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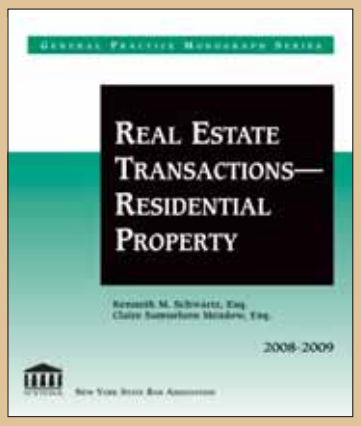

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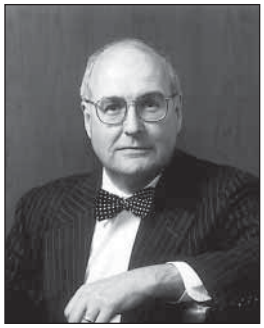
ON THE COVER

A view of rue de Grenelle in Paris, as seen at its intersection with rue du Bac, a few blocks south of the Gare d'Orsay. Painted by Sherman Stein, who said he chose this scene because it "caught the spirit of Paris." The artist's son, Joshua, chaired the Section for the year ending in May 2006. The painting appears here courtesy of its owner, Helaina Stein, Joshua's elder daughter.

Message from the Outgoing Section Chair

I am told that this is my last Chair's Message. They are not going to let me write any more of them—or I can write all of 'em I want, but are not about to publish them. I assume they are throwing away my picture. As a good lawyer I was not going to take somebody's word for it, so I checked it out. It turns out they are right. This is it. I once read in an ABA publication called *Bar Leader*, in which they dealt with the fact that after the term of a president of a Bar Association, state or local, or a leadership position ends, there is a depression that sets in. I would like to tell you after I cease on June 1 whether I experienced a great depression. However, they will not let me tell you. Maybe I could sneak in some night and slip an article (**with a picture**) into our *Journal* and tell you all about it, but I guess that is not going to happen. And besides, I will be too depressed to do it. I better move quickly.

Thank-yous are in order. First of all, thank you Joel (Sachs). Being Chair can be a pleasant experience but if you do not have the real help of the person following you, this can be a real hell. Joel, a former Section Chair himself (this will be his second Chairmanship; it may be some sort of record), made life for my term as Chair a joy. It turns out that Joel is a poet, and speaking of firsts, I believe I am the first Chair to go out with a poem in his or her honor. At the last Executive Committee meeting, Joel actually read a poem about me, for me. Good grief, it does not get any better than that. The Summer Meeting was a great success—the Annual Meeting for our Section was a great success. Joel's deferential cooperation meant so much. Thanks to Anne (Copps) for advice and encouragement. I was about to say that Anne is always positive, but she is not. Her advice accordingly is so much more valuable and she has been a treasured friend of mine for a long time. Thanks



Peter V. Coffey

to Ed (Baer), who had to go through some difficulties but stayed with us and now has come back swinging. Thanks to Spencer (Compton) for all his work on our budget. And then there is Heather Rogers, whose election to Secretary has prompted universal acclaim. As soon as she was nominated, she jumped right in, fully participated, attending regular officers' meetings and phone conferences with a very active voice.

While Chair, Harry Meyer brought a major change to our Executive Committee. He created new positions and invited people to fill those and existing positions who infused the Executive Committee with voices frankly not heard before. To almost everyone, change is unnerving to some extent and it may be frankly said that we have had somewhat of a bumpy ride. In the past, we have generally focused on the business aspects of banking, mortgages, foreclosures, etc. Now our Public Interest Law Committee and others want to focus on those who are affected by those activities. We would like to think of ourselves as rational beings whose decisions and positions are based upon pure rationality. Frankly, that is not true. As Hannah Arendt pointed out in her book *Life of the Mind*, there are basically three aspects of the human mind—thinking, willing and judging. We can think about something all we want but in the end our judgment is a matter of taste. **Hopefully, we can appreciate that those with a different viewpoint are not evil, sinful, irrational or all those other bad things that can be applied to the other side, but are simply people of goodwill who, observing the facts and law, etc. of a given situation, come to a different judgment.** In what was probably a perfect storm, these new voices were raised at the same time that Karl Holtzschue, together with Kathleen Lynch, brought a whole new perspective to our Section in that we became increasingly involved in the legislative process, in proposed bills, in lobbying and in taking positions regarding proposed legislation. As I say, it was a bumpy ride but **it was a wonderful ride. I must tell you all I really enjoyed it**. Thanks go out to Karl Holtzschue, Kathleen Lynch, Heather Rogers, Gerry Antetomaso, John Hall, Tom Hall, Harry Meyer, Mel Mitzner, Raun Rasmussen, Mike Hanley, Steve Alden, Steven Baum, Ed Filemyr. Their passion, their integrity, their thoughtfulness and thoroughness made it such an exciting year, particularly the last month or two. Finally, I do want to single out one person, and that is Karl Holtzschue. He, like Harry, is a former Chair and his efforts for our Section to involve us in legislation have been, if not unique, one of the great efforts I have witnessed. On a personal level, I want to thank Karl—he did everything I asked, including coming up with a procedure for reviewing comments on legislation **and always graciously accepted my resolution whenever there was an issue.**

There are many issues in which we involved ourselves but the issue which was paramount to me was the fact that a group of individuals—non-lawyers—believes it has the right to define our practice of law. This belief is set forth in the New York State Land Title Association's proposed bill on title agent licensing. **For everyone in this Section reading this article, you must know that that bill will prohibit most of you from carrying out your real estate practice.** It

(continued on page 53)

Message from the Incoming Section Chair


Joel H. Sachs

Although it may not be impressive as the Changing of the Guard at Buckingham Palace, or the hand-off of the baton during the 1,600-meter relay race at the Olympics, the time has come, as it does each year, for the torch to be passed to a new Section Chair.

I feel both honored and humbled by my new position and the responsibilities it entails. We are the largest Section within the State Bar Association and we probably have the most active group of committees of any Section in the entire State Bar. It is truly a challenge to lead this distinguished Section and attempt to make a lasting impact on the practice of real estate law in New York State.

In this regard, some attorneys have told me that I have not yet learned my lesson. As many of you know, several years ago I had the privilege of serving as Chair of the Environmental Law Section. That Section is approximately one-third the size of the Real Property Law Section. Even at that time, I looked with awe at the myriad accomplishments of the Real Property Law Section, never dreaming that years later I would assume the position as Chair of our Section.

I must start with a word of thanks to our outgoing Chair, Peter Coffey. Peter has been my mentor and friend. He has carried out his duties as Section Chair with professionalism, intelligence, patience and humor. In fact, when Peter became Section Chair, little did we know that the recession and the real estate crisis were right around the corner. Nevertheless, Peter has handled the situation and its impact upon our Section members quite well. In this regard, I composed an "Ode to Peter," which I recited to him at the Executive Committee meeting in April, 2009:

ODE TO PETER

When Peter became Section
Chair in the spring of '08
The real estate practice was
going just great.
Lawyers, lenders and title companies were in a real boom.
Only Peter could foresee the
coming gloom and doom.
But Peter has handled the crisis
so well,
With professionalism, intelligence and humor just swell.
So here's a big thanks to Peter.
You will always be remembered as our fearless leader!!!!

Although I may never be anointed as Poet Laureate of the Real Property Section, I do want you to know what a great asset Peter has been to the Section during these trying economic times.

I also want to extend my thanks and appreciation to the incoming First Vice Chair Anne Copps and to the incoming Second Chair Ed Baer for their hard work and tireless efforts on behalf of our Section. I also wish to congratulate Heather Rogers on becoming the newest officer of the Section.

Also, I would be remiss if I did not during my first message as Section Chair mention the untimely passing of Lorraine Power Tharp. Lorraine was a friend and role model to all of us. She will be sorely missed on both a professional and personal level. The Section has already presented Lorraine with the Section's Professionalism Award posthumously, and we are in the process of setting up a permanent scholarship in her memory.

I am especially pleased with certain new developments in regard to our committee structure. Although I truly believe that we already have the best committees within the entire State Bar Association, during the past year, under Peter's guidance, we formed a Construction Law Committee. The response to this new committee at an organizational meeting held in New York City was overwhelming. Moreover, this committee has already organized a two-part MCLE program in the Spring of 2008. Further, as my first action as Section Chair, I have created a Green Real Estate Committee. This committee will deal with issues related to energy efficiency in real estate projects and will deal with such matters as LEEDS compliance, green roofs, and new energy sources such as solar, thermal and wind power, in that "green buildings" in both residential and commercial construction will become the norm in future years. I am most excited about this prospect and our newest committee.

As for the coming year, my main goals are to increase Section membership, retain present Section members, have each of our committees involve themselves in at least one or two worthwhile projects, have our District Representatives become more active, continue commenting on legislation pending before the Assembly and Senate and raise the esteem of the Real Property Law Section in the eyes of the entire State Bar Association and the public. All this will be done during a year when we will hopefully be coming out of the real estate recession, which would be good news for all attorneys in our Section.

I look forward to working closely with not only members of our Executive Committee, but with all members of the Section. If at any time you have any suggestions or comments, please feel free to contact me at my email address, which is jsachs@kblaw.com.

Onward and upward, fellow real estate attorneys!

Joel Sachs

The Right to Terminate Proprietary Leases Based on Objectionable Conduct: Five Years After *Pullman*

By Vincent Di Lorenzo

Introduction

In the *Pullman*[1] decision, the New York Court of Appeals applied the business judgment rule to disputes involving the reasonableness of a cooperative corporation's decision to terminate a tenant-shareholder's proprietary lease because of "objectionable conduct" on the part of the lessee. Thereafter, lower courts have sustained decisions to terminate proprietary leases based on a claim of objectionable conduct in a variety of factual circumstances, including a sponsor's refusal to sell unsold shares.[2] Decisions to terminate proprietary leases have been sustained so often under the business judgment rule that one is left with the impression that there are few, if any, constraints on cooperative corporations' actions. This article examines the issue of constraints on the power to terminate proprietary leases.

Need for Authorization of a Power to Terminate

As a starting point, no cooperative corporation has the power to terminate a proprietary lease unless that power is granted in the governing documents, in this case the proprietary lease.[3] This is an application of the rule long recognized in landlord-tenant law that forfeitures are disfavored and that the law will not imply a right on the part of the landlord to terminate a lease.[4]

Typically this is not a barrier to termination because most proprietary leases grant the power to terminate for various events of default, including "objectionable conduct" on the part of the lessee.[5]

The need for explicit authorization to terminate a proprietary lease was confirmed in the context of an attempt to terminate by a cooperative housing corporation in *Joint Approach HDFC v. Mahoney*.[6] In that case, there was a provision in the proprietary lease permitting termination based on objectionable conduct.[7] The summary proceeding, however, was not brought based on a breach of the proprietary lease.[8] Rather, the cooperative corporation alleged that the lessee was committing a nuisance by maintaining her apartment in an unsanitary condition.[9] The court, in dismissing the proceedings, noted:

> There is no basis independent of the Proprietary Lease for termination of Respondent's tenancy based on nuisance. . . . A nuisance proceeding can be brought pursuant to RPAPL 711(1) against a proprietary lessee if the lease contains a limitation of the term, by reason of objectionableness of the tenant. However, in the case at bar, Counsel has stipulated . . . that this proceeding is not based on any such lease provision.
>
> Absent such a provision, there [is] no authority to terminate the tenancy. . . .[10]

A distinct claim that has been raised is that a provision in a proprietary lease allowing termination for "objectionable" conduct is too vague to be enforceable. The court considered and rejected that argument in *1050 Tenants Corp. v. Lapidus*.[11] In *Lapidus*, the proprietary lease provided for termination based on a determination that "because of objectionable and undesirable conduct on the part of the Lessee, or a person dwelling in or visiting the apartment, the tenancy of the Lessee is undesirable."[12] The court rejected a claim of vagueness with very little discussion, emphasizing, however, that the lessee was given detailed written notice of what actions were deemed objectionable and undesirable. This related question of an obligation to provide notice of the specific conduct deemed to be objectionable, and, perhaps, an opportunity to appear and defend against the claim of objectionable conduct, is further discussed below.

Assuming that a proprietary lease contains a provision permitting termination for objectionable conduct, and that the requirements imposed in the lease to authorize termination have been followed, will a court examine *de novo* if the conduct of the lessee was indeed sufficiently "objectionable?" In other words, will a court examine the reasonableness of the cooperative corporation's action?

Legal Backdrop and the *Pullman* Decision

There are two rules of law that provided the backdrop to the Court of Appeals' decision in *Pullman*. The first is Real Property Actions and Proceedings Law ("RPAPL") § 711(1). It provides, in relevant part:

> A proceeding seeking to recover possession of real property by reason of the termination of the term fixed in the lease pursuant to a provision contained therein giving the landlord the right to terminate the time fixed for occupancy under such agreement if he deem the tenant objectionable, shall not be maintainable unless the landlord shall by competent evidence establish to the satisfaction of the court that the tenant is objectionable.[13]

The second is the Court of Appeals' 1990 decision in *Levandusky v. One Fifth Avenue Apartment Corp.*[14] In that case, the court recognized a standard of review analogous to the corporate business judgment rule for challenges by a lessee of a cooperative apartment to a decision of the cooperative's board of directors.[15] *Levandusky* involved, however, a stop-work order for lessee's renovations that violated the terms of the proprietary lease.[16] It did not involve a decision to terminate a proprietary lease.

Thus, the issue became whether the business judgment rule would be applied to cooperative corporations' decisions to terminate a proprietary lease, or whether RPAPL § 711(1) required the court to determine the reasonableness of the conclusion that the lessee was engaged in objectionable conduct. In the *Pullman* decision, the Court of Appeals rejected the argument that the courts must independently evaluate the reasonableness of a cooperative corporation's decision to terminate a proprietary lease based on the lessee's "objectionable conduct."[17] Instead, the court held that "the business judgment standard governs a cooperative's decision to terminate a tenancy in accordance with the terms of the parties' agreement."[18]

Specifically, the court in *Pullman* rejected the argument that the requirement in RPAPL § 711(1)—that the tenant's objectionable conduct be established "by competent evidence . . . to the satisfaction of the court"[19]—required the court to review the evidence of lessee's objectionable conduct *de novo*. Instead, the court concluded that "in the realm of cooperative governance . . . the cooperative's determination as to the tenant's objectionable behavior stands as competent evidence necessary to sustain the cooperative's determination."[20]

In a scenario in which the courts will typically not review the sufficiency of the evidence of objectionable conduct, the issue that arises is what protections should be granted to unit owners against abusive or otherwise unjustified termination of possessory interests.[21] This issue initially arose in connection with a decision by a board alone to terminate a proprietary lease based on objectionable conduct.

In a corporate law setting, the business judgment rule is a rule deferring to the decisions of a corporation's board of directors.[22] In the *Pullman* case, however, the decision to terminate the proprietary lease was made at a special shareholders' meeting and was authorized by the shareholders, as required by the proprietary lease in question.[23] The *Pullman* court applied the business judgment rule to its decision on the part of corporate shareholders.[24] Some commentators have questioned whether the severe sanction in question—termination of all possessory rights of the unit owner—requires that the courts review the evidence *de novo* when the decision to terminate has been made by a small group—the board alone—rather than all shareholders.[25] This concern recognizes that the purpose behind the requirement in RPAPL § 711(1) —that a court must be satisfied that there is competent evidence of a tenant's objectionable conduct—is to protect tenants from eviction based on the landlord's sole and unfettered determination.[26]

There have been few subsequent cases in which the decision to terminate the proprietary lease was made solely by the board. One lower court applied the business judgment rule without discussion.[27] Another engaged in a detailed discussion of the risks of deferring to the actions of the board alone, but then felt compelled to follow the language found in the Court of Appeals' decision in *Pullman*, which, although *dicta*, repeatedly stated the business judgment rule would apply to the decisions of a cooperative corporation's *board*.[28]

Despite the origins of the business judgment rule, applying it to a board's decision to terminate a proprietary lease is somewhat controversial. The outcome is severe—the loss of a home by the lessee—and therefore arguably is a decision that should not be left to the board's discretion subject to only minimal judicial review. Indeed, in a third lower court decision, reached after the Appellate Division's decision in *Pullman*, but before the Court of Appeals' decision, the court distinguished the *Pullman* case precisely because the decision to terminate in *Pullman* was not made solely by the board.[29] After the Court of Appeals' decision, the lower courts so far have applied the business judgment standard to a board's decision to terminate proprietary leases. Given the concern generated by this issue, however, it is one that the appellate courts should address.

Constraints on Cooperative Corporation's Action

In *Pullman*, the court reaffirmed the limits to judicial deference that it had earlier announced in *Levandusky*.[30] Namely, a court will not defer to the cooperative corporation's decision if the board or the shareholders act: (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose, or (3) in bad faith.[31] The lessee bears the burden of proving that the shareholder or board decision is not entitled to deference.[32]

The courts have described the business judgment rule as applied to decisions to terminate a proprietary lease as a two-step process.[33] In step one, the court decides whether the business judgment rule is inapplicable.[34] The burden of proof is on the lessee to persuade the court there is a reason not to apply the rule based on the three limits noted in *Pullman*.[35] If the court does *not* apply the rule, then in step two, the court determines, from its own evaluation of the evidence, whether the cooperative corporation is entitled to possession based on evidence of the lessee's allegedly "objectionable" conduct. At this stage the cooperative corporation bears the burden of proof.[36]

A. Unit Owner Protections Recognized by *Pullman*

The three reasons stated for refusing to defer to decisions of cooperative corporations to terminate a proprietary lease due to objectionable conduct become constraints on a corporative corporation's power, at least in the sense that the court will decide *de novo* if termination is permitted. The manner in which the lower courts have applied these constraints is discussed below.

Scope of Authority

The first reason a court will refuse to defer to the decision of a cooperative corporation to terminate a proprietary lease is if the corporation's action was outside the scope of its authority. The lower courts have reached this conclusion primarily when the board or shareholders have failed to follow the procedures required in the proprietary lease for termination. When the *Pullman* decision applied the business judgment rule to the case before it, the court noted that the "cooperative unfailingly followed the procedure contained in the lease when acting to terminate defendant's tenancy."[37] Lower courts have refused to apply a rule of deference when required procedures have not been strictly followed, concluding that, as a result, the decision to terminate was not authorized.

Factually, the situations in which deference is not granted vary, but the common theme is a demand that the cooperative corporation strictly comply with all procedural requirements imposed in governing documents. Thus, deference has not been accorded when the lessee has raised an issue regarding whether the cooperative corporation complied with the proprietary lease's express requirements regarding notice to cure and notice of termination.[38] The court noted that such compliance was an inquiry the court must make independent of the business judgment rule.

An extreme example of insistence on strict compliance with the terms of the proprietary lease is *13315 Owners Corp. v. Kennedy*.[39] In the *Kennedy* case, the notice of the board meeting to consider termination of the lessee's proprietary lease was sent on letterhead of an entity, and signed by an entity, whose name did not match the petitioner's name. The difference could be considered minor,[40] and the lessee did in fact attend the board meeting in question. Nonetheless, the court noted that:

> [W]hen the name on the notice is not identical to petitioner's name, the shareholder-tenant might be misled and legitimately decide not to attend the meeting. The difference in names is a failure on petitioner's part unfailingly to follow procedures and is evidence that the board acted outside the scope of its authority.[41]

In addition, the lessee in *Kennedy* argued that the notice of a meeting of the board to consider termination failed to indicate which cooperative board officer signed the notice.[42] The cooperative by-laws required that a special meeting of the board must be called by the president or secretary.[43] The court noted that the available documents do not indicate that this procedure was followed and this possible failure to follow procedure would also lead the court to refuse to apply the business judgment rule.[44]

Finally, the *Kennedy* court recognized a third reason for refusing to defer to the board's decision. The lessee claimed, and the cooperative corporation did not dispute, that the board that terminated his lease was not elected at a meeting that complied with the cooperative's by-laws.[45] Specifically, the two prior meetings for election of the board either did not have the required quorum of shareholders or were not called pursuant to the required notice to shareholders.[46] The cooperative argued that improper election of the board was not ordinarily a defense that could be raised in a holdover proceeding.[47] However, the court concluded that this claim was directly related to the question of whether the board acted outside the scope of its authority under the *Pullman* rule.[48] The court noted:

> A situation in which a board can evict shareholder-tenants who never had a chance to vote for its members is precisely the kind of situation the Court of Appeals wished to avoid in requiring that the cooperative board unfailingly follow procedure. Without election as prescribed by its by-laws, a co-operative board can become authoritarian and heavy-handed, assuming a position reminiscent of a dictatorial landlord from feudal times.[49]

Good Faith

The second reason a court will refuse to defer to the decision of a cooperative corporation to terminate a proprietary lease is if the corporation failed to act in good faith. In *Pullman*, the court explained this basis for judicial intervention as a means to avoid abuse of power through "arbitrary or malicious decision-making, unlawful discrimination or the like."[50]

In other factual contexts involving court deference to board action, bad faith was typically based on discriminatory treatment.[51] However, bad faith was recognized by the court in *13315 Owners Corp. v. Kennedy*[52] based on the board's action of inviting the proprietary-lessee to the meeting to decide if the board would terminate his lease but then refusing to let him plead his cause to the board. In the court's view, this refusal demonstrated malice on the board's part.[53] This conclusion is related to the right to have an opportunity to be heard, which is further discussed below.

Furthering the Corporate Purpose

The Court of Appeals explained in *Levandusky* and again in *Pullman* that in order for the business judgment rule to be applied, the board or shareholders must act in "legitimate furtherance of corporate purposes. Specifically, there must be a legitimate relationship between the Board's action and the welfare of the cooperative."[54] This is not typically a barrier to judicial deference. Assuming that the lessee's actions were objectionable in the sense that they disturbed other cooperative unit owners, then, as the court concluded in *Pullman*, "[b]y terminating the tenancy, the Board's action . . . bore an obvious and legitimate relation to the cooperative's avowed ends."[55] In other factual contexts in which the business judgment rule was invoked, the claim that the board has failed to act to further legitimate corporate purposes when it acted primarily to benefit individual board members has at times been accepted.[56] Similarly, in situations involving termination of a proprietary lease, a failure to act in furtherance of corporate purposes could be related to a claim of malice or discriminatory treatment.

Absent malice or self-dealing, the true question becomes what types of conduct on the part of lessees have (a) led cooperative corporations to determine that the lessee was "objectionable" and (b) been accepted by the courts as terminations in furtherance of the legitimate interests of the cooperative corporation? The actions accepted as objectionable conduct in reported decisions include long-term disruptive behavior toward neighbors,[57] commencing numerous frivolous lawsuits,[58] failing to pay maintenance over a prolonged period of time without legal justification,[59] and numerous violations of the terms of the proprietary lease or by-laws.[60] In most cases, there were multiple types of behavior deemed to be objectionable, and the behavior continued for a prolonged period of time.

One unusual factual situation that led a cooperative corporation to terminate a proprietary lease based on objectionable conduct involved termination of sponsor's leases to apartments representing unsold shares for failing to sell such shares in good faith in accordance with the *Jennifer Realty* decision.[61] That decision was one in a procedural context in which the court denied sponsor's motion for a preliminary injunction prohibiting the cooperative from terminating its proprietary leases.[62] The court ruled that the sponsor had failed to show a likelihood of success on the merits in light of the *Jennifer Realty* decision.[63]

However, the *West Gate House* decision was handed down in the robust market of 2004. In the current market, sales of unsold units may be extremely difficult. Any cooperative development with a significant number of unsold units might be deemed "objectionable" to lessees that are owner-occupants. If the sponsor is incapable of selling the unsold units, however, then it is likely that a court would rule that termination would not be authorized.

B. Additional Procedural Protections Imposed by the Courts

A second type of constraint on the power of cooperative corporations to terminate proprietary leases relates to procedural requirements imposed by the courts rather than by the terms of the proprietary lease. Three types of implied procedural requirements have been considered by the lower courts—a recitation of specific factual allegations, the opportunity to be heard, and a right to cure. The first has been embraced by the courts. The courts are divided on the second, and the third has been recognized only when explicitly required by the cooperative corporation's governing documents.

Specific Factual Allegations/ Conclusion

The need to recite specific factual allegations that provide the basis for a possible conclusion that the lessee is engaged in objectionable conduct has been recognized (a) at the stage in which the lessee is provided with notice of a meeting to decide whether to terminate the lessee's proprietary lease, and (b) as part of the cooperative corporation's decision to terminate.

In *1050 Tenants Corp. v. Lapidus*,[64] the court seemingly imposed a requirement that the cooperative corporation provide the lessee with detailed written notice of what actions were deemed objectionable. The court did not explicitly impose such a requirement.[65] However, when it decided that the terms of a proprietary lease permitting termination based on "objectionable" conduct were not vague, and therefore were enforceable, it justified its conclusion by referring to the specific factual allegations provided to the lessee in a notice of a special meeting to consider termination of the lessee's proprietary lease.[66]

At the decision-making stage, *320 Owners Corp. v. Harvey*[67] recognized the need to provide detailed factual findings justifying a conclusion that the lessee's conduct was objectionable. The court noted that in the *Pullman* decision, the Court of Appeals had cautioned the courts that when dealing with lease termination they must exercise a heightened vigilance in examining whether the board's action meets the business judgment test, and that the business judgment rule, while deferential, should not serve as a rubber stamp for cooperative corporation actions.[68] In the *Harvey* case, the notice of a special meeting of the board to consider termination of the lessee's proprietary lease due to objectionable conduct did contain a detailed list of charges.[69] The board's determination, however, did not set forth any specific factual findings made by the board

to support its conclusion of objectionable conduct.[70] The court dismissed the cooperative corporation's action of ejectment.[71] It noted that the board "must at a minimum state the factual basis, and not a bare conclusion, in support of its decision to terminate a tenancy based on objectionable conduct."[72] This requirement was imposed because, without it, the court could not determine if the cooperative corporation acted in good faith and in the exercise of honest judgment. Instead, it would merely be asked to rubber stamp the decision of the cooperative corporation.

The Opportunity to Be Heard

The Court of Appeals in *Pullman* discussed the lessee's opportunity to be heard only in passing.[73] It noted in that case that the cooperative unfailingly followed the procedures contained in the lease, including providing the lessee with notice of the special meeting of the shareholders and the opportunity to be heard.[74] However, in *Pullman* the decision to terminate the lessee's proprietary lease was made by the shareholders at a duly convened shareholder meeting.[75] Thus, it is not clear whether notice and an opportunity to be heard are required at a meeting of the board that is to consider termination when not required by the proprietary lease. One lower court has considered this issue and rejected a claim that a full and fair opportunity to be heard, and defend allegations of objectionable conduct, was always required.[76] In that case, neither the proprietary lease nor the by-laws imposed this requirement and the court refused to independently impose it.[77] Instead it concluded that the board had acted in accordance with the requirements imposed by the governing documents.[78] In another lower court decision, however, the court criticized the board's failure to permit the lessee to plead his cause.[79] It concluded that not only did this prove malice but, in addition, it violated the "Court of Appeals' requirement that a shareholder-tenant have the 'opportunity to be heard' before a termination vote."[80]

Right to Cure

The lessee's possible implied right to be given a right to cure objectionable conduct was considered and rejected in *13315 Owners Corp. v. Kennedy*.[81] The *Kennedy* court noted that the proprietary lease did not explicitly provide for an opportunity to cure as a prerequisite to termination based on objectionable conduct.[82] It then concluded that this was not a right that the court would imply into the proprietary lease. It noted:

> A lack of notice to cure is a defense that a shareholder-tenant can raise in some competent-evidence proceedings but never in a proceeding brought under Paragraph 31(f) of a proprietary lease. Under the typical proprietary lease, a cooperative board evicting a shareholder-tenant for objectionable conduct under *Pullman* is not required to offer a cure period. That is one reason why courts must exercise caution in assuring that cooperatives implement *Pullman* fairly, especially after non-shareholder votes.[83]

Of course, the opportunity to cure may be expressly granted in the proprietary lease. An example of such an opportunity is when the lease provides that the objectionable conduct must be repeated after written notice of it is provided to the lessee.[84]

Conclusion

Five years have passed since the Court of Appeals handed down the *Pullman* decision. In that time the lower courts have made clear some of the constraints they will impose on the cooperative corporation's power to terminate a proprietary lease based on objectionable conduct without de novo judicial review. The clearest message provided by the courts is that they will insist on strict compliance with all procedural requirements contained in governing documents, such as the proprietary lease, for termination. In addition, the courts have required a specific recital of factual allegations that provide the bases for possible termination of a proprietary lease based on objectionable conduct.

