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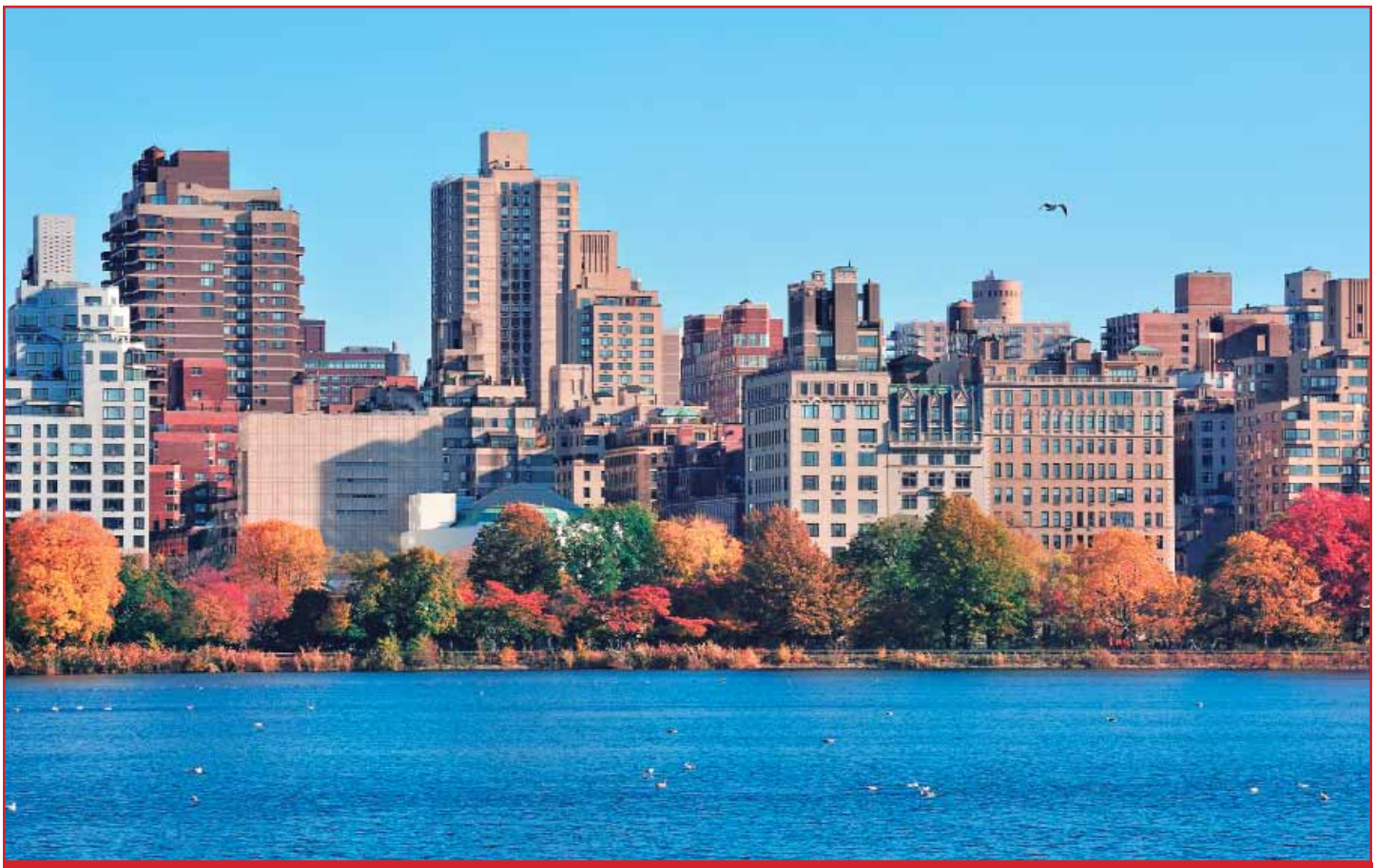

Inside

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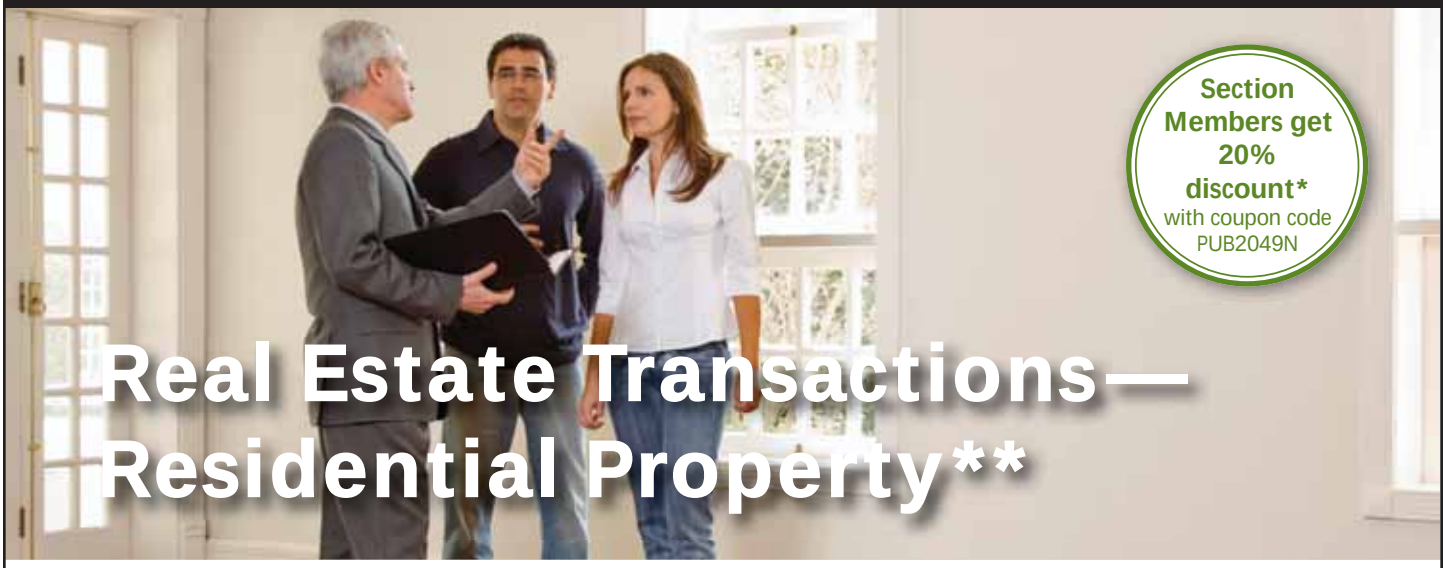

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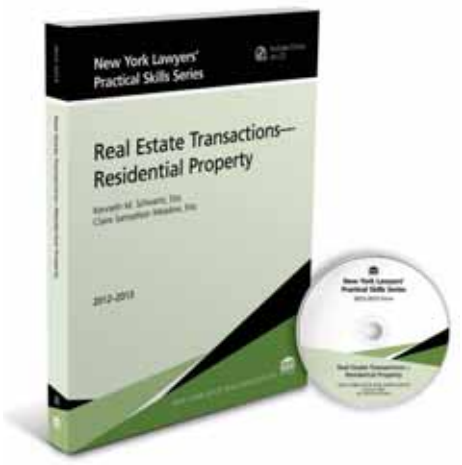

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Real Estate Transactions—Residential Property is a practical, step-by-step guide for attorneys representing residential real estate purchasers or sellers.

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NYSBA

Table of Contents

Message from the Section Chair

I trust that everyone had a relaxing and rejuvenating summer. Our Section's summer meeting at the Mohonk Mountain House was an exceptional event organized by our First Vice-Chair, David Berkey. In addition to providing a wonderful and elegant atmosphere for a memorable weekend, we benefitted from a very fulfilling and informative CLE program. Parts of the program will be expanded and presented to a much larger audience at the upcoming CLE programs on Hot Topics (November 2013 session statewide) and our Annual Meeting in January 2014.

I pause to remember a dear friend, colleague and mentor, Theodore Paul Sherris, who passed away on September 12th. Ted devoted himself to the education and training of title practitioners as an associate professor in New York University's Continuing Education program, a lecturer of Continuing Legal Education programs offered by various bar associations and their academies of law, and by authoring many scholarly articles on a wide variety of real property law and title subjects. Ted was best known for his extraordinary knowledge of even the most obscure issues of riparian rights and land patents. An entire generation of lawyers benefitted from his wisdom, erudition, practical solutions to knotty problems and the warmth he displayed when sharing himself with us.

With the arrival of the crisp fall weather, I have experienced a surge of activity at all levels of practice. Our Section is busy with programs and events to serve the bar. In addition to a broad array of Section programs that are listed in this issue and in our calendar, we have proudly co-sponsored events with the Young Lawyers Section and the Committee on Women in the Law, among others, in an effort to reach the widest audience possible. The Lorraine Power Tharp and Mel Mitzner Scholarship Committees are busy vetting candidates for those coveted awards and the honorees will be announced shortly.

The State Legislature is gearing up and Karl Holtzschue had been adeptly tracking pending legislation. The agent licensing bill and other initiatives have been advancing throughout the summer months and will accelerate into the fall legislative season.

Navigate to the new State Bar website and see the changes that have just launched. Our Section's *N.Y. Real Property Law Journal* is more accessible than ever and the new "communities" should permit you to have a higher degree of personalization in using our very popular listserv and blog. Our Section and the State Bar are very interested in your comments and suggestions. I encourage you to take a test drive and submit feedback.

Another important Internet enhancement is "Fastcase." This online research tool gives NYSBA members free and unlimited access to the New York case law and statute libraries, including decisions of N.Y. Court of Appeals, 1950-present; A.D. Decisions, 1955-present; Misc. Decisions, 1950-present; N.Y. Consolidated Laws; N.Y.C.R.R.; N.Y.S. Constitution; U.S. Code; 2d Cir. Decisions from 1924; and U.S. Supreme Court Decisions. NYSBA members are also eligible to subscribe to Fastcase's full national law library at an 80% discount. Attorneys in their first two years of admission will receive access to the full Fastcase library free of charge. To try Fastcase visit nysba.org/fastcase.

Finally, please mark you calendars with the dates of our Annual Meeting and events. We encourage you to attend.

Wednesday, January 29, 2014
10:00 a.m.–noon—Committee on Real Estate Financing and Real Estate Workouts and Bankruptcy joint meeting

1:30–3:00 p.m.—Committee on Attorney Opinions meeting

Thursday, January 30, 2014
2:00–4:00 p.m.—Committee on Title and Transfer meeting

2:00–5:00 p.m.—Committee on Condominiums and Cooperatives CLE meeting

6:00–8:00 p.m.—Committee on Landlord and Tenant Proceedings CLE meeting

Friday, January 31, 2014
8:30–10:00 a.m.—Committee on Construction meeting

9:00 a.m.–noon—Committee on Not-For-Profit CLE meeting

The General Session of our Section will be held on Thursday, January 30, 2014 from 8:30 a.m. to noon. David Berkey has arranged an exciting program covering a broad range of issues and interests. The CLE program will include non-profit issues affecting real estate, commercial beyond the "four corners of the lease," a 2013 case law update, and many more.

If you have never attended our meeting, now is great time to start. Come to the Section Luncheon at 12:15 pm on January 30 and meet your colleagues, listen to our guest speaker and enlarge your network of contacts. The rewards of Section membership can be endless.

Benjamin Weinstock

Model Landlord's Checklist of Silent Lease Issues (Third Edition)

By Joshua Stein and S.H. Spencer Compton

If you represent a landlord, do not assume a "standard" commercial lease says everything it should say. Unexpected issues can lurk, sometimes silently, sometimes not. This updated and improved checklist, now in its third edition, gives landlord's counsel a tool to spot those issues and prepare or negotiate a better lease.

ANY LAWYER WHO HANDLES COMMERCIAL LEASE NEGOTIATIONS has lived through the same story a billion times: After much back and forth, often over an extended time, the landlord and the tenant have come to an agreement on the business terms of a lease. The landlord will then call or email its attorney (you) to put together a lease that covers the negotiated terms. Just this one time, the parties are really in a hurry. And the landlord, with a keen eye on the bottom line and prevention of delay, doesn't want a treatise on commercial leasing. The landlord's counsel, feeling the pressure to deliver what the landlord wants in the most cost-effective way possible, turns to one or some combination of the following:

- A standard form of lease, preferably one that someone updated and improved recently, but more likely one that no one has updated and improved for a very long time;
- A form of lease from some other similar recent transaction; or
- A similar lease between the same parties or their affiliates negotiated for a different deal.

In this checklist, a "Standard Form" refers to any of those possibilities.

What's in a Standard Form Lease, Anyway?

A Standard Form lease will probably do an adequate job of covering bread-and-butter leasing issues. But it almost certainly will not adequately consider recent developments in leasing law, recently reported cases, unreported litigation and disputes, newly discovered gaps and glitches in Standard Forms generally, advances in technology, or changes in the marketplace. If participants in other transactions have come up with better ways to handle landlord-tenant issues, or have identified new issues that nobody has thought about before, those things usually will not appear in the Standard Form.

Getting Around to It

Even if you know your Standard Form needs work—and almost all of them do—you probably will not have the time during any particular leasing transaction to give your Standard Form a tune-up, much less an overhaul. Yet clients expect (demand, actually) a suitable document, consistent with modern industry standards, immediately, if not yesterday. Even if the business negotiations moved like a glacier before you got involved, as soon as the landlord and the tenant reach a deal, they want the legal work done instantly. Does your landlord client want you to pause long enough to improve your Standard Form? Only in your spare time—and only after the deal has been signed—and not on their meter.

If you want to improve your Standard Form, though, you need to start somewhere. You might first gather up several other recent leases that seem particularly well done, thorough, and up-to-date. You might read each one and compare it against your Standard Form, improving the Standard Form as appropriate. This is a job that almost no particular transaction will ever support or even allow. And editing any Standard Form will probably never rise to the top of your to-do list, either. The job is just too big and squishy, to say nothing of being a bit painful. But you should, at least as an aspiration, try to do it once in a while anyway.

How This Checklist Was Born

To simplify that process, and to create a roadmap for any landlord's attorney who wants to update a Standard Form, the New York State Bar Association Real Property Law Section Commercial Leasing Committee in 2000 appointed a subcommittee to prepare the first edition of a Landlord's Checklist of Silent Lease Issues.

Looking at leasing transactions from a landlord's perspective, the subcommittee tried to identify issues that a typical Standard Form would probably cover inadequately, or not at all. These issues—the "landlord's silent lease issues"—might arise from any of the causes or trends described above. Many of them also reflect the reality that judges do not like to infer obligations or prohibitions in leases, particularly in New York, and particularly at the behest of a landlord. Courts often say that if a landlord wanted to impose any particular obligation, burden, restriction, or prohibition on a tenant, then the landlord should have made it clear in the lease. If the landlord didn't do that, the courts usually will not do it for them. Courts routinely rule that if something is not in the documents that the parties signed, then it is not part of the deal. This checklist aims to help landlords assure that their leases contain whatever they may need to contain.

The Landlord's Checklist initially sought to suggest pro-landlord changes in a Standard Form that would ap-

ply in at least 15 percent of commercial leasing transactions. For an issue to make it on to the list, though, earlier editions required that the issue was also less than 50 percent likely to appear in a typical Standard Form, assuming the Standard Form was intended to cover transactions of the type for which the issue is relevant but had not been updated recently. The first and second editions of the Landlord's Checklist theoretically ignored any provision that the authors thought was 50 percent or more likely (when relevant) to appear in a typical Standard Form, or likely to apply in less than 15 percent of commercial leases.

Both the "15 percent test" and the "50 percent test" were applied in an absolutely arbitrary, capricious, and subjective manner, with no evidence, data, or other empirical information, validation, confirmation, or corroboration of any kind whatsoever. Random exceptions were made with precisely the same lack of analytical rigor. Ultimately, the test was applied inconsistently, unpredictably, and based on pure whim. Thus, the inclusion or exclusion of any particular issue carries—and continues to carry—no weight. The checklist merely amounts—and continues to amount—to a reasonable reference point for anyone representing a landlord and looking for points to consider when improving a landlord's form of lease. Such imperfections and incompleteness are inevitable in any checklist like this one.

These imperfections only compounded themselves as the Landlord's Checklist grew over time to become something closer to a generic checklist for lease negotiations. The threshold for adding suggestions to the checklist eroded over time. Thus, a substantial number of the comments in this checklist no longer have the aura of mystery and intrigue that ran throughout the first (and to a lesser degree the second) edition of this checklist. One should, however, still not assume that this Landlord's Checklist offers a complete list of everything that a landlord's counsel should consider.

What the Checklist Does

Even though any issues checklist will probably cover both too much and too little at the same time, this Landlord's Checklist valiantly seeks to deliver a summary of the latest issues that an author of a "state-of-the-art" Standard Form might wish to cover, all collected in one place—in a condensed manner—to help commercial leasing practitioners. That was true of both the first and second editions and is even more true of this third edition.

Does the Checklist Give Landlords an Unfair Advantage?

Some might argue that Standard Forms are already landlord-oriented enough and no one benefits from piling on even more landlord rights and tenant burdens (also known as "gotcha" clauses). The landlord can counter that argument by stating that once in possession, the tenant has all the leverage and judicial sympathy, and the landlord just has the words of the lease on which to rely. A landlord would also argue that if the lease enforcement game were played on a level playing field, then perhaps Standard Forms would not need to be landlord-oriented; they could be "balanced" and "fair." The use of landlord-oriented Standard Forms, the argument would go, merely represents some minimal effort to restore balance to the landlord-tenant relationship. Tenants' counsel would, of course, disagree.

As a variation on the theme of leveling the playing field, this Landlord's Checklist will also help a landlord's counsel respond when a major tenant insists on using its own form of lease. The points mentioned in this checklist will often correlate with the points that a tenant's form of lease disregards or covers in an inadequate way.

Intended for Major Commercial Space Leases

This checklist is intended mainly for substantial commercial space leases, for both retail and office uses, and other commercial occupancies. This checklist does not apply to residential leasing transactions. They raise their own set of "consumer protection" issues that can be treacherous, much like the minefield of residential mortgage lending.

Most issues here will apply to some leases but not others. Every item in this checklist should be interpreted as if prefaced by the words: "if applicable, appropriate, desired, possible, and realistic under the circumstances, taking into account the size and nature of the transaction, market conditions, the landlord's project, the tenant mix, the needs and negotiating positions of the parties, the history, the timing, governing law, and all other circumstances." Those words appear here once, but they could just as well appear as part of every suggestion made in the checklist.

Before adding anything from this list to a lease as part of a negotiation, first check to see if the lease under negotiation already covers it. If it does, just ask yourself whether the suggestions here inspire some fine-tuning of the particular lease provision. Do not ask for something you do not need, because if it's already in the lease and you show the addition as a highlighted change, you may lead the tenant's counsel to focus on it and ask for concessions they might never have thought of otherwise.

This checklist does not try to suggest which issues apply to which types of leases, which issues matter most, or how a tenant might respond to any of these issues. Particularly given these limitations, this checklist will add more value for an experienced lease negotiator than for a novice. Even a novice, though, will find it useful. Any reader of this checklist should use it prudently and with judgment, and should not stop thinking just because something appears on this checklist. Do not just shovel words from this checklist into a lease.

Sometimes, a landlord will tell its lawyer to "just update the major issues, and do not bother with the minor stuff." In those cases, this checklist might help counsel raise a few "major" issues, but the client will probably not appreciate it if counsel makes extensive use of this list.

If your landlord client has directed you to focus only on the critical issues because of budgetary, transactional, or time constraints, you might focus on these as the "most important" lease sections for review and comment:

- Use;
- Rent, including escalations and percentage rent;
- Operating expenses;
- Real estate tax and escalations;
- Defaults and remedies;
- Assignment and subletting;
- Security deposit;
- Consents;
- Services by landlord; and
- Utilities, including electricity.

If relevant to the transaction, you will probably also want to consider provisions on Alterations, End of Term and, in a suburban building, Parking. This list is not exhaustive or complete. The authors recommend against using this short list at all, and instead considering all sections of any lease.

If a client insists on the limited approach suggested here, then you want to make it clear that you recommended a more careful approach. This is especially important if it turns out that some "minor" item—something that counsel skipped—turns out to be important and expensive to fix.

Caveats, Warnings, Disclosures

This checklist does not represent a position statement or recommendation by the New York State Bar Association or its Real Property Law Section, Commercial Leasing Committee, any of its subcommittees, any member of any of them, or either of the authors. This checklist is offered merely as a tool for leasing practitioners, in the hope that it might help. It creates no legal duties or obligations, and no standard of due care. No representation or warranty is made on the enforceability, validity, or practical feasibility (or palatability to the tenant) of any provision suggested here. The checklist simply lists some issues landlord's counsel might want to consider when updating a Standard Form or responding to a tenant's lease form.

Although the authors of the checklist and the subcommittee members will be honored and pleased if anyone who reads this checklist mentions it in lease negotiations, this checklist does not estop any author or subcommittee member from taking any position in any lease negotiation. To the contrary, any reference to or quotation of this checklist in lease negotiations shall constitute an immediate and incurable event of default.

Notes on Style

In the editing process, the authors decided to express some issues as affirmative recommendations, to achieve a more direct and lively presentation. Thus, the checklist sometimes says a landlord "should" consider some concept or even "should" add specific provisions to a lease. Take each such statement with a barrel of salt. The subcommittee and the authors do not purport to establish or define requirements for what any lease should or should not say. Every lease represents its own negotiation, depending largely on the considerations above. One-size-fits-all recommendations usually do not work.

This checklist mentions each issue only once, even if it might reasonably belong under more than one heading, but provides no cross-references, even in cases where this checklist breaks one topic into two related topics, both of which you should consider. Read this checklist from beginning to end.

The Case Law

Although court decisions drive many landlord concerns suggested in this checklist, we do not cite a single case. Any effort to cite cases would change the character of the checklist. Case citations could go on almost without end, but would add little practical value for lease negotiators. If you want to find case law relevant to any issue, plenty of other resources exist for that purpose. For example, you might consider visiting a law library. They still exist. Many readers will fondly recall that a library is a room or other central physical facility that contains a range of "books," which are objects consisting of multiple paper sheets, typically printed on both sides, in which people who claim (and often even have) expertise in a particular legal area share the benefit of that expertise. A book can sometimes be even more effective than Google as a legal research tool. Unfortunately, books are also more work to use, often requiring the user to leave his or her computer terminal and constant easy access to his or her email stream for well over five minutes. Books also create that the risk that the user will learn something about related legal issues not directly responsive to the user's specific question, surely an inefficient and unnecessary use of time.

Likewise, you will need to develop lease language from sources outside this checklist (another visit to the library, perhaps?) or by thinking, an activity less and less a daily part of modern legal practice. This checklist may, at first view, contribute to that trend; if, however, anyone uses this checklist without thinking about it they will probably regret that.

Beyond the Four Corners of the Lease

This checklist considers primarily what goes into the lease itself. A successful leasing transaction also requires a landlord's counsel to consider many "silent" and other issues outside the leasing document. Those issues fall in three categories, collected at the end of this checklist: (1) due diligence; (2) additional lease-related documents and deliveries; and (3) monitoring the lease after the parties have signed it.

Have at It

So, keeping in mind that this checklist is not perfect, that it offers an accumulation of issues with no scientific rigor whatsoever, that misusing this checklist can create problems not solve them, that the unanticipated and the unexpected are also the inevitable, and that, in the end, every lawyer must do his or her own thinking, we present for your perusal and, we hope, edification and practical value, the third edition of the Landlord's Checklist of Silent Lease Issues.

1. Alterations and Build-Out

1.01 **Activities Outside Premises.** If the lease lets the tenant perform alterations outside the premises (such as cable or riser installations, HVAC equipment installations, back-up generator, or fuel storage and transmission), the tenant should, at a minimum, meet all the same requirements (including removal / restoration) that would govern interior alterations. At the landlord's option, consider having the landlord, not the tenant, perform any alterations that affect space outside the premises, but at the tenant's expense.

1.02 **Americans with Disabilities Act (and Similar Laws).** Require the tenant's alterations to comply with not only the Americans with Disabilities Act ("ADA"), but also state and local laws, state and local codes, etc., on disabled / handicapped access. The latter can be more burdensome than federal law. Allow the landlord to block any alteration, even inside the leased premises, if it might require any significant changes to space outside the leased premises to comply with these laws. In any case, the landlord must understand those requirements, allocating their cost between the landlord and the tenant, before signing the lease. In the worst case, complying with these requirements may be so expensive that a particular building will not work for a particular tenant.

1.03 **Artists' Rights.** Prohibit the tenant from installing any artwork that could give the artist a right under federal law to prevent the artwork from being modified or removed. The law in question is the Visual Artists Rights Act of 1990. That was a busy year for federal landlord-tenant legislation, the same year Congress enacted the ADA. If the tenant has an agreement with the artist governing removal, the landlord needs to see and approve that agreement (and any amendments) and it must allow modification or removal without cost to the landlord. Consider requiring a direct agreement between the artist and the landlord on these issues. Attach to the lease a copy of the artist's agreement, if possible.

1.04 **Broker's Representations.** State that any representations made by a broker, including representations about square footage, do not bind anyone and shall not be used to interpret the lease.

1.05 **Building Security**. Reserve the landlord's right to control building security. The landlord needs the right to install security cameras, scanning devices, and any other security technology—including future security technology—in common areas. Require the tenant to waive any right to object to such devices, and any right to sue the landlord over any privacy, labor, or workplace issues arising from their use. But the landlord should have no implied obligations regarding security, even if the landlord installs security equipment.

1.06 **Completion of Alterations.** Require the tenant to finish any construction job, close out all alteration permits, and deliver a final certificate of occupancy within a reasonable but determinable time after the tenant has obtained its first building permit or received possession.

1.07 **Completion Bond.** Before the tenant undertakes alterations expected to cost above a stated amount, require the tenant to deliver a bond or letter of credit in an amount equal to X percent of the estimated cost. If the landlord doesn't require this because the tenant has great credit, consider giving the landlord the right to rescind this concession if the tenant's credit deteriorates or the tenant assigns the lease.

1.08 **Construction Protocols.** During construction, require the tenant to fence or close off its premises. Prohibit the tenant's contractors from entering the premises until the landlord has completed its work. If the tenant needs a staging area, the tenant should use only the area (if any) that the landlord designates.

1.09 **Exterior Hoist.** If the tenant wants to use a hoist outside the building, all lease provisions, rules, and regulations that govern alterations and activities within the premises should also apply to the hoist. Consider requiring that the

landlord, rather than the tenant, control the hoist, although the landlord may not want the headaches or exposure. In the lease or a separate agreement, the parties should memorialize the terms of the tenant's use of the hoist, including priorities among the landlord and other tenants if the hoist will not belong exclusively to the tenant. Require the tenant to remove the hoist by a certain date. Should the landlord have the right to "free rides" on any hoist? If other tenants complain about the hoist or even try to claim rent offsets because of it, the tenant should indemnify the landlord. If the landlord has installed the hoist, provide for scheduling, charges, and the right to remove it, particularly if the hoist has overstayed its welcome. In any agreement or lease provisions on the hoist, think about how the hoist is attached, use of walkie-talkies, the landlord's liability under scaffolding or other strict liability laws, permits, insurance, and the landlord's liability to other tenants.

1.10 **Filings.** Consider requiring that the landlord's architect or expeditor supervise or handle all certificate of occupancy filings, and perhaps all other governmental filings for the tenant's work. Issues with the tenant's filing (and closing out of permits once issued) may impair the ability of the landlord or other tenants to pursue work in the building.

1.11 **Labor Harmony.** The tenant's obligation to maintain labor harmony should relate not just to construction, but also to any other activities at the premises and in the building. Establish a specific monetary consequence if the tenant doesn't comply. Describe it as liquidated damages, and include the "magic language" necessary to make the liquidated damages enforceable. Also, prohibit the tenant from starting its work until the landlord has completed all "base building" and other landlord work. Simultaneous work creates a high risk of disharmony.

1.12 **Landmarked Buildings.** If the building is designated as an historical landmark (or lies within a similarly protected area), include whatever "magic language" the landmarks protection law requires. If the building is not so designated, but might make an attractive target for designation, the tenant should agree: (i) not to file for historic designation, (ii) not to support any such designation without the landlord's consent; and (iii) to oppose any such designation if the landlord asks the tenant to do so.

1.13 **Liens.** Try to say that the landlord's fee interest will not be subject to liens arising from the tenant's alterations, but do not assume the language will work. One could even argue that including such language is deceptive, because a non-lawyer on the landlord's staff might read it and think it solves any problem.

1.14 **Modifications to Plans and Specifications.** Limit the tenant's right to modify its plans and specifications, except as necessary to conform to field conditions. If the tenant modifies its plans and specifications after the landlord approves them, the alterations as modified should still be required to meet the original standards of the lease. To avoid dealing with a flood of change orders, the landlord might give the tenant some leeway, but subject to criteria to protect the landlord's interests.

