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Changes 

Change Orders: The Danger of Too Much Control

It is no surprise that a landlord wants control over what a tenant constructs in its leased premises, since the premises are, after all, the landlord's property. In an effort to prevent a tenant from performing construction work that could impair the value of the landlord's property, landlords generally require the right to review and approve the plans and specifications for any tenant build-out or tenant alterations to the leased premises. So far, so good.

However, in an effort to prevent any modifications to the approved plans and specifications that could be problematic (now or in the future) for the building or the landlord, it is not unusual for the landlord to insist on the right to consent to ALL change orders. So what is the problem?

- **Delay in Completion.** Requiring the tenant to obtain the landlord's consent for every change order will inevitably delay the construction project. Consequences from such delay that could negatively impact the landlord might include:
 - A later commencement date, which could postpone the tenant's obligation to pay rent to the landlord.
 - In the retail setting, a longer period during which a store is closed for construction, which could negatively impact the shopping center as a whole.
- **Unintended Waiver of Future Obligations.** As a practical matter, it is unlikely that the landlord will enforce its consent right with respect to ALL change orders, because many change orders will be very minor (e.g., changing the direction that a door is hung). **This situation raises issues of waiver that could come back to haunt the landlord on unrelated issues.** In other words, the landlord's behavior could provide grounds for the tenant to argue that other provisions of the lease should not be strictly enforced.

SUGGESTED SOLUTION:

Consider specifying guidelines in the lease as to when the landlord will agree in advance not to require the right to approve a change order. For example:

- Field changes
- Non-structural changes
- Changes that do not affect the building systems

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- Changes that cost less than a specified dollar amount that do not affect performance or function

NOTE: Although change orders are discussed above in the context of the landlord/tenant relationship, the same considerations apply in the lender/borrower or tenant/subtenant context.



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