However, several important questions regarding possible constraints on power remain unanswered. It is not certain if the cooperative corporation must provide the proprietary lessee the opportunity to be heard when the decision to terminate is being made at a board meeting. Indeed, it is not certain that the business judgment rule must be applied when the decision to terminate a proprietary lease is made only by the board. These are questions that need to be addressed by the appellate courts. In the interim, cooperative corporations should proceed cautiously—providing the lessee with an opportunity to be heard, and, perhaps, insisting on shareholder authorization of the extreme sanction of termination of a unit owner's proprietary lease.

Endnotes

1. 100 N.Y.2d 147, 790 N.E.2d 1174, 760 N.Y.S.2d 745 (2003), *aff'd*, 296 A.D.2d 120, 742 N.Y.S.2d 264 (1st Dep't 2002).
2. *W. Gate House, Inc. v. 860-870 Realty LLC*, 7 A.D.3d 412, 776 N.Y.S.2d 482 (1st Dep't 2004).
3. *Pullman*, 100 N.Y.2d at 156, 790 N.E.2d at 1181, 760 N.Y.S.2d at 752 ("Indeed, it recognizes, correctly, that if there was no such provision, termination could proceed only pursuant to RPAPL 711(1).").
4. *See, e.g., Lake Anne Realty Corp. v. Sibley*, 154 A.D.2d 349, 351, 545 N.Y.S.2d 828, 829 (2d Dep't 1989). Tenant's violation of the lease provision, prohibiting alterations without town approval, did not allow landlord to declare forfeiture absent an express stipulation for forfeiture. *Id.*
5. In *Pullman*, for example, the proprietary lease provided as follows:

   > If at any time the Lessor shall determine, upon the affirmative vote of the holders of record of at least two-thirds of that part of its capital stock which is then owned by Lessees under proprietary leases then in force, at a meeting of such stockholders duly called to take action on the subject,

> that because of objectionable conduct on the part of the Lessee, or of a person dwelling in or visiting the apartment, the tenancy of the Lessee is undesirable.
>
> 100 N.Y.2d at 152, 790 N.E.2d at 1178, 760 N.Y.S.2d at 749.

6. N.Y.L.J., Dec. 19, 2007, at 30 (Civ. Ct., Kings Co.).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. 39 A.D.3d 379, 384, 835 N.Y.S.2d 68 (1st Dep't 2007).
12. *Id.* at 383, 835 N.Y.S.2d at 74.
13. N.Y. REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 711(1).
14. 75 N.Y.2d 530, 553 N.E.2d 1318, 554 N.Y.S.2d 807 (1990).
15. *Id.* at 533, 553 N.E.2d at 1321, 554 N.Y.S.2d at 808.
16. *Id.* at 535, 553 N.E.2d at 1320, 554 N.Y.S.2d at 810.
17. *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 154, 790 N.E.2d 1174, 1179-80, 760 N.Y.S.2d 745, 750-51 (2003) (concluding that the business judgment rule does not conflict with RPAPL § 711(1) because the lease agreement contained a contract provision for termination to which the lessee agreed to).
18. *Id.* at 150, 790 N.E.2d at 1176, 760 N.Y.S.2d at 747.
19. *Id.* at 154, 790 N.E.2d at 1180, 760 N.Y.S.2d at 751.
20. *Id.* at 154, 790 N.E.2d at 1179-1180, 760 N.Y.S.2d at 750-51.
21. *Id.* at 153-154, 790 N.E.2d at 1179, 760 N.Y.S.2d at 750. The court recognized that there may be instances where the cooperative's broad powers may lead to abuse by arbitrary decision-making. *Id.*
22. *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 153, 790 N.E.2d 1174, 1179, 760 N.Y.S.2d 745, 750 (2003).
23. *Id.* at 151, 790 N.E.2d at 1177, 760 N.Y.S.2d at 748.
24. *Id.* at 157, 790 N.E.2d at 1181, 760 N.Y.S.2d at 745. In applying the business judgment rule, the court determined that the cooperative had followed the procedures set forth in the lease and that defendant failed to challenge these findings. *Id.*
25. *See, e.g.*, Scott F. Mollen, Realty Law Digest, N.Y.L.J., Oct. 6, 2004, at 5, col. 1 (noting that there is a very real potential for abuse, and if boards are given too much power it could diminish demand for co-op apartments and hurt the value of co-op apartments in general).
26. *Pullman*, 100 N.Y.2d at 155, 790 N.E.2d 1180, 760 N.Y.S.2d 751.
27. *Carnegie Hill 87th Street Corp. v. Heller*, N.Y.L.J., Aug. 17, 2005, at 18, col. 3 (Sup. Ct., N.Y. Co.).
28. *See e.g.*, *London Terrace Towers Inc. v. Davis*, 6 Misc. 3d 600, 790 N.Y.S.2d 813 (Civ. Ct., N.Y. Co. 2004); s*ee also Sirianni v. Rafaloff*, 284 A.D.2d 447, 727 N.Y.S.2d 452 (2d Dep't 2001) (applying the business judgment rule in reviewing the board's decision, however, termination was due to lessees' act of operating a business out of their apartment in violation of the terms of the proprietary lease).
29. *Woodrow Court, Inc. v. Levine*, N.Y.L.J., Nov. 15, 2002, at 22, col. 4 (Civ. Ct., N.Y. Co.). The court stated two reasons for its conclusion that the case before it was distinguishable from *Pullman*: (1) unlike *Pullman* there was never a shareholder vote on respondent's tenancy; and (2) respondents never had an opportunity to defend themselves at a meeting of the board of directors and never had notice of the board's meeting regarding their alleged objectionable conduct. *Id.*
30. *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 790 N.E.2d 1174, 760 N.Y.S.2d 745, (2003).
31. *Id.* at 155, 790 N.E.2d at 1180, 760 N.Y.2d at 751; *see Levandusky v. One Fifth Ave. Apart. Corp.*, 75 N.Y.2d 530, 538, 553 N.E.2d 1317, 1322 (1990).
32. *Pullman* 100 N.Y.2d at 156, 790 N.E.2d at 1181, 760 N.Y.S.2d at 752. Defendant-lessee failed to demonstrate the cooperative acted outside the scope of its authority or in bad faith. *Id.*; *see Breezy Point Coop., Inc. v. Young*, 16 Misc. 3d 101, 104-5, 842 N.Y.S.2d 150, 152 (Sup. Ct. App. Term 2007). Tenant failed to overcome the presumption that the stockholders exercised their honest judgment to promote the lawful and legitimate interests of the corporation. *Id.*; *see also London Terrace Towers, Inc. v. Davis*, 6 Misc. 3d 600, 610, 790 N.Y.S.2d 813, 821 (Civ. Ct., N.Y. Co. 2004). The court noted that "[i]t is the shareholder-tenant's burden to show that the board vote is not entitled to deference." *Id.*
33. This two-step process and the shifting of burden of proof has been best described by Judge Lebovits in *13315 Owners Corp. v. Kennedy*, 4 Misc. 3d 931, 938, 782 N.Y.S.2d 554, 565 (Civ. Ct., N.Y. Co. 2004), and in *London Terrace Towers*, 6 Misc. 3d 600, 610, 790 N.Y.S.2d 813, 821 (Civ. Ct., N.Y. Co. 2004).
34. *Kennedy*, 4 Misc. 3d 931, 938, 782 N.Y.S.2d 554, 565.
35. *Pullman*, 100 N.Y.2d at 155, 790 N.E.2d at 1180, 760 N.Y.S.2d at 751.
36. *Kennedy*, 4 Misc. 3d 931, 938, 782 N.Y.S.2d 554, 565.
37. *Pullman*, 100 N.Y.2d at 156, 790 N.E.2d at 1181, 760 N.Y.S.2d at 752.
38. *16 Maujer St. HDFC v. Titus*, N.Y.L.J., Feb. 23, 2007, at 27 (Civ. Ct., Kings Co. 2007).
39. *13315 Owners Corp. v. Kennedy*, 4 Misc. 3d 931, 782 N.Y.S.2d 554 (Civ. Ct., N.Y. Co. 2004).
40. The petitioner-cooperative corporation's correct name was 13315 Owners Corp. The letterhead on the notice stated it was from East 15th Street Owners Corp., and it was signed by the management of 133 East 15th Street Owners Corp.
41. *Kennedy*, 4 Misc. 3d at 946, 782 N.Y.S.2d at 567.
42. *Id.* at 946, 782 N.Y.2d at 567.
43. *Id.*
44. *Id.*
45. *Id.* at 947, 782 N.Y.2d at 568.
46. *Id.*
47. *Id.*
48. *Id.* at 948, 782 N.Y.2d at 568.
49. *Id.*
50. *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 153-54, 790 N.E.2d 1174, 1179, 760 N.Y.S.2d 745, 750 (2003). The court later noted, when discussing the good faith requirement, that in the case before it there was not the slightest indication of any "bad faith, favoritism, discrimination or malice on the cooperative's part . . . ," and that these types of abuses are incompatible with good faith. *Id.* at 156-57, 790 N.E.2d at 1181-82, 760 N.Y.2d. at 752-53.
51. VINCENT DILORENZO, NEW YORK CONDOMINIUM AND COOPERATIVE LAW § 12-3 (2008-09 Supplement).
52. *Kennedy*, 4 Misc. 3d 931, 948, 782 N.Y.S.2d 554, 569.
53. *Id.* at 948, 782 N.Y.S.2d at 569.
54. *Pullman*, 100 N.Y.2d at 156, 790 N.E.2d at 1181, 760 N.Y.S.2d at 752.
55. *Id.* at 156, 790 N.E.2d at 1181, 760 N.Y.S.2d at 752. The disturbance might be physical or it might be financial. In *Pullman*, the court noted that the defendant's actions had a negative effect on all of the other 37 leaseholders including making them responsible for thousands of dollars in unnecessary legal fees. *Id.* at 157 n. 6, 790 N.E.2d at 1181 n. 6, 760 N.Y.S.2d at 752 n. 6.
56. DILORENZO, *supra* note 51. The board's actions must not violate fiduciary duties, including the duty of undivided loyalty.
57. *See, e.g.*, *Pullman*, 100 N.Y.2d at 150, 790 N.E.2d at 1177, 760 N.Y.S.2d at 748. The conduct of the lessee continued for over two decades. *Id.*; *see also Carnegie Hill 87th Street Corp. v. Heller*, N.Y.L.J., Aug. 17, 2005, at 18 (Sup. Ct., N.Y. Co.). Lessee yelled obscenities at tenants and

employees of the building, repeatedly slammed doors, banged on walls, rang neighbors' doorbells, and engaged in other actions that allegedly constituted a nuisance. *Id.*

58. *See, e.g., Pullman*, at 151, 790 N.E.2d at 1177, 760 N.Y.S.2d at 748 (noting that lessee commenced four lawsuits against neighbors, the president of the cooperative and the cooperative management, and tried to commence three more); *see also Breezy Point Cooperative, Inc. v. Young*, 16 Misc. 3d 101, 101, 842 N.Y.S.2d 150, 150 (Sup. Ct. App. Term 2007) (holding that lessee brought unfounded lawsuits against the cooperative in abuse of the judicial system, which cost the cooperative several hundred thousand dollars in legal fees).

59. *See, e.g., 1050 Tenants Corp. v. Lapidus*, 39 A.D.3d 379, 379, 835 N.Y.S.2d 68, 68 (1st Dep't 2007) (discussing the unjustified withholding of maintenance and other payments for extensive periods of time, as well as the repeated refusal to remove the air conditioning system that leaked into the apartment below, which caused further damage, all in violation of house rules).

60. *See, e.g., Pullman*, 100 N.Y.2d at 151, 790 N.E.2d at 1177, 760 N.Y.S.2d at 748 (noting that the lessee made alterations without board approval, performing construction work on weekends in violation of house rules and not allowing inspection of the apartment and not responding to requests to correct these conditions); *see also Lapidus*, at 383, 835 N.Y.S.2d at 74 (noting that lessees' consciously and unabashedly damage another neighbor's property, and inflict thousand of dollars in unnecessary legal fees, is in furtherance of the cooperative's legitimate interests); *Breezy Point*, 16 Misc. 3d 101, 103, 842 N.Y.S.2d 150, 151 (Sup. Ct. App. Term 2007) (finding that lessee violated cooperative by-laws or rules on 94 occasions over the course of 18 years); *London Terrace Towers, Inc. v. Davis*, 6 Misc. 3d 600, 603, 790 N.Y.S.2d 813, 816 (Civ. Ct., N.Y. Co. 2004) (noting numerous violations of house rules over the course of two years, including playing a stereo at unreasonably loud levels, slamming doors, storing personal belongings in the common hallways, creating a security risk by rigging stairwell doors to remain unlocked, and stealing from other residents in the common areas such as the health club).

61. *W. Gate House, Inc. v. 860-870 Realty LLC*, 7 A.D.3d 412, 776 N.Y.S.2d 482 (1st Dep't 2004). The *Jennifer Realty* decision imposed an implied contractual obligation on the sponsor to undertake in good faith to timely sell so many shares as necessary to create a fully viable cooperative. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 746 N.Y.S.2d 131 (2002).

62. *W. Gate House, Inc.*, 7 A.D.3d 412, 776 N.Y.S.2d 482.

63. *Id.* at 412, 776 N.Y.S.2d at 482.

64. 39 A.D.3d 379, 384, 835 N.Y.S.2d 68, 74 (1st Dep't 2007).

65. *See generally Lapidus*, 39 A.D.3d 379, 835 N.Y.S.2d 68.

66. *Id.* at 383-84, 835 N.Y.S.2d at 68, 74.

67. 2008 Slip Op. 32796, 2008 WL 4641987 (Sup. Ct., N.Y. Co. 2008).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 156, 790 N.E.2d 1174, 1181, 760 N.Y.S.2d 745, 752 (2003).

74. *Id.* at 156, 790 N.E.2d at 1181, 760 N.Y.S.2d at 752.

75. *Id.* at 151, 790 N.E.2d at 1177, 760 N.Y.S.2d at 748. The New York Business Corporation Law requires notice to the shareholders of any special meeting. BCL §§ 602(c), 605 (2009) (Westlaw). In addition, shareholders have an inherent right to speak at shareholder meetings. *See* N.Y. JUR. 2d, *Business Relationships* § 882 (2009) (Westlaw) (noting that the conduct of shareholders' meetings, absent an express by-law, are controlled by accepted usage and common practice—the fundamental rule being that all who are entitled to take part in a meeting must be treated with fairness and good faith). By contrast, special meetings of the board of directors require notice only to the directors. BCL § 711 (2009). Shareholders who are not directors do not have a right to attend or participate in discussions that is granted by the Business Corporation Law. *Id.*

76. *Carnegie Hill 87th Street Corp v. Heller*, N.Y.L.J., Aug. 17, 2005, at 18 (Sup. Ct., N.Y. Co.).

77. *Id.*

78. *Id.*

79. *13315 Owners Corp. v. Kennedy*, 4 Misc. 3d 931, 948, 782 N.Y.S.2d 554, 569 (Civ. Ct., N.Y. Co. 2004).

80. *Id.* at 948, 782 N.Y.S.2d at 569; *see Woodrow Court, Inc. v. Levine*, N.Y.L.J., Nov. 15, 2002, at 22 (Civ. Ct., N.Y. Co.). The *Woodrow Court* case was decided after the New York Appellate Court's decision in *Pullman*, but before the Court of Appeals' decision. The court distinguished *Pullman* and did not defer to the board's decision to terminate the proprietary lease in part because the lessees never had an opportunity to defend themselves at the meeting of the board and never had notice that the board was discussing and planning to act on the issue of their alleged objectionable conduct. *Id.*

81. *Kennedy*, 4 Misc. 3d at 931, 782 N.Y.S.2d at 554.

82. *Id.* at 945, 782 N.Y.S.2d at 566.

83. *Id.*

84. *See, e.g., 16 Maujer Street HDFC v. Titus*, N.Y.L.J. Feb. 23, 2007, at 27 (Civ. Ct., Kings Co.).

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Statutory Short Form Power of Attorney Revised; New Statutory Major Gifts Rider

By Michael J. Berey

On January 27, 2009, Governor Paterson signed into law an extensive revision of Title 15 of Article 5 of New York's General Obligations Law ("GOL"), which sets forth a new Statutory Short Form Power of Attorney ("SSF Power").[1] Chapter 644 of the Laws of 2008 also introduces the concept of the Statutory Major Gifts Rider ("SMGR").[2] Accordingly, the heading of Title 15 has been changed from "Statutory Short Form Power of Attorney" to "Statutory Short Form and Other Powers of Attorney for Financial Estate Planning."[3] Chapter 644's effective date of March 1, 2009 was changed to September 1, 2009 by Chapter 4 of the Laws of 2009.[4]

Amended Sections 5-1502J ("Construction–benefits from military service"), 5-1502K (newly named "Construction—health care billing and payment matters"), and 5-1504 ("Acceptance of statutory SSF Power power of attorney"), and new Sections 5-1505 ("Standard of care; fiduciary duty; compelling disclosure of record") and 5-1510 ("Special proceedings") will also apply to powers-of-attorney ("Powers") executed prior to September 1.[5] Powers validly executed prior to the effective date may continue to be used.

A "Person" may execute an SSF Power and be the "Principal" under the Power (what has been referred to as the "donor" of a power-of-attorney).[6] A "Person" is defined in new Section 5-1501 to include, among others, an individual "acting for himself or herself," a fiduciary, corporation, estate, trust, partnership, limited liability company, governmental entity or instrumentality, or "any other legal or commercial entity."[7] An individual executing an SSF Power or a SMGR, discussed below, must be 18 years of age or older.[8]

A non-statutory Power executed in New York can be used. It appears, however, that a natural person can only execute a non-statutory form of power of attorney meeting the requirements of new Section 5-1501B ("Creation of a valid power of attorney; when effective").[9] While new subsection 4 of Section 5-1501B states that "[n]othing in this title shall be construed to bar the use of any other or different form of power of attorney [not meeting the requirements of Section 5-1501B] desired by a person other than an individual . . . ,"[10] subsection 1 of new Section 5-1501B provides that "[t]o be valid, a statutory SSF Power power of attorney, or a non-statutory power of attorney, executed in this state by an individual, must" meet the requirements set forth in that Section.[11]

"[T]he heading of Title 15 has been changed from 'Statutory Short Form Power of Attorney' to 'Statutory Short Form and Other Powers of Attorney for Financial Estate Planning.'"

The form of the new SSF Power is set forth in new Section 5-1513 ("Statutory short form power of attorney").[12] While former Section 5-1501 included a separate form of durable power, new Section 5-1501A ("Power of attorney not affected by incapacity") provides that an SSF Power is durable unless it expressly states that the Principal's incapacity terminates the Power, and, unless the Power so states, "[t]he subsequent incapacity of a principal shall not revoke or terminate the authority of an agent. . . ."[13]

An SSF Power, and a non-statutory Power, executed in New York, by an individual, are required to be typed, in no less than 12-point type (or legibly printed with letters the equivalent of such type), dated and signed by a Principal with capacity and by the agent(s) appointed in the Power (the attorney(s)-in-fact).[14] An SSF Power and a non-statutory Power must contain the text of the sections in the SSF Power captioned "Caution to the Principal" and "Important Information for the Agent."[15]

A Power executed in another state or in a jurisdiction outside of New York which complies with the law of that state or the law of New York is valid in New York, regardless of whether the Principal is a domiciliary of New York.[16]

When a Statutory Power Is Effective

Although the Principal and the agent need not execute the Power at the same time, the Power is not effective until the agent's signature is acknowledged.[17] If more than one agent is appointed, the Power is effective when the signatures of all of the agents are acknowledged.[18] The signatures of the Principal and of the agent(s) must be acknowledged "in the manner prescribed for the acknowledgment of a conveyance of real property."[19]

Section 5-1501(13) provides that a signature can be made by even a mark, a stamp or by an electronic signature.[20] However, referencing Section 307 ("Exceptions") of the State's Electronic Signatures and Records Act, which excludes from the scope of that Act "any conveyance or other instrument recordable under article nine of the real property law,"[21] Sec-

tion 5-1501(13) states that a power of attorney "that is recordable under the real property law shall not be executed with an electronic signature."[22]

Section 5-1506 ("Powers of attorney effective at a future time or upon the occurrence of a contingency") has been repealed.[23] (New Section 5-1506 is captioned "Compensation").[24] Instead, under new Section 5-1501B(3)(b), a Power may provide that it takes effect on a certain date or on the occurence of a specified contingency.[25] The Power may also require that a person or persons named or otherwise identified declare in writing that the contingency has occurred, and such a declaration is effective "without regard to whether the contingency has [actually] occurred."[26]

Multiple Agents

Under new Section 5-1508 ("Co-agents and successor agents"), mulitple agents act jointly unless the Power states otherwise.[27] However, if prompt action is required to accomplish a purpose of a Power and to avoid irreparable injury to the Principal's interest when the co-agent is unavailable because of absence, illness, or other temporary incapacity, the other agent may act alone.[28] In addition, the Principal may appoint one or more successor agents to serve "if every initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve or declines to serve."[29]

Termination of the Agent's Authority

An agent may resign on written notice to the Principal and also to any co-agent or successor agent, a "Monitor" if one was named, or to the Principal's guardian, if one was appointed.[30] If the Principal is incapacitated and there is no other such person to whom notice may be given, notice of resignation may be given to a government agency with the authority to protect the Principal, or the agent may petition a court to approve his or her resignation.[31] The Power can set forth other ways for an agent to resign.[32]

A "Monitor" is a person appointed to receive from the agent a record of all receipts, disbursements and transactions entered into by the agent under the Power.[33]

"An agent is not entitled to be compensated unless specifically provided for in the Power, except that an agent may be reimbursed for reasonable expenses actually incurred."

An agent's authority may be terminated by the Principal affirmatively revoking the authority of the agent and by the death or incapacity of an agent.[34] If the agent is the spouse of the Principal, then on their divorce, or on the annulment or the issuance of a declaration of the nullity of their marriage, the agent's authority ceases.[35] However, the termination of an agent's authority is not effective as to third parties who act in good faith without actual notice.[36] Even when a notice of the revocation of an agent's authority is recorded, the third party must have actual notice: "A financial institution is deemed to have actual notice after it has had a reasonable opportunity to act on a written notice of the revocation or termination following receipt at its office where an account [of the principal] is located."[37]

An agent is not entitled to be compensated unless specifically provided for in the Power, except that an agent may be reimbursed for reasonable expenses actually incurred.[38]

Agent Is a Fiduciary

Under new Section 5-1505, an agent is a fiduciary and may be subject to liability for his or her conduct or omissions.[39] For example, absent being specifically authorized in the Power, an agent may not transfer the Principal's property to himself or herself.[40] The agent must also keep a record of all receipts, disbursements and transactions entered into and make them available within 15 days on request of a "Monitor," a co-agent or a successor agent, a government entity, a court evaluator appointed under the Mental Hygiene Law § 81.09 ("Proceedings for Appointment of a Guardian for Personal Needs or Property Management. Appointment of court evaluator"),[41] a guardian *ad litem* appointed under Surrogate's Court Procedures Act § 1754 ("Guardians of Mentally Retarded and Developmentally Disabled Persons. Hearing and Trial"),[42] a guardian or conservator of the estate of the Principal, or the personal representative of the estate of a deceased Principal.[43]

A Special Proceeding can be commenced by any of the parties noted in the immediately preceeding paragraph to compel the agent to provide the records.[44] A Special Proceeding can also be commenced by the agent, the Principal's spouse, child or parent, the Principal's successor in interest, and by any third party "who may be required to accept" a Power, to determine, among other things, whether the Power is valid, to remove the agent or to approve the resignation of an agent, to construe any provision of the Power, or to compel its acceptance.[45]

The Statutory Form

The statutory form of the new SSF Power in Section 5-1513 includes the following:[46]

1. A section captioned "Caution to the Principal";[47]
2. The designation of an agent or agents and a statement that they act jointly, with an option to direct that they are to act separately;[48]
3. A statement that the power is not affected by the Principal's subsequent incapacity, unless otherwise indicated in the

section of the Power captioned "Modifications";[49]

4. A statement that all prior powers of attorney executed by the Principal are revoked, unless stated otherwise in the section of the Power captioned "Modifications," in which case it must be indicated whether the agents under all of the Powers are to act jointly or separately;[50]

5. A list of "subjects" corresponding to the categories of powers set forth in Sections 5-1502A–5-1502N, similar to the list in the now effective form of SSF Power. Authority is granted as to a particular subject by the Principal's initialling the corresponding bracket or by listing the letters for the subjects selected on line "P" ("Each of the matters identified by the following letters _____") and by initialling line "P," as has been done under the prior statutory form of Power, "P" having been letter "Q" in the prior form.[51]

Deleted from the new SSF Power is the subject "making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate $10,000 to each of such persons in any year."[52] However, new subdivision 14 of amended Section 5-1502I ("Construction—personal and family maintenance") authorizes the agent "[t]o continue to make gifts that the principal customarily made to individuals and charitable organizations prior to the creation of the agency" to $500 in the aggregate to any one recipient in a single calendar year, and gifts can also be made as authorized under a duly executed SMGR.[53]

In addition to Section 5-1502I, other Sections, corresponding to the subjects listed on the Power, have been amended. The subjects "personal relationships and affairs," "benefits from military service," and "records, reports and statements" in the former statutory form are now captioned, respectively, "personal and family maintenance," "benefits from governmental programs or civil or military service" and "health care billing and payment matters; records, reports and statements."[54] Substantive changes have also been made to certain Sections. In particular, Section 5-1502A ("Construction—real estate transactions") has been amended to remove the authority of an agent to "revoke, create or modify a trust."[55]

6. An optional "Modifications" section. Section 5-1503, as amended by Chapter 644 and now captioned "Modifications of the statutory short form power of attorney and of the statutory major gifts rider," governs this section of the Power;[56]

7. A section providing that if the agent is to make major gifts and other transfers of the Principal's property, the Principal must initial a statement in the Power to that effect and annex an SMGR.[57] It cautions that an SMGR "should be prepared by a lawyer";[58]

8. The optional designation of a "Monitor";[59]

9. An optional section of "Compensation of Agents";[60]

10. "Acceptance by Third Parties," under which the Principal agrees to indemnify third parties relying on the Power and confirms that a termination of the Power is not effective as to a third party until that party has actual notice or knowledge that the Power has been terminated;[61]

11. "Termination," stating that the power continues until it is revoked or terminated by the death of the Principal or otherwise by an event listed in Section 5-1511.[62]

Under Section 5-1511 ("Termination or revocation of a power of attorney; notice"), a Power terminates when the Principal dies, the Principal becomes incapacitated (if the power is not durable), the authority of the agent terminates without there being a co-agent or a successor agent appointed or willing or able to serve, when the purpose of the Power is accomplished, or if a court appoints a guardian for the Principal and revokes the Power under Mental Hygiene Law § 1.29 ("Effect of the appointment on the incapacitated person") or as provided in Section 5-1511.[63]

12. The acknowledged signature of the Principal;[64]

13. "Important Information for the Agent";[65]

14. The acknowledged signature(s) of the agent(s).[66]

The agent executes an instrument pursuant to a Power by signing either his or her name as agent for the Principal, the name of the Principal by the agent as agent, or by "any similar written disclosure of the principal and agency relationship." Section 5-1507 ("Signature of agent").

Relying on the Power

No third party located in New York State "shall refuse without reasonable cause" to honor a properly executed SSF Power, an SSF Power supplemented by a SMGR, or an SSF Power "executed in accordance with the laws in effect at the time of its execution."[67] "Reasonable cause" to refuse to accept a Power exists when, for example, an agent refuses to provide the original power of attorney, the third party has actual knowledge of or a reasonable basis for believing that (i) the Principal has died, (ii) is incapacitated (when the Power is non-durable), (iii) was incapacitated when the Power was executed, or (iv) the Power was procured by fraud, duress or undue influence, when the agent has actual notice of the termination or revocation of the Power, or "the refusal of a title insurance company to underwrite title insurance for a transfer of real property made pursuant to a major gifts rider or a non-statutory power of attorney that does not contain ex-

press instructions or purposes of the Principal.''[68]

Grounds for refusing to honor a Power do not incude the lapse of time since execution of the Power or that there has been a lapse of time between the dates on which the signatures of the Principal and any agent were acknowledged.[69] Except as provided in Section 5-1504, it is

> unlawful for a third party to unreasonably refuse to honor a properly executed statutory short form power of attorney, including a statutory short form power of attorney which is supplemented by a statutory major gifts rider, or a statutory short form power of attorney executed in accordance with the laws in effect at the time of its execution.[70]

However, a third party is not required to accept a Power other than an SSF Power.[71]

A third party to whom a Power is presented may require the agent to execute an acknowledged affidavit which states that the Power is in full force and effect. More particularly, the affidavit may also state that the agent has no actual notice or notice of any facts indicating that the Power was terminated or revoked or otherwise modified in a way that would impact the immediate transaction. If the agent is a successor agent, the affidavit may also state that the prior agent is no longer able or willing to serve.

