



# Metropolitan Airports Commission

Legal Department

## Memo

DATE: December 6, 2021

TO: Kelly Gerads, Assistant Director—Reliever Airports

FROM: Andrew Hanson, Attorney

SUBJECT: Memorandum of Updates to Reliever Commercial Lease Form

## INTRODUCTION

The Reliever Lease Forms were last updated in 2012. In anticipation of the 2022 renewal season, MAC is taking the opportunity to update its lease forms. In particular, this update is targeted towards minor updates, providing increased clarity of phrasing, updated regulatory references, and the removal of unnecessary language. Some updates made substantive changes to the lease terms, and these changes are documented below. Note well, that this document gives only summary explanations of the changes, and this document is not intended to provide an authoritative interpretation of the substance of the changes. The language contained in the lease form is definitive. In answering Tenant questions about these changes, Tenants are advised to consult with an attorney who represents the Tenant's interests.

## UPDATES

### SECTION 1 [LEASED PROPERTY]

- Minor changes throughout to remove repetitive language and to clarify intent.
- Section 1.1 [Leased Property]: Amended to remove the square footage calculation. This calculation will now be represented on Exhibit A rather than in the body of the lease. This change will make it easier to adjust the square footage of lots when/if lot lines are ever re-drawn, upon mutual agreement of MAC and Tenant.

### SECTION 2 [TERM]

- Minor changes throughout to remove repetitive language and to clarify intent.
- Section 2.2 [Renewal Term]: Clarified that renewal will not be obligatory if tenant is in default and within a cure period.
- Section 2.3 [Right of First Refusal]: Clarified that the section is only applicable if a Renewal Lease is offered. This section was also updated to be consistent with Section 17.1 [Surrender of Leased Property].

## **SECTION 3 [USE OF LEASED PROPERTY]**

- Minor changes throughout to remove repetitive language, to condense, and to clarify intent.
- Section 3.1 [Use]: Clarified that other authorized uses are approved by MAC Staff, rather than the MAC Commission.
- Section 3.3 [Appropriate Use]: Clarified to ensure that Tenant not use the Leased Property in a way that would void MAC or the Tenant's insurance, even if such use is ostensibly an authorized use under the Lease. In addition, this provision was changed to prohibit uses of the Leased Property that were not disclosed to Tenant's insurer, rather than uses that "increase the insurance risk."

## **SECTION 4 [RENT]**

- Minor changes to remove repetitive language, to condense, and to clarify intent.
- Section 4.1 [Ordinance 119]: This section was updated to note that all required reports should be submitted electronically to MAC.
- Section 4.4.1 [Percentage Rent]: This section was expanded to clarify what must be included in percentage rent reports. Tenants must include "the amount of Gross Sales and all deductions and exclusions therefrom for the preceding calendar month."
- Section 4.4.1 [Percentage Rent]: A provision was added to place an obligation on Tenants, when requested, to provide general ledger sales transactions to MAC for the purpose of auditing Gross Sales and exclusions therefrom.
- Section 4.4.2 [Gross Sales]: The definition of Gross Sales was modified to bring it into greater conformity with other MAC leases. The new definition is not intended to expand the operation of the prior definition, but does clarify the prior definition in several instances.
- Section 4.4.2(c) [Exclusions from Gross Sales]: The application of exclusions (ix) and (x) were clarified. In addition, two new exclusions from Gross Sales were added to the Lease. Exclusion (xi) is intended to remove from the definition of Gross Sales, amounts billed for flights, or legs of flights, that were planned, ordered, or dispatched from a MAC airport, but do not utilize a MAC-owned airport in the course of the flight. Exclusion (xii) is aimed at certain amounts billed for air ambulance flights. Given the fact that the amounts billed for these flights often bear little resemblance to the amounts collected, this exclusion is targeted at arriving at an amount reportable as Gross Sales that approximates the average amount actually collected for these flights.
- Section 4.6.1 [Audit Findings]: This section was revised to clarify that overpayments in rent will be credited against future rent payments, or will be refunded if Tenant is in its last year of the Lease.
- Section 4.10 [Method of Payment]: This section was added to note that MAC's standard method of payment will be Electronic Funds Transfer ("EFT"). For those who cannot pay by EFT, checks (or other agreed-upon means of payment) will be accepted.

