#H-112 ns92
07/23/90

Fourth Supplement to Memorandum 90-50

Subject: Study H-112 - Commercial Lease Law: Use Restrictions (Comments on Tentative Recommendation--supplementary comments of Ronald P. Denitz)

Attached to this memorandum are supplementary comments of Ronald P. Denitz of Tishman West, concerning the issues raised in Memorandum 90-50 and the first three supplements to it.

Respectfully submitted,

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July 23, 1990

BY FAX

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4000 Middlefield Rd., Suite D-2
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Re: Tentative Recommendations Regarding to Use Restrictions in Commercial Real Property Leases - (Study H-112) - First Supplement to Memorandum 90-50

Gentlemen:

As we approach next Friday's Commission Meeting, and having reviewed Professor Bill Coskran's astute revised Comments dated July 9, 1990, I can only respectfully request that each member of the Commission read again my letter to the Commission dated May 11, 1990. That letter spelled out in considerable detail and, with pardonable pride, the realities faced in the commercial leasing marketplace by landlords not only for the protection of the investment-value and character of office buildings and shopping centers, but also for the protection of the value of the businesses of other tenants of the building, complex or shopping center who might be injured almost as much as landlord if a recalcitrant or defaulting or otherwise-assigning tenant tries to assign or sublet for some onerous or inconsistent use in direct violation of express use restrictions contained in his lease.

Use-restrictions are not imposed by landlords out of petulance, ignorance or a greedy-view to grind a tenant, (i.e., exact a pound of flesh); they are a valuable, if not often necessary, part of a commercial viability and continuity of the modern office building or other commercial complex.

Use-restrictions are bargained-for-in-advance essential elements which:

- Protect the compatibility of tenant's use with other uses in the building
- Create and assure continuity of desired ground floor service-stores in office buildings

- Preserve "mixed-use" in shopping centers
- Fairly determine utility-use [e.g., restaurants for water or photocopy centers for electricity] or other over-standard cost reimbursement
- Keep store-type-uses out of the upper floors of limited-elevator office buildings
- Permit tenants to pay a low "fixed minimum rent" where landlord depends upon a commercial percentage rent in order to break even or make even a little bit of profit, and
- Enable a landlord to grant to this tenant or protect a grant to another tenant an "exclusive" type of use.

Having referred you to the scholarly, case-supported Commentary of Professor Coskran and having in my letter to you of May 11, 1990 and in this letter expressed, I hope, some of the genuine business needs of landlords of office buildings, shopping centers, neighborhood mini-shopping centers and even parking structures, the last one and perhaps most important reason why legislation is not necessary to change the right of contracting parties to agree upon use restrictions is that they work, and work without many (if any) occasions of litigation ensuing in and among the thousands and thousands of leases which are drawn, executed, and administered in this state.

Honorable members of the Commission, "It works; please don't 'fix' it."

Respectfully,

RONALD P. DENITZ
Vice President and
General Counsel
TISHMAN WEST COMPANIES

RPD:ml
cc: W.J. Coskran, Esq.