According to Section 5-1504.5,

> [s]uch an affidavit is conclusive proof to the third party relying on the power of attorney that the power is valid and effective, and has not been terminated or revoked, except as to any third party who had actual notice that the power of attorney had terminated or been revoked prior to execution of the affidavit.[72]

Statutory Major Gifts Rider

The statutory form of the new SMGR is in Section 5-1514 (“Major gifts and other transfers; formal requirements; statutory form'').[73] The Section authorizes an agent to make gifts and transfers of the Principal's property. It must be executed simultaneously with and supplement an SSF Power or be executed simultaneously with a non-statutory form of Power.[74]

The SMGR and, if executed in connection with a non-statutory form of Power, the Power itself, must be witnessed “by two persons not named in the instrument as recipients of other gifts or other transfers, in the manner described at'' Estates, Powers and Trusts Law 3-2.1(a)(2) (“Execution and authorization of wills; formal requirements'').[75] EPTL 3-2.1(a)(2) requires the testator to sign in the presence of, or acknowledge his signature to, the attesting witnesses.[76]

The types of gifts that can be made under an SMGR and the limitations on the powers of the agent under an SMGR are set forth in Section 5-1514.[77] Note is made of the following provisions of the Section insofar as they may affect real property:

1. The SMGR must expressly authorize the agent to make any gifts or transfer of a kind not set forth in subdivision 14 of Section 5-1502I, noted above. In particular, an agent may not gift to himself or herself an interest in the Principal's property unless the authority to do so is expressly set forth;[78]
2. The agent is authorized “to execute, acknowledge, seal and deliver any deed, assignment, agreement, trust agreement, authorization, check or other instrument which the agent deems useful for the accomplishment of any of the purposes enumerated in'' Section 5-1514;[79]
3. The authority of the agent to make a gift of property is exercisable in connection with property in which the Principal obtains an interest after the Power is executed. Such property may be situated within or outside of New York;[80]
4. The authority for the agent to make a gift or a transfer to the Principal's spouse is revoked on the divorce of the Principal and his or her spouse, the annulment of their marriage, or the issuance of a declaration of the nullity of their marriage, unless the SMGR expressly provides otherwise.[81]

Endnotes

1. N.Y. Gen. Oblig. Law § 5-1501 (effective Sept. 1, 2009).
2. Chapter 644 of the N.Y. Laws of 2008 is available at http://www.titlelawnewyork.com/Chapter644.pdf. In connection with the SMGR, reference should be made to Sections 5-1501.14, 5-1501B.2 and 5-1514. § 5-1501(14); 5-1501B(2); 5-1514.
3. § 5-1501 (effective until Sept. 1, 2009).
4. Chapter 644 of the NY Laws of 2008.
5. §§ 5-1502J, 5-1502K, 5-1504, 5-1505 and 5-1510 (effective Sept. 1, 2009).
6. § 5-1501(9), (11) (effective Sept 1, 2009).
7. *Id.* at (9).
8. *Id.* at (11).
9. § 5-1501B (effective Sept. 1, 2009).
10. *Id.* at (4).
11. *Id.* at (1).
12. § 5-1513 (effective Sept. 1, 2009).
13. § 5-1501(1) (effective until Sept. 1, 2009); § 5-1501A(2) (effective Sept. 1, 2009).
14. § 5-1501B (effective Sept. 1, 2009).
15. *Id.*
16. § 5-1512 (effective Sept. 1, 2009) (“Powers of attorney executed in other jurisdictions”).
17. § 5-1501B(3)(a) (effective Sept. 1, 2009).
18. *Id.*
19. *Id.* at (1)(c).
20. § 5-1501(13) (effective Sept. 1, 2009).
21. N.Y. Tech. Law § 307 (2009).
22. § 5-1501(13) (effective Sept. 1, 2009).
23. § 5-1506 (effective until Sept. 1, 2009).
24. § 5-1506 (effective Sept. 1, 2009).
25. § 5-1501B(3)(b) (effective Sept. 1, 2009).
26. *Id.*
27. § 5-1508(1) (effective Sept. 1, 2009).
28. *Id.*

29. *Id.* at (2).
30. § 5-1505(3)(a) (effective Sept. 1, 2009).
31. *Id.*
32. *Id.* at (3)(b).
33. § 5-1501(6) (effective Sept. 1, 2009).
34. § 5-1511(2)(a)-(b) (effective Sept. 1, 2009).
35. *Id.* at (2)(c).
36. *Id.* at (5).
37. *Id.*
38. § 5-1506(1) (effective Sept. 1, 2009).
39. § 5-1505(2)(b) (effective Sept. 1, 2009).
40. *Id.* at (2)(a)(2).
41. N.Y. MEN. HYG. LAW § 81.09 (2009).
42. N.Y. SURR. CT. PROC. ACT § 1754 (2009).
43. § 5-1505(3) (effective Sept. 1, 2009).
44. § 5-1510(1) (effective Sept. 1, 2009).
45. § 5-1510(3) (effective Sept. 1, 2009).
46. § 5-1513 (effective Sept. 1, 2009).
47. *Id.* at (1)(a).
48. *Id.* at (1)(b).
49. *Id.* at (1)(d).
50. *Id.* at (1)(e).
51. *Id.* at (1)(f).
52. § 5-1505I (effective until Sept. 1, 2009).
53. § 5-1502I(14) (effective Sept. 1, 2009).
54. § 5-1502I, J, K (effective Sept. 1, 2009).
55. § 5-1502A(2) (effective until Sept. 1, 2009).
56. § 5-1503 (effective Sept. 1, 2009).
57. § 5-1514(9)(c)–(d) (effective Sept. 1, 2009).
58. § 5-1514 (effective Sept. 1, 2009).
59. § 5-1513(i) (effective Sept. 1, 2009).
60. *Id.* at (j).
61. *Id.* at (k).
62. *Id.* at (l).
63. *Id* at (1); N.Y. MEN. HYG. LAW § 1.29 (2009).
64. § 5-1513(m) (effective Sept. 1, 2009).
65. *Id.* at (n).
66. *Id.* at (o).
67. § 5-1504(1) (effective Sept. 1, 2009).
68. *Id.* at (1)(a).
69. *Id.* at (1)(b)(3).
70. *Id.* at (2).
71. *Id.* at (6).
72. *Id.* at (5).
73. § 5-1514 (effective Sept. 1, 2009).
74. *Id.* at (1).
75. *Id.* at (9)(b).
76. E.P.T.L. 3-2.1(a)(2) (2009).
77. § 5-1514 (effective Sept 1, 2009).
78. *Id.* at (4)(b).
79. *Id.* at (6)(b)(2).
80. *Id.* at (7).
81. *Id.* at (8).

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A copy of Chapter 644 is posted at www.titlelaw-newyork.com/Chapter644.pdf.

Development Rights Purchases by Zoning Lot Merger in New York City

By Francisco Augspach

I. Introduction

Zoning lot mergers are one of the two ways to purchase development rights (sometimes called "air rights") in the City of New York. This article explains what development rights are and how to purchase them by zoning lot merger. While these transactions involve the purchase of rights under the zoning law, they are typically handled by real estate practitioners because: (1) they involve private parties as opposed to the zoning law, where the object is governmental power, and (2) because the ultimate goal is to create interests attaching to land. Despite their twin-nature, zoning lot mergers are not prohibitively difficult, except for the fact that they involve concepts foreign to the real estate practitioner. Transferable Development Rights, i.e., development rights purchases from landmarks or special districts, are beyond the scope of this article.

II. Elements of New York City Zoning Law

Development rights are rooted in zoning law, not real property law. In order to understand their nature, the real estate practitioner must first familiarize himself or herself with concepts of the zoning law. At the very least, familiarity with the terms will ease communications with the client's architect and the Department of Buildings.[1]

A. "FAR," "FA," and Other Building Restrictions

The City is divided into residential, commercial, and manufacturing districts. Every district is designated with the letter "R", "C," or "M" followed by a number, 1 through 10. Usually, a higher number means a higher district density. For example, a building in an R2 district cannot have more square footage than half its lot size. If the lot is 40 feet by 100 feet, then it has a total 4,000 sq. ft. and any building on the lot cannot have more than 2,000 sq. ft. In a C5 district a building can have 10 sq. ft. per sq. ft. of the lot size. A lot with 4,000 sq. ft. would allow for a building with 40,000 sq. ft. (a tower). The ratio (e.g., 0.5 to 1 in R2; or 10 to 1 in C5) is called "floor area ratio" ("FAR") and the resulting square footage, "floor area" ("FA") or "development rights."

In addition to FAR, districts have many other restrictions. For example, minimum-lot size, front yard (i.e., setback), rear yard, side yards, and maximum height can be very strict in low-density residential districts. In fact, in the case of R1 and R2 districts, these restrictions typically limit the shape of the building to the extent that the builder cannot benefit fully from its endowment of FA. In low density residential districts, FAR is rather meaningless because the other restrictions determine the size of the building. An endowment of FA does not carry the right to expend it fully. In higher density districts, this point becomes relevant when the lot acquires FA in excess of its original allotment.

Other noteworthy restrictions include minimum garage / parking, lot coverage and sky exposure plane. Lot coverage is the percentage of the surface of the lot that may be covered by the building. For instance, a lot with 4,000 sq. ft. in a C5 district may have a total of 40,000 sq. ft of FA, but at the ground level the building cannot occupy more than 40% of the surface of the lot, or 1,600 sq. ft. The sky exposure plane is a setback (or further setback) that begins at a certain height to prevent buildings from blocking all light and air from the streets. The sky exposure plane varies substantially depending on whether the building fronts a narrow or a wide street.

The object of this scant exhibition of zoning restrictions is to show that development rights, or FA, are only one form of building restriction in a large regulatory framework. Zoning approvals require compliance with the entire framework, not just with FAR. More importantly, the real estate practitioner must recognize that this is part and parcel of the zoning law, and must avoid thinking of "development rights" as real property rights. While the principles of real property law protect the transfer of real estate, the transfer of development rights is a "privilege" at the pleasure of the city of New York, rather than a "right" incidental to ownership.

B. Commercial, Residential and Community Facility FA

There are three kinds of FA: commercial, residential, and community facility. These determine how much square footage can be designated to a specific use.[2] For instance, only commercial FA can be used for retail store space and most offices. "Community facility" refers to services (which can be profitable) that are essential to the immediate community, such as health care, houses of worship, libraries, and educational centers.

In C1 and C2 districts, unused commercial FA can be used for residential purposes. Community facility FA can sometimes be used for residential purposes.[3] Otherwise, no amount of one kind of FA can be exchanged for any amount of the other. When drafting contracts, it is important to distinguish the amount and type of FA involved.

C. A Definition of Floor Area?

Floor area "is the sum of the gross area of the several floors of a

building or buildings, measured from the exterior faces of the exterior walls or from the center lines of walls separating two buildings."[4] Five pages of items specifically included and excluded follow this definition. While we will not delve into the intricacies here, a word of caution is warranted.

An illegal use or development can result in more use of FA. For example, cellar space does not count toward FA unless the cellar is being used as dwelling space. After accounting for this, one may find that a lot did not have as much disposable FA as one thought. Other instances where FA may be accidentally increased are: (a) by enclosing steps, porches and galleries; (b) by increasing off-street parking (such as by covering yard with cement); and (c) by enlarging loading docks. In short, the legality of the premises involved in the transfer should be checked.

D. Other Means of Increasing FA

A zoning lot merger is only one way of increasing the original allotment of FA. The zoning resolution provides for other means, such as the purchase of excess development rights from protected buildings (landmarks or special districts) that they cannot legally use themselves. In addition, dedications of portions of the property to the public use are rewarded with a bonus of FA. Examples include creating a public park or indoor area at the ground level, building an archway or public passage connecting public streets, or even constructing an alternative access to the subway. While the closing attorney is not expected to be a building planner, this information sheds light on dedications filed on record, consequences of their breach and rights to be reserved when merging zoning lots.

III. Zoning Lot Mergers

A. Introduction

Zoning lot mergers are used to transfer development rights; however, they do not really cause transfers at all. The concept is straightforward: two or more owners of adjoining zoning lots enter into an agreement by which (a) the zoning lots are combined (i.e., merged), and (b) they apportion the resulting FA among them. For example, A and B own adjoining zoning lots, and each is allowed to develop 100,000 sq. ft. of FA. They merge the zoning lots, and now own a zoning lot with a maximum of 200,000 sq. ft. of FA. B records covenants and restrictions against her lot prohibiting her from using more than 70,000 sq. ft. of the combined FA. As a result, A now has 130,000 sq. ft. available. There is no actual transfer as would be the case in transfers involving special districts or landmarks (neither of which will be reviewed here). There is a merger of zoning lots, with filed covenants and restrictions against the parcel giving up development rights. That the other parcel can benefit from the balance of the combined zoning lot is only the result of merger and restriction.[5] The rationale in allowing this form of transfer is that the district density remains unaffected. The New York City Zoning Resolution ("ZR") assigns a certain FAR to the district. The city is neutral as to whether the FA is expended by one building or the one next-door, provided the lots, when seen jointly, remain within the district FAR.

B. Applications

In order to be merged, lots must be contiguous by ten linear feet and must be within the same block.[6] Any number of lots can be joined. The requirement of ten feet is satisfied if complied with in sequence, e.g., lot A shares ten feet with B, lot B shares ten feet with C, but A and C do not touch on each other. Occasionally, the immediately adjoining lot, for example, B, has no disposable FA, but will agree on a merger with A and C so that A can purchase FA from C. B would naturally exact a fee and perhaps some other benefit for this service.[7] A lot that joins in a merger to facilitate a transaction between two other lots, without selling any FA itself, is typically called a "through-lot." Zoning lot mergers have also been pursued by advertising companies. The maximum legal size of a sign is dictated by the size of the zoning lot. By having lots merge, advertising companies can post larger signs.

C. What Is a "Zoning Lot"?

Until now, we have referred to "lots" and "zoning lots" indistinctively. The concept of a "zoning lot" was introduced by the 1961 Zoning Resolution. A "zoning lot" is defined as "a lot of record existing on December 15, 1961" or as a lot that may result from a zoning lot merger.[8] By "lot of record," the Zoning Resolution means a tax lot on the official tax map of the city of New York. The first portion of the definition sets the starting line, the second portion opens the door for zoning lot mergers. "A 'zoning lot,' therefore, may or may not coincide with a lot as shown on the official tax map of the City of New York, or any recorded subdivision plat or deed."[9] The first task of the practitioner facing a zoning lot merger is determining which are the zoning lots involved. It is common practice to leave this determination to the title companies. However, as will be shown, identifying zoning lots can be a rather complex matter. The relevant information exceeds the type of records title companies are used to working with. Therefore, blind reliance on the title company's determination is ill-advised.[10]

1. Zoning Lot Mergers Between December 15, 1961 and August 18, 1977

Between December 15, 1961 and August 18, 1977, adjoining zoning lots (and in the same block) would be merged if they were in single ownership at the time of the application for a certificate of occupancy or building permit. Single ownership, however, did not necessarily mean "single fee ownership." The city had taken the position that a ground lease with a duration of 75 years, or a 50-year lease with an option to increase it to

75 years, qualified as "ownership." Developers would typically own in fee the parcel planned for development and obtain ground leases on surrounding lots meant to remain vacant or underdeveloped. The lots were only required to adjoin each other. The developer would submit its application with the lease and the permit would be issued for the combined lots in single ownership. The merger would then be noted (if only by metes and bounds covering both lots) in the building file with the resulting permit.

Mergers dating from this period present three problems. The first problem is that there was no requirement that the ground leases be recorded. Therefore, no diligent title search can reveal whether zoning lots have been merged. A developer might have thought he or she was purchasing vacant land in Manhattan (that alone should raise suspicion) and then later discover that there was a preexisting ground lease requiring the property to remain undeveloped for 75 years. A diligent search in the Department of Building records would not necessarily disclose the lease either. The merger would only be noted in the file of the building that benefited from it, not in the file of the transferor lot. This issue was mostly cured by the 1977 amendment, which, among other things, required all such ground leases to be recorded no later than August 1, 1978. We say "mostly cured" because a troublesome fact pattern remains unresolved. If a building was completed and the certificate of occupancy was issued prior to August 18, 1977, the developer would have had little interest in recording the ground lease and the Department of Buildings would have had little leverage to require it (even assuming that files for approved buildings would be revisited to check this).[11] Therefore, a purchaser of underdeveloped land could still find that the property is subject to a private ground lease.[12]

The second problem of mergers from this period is that the merger did not occur as soon as the lots entered into "single ownership"; an application for a permit or certificate of occupancy also had to be made. The fact that an owner granted a ground lease to the adjoining owner did not result in a merger. Consequently, the zoning law would consider both the fee owner and the lessee as the "owner." The Department of Buildings could legally entertain an application from either party.[13] The zoning law did not regard them as "co-owners" but each one as "the owner." Each one of them had the right to expend the available FA to the detriment of the other.[14]

The third issue is that ground leases, though long, expire or terminate prematurely. If the minimum term was 50 years (with an option to renew) and starting in 1961, then these leases could begin expiring in 2011. It appears that the Department of Buildings will allow these owners to continue to benefit from these mergers through the life of the building, rather than through the expiration of the lease.[15] Litigation by ground lessors is expected in this situation.

2. Zoning Lot Mergers After August 18, 1977

It was the 1977 amendment that finally disassociated development rights and land ownership. "Single ownership" is no longer required to merge lots. Rather, the current zoning resolution merely requires adjoining owners (or the same owner, should he or she be the same person) to file a statement declaring the lots merged. This statement, called a "Declaration of Zoning Lot Restrictions," must be filed with the City Register, or with the County Clerk, if filed in Richmond County.[16] Therefore, mergers occurring after August 18, 1977 are easily revealed by a title search. The procedure for merger will be explained below.

3. Zoning Lot Mergers Before 1961

It is undisputed that the concept of "zoning lot" was introduced by the Zoning Resolution of 1961. Therefore, there is support for the proposition that there could not have been any zoning lot mergers before 1961. Unfortunately, this is not the case.[17]

Air rights transactions pre-date the 1961 resolution. The Empire State Building (1931) and 666 Fifth Avenue (1957) were built thanks to air rights transactions.[18] The original 1916 resolution imposed height limits, but allowed them to be waived in one instance. After reaching the height limit the building could continue, if thereafter it only occupied 25% of the allowable base area of the building. For example, if a building could have 1,000 sq. ft. at its ground level, the so-called "25% tower" could have up to 250 sq. ft. at each level, without height limit.[19] Soon thereafter, "the Department of Buildings construed a 'lot' to include contiguous parcels that were: (i) held in common ownership; or (ii) held in separate ownership, provided that one of the parcels benefited (sic) from the use of the adjoining parcel's air rights by way of an air rights sale, lease, or other conveyance."[20] In 1959 this interpretation of "lot" for the purposes of waiving height restrictions was codified into New York City Zoning Resolution (hereinafter ZR) section 9(d).

It can be argued that none of this amounted to a zoning lot merger. These might have been requirements for the issuance of permits and certificates of occupancy. To say that these transactions constituted zoning lot mergers, when the concept was not introduced until 1961, would mean reclassifying them retroactively.

The 1961 Zoning Resolution presented three alternative definitions of "zoning lot." Two of them we have reviewed in Section 1, *supra*, which are a lot of record in the official tax map in effect on December 15, 1961 and zoning lots resulting from mergers after 1961. We are now concerned

with the third definition of "zoning lot" in the 1961 resolution:

> (b) A tract of land, either unsubdivided or consisting of two or more contiguous lots of record, located within a single block, which, on the effective date of this resolution or any subsequent amendment thereto, was in *single ownership*[.][21] (underlining added, italics in the original.)

This subsection (b) appears to have been meant to subsume pre-1961 transactions into zoning lots. The underlined portion clearly refers to something in place at the time of the writing (note the use of the past tense "was"). Moreover, "*single ownership*" are the precise words that the immediately following subsection (c)[22] uses to refer to what we call a zoning lot merger (no statute, not even the current one, uses the word "merger"). The fact that there is no reference to ground leases, or any other form of air rights conveyances, is not surprising. Subsection (c) does not refer to them either. There was probably no need to because "single ownership" had already been interpreted to include them. Our current Zoning Resolution contains a practically identical subsection (b), using the words "single ownership" without italics.

Norman Marcus, former counsel to the New York City Planning Commission, was of the opinion that these pre-1961 transactions effected mergers. In 1984 he wrote:

> In 1959, this ruling was codified by an amendment to section 9(d) that both the City Planning Commission and the Board of Estimate approved. The amendment provided that with respect to buildings erected or being erected on or before October 14, 1959, a "lot" could embrace contiguous parcels, provided that there is an 'acquisition of the air rights . . . [pertaining to one such parcel] by deed, lease or other written instrument' for the benefit of the other parcel. The viability of this definition of a "lot'' was tested when, in 1956, C.L.R. Realty Co., the owner of a parcel apparently restricted by an air rights lease sued the Commissioner of Housing and Buildings and the owner of a contiguous benefited parcel with a twenty-five percent tower. The plaintiff sought to remove any restriction from his apparently restricted parcel and thereby establish its independence. He sought a declaration that the twenty-five percent tower had no effect on any development rights that accrued to the plaintiff's parcel. The defendant argued that once the parcels were severed, the tower would more than double its coverage in relation to the reduced size of its owner's parcel and become markedly non-complying as to bulk. The New York Supreme Court held for the defendants and dismissed the complaint. The decision was affirmed on appeal.[23] (Internal citations omitted.)

It should be noted that the 1959 amendment to ZR § (9)d, the reference to lots that were in single ownership prior to the 1961 ZR, and the excerpt from Marcus' article, above, turn on the definition of "lot" or "zoning lot," not on building requirements. Therefore, the conclusion that these pre-1961 actions merged zoning lots cannot be escaped, even if the terms "zoning lot" and "zoning lot merger" were only coined subsequently.

The consequences of this are troublesome. This reading means that lots were merged or deemed merged retroactively at least as far back as 1931. Since the buildings would have been completed long before 1978, there would have been no interest in recording air rights leases or "other conveyances." As a result, there is another layer of unrecorded leases that might determine the zoning lot. Moreover, the older the building record, the more cryptic it is.

4. Certificate of Occupancy Searches

Sometimes a certificate of occupancy is approved subject to conditions, such as an easement for emergency egress through an adjoining lot. These conditions can sometimes have implications for the purpose of determining the zoning lot. For instance, the author has seen certificates of occupancy that read, "Note: Entire lot to remain in single ownership." Needless to say, this very much suggests that a zoning lot merger has occurred. Similarly, the certificate of occupancy could make reference to unrecorded leases, a negative easement for light and air, or a variance. The fact that one of the lots involved is subject to a variance can jeopardize a merger as will be explained below. In sum, review of the certificate of occupancy for the lots to be merged should be on the practitioner's due diligence list.

5. About Unrecorded Leases and Undisclosed Prior Mergers

If a zoning lot was merged and expended its development rights, the Department of Buildings could deny new applications on that basis. For that reason, practitioners should keep an eye out for any hints of unrecorded leases, such as references in the certificate of occupancy, or even references in other documents in the title records. There is no formula to discover unrecorded leases. The most conservative approach would be to request the building file of every building on the block. A more practical one would be to request the

building files only for those buildings that are too large for their lots. The client's building planner, or any professional familiar with building requirements, could be of great assistance identifying suspect buildings. Signage extending beyond the lot can also hint at a merger, as well as a building dwarfed by its neighbor. Once suspect buildings are identified, building files for them can be requested to investigate what their approvals were based on.

Despite our warning, the reader should know that it appears that the Department of Buildings has quietly decided to ignore over-development that may result from undisclosed zoning lot mergers. Many factors point to this conclusion. First, we know that the city has adopted the policy that development rights "are not recoverable during the life of the improvement."[24] Hence, no action will be taken against completed buildings. Second, the purpose of the recording requirements in the 1977 amendment was not only to protect private parties but to protect the city's interest against overbuilding as well. This suggests that the city is hardly any better positioned to detect prior mergers than private parties.[25] Third, because the City could not detect them, the actual language of the 1977 amendment required a zoning lot description to be filed on *every application*, regardless of whether a new merger was intended.[26] The plan appears to have been to define and record a zoning lot description every time the Department of Buildings visited a building file. If a merger was not filed before, it would be filed as the Department opened the file for any reason. Mergers on building files would then appear in the title records. However, the Department has chosen not to apply this portion of the ZR.[27] All in all, the Department might have given up searching for undisclosed leases and decided to address the problem with the new rules over decades as buildings are replaced.

This only provides some comfort to the practitioner. Private parties who oppose the development might search for and find the lease, and then report it to the Department. The Department has the duty to enforce the ZR, but not the right to dispense with provisions. Waivers, i.e., variances, can only be given by the Board of Standards and Appeals. Therefore, if the Department receives proof that a lot has been merged and that granting a permit will result in a violation of the ZR, then the Department would be bound to deny the permit.

The problems caused by unrecorded mergers extend beyond the context of development rights purchases. Searching for them should be considered in connection with the purchase of properties in Manhattan. For example, if a building was erected with the benefit of an unrecorded merger and it then burns down, the owner might not be able to rebuild it. If the owner cannot prove to the Department that the lot benefits from a merger, the permit will be denied. Even if it can be proven, there is the risk that the other lot might have been issued permits without knowledge of the merger, thereby expending the FA. The owner might find that its replacement building will be smaller, even though there was no down-zoning.

D. Mechanics of the Zoning Lot Merger

The current statute on mergers reads:

> A "zoning lot" is either . . . (d) a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single "block", which at the time of filing for a building permit (or, if no building permit is required, at the time of filing for a certificate of occupancy) is declared to be a tract of land to be treated as one "zoning lot" for the purpose of this Resolution. Such declaration shall be made in one written Declaration of Restrictions covering all of such tract of land or in separate written Declarations of Restrictions covering such parts of such tract of land and which in the aggregate cover the entire tract of land comprising the "zoning lot". Any Declaration of Restrictions or Declarations of Restrictions which individually or collectively cover a tract of land are referred to herein as "Declarations." Each Declaration shall be executed by each party interest (as defined herein) in the portion of such tract of land covered by such Declaration (excepting any such party as shall have waived its right to execute such Declaration in a written instrument executed by such party in recordable form and recorded at or prior to the recording of the Declaration). Each Declaration and waiver of right to execute a Declaration shall be recorded in the Conveyances Section of the Office of the City Register or, if applicable, the County Clerk's Office of the county in which such tract of land is located, against each lot of record constituting a portion of the land covered by such Declaration.[28]

The requirements regarding contiguity by ten feet, that the lots must be in the same block, and that the Declaration must be filed in the land records are self-explanatory. The form and content of the Declaration poses no difficulty either. On May 18, 1978, the Acting Commissioner of Buildings promulgated forms (often called Exhibits I through V) to be used.[29]

The only difficulty here is determining who the "parties in interest" are. The procedure and form will be addressed briefly.

1. Parties in Interest

> A "party in interest" in the portion of the tract of land covered by a Declaration shall include only (W) the fee owner or owners thereof, (X) the holder of any enforceable recorded interest in all or part thereof which would be superior to the Declaration and which could result in such holder obtaining possession of any portion of such tract of land, (Y) the holder of any enforceable recorded interest in all or part thereof which would be adversely affected by the Declaration, and (Z) the holder of any unrecorded interest in all or part thereof which would be superior to and adversely affected by the Declaration and which would be disclosed by a physical inspection of the portion of the tract of land covered by the Declaration.[30]

It is undisputed that fee owners are parties in interest under (W). All others need clarification.

a. Mortgagees, Remaindermen, Life Tenants and Contract Vendees

Mortgagees, remaindermen, life tenants and contract vendees have an interest superior[31] to that of the owner's, which could develop into possessory rights, and could be adversely affected by the Declaration. Therefore, they may qualify under (X), (Y), and (Z), depending on whether their interest is of record or can be ascertained by inspection.

b. Lienholders

Unlike mortgagees, miscellaneous lienholders cannot qualify under (X) because their interest is not superior to the owner's, or, rather, because they simply do not possess a real property interest.[32]

Nevertheless, judgment creditors can qualify under (Y). The test here is merely that their interest (a) be recorded and (b) that it be adversely affected by the Declaration. If the merger reduces the value of the property, which can be presumed, if the lot gave something up for consideration, then the lienholder would be adversely affected by the Declaration. The lesser the value of the debtor's real property, the lower the chance that the creditor might collect in full. Hence, the creditor of a judgment recorded against the transferor lot qualifies as a "party in interest" under (Y). Lienholders in general qualify under (Y) if their lien attached to the transferor lot.