## **SECTION 5 [TAXES AND OTHER CHARGES]**

- Minor changes to remove unnecessary language, to clarify intent, and to update reference to the Rates and Charges Ordinance.

## **SECTION 6 [COMPLIANCE WITH LAWS]**

- Minor changes to remove unnecessary language, to clarify intent, to consolidate, and to include a reference to online locations of MAC ordinances, rules, and regulations.

## **SECTION 7 [QUIET ENJOYMENT]**

- Minor changes to remove unnecessary language. Much of this language was moved to Section 8 [Right of Entry and Inspection], which was a more natural fit for the content.

## **SECTION 8 [RIGHT OF ENTRY AND INSPECTION]**

- Language regarding MAC's right to enter for purposes of making repairs or constructing improvements moved to this section from Section 7 [Quiet Enjoyment] in a condensed form.
- MAC's indemnification obligation was clarified to exclude any damages that are not compensating for an actual loss, and to note that MAC will indemnify on the basis of a written agreement with Tenant, or upon a judgment finding MAC's sole negligence to have been the cause of the damage.

## **SECTION 9 [CONSTRUCTION]**

- Minor changes throughout to remove repetitive language and to clarify intent.
- Section 9.3 [Approvals from Other Entities]: One paragraph regarding Part 77 requirements was moved to Section 21 [FAA Required Contract Provisions].
- Section 9.4 [Completion and Performance]: Language was added to clarify that Tenant's defense of liens asserted against the land, Lease, or Improvement must be defended against in the manner provided by Section 13.3 [Indemnification].

## **SECTION 10 [OWNERSHIP OF IMPROVEMENTS]**

- Minor changes to clarify intent.

## **SECTION 11 [MAINTENANCE]**

- Minor changes to clarify intent.

## **SECTION 12 [REMOVAL OF IMPROVEMENTS]**

- Minor changes to remove unnecessary language.

## **SECTION 13 [INSURANCE AND INDEMNIFICATION]**

- Minor changes throughout to clarify intent.
- Section 13.1 [Required Insurance].
  - Section 13.1(i).
    - Updated to use the correct, current terminology to describe this type of insurance policy. Language now refers to "extended peril" as opposed to "all risk."
    - Updated to clarify that personal property must, if not otherwise insured, also be insured under property insurance policies.
    - Updated to note that flood insurance, if applicable, must be held for the full year.
    - Updated to note that MAC must be named as a "loss payee" rather than having the policy contain a waiver of subrogation, which is inapplicable to these types of policies.
    - Updated to note that MAC has the ability to verify environmental decontamination via an independent contractor's test of the property.
  - Section 13.1(ii).
    - Commercial general liability limits increased from \$1,000,000.00 per occurrence to \$2,000,000.00 per occurrence and \$2,000,000.00 in aggregate.
  - Section 13.1(iii).
    - Aircraft liability limits increased from \$1,000,000.00 per passenger seat per occurrence to \$2,000,000.00 per passenger seat per occurrence.
  - Section 13.1(iv).
    - Employer's liability insurance, if required, will require limits set to \$1,000,000.00 each accident, \$1,000,000.00 disease – each employee, \$1,000,000.00 disease – policy limit.

- Section 13.1(v).
  - Aviation liability insurance limits increased from \$5,000,000.00 per occurrence and aggregate for refueling to \$10,000,000.00 per occurrence and aggregate for refueling and from \$1,000,000.00 products-completed operations per occurrence and aggregate to \$5,000,000.00 products-completed operations per occurrence and aggregate.
- Section 13.1 [Required Insurance].
  - Language was added whereby, in the event that a Tenant subleases, Tenant agrees that its “insurance policy or policies will act as contingent liability insurance in the event that Subtenant’s insurance coverage is exhausted, or Subtenant is otherwise insolvent or judgment proof.”
- Section 13.3 [Indemnification].
  - Heavily edited to make the provision more readable with an emphasis on re-structuring and condensing the language where possible. In addition, because a separate environmental indemnification provision was deleted from the agreement, language included in that eliminated provision was moved to this provision.