1.15 **Plans and Specifications.** Require the tenant to deliver plans and specifications (initial, as-built, and as filed with the buildings department) in a specified (or more current) computer aided design ("CAD") format using naming conventions and other criteria as the landlord approves or requires. Also, require the tenant to deliver copies of all governmental approvals necessary for the alterations, including a building permit and a temporary and final certificate of occupancy, as and when appropriate.

1.16 **Removal.** A strong tenant will often negotiate away any obligation to remove the tenant's alterations at the end of the lease term. As a more common alternative, the tenant will agree to remove only any unusual alterations that are difficult to remove, such as vaults, raised floors, and stairways between floors—but only if the landlord imposed the removal requirement when the landlord approved the tenant's plans. So the landlord must remember to think about this when reviewing plans. To protect the landlord from falling into a trap, perhaps the lease should require the tenant to provide an appropriate reminder when the tenant submits plans for the landlord's approval.

1.17 **Scope of Work.** Even if the tenant will bear all construction risks and costs, the landlord should think twice before agreeing to tenant alterations that may require a major compliance effort or cost. Regardless of what the lease says, tenant construction projects that will raise major issues will often, one way or another, end up costing the landlord money and grief. If the building is landmarked, for example, then trivial work in one part of the building may focus municipal attention on other parts. Landlords should understand those problems before they undertake projects for the tenant or allow the tenant to undertake projects. Lease language should take into account these concerns. For

example, if any tenant alterations would trigger an undesired level of scrutiny by the landmarking authorities, such as a "hearing" rather than a "staff action," consider categorically prohibiting those alterations.

1.18 **Supervisory Fee.** Allow the landlord to charge a supervisory fee for any tenant alterations and for any landlord review of environmental and other conditions. The landlord's wage schedule or standard rates in effect from time to time should constitute prima facie evidence of reasonableness.

1.19 **Tenant's Records.** Require the tenant to maintain records of the costs of its improvements for six years. This information may help in real estate tax protest proceedings. If the tenant's cost of any particular alteration exceeds a set amount, consider requiring the tenant to deliver its cost records within a certain short period after the tenant has completed construction. Otherwise, they will probably get lost, regardless of what the tenant has agreed to maintain.

1.20 **Third-Party Fees.** Require the tenant to reimburse the landlord for its architect's fees, lender's fees under any landlord loan documents, and any other in-house and outside professional fees for review of plans and specifications. If a building is subject to a special regulatory regime such as landmarking, the tenant's reimbursement obligation should also extend to any counsel or consultants the landlord engages to deal with that particular regime. The lease can express this idea broadly and generically. Always have the tenant reimburse the landlord's legal fees (inside and outside counsel) for practically anything the landlord does relating to the lease.

1.21 **Warranties.** Require the tenant to provide a warranty on completed alterations or at least an assignment of any warranty it receives from its contractor.

2. Assignment and Subletting: Consent Requirements

2.01 **Assignment/Sublet of Other Tenants' Leases.** Even if other leases allow assignment or subletting, prohibit this tenant from accepting an assignment of any other tenant's lease or from subletting any other tenant's premises in the building without the landlord's consent.

2.02 **Change of Control.** Treat a change of direct or indirect control of the tenant, unless a public company, as an assignment. To monitor, require the tenant to: (i) represent and warrant the tenant's current ownership structure, perhaps in an exhibit, when the parties sign the lease, to establish a baseline and define "change of control"; (ii) deliver an annual (or upon request) certificate confirming the tenant's then-current ownership structure; and (iii) report any change of control. The certificate described in "(ii)" might, ideally, come from the tenant's attorney or accountant, but the landlord might settle for a certificate from the tenant. In prohibiting any equity transfers, do not limit the restriction to refer only to corporations, partnerships, and limited liability companies. The restriction on transferring equity should apply even to future entity types not yet known.

2.03 **Collateral Assignment of Lease.** Any prohibition against assignment and subletting should also prohibit any collateral assignment of the lease (such as mortgaging, encumbering, or hypothecating).

2.04 **Continuing Status as Affiliate.** If the lease allows "free transfers" to the tenant's affiliates, require that the assignee or subtenant thereafter remain an affiliate throughout the lease term. If the affiliation ceases the tenant must notify the landlord, but the landlord should not assume the tenant will remember to do so. Once the affiliation ceases, the transaction becomes a prohibited transaction that requires the landlord's consent and possibly a payment. At that point, if the landlord does not consent or the tenant does not pay, the transaction may become an event of default.

2.05 **Fixture Financing.** Prohibit the tenant from financing its fixtures, or impose appropriate protective conditions upon any such financing arrangements.

2.06 **Future Sublease-Related Transactions.** Even if the lease allows the tenant to sublet, think about future transactions that might arise from the subletting, such as further subleasing by subtenants. Try to limit the number of sublets, and consider demanding a recapture right if the tenant wants to sublet more than once. Require the tenant to obtain the landlord's approval for any future modification or termination of a sublease, any recapture under a sublease, any sub-subletting, or any expansion or assignment by the subtenant. A landlord will regard any of these transactions as a future opportunity worth preserving for the landlord. Any landlord rights regarding these transactions should appear not only in the lease, but also in the sublease, with the landlord identified as an intended third-party beneficiary. The lease needs to require all of that.

2.07 **Government and Similar Tenants.** A government tenant often burdens the elevator, HVAC, parking, lobby, rest rooms, and security, by producing a higher occupant density than the typical private-sector tenant. This can quickly change a first-tier building into a second-tier building. Governmental occupancy, even by a subtenant, can in some cases lead to the unexpected imposition of governmental procurement regulations on the landlord. When drafting a sublease consent provision, consider limiting occupant density, power consumption, parking, operating hours, and noise. If the landlord is generally willing to allow a particular government agency as tenant, state that only a particular agency (or its successor performing the same functions) can occupy the space. Any change of agency should be deemed an assignment. Conform the use clause accordingly. The comments in this paragraph about government tenants would also apply to schools, both public and private, as well as social service agencies and some non-profit organizations.

2.08 **Operation of Law.** Confirm that the assignment restrictions extend to prohibit (or require the landlord's consent to) any assignments made by operation of law, such as mergers. Absent specific language to that effect, an assignment clause will often not reach assignments made by operation of law.

2.09 **Prohibit Competition with Landlord.** Prohibit assignments or sublets: (i) to existing tenants in the building; (ii) for less than fair market rent or the present rent; or (iii) if the landlord has available space. Prohibit the tenant from subleasing to any entity: (i) that occupies any other building the landlord (or its affiliate) owns within a specified area; or (ii) with whom the landlord (or its affiliate) is actively negotiating or has recently negotiated.

2.10 **Prohibit Other Landlord's Takeover.** Any other landlord's takeover of the lease, perhaps as an inducement to relocate the tenant to that landlord's building, should be deemed a prohibited sublease. The same should apply if that other landlord, or someone else, directly or indirectly obtains the right to exercise control over the disposition of the lease (a variation on a lease takeover transaction).

2.11 **Restriction.** Consider prohibiting any assignment / sublet to: (i) any party with whom the landlord (or its affiliate) is in litigation (or an affiliate of any such adversary), or perhaps even any party with whom other landlords have had significant litigation; (ii) a controversial entity such as a terrorist organization; (iii) any party entitled to diplomatic immunity; or (iv) specified entities or their affiliates, such as certain chain stores, parking lot operators, and multi-site / multi-brand restaurant operators that may have become notorious for their aggressive litigation programs against landlords. Also, prohibit assignments / sublets to any government, domestic or foreign; any government agency; a government contractor doing its contracted work in the space; or any other entity whose presence could subject the landlord to governmental procurement and affirmative action regulations. Federal procurement regulations sometimes make the landlord a deemed federal contractor under circumstances suggested in the previous sentence. State regulations vary, of course. The landlord may, however, prefer not to limit itself to any particular grounds for disapproval and rely instead on its right to "reasonably" reject proposed transactions, which might enable the landlord to reject a transaction on grounds like those suggested in this paragraph. This approach has the disadvantage, though, of creating an amorphous factual issue that may require litigation to resolve. Moreover, the cases indicate that if a landlord agrees to act "reasonably," this imposes a meaningful restriction on the landlord and could require it to show an objectively sound basis for its decision, such that a "reasonable person" in the landlord's position would reach the same result—not a conversation that any landlord should relish having.

3. Assignment and Subletting: Implementation

3.01 **ADA.** Prohibit any assignment or subletting that triggers incremental ADA or other legal compliance requirements in the building or by the landlord in the premises.

3.02 **Advertisements.** The landlord should have the right to pre-approve any advertisements for assignment or subletting. Prohibit any advertisement that mentions price.

3.03 **Assignor Guaranty.** As a condition to any permitted assignment, consider requiring any unreleased assignor—and any guarantor of the lease—to deliver a guaranty with full suretyship waivers or at least an estoppel certificate or a reaffirmation of guaranty to confirm that the signer remains liable. In either case, state that any future changes in the lease obligations do not exonerate the guarantor, though perhaps the guarantor need not necessarily stand behind any incrementally greater obligations.

3.04 **Breach of Anti-Assignment Covenant.** A breach of the covenant not to assign the lease without the landlord's consent should create an automatic event of default, not merely a generic default for which the tenant might have a cure period.

3.05 **Confidentiality.** The same confidentiality concerns that apply to the lease in general also apply to the tenant's assignment and subletting transactions, especially if the landlord would consider those transactions to be "below market"—as the landlord typically will. The landlord would like to assure that the market does not know the terms of those transactions.

3.06 **Contiguous Subleased Floors.** Require sublet floors to be contiguous—ideally at the top or bottom of the tenant's stack. Or require that any subleasing maximize contiguity (in some defined way), to facilitate future transactions and flexibility.

3.07 **Documentation.** If the tenant assigns or sublets, require the tenant to deliver unredacted copies of all documentation on the assignment or sublet.

3.08 **Leasing Agent.** Require the tenant to designate the landlord's managing agent as leasing agent at market rate commissions for any contemplated assignment or sublet.

3.09 **Partial Subleases.** Wherever the lease refers to subletting, it should refer to a subletting of "all or any part of" the premises, because a bare reference to subletting may let the tenant argue that the provision relates to a sublet of the entire premises only. This is yet another example of how a literal reading, or the possibility of a literal reading, produces ever-longer legal documents.

3.10 **Processing Fee.** Charge a processing fee for any assignment/subletting, payable when the tenant submits an application. The tenant should pay the landlord's in-house and outside attorneys' fees and expenses for any assignment or sublease, whether or not the transaction requires the landlord's consent and whether or not the landlord grants consent.

3.11 **Prohibited Use.** Even if the tenant has rights to assign or sublet, the new occupant should remain bound by the use clause. Although that proposition may seem self-evident, courts may infer some unintended flexibility on use if the parties negotiate a right to assign or sublet. Retail landlords are particularly vulnerable. More generally, state that any permitted assignment or subletting does not modify anything in the lease, including negative covenants.

3.12 **Recapture Right.** If the tenant wants to sublease (or if the subtenant wants to sub-sublease) any space, give the landlord a right to recapture that space. Usually, the landlord must exercise or waive any recapture right early in the tenant's assignment or subletting process, before the landlord knows who the assignee or sublessee will be. A landlord may prefer to wait until the landlord has that information, as it may affect the landlord's decision. Define the recapture period window, and also the date when any recapture becomes effective. Avoid circularity, such as by saying the recapture becomes effective on the date of the sublease, but the sublease becomes effective upon the landlord's consent and, therefore, never becomes effective. If the tenant wants to sublease 50 percent or more of its space, allow the landlord to recapture the entire leased space. If the landlord exercises any recapture right, consider requiring the tenant to pay the landlord a brokerage commission equal to what the tenant would have paid a third party to broker a comparable transaction. If the recapture right arises from a sublease, let the landlord decide whether to partially terminate the lease for the recapture space, or instead to require the tenant to sublease the same space back to the landlord, which might create another profit stream for the landlord. For any partial recapture right, require the tenant to pay for any demising wall or other space separation expenses. These could include code compliance expenses to establish a legally separate occupancy. And any switch from a full-tenant floor to a partial-tenant floor may trigger ADA and other code requirements. The tenant should pay for those too.

3.13 **Rent Increase or Other Changes Upon Assignment.** If the tenant assigns, let the landlord increase base rent to fair market rent. When assigning a lease with percentage rent, consider resetting the base for the rent calculation—either based on current market conditions or, in the case of retail space, the sum of existing base rent plus the average percentage rent for some specific period before the assignment. Anemic percentage rent will, however, often correlate with a tenant request to assign or sublet. Consider whether to reserve the right to require certain other changes in the lease (a higher security deposit?) upon assignment.

3.14 **Tenant's Profit.** If the tenant must pay the landlord a share of the consideration or other

profit the tenant receives from a subletting or assignment:

3.14.01 Allow the landlord to audit the tenant's books and records;

3.14.02 Any tenant revenue arising from rent concessions the landlord made under the original lease belongs entirely to the landlord (a proposition that has a ring of fairness to it but may reverberate with a dull thud);

3.14.03 If the tenant does not furnish the necessary information for the landlord to calculate assignment / subletting profits, the landlord may estimate and the tenant must pay the estimated amount until a correct amount is established;

3.14.04 The landlord may condition the closing of any assignment / subletting transaction on the tenant's acknowledging the amount of the landlord's profit participation and making any payments due at the closing of that transaction;

3.14.05 The landlord may collect profit payments from the assignee or sublessee if the tenant fails to pay;

3.14.06 For a sublease, amortize the tenant's transaction costs and other deductions over the term of the sublease; don't just subtract them from the first subrent payments;

3.14.07 Require the tenant to disclose all income derived from any subtenant, potentially backed by a certificate from the subtenant and from the tenant's principals;

3.14.08 Require the tenant to deliver unredacted copies of all assignment / sublease documents to the landlord for review before the landlord signs off on anything, as well as after the closing of the transaction;

3.14.09 Carefully define, limit, and scrutinize the scope and timing of all "offsets" or "credits" the tenant may claim in calculating its profits;

3.14.10 Consider requiring the tenant to pay the landlord's share of sublet profits in a present-valued lump sum at sublease execution;

3.14.11 Try to prevent the tenant from deducting any of the work allowance the tenant provided to the assignee or subtenant; and

3.14.12 Keep in mind that, even though the landlord might want to claim 100 percent of the sublet / assignment profit, this would vitiate the tenant's incentive to negotiate any sublease profit at all. The landlord might therefore prefer a somewhat lower percentage. In any case, the landlord might also want to require that the sublease be at market rent or higher.

3.15 **Transactional Requirements.** For any assignment / sublet, independent of any consent requirements, require the tenant to satisfy certain conditions (such as permitted use, reputation, net worth of assignee / subtenant, and no violation of exclusives) and delivery of certain documents satisfactory to the landlord (such as assignee / subtenant's certified financial statements, unconditional assumption of the lease, and reaffirmation of guaranties). The tenant should agree to report to the landlord, upon request, on how much space the tenant is marketing for sublease and the asking terms of any such sublease(s). Any sublease should expressly benefit the landlord as a third-party beneficiary, so if the tenant defaults, the landlord can take over the sublease, if it wishes.

4. Bankruptcy

4.01 **Characterize Tenant Improvement Contribution as Loan.** To the extent that the tenant's rent reimburses the landlord for tenant improvements, consider restructuring such payments as payments on a loan, independent of the lease, evidenced by a note. Require the tenant to pledge (at least) its leasehold as security and perhaps supplement that security with a separate "tenant improvements loan letter of credit." This structure may give the landlord an argument to avoid Bankruptcy Code limitations on the landlord's claim for "rent." The landlord would then, of course, instead face all the perils of being a secured or unsecured creditor in bankruptcy. The landlord's choice of poison will vary with circumstances, especially the ratio between the landlord's contribution and the annual rent.

4.02 **Letters of Credit.** If the tenant delivers a letter of credit in place of a security deposit for more than a year's rent, consider the effect of Bankruptcy Code section 502(ii)(6). Check the drawdown conditions of the letter of credit to confirm that the landlord has the right, though no obligation, to draw on the letter of credit if the tenant files bankruptcy, even if the tenant remains totally current in payments. Do not just rely on the proposition that a tenant bankruptcy would constitute an "event of default"; instead, the letter of credit should expressly allow the landlord to draw in that event.

4.03 **Multiple Leases.** If the same tenant (or its affiliate(s)) leases multiple locations from the landlord, try to structure the transaction as a single combined lease for all locations to prevent the tenant from "cherry picking" in bankruptcy. If the landlord must use multiple leases, try to provide cross-defaults and give all the

leases the same date. Try to avoid any language that would allocate particular rent or other economics to particular premises, an allocation that might invite or support selective lease rejection. Even a formulaic adjustment of rent based on casualty or condemnation may create enough of a hook for a bankruptcy judge. Try not to create that hook.

4.04 **Shopping Center Premises.** Bankruptcy Code Section 365 gives a landlord greater rights upon a tenant's bankruptcy if the landlord's building constitutes a "shopping center." But the statute does not define "shopping center." Within reason and the bounds of reality, the landlord can try to include favorable language in the lease to confirm that the landlord's project constitutes a "shopping center."

5. Bills and Notices

5.01 **Change of Address/Notice Party.** If the tenant relocates its main office or legal department, require the tenant to notify the landlord of the new address.

5.02 **Date of Delivery Definitions.** Confirm that every permitted means of notice also provides for the date when that particular notice will become effective. Try to make all notices effective as quickly as possible, even if the tenant refuses to accept the notice.

5.03 **Emailed Notices.** The co-authors disfavor the use of email as a means to give formal notices under a lease or other document.

5.04 **Next Business Day Delivery.** Define "overnight" delivery as "next business day" delivery, to avoid occasional case(s) saying "overnight" doesn't mean any particular number of nights—yet another example of bad cases producing ever-longer documents.

5.05 **Routine Rent Invoices.** Avoid any suggestion that the landlord cannot send routine rent or other invoices both: (i) by ordinary mail; and (ii) only to the tenant (no copies to counsel or the like). Negate any duty to send out base rent invoices unless they notify the tenant of an increase in base rent or an arrearage. The landlord should try to send only an annual invoice setting forth the year's base rent and known monthly escalation payments. The tenant should be able to pay monthly from that one invoice.

5.06 **Service of Process.** State that notice (or process) may be served on the tenant by serving the tenant's principal at his or her residence.

5.07 **Tenant's Notices.** Copies of notices from the tenant (or perhaps just notices of alleged landlord defaults) should also go to the landlord's counsel.

5.08 **Tenant's On-Site Contact.** Require the tenant to provide a single on-site contact for operational issues who gives the landlord his or her current home and mobile numbers. If that person leaves the company, the tenant should notify the landlord and identify a replacement immediately.

5.09 **Who May Give Notices.** State that the landlord's counsel or managing agent (as engaged from time to time) may give notices for the landlord. Negate any suggestion that the party who gives the notice must provide any evidence of authority. If the tenant wants evidence of authority, allow them to ask for it, but without thereby diminishing the effectiveness of the notice.

6. Compliance With Laws

6.01 **ADA.** If the tenant uses the premises as "public accommodation" or for any other use that triggers extra ADA requirements in or out of the building (e.g., "path of travel" areas such as parking areas, entrances, lobbies, or public corridors), the tenant should pay for the work necessary to bring the premises into compliance with those legal requirements. Define the premises to include the restrooms and common areas of any full floor the tenant has leased.

6.02 **Definition.** Define "Laws" broadly to include future enactments and amendments, insurance regulations and requirements, utility company requirements, administrative promulgations, governmental orders, and recorded declarations, present and future.

6.03 **Diplomatic Immunity.** If applicable, obtain the tenant's waiver of diplomatic immunity. Ascertain under the specific circumstances whether this waiver will be enforceable. If it will not be enforceable, find a different tenant.

6.04 **Legally Required Improvements.** Require the tenant to perform all improvements required by law. For any required improvements that relate to the building as a whole, the tenant should pay its proportionate share. Landlords often include such an obligation within the definition of operating costs for escalation purposes. That is fine, provided that the inclusion applies only during the adjustment years and not for any base year. If the tenant resists, consider limiting the tenant's obligation to apply only to laws enacted after the lease commences.

The tenant will probably still resist and the parties will probably reach the usual negotiated outcome in any space lease. The landlord will bear the risk of present and future laws that generally govern similar buildings and generic occupancies like the tenant's. The tenant will bear the risk of legal requirements that arise from tenant's particular use of the space, especially if unusual. Require the tenant to perform any improvements that are legally required as a result of any tenant alterations. Make the tenant financially responsible if it causes any part of the landlord's property to become noncompliant with the law or to lose a grandfathered status. For example, if code allows the landlord to maintain an antiquated fire alarm system, but requires the landlord to upgrade if anyone performs a certain amount of construction work anywhere in the building, and the tenant intends to undertake that amount of work, then the landlord may want to require the tenant to pay to upgrade the fire alarm system. Although that may sound like a desirable plan for the landlord, it may not conform to the best long-term asset management strategies.

6.05 **PATRIOT Act.** Require the tenant to certify that it is not a terrorist or someone with whom the landlord cannot legally do business, using language that refers to specific types of prohibited persons. For what it's worth, also have the tenant indemnify against any loss the landlord suffers (including, of course, the landlord's attorneys' fees) because the tenant really is a terrorist or falls within some other category of prohibited person. Consider similar anti-money-laundering provisions as they relate to rent payment.

7. Consents

7.01 **Conditions to Consent.** Even if the landlord has agreed to be reasonable about a consent, require the tenant to satisfy certain conditions first. For example, the tenant must not be in default. The tenant must first deliver an estoppel certificate and copies of all relevant documents. Set other requirements tailored to the particular consent at issue. Remember that the landlord may forget to impose any such requirements as a condition to the consent when issued. The lease should give the landlord a checklist of what to require, assuming that the landlord will think of opening up the lease and looking at it when the tenant actually seeks consent.

7.02 **Deemed Consent.** If the landlord has agreed that failure to grant consent within a specified number of days will be deemed consent, try to: (i) have this concept apply only in particular areas, such as consents to transfers or alterations; (ii) require a reminder notice before the deemed consent arises; and (iii) require both the original notice and the reminder notice to state conspicuously in all capital boldface letters that the landlord must respond within that period or will be deemed to have granted its consent.

7.03 **Discretionary Consents.** If the business agreement between the parties does not require the landlord to be reasonable about any particular action or event, then simply ban that action or event—instead of requiring "consent in Landlord's sole discretion"—to avoid possible claims of an implied obligation to act reasonably. Also, in this case, negate any implication that the landlord must at least consider whatever proposal the tenant presents. The tenant can always request the landlord's consent to anything, and the landlord can always choose to grant it, at any time during the lease term.

7.04 **Limitation of Remedies.** State that if the landlord wrongfully withholds consent (for example, the landlord acts unreasonably even though it agreed to act reasonably), then the tenant's only remedy consists of specific performance—not monetary damages, and especially not consequential damages. As a backup position, the lease could require expedited arbitration, perhaps with the potential arbitrator(s) designated in the lease. This might particularly make sense for construction disputes, if the tenant anticipates performing substantial construction. In these cases, or any other case where issues seem likely to arise, confirm with the designated arbitrator(s) that they are willing to serve. Negate any potential tort or common law liability as a result of withholding consent unreasonably or in violation of the lease or applicable law.

7.05 **No Representation.** State that the landlord's consent to anything is not a representation or warranty that the matter consented to complies with law or will meet the tenant's needs or otherwise makes any sense at all. In the case of alterations, the landlord should not be responsible for any contractors, architects, or engineers, even if the landlord approved or required them.

7.06 **Reasonableness.** Consider eliminating general references to "reasonableness" when describing a requirement for landlord consent. Instead, list specific permitted criteria, then agree that the landlord must act reasonably only once the tenant has met those criteria. Any mortgagee's disapproval of a matter should automatically constitute a "reasonable" basis for the landlord to withhold consent. Without some criteria or

clear flexibility for the landlord, as a threshold before the landlord must act "reasonably," the interpretation of "reasonableness" can result in litigation often stacked in favor of the tenant. Consider requiring arbitration on any issue of reasonableness.

7.07 **Scope of Consent.** Any consent applies only to the particular matter under consideration, and does not waive any future requirement to obtain the same consent if similar matters arise later.

7.08 **Survival of Conditions to Consent.** Whenever the tenant must satisfy certain conditions to obtain the landlord's consent (or to take any action without obtaining the landlord's consent), consider as a general conceptual proposition whether the lease should require the tenant to cause those conditions to remain satisfied even after the consent is granted or the action taken.

8. Default

8.01 **All Rent Due at Signing.** Consider requiring the tenant to pay all rent for the term of the lease at signing, but state that the landlord agrees to accept monthly installment payments only so long as no event of default exists.

8.02 **Cross Defaults.** Provide for cross defaults as against other leases with the landlord or its affiliates, or even against other obligations of the tenant or its affiliates, such as financial covenants under bank loans.

8.03 **Default Notices.** Provide that default notices need not specify cure periods; instead, the cure period will be whatever the lease provides for the particular default. (Does this work under governing landlord-tenant law?) Although any default notice will need to specify the default, give the landlord the right to supplement any default notice to include any additional defaults that were missed or correct any miscalculations, without thereby extending the tenant's cure period, unless the change is substantial.

8.04 **Discount for Timely Payment.** Consider increasing "face rent" in the lease by some high percentage, but also state that if the tenant pays its rent by the first day of the month, then the tenant receives a discount equal to the increased part of the rent. Although this is a creative suggestion occasionally seen, it may create unintended and unexpected grief in such areas as brokerage commissions, commercial rent tax, and property tax assessments. Thus, before adopting this suggestion counsel should consider its possible unintended consequences.

8.05 **Impairment of Business.** Define an event of default to include events (beyond the usual insolvency list) that may indicate the tenant is preparing to shut down. These might include the tenant's announcing that it will make substantial distributions, dividends, or asset sales outside the ordinary course of business; shut down its operations elsewhere; suspend or terminate a substantial part of its business; or lay off staff above a certain threshold. At a minimum, require reporting of these matters.

8.06 **No Right to Cure Event of Default.** Once an event of default has occurred, should the tenant have a wide-open cure right even after the tenant's cure period has already lapsed? Whenever the landlord can exercise remedies "if an event of default shall have occurred and be continuing," this quoted language may effectively give the tenant an open-ended right to cure the event of default, provided the tenant does so before the landlord actually exercises its remedies. Does the landlord really want that? Also say that if the landlord accepts rent after giving a notice of termination of the lease, the rent constitutes merely a payment on account of sums due. It does not vitiate the notice of termination or any landlord right to terminate unless it brings current all arrearages. The landlord may want to state once that, if the landlord has actually given a valid notice of termination of the lease, then whatever cure rights the tenant previously had no longer exist, except as law requires.

8.07 **Noncurable Defaults.** State that certain defaults are noncurable, such as prohibited transfers.

9. Destruction, Fire and Other Casualty

9.01 **Disaster.** Consider drafting a clause to address loss of the tenant's ability to use the premises because of disaster conditions that go beyond the building, or arise entirely outside the building, such as flood or terrorist attack. Under these circumstances, a landlord will face pressure to forgive rent if the tenant cannot use the premises. It might make sense to insure the risk, if possible, and provide for abatement in the lease.

9.02 **Insurance Coordination.** Whatever the landlord does regarding rent abatement, make sure it matches the landlord's insurance coverage, to prevent surprises and problems.

9.03 **Rent Abatement.** If the landlord maintains rental income insurance, rather than requiring the tenant to maintain business interruption insurance, then the lease should allow the ten-

ant to abate rent for a casualty. If, however, the casualty affects only part of the premises, then limit the abatement accordingly, so it applies only to the extent that the premises are not usable.

9.04 **Tenant Waiver.** Require the tenant to waive the provisions of New York Real Property Law Section 227 (which allows a tenant to terminate a lease in the event of a casualty that renders the premises untenantable), and comparable provisions in other states.

9.05 **Termination Right; Limitation on Restoration.** Provide no right (or a limited right) for the tenant to cancel upon casualty. To the extent the lease requires the landlord to restore, impose appropriate conditions, including completion of insurance adjustment and recovery of adequate insurance proceeds.

9.06 **Time to Restore.** If the landlord has the right or obligation to restore after a casualty, measure any deadline from the landlord's receipt of insurance proceeds—not from the date of casualty. Insurance policies require restoration "with due diligence and dispatch." If the lease defines an unrealistically short restoration period and allows the tenant to terminate the lease if the landlord misses the deadline, this could create a lender issue. Moreover, depending on policy language, any resulting lease termination may not constitute loss covered by the landlord's insurance program.

10. Development and Asset Management

10.01 **Air and Development Rights.** If the project includes development rights from other locations, should the landlord include them as part of the definition of the project? The answer may vary depending on state and municipal law, as well as the landlord's strategies for handling real estate taxes and related escalation clauses in leases. Have the tenant waive any right to object to any merger or transfer of development rights, and agree to sign any zoning lot merger if requested to do so. The tenant should have no right to limit any other uses within the project.

10.02 **Building Identification.** Allow the landlord to change the name or address of the building. Require the tenant to refer to the building only by whatever name or address the landlord gives it.

10.03 **Building Standard Specifications.** The landlord should reserve the right to modify building standard specifications. Consider the implications of any modification to building standards or specifications. For example, if the landlord wants to divide the building or shopping center into pieces, any CAM charges should continue to be calculated as if the landlord owned the entire property as one unit.