The reader may properly ask whether the lienholders of a through-lot can be considered "adversely affected." There is no law to answer this, so the practitioner is encouraged to take the conservative approach and address the liens. With that said, it is the writer's opinion that they should not be considered "adversely affected." The value of the through-lot is unaffected by the merger (the new building may have an impact, but that's a different question). The opportunity to act and benefit as a through-lot is pure chance, unique to the moment. If it lapses because the lienholder refuses to consent, there is no guarantee that a valuable interest has been preserved because the opportunity may not repeat itself. The same advice and rationale to the contrary applies to the case of mergers for signage purposes, where no lot gives up any development rights.[33]

c. Tenants

In *MacMillan, Inc. v. CF LEX Associates*, the landlord of the office building at 866 Third Avenue was sued by its tenant for merging the zoning lot without declaring the tenant as a party in interest, thereby failing to procure the tenant's approval.[34] The tenant contended that it used 100% of the usable area of the building and 95% of the total area of the building, and claimed that it fit under both (X) and (Y).[35] The Court of Appeals noted that the drafters of the resolution chose the words "tract of land" as opposed to "land and improvements" and concluded "that the phrase 'tract of land' refers only to the underlying surface land and does not embrace buildings on that land."[36] The Court reasoned that it would be impractical to require space tenants to sign off on mergers and that it would undermine the purpose of the zoning resolution, which is "to promote the most desirable use of land and direction of building development . . . ."[37] Under *MacMillan*, no tenant is a party in interest except for a ground lessee because it has an interest in the tract of land and not just in the use of the building.[38]

The *MacMillan* holding has met with considerable resistance by practitioners. Consider "[a] space tenant with a right to make improvements that may increase the amount of floor area being used, in conflict with the total available, retained FAR."[39] While a plain reading of the statute could support that this tenant is a party in interest, after *MacMillan* this can no longer be the case. The fact that the landlord may have frustrated the tenant's right to develop would be a breach of the lease but not a defect in the merger.

Other difficult cases are conceivable. An advertising company that has a lease for a sign on the building, which will be eclipsed by the development next door, might consider itself "adversely affected," as may general parties who will suffer congestion or interference in light and air because of the new development. It was the view of the Appellate Division, the lower court in *MacMillan*, that "tract of land" was more than "plot of land," and that the notion of "parties in interest" was an invitation for afflicted parties to opine on the development.[40] The Appellate Division did not elaborate on what

interests would merit protection, but decided that the 95% space tenant did.[41] As we know, however, this interpretation was rejected by the Court of Appeals.[42] The ruling of the Court of Appeals is best understood when contrasted with the lower decision it was asked to review.

d. Easement Holders

The question of easement holders has been largely resolved by *MacMillan*. It is well-settled law in New York that an easement is merely a right to use but not a right to the land itself.[43] Therefore, if easement holders do not have rights to the "tract of land" itself, then they cannot be considered "parties in interest."

2. Certificate of Ownership

Once the parties in interest have been identified, they must either join in the merger or waive their rights. There is no difference between joining and waiving, except that the actual fee owners are expected to join. Mortgage lenders, however, are usually asked to waive and subordinate their interest. This formula is not redundant. The waiver is necessary pursuant to the zoning law, and the subordination is necessary pursuant to the real property law. The former is a merger requirement (i.e., necessary under the zoning law), and the latter protects it from destruction by foreclosure (i.e., necessary under real property law). After all the parties are accounted for, a title company is to issue a certificate of ownership, also called a "certification pursuant to zoning lot" or an "Exhibit II," which identifies the parties in interest and which represents that all parties have either joined or waived of record. This certificate is then recorded in the land records and a certified copy of it is filed with the Department of Buildings.[44]

3. Declaration of Zoning Lot Restrictions

The document that evidences the consent to the merger is called the Declaration of Zoning Lot Restrictions (Exhibit IV). It is usually delivered at closing, and every party in interest must either waive or join. Waivers must be in the form of Exhibit V. It should be noted that the Exhibit IV does not cause the merger itself. It is only a request by the parties that the lots be treated as one zoning lot. The merger itself occurs subsequently, upon the filing of an application for a permit or certificate of occupancy.[45]

E. The Zoning Lot Development Agreement

The merging of zoning lots is a matter of zoning law; the allocation of the combined FA among the owners is a matter of private law.[46] So far, we have explained how the zoning lots are merged. Now, we will discuss the contract that the parties enter into to apportion development rights between them. This agreement is called the Zoning Lot Development Agreement ("ZLDA," pronounced "zelda"). The ZR makes no reference to this and it does not control agreements among the owners.

1. A Negative Easement

The purpose of the ZLDA is to create development restrictions on the transferor lots, and any through-lots, so that more FA is available to the purchaser's lot. In the language of real property law, a covenant running with the land restricting its development is a negative easement, even if the words "negative easement" are not used. The labeling is important to understand the set of rules that will govern it. For example, a negative easement cannot be created except by written conveyance or reservation.[47] Since an easement is an interest in real property, it is recordable.[48] Easements are also interpreted restrictively.[49] Most importantly, negative easements are subject to the two-year release statute in New York Real Property Actions and Proceedings Law.[50]

The restriction itself need only declare how much of the combined FA will be made available to each lot and prohibit development that may jeopardize the allocation. There is no need for an elevation survey, as would be the practice when a developer wishes to identify air space to remain vacant for light and air. A transferor lot does not need to covenant not to build above a certain height. The height of buildings is irrelevant. What matters is the amount and kind of FA used. A building can increase its FA use without increasing its height, e.g., by illegal occupancy, by building a garage underground, or by creating a mezzanine level in what was an opulent entrance level. The courts will enforce private agreements restricting development merely by preventing further use of FA and will look into the ZR for a determination.[51]

2. Parties

Since the purpose of the ZLDA is to create a negative easement, it would seem that the ZLDA would only require the same parties as would be necessary to create a valid easement. However, we must not forget that in order to determine who was a party in interest by reason of being "adversely affected," we made representations regarding which lots would lose and which lots would earn development rights. These representations do not appear in the merger documents, i.e., in the Exhibits IV and V. The resulting apportionment only appears in the ZLDA. Therefore, it is the suggested practice to have all the "parties in interest" join or waive their right to join in the ZLDA, even if these parties are not required to create the negative easement.

3. Other Matters Covered in the ZLDA

At a minimum, the ZLDA should contain representations and warranties regarding the availability of FA and prior mergers, provide for the contingencies of down-zoning or up-zoning, compel the parties to agree to subsequent mergers with new lots, and provide who will benefit from the additional FA. In addition, the owners of the transferor and of

the through-lots should covenant to support the new building in all public hearings, or at least not to contest it.

4. Recording

The ZLDA should be recorded, if only because it creates an interest in real property. It is important that all subsequent owners be on notice of the allocation. Otherwise, a *bona fide* purchaser would only be on notice of the merger itself (because of the zoning lot restrictions of record) and of whatever its seller represents to be the allocation.

F. "As-of-Right" Development

Most applications for permits and certificates of occupancy are done "as-of-right." This means that the application complies with all zoning regulations and that no discretionary approval is required. The fact that an application calls for FA acquired pursuant to a zoning lot merger does not prohibit its "as-of-right" status; however, there is an exception.

A lot that benefits from a variance cannot be merged without the approval of the Board of Standards and Appeals.[52] Variances are granted as a measure of relief to properties particularly prejudiced by the applicable zoning regulations. In *Bella Vista Apartment Co. v. Bennet*, the owner had obtained a variance to build a movie theater in a residential district, but that would use less FA than its allocation.[53] Years later, a developer merged the lot with a neighboring lot to benefit from the unused FA and applied for a building permit "as-of-right."[54] The application was denied and the litigation that resulted reached the Court of Appeals.[55] The Court, ruling for the city, reasoned that allowing the movie theater to profit from its excess FA by a sale to the developer would "undermine the basis for the use variance grant"; to wit, that the owner could not make a reasonable return under the applicable zoning regulation.[56] Therefore, the lot could not be merged without a decision by the Board of Standards and Appeals on whether it still merited the variance.[57]

G. Transfer Taxes

The sale of development rights is subject to the State Real Estate Transfer Tax and to the City Real Property Transfer Tax. There is no uniform convention as to which party is responsible for them. However, since the transfer taxes are the seller's liability under the statute, a silent contract would make the seller liable for them.

H. Title Insurance

1. The New York City "Development Rights" Endorsement

Title insurance is available to insure the purchase of FA through zoning lot mergers. At first sight, one would think that title insurance presents hardly any difficulty. There is an endorsement, the "New York City 'Development Rights' Endorsement," available for the Owner's Policy and the Loan Policy, which insures (a) that the "parties in interest" have joined in the merger, (b) the validity of the ZLDA, and (c) that the ZLDA is effective to transfer development rights. The endorsement does not insure either the amount of FA transferred or any matters of zoning law relating to use and occupancy. The cost of the endorsement is only $25.

2. The Problem of Separate Land and Development Rights Transactions

The drafters of the endorsement clearly envisioned a developer purchasing a tract of land simultaneously with the purchase of development rights. A regular title policy would be issued in the total amount of the purchases and the endorsement would be attached to it. The endorsement fits this transaction squarely.

But what if the developer already purchased and insured his or her tract of land? What if the purchase of development rights occurred subsequently to the land deal? Simply issuing the endorsement later to be made part of the policy is no suitable solution. To begin with, if the developer paid $10 million for the land and is now paying $2 million for the development rights, he or she would want to be insured in the amount of $12 million. Relying on her original $10 million policy would leave him or her under-insured by $2 million. In addition, it is uncertain whether the endorsement would be effective since it would suffer from a fundamental flaw: Insurance policies protect through the Date of Policy, but on the Date of Policy there was no zoning lot merger. Was there an insurable interest on the Date of Policy?

A new policy, as in the drafter's plan, insuring the land with the endorsement would be unacceptable. The developer will object to having to re-insure his or her land for the full amount. And if the developer were to request a new policy only in the amount of the FA purchase price, he or she would encounter two problems. First, the *Title Insurance Rate Manual* forbids title insurers from issuing an Owner's Policy in an amount lower than the greater of the contract price or the value of the interest.[58] Since the purchase price of the FA is by definition less than the value of the FA plus the value of the land, the insurer will refuse to issue the policy. Second, the policy would cover the entire project, so that payments on losses against the developer's main lot will reduce the coverage available for the development rights.[59]

3. A Possible Solution

Title insurers have created a policy to insure only the purchase of FA by zoning lot merger. It consists of the regular 2006 ALTA Owner's Policy with variations in the legal description and of schedules A and B. Schedule A specifies that it only covers the insured's interest under the attached New York City "Development Rights" Endorsement and that the source of title is the ZLDA, which is also excepted in schedule B. The legal description includes all lots involved in the merger, but separates the insured's "fee parcel" and the "development rights parcels," with

the latter being listed "for information only."

The problem with this policy is that the standard terms of the ALTA are at odds with the intended coverage. For example, the policy insures against lack of access to the "land."[60] If by "land" is meant the "fee parcel," we are once again in a situation where the policy inadvertently covers a broader interest. More importantly, it is not clear what the result is of citing the ZLDA as the source of title in schedule A and excepting it altogether in schedule B.[61] On a similar note, the standard policy insures against lack of marketability of title.[62] This coverage, designed with principles of real property law in mind, wreaks havoc in terms of zoning law. It implies that the insured is free to transfer its interest under the ZLDA. Needless to say, this cannot be. Any further transfer will require a new merger and, concomitantly, the approval of the original transferor,[63] and perhaps even a municipal approval. In addition, a zoning lot merger involves clearing liens against all lots involved, including the purchaser's own. When this is taken into account, we may find that the amount of coverage left for protection against liens on the transferor's lot is actually lower than the purchase price (i.e., the face amount of insurance).[64] Lastly, there is a question as to whether the policy is valid at all, since it is issued at closing, but the actual merger (as shown above) occurs subsequently, on the filing for a permit. Is there an insurable interest at the date of closing?

To summarize, the terms of the development rights policy are awkward and possibly conflict with the intention of the parties. It has not yet been subject to interpretation by the courts, so its application remains uncertain. The closing attorney can take comfort in the knowledge that insurance policies are typically interpreted in the light most favorable to the insured. At any rate, it's the only policy available.

4. A Proposed Solution

A different policy for development rights transfers is conceivable. The problem with the current one is that by insuring a zoning lot merger it mixes zoning and real property laws. A practical solution would be to create a title policy that only insures a property law interest, i.e., without the New York City Development Rights Endorsement. As explained above, the purchase of development rights through a zoning lot merger involves (a) the merger under the zoning law, and (b) the building restriction on the transferor-lot under the real property law. The proposed policy would cover only (b), and would, in effect, insure a negative easement on the transferor lot. The fact that it would not cover against (a) would be a concern, but one that could be easily corrected. The ZLDA would need a provision declaring it void (or at least, the negative easement void) in the event the merger is declared void *ab initio*. The title policy would only need to insure affirmatively against voidance by reason of defect in the zoning lot merger.[65] Then, any challenge to the merger would effectively be a challenge to the negative easement as well. The policy would be delivered at closing without any issues as to whether there was an insurable interest at closing. Moreover, this approach would also avoid an uncomfortable question we have not addressed, namely, whether title insurance companies possess the power to insure matters of zoning law at all.[66] Some provisions, such as the coverage on access to land, would have to be amended in schedule B. Other provisions, such as marketability, could be left untouched.[67]

IV. Conclusion

The only difficulty in zoning lot mergers is identifying the zoning lots to be merged. This task is typically relegated to the title companies to determine from title records. However, because the difficulty lies precisely in the fact that mergers may have occurred without notice in the title records, title companies are ill-fitted for this task. A review of the title records ranks high in the due diligence list, but it is not conclusive.

A conservative approach to the risk of undisclosed mergers is to inspect the building files of every building on the block. A more practical approach is to identify suspect buildings, i.e., buildings that appear to be too large for their lots and were built prior to 1978, and inspect those building files. The client's building planner could be of great assistance identifying suspect buildings.

Once the lots to be merged have been identified, determining the "parties in interest" is straightforward thanks to the Court of Appeals' strict interpretation of "tract of land" in *MacMillan*. Generally, the "parties in interest" are the fee owners, life tenants, remaindermen, contract vendees, ground lessees and mortgagees of all the lots and the lienholders of the transferor and through-lots.

Finally, there is title insurance available which protects against prior, unrecorded mergers. However, the validity and extent of these title policies, drafted in real property law terms, as to zoning law interests remains to be tested. And just as in every construction project, indemnity of the purchase price is an imperfect remedy to a developer who would have also expended time and resources drafting plans and obtaining permits, not to mention the loss of profit and the attorneys' fees.

Endnotes

1. *See generally*, NEW YORK CITY DEP'T OF CITY PLANNING, ZONING HANDBOOK (2006) (the author recommends this for an excellent introduction to the zoning law of the city of New York).
2. *See generally*, NEW YORK, N.Y., ZONING RESOLUTION art. VII, *available at* http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml (last modified March 24, 2009) (describing 18 use groups, of which, the first two are residential, the following three are community facility use, the last three are industrial, and the rest are commercial).
3. It should be kept in mind that if a part of a building is used for residential

purposes the amount of FA dedicated to community facility can be severely limited.

4. New York, N.Y. Zoning Resolution, art I, ch. 2, § 12-10, *available at* http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml (last modified March 24, 2009).

5. *Id.* ("zoning lot," subparagraphs (d) and (f)). (Subparagraphs (c) and (e) introduce the procedure for zoning lot mergers when all lots to be merged are owned by the same party. While the procedure is substantially similar to the case of different parties, its discussion exceeds the subject matter of this article, as it is not a purchase.)

6. *Id.* ("zoning lot," subparagraph (d)).

7. *See* William Neuman, *Selling the Air Above*, New York Times, March 5, 2006, at Real Estate Section, *available at* http://www.nytimes.com/2006/03/05/realestate/05air.html.

8. § 12-10 (zoning lot, paraphrased for ease of exposition).

9. *Id.*

10. A common mistake in this area is to order searches solely on the transferor-lot. At a minimum, searches on the transferee-lot will be required as well.

11. *In re* Amendment of the Zoning Resolution pursuant to section 200 of New York City Charter relating to Chapter 2, § 12-10 (Definition) concerning modifications to the definition of zoning lot, N 760226 ZRY, Cal. No. 27 (July 13, 1997) (on file with author) ("[A]s City policy, unused development rights which are transferred from one parcel to another parcel within the same zoning lot are not recoverable during the life of the development [. . .]."") (The city does not revoke certificates of occupancy for finished buildings because of terminated, rescinded or invalid leases.).

12. This is an instance where principles of real property law must be distinguished from principles of zoning law. A *bona fide* purchaser for value without notice after a diligent search may take free of the undisclosed lease. However, the validity of the lease between the parties would be irrelevant to the City, which would take the position that the lots have been merged and the combined FA already expended.

13. Once again, whether an application by the lessor breached the terms of the lease is a matter of private law between lessor and lessee, and of no interest to the Department of Buildings.

14. *See Newport Associates v. Solow*, 30 N.Y.2d 263, 332 N.Y.S.2d 617, 283 N.E.2d 600 (1972); *see also 873 Third Ave. Corp. v. Kenvic Associates*, 109 A.D.2d 489, 492 N.Y.S.2d 727 (1st Dep't 1985) ("[T]he Court of Appeals held that so long as no one had exercised the air rights, each was free to exercise them and to build to the maximum allowed by law." *Kenvic* at 492, 492 N.Y.S.2d at 730.).

15. *See supra* footnote 10.

16. New York, N.Y. Zoning Resolution, art I, ch. 2, § 12-10, *available at* http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml (last modified March 24, 2009) ("zoning lot," subparagraphs (c), (d), and last paragraph). The statute requires that a zoning lot certificate be filed even when there is no merger and the tract of land is the same as the corresponding tax lot from December 15, 1961. However, the Department of Buildings has chosen not to apply this provision. *See* Memorandum of New York City Department of Buildings, *Zoning Lot Certification Pursuant to Section 12-10 of the Zoning Resolution*, from Acting Commissioner Irving E. Minkin, P.E., to the Borough Presidents (May 18, 1978) (on file with author).

17. We have left this discussion for last because there is skepticism among practitioners regarding these mergers. Regular standards of review today do not include searching for pre-1961 mergers.

18. Marcus, Norman, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 Brook. L. Rev. 867, 873 (1984).

19. New York, N.Y., Zoning Resolution art. I, ch. 1 § (9)(d) (1916) (current version at New York, N.Y., Zoning Resolution art. I, ch. 2, § 12-10, *available at* http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml (last modified March 24, 2009).

20. Marcus, *supra* note 18, at 871–72.

21. New York, N.Y., Zoning Resolution art. I, ch. 2, § 12-10(b) (1961) (current version at New York, N.Y., Zoning Resolution art. I, ch. 2, § 12-10, *available at* http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml (last modified March 24, 2009).

22. *Id.* at § 12-10(c) ("A tract of land, located within a single block, which at the time of filing for a building permit [or, if no building permit is required, at the time of filing for a certificate of occupancy], is designated by its owner or developer as a tract of land all of which is to be used, developed, or built upon as a unit under *single ownership*.") (italics in original).

23. Marcus, *supra* note 18, at 872. (citing *C.L.R. Realty v. S.F.S. Realty*, No. 41234-1956 (Sup. Ct., N.Y. Co., Sept. 14,1956) (unpublished decision), *aff'd*, 2 A.D.2d 972, 158 N.Y.S.2d 753 (1st Dep't 1956) (mem.), *and appeal denied*, 3 A.D.2d 701, 160 N.Y.S.2d 618 (1st Dep't 1957)).

24. *In re* Amendment of the Zoning Resolution pursuant to section 200 of New York City Charter relating to Chapter 2, § 12-10 (Definition) concerning modifications to the definition of zoning lot, N 760226 ZRY, Cal. No. 27 (July 13, 1997) (on file with author).

25. *Id.* ("[T]he recording of the declaration will eliminate the current problem of not being able to determine from the public record whether the building has been built in part on the basis of development rights applicable to land on which the building is not physically located. The amendment thus proposed protects the City's interest in avoiding overbuilding, and provides private parties with a certainty based on which they can protect their own interests.)

    The author made an informal inquiry to the Department of Buildings. The inquiry was: If a lot merged and conveyed development rights before the recording requirements were in place, and years later the owner applied for a building permit only for that lot, when and how would the prior merger come up? The informal answer was that it would not. The application would be made "as of right" and everything filed against the applicant lot would be read. But if there is no hint in that file that the building next door expended the floor area already, it might not be detected.

26. New York, N.Y. Zoning Resolution, art I, ch. 2, § 12-10, *available at* http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml (last modified March 24, 2009) ("zoning lot," last paragraph).

27. *See* Memorandum of New York City Department of Buildings, *Zoning Lot Certification Pursuant to Section 12-10 of the Zoning Resolution*, from Acting Commissioner Irving E. Minkin, P.E., to the Borough Presidents (May 18, 1978) (on file with author). In that 1978 memorandum, the application of this section was limited to issuance of permits and certificates of occupancy and only where the lots in single ownership were held by different parties in interest. Nowadays, it appears that it is dead script altogether.

28. § 12-10 (Subsection (c) introduces a similar mechanism for merging lots owned by the same party. We will concern ourselves here with arm's length mergers only.).

29. *See* Memorandum of New York City Department of Buildings, *Zoning Lot Certification Pursuant to Section 12-10 of the Zoning Resolution*, from Acting Commissioner Irving E. Minkin, P.E. to the Borough Presidents (May 18, 1978) (on file with author) (The forms are available at every title company and are easy to complete. Therefore, we will not go over them here.).

30. § 12-10 ("zoning lot" subparagraph (f)(4)) (There is a different but similar definition for "party in interest" when merging lots in single fee ownership, pursuant to subparagraph (c).).

31. The meaning of "superior interest" can easily be misunderstood. Despite the fact that this appears in the Zoning Resolution, we must bear in mind that the drafting of this particular section "was undertaken in consultation with the Committee on Real Property Law of the Association of the Bar of the City of New York." *In re* Amendment of the Zoning Resolution pursuant to section 200 of New York City Charter relating to Chapter 2, § 12-10 (Definition) concerning modifications to the definition of zoning lot, N 760226 ZRY, Cal. No. 27 (July 13, 1997) (on file with author). Therefore, because this section relates to interests in a "tract of land," it is proper to give this term its specific meaning in the real property law.

    In real property law, a "superior interest" is merely one that the holder of the inferior one cannot destroy. It does not mean that the superior interest can divest or dispossess the inferior one. For example, a right of way is a superior interest to the landowner's because the landowner cannot rid himself or herself of it. *See* BLACK'S LAW DICTIONARY 1478 (8th ed. 2004). Examples of this use in cases abound. *See Canfield v. Ford*, 28 Barb. 336 (Sup. Ct., N.Y. Co. 1858) ("This class of cases is nearly allied to, . . . a still superior interest in real property, called an easement . . ."); *see also Arbor Nat'l Mortgage v. Goldsmith*, 154 Misc. 2d 853, 586 N.Y.S.2d 702 (Sup. Ct., Nassau Co. 1992) ("[T]he plaintiff, [foreclosing mortgagee], contends that [debtor's wife who is not in title], by virtue of her claim of an interest in the real property superior to that of plaintiff mortgagee, is attempting to resurrect the right of dower . . ."). Whether a superior interest is one that may mature into title (such as a remainder or a mortgage) is a separate question. Only real property rights can be superior to real property rights.

32. Filing liens with the county clerk does not result in real property rights. *See 2386 Creston Ave. Realty v. M-P-M Mgmt.*, 58 A.D.3d 158, 867, N.Y.S.2d 416, 2008 N.Y. Slip Op. 09002 (1st Dep't 2008). Their nature is different from that of mortgages. Foreclosing on a mortgage restores title to the state it was in when the mortgage was first made, destroying all subsequent liens, covenants, restrictions and conveyances, which jeopardizes the Declaration. Levying on a judgment against real property does not have this effect. The buyer receives the same estate the debtor possessed at the time of the transfer, not the time of filing.

33. On zoning lot expansions, i.e., on subsequent mergers, it is the standard practice today to ignore new liens against through-lots. The only possible support for this is that the lienholder is not deemed to be "adversely affected" by the new merger and therefore cannot be a party in interest. This, however, does not explain why new mortgages are ignored. The Zoning Resolution does not distinguish between original and subsequent mergers. They are both subject to the same rules.

34. 56 N.Y.2d 386, 452 N.Y.S.2d 377, 437 N.E.2d 1134 (1982).

35. *Id.* at 389, 452 N.Y.S.2d at 378, 437 N.E.2d at 1135.

36. *Id.* at 391, 452 N.Y.S.2d at 380, 437 N.E.2d at 1137.

37. *Id.* at 392, 452 N.Y.S.2d at 380, 437 N.E.2d at 1137.

38. Ground leases are different from space leases in that they convey the owner's estate for a term of years. As opposed to space leases, they convey the land as well, and therefore fit within the *MacMillan* standard of having an interest in the "tract of land." In fact, and to illustrate their nature as a conveyance of title, they can be created by deed. The only change that a standard deed would require is the substitution of the word "forever" for a definite term in the *habbendum* clause (e.g., "to have and to hold [for X number of years]").

39. Michael J. Berey, *Development Rights Transfers in New York City*, *in* CITY BAR CENTER FOR CONTINUING LEGAL EDUCATION, HOW DID THAT BUILDING GET SO TALL? 8 (New York City Bar, 2008).

40. *MacMillan, Inc. v. Cadillac Fairview Corp.*, 86 A.D.2d 15,19-20, 448 N.Y.S.2d 668, 671 (1st Dep't 1982), *rev'd sub nom. MacMillan, Inc. v. CF Lex Associates*, 56 N.Y.2d 386, 452 N.Y.S.2d 377, 437 N.E.2d 1134 (1982).

41. *Id.* at 19, 448 N.Y.S.2d at 671.

42. *MacMillan, Inc. v. CF Lex Associates*, 56 N.Y.2d 386, 452 N.Y.S.2d 377, 437 N.E.2d 1134 (1982).

43. *See Lewis v. Young*, 92 N.Y.2d 443, 682 N.Y.S.2d 657, 705 N.E.2d 649 (1998); *see also Grafton v. Moir*, 130 N.Y. 465, 29 N.E. 974 (1891); *Dowd v. Ahr*, 78 N.Y.2d 469, 577 N.Y.S.2d 198, 583 N.E. 911 (1991); *Bakeman v. Talbot*, 31 N.Y. 366 (1865); *Onthank v. Lake Shore & Mich. S. R.R.*, 71 N.Y. 194 (1877).

44. NEW YORK, N.Y. ZONING RESOLUTION, art. I, ch. 2, § 12-10, *available at* http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml (last modified March 24, 2009) ("zoning lot," subparagraph (f)1 and the last paragraph). Title companies typically issue a draft certificate first which purchaser and seller of development rights use to determine which parties they have to reach out to for joining or waiving. The fact that the statute should expressly call for certification by a title insurance company is odd. Why can't attorneys issue the certificate, as a legal opinion on ownership? It is not a matter of solvency, because no title insurance is issued and title companies usually limit their liability to $1,000 on the Exhibit II. It can hardly be a matter of expertise either. Reviewing documents of record and issuing opinions regarding real property rights (or zoning rights) is legal work under any definition. The only reason why title companies are allowed to issue regular certificates of title, i.e., title reports, in the first place is because of an exception in the Judiciary Law. N.Y. JUD. LAW § 495(5) (McKinney 2005). Why should the Zoning Resolution prohibit attorneys from issuing the certificate of ownership?

45. § 12-10 ("zoning lot," subparagraph (d), "a tract of land . . . consisting of two or more lots of record, *which at the time of filing for a building permit* . . . is declared to be a tract of land to be treated as one "zoning lot" . . .) (italics added).

46. *See generally 402 West 38th St. Corp. v. 485-497 Ninth Avenue*, 16 Misc. 3d 1131(A), 847 N.Y.S.2d 901, 2007 WL 2429695, 2007 N.Y. Slip Op. 51654(U) (Sup. Ct., N.Y. Co. 2007) (providing an example of the supreme court distinguishing between zoning duties under the ZR and private rights under the ZLDA).

47. *See Eng v. Shimon*, 12 Misc. 3d 1174(A), 820 N.Y.S.2d 842, 2006 WL 1789085, 2006 N.Y. Slip Op. 51221(U) (Sup. Ct., Queens Co. 2006); *see also Chatsworth Realty 344 v. Hudson Waterfront Co.*, 309 A.D.2d 567, 765 N.Y.S.2d 39, 2003 N.Y. Slip Op. 17392 (1st Dep't 2003); *see also Lafayette Auvergne Corp. v. 10243 Management Corp.*, 35 N.Y.2d 834, 362 N.Y.S.2d 863, 321 N.E.2d 784 (1974).

