drafting problems and other written assignments. Thus, consistent class attendance and participation is expected and encouraged. At the conclusion of the seminar, I reserve the right to add up to two (2) points to a student’s grade for consistent and *exceptional* class participation, as well as the right to reduce a student’s grade up to three (3) points for unexcused absences, unpreparedness, or lack of cooperative effort on team assignments.

B. **Negotiation/Drafting Problems.** During the semester, as noted above, there will be five
discrete negotiation and/or drafting problems. These problems will involve drafting a discrete provision of a commercial lease, either from “whole cloth” (i.e., without starting with a basic form) or by revising an existing form lease provision. Some of these problems will be done in two-person teams; others will be individual. Some will require negotiation (either landlord v. tenant or lender v. tenant) between students on opposing sides of a hypothetical transaction. In some cases, your completed work product will be the basis for subsequent class discussion about the drafting process and the transactional dynamics involved in lease negotiation. Each problem will be revised and resubmitted based on initial feedback. Collectively, these problems will constitute 60% of your course grade.

C. Lease Review. At the end of the course, instead of a final examination, you will review a proposed lease document (i.e., a form that is different from the one contained in the course materials). Working individually, you will evaluate the lease as if you were advising one of the parties to the proposed lease transaction, and prepare a memorandum that critiques the lease’s provisions and suggests amendments necessary to protect the client’s vital interests. I will assign the lease review problem prior to the final week of classes, and it will be due at 5:00pm on the final day of the exam period. The lease review will constitute 40% of your course grade.

COURSE WEB PAGE: I have established a Web page for this course. The URL for this page is [http://www.law.missouri.edu/freyermuth/leasing/winter2018/index.html](http://www.law.missouri.edu/freyermuth/leasing/winter2018/index.html) and you should refer to the home page prior to each class period for any announcements regarding class discussion problems, the assignments, or other relevant information regarding the course. A copy of this syllabus is posted on the Web page, and the questions for class discussion during each class period will also be posted there.

ATTENDANCE POLICY: I expect you to be in attendance for each class session. I will record attendance during each class session. If you know that you will have to miss a scheduled class period, you should inform me in advance (an e-mail message is fine), explaining the reason you must be absent. If you have to miss a class because of an emergency (i.e., an accident, death in the family, serious illness) and cannot inform me in advance, you should inform me as soon as possible after that class session and provide whatever explanation I may request. As noted above, I retain the discretion to lower the course grade of a student for unexplained or excessive absences.

TOPICS: In the course, we will address the following topics, in roughly the following order:

- Letters of Intent [Chapter 1]
- Premises [Chapter 2]
- Term [Chapter 3]
- Rent [Chapter 4]
- Use [Chapter 5]
- Assignment and Sublease [Chapter 7]
- Maintenance/Repair and Building Services [Chapters 8/11]
- Rules and Regulations/Rights Reserved to Landlord [Chapters 9 and 12]
- Alterations [Chapter 10]
- Fire/Casualty [Chapter 13]
- Insurance [Chapter 14]
As the course proceeds, I may modify the order of the topics covered, so you should refer to the course website for updated information on the order of future assignments.

ASSIGNMENT FOR CLASS #1, TUESDAY, AUGUST 21, 2018: Read pages xv-xxi (the Introduction to the Casebook) and Chapter 1 (Letter of Intent), pages 3-10. In addition to Problems 1-1 and 1-2 (on pages 6-7 of the Casebook), consider the following two problems as well:

**Problem 1-3.** Landlord owns land in Stanley Beach. Tenant owns and operates a restaurant, the Stanley Beach Brewpub, on adjacent land. The current restaurant is too small, and Tenant wants to expand. Last year, Tenant wrote Landlord and suggested that Landlord lease its land to Tenant beginning on November 1, shortly before Tenant’s current lease expires. The parties executed a document entitled “Letter of Intent regarding construction and lease of premises at 120 Stanley Beach Boulevard” (LOI). In the LOI, the parties agreed on the rent to be paid, the parties’ contributions to the cost of the building the new restaurant building, and other matters. The LOI also provided that the parties “represent that each intends, in good faith, to carry out the transaction described in this letter of intent, and that subject only to [Tenant’s] obtaining the necessary [governmental] approvals, this constitutes a binding legal agreement between the parties to negotiate and execute a Definitive Lease Agreement, including the terms and conditions of this letter of intent and other provisions customarily and ordinarily included in the type of transaction contemplated herein ....” The LOI did not include a provision regarding attorneys’ fees, although fee-shifting provisions are commonly included in commercial leases.

After the LOI was executed, the parties exchanged drafts of a lease, which did contain an attorneys’ fee clause. In July, Tenant’s attorney sent Landlord a draft of a proposed Lease which had been signed by Tenant. Landlord was not satisfied with the language of the proposed Lease regarding commencement of the lease and Tenant’s liability to pay rent to Landlord in the event hazardous waste was discovered during construction; thus, Landlord refused to sign the lease. Tenant sued Landlord for specific performance of the LOI (or, alternatively, for money damages for breach of the LOI) and sought to recover the attorneys’ fees expended by Tenant to pursue the litigation.

Should Tenant be able to obtain specific performance of the LOI? Damages for breach of the agreement? Attorneys’ fees?

**Problem 1-4.** In 2008, Landlord and Tenant entered into a lease (“Lease”) pertaining to commercial property for a term ending July 31, 2018. Tenant had the right to extend the term of its occupancy for a period of 5 years, provided that it complied with certain notice requirements as specified in § 18 of the Lease.

§ 21 of the Lease, entitled “First Refusal Option to Lease” provides as follows:

If at any time during the term of this lease, Landlord shall receive a bona fide offer to lease the demised premises for a term to begin subsequent to the present demised term, and the Landlord desires to accept such offer, Landlord shall immediately submit to Tenant a true
and correct copy of such bona fide offer with a full disclosure of all terms, covenants and provisions thereof and Tenant shall have ninety (90) days after receipt thereof, in which to elect to lease said premises upon the terms and provisions contained in such offer.

On April 30, 2018, Landlord executed a “Letter of Intent” (LOI) with Exxon, a prospective future tenant for a prospective term beginning September 1, 2018. The LOI provided that it was delivered “as part of preliminary negotiations and shall not be deemed a binding contract. Final agreement, if any, between the parties will be subject not only to the terms set forth herein, but such other terms and conditions mutually agreed between the parties.” On May 1, 2018, Landlord sent Tenant a copy of the LOI along with a letter stating that if Tenant did not respond pursuant to § 21 of the lease by matching the terms in the LOI, Landlord expected Tenant to vacate at the end of the term on July 31, 2018.

Instead, Tenant responded not by indicating its intention to match the terms in the Exxon LOI, but instead by indicating its intention to extend the lease term for an additional five years (assume this complied with the notification requirements in § 18 of the Lease). Landlord has admitted receiving this notice. Tenant did not vacate at the end of the term, but has continued to tender rent payments in the amount specified in its original lease. Landlord refused these rent payments, and sued Tenant to recover possession of the land and damages equal to the difference between the rent in Tenant’s original lease and the rental amount stated in the Exxon LOI. How should the court rule?