## **SECTION 14 [DAMAGE, DESTRUCTION, OR DISCONTINUED USE OF AIRPORT]**

- Minor changes to remove unnecessary language and to clarify intent.
- Section 14.3 [Rent Abatement]: This section was removed. This provision had its genesis in response to flood events that historically occurred at St. Paul Downtown Airport. After the construction of the flood wall, this section lost its utility.

## **SECTION 15 [CONDEMNATION]**

- Minor changes to remove unnecessary language and to clarify intent.

## **SECTION 16 [AIRPORT DEVELOPMENT OR REDEVELOPMENT]**

- Minor changes throughout to remove unnecessary language and to clarify intent.
- Sections 16.2 [Notice of Termination or Amendment], 16.3 [Tenant’s Right to Terminate]: Updated to reflect the fact that square footage will now be included on Exhibit A.
- Section 16.7 [Surrender of Leased Property & Ownership of Improvements]: Updated to be consistent with Section 17.1 [Surrender of Leased Property].

## **SECTION 17 [SURRENDER OF LEASED PROPERTY]**

- Minor changes throughout to remove unnecessary language, to clarify intent, and to reorganize language to provide for better flow.
- Section 17.1 [Surrender of Leased Property]: Updated to clarify that MAC does not take ownership of wells and septic systems upon surrender of the Leased Property.
- Section 17.2 [Holding Over]: Updated to use more accurate legal terminology to describe the legal relation between MAC and a holdover tenant.

## **SECTION 18 [TRANSFERS]**

- Minor changes throughout to remove duplicative or unnecessary language, to clarify intent, and to update outdated references.
- Section 18.3 [Sublease]: Updated to remove an ambiguity as to what indemnification language must appear in subleases (the language must mirror the language in Section 13.3).
- Section 18.3.1 [Storage Subleases]: Edited to remove the requirement that a Tenant seek MAC’s consent prior to subleasing for a term of greater than six months for storage purposes.
- Section 18.3.2 [Commercial Subleases]: Updated to clarify that requests to sublease to a Commercial Subtenant will not be approved if Tenant is in default and within a cure period.

- Section 18.4 [Collateral Assignments]: Updated to clarify that collateral assignments will not be approved if Tenant is in default and within a cure period.

## **SECTION 19 [DEFAULT]**

- Minor changes to remove duplicative language, to clarify intent, and to update outdated references.

## **SECTION 20 [ENVIRONMENTAL RESPONSIBILITIES]**

- Minor changes throughout to clarify intent.
- Section 20.2 [Indemnification].
  - The separate, environmental indemnification clause was eliminated. In its place is a notation that indicates that environmental claims are subject to Tenant's general indemnification and defense obligations in Section 13.3 [Indemnification].
- Section 20.3 [Compliance with Environmental Laws].
  - Clarified that MAC Staff provides written approval of any monitoring wells or tanks, rather than the MAC Commission.
  - Clarified that Tenants accept title and ownership of "all tanks, septic systems or wells existing on the Leased Property at the time of the execution of [the] Lease," whether or not those tanks, septic systems, or wells are used by Tenant.
- Sections 20.5 [Notification] and 20.7 [Right to Take Action].
  - Updated to account for changes to Section 20.2 [Indemnification]. Section 20.5 [Notification] was also updated to remove the term "hazardous substance" and to replace this phrase with the clearer, defined term, "Environmentally Regulated Substance."
- Section 20.9 [Miscellaneous Environmental Operating Conditions].
  - This is a new provision aimed at increasing awareness of some Tenant's obligation to apply for and comply with the Multi-Sector General Permit for Industrial Activity, or an individual stormwater permit. More information on these permits can be found [here](#).