48. N.Y. REAL PROP. LAW §§ 290-91 (McKinney 2006).

49. *See Brody v. St. Onge*, 167 A.D.2d 671, 563 N.Y.S.2d 251, (3rd Dep't 1990); *see also Crane Neck Assoc., Inc. v. NYC/LI County Serv. Group*, 92 A.D.2d 119, 460 N.Y.S.2d 69 (2nd Dep't 1983); *Sweet v. Hollearn*, 142 Misc. 408, 254 N.Y.S. 625 (Sup. Ct., Fulton Co. 1932).

50. N.Y. Real Prop. ACTS § 2001(2)(a) (McKinney 2009). *See Pak v. 5 Harrison Associates, Ltd.*, 43 A.D.3d 807, 841 N.Y.S.2d 779 (1st Dep't 2007); *see also Ram Island Homeowners Ass'n v. Hathaway Realty*, 305 A.D.3d 390, 758 N.Y.S.2d 522 (2nd Dep't 2003); *Rahabi v. Morrison*, 81 A.D.2d 434, 440 N.Y.S.2d 941 (1981). (The consequences of this statute can be troubling. If the seller violated the ZLDA by using more FA than agreed, the purchaser would only have two years to enforce the ZLDA. The purchaser is well-advised to procure its own permits promptly and to keep an eye on the seller's activities until permits covering all the FA are issued. One must bear in mind that the Department of Buildings will not look at the allocation of FA, i.e., the ZLDA; it will only look at the merger documents.).

51. *Wing Ming Properties Ltd. v. Mott Operating Corp.*, 79 N.Y.2d 1021, 584 N.Y.S.2d 427, 594 N.E.2d 921 (1992).

52. *See Bella Vista Apartment Co. v. Bennet*, 89 N.Y.2d 465, 655 N.Y.S.2d 742, 678 N.E.2d 198 (1997), *see also Fisher v. N.Y.C. Bd. of Standards & Appeals*, 21 Misc. 3d 1134(A), 873 N.Y.S.2d 511, 2008 WL 4966546, 2008 N.Y. Slip Op. 52345(U) (Sup. Ct., N.Y. Co. 2007).

53. *Bella Vista*, N.Y.2d at 467, 655 N.Y.S.2d at 742, 678 N.E.2d at 98 (1997).

54. *Id.* at 467, 655 N.Y.S.2d at 743, 678 N.E.2d at 199.

55. *Id.* at 467, 655 N.Y.S.2d at 742-43, 678 N.E.2d at 198-99.

56. *Id.* at 470, 655 N.Y.S.2d at 745, 678 N.E.2d at 201.

57. *Id.* at 471, 655 N.Y.S.2d at 745, 678 N.E.2d at 201.

58. *See* TITLE INS. RATE SERV. ASS'N INC., TITLE INSURANCE RATE MANUAL: NEW YORK STATE § 5, at 8 (2d rev 2008), *available at* http://www.tirsa.org/12-01-08IndexedTIRSARateManual.pdf. (The few enumerated exceptions therein do not apply here.)

59. *See* AMERICAN LAND TITLE ASS'N ("ALTA"), *Owner's Policy* (June 17, 2006) http://www.alta.org/forms/#2 ("Conditions," subparagraph 10).

60. *Id.* ("Covered Risks," subparagraph 4).

61. This case is not the same as citing a deed as source of title in schedule A and excepting a portion of it (e.g., the covenants and restrictions) in schedule B. The exception in question covers the entire document. It would be difficult to improve on it because the ZLDA is in essence a building restriction on the transferor lot. Therefore, excepting the covenants and restrictions in the ZLDA would also be inappropriate.

62. ALTA, *supra* note 59 ("Covered Risks," subparagraph 3).

63. ZLDAs typically include a power of attorney provision which allows the purchaser to cause further mergers and execute the same for the seller, if the seller refuses to join. However, no prudent attorney uses a power of attorney such as this one without court approval. *See 402 West 38th St. Corp. v. 485-497 Ninth Avenue*, 16 Misc. 3d 1131(A), 847 N.Y.S.2d 901, 2007 WL 2429695, 2007 N.Y. Slip Op. 51654(U) (Sup. Ct., N.Y. Co. 2007). Does this mean that the title company intends to cover the costs of enforcing the power of attorney?

64. This point is exacerbated in light of 2006 ALTA Owner's Policy, Condition #11 (Liability Noncumulative). Suppose the same title insurer issued three policies in the same project: an Owner's Policy on the land, an Owner's Policy on the development rights purchase, and a Loan Policy on the entire project. Any payout on the Loan Policy will reduce coverage on both Owners' Policies. Every dollar paid out on the Loan Policy would reduce coverage on each Owner's Policy by one dollar.

65. That the existence or life of an easement should be measured by the application of a different law is no new concept. The reader need only recall the ubiquitous easements for emergency egress which lapse if the building is demolished or if they cease to be required by the NYC Fire Code. Similarly, covenants and restrictions in towns and villages that delayed in passing a zoning ordinance were occasionally set to lapse upon adoption of a zoning ordinance by the local municipality.

66. *See* N.Y. INS. LAW § 6403(b) (McKinney 2009). The NYC Development Rights Endorsement insures that the ZLDA "is effective to transfer to the insured the floor area development rights. . . ."

67. We will not expand here on the difference between predicating "marketability" of an "easement," i.e., a real property interest, and predicating "marketability" of "FA" or "development rights," i.e., a zoning law term. We will only say that the former is a recognized and established real property law concept, while the latter is a new concept for the zoning law, which meaning is to be determined by the courts.

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Protecting a Subtenant from Losing Its Leasehold upon Termination of the Prime Lease or Foreclosure of a Building Mortgage

By L. Stanton Towne

In today's real estate market, a subtenant needs to consider the possibility that the tenant (the subtenant's sublandlord) will become insolvent, leading to a termination of the lease to the tenant (herein the "Prime Lease") or that the building landlord will become insolvent, leading to a foreclosure sale of the building landlord's interest in the building, or that both of these possibilities will occur. In order to protect itself from losing its leasehold in these situations, the subtenant should enter into appropriate agreements with the building landlord and the holder of any mortgage on the building.

Termination of the Prime Lease

In order for a subtenant to be protected from losing its leasehold upon a termination of the Prime Lease, the subtenant should enter into with the building landlord either (a) a subordination non-disturbance and attornment agreement (the "Landlord Subtenant SNDA") or (b) a contingent or standy lease (a "Standby Lease") as described below. Although the former is more common, for reasons discussed below the latter is to be preferred.

If a Landlord Subtenant SNDA is used, it should provide that if the Prime Lease terminates for any reason (with possible exceptions for casualty or condemnation or other situations varying from transaction to transaction) prior to the scheduled expiration date of the sublease, the subtenant will become a direct tenant of the building landlord for what would have been the balance of the term of the sublease. A number of aspects of the Landlord Subtenant SNDA warrant special attention:

> ***First***, building landlords will generally prefer that the Landlord Subtenant SNDA provide that from and after the date on which the subtenant becomes a direct tenant of the building landlord the subtenant shall pay rent to the building landlord equal to the higher of the rent provided for in the sublease or the rent for the sublease premises which would have been payable under the Prime Lease if it had continued in effect. This obviously is not favorable to the subtenant.
>
> ***Second***, the building landlord may prefer that the Landlord Subtenant SNDA provide that from and after the date on which the subtenant becomes a direct tenant of the building landlord the non-rental terms of the Prime Lease shall be substituted for the non-rental terms of the sublease. Often a subtenant has no reason to object to this.
>
> ***Third***, the Landlord Subtenant SNDA should provide that the direct lease arising between the building landlord and the subtenant upon termination of the Prime Lease shall have priority from the date of the Landlord Subtenant SNDA and shall not be subordinate to any mortgage granted after date of the Landlord Subtenant SNDA unless the mortgagee provides to the subtenant an SNDA in a form to be attached to the Landlord Subtenant SNDA or equivalent.
>
> ***Fourth,*** the Landlord Subtenant SNDA should be recorded and should either (a) not include a provision subordinating the Landlord Subtenant SNDA to mortgages granted after the date of the Landlord Subtenant SNDA (the simpler and common approach) or (b) provide that the Landlord Subtenant SNDA shall not be subordinate to any mortgage granted after the date of the Landlord Subtenant SNDA unless the mortgagee provides to the subtenant a Lender Subtenant SNDA in a form to be attached to the Landlord Subtenant SNDA or equivalent.

A Standby Lease is an alternative to a Landlord Subtenant SNDA. A Standby Lease is a lease of the premises devised by the sublease which provides that its term shall commence upon (and only upon) the termination of the Prime Lease for any reason (with possible exceptions for casualty or condemnation or other situations varying from transaction to transaction) prior to the scheduled expiration date of the sublease. A suggested model term commencement provision for a Standby Lease is set forth on Exhibit A to this Article. A Standby Lease is preferable to a Landlord Subtenant for a number of reasons:

> ***First***, a Standby Lease eliminates the need for the building landlord or its counsel to review the sublease to determine whether its provisions will work properly when converted into a direct lease as called for by a Landlord Sub-

tenant SNDA. As noted above, some building landlords seek to avoid this problem by providing in the Landlord Subtenant SNDA that the non-rental terms of the Prime Lease are deemed substituted for the non-rental terms of the sublease, but the Standby Lease offers a much more direct route to accomplish this.

Second, the Standby Lease appears (at least to this author) to offer a better method to achieve the goal of point ***Third*** above. Although I've found no cases on this, I think a subtenant's lawyer would rather defend the proposition that the delayed commencement date should not cause the Standby Lease to lose its priority rather than the proposition that the direct lease arising under the Landlord Subtenant SNDA should have priority from the date of the Landlord Subtenant SNDA.

Third, because the Standby Lease looks and reads like a regular lease in almost every detail, it should be easier (and certainly no harder) to process through the lender approval process than a Landlord Subtenant SNDA.

Both the Landlord Subtenant SNDA and the Standby Lease should provide for avoidance of doubt (a) that among the types of terminations of the Prime Lease covered by the Landlord Subtenant SNDA or the Standby Lease is a termination of the Prime Lease by reason of the foreclosure of a superior mortgage, and (b) that if the building landlord rejects the Prime Lease in bankruptcy and the sublandlord retains legal possession under Section 365(h) of the federal Bankruptcy Code, then for the purpose of the Landlord Subtenant SNDA or the Standby Lease the Prime Lease shall not be deemed to have terminated unless and until such legal possession under Section 365(h) terminates. The effect of a building landlord bankruptcy upon a subtenant is further discussed below.

Foreclosure of a Building Mortgage

In order for a subtenant to be protected from losing its leasehold upon a foreclosure of a building mortgage, the subtenant should enter into a subordination non-disturbance and attornment agreement with the holder of any mortgage on the building (a "Lender Subtenant SNDA") existing at the time of the making of the sublease.

The Lender Subtenant SNDA should be drafted with three different fact patterns in mind:

Fact Pattern A: Foreclosure of the mortgage and termination of the Prime Lease as a part of the foreclosure process.

Fact Pattern B: Foreclosure of the mortgage after an earlier termination of the Prime Lease, which termination previously led to a direct lease relationship arising between the building landlord and the subtenant.

Fact Pattern C: Foreclosure of the mortgage and continuation of the Prime Lease in effect between the purchaser in foreclosure and the tenant under the Prime Lease, followed by a subsequent termination of the Prime Lease

In order to protect the subtenant in Fact Pattern A and B, the Lender Subtenant SNDA should provide that, in either such case, upon foreclosure, a direct lease relationship shall arise between the purchaser in foreclosure and the subtenant. All of the issues addressed in the prior section of this article regarding termination of the Prime Lease are also applicable in this context, e.g., (i) the Lender may want to provide that the rent will be the higher of the rent payable under the sublease or under the Prime Lease, (ii) the Lender may want to substitute the non-rental terms of the Prime Lease for the non-rental terms of the sublease. Of course, if a Standby Lease has been used, rather than a Landlord Subtenant SNDA, the Lender Subtenant SNDA can be simpler because it can simply provide that, in either Fact Pattern A or B above, upon foreclosure, the Standby Lease will become effective between the purchaser in foreclosure and the subtenant.

In order to protect the Subtenant in Fact Pattern C, the Lender Subtenant SNDA should also provide that if the Prime Lease is in effect at the time of the foreclosure and is not terminated in the foreclosure, then the Landlord Subtenant SNDA or the Standby Lease (whichever shall have been used) shall continue in effect between the purchaser in foreclosure and the subtenant. This protects the subtenant from a termination of the Prime Lease occurring after the foreclosure.

Bankrupcty of the Landlord

A Lender Subtenant SNDA drafted as described above will protect the subtenant from losing its leasehold upon a foreclosure of a building mortgage. However, if the building landlord commences (or has commenced against it) a federal bankruptcy proceeding, there is at least one fact pattern in which the subtenant is exposed to a possible loss of its leasehold.

The federal bankruptcy code gives a bankrupt person or entity the right to reject any unexpired lease or executory contract (by which performance remains due to some extent on both sides).[1] This right is commonly invoked by tenants in bankruptcy, but is also available to landlords in bankruptcy. In order to protect tenants from being evicted (and in keeping with the notion that a lease is, in part, a conveyance, not merely a

contract), Section 365(h) of the federal Bankruptcy Code provides that if a landlord rejects a lease the term of which has commenced, the tenant retains its rights under the lease and, while the landlord is released from its affirmative obligations (e.g., repairs, etc.), the tenant is entitled to set off against the rent its damages arising from the failure of the landlord to perform those affirmative obligations.[2] For this reason, landlords do not as a rule reject leases in bankruptcy because there is no economic benefit for them to do so and even if they do, tenants can remain in possession.

Although there is, as far as I know, no court decision on point, it is likely that a bankruptcy court would consider a Landlord Subtenant SNDA to be an executory contract, not a lease, and therefore to be not entitled to the benefit of Section 365(h). Based on this, if the building landlord were to reject the Landlord Subtenant SNDA, the subtenant would have a difficult to value and presumably worthless unsecured damage claim against the building landlord, but would not retain its rights under the Landlord Subtenant SNDA. The mere rejection of the Landlord Subtenant SNDA would not necessarily result in the subtenant's losing its leasehold because, at the time of the rejection, the Prime Lease might remain in effect or the sublandlord might retain possession under Section 365(h), but if the Prime Lease or such possession under Section 365(h) were to be subsequently terminated (e.g., by reason of default thereunder by the sublandlord) the subtenant would no longer be entitled to invoke the Landlord Subtenant SNDA and thus would lose its leasehold.

The Standby Lease does not offer a solution to this problem because, as noted above, Section 365(h) only protects leases the terms of which have commenced, and we are here concerned about a bankruptcy of the building while the Prime Lease remains in effect (and so the term of the Standby Lease has not commenced).[3]

In order to protect the subtenant from a bankruptcy of the building landlord the transaction could be restructured from the start as a true direct lease from the building landlord to the subtenant, as follows:

- The building landlord and the intended subtenant enter into a direct lease (a "Replacement Lease") covering the intended sublease premises for the intended sublease term.
- The building landlord and the existing tenant modify the Prime Lease to exclude the intended sublease premises for the term of the Replacement Lease, i.e., for a term ending upon the expiration or earlier termination of the Replacement Lease.
- The intended subtenant as tenant under the Replacement Lease and the holder of the existing mortgage enter into a traditional subordination, non-disturbance and attornment agreement covering the Replacement Lease.
- The existing tenant guarantees the obligations of the intended subtenant as tenant under the Replacement Lease.
- As necessary, the parties enter into agreements to reproduce the intended economics of the transaction using the modified structure. For example, if (a) the intended subtenant was to have paid a higher rent per square foot, and (b) the landlord was to have received a portion of the subleasing profit, the economics of this structure could be reproduced by (i) setting the per square foot rent under the Replacement Lease to be equal to the sum of (x), the per square foot rent under the Prime Lease, plus (y), the per square foot profit which the tenant would have been required to pay to the building landlord, (ii) excluding the per square foot profit from the tenant guaranty of the Replacement Lease, and (iii) the tenant and the intended subtenant entering into a separate agreement requiring the intended subtenant to make a monthly payment to the tenant equal to the profit which the tenant would have made under the sublease. Other deal economics would require more complicated agreements.

Obviously the Replacement Lease structure can only be employed if both the building landlord and the tenant are sufficiently motivated.

Conclusion

By following the approach outlined in this article, a subtenant can protect itself from losing its leasehold upon a termination of the Prime Lease or a foreclosure of a building mortgage, except in the very unusual case in which the Landlord Subtenant SNDA or Standby Lease is rejected in bankruptcy and then the Prime Lease is subsequently terminated. If the subtenant is unwilling to accept this risk and the building landlord and the tenant are sufficiently motivated, the transaction can restructured as a direct lease from the start, as outlined above.

Endnotes

1. 3 COLLIER ON BANKRUPTCY, ¶ 365.02 (Alan N. Resnick *et al.* eds., 15th ed. rev. 2007).
2. 11 U.S.C. § 365(h) (2009).
3. *Id.*
4. The parties should separately consider each type of termination. For example, the tenant (subtenant) may want to exclude termination of the Prime Lease by the Prime Lease Tenant by reason of Landlord default or may not want to exclude termination of the Prime Lease by the Prime Lease Tenant by reason of fire or other casualty.

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Exhibit A

Suggested Model Term Commencement Provision for Standby Lease

If

(a) prior to [the scheduled expiration date of the Sublease], the term of the Prime Lease shall expire or be terminated with respect to the Premises [defined to mean the premises demised by the sublease and this Standby Lease] for any reason including but not limited to (i) termination by Landlord by reason of default by Prime Lease Tenant, (ii) termination by Prime Lease Tenant by reason of default by Landlord, (iii) exercise by Landlord or Prime Lease Tenant of any termination right or option provided for in the Prime Lease, (iv) voluntary surrender of the Prime Lease, (v) foreclosure of any mortgage (unless the Prime Lease continues in effect between the purchaser in foreclosure and Prime Lease Tenant), and (vi) termination by Landlord by reason of rejection in bankruptcy by Prime Lease Tenant under 11 U.S.C. §365(g), *excluding*, however, any termination of the term of the Prime Lease arising out any exercise by Landlord or Prime Lease Tenant of any termination right or option arising out of any casualty or condemnation,[4] and

(b) immediately prior to such termination, the Sublease was in full force and effect (or Tenant was in legal possession of the Premises pursuant to 11 U.S.C. § 365(h));

then the term of this lease shall commence immediately following such expiration or sooner termination of the term of the Prime Lease and, unless sooner terminated as herein provided or by operation of law, shall expire on [the scheduled expiration date of the sublease], it being understood that unless the conditions of clauses (a) and (b) above are satisfied the term of this lease will never commence. If Landlord shall reject the Prime Lease pursuant to 11 U.S.C. § 365(g) and Prime Lease Tenant shall remain in legal possession of the Premises pursuant to 11 U.S.C. § 365(h) then, for purpose of the preceding sentence, the term "Prime Lease" shall include such continuing legal possession.

Disclosure and Disclosure-Like Devices in the New York City Housing Court

By Gerald Lebovits, Rosalie Valentino, and Rohit Mallick

I. Introduction

Summary residential landlord-tenant proceedings in the New York City Civil Court, Housing Part—the Housing Court—give owners a simple, expedited, and inexpensive way to regain possession of premises when occupants refuse to pay rent or wrongfully hold over without permission or after the expiration of their term. In return for the benefits to an owner of pursuing a summary proceeding, occupants benefit from procedural, jurisdictional, and substantive defenses that do not exist in plenary actions.

Given the goals of summary proceedings, courts must weigh the benefits of permitting disclosure against the potential abuse and delay that disclosure causes. For some time now, the courts have favored and promoted disclosure—called discovery in federal court—in certain types of summary proceedings to help the parties litigate fairly and efficiently. Fairness and efficiency allow the sides seeking disclosure, or from which disclosure is sought, to prevail quickly, if appropriate. The tension between the judicial economy flowing from summary proceedings and preserving justice for parties in Housing Court comprises most of the debate over disclosure in landlord-tenant proceedings.[1]

Two types of cases—primary residence and owner's-use proceedings—enjoy almost automatic permission for disclosure in Housing Court, while for other cases the likelihood of permission for disclosure is reduced or nonexistent. This article discusses disclosure in some Housing Court proceedings: owner's use, nonprimary-residence, and illegal-sublet proceedings. The article also considers disclosure when the following defenses are raised: rent overcharge, horizontal multiple dwellings, illusory tenancies, succession rights, and economic infeasibility. The article further considers privacy issues arising from disclosing medical records and Social Security numbers and information from video surveillance. Disclosure and disclosure-like vehicles such as subpoenas, notices to admit, and bills of particulars are also examined.

"The tension between the judicial economy flowing from summary proceedings and preserving justice for parties in Housing Court comprises most of the debate over disclosure in landlord-tenant proceedings."

Although disclosure devices are available on notice without leave of court in plenary actions and served between parties, parties to a summary proceeding are not entitled to disclosure as a matter of right. Parties must move under CPLR 408 to obtain permission from the court to conduct examinations before trial, serve demands to produce and interrogatories, and conduct physical and mental examinations. A CPLR 408 request for admissions, called a notice to admit, is the only disclosure device that does not require leave of court.

A motion for leave to conduct disclosure should contain an affidavit from the party seeking disclosure, be carefully tailored to the lawsuit's pleadings, and annex a copy of the proposed document demand, interrogatories, and any other type of disclosure device sought to be used. If a movant fails to attach a copy of the proposed disclosure device to the motion papers, the courts might deny the motion without prejudice to renew.[2] The opposing party might take this procedural infirmity a step further and move to preclude disclosure altogether. The required procedure preserves the purposes of the summary proceeding: to avoid delay, promote judicial economy, and reduce the possibility of disclosure or trial by ambush.

Disclosure should be germane to the proceeding and sufficiently narrow to permit ready compliance.[3] Examinations Before Trial (EBTs)—called depositions in federal court—can be intimidating, expensive, and time-consuming. Courts allow EBTs in summary proceedings only if the movant demonstrates ample need—justice should not be sacrificed for speed. Document demands should also be germane and narrow. Courts prefer not to prune overbroad disclosure requests. The motion court might reject overbroad and oppressive requests for document production with leave to move a more reasonable discovery demand. The court's goal when considering disclosure demands is to avoid having to cull the good from the bad while simultaneously protecting sensitive, private information about the person subject to disclosure.[4] This goal encourages attorneys to tailor disclosure requests to avoid wasting time, money, and effort.

Although some Civil Court clerks might prefer otherwise, most Housing Court judges who grant disclosure will mark a case off calendar pending the completion of disclosure and allow either side to restore the proceeding on notice.

Courts that hear disclosure must be sensitive to the needs and rights of the unrepresented. For example,

many *pro se* litigants consent in stipulations to onerous, unfair disclosure. The courts must examine and allocate stipulations before they so-order them. To assure compliance and to make sure that the unrepresented will understand their disclosure obligations, the courts should consider setting out in its disclosure order the dates for the EBT and compliance with document production, which can occur about a week before the EBT. Courts should also consider inquiring whether the should EBTs take place in the courthouse—neutral territory—rather than at the landlord's lawyer's office.

Early disclosure in summary proceedings can yield beneficial results. Disclosure might assist in rapidly disposing of or settling a case. Disclosure helps both sides clarify issues to be presented at trial and might help a party with a motion for summary judgment. The historical hesitation with granting disclosure, on the other hand, is that disclosure mechanisms increase cost and conflict with the purpose of summary proceedings by causing delay.[5] The introduction of the ample-need standard, however, has clarified the usage of disclosure and preserved judicial discretion in granting disclosure in appropriate situations.

II. The Ample-Need Standard

To obtain an order granting the right to proceed with disclosure, the litigant must demonstrate "ample need" to prosecute or defend a summary proceeding.[6] The type of proceeding initiated will dictate the showing needed to obtain disclosure. Motions for disclosure require the court's attention to the particular factual circumstances in each case.

The seminal case of *New York University v. Farkas*[7] involved a summary proceeding based on a landlord's allegations that the tenant did not occupy the premises as the tenant's primary residence. The *Farkas* court identified and defined the ample-need standard, which consists of six factors a court should consider to determine whether and when disclosure should be permitted in a summary proceeding. The factors are (1) whether the petitioner has asserted facts to establish a cause of action; (2) whether the movant has demonstrated a need to determine information directly related to the cause of action; (3) whether the information requested is carefully tailored and is likely to clarify the disputed facts; (4) whether granting disclosure would lead to prejudice; (5) whether the court can alleviate the prejudice; and (6) whether the court can structure disclosure to protect *pro se* tenants against any adverse effects of a landlord's disclosure requests.

These factors must exist in a summary proceeding to obtain a court order permitting disclosure. They reflect the court's concerns with the availability of information relevant to the material facts of a claim or defense in the context of special proceedings, of which a landlord-tenant summary proceeding is an example. The ample-need standard ensures that an owner or landlord does not request disclosure simply to formulate a cause of action and prevents the occupant or tenant from conducting a fishing expedition to discern a defense. Each party must demonstrate ample need for disclosure, and the court will then tailor an order addressing the party's specific needs. Requiring a showing of ample need in summary proceedings allows the court to structure disclosure orders to safeguard both the efficiency of summary proceedings and each party's rights and defenses.

Although a presumption favors disclosure in some proceedings, not all cases are amenable to disclosure. In a standard nonpayment proceeding, no reason exists to allow disclosure for either side if no disputed factual issues arise—if, for example, the proceeding is about whether the tenant either paid or did not pay and the movant wants to learn only what the other side knows or intends to prove at trial. A more complicated nonpayment case in which the tenant raises defenses for nonpayment, such as breaching the warranty of habitability, will increase the likelihood that the court will allow disclosure, as long as a party demonstrates ample need. The court can allow disclosure in proceedings with no presumption of disclosure if the party meets the ample-need requirements.

III. Types of Proceedings

A. Owner's-Use Proceedings

In owner's-use cases, the landlord seeks to recover a rent-regulated apartment based on the claim that the landlord or the landlord's immediate family will reside in the apartment as their primary residence after possession of the apartment is obtained. Disclosure in the tenant's favor is presumed in owner's-use proceedings. Tenants need not accept the landlord's representations; they may seek leave of court to conduct disclosure to ascertain the truth of the landlord's representations. No presumption exists that a tenant possesses facts sufficient to prepare a defense to a proceeding predicated on the landlord's alleged good-faith intent to use a tenant's apartment as a personal, primary residence.[8] The operative facts are within the landlord's knowledge.[9] Landlords' mere declaration that they have the good-faith intent to recover the space for personal use is not enough: allegations are not dispositive of the landlord's real intentions. The tenant is entitled to conduct disclosure on the issue of the landlord's intention to use the space.

To acquire information about a landlord's intentions, a tenant may seek disclosure of the landlord's building renovation plans to determine whether the building can convert into a single-family home.[10] Additionally, a tenant may conduct disclosure when a landlord seeks to recover the tenant's apartment for use as a retirement home but the tenant suspects that the building will really be the landlord's primary residence.[11] A landlord's other properties are within the realm of disclosure. In an owner's-use proceeding, a tenant

will be allowed to conduct disclosure to ascertain whether the landlord will use the space as a primary residence or whether the landlord desires to replace the tenant and charge a higher rent. Because the operative facts are exclusively within the landlord's knowledge, the tenant will be permitted to obtain disclosure on this issue.[12]

B. Nonprimary-Residence Proceedings

In New York, the failure of a rent-regulated tenant to occupy an apartment as a primary residence constitutes incurable ground to evict.[13] The same is true for a market-rate or cooperative proprietary lessee who agrees to that provision in a lease.

The earlier-mentioned *Farkas* case involved a holdover proceeding based on the landlord's allegations that the tenant was not using the apartment as a primary residence. In *Farkas*, the landlord sought to depose the tenant and demanded documents to support its claim that the tenant did not occupy the apartment as a primary residence. The landlord sought the production of the tenant's New York City Resident Income Tax Returns and the address the tenant listed on those returns. The landlord also sought to ask questions about what specific portion of time the tenant lived at the subject apartment.[14] In considering whether to grant an order allowing the landlord to proceed with disclosure, the court noted that disclosure could be viewed as inconsistent with the speedy determination of rights. But the court relied on the rationale that disclosure, when used properly, aids the speedy disposition of a case because the information learned could clarify issues at trial, possibly lead to settling the case, or present a successful motion for summary judgment[15]—which, when made without pretrial disclosure, is sometimes called "poor-person's disclosure" because it can be used to force the non-moving side to disclose its proof.

