

Memorandum 89-11

Subject: Study H-111 - Commercial Lease Law (Assignment and Sublease--
use restrictions)

If a lease of commercial real property for specified purposes precludes a change in use by the tenant without the landlord's consent, does the landlord have absolute discretion to grant or withhold consent or may the landlord refuse consent only if there is a commercially reasonable excuse? This, and other issues parallel to the ones we've been dealing with in connection with transfer restrictions, is the subject of the attached study by our consultant Professor Coskran, titled "Use Restrictions in Leases: Relationship to Restrictions Against Assignment and Sublease."

Briefly, Professor Coskran finds that many of the same policies and concepts are applicable to change in use as are applicable to transfer, and in fact a proposed change in use may be one of the more significant reasons for the landlord to deny permission to transfer. Although the Kendall case deals only with a lease clause that requires the landlord's consent for a transfer, the principles involved, other than the policy against restraints on alienation, could apply as well to a lease clause that requires the landlord's consent for a change in use.

Should we attempt to resolve the lurking issues in this area of law by legislation before the courts are forced to struggle with them? In favor of doing this are that it would be fairly easy to extend our transfer restriction provisions to use restrictions, and that codification could save the substantial amounts of litigation that would be required to work out a case by case exposition of the law in the area. Opposed to codification are that transfer restrictions and use restrictions, while related, are distinct and may require subtle differences in treatment best accomplished by case law, and that

parties to a lease can draft around the problems, having been forewarned by Kendall.

Respectfully submitted,

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