10.04 **Condominium Conversion/Ground Lease.** If the landlord considers condominium conversion at all likely, the lease should cover this possibility. Allow the landlord to delegate its responsibilities to the condominium board. Require the tenant to join in or consent to the condominium declaration, if governing law might require that. Adjust pass-throughs to include condominium fees as appropriate. Consider how condominiumization would affect building operations, the use clause, base years, escalations, and everything else. What role should the condominium board have? The landlord should also retain the right to create a ground lease of the entire building, which raises similar issues. Require the tenant to cooperate, as reasonably necessary, provided any new structure produces no material adverse impact on the tenant.

10.05 **Construction Restrictions.** State that nothing in the lease limits by implication the landlord's right to construct or alter any improvements (including kiosks) anywhere on the landlord's property. If the lease does contain any such restrictions, state that they are limited to their express terms.

10.06 **Demolition.** Allow the landlord to terminate the lease after reasonable notice if the landlord intends to demolish the building. Give the landlord a similar right if the landlord plans to redevelop the building, such as by changing its use or reconfiguring it. Set as low as possible a standard for the landlord to satisfy. For example, avoid any requirement that the landlord must be unalterably committed to demolition or must have terminated other leases or obtained a demolition permit or construction financing. It should suffice that the landlord has decided to redevelop the property or has entered into a contract to sell the property to a developer. Give the tenant incentives to cooperate. Set up a process so the landlord will find out quickly whether the tenant will try to fight the early termination of the lease. For example, the lease can require the tenant, promptly after receiving a termination notice, to deliver an appropriately tailored estoppel certificate and an increased security deposit. Pay the tenant a demolition fee only if the tenant vacates strictly on time.

10.07 **Expansion Rights.** If the landlord might want to expand the physical size of the building, such as by adding floors, build in enough flex-

ibility so the landlord can prevent any issues that might arise from the expansion. More specifically:

10.07.01 Consider resetting base years after the expansion.

10.07.02 Consider how the expansion would affect the tenant's proportionate share for escalations (after completion and lease-up).

10.07.03 Require the tenant to sign appropriate documents as needed.

10.07.04 Allow the landlord to expand the measure of real estate taxes by adding other tax lots to the project.

10.07.05 Allow the landlord to reconfigure parking and the building as a whole.

10.07.06 Provide that the lease will be automatically subordinate to any future easements and other recorded documents the landlord signs to facilitate further development.

10.07.07 Review / revise / adjust the definition of "Building."

10.07.08 Give the landlord the right to enter the premises to install structural supports for any construction above the premises; to install new posts, pillars, or supports as necessary; and to move walls around to accommodate any of this work. Allow the tenant an equitable rent adjustment for any significant interference or reduction of the premises, but have the tenant waive any right to an injunction, damages, or claim of constructive eviction. (Commentators raised their eyebrows when a case reached the result the previous sentence suggests, even in the face of silence in the lease. Despite the landlord-friendly outcome in that case, a careful landlord's counsel will want to prevent the issue entirely.)

10.07.09 The tenant should waive any rights to light or air, within limits.

10.08 **Expiration Dates.** The landlord may want to plan strategically so that all leases (or at least adjacent leases) end on the same date, to help the landlord put together large blocks of space for possible future tenants. Or the landlord may want to stagger multiple lease expirations over multiple years, so the landlord never faces "too many" lease expirations at once. This all depends on the landlord's tastes and overall long-term strategy for the building.

10.09 **Relocation.** Give the landlord the right to relocate the tenant to comparable premises in the building or in some other specific building the landlord or its affiliate owns.

10.10 **Remeasurement.** If, over time, market conditions allow the landlord to nominally "expand" the building by remeasurement, make sure that will not produce any unpleasant surprises under this particular lease—e.g., an increase in the denominator for calculating this tenant's share, without a corresponding increase in the numerator.

11. Electricity

11.01 **Additional Electrical Capacity and Riser Rights.** If the tenant negotiates additional power and / or additional riser space, the landlord will want to preserve remaining electrical capacity and / or riser space for other tenants. Might the landlord want the tenant to remove any additional installations at the end of the lease term? Ordinarily no, but exceptions may arise.

11.02 **Change of Provider.** State that if the landlord changes the electricity provider for the building, the tenant must use the new provider, to the extent legally allowed, even if the tenant directly meters its own consumption.

11.03 **Delivery of Electrical Service.** The tenant should comply with electrical conservation measures and any limits on power grid availability, including required shutdowns that may arise. Allow the landlord to shut down electrical service to the premises when needed for alterations and other legitimate reasons so long as the landlord gives notice and the disruption is limited.

11.04 **Electrical Service.** If the tenant's space is directly metered, require the tenant to keep the landlord informed of the tenant's electrical consumption, with copies of bills. This may facilitate the landlord's long-term planning of electrical service for the building and future releasing of the space.

11.05 **Electricity Measurement.** In defining the electrical capacity that the landlord must provide, multiply the required watts per square foot by usable, not rentable, square feet. Then come up with a certain number of watts, because the lease should not use the words "rentable," "usable," or "square foot."

11.06 **Post-Termination Electric Charges.** To the extent any utility provider has the right to recalculate charges and bill the landlord later, expressly allow the landlord to bill the tenant for its share of such charges. If the electric utility has a certain time within which it can send

such a bill, give the landlord at least the same time plus 60 days for processing.

12. End of Term

Some of the following comments about "end of term" issues also apply if the tenant has the right to prematurely or partially terminate the lease. The lease should treat any such termination as the end of the term, at least for certain purposes relating to the affected part of the premises.

12.01 **Abandoned Personalty.** Upon lease termination, any personalty in the premises that the lease requires the tenant to remove, but the tenant does not remove, should be deemed abandoned. Require the tenant to pay to remove and store that personalty unless the landlord elects to retain or discard it.

12.02 **Cables, Conduits.** The landlord should retain ownership of all cables and other wiring in the building. Require the tenant to remove cables, conduits, wires, raised floors, and rooftop equipment at the end of the lease term either in all cases or at the landlord's request. Require the tenant to indemnify the landlord from all liability in connection with that removal. To the extent that the lease allows any of these items to remain, require the tenant to properly cap and label them.

12.03 **Consequential Damages.** If the tenant holds over, require the tenant to pay all damages the landlord incurs, including consequential damages such as the loss of the next prospective tenant. If necessary, consider giving the tenant a window of up to 60 days before consequential damages apply. Holdover rent would apply as usual.

12.04 **Holdover.** Consider providing that if the tenant fails to vacate the premises at the end of the term, the tenant must pay a use and occupancy charge (not "rent") equal to the greater of: (i) some high percentage of the final adjusted rent (including escalations) under the lease; and (ii) some high percentage of the then fair market rental value of the entire premises. Calculate the charge on a monthly basis for an entire month for every full (or partial) month the tenant holds over. Confirm what the maximum enforceable holdover rate may be. Describe this payment as liquidated damages and not a penalty. Consider simplifying matters by saying that during the final year of occupancy the tenant must pay either fair market appraised rent, or a very, very high rate. Give the tenant an option to terminate the lease effective just before that last year of the term begins, on at least a year's notice. This way, if the tenant stays, the landlord can try to collect very high rent. The landlord does not have to hold its breath to the last minute to see if the tenant will decide to default. The whole arrangement looks something like the "anticipated repayment date" and "hyper-amortization" provisions that sometimes appear in securitized loans.

12.05 **Landlord's Property.** At the landlord's option, the tenant should leave behind any improvements, fixtures, or personal property that the landlord paid for, including by rent abatement. Consider the tax implications of ownership. Consider to what extent the tenant can remove improvements and fixtures. Should the landlord be able to prohibit the tenant from removing these items?

12.06 **Obligation to Restore.** Require the tenant to restore the premises, including removing signage, at the end of the term. State that the landlord's consent to any alteration does not waive the tenant's obligation to remove it and restore the premises at the end of the term—particularly for major or difficult-to-restore alterations such as a slab cut for an internal staircase. To the extent that the landlord wants—or might want—the tenant to leave a major alteration in place, give the landlord that right. Where appropriate, specify by exhibit which alterations may remain, which must remain, and which the tenant must remove and restore. The restoration obligation should survive expiration or sooner termination of the lease. State that if the tenant does not complete restoration or other end of term activities (such as environmental remediation) by the expiration date, the tenant must pay holdover rent until completion.

12.07 **Security Deposit.** Consider requiring an incremental security deposit, a few years before the end of the term, to back the tenant's end-of-term obligations. Security deposits often "burn off" over time, with the result that little security deposit remains when it may most matter, at the end of the term.

12.08 **Survival.** The tenant's obligations and liabilities under the lease should survive the expiration or termination of the lease.

12.09 **Tenant Waiver.** Require the tenant to waive any civil procedure law or rule that would allow a court to issue a stay in connection with any holdover or other summary proceedings the landlord might institute.

12.10 **Time of Essence.** State that "time is of the essence" for the tenant's obligation to vacate the premises.

12.11 **Timing.** The landlord may prefer not to have leases expire during a holiday season or before or after a long weekend.

12.12 **Warranties.** If the tenant surrenders space (either at the end of the term or because the tenant reduces its occupancy), require the tenant to assign to the landlord any warranties the tenant received for any improvements or equipment surrendered.

13. Environmental

13.01 **Copies of Notices**. Require the tenant to promptly deliver copies of all notices it receives from any state or federal environmental agency relating to the property.

13.02 **End-of-Term Assessment.** Where applicable, allow the landlord to require an environmental assessment at the tenant's expense at the end of the term. Require the tenant to remediate any conditions that would have been the tenant's responsibility under the lease.

13.03 **High Risk Uses.** For a gas station or other high-risk use, consider: (i) establishing an environmental baseline by undertaking a sampling plan or environmental assessment before occupancy (to define what problems, if any, already exist); (ii) requiring periodic monitoring, especially at locations where groundwater might be readily affected, and along perimeter areas where migrating oil can be detected; (iii) obtaining an indemnification that is both very broad (all environmental risks) and very specific (particular environmental issues arising from the tenant's particular business); (iv) requiring the tenant to post a bond if the tenant cannot obtain environmental liability insurance; (v) if underground tanks already exist, requiring the tenant to: (1) accept the tanks "as-is;" (2) comply with all applicable laws, including obtaining all permits (as well as annual registration and recertification); (3) post all required financial assurances; (4) maintain, repair and replace, if required, all tanks; (5) maintain all required records and inventory controls; (6) deliver evidence of compliance (e.g., copies of recertifications) according to a reasonable schedule; and (7) comply with any present or future lender requirements.

13.04 **Interior Air Quality.** Disclaim any landlord liability for mold, bad air, or "sick building syndrome." Also allow the landlord to prohibit smoking anywhere in the building or at adjacent sites such as sidewalks and terraces.

13.05 **Landlord Indemnification.** If the landlord agrees to indemnify the tenant for past environmental problems, limit this indemnification to any liability that exists under present law based on present violations. Exclude any liability arising from the act of a third party, future laws, amendments of existing laws, or any action (or failure to act) of the tenant that exacerbates any existing condition or increases any existing liability.

13.06 **LEED Compliance.** If the landlord seeks to comply with LEED, the landlord may need to include suitable language in the lease, and modify some typical lease provisions. As one element of green leasing, the landlord may require in every relevant context that the tenant comply with the landlord's environmental requirements or guidelines and perhaps anything necessary to preserve the landlord's LEED or other certification. This all works very well until it starts to cost the tenant an undefined and unknowable amount of money. If the landlord has agreed with other tenants to maintain LEED certification, then the landlord may not have much flexibility on these issues. Therefore, the landlord should try to avoid making any ironclad LEED commitments to any tenants.

13.07 **Notice of Hazardous Conditions.** Require the tenant to promptly notify the landlord of any leaking or other hazardous or potentially adverse condition on the premises, including mold, leaks, and other conditions that could cause mold. Require the tenant to abate any such circumstances promptly, except any that are the landlord's responsibility.

13.08 **Reports; Inspections.** The tenant should agree to deliver, or reimburse the landlord's cost to obtain, updated environmental reports. Give the landlord and its environmental consultant the right to enter and inspect the premises and perform environmental assessments, including invasive assessments, if the landlord reasonably believes that a violation of environmental law exists, all at the tenant's expense.

13.09 **Tank Removal.** The landlord might want the right to perform a further environmental assessment at the end of the term, and require the tenant to remove any underground storage tanks (especially but not only if the environmental assessment discloses problems) and perform any required remediation. Condition the return of the tenant's security deposit on the tenant's completing any such removal and/or remediation.

13.10 **Tenant Indemnification.** Require the tenant to indemnify the landlord against all harm aris-

ing from the tenant's use and occupancy of the premises and the property. Specify that the tenant's indemnity includes all environmental matters and extends to anything that the tenant installs anywhere. The indemnity should survive the expiration or termination of the lease.

14. Escalations

14.01 Audit Issues (Operating Costs).

14.01.01 **Auditors**. Prohibit contingent fee auditors or auditors that have worked for other tenants in the building. If the landlord agrees to reimburse audit costs, e.g., if the tenant's audit reveals a certain level of mistakes, then negate any reimbursement to contingent fee auditors. Consider requiring a national CPA firm. Insist that such firm agree to notify the landlord of any undercharges or errors in the tenant's favor that the audit discloses, and to give the landlord a copy of the auditor's full report. If the auditor does not, the tenant should agree to do so. If the tenant engages any particular lease auditor, require that lease auditor to agree not to represent other tenants in the building.

14.01.02 **Claims**. Require specificity, completeness, and finality in any tenant claim of discrepancy or error.

14.01.03 **Condition for Audit**. Allow the tenant to audit operating costs only if those costs increase more than a specified percentage over a specified prior year or base year.

14.01.04 **Confidentiality**. Require the tenant and its auditor to sign a confidentiality agreement satisfactory to the landlord for any audit and its results before disclosing any records or information to the tenant or its auditor. The agreement should, among other things, prohibit the tenant and its advisors from disclosing the existence of any audit or any of its results, including any settlement, particularly to other tenants in the building. The tenant's breach of the confidentiality agreement should constitute an incurable default under the lease or at a minimum preclude the tenant from initiating further audits for several years.

14.01.05 **Costs of Audit**. Ask the tenant to pay for the landlord's out-of-pocket costs for any audit (such as photocopying, staff time, document retrieval, accountants' time spent answering inquiries, etc.), at least if the audit fails to disclose any issues serious enough that they would make the landlord responsible for the audit costs.

14.01.06 **Dispute Resolution**. Provide a private and final mechanism (such as arbitration) to resolve any dispute about operating costs.

14.01.07 **Inspection Restrictions**. Allow the tenant (or its representative) to examine specified books and records only, and only for a specified period, but prohibit copying. Require that any audit comply with the landlord's reasonable requirements and instructions. On assignment, prohibit the new tenant from auditing for any period before the date of the assignment.

14.01.08 **Limits**. Limit the timing, frequency, and duration of audits. Require the tenant to complete the audit within a stated time after notifying the landlord of the audit. Consider requiring the tenant to audit multiple years at once, or requiring that the notice of audit specify the specific issues the tenant intends to raise (difficult or impossible if the tenant has not yet seen any of the underlying records).

14.01.09 **Threshold for Payment**. If overcharges (net of undercharges) total three percent or less of total annual operating costs (a generally accepted definition of "materiality"), then the tenant should receive no adjustment or reimbursement of its audit costs. Define carefully the variable against which the three percent test will apply. Try to use a variable that will be large rather than small. For example, refer to three percent of gross annual operating costs rather than three percent of the tenant's escalation payment. Try to use a higher percentage.

14.02 Generally.

14.02.01 **Base Year**. Consider whether anything might make the current base year for operating costs unusually high, such as a spike in insurance costs, energy cost spikes, a change in management, or extraordinary repairs. Normalize the base year for operating costs to adjust for such unusual spikes. Or, instead, consider a fixed dollar amount to define the base.

14.02.02 **Brokers' Commissions**. Exclude all escalations from the calculation of broker's commissions in the brokerage agreement.

14.02.03 **Ease of Proof**. Make operating costs easy to prove. The landlord does not want to have to prove all the underlying facts. How would a judge respond to the definition of "operating costs" in the lease, and all the various definitions and exclusions? Ask a litigator. Perhaps the calculation should come from the landlord's outside accountant, and not be subject to challenge except based on manifest error.

14.02.04 **Examples**. For any complex or intricate escalation formula, consider adding an example, but do not make the numbers dramatic or shocking. Keep in mind, though, that the formula should speak for itself. By adding an example, one says the same thing twice, introducing the risk of inconsistencies. The example should add nothing. If it adds anything at all, then it also adds risk.

14.02.05 **Fixed Fee**. Consider replacing escalations based on operating costs or CAM with a fixed formula.

14.02.06 **Implied Covenants**. State that the landlord has no obligation to use operating cost escalations to pay operating costs.

14.02.07 **Liability for Refunds or Rent Credits**. The landlord's liability for any refund (or credit) of overpaid escalations should terminate after a specified number of years. It should also terminate automatically upon any sale, receivership, or foreclosure of the building. Otherwise, the possible overpayment may create open-ended obligations or issues for the landlord, particularly at the time of sale. Consider whether the landlord should have the right to pay in installments any refund that the landlord might owe, or limit the tenant's relief to a future offset against rent, unless the lease expires before the tenant fully recovers what's due.

14.02.08 **No Decrease**. Escalation formulas should never allow rent to go down.

14.02.09 **Survival; Timing**. Limit the time during which the tenant may challenge any escalation or demand a refund that the landlord "forgot" to pay. Be careful, though. The tenant may try to make this reciprocal for the landlord's billings. All the tenant's obligations on escalations should survive the expiration or termination of the lease.

14.03 Operating Costs.

14.03.01 **Broad Definition**. Consider any special characteristics of the property that could cause the landlord to incur costs outside the typical operating cost definitions in a generic lease. For example, if a reciprocal easement agreement or a ground lease imposes costs similar to real estate taxes or operating costs, expand the appropriate definition to include them.

14.03.02 **CAM**. Avoid the term "CAM" (common area maintenance) because operating cost escalations cover far more than common area maintenance. A tenant may argue that the phrase "CAM" is somehow deceptive.

14.03.03 **Capital Expenditures**. Ideally, the base year would disregard any contribution to capital expenditures—even their partial amortization. Amortize capital improvements only in the comparison years, not the base year, for operating costs. In that case, unusual capital expenditures in the base year would not raise an issue. Only the adjustment years would include amortization of capital expenditures as part of operating expenses. Try to tack on an interest factor on the landlord's unreimbursed capital outlay.

14.03.04 **"Gross Up" Clause**. The landlord should have the right to "gross up." For example, if the building has an occupancy level under 95 percent, increase the amount of operating costs to the amount that the landlord would have incurred for full occupancy. Expect the tenant's lawyer to negotiate a gross-up in the base year operating costs as well.

14.03.05 **Major Repairs**. Do not necessarily limit multi-year amortization of large repair costs to "capital" items. Particularly if leases limit escalations or if the landlord worries about base years for new leases, the landlord may want the ability to spread major noncapital repair costs, and new costs of legal compliance, over multiple years.

14.03.06 **No Fiduciary Duty**. Negate any fiduciary duty regarding operating cost escalations and their administration, and any other lease provisions.

14.03.07 **Off-Site Costs**. Avoid limiting "operating costs" to those incurred physically within the particular building. The landlord may incur off-site operating costs, such as in a multi-use project (such as holiday decorations in a central plaza) or for off-site equipment, installations, or shuttle bus service for the benefit of the building. Likewise, if municipal approvals for development of the building required the landlord to incur continuing off-site expenses, treat those as additional operating costs. Examples might include maintenance of traffic improvements, a day care facility, or a sculpture park containing statues of the Mayor and City Council.

14.03.08 **Reality Connection**. When negotiating the operating cost escalation clause, confirm that the clause, particularly as negotiated, matches the landlord's current practices in operating the building, so the landlord can actually make the necessary calculations and adjustments without experiencing a long, slow descent into accountancy hell. Consider consulting with the landlord's accountant and the building manager. Ask both to review the definition of operat-

ing costs and any exclusions. Try to keep these definitions consistent across multiple leases.

14.03.09 **Reserve Charge**. Operating expenses should include repair and replacement reserves. To avoid common arguments about how to treat "capital" items, consider establishing an annual per-square-foot capital reserve charge. The landlord would not need to account for these funds and the lease would define categories of "capital type" costs to which tenants need not contribute. If, however, this reserve charge stays constant from year to year, including the base year, then the reserve charge on its own will not allow the landlord to recover a penny under the typical pass-through of only increases in operating costs. Therefore, make the reserve charge a separate additional charge.

14.03.10 **Timing**. Try not to agree to tight time limits (or, worse, a "time is of the essence" provision) for the landlord's obligation to provide operating statements. The landlord should, of course, try to be timely, based on cases that have required such timeliness based in part on an inferred "fiduciary duty" because the landlord controls the information.

14.03.11 **Use of Generally Accepted Accounting Principles ("GAAP")**. In defining operating "costs" (not "expenses," perhaps an accounting term of art), try not to refer to GAAP. The term often arises in two places: (i) when defining what the landlord can pass through to tenants; and (ii) when excluding "capital" items. GAAP may unintentionally skew the calculation of operating costs in ways the landlord would regard as a surprise. Again, coordinate with the landlord's accountant.

14.04 **Other Escalations.**

14.04.01 **Consumer Price Index**. Use the Consumer Price Index for all Urban Areas ("CPI-U") index. Many believe that this index has historically increased faster than the Consumer Price Index for Urban Wage Earners and Clerical Workers ("CPI-W") index.

14.04.02 **Fixed Percentage Increase**. Neutral, predictable, and easy to administer, though the landlord must still remember to do it.

14.04.03 **Porter's Wage**. Include fringe benefits and all other labor costs. The wage rate used should not reflect "new hire" or other transitional wage rates.

15. Estoppel Certificates

15.01 **Additional Requirements.** In defining the scope of an estoppel certificate, allow the landlord to require any additional information the landlord reasonably requests. Think about uncertainties that, at some later date, a lender might want the tenant to confirm—such as whether the tenant exercised an option, the dollar amount of base operating costs, or any nonstandard dates that might help define either party's obligations.

15.02 **Attach Documents.** Require the tenant (if asked) to attach to any estoppel certificate a copy of the lease and all amendments, option exercise letters, and other documents that define the landlord-tenant relationship.

15.03 **Exhibit.** Attach a form of estoppel certificate as a lease exhibit (conform to typical lender requirements), but build in flexibility for future lender requests. Include a certification of the tenant's current ownership structure. Include "reliance" language to support enforceability.

15.04 **Failure to Respond.** Establish specific, meaningful remedies for failure to sign an estoppel certificate within a short period. These might include a deemed estoppel, a power of attorney to execute it for the tenant, or a daily nuisance fee.

15.05 **Future Estoppels.** Require the tenant to deliver future estoppel certificates at any time on the landlord's request. If the tenant negotiates restrictions on the frequency of estoppel certificates, then think about other specific occasions when the landlord might want an estoppel certificate, and perhaps provide for those (e.g., completion of improvements, exercise of renewal option).

15.06 **Ratify Guaranty**. Allow the landlord to require a confirmation / ratification of any guaranty, and an estoppel certificate from the guarantor, not merely an estoppel certificate from the tenant.

15.07 **Reliance.** Allow reliance by prospective purchasers, mortgagees or any participant in a future securitization, including rating agencies, servicers, trustees, and certificate holders. What about the landlord? If the landlord cannot demonstrate detrimental reliance, a court might conclude that an estoppel certificate does not estop the tenant as against the landlord. Thus, the lease should perhaps say that an estoppel certificate binds the tenant as against the landlord, even if the landlord cannot demonstrate detrimental reliance.

16. Failure to Deliver Possession

16.01 **Condition of Premises.** Substantial completion should suffice (for example, temporary certifi-

cate of occupancy) for the landlord's delivery of the premises.

16.02 **Delivery Dispute.** Provide for a short deadline for the tenant to report any issue or problem about the premises or the landlord's work. If possible, state that taking of possession constitutes acceptance for all purposes.

16.03 **Delivery Procedure.** Try to tie the "Commencement Date" to an objective event—preferably within the landlord's control—or a date, rather than to any notice from the landlord. Notices are often not as easy or quick to give as they often seem to attorneys drafting leases. Any delay in giving a commencement date notice will mean lost revenue for the landlord.

16.04 **No Liability.** The landlord should incur no liability for failing to deliver possession on the commencement date for any reason, including holdover or construction delays. The lease should expressly waive any applicable law that may provide otherwise. The tenant's obligation to pay rent should start on possession. Perhaps extend the term by the duration of any landlord delay in delivering the premises, especially if the delay exceeds a certain amount of time. But, depending on state law, without an outside deadline for delivery, the lease may be subject to attack under the rule against perpetuities.

16.05 **Rent Abatement.** To the extent the landlord agrees to give the tenant a rent abatement for late delivery, limit the duration of the abatement (for example, if the rent abatement exceeds a set number of days, thereafter the tenant must either terminate or wait, but cannot continue to abate). Try to defer any such abatement (for example, spread it out in equal annual installments over the remaining term of the lease, rather than front-load it). This will reduce immediate damage to the landlord's cash flow at a time when the landlord may face financial stress.

16.06 **Termination Right.** The landlord (not just the tenant) may want the right to terminate the lease if the landlord ultimately cannot deliver possession by a date certain.

17. Fees and Expenses

17.01 **Attorneys' Fees and Expenses.** The tenant should reimburse the landlord's attorneys' fees and expenses both broadly and with specificity (for example, for actions and proceedings, including appeals, and in-house counsel fees and expenses). The reimbursement obligation should cover attorneys' fees and expenses incurred in connection with: (i) any litigation the tenant commences against the landlord (including any declaratory judgment action or any action to interpret or apply the lease), unless the tenant obtains a final favorable judgment; (ii) any litigation or arbitration the landlord commences against the tenant whether for default or specific performance; (iii) negotiating a lender protection agreement for the tenant's asset-based lender; (iv) the landlord's (or its employee's) acting as a witness in any proceeding involving the lease or the tenant; (v) reviewing anything that the tenant asks the landlord to review or sign; (vi) any lien filing arising from the tenant's work, even if the lien filing does not constitute a default; (vii) bankruptcy proceedings; (viii) providing the tenant with an estoppel or a subordination, non-disturbance and attornment agreement ("SNDA"); and (ix) considering and responding to any tenant request for an amendment or waiver.

17.02 **Fees and Expenses.** Require the tenant to pay any fees or expenses the landlord incurs, including legal costs, in connection with any consent or consent request, even if denied. Try to make the reimbursement obligation broad enough so it even applies if the tenant initiates discussions with the landlord for a totally discretionary lease amendment or waiver, as opposed to a consent already contemplated within the four corners of the lease. The tenant should also pay a fee (and expenses) for the landlord's review of any plans and/or specifications. Avoid a flat fee. Set the fee according to a formula based on the size of the job or hours necessary, with a floor.

18. Future Documents, Deliveries, Events, and Information

18.01 **Confidentiality.** The tenant should keep confidential the terms of the lease, particularly if the tenant's pricing is below current market value (or the landlord's conception of current market value) or the landlord's asking price for direct space. If the landlord provides the form of lease, require the tenant to acknowledge that the form is confidential. Require the tenant and its counsel to agree not to use the landlord's form of lease for other transactions, and not to disclose any concessions that the landlord made to this particular tenant.

18.02 **Further Assurances.** Require the tenant to enter into any amendments that the landlord reasonably requests to correct errors or otherwise achieve the intentions of the parties, subject to reasonable limitations.

18.03 **Future Events.** The parties should agree to memorialize any commencement date, rent adjustment, or option exercise in a lease amendment or confirmation letter. If the parties do not actually do that, though, the lease should say such failure does not affect either party's obligations. If the parties recorded a memorandum of lease, they will often need to record the confirmation of dates.

18.04 **Governmental Benefits, Generally.** Require the tenant to cooperate in a timely manner, as necessary, to help the landlord qualify for any available tax or governmental benefits, such as tax abatements.

18.05 **Landlord's Accommodations.** To the extent that the landlord agrees to provide future deliveries or take certain actions for the tenant's benefit, require the tenant to reimburse all costs and expenses the landlord incurs, including reasonable attorneys' fees.

18.06 **Limits on Tenant Rights.** To the extent that the landlord gives the tenant any special "right" or "privilege," condition it as appropriate. Certain minimum occupancy? No default? Other criteria or conditions? Maintenance of a certain financial strength? When the landlord agreed to the concession, what assumptions did the landlord make? What happens if those assumptions stop being true? For example, if the tenant's good credit eliminates any requirement for bonds or other landlord protections, undo this concession if the tenant's good credit turns bad. Can the tenant exercise any privilege or right only once or only within a certain period? Or does it apply throughout the lease term? Can the tenant assign any particular special privilege if the tenant assigns the lease? Or does the special privilege go away upon assignment? If the tenant exercises any privilege or right, should the lease require the tenant to deliver an estoppel certificate, any documents the tenant entered into in exercising the privilege or right, or any other documents? If so, state that the documents must be unredacted and true and complete copies. These issues potentially arise for every tenant "right" or "privilege," including permitted assignments, releases from liability, options, and exclusive uses.