## **SECTION 21 [FAA REQUIRED CONTRACT PROVISIONS]**

- This section was re-titled to better describe the contents, changing from "Non-Discrimination" to "FAA Required Contract Provisions." With the movement of several existing provisions to this section, and the inclusion of new provisions, the section now deals with more than simply non-discrimination obligations.
  - Several sections were moved to this section from other places in the former lease form. These sections are now numbered as Sections 21.1 [Further Development]-21.5 [Use Not Exclusive], and Section 21.7 [Performance of Services on Aircraft].
  - Section 21.6 [Hazards].
    - This provision was added to address MAC's obligation pursuant to the grant assurances it makes to the Federal Government to assure that MAC has the ability to mitigate and/or remove hazards. *See* Grant Assurance No. 20, available [here](#).
  - Section 21.8 [General Civil Rights Provision].
    - FAA updated the language of this section. Per FAA's guidance document, FAA "[r]e-phrased [the] General Civil Rights Provision to simplify language and to clarify duration of obligation for tenant/concessionaire/lessee." *See* [here](#).
  - Sections 21.9 [Title VI Clause for the Use of Real Property] and 21.10 [Title VI Clause for Construction/Use/Access to Real Property].
    - These provisions were updated by FAA. It appears that these changes were made to update cross-references, as well as to improve the flow and to clarify the intent of the provisions.
  - Sections 21.11 [Civil Rights – Title VI Assurance] and 21.12 [Title VI List of Pertinent Nondiscrimination Acts and Authority].
    - These provisions are new additions to this lease form and are required to be present pursuant to the FAA's [most recent guidance document on required contract provisions](#).

- Section 21.11 [Civil Rights – Title VI Assurance] is an addition to this lease form. Tenants are advised to read paragraphs three and six to gain an understanding of what will be required of them when soliciting and entering into contracts for the procurement of materials and equipment under this Lease, as well as when entering into subleases.
- Section 21.12 [Title VI List of Pertinent Nondiscrimination Acts and Authority] explicitly lists non-discrimination regulations that had been incorporated by reference in older lease forms.

## **SECTION 22 [MAC’S OPERATION OF THE AIRPORT]**

- Minor changes to clarify intent.

## **SECTION 23 [NOTICES]**

- This section was updated to allow for notice by attorney, as well as by electronic mail, and to clarify the presumptions of delivery associated with different means of giving notice.
- This section was also updated to move Tenant’s notice addresses to an exhibit to provide for easier updating.

## **SECTION 24 [GENERAL PROVISIONS]**

- Minor updates throughout to clarify intent, to remove unnecessary language, and to update outdated references.
- Section 24.9 [Public Data] was updated to better align with MAC’s obligations under the Minnesota Government Data Practices Act. It was also updated to provide clarity as to what is expected of Tenants when they share data with MAC that Tenant considers Trade Secret Information.
- Section 24.14 [Execution] was updated to provide for execution in counterpart and by electronic signature. In addition, language was added to ensure that Tenant’s signatory has authority to bind Tenant.

## **EXHIBIT A [DESCRIPTION OF LEASED PROPERTY AND SQUARE FOOTAGE CALCULATION]**

- This exhibit will now include a square footage calculation, in addition to the description of the Leased Property.

## **EXHIBIT B [DESCRIPTION OF SEWER AND WATER EASEMENT]**

- No changes.

## **EXHIBIT C [SUBLEASE PROVISIONS]**

- This exhibit was significantly changed to incorporate the amendments made to these provisions in the body of the document.
- The text of these provisions was also modified slightly to render references that were proper to the master lease more appropriate for their placement in a sublease.
- Property insurance requirements were amended to clarify that such policies are only required to cover Improvements in which Subtenant has an insurable interest and personal property and trade fixtures that are owned by Subtenant and are not otherwise insured.
- In addition, whereas in prior lease forms Tenants were required to include in subleases an unspecified “provision making the sublease subject and subordinate to this Lease,” now, this provision has been provided in a form ready for inclusion in the sublease.
- Finally, a section was included for inclusion in all Commercial Subleases relating to the maintenance of Books and Records.

## **EXHIBIT D [LEASE NOTICE ADDRESS]**

- A new Exhibit D was added to the Lease. This exhibit will be filled out by Tenants with notice addresses and other contact information. Moving this information to an exhibit will assist MAC in managing this information. In addition, it will allow for this information to be changed without impacting the body of the Lease.