If a summary proceeding involves a landlord's allegations of nonprimary-residence, the court will permit disclosure because the information is exclusively within the respondent-tenant's knowledge. This exclusivity of knowledge drives the presumption favoring disclosure in nonprimary-residence cases.[16]

In *390 West End Associates L.P. v. Atkins*,[17] for example, the court illustrated the types of discoverable documents in a nonprimary-residence action: driver's licenses, vehicle registrations, employment / business records, tax returns, frequent-flyer statements, bank statements, utility bills, and credit-card statements. These documents are discoverable because they contain information showing the extent and duration of the respondent-tenant's tenures at various residences. Although most courts allow landlords to obtain documents going back about two years before the *Golub*, or nonrenewal, notice (a predicate notice often combined with the termination notice),[18] facts particular to each proceeding could lengthen or shorten the relevant period for which disclosure might be available. The *390 West End* court allowed the landlord to demand the documents dating back from the inception of the landlord-tenant relationship, a period of five years. The documents would let the landlord evaluate the tenant's primary residence throughout the period of the tenancy.[19]

Given that primary residence involves determining tenant intent, examining the tenant's documents and subjecting the tenant and necessary, knowledgeable nonparties affiliated with the tenant to examinations before trial and will supply evidence to ascertain the purpose and duration of the residence in dispute and any alleged alternative residence.[20]

Tenants, on the other hand, rarely if at all obtain leave to conduct disclosure in nonprimary-residence proceedings. The tenant might seek disclosure to learn about what evidence is in the landlord's possession. But that is not a ground to get disclosure, and the information sought is in the tenant's exclusive possession and control in any event.

The parties in *Farkas* and *390 West*—and in thousands of similar cases—have used disclosure devices to maximize the speed and efficiency of the trial process. Abusing the disclosure process in nonprimary-residence proceedings is limited because leave of court is necessary, but some landlords can and do harass tenants through disclosure, a process that that forces tenants to turn over private information and makes them spend time, effort, and money. At the same time, disclosure, when used honestly, ferrets out the truth.

C. Illegal-Sublet Proceedings

Unlike nonprimary-residence holdovers, cases regarding illegal sublets reserve no presumption favoring disclosure. In sublet cases, the courts do not blindly grant disclosure but, instead, safeguard the summary proceeding by narrowly crafting disclosure orders.

If a landlord incorrectly frames an illegal-sublet summary proceeding as a nonprimary-residence proceeding, the court might deny permission for the landlord to seek disclosure. In *Metropolitan Life Insurance v. Butler*,[21] for example, the landlord in a summary proceeding based upon the tenant's illegal subletting of the subject apartment drafted a petition that never alleged that the tenants did not use the apartment as their primary residence. Despite the petition's illegal-sublet framework, the landlord sought to disclose documents related to a nonprimary-residence case. The proof the landlord sought was inconsistent and inapplicable to the cause of action alleged in the petition, and the court denied the landlord leave to depose the tenant. The court would not permit the landlord to "bootstrap" a nonprimary-residence case into an illegal-sublet proceeding. Because the documents the landlord sought had nothing to do with its theory and allegation of an illegal

sublet, the court held that disclosure under these circumstances would not promote judicial efficiency.

The ruling in *Butler* does not stand for the proposition that courts will categorically deny disclosure in illegal-sublet proceedings. To the contrary, in cases like *Jane Street v. John*,[22] the Appellate Term, First Department, reversed and granted the landlord's motion for disclosure in a sublet proceeding because the "[l]andlord's assertion, in support of discovery, that tenant does not primarily reside at the premises is consistent with the theory of illegal sublet or assignment alleged in the petition, and the nature of her relationship with the other respondent and the extent to which their occupancy is contemporaneous are related issues." Rather, *Butler* stands for the proposition that courts will supervise and tailor disclosure orders.

In *Hartsdale Realty Company v. Santos*, [23] the landlord alleged that the tenant illegally sublet her apartment. In addition to a request to disclose the apartment's occupants' identities, the landlord sought disclosure helpful to a nonprimary-residence case. Landlords' attorneys argue that landlords in sublet cases must prove that the prime tenant does not live in the premises—that is the difference between an unapproved sublessee and a lawful roommate—and thus that they need disclosure akin to the kind they can get in nonprimary-residence cases. But the courts have found that nonprimary-residence disclosure is irrelevant to the landlord's cause of action for an illegal sublet. Nevertheless, landlords are given leave to depose the tenant and the subtenant in sublet cases. That deposition was restricted in *Santos* to the landlord's allegations that the tenant illegally sublet the subject apartment.[24] Similarly, in *Wong v. Khoo*,[25] the court permitted disclosure of the identity of the apartment's occupants and their relationship to the tenant of record to aid the landlord's illegal-sublet claim. The landlord proved ample need by submitting the managing agent's affidavit.

Based on the *Butler* and *Hartsdale* proceedings, and many other cases, litigants should carefully craft their petitions for summary proceedings and requests for disclosure to correspond with their specific causes of action.

IV. Types of Defenses

A. Rent-Overcharge Cases

When a landlord seeks to increase the tenant's rent based on an alleged substantial rehabilitation, the tenant may seek disclosure to determine whether the rental increase is or was justifiable. Courts have granted tenants permission to depose the landlord to ascertain whether the landlord substantially rehabilitated the apartment or instead had made only minor alterations.[26] Courts also allow tenants to learn whether a rent increase was lawful relative to the improvements made.[27] When a tenant disputes the rent and claims a rent overcharge, the tenant's ability to defend at trial might be impaired without access to the landlord receipts and invoices.[28] This is an example of one party's having most of the operative facts in its possession and the courts' attempt to balance the conflict between summary proceedings and judicial fairness.

B. Horizontal Multiple Dwelling Cases

A multiple dwelling is a dwelling rented, leased, let, or hired as a home of three or more families living independently of each other in cities with populations of 325,000 or more.[29] The landlord of a multiple dwelling has a non-delegable duty to maintain the premises in a reasonably safe and habitable condition.[30] Recognizing the high stakes for tenants in summary proceedings, courts allow tenants to proceed with disclosure in horizontal multiple-dwelling cases. A horizontal multiple dwelling invokes the benefits of rent-stabilization protection.

In *480-486 Broadway LLC v. No Mystery Sound, Inc.*,[31] the tenant defended on the basis that the premises were a residential rent-stabilized horizontal multiple dwelling, not commercial space. The court in that commercial landlord-tenant holdover proceeding found that the only way to resolve that proceeding was to allow the tenant to discover evidence proving whether the subject premises was a *de facto* horizontal multiple dwelling. The court allowed the disclosure to demonstrate whether the subject premises had been converted to residential use.

C. Illusory Tenancy

An illusory tenancy exists if the prime tenancy is a sham. The hallmark of an illusory tenancy is a subtenancy set up to profit improperly by violating rental laws.[32] An illusory tenancy exists if an owner creates a residential leasehold in persons who do not occupy the premises for their own residential use and who then sublease it for profit.[33] To determine whether an illusory tenancy exists, courts will consider the extent of the prime tenant's dominion and control over the premises,[34] whether the subtenant reasonably expected to continue in possession indefinitely as a rent-regulated tenant when the sublease ended, and whether the landlord or its agents knew whether parties other than the prime tenants were residing in the premises for a substantial period of time.[35] Under illusory-tenancy doctrine, when the sublet is from a rent-stabilized apartment, the subtenant in certain circumstances can be recognized as the legal rent-regulated prime tenant.[36]

Disclosure in these cases is crucial to the subtenant's defense because much is at stake for the subtenant. For example, in *125 Church Street Development Co. v. Grassfield*,[37] the landlord sought to remove the prime tenant from the subject apartment because the prime tenant did not occupy the premises as a primary residence. The subtenant sought to establish an illusory-tenancy defense on the basis that the prime tenant engaged in illegal-rent profiteering

by overcharging the subtenant. The subtenant sought information exclusively within the prime tenant's knowledge—whether the tenant gave up his primary residence in the subject premises years ago and had since illegally profited from subletting the apartment while holding onto the space in hopes of a substantial buyout from the landlord. The court ordered that if the landlord proceeded to take the deposition, the subtenant would be allowed to appear at the deposition to question the prime tenant under CPLR 3113(c).

Another way a subtenant can establish a defense is by deposing the landlord's employees. Leases, renewals, rental log payments, correspondence and papers about the tenants or occupants of the apartment, photographs and videos of the respondent's presence in the building, and the apartment's maintenance records are examples of relevant documents to a respondent's seeking to establish an illusory tenancy. These documents might show whether the landlord knew or should have known about the occupancy agreement between the respondent and the prime tenant.

Examinations before trial of the landlord's employees can be key disclosure devices to establish illusory-tenancy defenses. The examinations might disclose the landlord's actual or constructive notice of the subleasing arrangement.[38]

Courts have authorized the examinations of nonparties in these types of cases. In *255 West 88th Co. v. Gelband*,[39] the subtenant lived in the subject apartment for 14 years. The subtenant sought to depose the building's porter, superintendent, and doorman to establish whether the landlord had either actual or constructive knowledge of the illegal-subletting scheme. Despite the landlord's attempt to oppose the motion for disclosure by offering an affidavit that the landlord was unaware of the subtenant's presence, the court granted the tenant's motion to obtain those three EBTs. Nonparty disclosure can therefore occur in the proceeding if the notice or subpoena advises the nonparty of the disclosure and the reasons that disclosure is sought.

Elevator operators and maintenance staff have also been subjected to EBTs to establish the subtenant's illusory-tenancy defense.[40] Subtenants can try to prove that from the inception of their sublease, the owner's employees knew about their occupancy and of the prime tenant's absence from the premises. The EBTs of the owner's employees might demonstrate that the owner knew whether the elevator operators saw the subtenants every day and whether maintenance personnel were on the premises several times to effect repairs. Whether the subtenant seeks the EBT of a doorman or elevator personnel, no restriction is placed on which of the owner's employees must be aware of the sublease for the respondent to establish an illusory-tenancy defense.[41] The court is more concerned with disclosing whether an illusory-tenancy defense might be meritorious.

D. Succession Rights

Courts allow disclosure in summary proceedings involving succession rights. In dispute in these cases is whether and when the prime tenants permanently vacated the apartment, whether and when the successor resided in the apartment for two years with the prime tenant, and whether the successor tenant is either an immediate family member or a nontraditional family member entitled to succeed to the tenancy. Courts have found that documents relating to acquiring the tenant's home, records of the tenant's children's school attendance, telephone records, voter-registration records, newspaper and magazine subscriptions, utility bills, rent statements, bank and credit records, motor-vehicle registration, and use of the premises address for mail are all subject to disclosure.[42] A tenant asserting succession rights—an affirmative defense—must make documents available to establish the same facts the tenant in a nonprimary-residence case will seek to prove: the customary indicia of continuous residence, specifically the ongoing, substantial, and physical nexus with the regulated premises for actual living purposes.[43]

The tenant may oppose the disclosure motion or move for a protective order under CPLR 3103 to limit the scope of disclosure.[44] Although a court will preclude irrelevant documents, i.e., documents not addressed to ascertaining the time period in which a respondent has lived on the premises, a court will order that a respondent provide all relevant documents evidencing billing and mailing addresses. Specifically, addresses listed on W-2 forms, federal and New York State income tax returns, mailing and billing addresses for credit cards, monthly bank statements, Con Edison, New York Telephone Company bills, and voter registration might evidence a respondent's address, and are all related to succession rights.[45] The court is concerned only with billing and mailing addresses. Therefore, although a respondent will be ordered to provide copies of medical bills, the respondent would not be required to disclose the basis and type of treatment prescribed. The respondent would be required, however, to list the address to which the medical bills were sent. The same is true for financial information—and this is so in all cases, whether a nonprimary-residence case or an illegal-sublet case—in which a party seeks Housing Court disclosure. The rationale behind producing these documents is that the respondent should disclose accurate information, but to limit their intrusive value, that would substantiate whether or not succession rights apply.

E. The Economic-Infeasibility Defense

The affirmative defense of economic infeasibility is available to an owner in a Housing Part (HP) repair proceeding if the owner's cost to restore the premises and cure the

housing violations would exceed the value of the premises after restoration. The owner may then demolish the premises and pay the rent-regulated tenant(s) the value of their rent-regulated premises. The burden of this defense is placed on the owner, which must prove this defense by a preponderance of the evidence. If an owner asserts economic infeasibility, a presumption favors disclosure under CPLR 408, and the tenants will be allowed to serve interrogatories on this issue.[46] The interrogatories can be tailored to ask about the assessed value of the premises, the current offers for the property, and the financial operating statements of the premises, including the rent roll. This information is likely within the owner's exclusive knowledge and control.

The economic infeasibility defense might also arise in a nonpayment proceeding. In *City of New York v. Cordero*, the landlord instituted a nonpayment proceeding, and the tenant counterclaimed that the landlord breached the warranty of habitability.[47] The court granted the tenant leave to conduct disclosure relevant to the landlord's contention that repairing the subject premises was economically infeasible. The court found that disclosure would promote the overall efficiency of the trial process.[48] This demonstrates that a petitioner-landlord does not have an exclusive right to obtain disclosure. Disclosure necessary for a respondent's defense will be granted.

V. Privacy Concerns

A. Medical Records

A person's medical records are generally privileged materials not subject to disclosure. In summary proceeding disputes involving medical conditions, however, courts have ordered disclosure of medical records.

In *Stern v. Levine*,[49] the landlord's medical records were subject to disclosure. The landlord sought to recover the tenant's third-floor apartment for the landlord's personal use. The tenant sought to establish the landlord's bad faith; according to the tenant, the landlord could not use the third-floor apartment due to a physical disability. The tenant sought the disclosure of an administrative hearing before the Social Security Administration in which the landlord testified before an administrative law judge that he was unable to climb the stairs without difficulty. As part of that proceeding, the landlord submitted medical records relating to the landlord's ability to climb the stairs. Those medical records became material and necessary to the tenant's defense that the landlord had neither an intention nor an ability to live in the third-floor apartment. Remaining sensitive to the confidentiality and privilege of the records, the court allowed the landlord to redact any nonmedical, otherwise irrelevant material submitted to the Social Security Administration.

A landlord is likewise able to seek disclosure of tenants' medical condition when tenants put their medical condition in issue. In *Banchik v. Ruggieri*,[50] the landlord sought to recover an apartment for his personal use. The tenant claimed protection under the Rent Stabilization Code due to a permanent and incurable medical disability that prevented the landlord from ousting the tenant, but the tenant objected to providing her medical records to the landlord. The landlord's motion seeking leave to disclose of the tenant's medical, financial, and business records was granted, and the court entered an order directing the tenant to be subjected to a physical examination by an independent physician.

A landlord who does not move for leave of court to obtain disclosure to inquire into the validity of the tenant's disability may not, on a tenant's summary-judgment motion in an owner's-use proceeding, argue that he cannot disprove without a trial the tenant's disability claim. In *Mozaffari v. Schatz*,[51] the landlord sought possession of the premises on owner's-use grounds. The tenant asserted a disability that, if true, would prevent the landlord from refusing to renew the lease unless, under Rent Stabilization Code § 2524.4(a)(2), the landlord offered the tenant an equivalent or superior housing accommodation at the same or lower regulated rent in a closely proximate area. In a motion for summary judgment, the tenant submitted expert medical testimony establishing her disabilities, but the landlord did not offer any evidence to contradict this testimony and thus create a triable issue of material fact.

The issue whether to disclose medical records also arises in holdover proceedings based on nonprimary residence. Sometimes tenants are confined to nursing homes due to a medical condition. In dispute is whether a rent-regulated tenant placed in a nursing home might have the ability or intention to return to the original primary residence.

A tenant's severe mental condition can provide an excuse to prevent a landlord's petition to evict a tenant on the grounds of nonprimary residence.

If tenants place their mental disability in issue by asserting the affirmative defense that a mental disability shields the tenant from an eviction and the tenants have already submitted to a psychiatric examination by their own doctor, the landlord will be given a reciprocal right to conduct a psychiatric examination of the tenant. CPLR 3121(a) provides the basis for the statutory right to conduct a psychiatric medical examination.

If a tenant refuses to submit to the landlord's psychiatric examination, the court has the power to grant the landlord's motion to strike the tenant's affirmative defense of mental disability. The Appellate Division, First Department, in *TOA Construction Co., Inc. v. Tsitsires*,[52] for example, conditioned the striking of tenant's affirmative defense of mental disability on his production of medical records pursuant to the landlord's disclosure demands. The court

compelled the tenant to submit to an independent psychiatric examination to retain his affirmative defense.

Deposing a tenant's physician has been found necessary to support a landlord's allegations of a tenant's nonprimary residence. In *65 Central Park West, Inc. v. Greenwald*,[53] the EBT of the tenant's physician was relevant to determine whether the tenant's medical condition was grave enough to prevent the tenant from ever returning to the apartment. The tenant was unable to assert a privilege in this context because whether there is the possibility of a tenant returning to the apartment is not a determination that can be summarily decided without disclosure. Additionally, the tenant relied on her physician's statement that although the tenant's medical condition was grave, it was reasonable to expect that the tenant would return to her apartment given the substantial progress in her health. Because the physician's statement was ambiguous, the court granted the landlord's request to depose the physician to clarify this statement. This is an example of the court's finding it appropriate for a landlord to depose a nonparty witness under CPLR 3101(a)(4).

Courts will allow disclosure to be conducted by both the landlord and tenant depending on the nature of the factual disputes. Litigants who place their physical or medical conditions in issue waive the claim of privilege. A party may not assert a physical or mental condition in a claim or a defense and at the same time assert a medical privilege to prevent the other party from ascertaining the truth of the claim, nature, and extent of the injury.[54]

B. Social Security Numbers

Like medical records, an individual's Social Security number is privileged information. The party asserting the privilege can successfully cite New York State General Business Law § 349(h), a consumer-protection statute, to invoke the protection and preclude disclosure of this confidential information.[55] A petitioner-landlord may not demand that tenants reveal their Social Security numbers to complete a form detaining the number of occupants in their apartment.[56] Although the New York City Administrative Code permits landlords to inquire about apartment occupants,[57] this does not authorize the landlord to demand Social Security numbers. The potential for misusing Social Security numbers outweighs the benefits of disclosure in a summary proceeding—obtaining a Social Security number can lead to obtaining a person's welfare or Social Security benefits, credit-card information, personal checks, or even a person's paycheck.

A landlord is presumptively entitled to disclosure of tax records and bank records in a nonprimary-residence holdover proceeding. But a landlord is not presumptively entitled to a tenant's Social Security number to obtain unredacted versions of a tenant's tax records and bank records.

In *Alta Apartments LLC v. Wainwright*,[58] the landlord sought leave to renew and reargue its motion for disclosure of the tenant's Social Security number in connection with its nonprimary-residence holdover proceeding. The landlord sought the Social Security numbers to issue subpoenas on the New York State Department of Taxation and the tenant's banks. The purported ample need for the disclosure was the landlord's contention that these documents would demonstrate how much time the tenant spent at her New York address. The landlord's alleged ample need for the tenant's Social Security number was dispelled by the persuasive evidence of the tenant's cooperation throughout the discovery process. The tenant had fully cooperated in disclosing evidence to the landlord. The tenant disclosed over 400 pages of requested documents and was subjected to a three-hour EBT. Among the documents the tenant turned over were the tenant's redacted tax forms and bank account information—documents the landlord never moved for disclosure but which the tenant voluntarily provided. The landlord already possessed the information necessary to prove its case, if it could.

Granting the landlord's request for disclosure of the tenant's Social Security number would give the landlord a free pass to obtain privileged information like unredacted tax forms and bank records containing information not relevant to proving the tenant's primary residence. The *Alta Apartments* court therefore denied the unimpeded disclosure of tenant's documents.

C. Video Surveillance

Debate fragmenting the Appellate Division's four departments has arisen over disclosing video surveillance in personal-injury cases. The First Department has treated surveillance films as discoverable in their entirety. The Second and Fourth Departments have treated surveillance tapes as material prepared for litigation and held that a substantial need and undue hardship must be established to obtain disclosure. For instance, the party seeking disclosure must demonstrate that it will be unable to obtain the substantial equivalent of the surveillance materials by any other means.

The Fourth Department had held that video surveillance tapes are discoverable before trial, but only after the party had submitted to depositions.[59] Soon after that decision, the New York Legislature enacted CPLR 3101(i), which mandates the full disclosure of films, photographs, videotapes, and audiotapes involving a party to the action. Because CPLR 3101(i) is silent about the timing of videotape disclosure, that issue remained open issue for the courts to decide.

For a time, the Court of Appeals had resolved this dispute in *DiMichel v. South Buffalo*.[60] The court found that a court's determining whether surveillance tapes should be turned over before trial but after a plaintiff is

deposed prevents parties from withholding tapes and tailoring testimony and protects the other party's need to authenticate the videotape. But the legislature's enactment of CPLR 3101(i) overruled *DiMichel*'s disclosure rule. Under CPLR 3101(i), videotapes and other specified materials are now subject to full disclosure. A party seeking to disclose any of the specified items under CPLR 3101(i) need not make a showing of "substantial need" and "undue hardship." The provision compels the disclosure of all listed materials, including "outtakes," regardless whether the materials will be used at trial. Therefore, a party must disclosure all portions of this material, including outtakes, rather than only those portions the party intends to use at trial.

The Court of Appeals in *DiMichel* agreed with the Fourth Department and held that surveillance tapes should be treated as material prepared in anticipation of litigation and thus subject to a qualified privilege that a factual showing of substantial need and undue hardship can overcome.

In *Tran v. New Rochelle Hospital Medical Center*,[61] the Court of Appeals later clarified the open issue presented in *DiMichel*: whether CPLR 3103(i) overruled that aspect of *DiMichel* allowing defendants to withhold surveillance tapes until after a plaintiff has been deposed. The *Tran* court found that CPLR 3101(i) requires full disclosure of videotapes with no limitation as to timing. The court refused to declare otherwise until the Legislature acted again. To date, the Legislature has not acted, and the Court of Appeals decision in *Tran* is good law.

Video recording and photographs are helpful in nonpayment proceedings if the tenant contends that the apartment is in disrepair. When a tenant seeks to rely on video recordings or photographs and refers to them in motion papers, the landlord will be allowed, at the landlord's expense, to require the tenant to provide videotapes and better quality photographs.[62] The court has found that this clarification is a reasonable request for a landlord seeking to defeat claims that a roof had not been fixed and to demonstrate whether a rent abatement is an appropriate remedy.[63] Requiring the tenant to provide clearer photographs and videotape will clarify the substance of the claim and promote the ends of justice.[64]

"Because most subpoenas do not need to be court-ordered unless directed at a government agency, subpoena requests face less scrutiny than disclosure motions."

Video recordings and photographs can also help proving whether a tenant violated a stipulation settling an eviction proceeding. Practitioner should be mindful that spoliation-of-evidence issues can emerge in the context of a summary proceeding. In *Russell Place Associates LLP v. Super*,[65] the landlord sought to introduce into evidence a video demonstrating that the tenant allowed her daughter to enter into a building in violation of the stipulation of settlement. But the landlord's building manager inadvertently erased the film and destroyed the evidence. The court found that these actions amounted to spoliation of evidence and therefore drew a negative inference that the daughter was not observed entering or leaving the building. As a result, the landlord was unable to prove that the tenant violated the stipulation. *Russell Place* demonstrates that the existence of video surveillance requires landlord to preserve relevant evidence before and during litigation. A failure to do so can lead to consequences.

A landlord may evict a tenant on the ground that the tenant is using the subject premises for illegal purposes—for example, selling illegal drugs. Examples of the type of evidence that would support an eviction include (1) increased pedestrian traffic at unusual hours, (2) broken front-door locks, (3) noise complaints, (4) strange cars parked in front of the building, (5) unfamiliar people loitering about, (6) tenants who pay or prepay rent in cash, (7) holes in apartment doors to pass money and drugs, and (8) evidence of drug paraphernalia.[66] Video surveillance of the lobby, elevators, stairways, and hallways could provide support of this evidence and could help a landlord evict a tenant on grounds of illegal use.

Video surveillance is also often used to prove a nonprimary-residence holdover. Reliable tapes will prove how often the tenant came to and left the apartment as well as the duration of the tenant's stays in the apartment.

VI. Disclosure-Like Devices

A. Subpoenas

Subpoenas are not regulated by the disclosure provisions in CPLR 408 or 3102, but they serve discovery purposes similar to the disclosure mechanisms described above. Subpoenas are required to be closely tailored to the case's particulars.[67] Because most subpoenas do not need to be court-ordered unless directed at a government agency, subpoena requests face less scrutiny than disclosure motions.

Practitioners regularly draft subpoenas *duces tecum* and subpoenas *ad testificandum*. The former requires the production of books, papers, and other physical objects and papers; the latter requires the witness attendance to give testimony. Each type of subpoena must be drafted carefully and strictly served in accordance with the CPLR's rules and procedures. A careless practitioner who abuses the subpoena system will face sanctions and discipline and might lose the informational benefits of a subpoena.

In a summary proceeding, CPLR 2301 allows a party to issue a subpoena *duces tecum* ordering production of documents for trial. CPLR 2303(a) provides that subpoenas be promptly

served on each party so that they are received after service on witnesses and before producing books, papers, and other things. Unlike disclosure mechanisms, the subpoena produces material for trial and not for pretrial proceedings. The subpoena should not direct the witness to turn over the documents directly to the attorney for whichever party served the subpoena.[68] Courts have criticized this practice, known as "back-door discovery," as circumventing the CPLR's requirement to produce documents for the court.[69]

A trial subpoena may not be used as a fishing expedition to acquire materials obtainable through pretrial disclosure.[70] The subpoena should be tailored to the nature of the Housing Court proceeding to ensure that a court will not quash it. If an attorney drafts and serves a subpoena that fails to comply with the express terms of a court order, the subpoena will be quashed.[71]

Notice requirements must be strictly observed when nonparties are subpoenaed.[72] The failure to provide the statutory notice might preclude that party from introducing into evidence any information illegitimately obtained, and the court may also impose sanctions and award costs and attorneys' fees incurred by the aggrieved party in connection with a motion to quash the subpoena.[73] If an aggrieved party's substantial right has been prejudiced as a result of an improper subpoena, the court might preclude any improperly or irregularly obtained disclosure.[74]

It is improper for an attorney to use letter requests urging a tenant to send subpoenaed documents directly to the attorney, rather than to the court, in this way subverting the court's procedure for receiving, maintaining, and releasing subpoenaed records.[75] An attorney's soliciting and obtaining documents through a subpoena circumvents the Housing Court's rules and procedures meant to protect parties from subversive layering practices.

B. Demand for Bills of Particulars

CPLR Article 31 provides a comprehensive list of disclosure devices. A demand for a bill of particulars is not a disclosure device under Article 31, and CPLR 408 does not require leave of court for its use in a special, summary proceeding.[76] A bill of particulars is an amplification of a pleading rather than a disclosure device and can help ascertain the facts on which a special proceeding is based.[77] Only the party bearing the burden of proof on a disputed issue must provide a bill of particulars with respect to that disputed issue.[78]

In *City of New York v. Valera*,[79] the court endorsed the use of the bill of particulars to provide a statement of facts in connection with a holdover proceeding based on nuisance. The landlord was required to produce a bill of particulars to notify the tenant of any potential defenses it may have.[80] A bill of particulars is a useful tool for the tenant in preparing a defense in a summary proceeding.

A respondent-occupant demand for a bill of particulars, if granted, requires the petitioner-owner to refine and formally detail its claim against the respondent. Respondents may use the motion to limit the items at trial to gain detailed information about all allegations that the petitioner will raise. Like a subpoena, a bill of particulars is an alternative pretrial disclosure method that can streamline the judicial process. It is improper to use the bill of particulars as a disclosure device to disclose evidentiary matters. Leave of court will be necessary to serve a disclosure device disguised as a bill of particulars.[81]

C. Notices to Admit

The one disclosure device expressly permitted in a special proceeding without court order under CPLR 408 is a notice to admit as provided in CPLR 3123. Under CPLR 3123(a), a failure to respond to the notice to admit, to deny any portion thereof, or to explain why neither an admission nor a denial can be provided is deemed an admission of the truth or genuineness of the notice. A notice to admit may be used to dispose of uncontested questions of fact or those easily provable. The notice to admit should not be used to compel admissions of fundamental or ultimate facts that can be resolved only after a full trial.[82]

The notice to admit does not offer the same breadth of inquiry as do other disclosure devices: It does not allow a party to obtain any type of document or testimony from witnesses, and it cannot be used in another action or proceeding against the party making the admission.[83] Thus, a party may not use a notice to admit or a bill of particulars as a disguised disclosure device to obtain evidentiary matters, and neither device may be used as a tactic to delay a speedy proceeding.