18.07 **Original Lease Document.** The landlord may scan and destroy its original lease in the ordinary course of business. The landlord need never produce an original counterpart. Make sure this will not raise any problems in litigation in the particular jurisdiction.

18.08 **Permitted Disclosure.** If the landlord agrees to any confidentiality restrictions, or if governing law automatically infers such restrictions, then the landlord should exclude from such restrictions the right to disclose any information to actual or prospective mortgagees, equity investors, purchasers, or where required by legal process.

18.09 **Reporting.** Require the tenant to immediately report if the tenant or any guarantor experiences: (i) any adverse change in financial position; or (ii) any litigation that could adversely affect the tenant's or guarantor's ability to perform. For an individual guarantor, require the tenant to notify the landlord of the guarantor's death or disability. If the landlord receives such a notice, the landlord may need to file a claim with the guarantor's estate, or lose the benefit of the guaranty.

18.10 **Sales Reports.** Even if the tenant does not pay percentage rent, a retail tenant should still provide monthly sales reports and sales tax records. This helps assess the tenant's profitability, the long-term prospects of this tenant and the project, and how to approach future rent negotiations. Although such provisions are standard in mall leases, they probably make sense in all retail leases.

18.11 **Tenant's Financial Condition.** Require the tenant to deliver annual financial statements for itself and any guarantor. Negotiate the right to require a security deposit, rent adjustment, or other consequences to protect the landlord if the financial condition of either deteriorates.

18.12 **Tenant's SEC Filing.** A publicly held tenant whose lease is a "material obligation" must file a copy of the lease with the tenant's publicly available SEC filing. Therefore, consider having the tenant: (i) represent that the lease is not a "material obligation;" (ii) agree to notify the landlord if the tenant ever must publicly file the lease; and (iii) agree to try to have rental information and other economic terms redacted or given "confidential" treatment. If the lease is "material," however, the last suggestion might not be realistic, because if the lease was material then presumably its rent and economic terms are the most material part of the lease and hence the whole point of the exercise.

18.13 **Tenants Representations, Warranties, and Status.** The tenant should agree to update its representations and warranties from time to time and to stay in good standing throughout the lease term.

18.14 **Termination of Lease Memo.** If the tenant obtains a memorandum of lease: (i) the tenant should agree to execute and deliver a termination of memorandum of lease in recordable form if the lease terminates early; and (ii) consider requiring the tenant to sign such a termination at lease execution, to be held in escrow.

19. Guaranty

19.01 **Estoppel Certificate.** Any guarantor should agree, in the guaranty, to issue estoppel certificates promptly upon request. Any failure should constitute a lease default.

19.02 **"Good Guy" Guaranty.** If a tenant is not creditworthy, consider obtaining a "good guy" guaranty. This guaranty would cover all rent and certain other obligations under the lease, starting with mechanics' liens. Like "carveout guaranties" for loans, the scope of these guaranties has metastasized over time, potentially covering a wide variety of obligations under the lease. Any "good guy" guaranty would end when the guarantied obligations have all been performed (by the tenant or the guarantor) and the tenant surrenders the premises vacant, in satisfactory physical condition, and free of any occupancy rights, provided the guarantor gives X months notice of surrender and pays X months rent. Upon the tenant's surrender, and as a condition to release of the guaranty, the tenant should release the landlord in writing from all lease obligations. The "good guy guaranty" should remain in force until the guarantor has paid all sums due under the guaranty.

19.03 **Guarantor Consents.** Tailor the guarantor's consent / waiver boilerplate to reflect circumstances of the lease. For example, the guarantor should consent in advance to any future assignment of lease. The guaranty should also contain any state-specific language necessary or helpful for a guaranty.

19.04 **Guarantor Consideration.** In any guaranty, recite the relationship between the guarantor and the tenant to confirm the guarantor will receive some benefit from the lease.

19.05 **Guarantor's Financial Condition.** Require the guarantor to provide financial statements at lease execution. Require regular reporting of each guarantor's net worth, and then the landlord should remember to enforce that requirement. State that a material decline in a guarantor's net worth or a guarantor's death, disability, or bankruptcy constitutes an event of default unless the tenant promptly furnishes additional collateral or a new guarantor satisfactory to the landlord or meeting an agreed financial test, such as a net worth equal to some multiple of the annual rent. Any remedies triggered by a guarantor's bankruptcy should be enforceable against a tenant.

19.06 **Lease Assignment.** If the landlord sells the property, then the guaranty should, by its terms, automatically travel to the purchaser, whether or not the transfer documents say so.

19.07 **Social Security/EIN Number/Address.** State the Social Security or employer identification number (and, perhaps, driver's license and passport) number and home address of any guarantor beneath its signature line. This underscores the fact that the guaranty is intended to constitute a personal obligation of the guarantor and may facilitate enforcement. In the case of any foreign or out-of-state guarantor, require appointment of an in-state agent for service of process and a consent to jurisdiction.

19.08 **Springing Guaranty.** Consider a springing guaranty if certain adverse events occur, such as a material reduction in the tenant's or a guarantor's net worth.

19.09 **Tenant Bankruptcy.** Any guarantor and any unreleased assignor should acknowledge that its liability will not decrease if a tenant bankruptcy "caps" the landlord's claim for "rent."

19.10 **Unreleased Assignors.** If the tenant assigns the lease, then unless the landlord has released the assignor, recognize that the assignor remains functionally a guarantor of the lease. Any reference to a guarantor of the lease should include any unreleased assignor, and the lease should treat them the same way.

20. Inability to Perform

20.01 **Exception to Force Majeure.** Force majeure should never limit any monetary obligation of the tenant, or any obligation to maintain insurance.

20.02 **Force Majeure.** For the landlord, force majeure should include a failure to obtain governmental consents or permits and acts of government, war, terrorism and insurrection.

20.03 **Triggering Event.** If the tenant negotiates a force majeure clause, require the tenant to notify the landlord promptly of any "force majeure" event. If the tenant doesn't notify the landlord quickly, then the tenant cannot claim force majeure. The tenant's extension of time to perform should continue only so long as the triggering event actually causes the tenant delay.

21. Initial Alterations

21.01 **Completion of Landlord's Work.** When the landlord completes any work it agreed to perform for the tenant, require the tenant to deliver an estoppel certificate confirming satisfactory completion. The lease will probably already allow the landlord to request an estoppel certificate at any time. The landlord just needs to remember to exercise that right.

21.02 **Minimum Tenant Payment.** Require the tenant to spend some minimum amount on its initial build-out, either generally or as a condition to satisfy before the landlord must make any contribution.

21.03 **Landlord's Work.** Because rent commencement will probably hinge on the landlord's completion of any work the landlord agreed to perform, scrutinize the scope and process for that work to assure that the landlord can accomplish it in a timely way without any need for cooperation from the tenant. As a small example, if anything requires the tenant's approval, even reasonable approval, the landlord can lose time if the tenant disapproves or delays its approval. Minimize any such requirements, and think about all the measures you can take to mitigate the effect of consent requirements. Some are described in other sections of this checklist. The process of defining and completing any initial build-out requirements raises a huge number of issues large and small, which this checklist does not further address.

21.04 **Punchlist Waiver.** If the landlord has delivered the premises to the tenant, and the tenant starts alterations (or takes occupancy to conduct business) in any area, then the tenant waives any claims about the landlord's work in that area, unless previously included in a punchlist notice to the landlord.

21.05 **Tenant Improvement Allowance.** Coordinate the landlord's payment of any tenant improvement allowance with the terms of the landlord's construction loan or other financing. Make sure the requisition and funding schedules and conditions align.

21.06 **Tenant Work Letter.** The tenant work letter will become part of the lease. Give it the same (if not greater) legal scrutiny as the rest of the lease. The landlord should confer with its architect to make sure the landlord can reasonably deliver what the work letter requires.

21.07 **Use of Funds.** Allow the landlord to keep any portion of the tenant improvement allowance not used by a specific date. Limit the tenant's ability to use its improvement allowance for anything that does not directly improve the landlord's real property. For example, exclude "soft costs," furniture, and network wiring.

22. Insurance

22.01 **Additional Insureds.** Include the landlord and its managing agent and mortgagee as "additional insureds," not "named insureds." Require that coverage for the additional insured parties be primary. Any other insurance available to an additional insured party should not be called upon to contribute to a loss until the tenant's coverage (primary, umbrella and excess) is exhausted. Avoid the "named insured" designation. It may lead to liability for premiums and may prevent the landlord from seeking indemnification against the tenant for claims. Bear in mind that nobody is an additional insured under a policy unless the policy is endorsed to say so. Also, two kinds of additional insured endorsement exist. One purports to cover anyone who is required by contract to be so covered. The other actually identifies the additional insured by name. The latter is preferable as a matter of practice. It requires less proof in court. In contrast, a so-called "blanket" or "automatic" endorsement forces the additional insured to prove that the contract was executed before the loss occurred and that the contract is between the additional insured and the named insured. Carriers successfully reject a significant number of additional insured claims because the claimant failed to meet the technical details of the endorsement.

22.02 **Approval Rights.** Allow the landlord to approve the identity and financial condition of the tenant's insurance carriers. Set minimum financial rating standards for any insurance carrier (typically a minimum A:X by AM Best or A by Standard & Poor's).

22.03 **Coordination with Loan Documents.** Conform the insurance requirements in the lease to those in the landlord's current loan documents. Allow the landlord to change the insurance requirements in the lease as needed to comply with the landlord's and any mortgagee's future reasonable requirements.

22.04 **Evidence of Insurance.** In the case of first party property insurance that tenant must maintain, call for delivery of "evidence" of insurance through one of the "ACORD" forms. "ACORD" is the universally used acronym for Association for Cooperative Operations Research and Development, a nonprofit standard-setting body for the worldwide insurance industry. (For more information, visit www.acord.org.)

The forms would include the "ACORD 28" form, formerly "ACORD 27") or a copy of the tenant's insurance policy at lease signing, not a "certificate" of insurance (the "ACORD 25" form), which is a worthless piece of paper that may not lawfully be modified. For liability insurance, mandate the delivery of the policy itself and examine it for the endorsements that are necessary to make anyone at all an additional insured. The lease should require the tenant to deliver evidence of insurance whenever necessary to facilitate the landlord's refinancing of the property, with a nuisance fee for late delivery. State that the landlord's failure to demand evidence of full compliance with the insurance requirements or to identify a deficiency in whatever documents the tenant does provide does not waive the tenant's insurance obligations.

22.05 **Improvements and Betterments.** Have the tenant insure any improvements and betterments it makes to its space, not just its personal property.

22.06 **Insurance Advice.** Work with the landlord's risk management team to check, update, and improve—and above all confirm compliance with—the insurance requirements of the lease as appropriate. Try to get an insurance broker (engaged by either the landlord or the tenant) or consultant to confirm in a letter, directed to the landlord, that the tenant's insurance coverage complies with the lease. Keep an eye on TRIPRA / terrorism-related legislation; it has typically always had a sunset date, triggering a periodic crisis in the commercial real estate industry as each sunset date approaches. If the tenant engages a consultant, then the landlord may have no remedy against the consultant unless the consultant makes the landlord its customer. Absent such privity of contract, the third party may find itself without any remedy, at least absent fraud.

22.07 **Insurance Broker.** Allow the landlord (at its option) to deal directly with the tenant's insurance broker to obtain any insurance documents the lease requires. The tenant should expressly authorize the tenant's broker to release the requested documents. The lease should state that doing so imposes no liability or obligation on the landlord, and doesn't excuse the tenant from any obligations. Absent special agreements, a broker owes no duty to anyone who is not the broker's "customer," so in an important enough case, ensure that the requisite special agreement is in place with the broker. In such a case, also consider checking the broker's errors and omissions insurance.

22.08 **Limits on Liability Insurance.** A well-drawn liability insurance clause should specify the limit of liability by requiring per-event coverage and aggregate coverage. As its name suggests, a "per-event coverage" limit would apply per occurrence, per accident, or per claim. An "aggregate coverage" limit would apply to all occurrences, accidents or claims that take place during a policy period, typically one year. Specify when the aggregate limit should reset. For tenants with multiple locations, require a per-project or per-location aggregate limit. Require the tenant to submit "loss runs" to show how much insurance remains available after taking into account the claims filed to date. Establish a threshold for claims that will require the tenant to reset or increase its insurance coverage. Specify the maximum permitted deductible and self-insured retention amounts. Specify whether the policy is "claims made" or "occurrence"-based.

22.09 **No Fault Liability.** Resist the inclination to state that the tenant gets no rental abatement after a casualty if the tenant caused the casualty. Though this may sound "fair," remember that the tenant has paid for its share of insurance coverage through operating cost escalations or otherwise. Fault may not be easily determined. Also, if rent does not abate upon a casualty, then the landlord cannot make a claim under its rental income insurance. Try to say that if the landlord cannot collect insurance proceeds, the tenant's rent abatement ceases. Any tenant waivers of liability should expressly cover negligence and should benefit not only the landlord, but also the usual list of landlord-related parties, the property manager, and so on.

22.10 **Plate Glass Insurance.** Require any retail tenant to carry plate glass insurance. This coverage relates only to glass on the first floor of a building.

22.11 **Rent Coverage.** A landlord will usually prefer to maintain rental income insurance, as part of a larger property insurance package. In that case, it probably makes no sense to require the tenant to maintain business interruption insurance. Any rental / business interruption insurance should cover additional rent (such as escalations or tax pass-throughs) and percentage rent as well as base rent. The landlord should try to carry rental income insurance coverage for at least 12 months, more for buildings that would take longer to rebuild. The landlord will

typically want to supplement the coverage with 12 months of an "extended period of indemnity" to cover the re-leasing period. Rental/business interruption insurance is usually written with an "exclusionary period," which means the insurance does not respond until the loss continues for some period, typically 30 days.

22.12 **Self-Insurance.** If the tenant self-insures, work with an insurance adviser to understand the interaction between self-insurance and the waiver of liability addressed in a typical "waiver of subrogation" clause in an insurance policy. The landlord still needs to obtain the benefit of those waivers, even if the tenant acts as its own insurer. And the waivers should not preclude the landlord from making claims against the tenant in the tenant's role as self-insurer.

22.13 **Should Landlord Insure?** Consider having the landlord insure the tenant's improvements, with the tenant reimbursing the allocable insurance cost—premium, co-insurance and all other insurance costs—either directly as additional rent or as an operating cost without a base year. Then have the landlord agree to restore, or give the landlord the right to require the tenant to restore, using any available insurance proceeds. If the landlord insures, have the tenant agree not to do anything that will void the landlord's insurance, increase the landlord's insurance risk, or cause disallowance of sprinkler credits, if applicable.

22.14 **Tenant Failure to Insure.** If the tenant fails to insure and a fire occurs, then make the tenant liable for the entire loss and not merely the unpaid insurance premiums—even if the landlord knew about the failure to insure. Such a provision responds to cases that limit the tenant's liability to the amount of the unpaid premiums. For net-leased properties where the tenant is responsible for buying the insurance, give the landlord the right (but not the obligation) to buy the required insurance and obtain reimbursement from the tenant.

22.15 **Tenant's Right to Proceeds.** Make any right of the tenant to receive insurance proceeds subject to the rights of the landlord's mortgagee and to fulfillment of any tenant restoration duties under the lease.

22.16 **Tenant's Special Use.** Consider the tenant's specific use and whether the lease should require any particular insurance. For instance, if the tenant sells liquor on the premises require the tenant to purchase liquor liability insurance and dram shop coverage. If the tenant gives away liquor without charge, then the lease should require host liquor liability insurance. Art poses special issues, as do high-risk activities. More generally, if the tenant's use and occupancy of the premises presents an unusual situation or risk of loss, consult an insurance adviser.

22.17 **Waiver of Subrogation.** Understand "waiver of subrogation." This is a tricky topic, often handled badly. Do not provide that landlord and tenant waive their subrogation rights. They have no subrogation rights. Only the insurance carrier has subrogation rights. Provide instead that landlord and tenant waive all right to recover from the other for property damage to the extent covered by property insurance (not liability insurance). These clauses should be mutual, covering all losses caused by any insured risk (even negligence of the landlord or the tenant), provided the insurance carrier has consented to the waiver. Such consents (the actual waivers of subrogation) appear in the standard insurance policies published by the Insurance Services Office and used by insurance carriers in the vast majority of the market. But confirm this each time.

23. Landlord's Access

23.01 **Communications with Third Parties.** Require the tenant to provide the name, telephone number, and email address of its consultants, insurance brokers, and other third parties. Allow the landlord to communicate directly with these parties. The tenant should agree to authorize and require those people to cooperate.

23.02 **Emergency Contact.** Require the tenant to provide the name, telephone number, and email address of an emergency contact and recite in the lease, subject to change by proper notice.

23.03 **Keys.** Leases usually require the tenant to give the landlord copies of all keys and access codes. The landlord should note that liability may travel with those keys and access codes, especially if the tenant has unusually valuable personal property. The landlord may want to be selective about requiring keys and access codes or limit the landlord's liability, if the lease does not already do that.

23.04 **Landlord's Right to Enter.** Give the landlord the right to enter to perform repairs in the premises and to facilitate the landlord's ability to perform repairs and do work in other tenants' premises.

23.05 **No Eviction.** Make clear in the lease that the landlord's entry onto or inspection of the premises does not constitute an actual or construc-

tive eviction and does not entitle the tenant to any rights or remedies, or any claim, offset, deduction, or abatement of rent.

23.06 **Notice Requirements.** The lease should state that the landlord may enter without notice in an emergency. Even absent an emergency, oral notice to someone on site should suffice. This is yet an other example of an area where a requirement for "written notice" may sound perfectly reasonable, but in the real world such a requirement is completely impractical.

23.07 **Reconfiguration.** Reserve for the landlord the right to reconfigure or change the means of access to the premises.

23.08 **Secure Areas.** Limit the tenant's right to create secure areas (areas the landlord may not enter without the tenant's permission) by annexing an exhibit to the lease specifically identifying such areas. If the tenant insists on having the right to move those areas around, limit them to their original overall size, and require some level of reasonableness.

23.09 **Signs and Showings.** The landlord should insist on having the rights to: (i) show the premises to prospective purchasers, mortgagees, or appraisers and post "for sale" signs; and (ii) during the last 18 months of the term, show the premises to prospective tenants and post "for rent" signs. As a matter of "green leasing," the landlord may also need to be able to show the premises to any consultants or organizations issuing or maintaining LEED or similar certifications, or to interested persons seeking to learn about environmentally sound construction.

24. Landlord's Liability

24.01 **Exculpation.** Limit the landlord's liability to its interest in the property or, better, to whatever equity the landlord would have if it had entered into a mortgage securing financing equal to 80 percent of the value of the property. Negate any personal liability of the landlord and its partners, members, managers, officers, directors, affiliates, and the like. Recent cases have applied the "implied covenant of good faith and fair dealing"—a tort theory of liability—to sidestep exculpation clauses in leases. To avoid the possible effect of such cases, state that the landlord's exculpation applies not only to claims under the express terms of the lease, but also to claims of any kind whatsoever arising from the relationship between the parties or any rights and obligations they may have relating to the property, the lease, or anything related to either.

24.02 **Landlord Default.** Give the landlord at least the same open-ended cure periods for nonmonetary defaults that tenants typically obtain. So long as the landlord has commenced and is diligently prosecuting the cure of its default, the tenant should have no rights or remedies against the landlord. Consider giving mortgagees some additional cure period.

24.03 **Liability.** Any liability of the landlord should end if the landlord transfers its interest in the premises.

24.04 **Liability for Prior Owners' Acts**. As a rather aggressive position, say that after any conveyance of the property (even outside foreclosure), the new owner is not liable for (and the tenant may not assert any credit, claim or counterclaim because of) any claims the tenant might have had against the former owner, such as for overcharges and refunds of escalations. Perhaps the liability should cut off as soon as a mortgagee takes over control of the property, whether through a receiver or as a mortgagee in possession.

24.05 **Statute of Limitations.** Require the tenant to assert any claim against the landlord within a certain short period after the tenant first became aware of the facts supporting the claim.

25. Landlord's Representations

25.01 **Express Not Implied.** State that the landlord makes no implied covenants, representations or warranties. Limit the landlord's responsibilities to those expressly set forth in the lease (i.e., hopefully, none).

25.02 **Independence of Covenants; No Termination Right.** The tenant should acknowledge that all covenants of the landlord are independent. The tenant should waive any right to terminate based on the landlord's default.

25.03 **Merger.** State that any agreements, written or otherwise, predating the lease (including prior lease drafts) merge into (i.e., are totally superseded by) the lease. Indicate that any statements or representations on the landlord's website or in the landlord's advertising are not part of the lease.

25.04 **Other Leases.** State that the landlord makes no representations, warranties or covenants, about other tenants (past, present or future) or the terms of their leases.

26. Maintenance and Repairs

26.01 **Broad Repair Obligations.** When the tenant has broad repair obligations, expressly include

"ordinary or extraordinary, structural or nonstructural, foreseen or unforeseen" repairs.

26.02 **No Overtime.** The landlord should have no obligation to do any work at overtime or premium rates.

26.03 **Periodic Upgrades.** Beyond maintaining the premises "as is," the lease could require the tenant to upgrade and renovate every specified number of years, to keep the premises exciting and new, particularly for retail space. Perhaps the tenant must have invested a certain additional amount in the premises within a certain period as a condition to exercising any lease renewal rights.

26.04 **Right to Perform.** If the tenant's acts or omissions cause damage to another tenant's premises, the landlord can repair them at this tenant's expense.

26.05 **Specify Repair Obligations.** Try not to refer categorically to repairs as "structural" (the landlord's responsibility) and "nonstructural" (the tenant's responsibility). Draw these lines specifically and in detail, saying exactly who repairs what. Otherwise, a court may decide what the parties intended and the landlord may not like what the court decides. The lines between "structural" and "nonstructural" may vary between whole-building leases and leases of only part of a building.

26.06 **Tenant's Obligation.** The tenant must maintain, repair, and replace any parts of the building—including storefronts and sidewalks—that exclusively serve or abut the premises. Prohibit the tenant from placing anything on the sidewalks that might violate a local ordinance (e.g., a pickup box for FedEx). Should the tenant be allowed to display merchandise on the sidewalk? Or place vending machines on the sidewalk? If the tenant is allowed to place any "lucrative" vending devices on the sidewalk, then consider entitling the landlord to a percentage of the revenues. Require the tenant to obtain and maintain any related permits.

26.07 **Wireless Internet.** If the tenant's wireless Internet service causes interference, the tenant must resolve. The landlord may require the tenant to password-protect its Wi-Fi service.

27. Occupancy

27.01 **"As Is" Condition.** The tenant should represent and acknowledge that it takes possession of the premises and the building and common areas in their as-is, where-is condition as of the commencement date. Consider including specific language to negate landlord liability for any latent defect.

27.02 **Minimum Operating Covenant.** The tenant should agree to open for business by a certain date. The tenant should then agree to operate for at least a certain minimum period. For a retail tenant, the lease should set minimum days and hours of operation, and consequences if the tenant "goes dark."

27.03 **No Obligation Except Specific Work.** Confirm that the landlord has no obligation to perform any work or make any installations to prepare for the tenant's occupancy, except as the lease expressly states.

27.04 **Service Contracts.** Consider whether the tenant should agree to reimburse the landlord for some share of the cost of all applicable service contracts (such as HVAC, boiler, sprinklers, alarms, and security) or to maintain such contracts for the premises at the tenant's expense. Where the tenant maintains such contracts, stipulate quality standards for the service provider; minimum maintenance frequency; and record-keeping requirements.

27.05 **Tenant's Name.** If the tenant operates under any name other than the tenant's name as stated on the lease, confirm that this does not give the other entity any rights or require the landlord to name or serve them in any action. In some cases, if the name on the door does not match the respondent's name on the warrant of eviction, the marshal may not evict. Careful landlord-tenant counsel can probably prevent the problem, but any variation in names could create a spurious issue. This will vary among states. In some cases, the lease should require that the tenant operate and identify itself only under a particular name consistent with the lease.

28. Options (Expansion/Renewal/Reduction/Termination)

28.01 **Conditions**. Although tenants like options, they limit a landlord's flexibility. Even if the landlord is willing to grant them, the landlord should do whatever it can to limit them and try to make them go away under circumstances that suggest the tenant does not really need them, or no longer deserves them. For example, do not allow the tenant to exercise an option if the tenant is in default on the exercise date or on the effective date of any exercise. The landlord could even require that no defaults have occurred within a specific period before the exercise date. A tenant's option rights should terminate if the tenant has: (i) assigned the lease; (ii) sub-

let more than a certain amount of space; (iii) dropped below a certain minimum occupancy; (iv) stopped operating in the space; (v) recently exercised any "giveback" right; (vi) recently failed to exercise any available "first refusal" or expansion right; (vii) not invested a certain dollar amount in the space in a certain period; or (viii) suffered a deterioration in its financial condition.

28.02 **Consequences.** If the tenant exercises any option right of any kind, think about whether any lease terms should change as a result. For example, if the tenant received special signage rights because of the tenant's large occupancy, those rights should perhaps go away if the tenant exercises a right to substantially reduce the size of the leased premises.

28.03 **Multiple Bites at Apple**. If the landlord offers "first refusal" space and the tenant does not take it (or if the tenant declines to exercise an option), then for a specified number of months the tenant should be deemed to have waived any first refusal rights (and any options that would otherwise apply), at least where they relate to comparable space, broadly defined.

28.04 **Option Maintenance Fee.** Require the tenant to pay a nominal annual fee to preserve future options. This gives the tenant an incentive to terminate any option rights that it does not truly need and will never use.

28.05 **Option Rent.** Set a floor for rent during any renewal option term equal to the previous rent under the lease.

28.06 **Option Subject to Other Rights.** Make any expansion option subject to existing exclusives and renewal clauses of other tenants. To preserve tenant diversity, the landlord may even want the right to negotiate a renewal with an existing tenant before making that tenant's space available to a new tenant negotiating its own option or right of first refusal.

28.07 **Overlapping Options.** Try to limit the landlord's liability if the landlord inadvertently allows overlapping or inconsistent options, or forgets to notify the tenant of potentially available space.

28.08 **Purchase Right Carveouts.** If a tenant somehow manages to negotiate an option or right of first refusal to purchase the landlord's building, exclude: (i) foreclosure or its equivalent; (ii) any subsequent transaction; (iii) transactions between the landlord and affiliates or family members; (iv) other permitted transactions, such as transfers of passive interests or creation of preferred equity for mezzanine lenders; (v) any exercise of remedies under one of those permitted transactions; and (vi) if the tenant "passes" on its preemptive right, then all subsequent transactions.

28.09 **Reduction Options.** If the tenant negotiates an option to "give back" space, this raises many of the same issues as expansion or renewal options, as well as lease expirations. In addition, think about the practical issues that any space reduction might create. Will the tenant need or want to leave any installations in place to service their remaining space in the building? If the tenant gives back a partial floor, who will construct—and pay for the construction—of any new demising walls or any incremental costs to comply with building code requirements for a separate occupancy? How will the landlord need to change its operations if a floor previously occupied by one tenant becomes a multiple-tenant floor? Will the tenant's elevator lobby signage need to change? Exclusive elevator banks? How will the parties handle submetering and other reconfiguration of utilities? What happens if the tenant gives a notice of reduction but then can't move out on time? If the tenant reduces its occupancy, should it lose some of the concessions it otherwise negotiated in the lease? If the tenant gives back multiple floors, the lease might require contiguity among those floors, and require them to consist of the highest (or possibly lowest) floors in the tenant's stack.

28.10 **Termination Options.** If the tenant has a termination option, require the tenant to make any termination payment when the tenant exercises the option. Adjust any brokerage agreement to assure that if the tenant terminates, then the landlord will not have to pay a commission for the terminated/cancelled part of the lease term. This is typically done by deferring the corresponding commission until the termination option has lapsed without exercise. The broker may expect to receive a commission on the termination fee.

28.11 **Time of the Essence.** Make time of the essence for exercising any option or right of first refusal. Say that timely notice constitutes an agreed and material condition of exercise. Recognize that the courts sometimes validate late exercise. Perhaps provide for a protective rent adjustment in this case, e.g., to fair market rental value if the lease would not otherwise provide for it.

28.12 **Timing.** Make the exercise deadline early enough to give the landlord time to relet if the

tenant does not exercise. Allow the landlord to immediately start showing the option space if the tenant does not exercise. Coordinate the timing with other leases to facilitate assembling large blocks of space in the future if the landlord wants to do so. A landlord usually wants plenty of lead time and notice, but may want to give the tenant as little lead time and notice as possible, to maximize the landlord's flexibility in dealing with unexpected changes in occupancy. If some other lease ends earlier than anticipated, give the landlord the right to accelerate any future option or first refusal right that the tenant may have on the affected space.

29. Percentage Rent and Radius Clause

29.01 **Audit Right.** Let the landlord audit the tenant's gross sales. The tenant should deliver point of sales data as well as sales tax returns. If the tenant underpaid percentage rent by more than three percent, the tenant should pay interest and the costs of the audit.

29.02 **Effect of Casualty.** If the premises are closed for parts of the year because of a casualty or condemnation, the "breakpoint" for percentage rent should drop. This assumes the lease expresses the breakpoint as a fixed dollar amount, and not a formula referring to actual fixed rent payable from time to time. The latter would be more common, so this problem usually does not arise.

29.03 **Fixed Rent Increases.** Increase fixed minimum rent (and the percentage rent breakpoint) periodically, based on actual or projected increases in gross sales.

29.04 **Gross Sales.** Define gross sales to include sales by subtenants and concessionaires.

29.05 **Inclusions/Exclusions.** Consider whether to include any catalog or Internet sales that the tenant makes through the store. Take into account the mechanics of the tenant's business. Prohibit the tenant from claiming any credit for goods that a customer bought through a catalog or over the Internet, unless previously included in store sales. Exclude sales to the tenant's employees only if the tenant makes those sales at a discount or, better (but less "standard"), include those sales based on their actual discounted prices.

29.06 **Increases.** Provide for an increase in percentage rent upon any change of use or change of the tenant. If the lease provides for multiple increases in percentage rent over time, think about the interaction of those multiple increases, and whether any uncertainty exists about their possible "compounded" effect.

29.07 **Kick-Out Right.** Allow the landlord to terminate the lease if percentage rent does not reach a certain level by a certain date or if the tenant goes dark. Upon any such termination, require the tenant to reimburse the landlord for all its unamortized leasing costs, including the cost of tenant improvements, brokerage commissions, negative rent, inducement payments, free rent, and cash allowances. Try to continue any kick-out right over the entire lease term. If a retail landlord only has a one-shot kick-out right, this may concern future lenders.

29.08 **Limit Any Percentage Rent Penalty Period.** If any co-tenancy or other problem arises, the lease may allow the tenant to pay "percentage rent only." In those cases, if the landlord ever solves the problem, regular rent should once again apply. After a certain time, allow the landlord to require the tenant to either terminate or resume paying regular rent (fish or cut bait).

29.09 **Radius Clause.** Include a radius clause in any lease requiring percentage rent, i.e., the tenant (and affiliates) may not compete with itself within a restricted area without the landlord's consent.

29.10 **Recordkeeping.** Require the tenant to maintain records, in accordance with GAAP or any other generally accepted accounting standard, sufficient to make any audit meaningful. The tenant should keep its records at an accessible and reasonable location, specified in the lease. If the tenant moves its records, it should agree to promptly notify the landlord. The tenant should keep its records for at least three years.

29.11 **Violation.** If the tenant violates the radius clause, then consider requiring the tenant to include as "gross sales" (for percentage rent purposes) the greater of: (i) a specified percentage of gross sales at the premises; or (ii) the gross sales of the tenant's store in the prohibited area.

30. Quiet Enjoyment

30.01 **Conditions.** New York law (and probably the law of other states) implies a covenant of quiet enjoyment if the lease says nothing. Indicate that quiet enjoyment is subject to the rights of mortgagees, ground lessors, other tenants, matters of record, and all other terms of the lease. Condition the covenant of quiet enjoyment upon the tenant's not being in default, or at least not in default beyond cure periods.

30.02 **Limit Services.** Expressly limit the landlord's obligation to provide services and other obligations to only whatever the lease expressly requires. Try to prevent the courts from using the "covenant of quiet enjoyment" as the basis to infer possible landlord obligations to provide services beyond those the lease requires. But also consider whether modifying the covenant of quiet enjoyment at all justifies the controversy and negotiations it may cause.

31. Real Estate Taxes

31.01 **Allocation of Tax Liability.** The landlord might not always want to allocate real estate taxes by square footage. For example, retail space may increase taxes more than residential or office space. Try to require each tenant to pay for any real estate tax increases that result from that particular tenant's installation. If one tenant receives a tax abatement, the other tenants should typically contribute to real estate taxes based on the pre-abatement taxes.

31.02 **Base Year Real Estate Taxes.** Define "Base Year Real Estate Taxes" to include water and sewer charges; as "net of any special assessments"; and "as finally determined." Consider the impact of varying tax years for varying tax jurisdictions, such as school district, water district, municipal, and county.

31.03 **Business Improvement District ("BID") Charges and Special Assessments.** Include any "BID" charges and special assessments in the definition of "Real Estate Taxes," even if no BID presently exists.

31.04 **Estimated Tax Payments.** Require the tenant to make monthly estimated tax payments, especially if the landlord's mortgage requires tax escrow payments. Time the tenant payments to precede the tax escrow payments by at least a few days.

31.05 **Further Assurances.** The tenant should agree to assist the landlord, as reasonably necessary, to qualify for tax abatements and benefits (such as the Industrial and Commercial Abatement Program, or "ICAP," in New York City). Allow the landlord to amend the lease to qualify for any tax benefits or abatements. If the landlord obtains such benefits, the lease should say whether the landlord or the tenant will ultimately receive the economic benefits of the program and how those benefits interact with real estate tax escalations. If an ICAP reduction arises from a particular tenant, all parties will typically expect it to be allocated just to that tenant.

31.06 **Imperiled Abatement.** If the property benefits from any tax abatement, deferral, subsidy, or the like, think about the risk that someone might challenge the validity of such a benefit. If any such challenge arises or someone threatens such a challenge, allow the landlord to require the tenant to pay monthly (just like a regular payment of real estate taxes) an appropriate contribution toward whatever incremental taxes, with interest, the landlord owes or might owe if the challenge succeeds. The landlord would refund these payments with interest if the challenge failed. Without a structure like this, the landlord will bear much of the risk of any challenge and, in practice, may not be able to shift much of that risk to tenants.

31.07 **Management Fee.** If the landlord protests real estate taxes, impose a reasonable management fee to compensate for the landlord's time, trouble, and effort. Such a fee might apply generally or, if appropriate, only to particular tenant(s) requesting the tax contest.

31.08 **Payments in Lieu of Taxes ("PILOT").** Include PILOT payments in real estate taxes.

31.09 **Successful Contest.** If a tax contest succeeds, the tenant will not necessarily be entitled to its share of the full refund. Instead, subtract the refund from actual real estate taxes for the year in question, and then ask whether this would have reduced the tenant's tax escalation, after considering base years. The tenant's refund should not exceed that hypothetical reduction.

31.10 **Tax Contests.** Prohibit the tenant from contesting taxes without the landlord's consent. If the landlord does consent, the landlord may want the right to require the tenant to post a bond or letter of credit equal to any contested taxes, if the tenant did not need to pay the taxes first, as a condition to the contest. The landlord may also want to control choice of counsel. The tenant should indemnify the landlord against all losses that arise from any tax contest the tenant initiates. The landlord will almost always prefer to handle the contest.

31.11 **Transfer Taxes.** Consider possible transfer taxes on the lease. New York, for example, imposes a transfer tax on certain leases that extend beyond 49 years (including options) or contain a purchase option.

32. Recognition of Subtenants

32.01 **Clear and Objective Standards.** Any landlord that agrees to deliver recognition protections to subtenants should insist that any "recognized" sublease must satisfy clear and objective stan-

dards. (In the context of protecting subtenants, these agreements are often called "recognition agreements." They are very similar to, and also sometimes called, "non-disturbance agreements." This checklist reserves the latter term, abbreviated as "SNDA," for the agreements between a tenant and a landlord's mortgagee.) Before agreeing to recognize any actual or potential sublease, the landlord must ask whether it wants to be stuck with that sublease and all of its terms if the main lease terminates. The landlord may want to require minimum rents, a certain form of sublease, an unrelated subtenant, arm's-length negotiations, a reasonable configuration (such as multiple contiguous full floors), subrent that does not decline over time, and other characteristics. And the tenant should not be in default.

32.02 **Multiple Subleases.** If the lease terminates, a landlord that has entered into recognition agreements could conceivably end up inheriting any one or more, or some random selection, of the tenant's subleases. Subtenant recognition agreements can create issues similar to partial release clauses in mortgages (concern about "cherry picking" and/or destruction of expected value).

32.03 **Multiple-Floor Subtenants.** If the tenant occupies multiple floors, try to limit the recognized space to full floor(s) at the top or bottom of the tenant's stack.

32.04 **Negotiations.** The tenant should agree to reimburse the landlord's legal fees to review the sublease and negotiate the recognition agreement. To short-circuit those negotiations, attach a form of recognition agreement to the lease as an exhibit. Those recognition agreements often give a landlord protections that exceed the protections that a mortgagee expects in an SNDA. The agreement needs to assure, generally, that the landlord has no greater obligations under the "recognized" sublease than the landlord would have had under the terminated lease. Beyond that, the landlord will want to negate liability for a litany of possible unappealing sublandlord obligations, such as representations, warranties, confidentiality, space preparation, and provision of incidental services. The landlord will also want protection against the risk (likelihood) that the subrent will fall short of the agreed rent under the main lease for the same space. If the landlord's counsel uses a mortgage SNDA as the template for a subtenant recognition agreement, counsel should check it against other subtenant recognition agreements.

32.05 **Sale of Building.** If a lease obligates the landlord to "recognize" subtenants and the landlord later decides to sell the building, how can a purchaser obtain comfort about the scope of "recognition" obligations the purchaser will inherit?

32.06 **Security Deposit.** If the landlord does agree to enter into a recognition agreement with any subtenant, the landlord may want to hold the subtenant's security deposit, but beware of becoming involved in sublandlord/subtenant disputes.

33. Remedies

33.01 **Abandonment.** The landlord's seizure and reentry into the premises based on abandonment can create risk, because of uncertainty about what abandonment means. Try to define abandonment in the lease, such as nonpayment of rent and physical absence from the premises for a certain time. State that if the tenant defaults beyond cure periods and also removes a significant amount of fixtures and equipment, that would constitute an abandonment and a surrender of the premises, entitling the landlord to repossess. Thus, the landlord need not bring summary proceedings or give the tenant further cure rights. Expressly allow self-help for abandonment.

33.02 **Arbitration.** If the tenant has the right to invoke arbitration of disputes, condition this right on the absence of any rent default. Expressly exclude any rent dispute from arbitration. If the landlord cares about quick resolution of any arbitrated dispute, agree in the arbitration clause on possible arbitrators (and the number of arbitrators), the arbitration authority, and the rules that will apply. Do not leave these matters until a dispute arises. Specify arbitrators (and confirm that they are willing to serve), or arbitrator qualifications, so that the arbitrators will understand the landlord's business and position, or even favor the landlord. Specify a limited and short list of issues for which arbitration will apply, such as escalation charges; disputes about repairs; and assignment and subletting if the landlord has agreed to be reasonable. Landlords often believe tenants are more willing to arbitrate than to litigate. Arbitration should not apply to nonpayment, dispossession, or conditional limitation proceedings. Require any arbitrator to issue a written explanation of its decision.

33.03 **Default Rate.** Require the tenant to pay interest at the default rate on amounts past due even after judgment, when the statutory judgment rate would otherwise apply.

33.04 **Equitable Relief.** Try to state that the landlord can obtain injunctive and declaratory and specific performance-type relief regarding all nonmonetary covenants—both negative and affirmative—supervised and monitored by a special master if necessary.

33.05 **Inducement Repayments.** State that if the lease terminates early because of default, the tenant must repay with interest the unamortized balance of the landlord's rent concessions, brokerage commissions, contribution to the tenant's work, and work the landlord performed for the tenant. The tenant will argue that this gives the landlord double compensation. That may be true—but only if the tenant actually pays the damages the lease or governing law requires the tenant to pay. The landlord can agree to offset any liquidated damages provided for in the lease by the damages suggested in this paragraph if the tenant actually pays the latter damages. But in that case, why bother?

33.06 **Interest and Late Charge.** Require the tenant to pay interest on late payments, in addition to a late charge. Make the tenant responsible for any charges the landlord incurs due to a bounced check. Multiple defaults or bounced checks within a specified period should trigger special consequences up to and including termination of the lease. For example, the landlord can require a higher late fee; a larger security deposit; that the next default be incurable; or that future payments—or at least all payments for the next specified number of months—be made by bank checks or wire transfer.

33.07 **Intermediate Remedies.** Deal with the fact that courts typically refuse to terminate leases based on "minor" defaults such as failure to deliver financial information or an estoppel certificate. For these defaults, establish intermediate remedies. Make them meaningful, but not draconian, such as liquidated damages (e.g., $500/day), a temporary rent adjustment, or a suspension or deferral of some privilege or benefit. If the tenant's "minor" default continues for a specified period, at some point it should constitute an event of default. Consider the degree of reasonableness necessary for any such payment remedy to qualify as liquidated damages.

33.08 **No Mitigation.** Provide that the landlord has no obligation to mitigate damages. If the landlord agrees to mitigate, the lease should define exactly what the landlord must do. It should not be much.

33.09 **Nonpayment.** If the tenant fails to pay rent, expressly allow the landlord to exercise a "conditional limitation" right and terminate the lease, not just commence nonpayment proceedings. Watch out: many Standard Forms establish a "conditional limitation" for all defaults except failure to pay rent. Expressly allow the landlord to exercise a "conditional limitation" right to terminate the lease and also prosecute simultaneously a proceeding for nonpayment of rent. Try to negate the usual rule that requires the landlord to elect between the two—although of course the landlord cannot actually obtain both forms of relief.

33.10 **Ownership or Succession.** Consider asking the tenant to excuse the landlord from any obligation to prove ownership or succession in any eviction proceeding. The landlord would need to prove only tenant default. The tenant would then bear the burden of proving that the party claiming to be the landlord is really just an impostor without rights. If enforceable, this would eliminate a sideshow that merely gives any tenant an opportunity to trip up the landlord and delay the proceedings, with no practical benefit in the real world. As a variation, state that if the landlord shows a recorded deed to the court, then this constitutes prima facie proof of ownership sufficient to prosecute eviction proceedings, and the tenant bears the burden of proving the landlord doesn't actually own the building, i.e., has commenced the eviction proceeding just for fun.

33.11 **Right to Cure.** Allow the landlord to cure the tenant's defaults and bill the tenant for the landlord's expenses, with interest at the default rate, as additional rent.

33.12 **Waiver of Jury Trial.** The waiver should apply to all matters arising out of the landlord/tenant relationship and the property, not merely the lease, so as to reach tort claims between the parties.

33.13 **Yellowstone Injunction.** Consider whether the landlord can proactively add language to the lease to limit the availability and potential burden of so-called "Yellowstone" injunctions under New York law. For example, consider some or all of the following, each of which responds to one or more of the issues that arise in Yellowstone proceedings:

33.13.01 **Cure Period Extension Rights**. State that the tenant may obtain an open-ended cure period, and as much time as the tenant wants to litigate an alleged default, by depositing with the landlord as security an amount equal to the landlord's estimate of the cost to cure the alleged default. State that such a deposit constitutes the

only way the tenant can evidence its ability and desire to cure the default.

33.13.02 **Final Cure Period Before Eviction**. State that if the landlord obtains a warrant of eviction, the tenant will automatically have—or the landlord can agree at any time to grant the tenant—a short final cure period before the landlord proceeds with actual eviction. A "last clear opportunity to cure" at the end of the eviction proceedings substantially undercuts the basis for a Yellowstone injunction. Provide that the landlord may offer the tenant any such "last clear chance" either in the notice to cure or at any later point before the lease has actually terminated.

33.13.03 **Financial Defaults**. Require the tenant to acknowledge that it cannot obtain a Yellowstone injunction for any financial default, even if uncertainty or disagreement exists about the tenant's obligations. Uncertainty or disagreement will always exist in these cases. The tenant must pay first, fight later. At one time, it was thought that Yellowstone injunctions were never available for financial disputes, but that is no longer always true.

33.13.04 **Landlord Court Victory**. State that if the landlord prevails in litigation, the lease will be deemed to have terminated on the date the landlord delivered notice of default, and the hold-over rent rate applies from that date forward. Require the tenant to deposit this amount in escrow during any Yellowstone injunction.

33.13.05 **Other Rights and Remedies**. State that a Yellowstone injunction, if granted, limits only the landlord's right to terminate the lease and does not limit any other rights or remedies, such as late charges, default interest, and reimbursement of the landlord's expenses.

33.13.06 **Waiver**. Require the tenant to waive its right to bring a Yellowstone injunction, but recognize that existing law probably makes such a waiver unenforceable. Perhaps consider limiting the duration of any Yellowstone injunction to 20 days.

34. Rent

34.01 **All Payments Are "Additional Rent**." Define "additional rent" to include all payments the lease requires of the tenant. This will support the use of "summary dispossess" rights for nonpayment of all these amounts. The same characterization may have unfavorable consequences in bankruptcy, though. The landlord may wish to be strategic about this issue.

34.02 **Commercial Rent Control.** Standard Forms already often require the tenant to make a corrective payment when rent control terminates. Consider requiring the tenant to escrow the shortfall amount with the landlord each month during any rent control period, and pay interest on the shortfall, with credit for any interest earned on the escrow account.

34.03 **Finalizing Dates.** Where important dates remain to be determined after lease signing, such as the delivery date or commencement date, state that the landlord can later deliver a commencement date letter to the tenant, memorializing all relevant dates. The lease could include a form of that letter as an exhibit. The letter should automatically become effective unless the tenant delivers a written objection to the landlord within 10 days after receipt.

34.04 **Free Rent.** Define the free rent period as ending on a particular date (defined in the term sheet), not a certain number of months after an event (such as lease signing or delivery of premises). Consider including a rent schedule for clarity. This approach shifts to the tenant the financial risk of protracted lease negotiations. Free rent periods should apply only to fixed rent. As a compromise in "free rent" negotiations, consider allowing a retail tenant to pay rent in gift certificates for a certain period.

34.05 **Lockbox.** If the tenant pays rent into a lockbox, consider how to handle the risk that the lockbox administrator will deposit a check that the landlord would have wanted to reject. For example, the lease might say that any such deposit does not waive the landlord's rights, as long as the landlord refunds the amount of the incorrectly deposited check within some short time after the lockbox administrator deposited it. Thus, the landlord can correct the lockbox administrator's mistakes and preserve the landlord's rights.

34.06 **Payment.** The lease should include an express covenant to pay rent, not merely a schedule of rental amounts. Allow the landlord to require the tenant to pay all rent by wire transfer. If an affiliate pays the rent, the landlord can reject the payment or require that all future payments be made by the actual tenant. The lease should say that an affiliate's payment of rent does not give the affiliate any rights. Any such payment is merely for the tenant's convenience.

34.07 **Remeasurement.** Negate any possible remeasurement of the space or the common areas. If the tenant insists on the right to remeasure, define the formula for measurement. For example,

one might refer to the Building Owners and Managers Association ("BOMA") standards. In that case, however, make sure the landlord and its counsel understand exactly how BOMA works. The authors of the BOMA standards almost by definition favor larger measurements rather than smaller measurements of space. Have the landlord's architect / space planner certify any space measurement to the landlord. If the tenant later brings an action against the landlord for bad measurement, the landlord may have a claim against the design professional. Any restriction on remeasuring the space should not preclude the landlord from remeasuring the entire building with no effect on the tenant's overall percentage.

34.08 **Rent Concessions.** Allow the landlord to undo or recapture a rent concession and any other inducement if the tenant defaults before fully applying the concession. Consider extending a rent concession for a longer time, such as six months of 50 percent free rent rather than three months of 100 percent free rent. Perhaps allow free rent in stages over the lease term, such as one month free after every 24 months rather than several months free at the beginning. Condition any rent concession on the tenant's having finished its initial alterations by a certain date or having met other conditions. Consider any accounting implications for the landlord.

34.09 **Rent Not Per Square Foot.** State rent as a flat amount rather than basing it on the square footage of the premises. This can prevent controversy about square footage and remeasurement. Avoid any statement about the square footage or rentable square footage of the premises.

34.10 **Stock Options.** For tenants with initial public offering ("IPO") potential, consider whether to require stock, options, or warrants in lieu of, or in addition to, rent.

34.11 **Waiver.** Consider requiring the tenant to waive legal principles that can automatically convert a terminated lease into a month-to-month tenancy, with notice requirements for termination. Some subcommittee members reject such a waiver, arguing the automatic conversion makes sense.

35. Rules and Regulations

35.01 **Compliance.** Require the tenant to comply strictly with the rules and regulations attached as an exhibit to the lease, and also with any changes (or perhaps only just "reasonable" changes) that the landlord makes later. Consider whether the landlord's rules and regulations correctly reflect present circumstances and building operations. They often do not. In that case, update them.

35.02 **Lease Incorporation.** If the rules and regulations contain anything unusually important, move it to the body of the lease. Courts may ignore rules and regulations. State that if any conflict exists between the rules and regulations and the lease, the lease governs.

35.03 **No Liability.** If the landlord does not enforce the rules or regulations against other tenants, or if other tenants violate them with impunity, this should impose no obligation on the landlord. A landlord often wants to have the freedom to enforce rules and regulations against some tenants but not others.

35.04 **Recycling.** Consider requiring the tenant to separate its waste. The landlord's requirements may exceed those of applicable law. Consider adding a provision governing medical waste or other tenant-specific recycling or waste disposal requirements.

36. Security Deposit

36.01 **Amount.** Although the amount of any security deposit is a business issue, counsel may wish to suggest a declining letter of credit (initially in the amount of the tenant improvement allowance, or the landlord's cost of build-out) to protect the landlord if the tenant defaults after the landlord incurs significant expense for front-end leasing costs.

36.02 **End-of-Term Issues.** Expressly allow the landlord to apply the security deposit to, among other things, costs to restore the demised premises and remove the tenant's abandoned personal property and signs. Give the landlord a reasonable time to return the security deposit after the end of the lease term, so the landlord can fully process and calculate any escalations, reimbursements, damages, and other amounts the tenant may owe.

36.03 **Increased Security.** Require the tenant to increase the security deposit if the rent rises or the tenant's or guarantor's financial rating drops below a certain point. Should any other circumstances trigger such a requirement?

36.04 **Letter of Credit.** Depending on the jurisdiction, consider requiring the tenant to deliver a letter of credit in place of a cash security deposit to try to reduce the impact of any possible tenant bankruptcy. To minimize administrative complexity, require the tenant to elect at lease signing whether it will post cash or deliver a letter of credit. Try not to allow either / or. Only if the

landlord insists on the promptest possible closing, allow the tenant to deliver a letter of credit after signing. Close with a cash security deposit. This avoids delays in dealing with banks' letter of credit departments.

36.05 **Letter of Credit Requirements.** If the tenant delivers a letter of credit, require that: (i) the issuing bank be (1) reasonably acceptable to the landlord and (2) a New York Clearinghouse bank; (ii) the landlord can draw the letter of credit at a bank branch in the same city as the landlord upon presentation of merely a sight draft (no drawing certificate or other documentary conditions); (iii) the letter of credit be an "evergreen" (i.e., providing for automatic renewal unless the issuer gives ample notice of nonrenewal) or the bank must notify the landlord (at least X days before expiry) of any failure to renew and the landlord may draw (or better, shall be deemed automatically to have drawn) the letter of credit; (iv) even if the letter of credit is an "evergreen," the issuer must confirm the current expiry date upon request; (v) the letter of credit will not expire until at least a specified period after lease expiration; (vi) the landlord can transfer the letter of credit without charge to any lender or purchaser (or, if there is a charge, the tenant must pay it); and (vii) the tenant must reimburse the landlord's out of pocket costs, including attorneys' fees, in dealing with the letter of credit.

36.06 **Lien on Personalty.** In states where the common law does not give a landlord an automatic lien on the tenant's personal property, the landlord should consider taking such a lien. File a U.C.C.-1 financing statement if the landlord obtains a security interest in the tenant's personal property. Any security interest should by its terms survive lease termination; otherwise it might terminate with the lease. Note that the tenant may (legitimately) resist granting such a lien because it violates or will interfere with its financing arrangements.

36.07 **Mortgagee Requirements.** Accommodate future mortgagee requirements (for example, allow the landlord to pledge the landlord's interest in the security deposit or to transfer any letter of credit to the mortgagee). If the tenant ultimately needs to cooperate with these measures, establish a tight time frame for cooperation. Allocate any resulting costs, including attorneys' fees and bank fees to reissue or transfer a letter of credit.

36.08 **Replenishment.** Require the tenant to replenish promptly the amount of any security that the landlord draws, or restore the letter of credit accordingly.

36.09 **Segregated Account.** The landlord and the lease should comply with any state-specific requirements on holding security deposits. When these provisions require notices to the tenant about the security deposit, try to build those notices into the lease, if possible and permissible. Before the landlord disburses any interest to the tenant, the tenant should execute and deliver a W-9 form to the landlord.

36.10 **Security for Guaranty, not Lease.** Consider securing a lease guaranty obligation with a letter of credit or other security. By tying such a letter of credit or other security to a guaranty rather than to the lease, the landlord may reduce the likelihood that the tenant's bankruptcy estate could "claw back" any proceeds that exceed the landlord's permitted claim for rent in the tenant's bankruptcy.

36.11 **Waiver.** Require the tenant to waive any damages claim against the landlord for any wrongful drawing on the letter of credit, and any right to enjoin or otherwise interfere with a drawing. Replenishment of an incorrect drawing should make the tenant whole.

37. Services

37.01 **Additional Services.** If the landlord agrees to make available additional electricity or HVAC services, allow the landlord to set aside capacity for future needs, as the landlord estimates them. State that the landlord will furnish building services only during "building standard" hours, with some flexibility to (re)define what that means.

37.02 **Changes in Building Operation.** Allow the landlord to change how the building operates and the services the landlord provides, such as the number of elevators and security levels and procedures, subject to reasonable standards. To the extent that the landlord agrees to particular performance standards, build in flexibility if usage levels change, such as if the long-term storage area for old files on the third floor becomes a cafeteria.

37.03 **HVAC.** Define any HVAC standards as design criteria, not as performance specifications. The landlord's only obligation should be to operate HVAC in conformance with design criteria. Prohibit the tenant from changing the HVAC system without the landlord's consent. The tenant should be responsible for any distribution problems within the premises.

37.04 **Off-Season Air-Conditioning.** If the landlord provides air-conditioning before or after the regular air-conditioning season, because of hot weather or tenant requests, allow the landlord to charge tenants for that extra service, even if the lease does not yet require air-conditioning.

37.05 **Resale.** Prohibit the tenant from reselling to other tenants any telecommunication services, satellite capacity, electricity, or other utility or service.

37.06 **Safety Measures.** Require the tenant to cooperate with the landlord's implementation of safety measures for the building. For example, the tenant should participate in fire drills.

37.07 **Specifications.** To the extent the landlord agrees to meet specifications for any landlord services, consider the assumptions that underlie those specifications. For example, elevator specifications assume a certain level and distribution of occupancy and type of usage. If the tenant installs a cafeteria, this may alter traffic patterns so much that the landlord should have the right to change the elevator performance specifications.

37.08 **Sprinklers.** Charge the tenant for sprinkler maintenance and upgrades. Consider charging a monthly fee for static water.

37.09 **Telecommunications/Fiber Optics Cable Provider.** Consider requiring the tenant to use the landlord's telecommunications / fiber optics cable provider. Give the landlord the right to change providers. Negate any landlord obligation to continue to use any particular provider. The Federal Communications Commission constantly reviews and revises the rules in this area, which often supersede lease language.

37.10 **Tenant Complaints.** Limit who can complain about building services. Require a written notice of any such complaint, signed by specified officers of the tenant. Excuse the landlord from any liability for utility service failures.

37.11 **Tenant-Provided Services.** Prohibit the tenant from providing its services of types that the lease contemplates the landlord will provide, such as cleaning, especially if this might create labor problems.

37.12 **Utilities.** Require the tenant to pay for temporary utilities during construction. If the tenant's business will consume unusual amounts of utilities or services (such as a hairdresser, restaurant, or trading floor), try to require a separate (sub)meter. If not, make sure the allocation formulas will adequately capture the tenant's usage.

38. Subordination and Landlord's Estate

38.01 **Expenses.** Require the tenant to reimburse the landlord's expenses for obtaining any SNDA from the landlord's mortgagee, including the landlord's reasonable attorneys' fees. (All comments in this section relating to the landlord's mortgagee also presumptively apply to possible future ground lessors.)

38.02 **"Financeability" Provisions.** To avoid negotiating a separate SNDA, include directly in the lease all mortgagee protections and benefits that an SNDA would typically give a mortgagee. Require the tenant to confirm these protections if a mortgagee so requests, with the form of confirmation attached as an exhibit, perhaps within the form of estoppel certificate. Build in flexibility to add any other SNDA protections that some future mortgagee might (reasonably?) require. Tightly limit any cure period for any default arising from the tenant's failure to sign an SNDA.

38.03 **Lease Subordinate.** Make the lease automatically subject and subordinate to the landlord's existing or any future fee mortgage, easement agreements, condominium declaration, ground lease, and similar future documents. Try not to condition subordination on delivery or filing of these documents, or any confirmation or countersignature by anyone.

38.04 **Mortgagee Modifications.** Require the tenant to agree to any reasonable modification that a mortgagee requests, if it does not materially reduce the tenant's rights or materially increase its obligations.