Given the advantage of not having to obtain a court order to serve a notice to admit, some parties have disguised interrogatories in the form of notices to admit. In *Blanca Realty Corp. v. Espinal*,[84] the 72-paragraph-long notice to admit that the landlord served on the tenant was a red flag to the court that ultimate issues of fact were in dispute. That notice to admit was found improper because it essentially mirrored an interrogatory subject to leave of court under CPLR 408. As *Blanca Realty* explained,

> While there may be a couple of items in the Notice that are proper, it is unwise and unnecessary for the court to prune the requests to construct for counsel and the parties a proper notice to admit . . . . Accordingly, the respondent's motion to strike the notice to admit and for a protective order is granted.[85]

VII. Compelling Disclosure and Penalties for Failing to Disclose

If a party fails to comply with a court order and frustrates the CPLR's

disclosure scheme, the resolution judge may dismiss the petition or strike the answer.[86] This power parallels the wide discretion that courts retain over crafting and granting disclosure orders. To combat a common scenario of ignoring court orders, the Court of Appeals unanimously stated the following in a 1999 decision:

> a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders . . . as are just,' including dismissal of an action. . . . [C]ompliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully . . . .[87]

In response to a failure to disclose, except with notices to admit, a party may move under CPLR 3124 to compel disclosure properly requested under the other provisions of Article 31. If the original request was proper, a motion to compel is a proper method to enforce disclosure.

Often the court will strike pleadings conditionally, giving the litigant one more chance. But the court may strike pleadings or preclude if a failure to comply with disclosure demands is willful, deliberate, and contumacious.[88] Answers are stricken only in cases of severe noncompliance.[89] In *Miller v. City of New York*, the Supreme Court struck the defendant's answer after determining defendant had failed to comply with five different orders,[90] displaying a pattern of non-compliance.[91] In *305 Riverside Corp. v. Parnassus*, the court explained that although the tenants failed to comply with two disclosure requests, the evidence displayed no proof of deliberate non-cooperation and non-compliance; thus, the court denied the motion to strike the answer.[92] Striking an answer is a drastic remedy. Requiring a pattern of non-compliance assures that it is used solely in the most appropriate and narrow manner.

No penalty may accrue against a party who legitimately does not have the document. Parties subject to disclosure need not produce documents, such as tax returns or other official forms, they do not have or never had. Instead, they may sign an affidavit averring the lack of possession and a notarized release authorizing the moving party to acquire the document from its original source.

VIII. Use of Interrogatories if a Person Cannot Appear at an EBT

Requiring the deposition of some individuals can be unduly burdensome due to a person's age, health, and location. In *65 Central Park West*,[93] the court rejected the landlord's request for an EBT because the elderly tenant's residence in a nursing home created an unnecessary burden to appear at the EBT. Instead, the court allowed the EBT of a nonparty physician to determine the tenant's primary residence.[94]

"When permitted, disclosure allows the parties to press their cases forward, to force the other side to reveal otherwise hidden facts, and to avoid trial by ambush."

In a different type of proceeding, facts might be disclosed by interrogatories. In *Lewis v. Katzev*,[95] the court denied the landlord's motion to compel an elderly tenant to submit to a pretrial EBT and physical and mental examinations connected to the landlord's nonprimary-residence holdover proceeding. In consideration of the tenant's physical condition and two-year residence in a nursing home, the court limited the landlord's disclosure to interrogatories. The court determined that the interrogatories would be sufficient for the landlord to investigate the nature of the tenant's nursing-home residency without forcing the tenant to appear at a deposition.[96]

IX. Conduct at EBTs

Part 221 of the Uniform Rules for Trial Courts went into effect On October 1, 2006. The new modifications expand the scope of disclosure during EBTs.The rules create new limitations about objections. Objections are noted and not ruled on during a deposition.[97] The court will not rule in advance on whether a particular question is proper. Instead, the question is posed, the objection taken, and, with exceptions noted below, the answer given, and then the court may rule on the question at trial. Each objection shall be stated succinctly and framed so as not to suggest an answer to the witness and shall clearly state the defect in form or other basis of error or irregularity.[98] This avoids manipulating the facts during deposition and seeks to improve EBTs' efficiency as a disclosure mechanism. If the deponent refuses to answer a question based on privilege, to enforce a limitation set forth in a court order, or when the question is plainly improper, the refusal to answer must be accompanied with a succinct and clear statement of the basis.[99] Because Housing Court tailors discovery methods in summary proceedings, this is the most common ground of objection at a deposition. Attorneys and *pro se* litigants should be aware of this right to refuse to answer based on the court's order to preserve their rights, further the goals of discovery, and effectuate a court's order.

X. Conclusion

Summary landlord-tenant proceedings are designed to move quickly and efficiently. Disclosure, although requiring leave of the court to obtain, is available in some cases in which ample need is shown. When permitted, disclosure allows the parties to press their cases forward, to

force the other side to reveal otherwise hidden facts, and to avoid trial by ambush. Practitioners have in their arsenal numerous aids to enable their clients' theories to prevail. Disclosure and disclosure-like devices remain at the top of the arsenal.

Endnotes

1. For good articles on disclosure, see Dov Treiman, *Discovering Disclosure—Parts 1-4*, Volume 2, Issues 2-5, Landlord-Tenant Monthly (Feb., Mar., Apr. & May 2004), and Anthony J. Fiorella, Outside Counsel, *A Judicial Perspective on Permissible Discovery in Summary Proceedings*, N.Y.L.J., Aug. 19, 1999, at 1, col. 1. For a good disclosure outline from which some research in this article was borrowed, see Samuel J. Himmelstein & David M. Skaller, *Disclosure in Housing Court Proceedings* (unpublished outline for the 2008 Summer Judicial Seminars in Rye Brook, New York). The authors thank Mr. Skaller, Mr. Himmelstein, and Mr. Santo Golino for kindly reviewing a draft of this article.
2. *But see* Alan D. Kucker & Santo Golino, Real Estate and Title Insurance Trends, *Discovery in Summary Landlord-Tenant Proceedings: Some Controversies Still Exist*, N.Y.L.J., Mar. 20, 2000, at S2, col. 1 (citing unstated inference from *Hart v. Blackwood*, N.Y.L.J., July 23, 1998, at 21, col. 2 (App. Term 1st Dep't) (*per curiam*) in arguing that disclosure is warranted even if the movant does not append the document demand as an exhibit).
3. *Bouton v. DeAlmo*, 12 Misc. 3d 132(A), 2006 N.Y. Slip Op. 51166(U) at *1 (App. Term 1st Dep't 2006) (*per curiam*); *Benjamin Shapiro Realty Co. v. Henson*, 162 Misc. 2d 1, 9, 615 N.Y.S.2d 570, 575 (Civ. Ct., N.Y. Co. 1994) ("Courts have permitted narrowly tailored disclosure in summary proceedings upon a demonstration of 'ample need.'").
4. *See, e.g., Profile Enters. LP v. Sanzo*, N.Y.L.J., July 13, 2005, at 21, col. 3 (Civ. Ct., N.Y. Co.) (denying disclosure motion as overbroad and oppressive but allowing petitioner to make more reasonable disclosure demand without Social Security numbers and financial information); *see also Grotallio v. Soft Drink Leasing Corp.*, 97 A.D.2d 383, 383, 468 N.Y.S.2d 4, 5(1st Dep't 1983) (mem.) (discussing overbroad subpoena request).
5. *See Atkinson v. Trehan*, 70 Misc. 2d 612, 613, 334 N.Y.S.2d 291, 292 (Civ. Ct., N.Y. Co. 1972) ("One purpose of requiring parties to proceed by motion is to prevent an unwarranted delay in proceeding intended to be summary. . . . ").
6. *Dubowsky v. Goldsmith*, 202 A.D. 818, 818-19, 195 N.Y.S. 67, 67 (2d Dep't 1922); *Antillean Holding Co., Inc. v. Lindley*, 76 Misc. 2d 1044, 1047, 352 N.Y.S.2d 557, 561 (Civ. Ct., N.Y. Co. 1973).
7. *New York Univ. v. Farkas*, 121 Misc. 2d 643, 648, 468 N.Y.S.2d 808, 811–12 (Civ. Ct., N.Y. Co. 1983).
8. *Smilow v. Ulrich*, 11 Misc. 3d 179, 184, 806 N.Y.S.2d 392, 396 (Civ. Ct., N.Y. Co. 2005) (Gerald Lebovits, J.).
9. *Miller v. Vosooghi*, N.Y.L.J., Apr. 18, 2001, at 18, col. 1 (App. Term 1st Dep't) (*per curiam*).
10. *Smilow*, 11 Misc. 3d at 187, 806 N.Y.S.2d at 398.
11. *Teichman v. Ciapi*, 160 Misc. 2d 182, 185, 612 N.Y.S.2d 293, 295 (App. Term 1st Dep't 1994) (*per curiam*).
12. *Miller*, N.Y.L.J., Apr. 18, 2001, at 18, col. 1.
13. *See Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4, 7-8, 651 N.Y.S.2d 418, 421 (1st Dep't 1996), *lv. denied in part & dismissed in part*, 90 N.Y.2d 829, 683 N.E.2d 17, 660 N.Y.S.2d 552 (1997); *see also* N.Y.C. Admin. Code § 26-504(a)(1)(f).
14. *Farkas*, 121 Misc. 2d at 644, 468 N.Y.S.2d at 810.
15. *See Id.* at 645-49, 468 N.Y.S.2d at 811-13.
16. *Id.* at 647, 468 N.Y.S.2d at 811.
17. N.Y.L.J., June 3, 1998, at 26, col. 3 (Hous. Part Civ. Ct., N.Y. Co.).
18. *See, e.g., Profile Enters.*, N.Y.L.J., July 13, 2005, at 21, col. 3 ("At the deposition petitioner's inquiry is limited to facts that have occurred from two years before the date of the notice of termination.").
19. N.Y.L.J., June 3, 1998, at 26, col. 3.
20. *See Heller v. Joy*, N.Y.L.J., Feb. 22, 1984, at 6, col. 1 (Sup. Ct., N.Y. Co.).
21. N.Y.L.J., Dec. 19, 2001, at 24, col. 2 (Hous. Part Civ. Ct., N.Y. Co.), *aff'd*, 2002 WL 83691, 2002 N.Y. Slip Op. 50014(U) (App. Term 1st Dep't) (*per curiam*).
22. N.Y.L.J., Apr. 25, 1991, at 25, col. 4 (App. Term 1st Dep't) (*per curiam*) (citations omitted).
23. 170 A.D.2d 260, 260, 565 N.Y.S.2d 527, 528 (1st Dep't 1991) (mem.).
24. *See id.*, 565 N.Y.S.2d at 528.
25. N.Y.L.J., Jan. 23, 1997, at 27, col. 3 (App. Term 1st Dep't) (*per curiam*).
26. *See, e.g., Herman v. Lancaster*, N.Y.L.J., Mar. 27, 1991, at 22, col. 6 (Hous. Part Civ. Ct., N.Y. Co.).
27. *See, e.g., Singh v. Pierson*, N.Y.L.J., Aug. 11, 1999, at 28, col. 4 (Hous. Part Civ. Ct., Kings Co.).
28. *Clark v. Kellogg*, N.Y.L.J., July, 28, 1982, at 6, col. 1 (App. Term 1st Dep't) (*per curiam*).
29. *See* N.Y. Mult. Dwell. L. § 3.
30. *See id.* § 78.
31. 11 Misc. 3d 1056(A), 815 N.Y.S.2d 494 (Civ. Ct. N.Y. County 2006), *aff'd*, 16 Misc. 3d 1056(A), 851 N.Y.S.2d 57 (App. Term 1st Dep't 2007) (*per curiam*).
32. *270 Riverside Dr., Inc. v. Wilson*, 195 Misc. 2d 44, 50, 755 N.Y.S.2d 215, 220 (Hous. Part Civ. Ct., N.Y. Co. 2003).
33. *Partnership 92 LP v. N.Y. St. Div. of Hous. & Comm. Renewal*, 46 A.D.3d 425, 429, 849 N.Y.S.2d 43, 47–48 (1st Dep't 2007) (mem.).
34. *See, e.g., Art Omi Inc. v. Vallejos*, 15 Misc. 3d 870, 832 N.Y.S.2d 915 (Hous. Part Civ. Ct., N.Y. Co. 2007) (Gerald Lebovits, J.), *aff'd*, 21 Misc. 3d 129(A), 2008 N.Y. Slip Op. 52012(U) (App. Term 1st Dep't 2008) (*per curiam*).
35. *Treasure Tower Corp. v. Chen*, 20 Misc. 3d 1109(A), 2008 N.Y. Slip Op. 51288(U), 2008 WL 2548796, at *2 (Hous. Part Civ. Ct., N.Y. Co. 2008) (Gerald Lebovits, J.).
36. *Primrose Management v. Donahoe*, 253 A.D.2d 404, 405, 676 N.Y.S.2d 585, 586 (1st Dep't 1998) (mem.); *Avon Furniture Leasing, Inc. v. Popolizio*, 116 A.D.2d 280, 284, 500 N.Y.S.2d 1019, 1023 (1st Dep't 1986).
37. 170 Misc. 2d 31, 34, 648 N.Y.S.2d 515, 518 (Civ. Ct., N.Y. Co. 1996); *accord 545 Eighth Ave. Assocs. LP v. Shanaman*, N.Y.L.J., Feb. 4, 2004, at 21, col. 3 (Hous. Part Civ. Ct., N.Y. Co.) (permitting disclosure to establish illusory tenancy by demonstrating unlawful rent profiteering through prime tenant's over-collection of electricity charges from the subtenant), *aff'd*, 12 Misc. 3d 66, 819 N.Y.S.2d 813 (App. Term 1st Dep't 2006) (*per curiam*).
38. *Goldman v. Richards*, N.Y.L.J., Jan. 17, 2004, at 18, col. 3 (Hous. Part Civ. Ct., N.Y. Co.).
39. *255 W. 88th Co. v. Gelband*, N.Y.L.J., Jan. 5, 2005, at 20, col. 1 (Hous. Part Civ. Ct., N.Y. Co.).
40. *Goldman*, N.Y.L.J., Jan. 17, 2004, at 18, col. 3.
41. *Id.*
42. *See, e.g., Cox v. J.D. Realty Assocs.*, 217 AD.2d 179, 185, 637 N.Y.S.2d 27, 31 (1st Dep't 1995).
43. *Emay Props. Corp. v. Norton*, 136 Misc. 2d 127, 128-29, 519 N.Y.S.2d 90, 92 (App. Term 1st Dep't) (*per curiam*).
44. *See Cohen & Zerenowitz Realty Corp. v. Asero*, N.Y.L.J., Nov. 29, 1991, at 26, col. 5 (App Term 1st Dept) (*per curiam*).
45. *E.g., id.*
46. *See 153-155 Essex Street Tenants Assocs. v. Kahan*, N.Y.L.J., June 9, 2004, at 22, col. 1 (Hous. Part. Civ. Ct., N.Y. Co.).
47. *See City of New York v. Cordero*, N.Y.L.J., Apr. 14, 1999, at 29, col. 4 (Civ. Ct., Kings Co.).
48. *Id.*

49. *Stern v. Levine*, 10 Misc. 3d 129(A), 809 N.Y.S.2d 484, 2005 N.Y. Slip Op. 51931(U) (App. Term 2d Dep't 2d & 11th Jud. Dists. 2005) (mem.).

50. *Banchik v. Ruggieri*, N.Y.L.J., Nov. 18, 1998, at 29, col. 4 (Civ. Ct., N.Y. Co.).

51. *Mozaffari v. Schatz*, N.Y.L.J., Oct. 8, 2008, at 26, col. 1 21 Misc. 3d 1103(A), 2008 WL 4355437, 2008 N.Y. Slip Op. 51942(U) (Civ. Ct., N.Y. Co.) (Gerald Lebovits, J.).

52. *TOA Construction Co., Inc. v. Tsitsires*, 4 A.D.3d 141, 142, 772 N.Y.S.2d 24, 25–26 (1st Dep't 2004) (mem.).

53. 127 Misc. 2d 547, 551, 486 N.Y.S.2d 668, 672 (Civ. Ct., N.Y. Co. 1985).

54. *Koump v. Smith*, 25 N.Y.2d 287, 295, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858 (1969).

55. *Meyerson v. Prime Realty Services, LLC*, 7 Misc. 3d 911, 917-18, 796 N.Y.S.2d 848, 854 (Sup. Ct., N.Y. Co. 2005).

56. *Goldman*, N.Y.L.J., Jan. 17, 2004, at 18, col. 3.

57. *See* N.Y.C. Admin. Code § 27-2075(c).

58. 4 Misc. 3d 1009(A), 791 N.Y.S.2d 867, 2004 N.Y. Slip. Op. 50797(U), 2004 WL 1717573, at *5 (Civ. Ct., N.Y. Co. 2004) (Gerald Lebovits, J.).

59. *Id.; see DiMichel v. South Buffalo*, 80 N.Y.2d 184, 196, 604 N.E.2d 68, 70, N.Y.S.2d 1, 196 (1992) (discussing rule in the Second, Third, and Fourth Departments).

60. *Id.* 80 N.Y.2d at 197, 604 N.E.2d at 68, 590 N.Y.S.2d at 2.

61. 99 N.Y.2d 383, 390, 786 N.E.2d 444, 451, 756 N.Y.S.2d 509, 515 (2003).

62. *Katz v. Bellmore Kickboxing Academy, Inc.*, 16 Misc. 3d 1108(A), 847 N.Y.S.2d 897, 2007 N.Y. Slip Op. 51340(U) at *2-3 (Dist. Ct., Nassau Co.).

63. *Id.* at *2.

64. *Id.* at *2.

65. N.Y.L.J., July 21, 2004, at 17, col. 2 (Dist. Ct., Nassau Co.).

66. Scott E. Mollen, Realty Law Digest, Landlord / Tenant, *Eviction Based on Illegal Activity*, N.Y.L.J., Dec. 6, 1989, at 4, col. 3.

67. *See Discovering Disclosure, Part 2*, at 1, and cited cases.

68. *See, e.g., Building Mgmt. Co., Inc. v. Schwartz*, 3 Misc. 3d 351, 353-54, 773 N.Y.S.2d 242, 244-45 (Civ. Ct., N.Y. Co. 2004).

69. *Id.; see also* CPLR 2301.

70. *Mestel & Co. v. Smythe Masterson & Judd*, 215 A.D.2d 329, 637 N.Y.S.2d 37 (1st Dep't 1995) (mem.).

71. *See, e.g., 1050 Tenants Corp. v. Lapidus*, 17 Misc. 3d 133(A), 851 N.Y.S.2d 64, 2007 N.Y. Slip Op. 52049(U) (Civ. Ct., N.Y. Co. 2007) (Gerald Lebovits, J.).

72. *Henriques v. Boitano*, N.Y.L.J., Oct. 27, 1999, at 30, col. 3 (Civ. Ct., N.Y. Co.).

73. *See* 22 N.Y.C.R.R. 130-1.1.

74. *See generally*, N.Y. CPLR 3101(c).

75. *See Henriques*, N.Y.L.J., Feb. 2, 2000, at 5, col. 1; *see also* CPLR 2301, cmt. 4.

76. *See Tower Properties, Inc. v. Castro*, 99 Misc. 2d 405, 406–07, 416 N.Y.S.2d 508, 509-10 (Rockland County Ct. 1979).

77. *See* David D. Siegel, New York Practice, § 555, at 772.

78. *See Holland v. St. Paul Fire & Marine Ins. Co.*, 101 A.D.2d 625, 475 N.Y.S.2d 156, 157 (3d Dep't 1984).

79. 216 A.D.2d 237, 238, 628 N.Y.S.2d 695, 696 (1st Dep't 1995) (mem.).

80. *Id.*

81. *Tower Properties, Inc. v. Castro*, 99 Misc. 2d at 406-07, 416 N.Y.S.2d at 509–10. (Rockland County Ct. 1979).

82. *See Meadowbrook-Richman, Inc. v. Cicchiello*, 273 A.D.2d 6, 6-7, 709 N.Y.S.2d 521, 521–22 (1st Dep't 2000) (mem.).

83. Richard T. Walsh, Outside Counsel, *Disclosure in Special Proceedings Under CPLR § 408*, N.Y.L.J., Dec. 5, 1995, at 1, col. 1.

84. N.Y.L.J., Apr. 5, 2006, at 17, col. 1 (Hous. Part. Civ. Ct., N.Y. Co.).

85. *Id.* (quoting *Berg v. Flower Fifth Ave. Hosp.*, 102 A.D.2d 760, 761, 476 N.Y.S.2d 895, 896 (1st Dep't 1984) (mem.)).

86. *See Zletz v. Wetanson*, 67 N.Y.2d 711, 713, 499 N.Y.S.2d 933, 934, 490 N.E.2d 852, 853 (1986) (mem.).

87. *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123, 700 N.Y.S.2d 87, 89, 722 N.E.2d 55, 58 (1999) (quoting CPLR 3126).

88. *See, e.g., Dexter v. Horowitz Mgmt.*, 267 A.D.2d 21, 21, 698 N.Y.S.2d 33, 34 (1st Dep't 1999) (mem.).

89. *305 Riverside Corp. v. Parnassus*, 2008 WL 2548754, 2008 N.Y. Slip Op. 51287(U) at *4-5 (Civ. Ct., N.Y. Co. 2008) (Gerald Lebovits, J.).

90. *See Miller v. City of New York*, 15 Misc. 3d 1127(A), 841 N.Y.S.2d 219, 2007 WL 1238601, 2007 N.Y. Slip Op. 50882(U) (Sup. Ct., Bronx Co. 2007).

91. *Id.* at *3; *accord Figdor v. City of New York*, 33 A.D.3d 560, 561, 823 N.Y.S.2d 385, 386 (1st Dep't 2006) (mem.) (striking answer because defendant resisted myriad court discovery orders over two years).

92. *See 305 Riverside Corp.*, 2008 N.Y. Slip Op. 51287(U) at *4-5.

93. *See* 127 Misc. 2d at 549, 486 N.Y.S.2d at 670–71.

94. *Id.*, 486 N.Y.S.2d at 670–71.

95. N.Y.L.J., Dec. 11, 1996, at 25, col. 1 (Civ. Ct., N.Y. Co.).

96. *See id.*

97. *See id.* at 221.3. Because an attorney may not interrupt a deposition to communicate with a deponent without permission of the other party, a skillful objection can advise a deponent of an appropriate answer to a difficult question. The rules are designed to defeat this type of EBT manipulation.

98. *Id.* at 221.1(b).

99. *Id.* at 221.2.

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The Most Influential Commercial Lease Cases in the Last Century That Every Drafter and Litigator Must Know

By Adam Leitman Bailey and Dov Treiman

For almost two years, the attorneys at Adam Leitman Bailey, P.C. have been compiling a list of the greatest commercial leasing cases of the past century. The authors have always been fans of "greatest" lists—there being something special about choosing the best among so many great people, entertainers, athletes, composers, or, in our case, decisions that have had the greatest effect on leasing law. "Greatest" lists permeate our entire culture and are the basis for entire institutions like the Academy Awards, Tonys, Grammys, and the various Halls of Fame. Cooperstown, New York, is a village entirely based on "greatest" lists, housing both the Baseball Hall of Fame and the greatest of the American summer opera festivals, Glimmerglass.

Law, however, is a peculiar field which, like baseball but unlike opera, lends itself well to actual statistical analysis of "greatness." These "greatests" are therefore those cases that are so heavily cited that they have demonstrated to have the most important impact on landlords' and tenants' businesses, and they are those cases in ignorance of which no litigator or drafter dares to enter either a courtroom or a lease negotiation.

A mere handful of cases have achieved that kind of influence in commercial landlord-tenant relations. In New York, few areas have residential rent regulation, but for the most part in the commercial arena, the principles of governing law are those of the common law, finding their roots in its development over the past thousand years, first in Britain and then later, here. These cases cover stability in leasing law, mitigation of damages, lease interpretation, lease enforcement, lease violations, attorneys' fees, bankruptcy, court stipulations, and actual and constructive eviction. While late night television talk show hosts would no doubt list these cases in inverse order of importance, we will use them to trace the lifetime of a leasehold, from negotiation through breach and enforcement.

Holy Properties Ltd. v. Kenneth Cole Productions, Inc.: Stability in commercial leasing law and mitigation of damages

Of these leading cases, probably the most essential one to understand is *Holy Properties Ltd. v. Kenneth Cole Productions, Inc.*,[1] for it is this case that erects the entire dominant theory of commercial leasing law. The court wrote:

> Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule. This is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside.[2]

This holding sets the theme for this entire article. Yes, New York will vary from other jurisdictions about its holdings on a particular point, and the view expressed in some other jurisdiction may be eminently logical, but the principle of *stability* is so important to real property law, that New York will not lightly be persuaded to abandon its own view to hold some better view. In ancient Egypt, this principle of stability was known as *ma'at*[3] and endured for 5,000 years. Therefore, there is no reason to believe that in New York the principle of *Holy Properties* will be changed any time soon. Under *Holy Properties*, better is simply not good enough.

Holy Properties adhered to the common law; now a minority rule held only in Alabama, Georgia, Minnesota, Mississippi, New York, and West Virginia that a landlord has no duty to mitigate damages when the tenant abandons the lease.[4] After acknowledging its minority position, the New York high court felt that the adherence to *ma'at* was so important that it overrode any considerations of having a right or better rule.[5]

While it is perhaps more the profession of economists and MBAs than of lawyers to make these determinations, it cannot be doubted that stability in commercial transactions, especially commercial leasing, will make a state more economically attractive for businesses seeking a new location. No one likes the law to be an unknown commodity. This, along with the sheer number of business contacts physically nearby, no doubt substantially contribute to New York's attractiveness as a business environment and continue to make New York one of the great economic engines of the nation, indeed, of the world.

Interpreting Leases

151 West Associates v. Printsiples Fabric Corp.: Construction of leases against their drafters

While leasing no doubt has a flavor of conveyancing to it and was certainly understood at common law to be such, modern commercial leasing law is vastly more inclined to look at the lease as a contract subject to the same kinds of principles that govern contracts generally.[6]

Among the most important of these principles is that of *contra*

proferentem, the idea that contracts are construed most strongly against their drafters.[7] This doctrine is somewhat stronger in the residential leasing context than in the commercial leasing context because in all but very few residential leasing markets, the leases are presented to the tenants essentially as take-it-or-leave-it. In commercial leasing, however, the amount of participation by the tenant can vary widely. The mere fact, however, that a lease says that it was jointly drafted by the landlord and the tenant will not foreclose the tenant from offering proof that this was simply not true. The clause reciting that a contract is not one of adhesion may be no less a contract of adhesion than the rest of the contract. As a practical matter, therefore, any landlord who wants to elude the doctrine is going to have to have and maintain a paper trail demonstrating the tenant's actual participation in the drafting process. For landlord's counsel, this may well mean letters that begin, "This is to memorialize your request that the lease say." The leading case discussing all these ideas is *151 West Associates v. Printsiples Fabric Corp.*, in which the court wrote: "It has long been the rule that ambiguities in a contractual instrument will be resolved *contra proferentem*, against the party who prepared or presented it. Moreover, unless the terms of a lease are clear, no additional requirements or liabilities will be imposed upon a tenant."[8]

Vermont Teddy Bear Co. v. 538 Madison Realty Co.: Strict adherence to the terms actually embodied in a lease

In *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, the court takes this idea to the next step, holding that it does not matter what the parties meant to say or what they should have said.[9] When it comes to a lease, the parties will be bound by the clear meaning of the words actually employed. As the court put it:

> When interpreting contracts, we have repeatedly applied the "familiar and eminently sensible proposition of law [ ] that, when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms." We have also emphasized this rule's special import "in the context of real property transactions, where commercial certainty is a paramount concern."[10]

Again we find that same concern we saw in *Holy Properties*.[11] And the kicker in *Vermont Teddy Bear* is the phrase, "In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract's meaning."[12] In short, if the clause is clear, it need not be sensible to be enforced.

Vermont Teddy Bear stands as something of an unsung hero of capitalism. Its proposition that a written agreement entered into by two people shall be enforced regardless of the severity of the consequences or the lunacy of the terms monumentally strengthens business relationships. Business people will only do business in a reliable province where the laws are stable and justice is invoked fairly. But fairness can only be achieved when courts enforce the agreements before them without relying on the equities or any prejudices—hence the importance of this animal of a case.