38.05 **Mortgagee Right to Subordinate.** State that any mortgagee can unilaterally subordinate its mortgage to the lease, in whole or in part, at any time, including after commencement of a foreclosure action. Any such subordination should bind the tenant automatically, whether or not the tenant has been notified of it.

38.06 **SNDA Form.** Require the tenant to execute any SNDA form that the landlord's lender requires or attach an industry standard model SNDA, such as the one the New York State Bar Association promulgated in 1994 (New York State Bar Association Real Property Law Section Newsletter, Spring 1994, at 42). Edit the form of SNDA to make it non-recordable, and prohibit recordation. State that if the landlord delivers a conforming SNDA and the tenant does not sign and return it within a specified period, then the landlord has fully performed its obligations on obtaining an SNDA from that mortgagee.

38.07 **Zoning Lot Mergers.** Require the tenant to cooperate and timely execute documents as necessary.

39. Tenant's Equipment and Installations

39.01 **Conduits and Risers.** The landlord should control and coordinate use of conduits and risers that run through or next to the premises. The landlord should have no liability for claims arising out of the tenant's use of conduits and risers. The tenant should label all cables and communications lines. Allow the landlord to relocate conduits; to recapture unused conduit or riser space; and to require the tenant to remove cables, conduits, and risers no longer in use.

39.02 **Ducts and Ventilation.** Require the tenant to pay for any alterations or upgrades. Require the tenant to solve at its expense any venting or odor problems, all to the landlord's reasonable satisfaction.

39.03 **Electromagnetic Fields ("EMF").** The tenant should agree not to cause any EMF interference. If the tenant generates EMF interference, the tenant should agree to solve the problem. Negate any landlord liability. Allow the landlord to limit placement of machines that may cause EMF, even within the premises.

39.04 **Rooftop Equipment.** The landlord should control roof rights, including penetrations, fuel supplies, ancillary equipment, relocation, and size and weight of any rooftop dish or other equipment. Require the tenant to remove its equipment, including any connecting cables, and restore (or pay for the landlord to restore) the roof at the end of the term. The tenant should agree to indemnify the landlord against all liability and roof damage that arises from the tenant's rooftop equipment. Charge for the tenant's use of rooftop space. State that the landlord may require the tenant to relocate equipment elsewhere on the roof, and to provide screening or walkways, all at the tenant's expense. State that any use rights granted to the tenant do not limit the landlord's use rights. Describe the tenant's rooftop rights as a "nonexclusive license." Try to limit the tenant's roof usage as much as possible, recognizing that future installations, including installations as yet unknown, can produce substantial additional income for the landlord.

39.05 **Signage and Identity.** The landlord should control all rights to exterior signage (including the name of the building, any flagpole, and rights to install plaques or other identification), even if exterior signage affects light and air. Prohibit digital, flashing, or video signs, or establish criteria for such signs, such as how often they may change. Signage can only advertise this tenant's operation at this location; it cannot advertise the tenant's products or services generally. If the landlord installs any signs for the tenant, the tenant should pay for them. As an alternative, state that the tenant's signs must comply with signage criteria attached as a lease exhibit, which the landlord may modify or update from time to time. The landlord should think about consistency in the signage program for the entire building. For future changes in signage criteria, give the landlord an express right to upgrade the tenant's signs, at the tenant's expense. Require the tenant to cooperate and execute all necessary documents. Give the landlord the right to remove signage temporarily for repair or compliance with law. In drafting lease provisions, think of signage as a profit center, which the landlord should preserve and protect.

39.06 **Supplemental HVAC, Backup Generator, and Fuel Tank.** The tenant must maintain its equipment in compliance with law and good practices (such as monthly inspections), and keep written maintenance records. These installations become the property of the landlord at the end of the term. Tenant must deliver the equipment in good working order with all permits, warranties, and maintenance history documents. Restrict testing of backup generators, which are very loud.

39.07 **Uniform Elevator Lobbies, Signage, Entrance Doors and Window Shades.** Require all tenants to maintain uniform elevator lobbies, signage, entrance doors and window shades. As an alternative, consider giving the landlord the right to require future uniformity. Give the landlord the right to install thermal film on the inside surfaces of any windows.

39.08 **Temporary Signage.** Require a retail tenant to install temporary promotional signage during construction and before opening. Does the landlord want the right to approve that signage? Require uniform signage for space under construction?

40. Use

40.01 **Advertising.** In a retail lease, consider requiring the tenant to include the name and address of the premises, as appropriate, in all regional and Internet advertising. Or, in the alternative, prohibit the tenant from using the name, image, or likeness of the building in its advertising, or control the manner in which the tenant does so.

If the landlord has trademarks, service marks, or other intellectual property, which the landlord will allow or want the tenant to use under certain circumstances, include appropriate provisions in the lease. At a minimum, the tenant will need to disclaim any interest in the landlord's intellectual property and the landlord will need to approve each usage.

40.02 **Basement Use.** If the building contains a basement with tenant access, describe the basement and indicate what permitted uses tenant has. For example, is it a "selling basement"? If so, then the rent is generally higher. Is it a "storage basement"? If so, what can be stored there? If there are meters inside the basement, require that the utility companies have the right of access even if they have remote reading capabilities. Basement usages tend to expand over time. Allow the landlord to adjust the rent accordingly.

40.03 **Certificate of Occupancy.** State that the landlord does not represent or warrant that the tenant may use the premises for the permitted use. Even delivery of a certificate of occupancy does not create such a representation or warranty.

40.04 **Continuous Operation.** Require a retail tenant to open and stay open during certain prescribed hours with sufficient personnel and inventory and all required licenses. If the tenant breaches, try to define the landlord's measure of damages. Also, provide for remedies other than an injunction or a lease termination, such as higher rent. A court may not grant an injunction and the landlord would probably not want to terminate the lease.

40.05 **Cotenancy.** Provide for flexibility in cotenancy requirements to accommodate possible future changes in the retail marketplace. Avoid requirements that over time may become impossible to satisfy (for example, because of multiple name changes). Terminate the cotenancy requirements at some point (for example, based on time or sales thresholds).

40.06 **Density.** Limit density in the premises, i.e., how many people in how much space.

40.07 **Exclusive Uses.** Track exclusive uses to avoid conflict. The landlord would ideally have no liability for conflicting exclusive use clauses or enforcement of exclusive use clauses. Consider limiting the tenant's remedies if the landlord violates any exclusivity clause. For example, allow the tenant to pay "percentage rent" only—but have no other remedy—if the landlord violates the clause. If some other tenant operates a prohibited use, allow the landlord to assign to this tenant any right to enforce the prohibitions in the other tenant's lease. Carve out from any "exclusive use" existing tenants and expanded or new anchors, and/or any store that operates the same use as one of multiple uses, but not its primary use. Limit this tenant's exclusive use right so it refers only to tenant's primary business. Consider measuring limited permitted excluded use by square footage, time of day, or percentage of sales. Allow other tenants a limited right to sell exclusive use items (so-called "incidental sales"), but limit the right to sell the exclusive use item to a certain percentage of sales floor area or restrict the percentage of sales that may come from the exclusive use item.

40.08 **Limited Hours of Operation.** Consider limiting hours of operation as appropriate, e.g., in a mixed-use building with security concerns.

40.09 **Loss of Exclusive.** Provide that if the tenant does not use its exclusive use right, or goes dark for a certain period, then any exclusive use rights terminate. These terminations need to be permanent. Temporary terminations do not help the landlord much.

40.10 **Narrow Use.** Draft the use clause narrowly (for example, not general office use, but office use for a computer consulting company operating under a specific business name). Then say: "and for no other use."

40.11 **Noise and Odors.** If the tenant's operation emits noise or odors (such as a bar, a restaurant, or a donut store), define in the lease specific noise and odor mitigation measures. Do not just impose a general obligation for the tenant to control or prevent noise and odors. Allow the landlord to impose additional noise and odor control measures if the landlord determines that the initial measures do not work. State that the landlord has no responsibility for other tenants' noise or odors, provided the landlord exercises reasonable efforts to require such tenants to comply with applicable codes.

40.12 **Permitted Use.** State that the landlord has no obligation, implied or otherwise, to allow any change in the permitted use of the premises, even if the landlord consents to (or is required to consent to) an assignment or subletting or any alterations. Even delivery of a certificate of occupancy does not create such representation or warranty.

40.13 **Quality Standards.** If the landlord requires a certain quality level, do not use words like "first class." Instead, define the required standard of operation, such as "white tablecloth" or

"table service" in the case of a restaurant. These standards can be very tricky. It is best to use a very specific and objectively determinable standard. For example, the lease could require that the quality level match the quality level of a comparable business/location, as of a specified date. Pricing may be a dangerous test. Obligate the tenant to remodel and/or renovate as necessary to maintain the desired quality level.

40.14 **Recapture Right.** In a retail lease, especially one without an operating covenant, give the landlord a continuous or periodic recapture right if the tenant ceases to operate for a stated period. Structure the right so a lender can exercise it after foreclosure. For example, do not just give the landlord a one-time right to recapture within a certain period after the tenant closes its store; provide for a periodic or continuous right. Anything less will make lenders nervous.

40.15 **Security Requirements.** Make the tenant responsible for any additional security (and any damages) resulting from the tenant's presence in the building and its use of the premises.

40.16 **Single-Store Operation**. Require the tenant to use and operate the premises only as a single retail operation (no separate stores or stalls, except bona fide licensed departments or concessions not operated under a separate name). Prohibit the tenant from segregating any part of its space from the rest of the space for use as a separate store, with or without a separate entrance.

41. Vault Space

41.01 **Diminution.** State that any reduction of vault space (such as use by any government or utility) does not entitle the tenant to any rights.

41.02 **Recapture.** Give the landlord the right to recapture any vault area if the landlord, a utility, or governmental authority ever needs the space.

41.03 **Use and Occupancy.** Since vault space may lie outside the boundaries of the landlord's property, state that the landlord makes no representation about any right to use or occupy such space. If the tenant uses any vault space, require the tenant to maintain, repair, and pay any municipal fees imposed from time to time. Alternatively, the landlord may want to prohibit the tenant's use of any vault space to avoid liability and other issues.

42. Due Diligence, External Considerations

42.01 **Accounting Implications.** The Financial Accounting Standards Board has tormented real estate professionals for at least half a decade with proposed new guidelines on how to account for leases. That process continues, creating uncertainty about possible accounting disasters ahead for landlords and tenants. The proposed guidelines, if adopted, may drive substantive changes in the terms of leases, such as by leading tenants to favor shorter leases. Any such trend would affect not only lease negotiations but also the entire dynamic and structure of commercial real estate ownership. Any attorney negotiating a commercial lease, especially a substantial one, for the landlord or the tenant should involve the client's accountants.

42.02 **Background Check.** Perform suitable background and credit checks, including online checks. Check the Office of Foreign Assets Control ("OFAC") list of terrorist entities online at www.fincen.gov to see if the tenant, or any of its principals, appears on the list. Perform a UCC and bankruptcy search for the actual specific entity that will be the tenant, as well as its parent company and perhaps major affiliates. Look online for general information about the tenant's past litigation, other history, activities, and plans. Some types of background investigation will require a consent from the person being investigated. Do not assume the prospective tenant can consent to a background check for some other person, such as a guarantor.

42.03 **Consents.** Does any mortgage, ground lease, other space lease, development agreement, or reciprocal easement agreement limit who may be a tenant in the building? Confirm that this tenant complies. If appropriate, obtain suitable representations and warranties (for example, not a "prohibited person"). Does the transaction require any consent on the landlord's side, such as from a joint venture partner, mortgagee, mezzanine lender, or ground lessor? Do any of these parties require the landlord to include particular provisions in space leases? If so, include them. And what will the consent process require? How long will it take? Can the landlord seek consent based on just a term sheet, or must the landlord wait until the transaction has been fully documented? What needs to go into the package sent to the party whose consent the landlord needs? And what else can the landlord or its counsel do to expedite the consent process?

42.04 **Green Construction.** Every company now seems to say it is a "green" company—whatever that means. Leases are starting to sprout new "green" covenants, e.g., obligations to recycle, as mentioned in the main checklist. But most new occupants of commercial space still fully

demolish their new space, if it wasn't already raw when delivered. Every time a space turns over to a new tenant, huge amounts of construction debris still go to landfills. If a landlord wants to reduce the environmental impact of its building, what can that landlord do over time to change construction techniques in the building, to eliminate or reduce those truckloads of construction debris? How can landlords make their spaces more adaptable to the needs of multiple tenants over time, so every tenant will not need to fully demolish the space? Those questions go beyond lease negotiations and legal issues. A "greener" approach to tenant improvements would eventually affect the terms of leases.

42.05 **Identities of Tenant and Guarantor.** Determine early the exact name of the tenant. Understand the tenant's equity ownership structure. Get the right entity as the tenant. Cross-check the tenant's name against its charter certificate as filed. The same comments apply to any guarantor.

42.06 **Incentives and Subsidies.** Understand any incentive and subsidy programs available for the contemplated lease. Can this tenant qualify? If so, the landlord should consider that qualification—and any economic benefits the tenant will realize—as part of rent negotiations. If the tenant will save a dollar through incentive and subsidy programs, perhaps the landlord can charge an extra 90 cents of rent, demonstrating that geographically targeted incentive programs may ultimately do nothing more than increase the value of real estate investments (and ultimately land) in the targeted area. These programs often require that when the beneficiary applies for benefits, the beneficiary has not yet taken some action to "commit" to a particular location, such as filing a building permit or signing a lease. Keep these pitfalls in mind in managing the process.

42.07 **Lease Cross-Check.** Just before signing the lease, take one last look at the term sheet or deal summary. Recheck to confirm that the final lease documents, after whatever negotiations occurred, still fully conform to the term sheet or deal summary. If the landlord moved away from that starting point in negotiations, counsel should confirm that the landlord signed off on those concessions in writing, at least by email. In the morass of leasing issues great and small, do not lose sight of the single most important issue: the rent. Consider circulating just the final rent numbers to the client and the client's broker—separately from anything else—with a request for final confirmation that they are right. As with any other numbers in a legal document, these numbers can look right but be very wrong. And so can the rent adjustment dates.

42.08 **Legal Requirements.** Do any special legal requirements apply to this landlord? For example, if the landlord is somehow a governmental contractor, then procurement regulations may require this landlord to include in its leases an obligation for tenants to comply with equal opportunity requirements, hiring of particular categories of person, or other governmental agendas, including, for example, the foreign policy of the City of New York.

42.09 **Other Leases.** Does any other tenant have a right of first refusal or other pre-emptive right for the space now being leased? The landlord should understand all possible preemptive rights under other leases in the building, to assure that no two tenants can ever claim the same space at the same time. Does any other tenant's lease contain any other provisions that this lease ought to take into account, such as a right to enter the premises to run cable or obtain access to telecommunications installations? Particularly in a retail context, has the landlord given any other tenant an exclusive right that this one might violate? If the tenant requests any rights outside the leased premises (for example, an antenna on the roof), can the landlord accommodate that request without running afoul of rights already given to other tenants? Rather than deal with all these issues on a one-off basis for each lease, the landlord or its counsel should maintain—and keep updated—a correct and complete master list of all rights of the types mentioned in this paragraph.

42.10 **Plans.** Does the landlord plan any significant changes, redevelopment, repositioning, or sale of the building in the term of this lease? How would those plans affect the terms of the lease? Does this lease match the landlord's plans for the building?

42.11 **Previous SEC Filings.** If the tenant is publicly held and any previous lease of the tenant was a "material obligation," the tenant should have incorporated that prior lease in a previous SEC filing. As a strategic matter, the landlord may wish to review that filing and see what the tenant accepted in the previous transaction.

42.12 **Real Estate Tax Assessment.** Think about the real estate tax assessment in the base tax year. If for some reason the landlord knows it is "too high," will probably drop in later years, but probably will not drop for the actual base year,

then over time the real estate tax escalation in the lease may not help the landlord much. How to handle this problem will depend in part on the particular building and the particular landlord, as well as local tax assessment procedures and timing.

42.13 **References.** Obtain references for the tenant and its principals.

42.14 **Scope of Premises.** Think about where the premises begin and end, identifying and resolving any uncertainties. Do not just refer, for example, to "the eighth floor" or "all the rentable space on the eighth floor." Prepare a clear floor plan (or at least a sketch) to attach to the lease. Even for a full-floor tenant, clearly demarcate where the premises end and the common areas (and other landlord-controlled areas) begin. Do the premises include service closets? Elevator lobbies and restrooms, particularly in the case of full-floor premises? If someone prepares and throws onto the back of the lease an intuitive sketch of the space at the last minute, this can lead to serious disputes later if the sketch included even very tiny spaces that it shouldn't have included. If the lease refers to rent as a function of "rentable area"—an undesirable approach—then a space sketch could even somehow create arguments or uncertainty about the amount of "rentable area" and hence the rent.

42.15 **Status of Premises.** Is the space presently vacant? Do any issues exist about its present physical condition? Does the landlord anticipate any problems obtaining vacant possession?

42.16 **Tax.** Consider any tax issues arising from, e.g., the structuring of the rental stream and allocation of depreciation deductions arising from any initial capital investment for the lease.

42.17 **Tenant Representations.** Obtain representations and warranties about the ownership structure of the tenant, perhaps backed by a secretary's certificate and copies of documents. Also seek confirmation that the tenant obtained all necessary approvals, especially if the tenant is a nonprofit or other unusual type of entity. Consider obtaining the same for any entity guarantor.

43. Other Documents and Deliveries

43.01 **Advice and Administration Memo.** The landlord may desire counsel to prepare a memorandum summarizing important provisions of the lease and advising the landlord on actions it should remember to take to avoid problems, issues or disputes. Any such memorandum should also include reminders of any important dates (including any that recur periodically); a disclaimer of counsel's responsibility to remind the landlord of those dates; and a suggestion that the landlord maintain a tickler file. Because such a memo can't include everything, it should include appropriate disclaimers. But to the extent it does cover anything, make it 100 percent right. Check it three times.

43.02 **Brokerage Agreement.** Confirm that the landlord has entered into suitable brokerage agreements (or has obtained commission waivers) with every broker involved in the transaction in any way. Consider the effect of a possible tenant default on the landlord's liability for unpaid brokerage commissions. What about an early negotiated termination of the lease based on a change in the tenant's financial condition? Try to negate any further payment obligations to the broker in any such event. If the lease gives the tenant early termination options, then defer any commission payments accordingly. Try to express any brokerage commission as a dollar figure rather than as a formula, because formulas invite disputes, especially when they provide for exclusions, gross-ups, adjustments, hypothetical eventualities, and other sources of complexity and disputes. Did the landlord ever enter into any previous leasing transaction with this tenant, creating the risk that a broker involved in the previous transaction will expect a commission from this one?

43.03 **Certificate of Insurance.** Have an insurance consultant review the tenant's insurance certificate as well as the tenant's underlying insurance policy and endorsements. There is really no substitute for reviewing the actual policy and endorsements themselves.

43.04 **Disclosures.** To the extent that governing law requires a prospective landlord to disclose information to a prospective tenant, identify those requirements and make the disclosure. Ever-expanding disclosure requirements have become part of the territory for certain consumer transactions. The trend has started to affect commercial leasing. For example, New York requires prospective landlords to notify prospective tenants of certain vapor intrusion issues.

43.05 **Environmental Assessment (Baseline).** Particularly if a tenant will lease an entire building or conduct activities that might cause contamination, obtain an environmental assessment as of the beginning of the lease term. Attach it as an exhibit. Use it as a baseline to measure any possible contamination the tenant caused

or for which the tenant might otherwise be responsible.

43.06 **Estoppel Certificate.** Attach a form of estoppel certificate to the lease. Make it as broadly acceptable as possible, and consistent with the form contemplated by any existing loan documents. It should allow reliance not only by third parties but also, if possible, by the landlord.

43.07 **Exhibits**. To the extent that the lease will contain exhibits, who prepares them? For example, will someone else want to prepare the rules and regulations for the lease? Construction rules and regulations? Have they changed since the last version included in the standard form?

43.08 **Financial Statements.** Obtain for the tenant and any guarantor(s), and perhaps selected affiliate(s). Make sure the client has reviewed them.

43.09 **Good Standing and Organizational Documents.** Obtain and review the tenant's good standing certificate and government-certified copies of organizational documents. Ask for an organizational chart if the tenant's structure is complex.

43.10 **Guaranty.** Obtain a guaranty executed by the correct guarantor—check the name against some appropriate document—and acknowledged before a notary. Confirm the authority of the signer for any entity guarantor. Require the guarantor's taxpayer identification number and (for an individual) residence address under the guarantor's signature. If an individual guarantor resides in a joint property state, consider obtaining the signature of the guarantor's spouse as well. If the guaranty covers anything less than all lease obligations, think about how the landlord might enforce the guaranty in the context of various possible defaults, and try to prevent any surprises. If the tenant defaults and perhaps cures some of those defaults in various ways, how does that affect the landlord's claims under the guaranty?

43.11 **Letter of Credit.** Review the letter of credit form as early as possible in the process. Obtain lender sign-off as needed. If the lender requires any arrangements to give the lender control of the letter of credit, set up those arrangements. They may involve third parties, hence take longer.

43.12 **Lender's Rights.** Review the landlord's loan documents to assure that the landlord's rights and obligations under the lease track the landlord's obligations as borrower under the loan. What landlord consent rights do the existing loan documents require the borrower to retain? And what landlord consent rights will future lenders probably require? If the loan documents are being negotiated at the same time, try to correct any disconnects by modifying the loan documents if necessary. The concerns in this paragraph go beyond assignment and subletting, but seem most likely to apply to assignment and subletting.

43.13 **Marked Leases.** When preparing final lease documents for signature, mark them against the landlord's standard form to facilitate future lease review projects and administration. Do not give tenants and their counsel those marked copies.

43.14 **Memorandum of Lease and Release.** If the lease requires the landlord to sign a memorandum of lease, also obtain a release of memorandum of lease, and deposit it in escrow with the landlord's counsel or some other third party willing to assume responsibility.

43.15 **Opinion of Counsel.** For a major lease, consider obtaining an opinion of counsel about the tenant's due authorization, execution, and delivery of the lease, though probably not enforceability of the lease. Consider requesting a representation by the tenant that entering into the lease does not violate any pre-existing agreements. Similar considerations may arise for any guarantor. A landlord might particularly want an opinion of counsel for a foreign, governmental, or nonprofit tenant.

43.16 **Original Documents.** Create an audit trail showing who received original documents, particularly letters of credit. In general, original documents should go to the client and the landlord's counsel should retain a scanned copy of the entire lease and all related documents, with all exhibits. Is there anyone else to whom the landlord must send copies of new leases? What about the landlord's mortgagee or any ground lessor?

43.17 **Plan Approval.** If the landlord will perform any construction, have the tenant approve any plans at lease signing, if possible. Failure to do that may give the tenant an opportunity to delay the construction process (by withholding approval of future plans), which could delay commencement of rent.

43.18 **Press Release.** Particularly if the landlord wants to control or initiate press coverage for the transaction, the landlord may want the parties to issue a press release about their transaction. If so, the parties should resolve the

form of that press release as part of negotiating documents, because it will need to go out immediately after signing to achieve maximum attention from the press.

43.19 **SNDA Request.** Without putting any ideas into the tenant's head, try to determine early in the process whether the tenant intends to require an SNDA. If so, start the process early. See what exactly the governing loan documents will require the landlord to do. Who acts for the lender? What information must that person receive? Match the form of SNDA attached to the lease (or otherwise expected by the tenant) to the form of SNDA contemplated by the loan documents. The same agenda arises for any ground lessor.

43.20 **Taxpayer Identification Number; W-9 Form.** Require the tenant's taxpayer identification number under the tenant's signature. Sooner or later the landlord will need it. If the tenant delivers an interest-bearing security deposit, the landlord will need the taxpayer identification number immediately. Consider incorporating the tenant's W-9 Form certifications into the body of the lease, as a backup for a separate form, which the landlord should also obtain.

43.21 **Term Sheet (Letter of Intent).** Any significant leasing transaction often starts with a term sheet or letter of intent, prepared by the brokers. The landlord's counsel should try to participate in preparing that document, at least to the extent necessary to prevent unintended liability, obligations, and issues for the landlord. Typically, it will make sense to say that the term sheet or letter of intent does not bind the parties, except a few provisions that do, such as confidentiality, a brokerage indemnity, consents to background checks, nonreliance, and the agreement of the parties about the otherwise nonbinding nature of the document.

43.22 **Third-Party Consents.** If the transaction will require any third-party consents, obtain whatever piece of paper evidences that consent. Like any other piece of paper, it may require drafts and negotiations. Start those early.

44. Post-Closing; Monitoring

The following suggestions on lease administration and enforcement do not constitute a complete guide to administering and enforcing leases. Some of these responsibilities will belong to the landlord's leasing broker or property management company, so they should be delegated accordingly in a way that is unambiguous.

44.01 **Abandonment.** If the tenant seems to have moved out, then before entering and taking control of the premises, consider sending an "estoppel" notice to the tenant reiterating the lease provisions on "abandonment" and inviting the tenant to confirm that it has not abandoned the premises, with payment of any unpaid rent. If any doubt exists about whether the tenant has abandoned the premises, consider using a summary possession action rather than self-help to avoid claims of wrongful eviction.

44.02 **Alteration Consents.** A lease sometimes says the tenant need not remove its alterations and restore the premises at the end of the term unless the landlord requires such restoration as a condition to the landlord's approval of the particular work. In those cases, the landlord must remember to exercise its right to require restoration when appropriate—thus creating a little trap for the landlord. So when the landlord receives a request for approval of alterations, the landlord should check the lease to see if it imposes such a requirement. (In a perfect leasing world, of course, the lease would require the tenant to give the landlord a conspicuous reminder of any such requirement whenever the tenant submits plans.)

44.03 **Casualty and Restoration.** If a casualty occurs during construction and affects the construction, identify and comply with any lien statutes or other contractor-protection statutes that might apply. In New York, for example, insurance proceeds that arise under these circumstances will be subject to the trust fund provisions of Lien Law article 3-A, a minefield for all concerned.

44.04 **Changes of Address.** If the landlord or any other notice recipient relocates, send formal notices to all tenants. Do not assume an ordinary emailed or bulk-mailed announcement will do the job. Update any filings, such as the Secretary of State and corporate service companies. If a tenant gives a formal notice of a change of address, the landlord should update its records. If the landlord becomes informally aware of a tenant relocation, the landlord should add the tenant's new address to its records, but use it in addition to continuing to use the old address. For clarity in that case, the landlord might request the tenant to give a formal update.

44.05 **Commencement Date; Delivery of Premises.** Issue formal notice and confirmation of delivery of the premises and commencement date, in a way that satisfies the specific delivery requirements of the lease. Exactly who needs to receive notice? Does anyone else need to receive

a copy? The requirements may exceed those of the regular "notices" clause in the lease. Think about how to comply with them before the commencement date actually occurs, because delays in giving notice may result in lost rent dollars. Memorialize the commencement date with a document filed in such a way that someone will be able to find it in five years. If the lease (or a memorandum of lease) was recorded, consider recording notice of the commencement date.

44.06 **Consent Requests.** If the tenant requests consent to anything, check the lease to see what conditions the tenant must satisfy. The tenant's request for consent may give the landlord an opportunity to solve problems or uncertainties that may have arisen. If the landlord anticipates incurring attorneys' fees in dealing with the consent, confirm that the lease obligates the tenant to reimburse those fees. If it doesn't, try to have the tenant agree to do that before the landlord starts to consider the request for consent.

44.07 **Document Files.** The landlord should establish reliable procedures to assure that when the tenant requests an estoppel certificate, the landlord will be able to list all documents that define the landlord-tenant relationship, such as option exercise letters, change of address notices, other notices, and the like. The landlord should prevent issues that might arise if the landlord delivers an estoppel certificate and forgets to include any of these other miscellaneous documents.

44.08 **Estoppels.** The landlord may wish to request periodic estoppel certificates simply to try to prevent future issues from arising. Request an estoppel certificate (or include equivalent language in the documentation) for any amendment, consent, waiver, favor, or other concession of any kind. Consider periodically requiring an estoppel certificate on general principles, including from guarantors. Obtain one when the landlord has finished initial build-out. If the tenant has a deadline to respond to these requests, and perhaps in all cases, communicate these requests in compliance with the notice provisions of the lease. Periodically ask the tenant to confirm its formal notice address.

44.09 **Fair Market Value Determinations.** If the lease will require the parties to determine fair market rental value for any rent adjustments or option terms, the landlord should plan ahead for those likely disputes. At a minimum, the landlord should maintain suitable notes on other transactions and useful information, and perhaps engage the "best" appraisers well in advance to try to assure the process goes well if the parties can't agree on fair market rental value.

44.10 **Future Amendments.** If the landlord and the tenant amend the lease, the landlord should obtain guarantor consent (even if the guaranty waives such a requirement); amend any recorded memorandum of lease; and obtain any consents needed from lenders, partners, or other parties. Consider including estoppel-type assurances in any amendment. Lease amendments create their own minefields, as described in Joshua Stein's article on the topic, *How to Stay Away from the Minefields in Lease Expansions, Extensions, and Renewals*, The Practical Real Estate Lawyer, March 2012, at 17. Among other things, lease amendments give the landlord a good occasion on which to check the file, understand all amendments that have occurred to date, and make sure the landlord's housekeeping remains in order.

44.11 **Future Deliveries.** To the extent the lease requires the tenant to make future or periodic deliveries of documents (such as financial statements, certificate of ownership structure, or insurance renewals), remember to ask for them. If the landlord fails to enforce a tenant obligation long enough, that might create a waiver.

44.12 **Future Events.** Memorialize any exercise of an option, delivery of additional space, and the like, and any resulting rent or base year adjustments. Keep a copy of any resulting documentation in the lease file, in a place where someone will find it when they want "all" the lease documents.

44.13 **Guarantor.** For an individual guarantor, check occasionally to see if the guarantor has died or has become disabled. If this occurs, the landlord may need to file a claim in probate, quite quickly, or lose its rights against the guarantor.

44.14 **Insurance.** Monitor expiry dates of insurance. Update coverage limits and requirements as markets change. Check insurance certificates for renewals, to confirm they continue to comply with the lease.

44.15 **Lease-Related Agreements.** If the landlord and the tenant enter into any future agreements related to the lease, think about whether they constitute lease amendments and require approval from lenders or other third parties. Unless they constitute lease amendments, any nonpayment or nonperformance under these future agreements will probably not constitute a default under the lease, and thus may not

allow the landlord to exercise lease-related remedies.

44.16 **Letters of Credit.** Establish a single safe location to store letters of credit, and memorialize that location among all who need to know about it. Check that location once in a while to make sure the letter of credit has not somehow walked away. Monitor expiry dates. Pay attention to possible credit downgrades affecting the letter of credit issuer; they may allow the landlord to draw the letter of credit. If the letter of credit is an evergreen, consider obtaining periodic confirmations that the letter of credit remains in effect. It's hard for a landlord to prove the landlord never received a cancellation notice. Typically, draw at the earliest possible opportunity, if necessary.

44.17 **Permits.** Periodically check the official records for open building permits that the tenant should have closed.

44.18 **Preemptive Rights.** Give the tenant notices of available space, and other notices, under any right of first refusal or other preemptive rights in the lease. Track this tenant's rights, and potential triggering events for those rights, in a way that nothing will fall between the cracks. In giving notices, do it right the first time. For suggestions, see Joshua Stein's article on the topic, *A Checklist for Giving Legally Effective Notices*, The Practical Lawyer, August 2005, at 11.

44.19 **Tenant's Name.** If the tenant operates or identifies itself under any name other than its legal name in the lease, check with landlord-tenant counsel to see whether this could create an issue in an eviction action. Similarly, if checks for rent under the lease show the name of anyone other than the tenant, consider any issues this may create. If necessary, notify the tenant that future rent checks should come from the tenant, and not any affiliate or other party.

44.20 **Tickler Reminders.** If the tenant persuaded the landlord to remind the tenant of certain matters (e.g., option exercise deadlines), establish appropriate reminders in the landlord's calendar. Counsel may also wish to make appropriate "tickler" entries, but should avoid assuming responsibility to remember. To the contrary, counsel should affirmatively warn the landlord that counsel does not assume responsibility to remember any dates.

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Owners' Rights to Inspect the Records of Cooperatives and Condominiums

By Adam Leitman Bailey

Since the legislature gave birth to the first cooperative and condominium laws, very few issues have had as much attention and confusion as boards' concerns about the extent of unit owners' access to inspect the management books and records. Regarding cooperative buildings, many of the most prominent questions about these little governments have been answered. On the other hand, condominiums have been left without law or a statute to handle these questions, and many times all out civil wars ensue. Just this year, the Appellate Division, First Department, handed down its first decision on the subject, albeit limited to its facts. This article will analyze the state of the law and attempt to provide guidance to the practitioner and members of boards of directors.

The Right of Analysis

Although the law on shareholders' inspection rights is more developed than that of condominiums, there are still issues that arise as to the extent of books and records that shareholders are entitled to inspect.

Analysis must start with the statutory grant of power laid out in the New York Business Corporation Law ("BCL"). BCL § 624 grants shareholders a statutory right to inspect the minutes of shareholder meetings and the record of shareholders.[1] They also have the right, if they meet standing requirements, to receive an annual balance sheet and profit and loss statement. In *Bohrer v. International Banknote Co.*, the First Department elaborated on the meaning of the right to inspect the record of shareholders.[2] A shareholder sought to compel the cooperative to disclose certain shareholder records for use in soliciting proxies in connection with an election of the board of directors. Ruling for the shareholder, the court held that BCL § 624 was to be liberally construed so as to facilitate communication among shareholders on issues respecting corporate affairs.[3] Furthermore, the court reasoned that the public policy behind § 624 was to put shareholders on the same or equal footing with the corporation when attempting to contact other shareholders in an upcoming proxy fight.[4]

Courts have also adopted common law rights of inspection, expanding access beyond the statutory right in certain circumstances. In *Crane Co. v. Anaconda Co.*,[5] the Court of Appeals reaffirmed doctrines such as those found in *In re Steinway*,[6] harking back to 1899, holding that shareholders have the common law right to inspect all corporate books and records where the request is made in good faith and for a proper purpose.[7] We see these principles applied specifically to cooperatives in *Matter of Schapira v. Grunberg*, where shareholders sought inspection of the records of a particular election, including both ballots voted for in person and by proxy and the proxies.[8] Citing *In re Steinway*[9] and *Crane Co. v. Anaconda Co.*,[10] the trial court held that unit owners of cooperatives have a right not only to inspect the records specified under BCL § 624, but they also have the common law right to inspect other corporate records, merely by virtue of their status as corporate shareholders.[11] *Schapira* found in these precedents a right to inspect the books and papers of a cooperative corporation for any proper purpose and under reasonable circumstances. Thus, the court ordered a hearing limited to examination of those two questions. Although the First Department mooted this rationale, finding a right of inspection already present in the corporate bylaws, it did not overturn the trial court's rationale for circumstances where there is no such explicit right.[12] Thus, this rationale, which the Court of Appeals has applied in regards to general business corporation shareholder inspection rights, is more generally applicable to all types of shareholders including those of cooperatives.

It has clearly been established that rights of inspection are conditioned on shareholders showing that their demand is in good faith for a proper purpose.[13] BCL § 624(c) establishes this, stating that a shareholder must furnish an affidavit to the corporation substantiating that the inspection is not for:

> [A] purpose which is in the interest of a business or object other than the business of the corporation and that (the shareholder) has not within five years sold or offered for sale any list of shareholders of any corporation of any type or kind, whether or not formed under the laws of this state, or aided or abetted any person in procuring any such record of shareholders for any such purpose.[14]

Upon furnishing said affidavit, the burden of proving bad faith or improper purpose is on the corporation if it wants to deny access to books and records.[15] The corporation must raise a substantial question of fact as to the shareholders' good faith and motives in order for the court to order a hearing on that issue.[16] The question of whether to hold the hearing on the good faith issue is reserved to the court's sound exercise of discretion.[17]

Generally, good faith encompasses honest intent, absence of malice, and absence of design to defraud or seek unconscionable advantage.[18]

Purposes solely based on harassing the corporation's directors or an intention to injure the corporation's pursuits would not satisfy the good faith requirement of common law inspection rights.[19]

Since a cooperative corporation is a corporation first and foremost, much of its common law is to be found related to actual business corporations. However, since a cooperative corporation has neither profits nor competitors, more appropriate analogies can be found at times in religious corporations. As for the proper purpose requirement, proper purposes for inspection of corporate records by a shareholder are those reasonably related to a shareholder's interest in the corporation. The information obtained through the inspection must not be used for a purpose that is in the interest of a business or object other than the business of the corporation.[20] It has been held that proper purposes for inspection generally include, among others, efforts to ascertain the financial condition of a corporation, to calculate value of stock, to investigate management's conduct, and to obtain information in aid of legitimate litigation.[21] Most improper purposes authorizing corporations to refuse to allow shareholders to inspect corporate books and records are those speaking to for-profit corporations only, but that does not mean that the peculiar world of cooperatives will never find an improper purpose.

Courts have ruled in favor of shareholders' inspection rights on several different occasions, demonstrating a lenient standard that shareholders must meet to establish good faith and proper purpose. In *Durr v. Paragon Trading Corp.*, the Court of Appeals held that shareholders had the right to examine corporate books to determine if its affairs were being properly managed.[22] The court determined that based on the disputed issue of financial mismanagement and the conceded facts that petitioners are stockholders, an examination of the books was requisite to prove the truth of the shareholders' claims.[23] In *Troccoli v. L & B Contract Industries, Inc.*, the Second Department found a shareholder's desire to evaluate the worth of his shares was a demonstration of good faith and valid purpose to compel the corporation to produce its books and records that were relevant and necessary for the purpose.[24] Clearly, the emerging common law of BCL § 624 requires liberal construction in favor of the shareholders who have genuine issues as to their welfare as stockholders or who show genuine concern for the corporation's welfare.[25] The law has no such leniency in favor of mere gadflies, however.[26]

The shareholders of a corporation hold the franchise with a pecuniary interest in the corporation's appropriate administration. As such, they have the right, at common law, to examine all the books and records of the corporation. Such a right is not to be exercised to gratify curiosity or for speculative purposes, but instead should be used for good faith purposes, and where there is a particular matter in dispute, involving and seriously affecting the rights of the stockholder.[27] Assuming there is good faith and proper purpose, it is in the Court's discretion to exercise its authority to limit or expand the scope of the shareholder's inspection of corporate records to the material necessary to protect the interest in the Corporation.[28]

Analyzing Condominium Records

Because most condominiums exist as unincorporated associations and are not subject to the business corporation law, any rights of owners as to the inspection of books and records arise out of the building's corporate documents, the common law and RPL § 339-w which states that:

> [T]he manager or board of managers, as the case may be, shall keep detailed, accurate records, in chronological order, of the receipts and expenditures arising from the operation of the property. Such records and the vouchers authorizing the payments shall be available for examination by the unit owners at convenient hours of weekdays. A written report summarizing such receipts and expenditures shall be rendered by the board of managers to all unit owners at least once annually.[29]

Until this year, only two lower court decisions, providing mixed results, gave any guidance as to condominium inspection rights.[30] For the first time, the First Department, in *Pomerance v. McGrath*,[31] recognized a common law right for an owner to have access to the "contact information for the other condominium owners in the building in written form and in any other format in which the condominium or its managing agent maintains such information…"[32] The phrase "any other format" is important as it essentially gives access to the native computer files at the least, if not to the condominium's computers.

While recognizing a common law right, the Appellate Division specifically rejected the argument that a unit owner is entitled, under the BCL, to examine the books and records of the condominium, as it is not a cooperative and not an incorporated association.[33] However, the court reasoned that the:

> [R]ight of a stockholder to examine the books and records of a corporation existed at common law, and does not depend on a statute. The unit owners of a condominium collectively own the common elements thereof and are responsible for the common expenses. Thus the rationale that existed for a shareholder to examine a corporation's books and records at common law applies equally

to a unit owner vis-à-vis a condominium.[34]

The court continued to expand its common law development of RPL 339-w and held that the access rights should not be limited to those items specifically delineated in the statute. The court stated that the legislative history of article 9-B demonstrated that the Condominium Act should be "liberally construed."[35] For policy reasons, the court further opined that "giving condominium unit owners the same rights as cooperative shareholder-tenants will encourage condominium ownership," a goal the court evidently felt worthy of pursuit.[36]

While deciding that inspection rights should be liberally construed, the court made sure to mention that the rights given in this decision apply to elections for a condominium board.[37] It appears that the court has left the door open for future litigation to better define the common law rights of owners to inspect and have access to condominium board records. Thus, there remains the possibility that a unit owner's rights are not ultimately going to be found to be fully co-extensive with a shareholder's rights. Thus, *Pomerance* provides guidance and reason to believe in analogy, but it is not squarely on point for anything but its own facts.

Formally speaking, the law is only fully established for cooperatives and less fully established for condominiums (especially outside the First Department). We can expect that further common law development in this field will ultimately give plenary rights of records inspection to all shareholders and unit owners, so long as their request is in good faith and for a proper purpose.

Endnotes

1. N.Y. Bus. Corp. Law § 624 (McKinney 2013).
2. *See* 150 A.D.2d 196, 196, 540 N.Y.S.2d 445, 445 (1st Dep't 1989).
3. *Id.*
4. *Id.* at 197.
5. *See* 39 N.Y.2d 14, 17, 346 N.E.2d 707, 710 (1976).
6. *See* 159 N.Y. 250, 263 (1899).
7. *See* Crane Co. v. Anaconda Co., 39 N.Y.2d 14, 18, 346 N.E.2d 507 (1976).
8. *See* 12 Misc.3d 1195(A), *1 (Sup. Ct. 2006).
9. *See In re* Steinway, 159 N.Y. 250, 53 N.E.2d 507 (1976).
10. *See* 39 N.Y.2d 14, 346 N.E.2d 507 (1976).
11. *See* Schapira v. Grunberg, 12 Misc.3d 1195(A) at *2.
12. *Id.*
13. *Crane Co., supra*; Mayer v. Nat'l Arts Club, 637 N.Y.S.2d 58, 59 (1996).
14. N.Y. Bus. Corp. Law § 624(c) (McKinney 2013).
15. *See* Dyer v. Indium Corp. of Am., 770 N.Y.S.2d 184, 185 (2003).
16. *See* Troccoli v. L & B Contract Indus., Inc., 687 N.Y.S.2d 400, 401 (1999).
17. *Id.*
18. *See* Cravatts v. Klozo Fastener Corp., 133 N.Y.S.2d 235, 238 (Sup. Ct. 1954).
19. *See* De Paula v. Memory Gardens, Inc., 456 N.Y.S.2d 522, 524 (1982).
20. N.Y. Business Corporation Law § 624(c).
21. *See* Tatko v. Tatko Bros. Slate Co., Inc., 173 A.D.2d 917, 918 (1991).
22. *See* Durr v. Paragon Trading Corp., 270 N.Y. 464, 471 (1936).
23. *Id.*
24. *See Troccoli*, 687 N.Y.S.2d at 401.
25. *See Crane Co.*, 346 N.E.2d at 512.
26. *See In re* Steinway, 159 N.Y. at 262.
27. *Id.*
28. *See* Mathews v. Onondaga Co. Deputy Sheriff's Benevolent Assoc., 225 A.D.2d 1048, 1048 (4th Dep't 1996).
29. N.Y. Real Prop. Law § 339-w.
30. *See* A & A Properties NY Ltd. v. Soundings Condominium, 675 N.Y.S.2d 853, 854 (Sup. Ct. 1998) (allowing inspection of condominium records); *contra*, Mishkin v. 155 Condominium, 2 Misc.3d 1001(A) (Sup. Ct. 2004).
31. *See* Pomerance v. McGrath, 104 A.D.3d 440, 441 (1st Dep't 2013).
32. *Id.*
33. *Id.*; *see also* Steinway, 159 N.Y. at 258-59, 262-64.
34. *See Pomerance*, 104 A.D.3d at 441.
35. *Id.* at 441.
36. *Id.* at 441-42.
37. *Id.* at 442.

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Chazon—The Court of Appeals Weighs in on New York City's Loft Wars

By Andrew D. Brodnick

I. Introduction

Substandard multi-family housing plagued New York State during the end of the nineteenth century and the beginning of the twentieth century, especially in the tenements of Lower Manhattan. The Multiple Dwelling Law ("MDL"),[1] enacted in 1929, sought to combat that plague and was considered landmark legislation, which was said to provide for "the highest standards for [residential] construction in the world."[2]

The Multiple Dwelling Law mandated that multiple dwellings (buildings in which three or more families reside) must conform to certain minimum standards of habitability. No multiple dwelling could be occupied until a residential certificate of occupancy was issued confirming that the dwelling complied with the habitability requirements of the Multiple Dwelling Law.[3]

Compliance was compelled under MDL § 302(1)(b). In the event a multiple dwelling did not have a residential certificate of occupancy, then "[n]o rent shall be recovered by the [landlord], and no action or special proceeding shall be maintained…for possesion of a [multiple dwelling] for nonpayment of…rent."[4] Landlords faced a stark choice—either obtain a multiple dwelling with a residential certificate of occupancy or lose the right to collect rent.

The Multiple Dwelling Law substantially lessened the scale of substandard housing. Later, in the second half of the Twentieth century, tenants in sections of New York City began to use old commercial manufacturing lofts, which had become plentiful and cheap, for residential purposes. The lofts were not designed for residential occupation, but tenants willingly sought out lofts and made improvements at their own expense to make them habitable. The lofts, however, did not have a residential certificate of occupancy and therefore the landlord was technically barred under MDL § 302(1)(b) from collecting rent or evicting a tenant for nonpayment of rent.

This wholesale violation of MDL § 302(1)(b) was—at least initially—gladly tolerated by tenants, who were happy to live in a large open space, a highly prized quality in New York City residential rentals. Landlords were happy to be able to find *any* tenants because by the 1960s commercial manufacturing tenants had almost completely disappeared from Lower Manhattan. Public welfare in general benefited because the residential use of lofts expanded New York City's housing stock.

This happy medium, rarely achieved between landlord and tenant in New York City, did not last. Though tenants willingly invested sums to make the interiors of lofts habitable, they still expected their landlords to provide common area services. Landlords may have looked the other way when tenants modified their lofts for residential use, but were not prepared to invest the sums to formally convert the building to residential use. A new front opened in New York City's landlord / tenant wars, and tenants were inevitably lured into withholding rent and using MDL § 302(1)(b) as a defense. In the 1970s, a flood of cases overwhelmed the New York City Civil Court in New York County.

The "Loft Law," passed by the New York State Legislature in 1982, addressed this conundrum. It directed landlords of lofts which were "de facto" multiple dwellings to register the buildings as such. The new law also set forth a timetable by which the landlord had to obtain a residential certificate of occupancy. A landlord was granted an exemption from MDL § 302(1)(b) and was permitted to collect rent while it sought a residential certificate of occupancy.

Decades later, many lofts that registered as interim multiple dwellings still had not obtained their residential certificates of occupancy. Courts once again returned to deciding whether MDL § 302(1)(b) prevents a landlord from recovering rent when it has failed to obtain a residential certificate of occupancy within the timetable set forth in the Loft Law.

Last year—thirty years after the Loft Law was enacted—a loft case found its way to the Court of Appeals. *Chazon, LLC v. Maugenest*[5] reemphasized that MDL § 302(1)(b) retained its punitive power. A landlord of a "de facto" multiple dwelling who did not have an excuse for failing to obtain a residential certificate of occupancy as required under the Loft Law cannot "collect rent or… evict the tenant" even if the tenant could spend years living rent free in a loft.[6]

II. Background

In the late nineteenth and early twentieth centuries, Lower Manhattan experienced an explosion of commercial manufacturing construction. Old residential areas south and north of Houston Street were razed. Not only were tenements replaced; New York City's first residential cooperative established in 1880 (which had been promoted and occupied by the actor Edwin Booth) was torn down to build lofts.[7] Open floor buildings for manufacturing and storage were built in their place. The frenzy started south of Canal Street, moved up to Houston Street, pushed to 14th Street, and ended with an orgy of "mega" lofts north of 23rd Street just after the end of the nineteenth century.[8]

Loft buildings retained their value through the 1940s. Thereafter, manufacturing in Lower Manhattan severely declined. Vacancies multiplied. While the garment industry, and other industries, continued to provide some demand for the more modern structures north of 23rd Street, Lower Manhattan lofts were abandoned *en masse*.

Nature abhors a vacuum.[9] So does New York City real estate, especially a vacuum well situated in Manhattan just north of the financial district and just south of the East and West Village. Artists were the first to lay claim to the abundant vacant and cheap loft space. By the early 1960s, artists had taken over thousands of lofts as studios and living quarters.[10]

Landlords were more than happy to look the other way when tenants under "commercial" leases were using lofts to live in as well as work. Building inspectors, on the other hand, were not so happy. Though the residential use of lofts was obviously barred under the Multiple Dwelling Law, it was hard to prove that someone was or was not living in a loft. Instead of issuing residential violations, the Building Department began a crackdown by issuing commercial code violations.

Artists were angered by what they perceived as harassment from the building inspectors. The harassment was also arguably misdirected because enforcing commercial code requirements on lofts used as residences did not even address the real issue, *i.e.*, were the lofts safe for human habitation?

In 1961, an artists' group, including Willem de Kooning, threatened to "strike" if building inspectors did not stop issuing violations which were causing artists to be evicted.[11] The planned strike involved a refusal of artists to sell their work, therefore depriving galleries and museums of new product. The Legislature, which may or may not have been cowed by the threat of gallery and museum stagnation, enacted Article 7B of the Multiple Dwelling Law to address this quandary.[12]

Article 7B, entitled "Occupancy For Joint Residential-Visual Fine Arts Purposes," stated as follows:

> It is hereby declared…that persons regularly engaged in the visual fine arts require larger amounts of space for the pursuit of their artistic endeavors [and] there exists in [NYC] buildings in the past occupied for manufacturing and commercial purposes which contain…physically and economically suitable space for use by persons regularly engaged in the visual fine arts for the combined purposes of pursuit of their artistic endeavors and residences.[13]

Article 7B allowed "certified" artists to occupy loft space as long as those lofts complied with certain minimum habitability requirements.[14]

Not surprisingly, interest in loft space for residential use began to expand beyond artists. A new breed of tenant arrived. *The New York Times* noted in 1970 that "Madison Avenue advertising men"—known then and now as "Mad Men"—wanted to live among artists.[15] They could afford higher rents. The market responded; rents rose.[16] Residential use of lofts increased substantially in the 1970s. Property values rose. Tenants would make their own improvements to make the lofts habitable (if not necessarily code compliant). An incoming tenant would pay "fixture money" to an outgoing tenant to reimburse the outgoing tenant for his or her improvements.[17] Some tenants grouped together, bought out their landlords, and transferred ownership of the buildings to a cooperative.[18]

This scramble brought to the forefront the lurking conflict between MDL § 302(1)(b)'s prohibition on collecting rent absent a residential certificate of occupancy and voluntary residential use of commercial lofts. Litigation proliferated. The Civil Court of the City of New York, New York County, suffered a surge of loft summary proceedings best described by Civil Court Judge Leonard N. Cohen in *Lipkis v. Pikus*,[19] as follows:

> These nonpayment summary proceedings illustrate the unregulated twilight zone of commercial loft conversions for residential reuse in our city, resulting in widespread illegality, absence of housing code enforcement, hazards to health and safety, owner abuses and manipulation of tenants, and housing law confusion.[20]

The landlord in *Lipkis* was seeking to evict loft tenants notwithstanding the fact that the landlord was well aware of the residential use of the lofts and encouraged such use (though he evasively sought to deny it at trial). The Civil Court held that the landlord could not collect rent because he knew the lofts were being used for residential purposes and he could therefore not collect rent under MDL § 302(1)(b) without a residential certificate of occupancy.[21]

The Appellate Term ostensibly affirmed the Civil Court ruling, but modified Judge Cohen's order and directed that the tenants pay all rent arrears and ongoing rent with the clerk of the court until the landlord obtained a residential certificate of occupancy.[22] Judge Riccobono issued a vigorous dissent based primarily on the proposition that MDL § 302(1)(b) said what it meant and meant what it said.[23] If the loft conversion field was rendering the application of MDL § 302(1)(b) inappropriate, Judge Riccobono opined that such judgment should emanate from the Legislature rather than the courts.[24]

The New York State Legislature addressed the morass created by the residential use of lofts in 1982 by enacting Multiple Dwelling Law Art. 7–C, "Legalization of Interim Multiple Dwellings" ("Loft Law").[25]

The Legislature found that in cities having a population of over 1,000,000 residents (the Legislature's traditional euphemism for New York City):

> [A] serious public emergency exists in the housing…by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws. [T]enants in such buildings would suffer great hardship if forced to relocate…[I]ntervention of state and local governments is necessary to effectuate legalization….[26]

The goal was to legally convert "de facto" loft multiple dwellings in New York City so that they could obtain residential certificates of occupancy. The Loft Law defined buildings that housed three or more families in commercial lofts from April 1, 1980 through December 1, 1981 as "interim multiple dwelling[s]."[27] Landlords were required to meet deadlines by which the units would have to be modified to meet residential occupancy standards and ultimately obtain a residential certificate of occupancy.[28]

A "Loft Board" was created (to be staffed by mayoral appointees) and would rule on various issues regarding the conversions.[29] A landlord could obtain an extension of the certificate of occupancy deadlines from the Loft Board for "good cause."[30] If a landlord were in compliance with the requirements set forth in the Loft Law, the landlord could bring an action for possession of the units for non-payment of rent notwithstanding the prohibition under MDL § 302(1)(b).[31] Rent was regulated both during and after the process of obtaining a residential certificate of occupancy.[32]

Lofts that were registered as interim multiple dwellings worked their way towards obtaining residential certificates of occupancy at a glacial pace.[33] The Loft Law was modified repeatedly to extend the deadlines for obtaining residential certificates of occupancy.[34]

Years passed, and a second surge of loft litigation commenced. Tenants once again used MDL § 302(1)(b) as a defense against evictions. Once again, the Civil Court was faced with the issue of whether to allow landlords to collect rent where they had not obtained a residential certificate of occupancy. And, again, the New York City Civil Court, as it did in *Lipkis*, at times declined to strictly apply MDL § 302(1)(b) and instead allowed some landlords to seek eviction and collect rent notwithstanding the absence of a residential certificate of occupancy.[35] For example, in *99 Commercial Street*, the Second Department allowed a landlord, which had not obtained a residential certificate of occupancy, to recover possession of a loft (although the court did not permit rent to be recovered).[36]

Last year—over thirty years after *Likpis* and after the Loft Law was enacted—the Court of Appeals addressed this issue in *Chazon, LLC v. Maugenest*.[37] A landlord in Brooklyn (where many of the loft wars have migrated) sought to remove a loft tenant by way of an ejectment action. The landlord did not seek to recover rent (which the tenant had stopped paying in 2003). The lower court ruled, and the Second Department agreed, that the landlord could recover possession of the premises.[38]

The Court of Appeals reversed the Second Department, holding that the landlord could not "collect rent ***or*** evict the tenant."[39] The Court reviewed the history of the Loft Law, noting that it was not completely successful in effectuating the transition of commercial loft space into loft space approved for residential occupancy.[40] The landlord in *Chazon* had not met the timetable set forth in the Loft Law to obtain a residential certificate of occupancy, and the Loft Board declined its request for an extension on the ground that the landlord had not been hindered by circumstances beyond its control.[41]

The Court conceded that it might have made "sense" for the lower courts to permit a landlord to recover possession by way of ejectment (without seeking to recover rent), but such an avenue was inconsistent with MDL § 302(1)(b), which bars both an action to recover rent and an action "for possession…for nonpayment of such rent."[42] Any "undesirable" result was to be addressed by the Legislature.[43]

III. Conclusion

Before the enactment of the Loft Law, courts at times allowed landlords of commercial loft buildings to recover rent from residential tenants notwithstanding the prohibition under MDL § 302(1)(b). The Loft Law thereafter allowed recovery of rent as long as the landlord took timely steps to qualify for a residential certificate of occupancy. But thirty years later, the Court of Appeals has made clear that MDL § 302(1)(b) retains its punitive power to defeat a landlord's right to be paid rent if the landlord has not obtained the necessary extensions of time to obtain a residential certificate of occupancy.

Endnotes

1. N.Y. Mult. Dwell. Law § 2 (McKinney 1992).
2. John W. Harrington, *Tenement Hazards A Problem For City*, N.Y. Times, March 11, 1934 at XX2.
3. N.Y. Mult. Dwell. Law § 301(1) (McKinney 1992).
4. N.Y. Mult. Dwell. Law § 302(1)(b) (McKinney 1992).
5. *See* Chazon, LLC v. Maugenest, 19 N.Y.3d 410, 416, 971 N.E.2d 852, 855 (2012).
6. *Id.* at 413, 948 N.Y.S.2d at 572.
7. *Edwin Booth House Turned Into Lofts*, N.Y. Times, November 27, 1910.
8. The largest loft building as of 1910 was 22 stories high at 36th Street, just west of Broadway. *Demand For Lofts Near Fifth Avenue*, N.Y. Times, December 11, 1911.
9. Sun Oil Co. v. Traylor, 407 Pa. 237, 243, 180 A.2d 235, 238 (1962).
10. Yoko Ono moved into a loft in 1960 in which the windows were darkened (presumably to keep the interior cool and keep workers focused), but the skylight was clear and provided a beautiful skyward view. Sam Roberts, *Urban*

Memories; With John and Yoko, N.Y. Times, February 22, 2013, at MB3.