South Road Assocs., LLC v. IBM Corp.: Strict adherence to the terms actually embodied in the lease in spite of practical construction

South Road Assocs., LLC v. IBM Corp.,[13] takes *Vermont Teddy Bear* one step further. Not only does it adhere to the strict meaning of the terms used in the lease itself, but it forbids interpretation of those words by reference to practical construction[14] when the words themselves are clear. The key passage in the case is to be found in the words:

> Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous. Further, "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." Since the meaning of "premises" is clear and unambiguous in the lease, extrinsic evidence such as the conduct of the parties may not be considered. IBM's conduct—placing underground storage tanks in the surrounding land and cleaning the resulting pollution—is not sufficient to create an ambiguity in the lease where the language is clear. Neither may the conduct of IBM in paying all real estate taxes pursuant to a lease provision create an ambiguity. The contract, read as a whole, clearly and consistently uses the term "premises" to refer only to interior space and we cannot rely on extrinsic evidence to find otherwise.[15]

Fifty States Mgt. Corp. v. Pioneer Auto Parks: Enforcement of leases as written and acceleration of rent upon default

Yet, in spite of their importance, *Vermont Teddy Bear* and *South Road Assocs.* can hardly be regarded as unique. They stand in a line of increasingly powerful cases binding landlords and tenants to the actual wording of their leases. One of the most signal cases of all time, *Fifty States Mgt. Corp. v. Pioneer Auto Parks*,[16] examined whether a clause in a lease making the rent for the entire term of the lease due upon a single default could be enforced. While there were earlier cases that had argued that such a drastic result was inequitable and an unenforceable forfeiture, New York's high court in *Fifty States* cut through all of that, holding:

> In sum, the facts of this case do not justify equitable intervention. The parties freely bargained for the inclusion of a clause in their lease whereby the rent for the remainder of the lease term would be accelerated upon breach of tenant's covenant to pay rent. . . . That honoring at least this aspect of its bargain may cause Pioneer fiscal hardship does not, standing alone, serve as a basis for construing the acceleration clause as a penalty under the guise of applying equitable principles to a routine commercial transaction.[17]

In short, in a commercial transaction, the parties are to be held to the terms they negotiated, even if harsh.

Enforcing the Lease

Greenblatt v. Zimmerman: Use of "practical construction" to interpret a lease

Morgan Guaranty Trust Co. of NY v. Solow d/b/a Solow Building Co.: Adherence to "practical construction" to interpret a lease

The ideas associated with enforcing leases are tightly tied with the ideas of interpreting them. Frequently, cases discussing how a lease is to be enforced out of necessity also deal with the rules of how one is to be interpreted. Since commercial leases tend to be for longer terms than residential leases, there can be some considerable lapse in time from when a clause is written to when it falls upon a court to interpret it. So, in commercial leasing, one often comes across the idea of "practical construction" whereby a court, rather than taking a fresh look at the language in the lease itself, will look instead to how the parties actually lived under that language in the early years of the lease.[18] If the landlord suddenly departs from that interpretation, such as in calculating the rent, the courts will rarely sustain that departure.

For example, common in commercial leases are so-called "pay now—fight later" clauses.[19] In these, the lease contains a component of the payments that the tenant must make usually called "additional rent."[20] Unlike the "base rent," however, the actual numbers are not set forth in the lease. Instead, the landlord has to examine the operating expenses of the building, typically including real estate taxes, and *compute* which of the operating expenses are properly passed along to the tenant as additional rent. Where either the lease is unclear in its writing as to which expenses count as "operating expenses" and which don't, or where there are expenses that could be characterized either way, depending on one's point of view, disputes will arise as to how much additional rent the tenant owes. For example, a roof repair is typically an operating expense, but a roof replacement is typically not. It therefore becomes a disputable item as to whether a particular repair was so extensive as to be essentially a replacement and therefore outside of the tenant's fiscal obligation. Leases will often call for arbitration to resolve such disputes. In a "pay now—fight later" clause, however, the tenant must first pay the disputed amount as a prerequisite to demanding arbitration as to whether it was, in fact, owed.[21] If the landlord abuses that process, however, the courts will enjoin the landlord's improper calculations.[22]

Ran First Assocs. v. 363 E. 76th St. Corp.: Tenants' entitlement to the benefit of tax abatements procured by landlord

Clauses like the "pay now—fight later" clauses are part of the generally common phenomenon in commercial leasing of the rent being broken out into the tenant paying a base rent plus increases in the rent itself and a share of the operating expenses of the building. These expenses often include real estate tax escalations. While leases often call for such things, they are generally silent about whether the tenant gets to share in the benefit of tax decreases the landlord manages to procure. Unless the lease says to the contrary, the tenants do indeed get such benefit.[23]

41 Fifth Owners Corp. v. 41 Fifth Equities Corp.: Fixtures defined

While many leases call for fixtures becoming the property of the landlord, almost no lease attempts even a decent job at defining just what is and what is not a fixture. *41 Fifth Owners Corp. v. 41 Fifth Equities Corp.*[24] takes the lead in filling that gap, albeit somewhat tersely. While it makes no attempt to provide a comprehensive definition of the term fixture, at least it stated, "The dedicated purpose of the unit, its size and the extent of its connection to the structure render it a fixture."[25] We would have to conclude that a vastly smaller unit would *also* be a fixture if indeed it was of dedicated purpose and extensively connected to the structural fabric of the building itself. Apparently the equipment in *41 Fifth* had fairly complex connections to the structure.

Lease Violations

Jefpaul Garage Corp. v. Presbyterian Hospital in the City of New York: Definition of waiver, acceptance of rent not constituting a waiver

Closely tied to the ideas behind enforcing leases are the ideas associated with when they are breached. While it is generally an ordinary exercise in lease interpretation to determine if the tenant has technically breached the lease, it is a more fact-laden question to determine whether the landlord has waived that breach. The first and most important concept with waiver is its very definition. For that purpose, the leading case is *Jefpaul Garage Corp. v. Presbyterian Hospital in the City of New York*,[26] which defines a breach as a voluntary relinquishment of a known right. The two key words in that definition are

"voluntary" and "known."[27] If the landlord is acting under compulsion, there is no waiver. However, much more importantly, if the landlord is unaware of either the right itself or the breach of it, then the landlord cannot be said to have relinquished a known right.

How does ignorance of the breach take the situation out of the definition? Let us illustrate this by way of an example. Under a rather common lease clause, if the tenant fails to have certain insurances naming the landlord as an additional insured, the tenant is in breach of the lease. It would stand to reason and indeed the law charges the landlord with knowledge of the contents of its own lease. So there is no real question that the landlord *knows* of the right that the tenant's insurance insures the landlord. If the landlord, however, does not know that the tenant is *breaching* this clause, as, for example, by fraudulently claiming that certain insurances are in place when in fact the insurance certificates are forged, then the landlord has not waived this breach if the landlord is fooled by the certificates. Why? Because the lease gives the landlord a remedy for the tenant's breach. That remedy is itself one of the landlord's rights, but if the landlord is kept in the dark about the breach, the landlord, while knowing of the right to be insured, does not know of the right to evict to which the breach of the insurance clause had given rise. Thus, with the falsified insurance the landlord's right to terminate the lease is an *un*known right which landlord cannot be said to have waived. The other key point of *Jefpaul* is that the conduct on the part of the landlord cannot be accidental or inadvertent but must have been specifically intended as a waiver.[28] The key phrase from the decision is, "While waiver may be inferred from the acceptance of rent in some circumstances, it may not be inferred . . . as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise."[29]

TSS-Seedman's, Inc. v. Elota Realty Company: Difference in remedies allowed by conditional limitations and conditions subsequent

Summary proceedings, while generally regarded a derogation of common law, are now approaching the conclusion of their second century since their invention and have had ample time to develop a common law of their own. For most of that period, the courts have shown a decided hostility to the invocation of the summary remedy and the proceedings have, in many jurisdictions, betrayed a certain fragility. This is no less true in the state of New York, the geography of their invention, than anywhere else. Generally in garden variety commercial summary proceedings, especially those for nonpayment, a landlord can obtain the relief sought. In summary proceedings brought to recover the property itself, rather than to recover funds, many courts will find in the summary proceedings common law ample doctrine relegating suitors to the long, slow, and expensive common law ejectment proceeding.

The legal theory here is between two ostensibly different kinds of contingencies in leases that occur in the event (typically) of a default by the tenant in fulfilling some obligation under the lease. In the first, the failure of the tenant to abide by a lease obligation triggers a *conditional limitation* whereby the termination of the lease is automatic without any further action by the landlord. In the other, the *condition* (a / k / a condition subsequent), the default, gives the landlord the option to terminate the lease. There is nothing automatic. The landlord must exercise the option for it to take effect.[30] While it is generally easy to state this theory, it is remarkably difficult to apply it by using any kind of analytical means. But, if one applies the mechanical method of finding that the presence of a notice to cure creates a conditional limitation and the absence of one creates a condition subsequent, one will most generally come up with the correct result. A notice to cure will, however, often provoke a *Yellowstone* injunction and one is therefore better off with a naked termination notice, set up as a conditional limitation—although wording the lease just right to achieve that result is exceptionally difficult. For undeniably obsolete reasons, while conditional limitations can be the predicate of a summary proceeding, a condition subsequent can only be enforced through an ejectment action.[31]

For all of the reasons commercial litigators condemn badly written leases and their drafters, no complaint rings louder or more justifiably than when a landlord finds its case can no longer be maintained as a summary proceeding designed to last a few months but instead must proceed in the longer, more cumbersome common law ejectment action lasting typically a few years before an order of eviction. Hence, no lesson is more important to the lease drafter than understanding, drafting and implementing conditional limitations and staying far away from the ocean of dangerous conditions subsequent.

Dulac v. Dabrowski: Landlord's ability to bring nonpayment proceeding without violating automatic stay in bankruptcy proceedings

There can be no doubt that the most important incident of the landlord-tenant relationship is the landlord's ability to collect rent. While many things can frustrate this ability, under *Dulac v. Dabrowski*,[32] the presence of a bankruptcy proceeding is no bar to the bringing of an ordinary nonpayment proceeding—provided one seeks only possession and not the back rent. However, what the decision leaves unstated is just exactly how one is to go about wording the demand for such a proceeding. The statute says that one must demand rent or possession in the alternative, but this decision only allows for the demand for possession. No reported case has yet declared what the correct wording for the demand would be.

First National Stores, Inc. v. Yellowstone Shopping Center, Inc.: Tenant's right to litigate whether it is in breach prior to actual forfeiture of the lease

New York leads the nation in devising a procedure allowing a tenant who has received a notice to cure the opportunity to contest prior to the declaration of the termination of the lease whether there really has been a lease violation.[33] Jurisdictions allowing such a procedure accord the tenant an enormous safeguard permitting the tenant the opportunity to find out if the landlord was right and to put things to right before losing a valuable leasehold. However, there is a cost to that benefit. The same line of authority holds that unless the tenant utilizes this procedure to obtain a tolling of the cure period actually *during* that period, by way of a declaratory judgment action, if the tenant actually was in default of the lease, once the cure period is up, the courts themselves have no power to fix it. The *Yellowstone* injunction, as it has come to be known, is the single most powerful weapon in a tenant's arsenal and fear of its employment has guided many a landlord's decisions.

Stipulations

Hallock v. State of New York and Power Authority of State of New York: High favor to which attorney stipulations are entitled and authority of attorney

Although not itself a decision from the realm of commercial leasing, the single most influential decision in the realm of commercial litigation is *Hallock v. State of New York and Power Authority of State of New York*.[34] The theme of this article is that of case law. Yet, it is obvious that there can be no case law without litigation. As soon as one deals with *any* kind of litigation, it is preferable for the parties, for the courts, and for society, that parties arrive at some kind of resolution of the matter without requiring the court to go to judgment. The chief mechanism of such resolution is the judicial stipulation, and they save taxpayers hundreds of millions of dollars annually. Therefore, judicial stipulations are highly favored by the courts and, when crafted by attorneys on all sides, should be almost invulnerable to attack. Indeed, absent notice of lack of authority to the other side, it is conclusively presumed that an attorney's stipulation binds his or her client.

1029 Sixth LLC v. Riniv Corp.: Strict enforcement of stipulations

However, the attack can be somewhat subtle. The parties may continue to avow that the stipulation binds them while one side seeks to be excused from a *de minimis* departure from the obligations undertaken in the stipulation. Courts will generally allow such departures unless the stipulation by its own terms forbids such.[35]

379 Madison Avenue, Inc. v. The Stuyvesant Company: Attorneys' fees clause in favor of landlord enforceable

Sykes v. RFD Third Ave. I Assocs., LLC: Stipulated victory sufficient predicate for an award of attorneys' fees

It is now generally agreed that a lease clause calling for the tenant to pay for the landlord's attorneys' fees in the event of litigation is fully enforceable.[36]

Although New York allows victory in the litigation in chief to be the basis of an award of attorneys' fees when authorized by the lease, there is some controversy as to whether a "win" achieved by means of a stipulation is enough of a win to justify the attorneys' fees award. Some writers believe that such a doctrine discourages parties from stipulating to their own defeat, but others maintain that it encourages the winner to win at the bargaining table, knowing that the win will not be diminished by it having been achieved through a stipulation. The dominant view is that a stipulated win will, in fact, support an award of attorneys' fees.[37]

F & F Restaurant Corp. v. Wells, Goode & Benefit, Ltd.: Subletting and assignment, landlord bound not to withhold consent without a valid reason

Among the most common clauses in commercial leases are those dealing with subletting and assignment. At common law, tenancies are freely sublettable and leases freely assignable. So, if the lease is silent on the issue, the tenant can do as it wishes. Most leases are not silent on the issue of subleasing, however, and either prohibit or restrict it. The most common form of restriction is that sublets or assignments must only be on consent of the landlord. Also, most typically, consent "shall not [be] unreasonably with[e]ld."[38] This phrase has come to mean that consent will be deemed given unless the landlord can articulate a valid reason to refuse consent. The two key concepts in that sentence are "articulate" and "valid." If the landlord is silent, the law deems consent to have been given. If the landlord simply says "no" without stating a reason, the law again deems consent to have been given. If the landlord says "no" and gives a reason that is not valid, the law still again deems the consent to have been given. As *F & F Restaurant Corp. v. Wells, Goode & Benefit, Ltd.*[39] states:

> It is enough on this point to note that Neuman as equitable owner had the right to withhold consent only if he had a reasonable ground for doing so and that the existence of a reasonable ground must be proved by Neuman's successor, the present owner, and will not be presumed. For like reason, the assignment from Margin Call to plaintiff must be given effect unless the landlord can establish a reasonable ground for withholding consent.[40]

Actual and Constructive Eviction

Barash v. Pennsylvania Terminal Real Estate Corporation: Definition and distinctions of actual and constructive eviction

At the other end of the spectrum from stipulations resolving litigation, is self-help. This comes in two principal species. The first, actual eviction, is where the landlord without benefit of judicial process deprives the tenant of actual possession of the premises in whole or in part—by means of physically depriving the tenant of some or all of the leased space. The second, constructive eviction, is where the tenant, also without benefit of judicial process, deems itself to have been deprived of the *use* of the premises and abandons them in whole or in part. If the tenant only abandons a portion of the used space, deeming it unusable, this is a "partial constructive eviction." In sum, actual eviction is a self-help remedy employed by landlords; constructive eviction is a self-help remedy employed by tenants. *Barash v. Pennsylvania Terminal Real Estate Corporation* states, "To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises."[41] From this point of view, the action is in either case *regarded* as being taken by the landlord, but this is a faulty perception. It is the *inaction* of the landlord and the *action* of the tenant that makes one realize a constructive eviction has taken place. It is the opposite for an actual eviction.

Eastside Exhibition Corp. v. 210 E. 86th St. Corp.: Landlord's entitlement to rent in spite of *de minimis* permanent deprivation of leased space

Returning to our theme of *ma'at*, we find it seriously upset by *Eastside Exhibition Corp. v. 210 E. 86th St. Corp.*[42] The common law rule had been that an actual partial eviction, no matter how small, deprives a landlord of the entire entitlement to rent. To put this in realistic terms, let us say that the landlord rents the tenant some 2,000 square feet and then reduces the square footage to 1,980 for the purpose of installing a utility closet to which the tenant is forbidden access. At common law, such deprivation of the 20 square feet would deprive the landlord of all entitlement to rent until the premises are restored to their previous condition. In *Eastside Exhibition*, however, the court ruled that a *de minimis* deprivation will not forfeit the landlord's entitlement to rent.[43]

Note the important distinction here: actual eviction, whether it is actual total eviction or actual partial eviction, entitles the tenant to total forgiveness of the rent. *Eastside* holds that where the actual partial eviction is *de minimis*, the tenant is *not* entitled to total forgiveness, but only an assessment of the damages actually sustained.[44] *Constructive* eviction, on the other hand is where the tenant has deemed the premises to have become so unusable that the tenant has abandoned them in whole or in part. Under constructive eviction, the amount of forgiveness of rent the tenant receives varies with the amount of space the tenant has abandoned.

Those watching the development of commercial leasing law are keeping a careful eye focused on how and whether *Eastside's* doctrine spreads across the state. That it violates *ma'at* cannot be denied.

Conclusion

As we saw with our analysis of *Holy Properties*, the principle of *ma'at* is critical in the study of commercial leasing law. Yet, as we see from *Eastside Exhibition*, common law doctrines do, from time to time, get thrown out or severely modified.

There are fields of law in which one can rely on ancient doctrines and not worry about their changing much. One can keep practicing law at the end of one's career essentially the way one did at the beginning. But commercial leasing law is *not* such a field.

Many of the above cases help commercial leasing practitioners avoid land mines. Other cases assist in understanding the essence and important rules of commercial leasing. Other cases are simply core elements of the always developing common law of commercial leasing. Although many other cases could and should be added to this body of law, these cases will give the reader enough weapons and shields to enter the friendly battle of commercial lease representation. The practitioner who does not master at least the cases discussed in this article and keep an eye open for further developments works at peril.

Endnotes

1. 87 N.Y.2d 130, (1995), *TLC Mitigation 1*, TLC Serial #0095 (1995).
2. *Holy Properties*, 87 N.Y.2d at 134.
3. *See* New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Ma'at (last visited Mar. 19, 2009) (stating that *ma'at* was a divine order which designated the meaningful and orderly nature between man and gods).
4. *See Holy Properties*, 87 N.Y.2d at 130 (stating that the lease expressly provided that landlord was under no duty to mitigate damages if tenant abandons property).
5. *Id.* at 134 ("the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the 'correct' rule") (citing *Maxton Builders Inc. v. Lo Galbo*, 493 N.Y.S. 825 (1986)).
6. *See generally 151 West Assoc. v. Printsiples*, 61 N.Y.2d 732, 734 (1984) (discussing the rule of interpreting a contract in the case of ambiguities).
7. *Id.* (citing *Taylor v. U.S. Casualty Co.*, 269 N.Y. 360 (1936)).
8. *Id.*
9. 1 N.Y.3d 470 (2004), *TLC Leases 5*, TLC Serial #0256.
10. *Id.* at 475 (quoting *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990)).
11. *Supra* note 4.
12. *Vermont Teddy Bear*, 1 N.Y.3d at 475.
13. 4 N.Y.3d 272 (2005), *TLC Leases 12*, TLC Serial #0306 (2005).
14. *Id.* (concluding that when an agreement is a clear and complete document, the

agreement should be binding according to those terms which are stated).

15. *Id.* at 278.
16. 46 N.Y.2d 573 (1979).
17. *Id.* at 579.
18. *See Greenblatt v. Zimmerman*, 117 N.Y.S. 18, 20 (1st Dep't 1909) (holding that in order to give a fair construction of the lease, great weight should be placed on the practical construction placed on the lease in the prior years).
19. *Morgan Guaranty Trust Co. of NY v. Solow*, 68 N.Y.2d 779 (1986), *TLC Rent 6*, TLC Serial #0279.
20. *Id.*
21. *Guaranty Trust*, 68 N.Y.2d at 780.
22. *See id.* (discussing how landlord submitted different calculations of the additional rent for each year it was due. This court affirmed the decision of the arbitrators in choosing the correct calculation.).
23. *Ran First Assoc. v. 363 E. 76th St. Corp.*, 747 N.Y.S. 13 (1st Dep't 2002), *TLC Taxes 1*, TLC Serial #0230 (holding that the tax abatement should not have been included in the calculation of additional rent because "real estate taxes" as defined in the lease does not include tax exemptions or abatements, and the assessment of tax required actual payment by landlord).
24. 787 N.Y.S. 326 (1st Dep't 2005), *TLC Fixtures 1*, TLC Serial #0300.
25. *Id.* at 387.
26. 61 N.Y.2d 442, 446 (1984), *TLC Waiver 1*, TLC Serial #0084 (1984).
27. *Id.* at 446.
28. *Id.* at 445.
29. *Id.*
30. *TSS-Seedman's, Inc. v. Elota Realty Co.*, 72 N.Y.2d 1024, (1988).
31. *See* discussion *infra* note 36.
32. 774 N.Y.S.2d 487 (1st Dep't 2004).
33. *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 (1968).
34. 64 N.Y.2d 224 (1984).
35. *See 1029 Sixth LLC v. Riniv Corp.*, 777 N.Y.S. 122 (1st Dep't 2004).
36. *379 Madison Avenue, Inc. v. The Stuyvesant Co.*, 275 N.Y.S. 953 (1st Dep't 1934), *aff'd* 268 N.Y. 576 (1935).
37. *See Sykes v. RFD Third Ave. I Assocs.*, 833 N.Y.S. 76 (1st Dep't 2007).
38. *F & F Restaurant Corp. v. Wells, Goode & Benefit, Ltd.*, 61 N.Y.2d 496 (1984).
39. 61 N.Y.2d 496 (1984).
40. *Id.* at 503.
41. 26 N.Y.2d 77 (1970).
42. 801 N.Y.S.2d 568 (1st Dep't 2005).
43. *Id.* at 570.
44. *Id.*

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(continued from page 4)

will prohibit you from acting as an agent for a title company in the same transaction in which you represent the buyer, thereby making it almost financially impractical if not impossible to carry on a residential real estate law practice. Specifically, this bill contains a controlled-business definition—if we primarily do title insurance for our own clients and not for others, that is a controlled-business situation and we would be prohibited from engaging in that scenario.

There is no question about this. Their solution in order to mollify us was to state, "Well, all right, we want to kick you all out but what we will do is we will compromise—we will put in a provision that if you are currently practicing when the law takes effect or two years thereafter, we will let you continue to do it but after that all the rest of the lawyers are out." Yes, they really mean to keep us out of the business. This is unheard of. There is another bill sponsored by the Insurance Department, which is a superior bill in many respects to the New York State Land Title Association's bill but also has this controlled-business aspect. We have fought this with every bit of energy and effort we can muster. In a considerably unusual development, Bernice Leber, who has just finished her term as President of our Bar, has taken steps to expedite the Bar's approval process and call into session a special meeting of the Executive Committee of the main Bar to back us in our efforts. Thank you, Bernice. It shows the leadership that she has exercised throughout her term as President and we do so need it. Within our Section, Tom Hall and Gerry Antetomaso have done much to prepare memorandums, to review legislation, to get out reports to all of us so that we knew where we were going on an almost daily basis. The Executive Committee itself took a strong-line position. Karl worked to see that we went forward, and I want to thank Ron Kennedy and Kevin Kerwin who worked hard in guiding us and arranging for meetings with the appropriate Senators and Assemblypersons—we met with the Chair of both the Senate and Assembly Insurance Law Committees—to present our position. We had a group that went to Albany, including Karl and Steve Alden, Gerry Antetomaso, Tom Hall, George Haggerty, myself, Kevin and Ron, and we believe we were effective in pointing out that lawyers should be excluded from the controlled-business provisions. This is not a new problem. Harry Meyer, in his final message, also addressed this issue, stating specifically, "Unfortunately, this well-organized practice is under attack by a coordinated effort mounted by the New York State Land Title Association to pass legislation." He went on to talk about the efforts of our Title Insurance and Title and Transfer Committees to address the issue. This year our efforts went to a new level. **But if any of you out there are reading this, please call your legislator, call your senator, or anyone you know who might know them. It is unconscionable that non-lawyers would presume to define our practice of law.**

One of the, if not the, main projects of mine this year was to open up the meetings of all the Committees to phone attendance. We were slow getting started and it had its glitches but it is up and running now, and for everyone out there again I say please find a committee you want to work with and, if you cannot be physically present, call in—it is just a tremendous resource. Special thanks to Ira Goldenberg for his taking on the task and together with others developing a code of ethics for phone attendance. Thanks to Lori Nicoll, whose job was made a great deal more complex by this effort but who came through swinging.

Thanks to the Co-Editors of this *Journal* and to the Student Editorial Board. Hi to everybody at St. John's and thanks much. We would not have the *Journal* we have without you.

Thanks in particular to George Haggerty for all his efforts in presenting the issue of the unlawful practice of law and to Mindy Stern for a number of items, particularly helping with our effort to honor Lorraine Tharp.

As I mentioned above, we have all heard voices this year which we were not used to hearing, at least not with such forcefulness. What keeps coming back to me is Dorothy Day and her words. In a book entitled *Dorothy Day Selected Writings*—Orbis Books, 1983, 1992, 2005, at p. 106, it is written:

> It is hard to write about poverty. We live in a slum neighborhood. It is becoming ever more crowded with Puerto Ricans, those who have the lowest wages in the city, who do the hardest work, who are small and undernourished from generations of privation and exploitation.
>
> It is hard to write about poverty when the backyard at Chrystie Street still has the furniture piled to one side that was put out on the street in an eviction in a next-door tenement . . . . We need always to be thinking and writing about poverty. . . . We must talk about poverty, because people insulated by their own comfort lose sight of it. So many decent people come in to visit and tell us how their families were brought up in poverty, and how, through hard work and cooperation, they managed to educate all the children. . . . They contend that healthful habits and a stable family situation

enable people to escape from the poverty class, no matter how mean the slum they may once have been forced to live in. So why can't everybody do it? No, these people don't know about the poor. Their conception of poverty is of something neat and well ordered as a nun's cell. Occasionally, . . . we dream of going out on our own, living with the destitute, sleeping on park benches or in the city shelter, living in churches, sitting before the Blessed Sacrament as we see so many doing from the Municipal Lodging House around the corner. And when such thoughts come on warm spring days when the children are playing in the park, and it is good to be out in the city streets, we know that we are only deceiving ourselves, for we are only dreaming of a form of luxury. What we want is the warm sun, and rest, and time to think and read, and freedom from the people who press in on us from early morning until late at night. No, it is not simple, this business of poverty.

It was a great experience and thank you all.

Peter V. Coffey

BERGMAN ON MORTGAGE FORECLOSURES:
So You Want to Sell the Co-op Back to the Borrower

By Bruce J. Bergman

Lenders recognize that settlement discussions often reach their peak of intensity when the borrower finally realizes that the end is in sight—often when the foreclosure sale is imminent. This, of course, creates time problems and not infrequently leads to a sale the parties hoped would not happen. In turn, this generates a common lender or servicer question: "Can we undo the sale because the borrower just sent us the money to reinstate?" The answer in New York is maybe, but that dilemma is for another day. For now, let's focus that inquiry upon an even more elusive subject—the co-op.

Co-ops are weird animals for most lenders and servicers—in part because they are not seen so often and also because they aren't even real estate. (Most mortgage servicers are from outside New York State, which explains the common unfamiliarity with the co-op form of ownership.)

The co-op, of course, is personal property and here is a momentary refresher. A building (typically an apartment building) is converted to cooperative ownership when title is conveyed to a co-op corporation. Shareholders of that corporation are then eligible to receive what are called proprietary leases to a particular apartment. We think of that person as an owner of the unit, but in actuality that person is a tenant. (The more accurate term is proprietary lessee.)

To finance the purchase of an apartment (in fact, the purchase of shares in the corporation) a borrower executes a security agreement (not a mortgage) pledging the shares and the lease as security. Upon default, a foreclosure proceeds according to the UCC and is quite similar to the non-judicial foreclosure non-New York mortgage servicers are comfortable employing in many states.

Noting that a critical overriding element of cooperative ownership is that the co-op board retains virtually sovereign authority over the building—particularly over who can buy shares—what happens if after a co-op foreclosure the lender takes back the apartment (that is, the co-op issues shares and a lease to the lender, now "owner") the borrower settles everything and wants the apartment back? It is very symmetrical if the lender joins in this desire and, because no court is involved with this, who could object?

The co-op could, and has [*see Hochman v. 35 Park West Corporation*, 293 A.D.2d 650, 741 N.Y.S.2d 261 (2d Dep't 2002)]. There, the reason for the foreclosure in the first place was nonpayment. Perhaps not surprisingly, the borrower was also delinquent to the co-op in remitting his monthly maintenance charges. So while the lender (now made whole) had no problem selling back to the former borrower, the co-op did.

When the issue went to court, the ruling was that the co-op did indeed have the power to reject the borrower as an owner. The co-op is bound only by what is called the business judgment rule, which in a nutshell means that a court cannot interfere with decisions made by a co-op (or condo) board taken in good faith and in the exercise of honest judgment.

So, the borrower was out and stayed out; a concept for REO and loss mitigation staff of mortgage lenders and servicers to know

Mr. Bergman, author of the three-volume treatise *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a Partner with Berkman, Henoch, Peterson & Peddy, P.C., Garden City, New York; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

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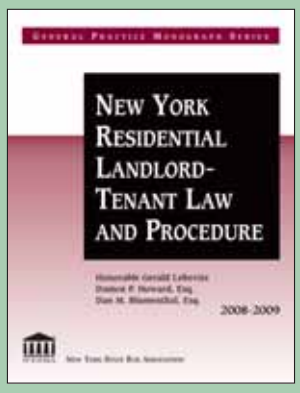

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