11. McCandlish Phillips, *Artists May Strike To Save Lofts,* N.Y. Times, July 3, 1961, at 1.
12. N.Y. MULT. DWELL. LAW § 275-278 (McKinney 1992).
13. N.Y. MULT. DWELL. LAW § 275 (McKinney 1992).
14. N.Y. MULT. DWELL. LAW § 276 (McKinney 1992) (defining an artist); N.Y. MULT. DWELL. LAW § 277 (McKinney 1992) (defining the habitability requirements of the premises).
15. Leslie Gourse, *Cost for 'SoHo' Lofts Are Rising Drastically*, N.Y. Times, July 26, 1970, at 200. Indeed, Don Draper's very first adulterous affair captured on the show "Mad Men" was with a fetching free spirited Manhattan artiste. *See Madmen: Smoke Get in Your Eyes* (AMC Networks July 19, 2007).
16. Leslie Gourse, *Cost for 'SoHo' Lofts Are Rising Drastically*, N.Y. Times, July 26, 1970, at 200.
17. *Id.*
18. *Id.*
19. *See* Lipkus v. Pikus, 96 Misc. 2d 581, 584, 409 N.Y.S.2d 598, 600 (N.Y. Civ. Ct. N.Y. Cnty. 1978), *aff'd*, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979).
20. *Id.* at 584, 409 N.Y.S.2d at 600.
21. *Id.* at 590, 409 N.Y.S.2d at 603.
22. *See* Lipkus v. Pikus, 99 Misc. 2d 518, 519, 416 N.Y.S.2d 694, 695 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979).
23. *Id.* at 521, 416 N.Y.S.2d at 697 (J. Riccobono, dissenting).
24. *Id.* at 522.
25. N.Y. MULT. DWELL. LAW § 280 (McKinney 1982).
26. *Id.*
27. *Id.* § 281.
28. *Id.* § 284.
29. *Id.* § 282.
30. N.Y. MULT. DWELL. LAW § 284(1).
31. *Id.* § 285.
32. *Id.* § 286(4), (5).
33. *See* Dennis Hevesi, *The Loft Law's Pursuit of Lofty Goals*, N.Y. Times, Jun. 20, 1999, http://www.nytimes.com/1999/06/20/realestate/the-loft-law-s-pursuit-of-lofty-goals.html (stating that out of 835 registered interim multiple dwellings in 1999, only 375 had achieved code compliance).
34. *See* Gerald Lebovits & Linda Rzesinowjecki, *The New York Loft Law*, 38 N.Y. Real Prop. L.J. 21 (2010) (stating that the Loft Law was extended in 1992, 1996, 1999 and 2007); *see also* Carla Buckley, *That Cheap, Roomy Loft Can Now Be a Legal One, Too,* N.Y. Times, Jul. 25, 2010, http://www.nytimes.com/2010/07/26/nyregion/26loft.html (noting that the last extension was granted in 2010).
35. *E.g.*, Lipkis v. Pikus, 99 Misc. 2d 518, 521, 416 N.Y.S.2d 694, 696 (Supt. Ct. App. T. 1st Dep't 1979).
36. 99 Commercial Street, Inc. v. Llewellyn, 240 A.D.2d 481, 483, 658 N.Y.S.2d 130, 132 (2d Dep't 1997), *citing* Aponte v. Santiago, 165 Misc. 2d 968, 630 N.Y.S.2d 869; Broome Realty Corp. v. China Print. Co.,157 Misc.2d 572, 598 N.Y.S.2d 138; N.Y. MULT. DWELL. LAW § 302 (1)(b)) (Consol. current through 2013).
37. Chazon, LLC v. Maugenest, 19 N.Y.3d 410, 413, 971 N.E.2d 852, 853, 948 N.Y.S.2d 571, 572 (2012).
38. *Id.* at 410, 971 N.E.2d at 852.
39. *Id.* at 413, 971 N.E.2d at 852 (emphasis added).
40. *Id.* at 414, 971 N.E.2d at 852.
41. *Id.* at 415, 971 N.E.2d at 852.
42. *Id.* at 416, 971 N.E.2d at 855.
43. *Chazon*, at 416. This was the same point made in the *Lipkis* dissent. Lipkis v. Pikus, 99 Misc. 2d 518, 522, 416 N.Y.S.2d 694, 697 (Supt. Ct. App. T. 1st Dep't 1979) (Riccobono, J., dissenting). The Court of Appeals was not entirely clear in its holding. Clearly, the landlord in *Chazon* was required under the Loft Law to obtain a residential certificate of occupancy and had not obtained the necessary extensions to obtain one. Accordingly, the landlord could not perform an "end run" around that requirement by seeking possession of the premises by way of ejectment. However, a landlord not subject to the Loft Law should be able to obtain possession of the premises by ejectment even though the landlord would be barred under MDL § 302(1)(b) from either recovering rent or recovering possession due to non-payment of rent.

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Real Property Law Section 294-b: An Ineffective Law

By Michael J. Siris

Introduction

A law always has a purpose—an objective it seeks to accomplish. Originally enacted in 1982 and then amended in 2008, New York's Real Property Law ("RPL") Section 294-b was intended to protect brokers and their claims for commissions but it really accomplishes nothing.

As first passed in 1982, the law allowed a licensed real estate broker to record with the county clerk an "affidavit of entitlement" to a commission in the event the broker claims "he or she has produced a person who was ready, able and willing to purchase or lease all or any part of a parcel of real property pursuant to a written or oral contract."[1] The law provided:

> § 294–b. Recording brokers (sic) affidavit of entitlement to commission for completed brokerage services
>
> 1. A duly licensed real estate broker who asserts that he or she has produced a person who was ready, able and willing to purchase or lease all or any part of a parcel of real property pursuant to a written or oral contract of brokerage employment between the owner of said parcel of real property and such broker, and who asserts that such person or a party acting on his or her behalf subsequently contracted to purchase or lease, or did purchase or lease such real property or any part thereof, and who asserts that he or she is entitled to a commission pursuant to such written or *oral* contract, may file an affidavit of entitlement to commission for completed brokerage services in the office of the recording officer of any county in which any of the real property is situated.
>
> * * *
>
> 3. Upon receipt by the county clerk of a broker's affidavit of entitlement to commission for completed brokerage services for the purpose of recording, entering and indexing, the clerk shall note thereon that such notice does not *constitute a lien nor shall it invalidate any transfer or lease*. In payment for said services the county clerk shall be entitled to receive a fee equivalent to that received for recording a deed and pages thereof (emphasis added).

Not surprisingly, given the fact that the law specifically provided that the recording of such affidavit shall "not constitute a lien," the law lay fallow, obscure and essentially unused until 2008 when the Legislature amended it to supposedly give it more bite.[2]

The 2008 amendment provided, among other things, that in cases involving one to four family dwellings, or cooperative or condominium apartments[3] with respect to which a broker had filed[4] an "affidavit of entitlement" which includes a "*written* contract of brokerage commission" (emphasis added):

> "…the lesser of the net proceeds of the sale or the amount of the unpaid portion of the compensation agreed to in such written contract shall be deposited by the seller, at the time of delivery of the deed or delivery of the stock certificate and / or proprietary lease, with the recording officer in whose office such affidavit of entitlement had been recorded."

Still, the 2008 amendment—not to mention the original 1982 law—is completely ineffective.

History of Statute

The original 1982 legislation was part of what the late Clarence Barasch described as "twin" efforts to assist real estate brokers.[5] One of those efforts resulted in an amendment to the Lien Law[6] which amended the definition of "improvements" to include "real estate brokerage services in obtaining a lessee for a term of more than three years of all or any part of real property to be used for other than residential purposes pursuant to a written contract." The other part of the "twin" 1982 efforts was the above-discussed addition to Real Property Law (Section 294-b), which allowed a broker to record an "affidavit of entitlement."[7]

Interestingly enough—given that the 2008 amendment did not give the broker any sort of lien against the real property involved—the 2008 amendment actually had a difficult time getting passed. The 2008 amendment first surfaced in 2006 but was vetoed by then-Governor Pataki who was concerned that the added escrow requirement would "unfairly burden consumers…[and] shift...the burden to them to initiate litigation [against a broker to recover the escrowed commission]"[8]—a completely unnecessary concern as history would later show. In any event, the same amendment presented and vetoed in 2006 was re-presented in 2008 to then Governor Paterson, who allowed the amendment to become law.[9]

While making minor changes to the existing subdivisions 1-3[10] of RPL

294-b, the 2008 amendment added subdivisions 4-5 to the same section (RPL 294-b).[11] These subdivisions (4 and 5) set forth the timing and method of service of the affidavit upon the broker (subdivision 4) and the actual "deposit" mechanism itself (subdivision 5).[12] However, just as the original (1982) version of RPL 294-b (3) provided that the clerk shall "note" that such affidavit "does not constitute a lien nor shall it invalidate any transfer or lease," subdivision 5(g) of the 2008 amendment (RPL 294-b(5)(g)) provides that the obligation of the seller to deposit, or the seller's failure to deposit monies under the law, shall "not constitute or be deemed to create a lien" or "invalidate" any transfer.[13]

Use of Statute

Indeed, with very few exceptions,[14] it is difficult to find any case that has invoked the statute either before or after its 2008 amendment. Even with respect to the supposedly beefed up statute resulting from the 2008 amendment's requirement of a "deposit," this should hardly come as a surprise. While the law (as amended in 2008) provides that the seller "shall" deposit the disputed monies with the county clerk, there is absolutely no penalty for the seller's refusing to do so.[15] If the seller simply ignores the filing of the broker's "affidavit of entitlement" and refuses to *make the required "deposit" with the county clerk, the seller is in no worse position—either way*, the seller faces a lawsuit by the disgruntled broker but impunity for ignoring the law's apparent requirement to escrow funds with the county clerk.[16] Sellers are left with little incentive to follow this meaningless requirement, as there are little, if any, consequences for not doing so.

Conclusion

The law in question, even as amended to supposedly give it more force, has been completely ignored and serves no useful purpose. No doubt some real estate brokers and their counsel will be tempted to file an "affidavit of entitlement" which clearly has no legal meaning. Either a claimed brokerage commission under the law in question should be elevated so as to support a lien (as is the case with commercial leases of three or more years) or the law should be scrapped in its entirety because it accomplishes nothing.

Endnotes

1. N.Y. Real Prop. Law § 294-b (Consol. 1982) (amended 2008).
2. *Id.* Some commentators had predicted that the 2008 amendment might make the "seldom utilized" law a more powerful weapon for brokers but that has not turned out to be the case. *See, e.g.*, Eric C. Rubenstein, *Unpaid Brokers Get a Stronger Remedy*, N.Y.L.J., January 12, 2009, at S9, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202427323646&Un paid_Brokers_Get_a_Stronger_Remedy&slreturn=20130725123537.
3. The original 1982 law quoted above contained no reference to cooperative or condominium apartments or four dwelling units. In the 2008 amendment, the Legislature apparently intended that the deposit would be restricted to only transactions involving such properties. *See* Michael Berey, *Broker's Affidavit of Entitlement to Commission*, Real Property Law Section Blog (Aug. 18, 2008, 2:31 PM), http://nysbar.com/blogs/RPLS/2008/08/. For any broker who wishes to take advantage of this "deposit" requirement, it is worth noting that the 2008 amendment also provided that the "written [brokerage] contract" supporting the affidavit must have the specific language that appears in N.Y. Real Prop. Law § 294-b(5)(j).
4. It seems odd that, in the 2008 amendment relating to the requirement of a "deposit" the Legislature required a "written" contract but yet the original statute—which remained in place as to a broker's right to file an "affidavit of entitlement"—applied to written or oral brokerage contracts. It may be an error in draftsmanship or it may be that the Legislature intended that the "deposit" requirement would be triggered only by a "written" brokerage agreement. *See infra* note 10.
5. *See* Clarence S. Barasch, *Amendment Requires Escrowing of Real Estate Brokerage Pay*, N.Y. L.J., January 29, 2009, at 4, *available at* http://www.law.com/jsp/article.jsp?id=1202427816517.
6. N.Y. Lien Law § 2(4) (Consol. 1909) (amended 1983).
7. *See supra* note 1.
8. Barasch, *supra* note 5.
9. *Id.*
10. N.Y. Real Property Law § 294-b. The 2008 amendment, among other things, added "cooperative apartments" to subdivisions 1 and 2. Oddly while keeping intact the language in subdivision 3 that the affidavit shall "not constitute a lien," the 2008 amendment added to subdivision 3 a requirement that the county clerk "shall record such affidavit [of entitlement] in the *lien docket*...." (emphasis added). Needless to say, the filing of an affidavit of entitlement cannot create lien—just as the statute provides. *See, e.g.*, Homespring LLC v. Hyung Young Lee, 55 A.D.2d 541, 866 N.Y.S.2d 516 (2d Dep't 2008).
11. N.Y. Real Property Law § 294-b. The 2008 amendment has various "ambiguities." Barasch, *supra* note 5. For instance, the first subdivision (RPL 294-b (1)) in the original law essentially left intact by the 2008 amendment refers to a "written or *oral* contract" (emphasis added). However, the 2008 addition of subdivision 5 (relating to the seller's obligation to escrow funds) mandates a "written contract." It is possible that the Legislature intended that the affidavit of entitlement could be invoked in cases of written or oral contracts but the requirement of the deposit would be triggered only by a written contract. Alternatively, the statute is not consistent internally.
12. *Id.*
13. *Id.*
14. One of the few and perhaps the lone case invoking RPL 294-b to support a seller's deposit is Nastri Real Estate, LLC v. Beblo, 96 A.D.3d 1476, 946 N.Y.S.2d 516 (4th Dep't 2012), 2012 N.Y. Slip Op. 04575 at *2. It is not clear why the seller in that case apparently made the deposit with the county clerk but the claim was sustained (in part).
15. N.Y. Real Property Law § 294-b. Subdivision 5(f) of RPL 294 (b) (which was part of the 2008 amendment), provides that "[i]n any action or proceeding pursuant to this subdivision [5] when the seller has not made the deposit required by this subdivision [5], and it is determined by a court the broker is entitled to compensation pursuant to the written contract of brokerage employment, the broker shall be awarded…reasonable attorneys' fees" (emphasis added). Such an award might be an advantage for a broker and a reason for a broker to file an "affidavit of entitlement"—if the broker files such an affidavit and the seller fails to comply, the 2008 amendment provides for an award of attorneys' fees to the broker if he or she prevails (something not otherwise available). Interestingly, in *Nastri*, the Appellate Division held that the broker was not entitled to attorneys' fees in an action under RPL 294-b "inasmuch as the

statute does not authorize such an award in this proceeding." That result followed because the seller—again for reasons unknown—had made the deposit under the 2008 amendment (and was thus not liable for attorneys' fees). Presumably, had the seller not made the required deposit under the law, the seller might have been responsible for attorneys' fees—the only conceivable benefit the law confers on a broker.

16. *Id.* In fact, title insurers note in their underwriting guidelines available to the public that the filing of an affidavit of entitlement, if noted, is for information purposes only. *See, e.g.*, http://www.vuwriter.com/vusubtopics.jsp?displakey=STSE00030301&parenttype=2.

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Another Potential Capital Gain: Can an Exchange of Condominium Units for Cooperative Apartments Qualify as a Section 1031 Like-Kind Exchange?

By Dr. Valeriya Avdeev

Introduction

Consider the following hypothetical: A sole owner and member of a New York Limited Liability Company (LLC) contemplates an exchange of five condominium units and some monetary consideration for three cooperative apartments. All of the properties are located in improving neighborhoods of New York City. The LLC has been renting all of the condominium units to tenants on short-term leases, fully furnished. Furthermore, the LLC owns all of the condominium units free and clear of debt. Recently however, the owner of the LLC became concerned about the financial stability of the condominium units, yet does not wish to sell the units in a taxable transaction. After consulting with a financial advisor, the sole member of the LLC decided to upgrade the existing investments by taking advantage of a non-recognition transaction, namely, by doing a tax-free IRC Section 1031 like-kind exchange to cooperative apartments, which are perceived to be located in a better community. As a result, the sole member of the LLC decided to exchange five condominium apartments for three cooperative apartments, owned by a real estate developer. After the exchange, the owner of the LLC intends to rent the cooperative apartments for several years and later, possibly, to convert one to a personal residence. The sole member of the LLC and the LLC itself are financially stable. Therefore, the approval by the board of the cooperative development is anticipated. Furthermore, the corporate bylaws and proprietary leases permit owners to sublet their respective units on a short-term basis only after two years of ownership. However, the apartments could not be owned through an LLC. As such, the owner of the LLC has proposed the following transfer: the LLC will exchange five of its condominium units for three cooperative apartments, yet the title to the cooperative apartments will be recorded in the owner's individual name.

These circumstances present a question as to whether the sole member of the LLC can successfully treat such an exchange as tax-free under IRC Section 1031. As such, Part I of this article will examine the elements of like-kind exchanges as they apply under the hypothetical set of facts above. Then, Parts II. through V. will focus on various other related issues, such as multiple property exchanges, exchanges between related parties, basis of like-kind property and its holding period, and character of the potential gain from the transaction.

Analysis of Applicable Law and Discussion

I. Elements of Section 1031 Like-Kind Exchange

As a general matter, gains derived from dealings in property are included in gross income, unless a specific exclusion applies.[1] However, Section 1031 of the Internal Revenue Code allows taxpayers to defer recognition of gain or loss in like-kind exchanges.[2] Specifically, in order to qualify under Section 1031 and to be allowed to exchange properties tax free, taxpayers must meet the following requirements: (a) such transaction must qualify as an exchange, (b) the properties exchanged must be like-kind, (c) both property relinquished and property received in an exchange must be held for productive use in trade or business or for investment, and (d) properties must not be of the type specifically excluded under Section 1031(a)(2).[3] The following elements will now be discussed in detail in the next sections that follow.

A. Transaction Must Be an Exchange

In order for the transaction to qualify as an exchange, it must involve a reciprocal transfer of property and not a mere exchange of property for monetary consideration.[4] However, if the properties are otherwise like-kind, monetary consideration could be part of the transaction, without disqualifying it from Section 1031 treatment.[5]

In other words, in order to satisfy the exchange requirement, the same taxpayer must both relinquish and receive like-kind property.[6] For example, where a partnership transferred relinquished property to a qualified intermediary, but the titles were directly deeded to partners in liquidation of their partnership interests, the IRS privately ruled that the exchange requirement was not met.[7] Even though the partnership did transfer like-kind property, it did not receive like-kind property in return.[8] Therefore, the exchange was never completed and the transaction did not qualify for Section 1031 treatment.[9]

After reviewing the facts of the proposed hypothetical exchange described above, it appears that there are similarities between the proposed transaction and the partnership transfer. As such, the result could possibly be the same. Specifically, five condominium apartments are to be transferred by an LLC, and yet the title to the exchanged cooperative apartments is to be recorded in the owner's individual name, not deeded to the LLC. Therefore, it seems that in the proposed transaction, the taxpayer, namely the LLC, does not transfer or receive properties.

However, the IRS has privately ruled on several occasions that receipt of replacement property by a single-member limited liability company (LLC) is treated as receipt of property by the owner of the LLC for purposes of the exchange requirement under Section 1031.[10] An argument could be made that the receipt of replacement property by the owner of the single member LLC should also be treated as receipt of property by the LLC itself. However, without requesting a private letter ruling from the IRS that would be specific to the facts of the owner's proposed exchange, the owner of the LLC has no specific authority to assert that the proposed transaction would qualify as an exchange for purposes of Section 1031. Furthermore, in order to be successful in requesting such a private letter ruling, such owner should have set up the LLC as a disregarded entity and should have elected to have it treated as a corporation.[11] Therefore, without a favorable private letter ruling from the IRS, the proposed transaction probably would not be considered an exchange for purposes of Section 1031.

B. Properties Must Be Like-Kind

In order to qualify for non-recognition treatment under Section 1031, the exchanged properties must be like-kind.[12] Specifically, one class of property cannot be exchanged for property of a different class.[13] For example, real property can only be exchanged for real property and personal property for another item of personal property.[14] Furthermore, when determining if properties are like-kind, taxpayers should consider the nature and the character of the property rather than its grade or quality.[15]

Under the facts of the proposed hypothetical exchange, real property is being exchanged for real property, which is clearly property of the same class. While assessing whether exchanges of real property are like-kind, the Tax Court has generally applied a "duration-of-the-rights" test, where properties in question must convey the same rights to be like-kind.[16] Specifically, taxpayers must consider not only the nature and character of the properties exchanged, but also the respective interests in the physical properties, the nature of the title conveyed, the rights of the parties and the duration of their interests.[17] Under the facts of the proposed exchange, the owner of the LLC will exchange five condominium apartments for three cooperative apartments. Generally speaking, a condominium apartment is a real property that conveys ownership interest, where a cooperative unit is a real property that does not convey any ownership interest, but is merely an investment in a corporation with a perpetual right to rent. However, based on some examples from private letter rulings, an argument could be made that the proposed hypothetical exchange could also be considered like-kind. For example, the IRS has privately ruled that an exchange of a house, namely a fee simple interest, for a condominium interest was like-kind.[18] Likewise, the IRS has privately ruled that an exchange of a commercial building for a condominium interest in a commercial building was like-kind, provided that the condominium interest included a common interest in the underlying land.[19] Finally, the IRS has privately ruled that an exchange of cooperative housing corporation stock for condominiums in the same physical property was like-kind, where the cooperative interest included a lease that ran for more than thirty years and applicable local law characterized cooperative and condominium interests as ownership interests.[20] Under New York case law, however, the cooperative interest is not an ownership interest in real property that is required for Section 1031 exchanges.[21] However, in another private letter ruling, the IRS has disagreed with the New York case law holdings and asserted its opinion that there are several New York statutes that treat an interest in a cooperative unit as ownership interest in real property.[22] Based on the examples described above, the owner of the LLC should also apply for a private letter ruling asserting that his or her exchange of condominium units for cooperative apartments is like-kind. However, without obtaining a private letter ruling specific to the facts of a given exchange, the owner of the LLC has no specific authority to rely on and to assert that the exchange would definitively be like-kind under IRC Section 1031.

In order to be like-kind for purposes of Section 1031, properties must also have the same fair-market values.[23] If the values of the properties are different or if money or other property that is not like-kind is received, gain or loss is recognized to the extent of boot.[24] Under the facts presented, the owner of the LLC did not receive any money as replacement property. If any extra monetary consideration were to be paid by the owner to equate the values of the properties, such monetary consideration would be taxable to the other party of the exchange and would also increase the owner's basis in the properties received.

When considering whether properties are like-kind, the fact that some of the properties are encumbered by leases and others are not so encumbered usually does not disqualify the exchange from Section 1031 non-recognition treatment.[25] For example, the Tax Court held that an exchange of interests in real property subject to ninety-nine-year condominium leases for interests in real property not so encumbered was like-kind, since the exchanged interests were perpetual in nature and the existence of the lease affected the grade and quality of the property rather than its nature and character.[26] Under the facts presented, the owner's condominium apartments are subject to short-term leases, where the cooperative apartments are not so encumbered. However, based on the discussion above, such short term leases alone do not disqualify the exchange from being like-kind, since the interests are perpetual in nature and meet the duration-of-the-rights test.

Finally, when considering whether real properties are like-kind, the location and the condition of the real property are not relevant for purposes of Section 1031 non-recognition treatment.[27] Therefore, if the condominium and cooperative apartments are not located in the same neighborhoods, such fact alone would not by itself disqualify the exchange from being like-kind. In summary, unless the owner of the LLC is successful in obtaining a private letter ruling establishing that the exchange of condominium property interest is like-kind to a cooperative property interest, such proposed exchange probably would not be considered like-kind, since condominium and cooperative interests do not convey the same ownership rights.

C. Held for Productive Use in Trade or Business or for Investment

In order to defer recognition of gain or loss in a like-kind exchange, both the property exchanged and the property received must be held by the taxpayer either for productive use in a trade or business or for investment.[28] Furthermore, the intent to hold the properties for productive use or investment must be the taxpayer's primary purpose in holding the properties.[29] Therefore, properties that are used solely for personal purposes would not qualify for like-kind exchange treatment.[30] However, properties that are rented out create an indicia of investment or productive use motive necessary for Section 1031 treatment.[31] Moreover, property held for productive use in a trade or business can be exchanged for property held for investment.[32] Likewise, property held for investment can be exchanged for property held for productive use in a trade or business.[33] Finally, when determining whether property transferred and property received was held for productive use or for investment, the motive of the taxpayer must be considered and not that of the other party to the exchange.[34] Thus, it is possible for the non-recognition provisions of Section 1031 to apply to one party of the exchange, but not to the other, if for example, one party is a real estate investor and the other is a dealer in the properties exchanged.[35]

Under the hypothetical proposed exchange, the owner of the LLC will transfer five condominium units, which have been rented out to tenants on short-term leases, fully furnished. All of the condominium units were owned by the LLC and not by the owner personally. As such, the condominium units in question were not used solely for personal purposes, but were rented out to tenants. Therefore, the condominium properties transferred in the exchange were most likely held for investment. If other facts were present, such as the existing LLC was the owner's sole occupation and it was run as a renting business, then the owner of the LLC could argue that the condominium apartments were held for productive use in a trade or business.

In return for the condominium apartments, the owner of the LLC will receive three cooperative apartments owned by a real estate developer. Even though more facts are necessary to make a proper determination, it is possible that those cooperative apartments were held primarily for sale to customers. If true, such real estate developer would not be able to claim non-recognition treatment under Section 1031 and such exchange would be taxable to him.[36] However, the owner of the LLC would probably be considered a real estate investor, rather than a dealer. Therefore, the owner of the LLC could still claim non-recognition treatment under Section 1031. Since taxpayer's intent in acquiring replacement property affects whether he or she satisfies the investment or productive use requirement, it is important to note that the owner of the LLC is planning to rent the new cooperative apartments for several years and later possibly move into one, converting it to personal use. Corporate by-laws and proprietary leases will permit the owner to sublet the cooperative apartments in question on two-year leases after one year of ownership. If the owner truly intends to convert one of the cooperative apartments to exclusive personal use, then non-recognition treatment would not apply to that property but could still apply to the other apartments, which were intended to be rented out.[37] Moreover, even though the owner would not be able to rent out the cooperative apartments for the first year of ownership, if those apartments were not used for any purposes other than business purpose during that one year, such use of the apartments would not be considered personal and would not disqualify the owner from claiming that the cooperative apartments were held for investment.[38] Under Section 280A(d)(2), the use of real estate for personal purposes is not limited to uses that involve personal pleasure or recreation.[39] Furthermore, under such personal use standard, taxpayers who did not use their real properties at all during the year or did not visit unless there was a pressing business need were successful in avoiding the claim that they used their real properties for personal use.[40]

The IRS has also provided for a safe harbor provisions for the taxpayers who use their dwelling units primarily as rentable property, but also incidentally use the properties for their personal use.[41] Specifically, if all of the requirements are met, the taxpayer is provided with a safe harbor under which a dwelling unit qualifies as property held for productive use in a trade or business or for investment under Section 1031, even though the taxpayer occasionally used the dwelling unit for personal purposes.[42] Under Revenue Procedure 2008-16, dwelling unit is defined as real property improved with a house, apartment, condominium, or similar improvement that provides basic living accommodations including sleeping space, bathroom, and cooking facilities.[43] Finally, in order to fall under the safe harbor provisions of Revenue Procedure 2008-16, the taxpayer must establish that the dwelling unit in question meets the qualifying use standards for the property relinquished in the exchange and for the

replacement property received in the exchange.[44] Relinquished property qualifies under the safe harbor rules if it's a dwelling unit that is (1) owned by the taxpayer for at least two years immediately before the exchange and (2) in each of the twelve-month period immediately before the exchange (i) taxpayer rents the dwelling unit at fair rental for fourteen days or more and (ii) taxpayer's personal use of the dwelling unit does not exceed the greater of fourteen days or ten percent of the number of days during the twelve-month period that the dwelling unit is rented at fair rental.[45] Replacement property qualifies under the safe harbor rules if it's a dwelling unit that is (1) owned by the taxpayer for at least two years immediately after the exchange and (2) in each of the twelve-month period immediately after the exchange (i) taxpayer rents the dwelling unit at fair rental for fourteen days or more and (ii) taxpayer's personal use of the dwelling unit does not exceed the greater of fourteen days or ten percent of the number of days during the twelve-month period that the dwelling unit is rented at fair rental.[46]

Under the hypothetical proposed exchange, both the replacement property and the relinquished property fit the definition of a dwelling unit, since they are condominium and cooperative apartments, which have basic living accommodations including sleeping space, bathroom, and cooking facilities. Furthermore, as to the condominium apartments, the safe harbor rules could be satisfied assuming that they were all rented out during the last two years prior to the exchange and the owner's personal use during those two years prior to the exchange was very minimal. However, as to the cooperative apartments, the safe harbor rules will not be satisfied, since the apartments cannot be rented out during the first year after the exchange. Therefore, the owner will not be able to take advantage of the safe harbor provision held for productive use in trade or business or for investment requirement.

D. Types of Property Excluded Under §1031(a)(2)

Finally, in order to qualify for non-recognition treatment under Section 1031, properties must not be of the type specifically excluded from non-recognition treatment.[47] For example, taxpayers cannot defer recognition of gain or loss under Section 1031 if they exchange stock in trade, other property held primarily for sale, partnership interests or certificates of trust or beneficial interests.[48] However, such specific exclusions listed under § 1031(a)(2) do not apply to the facts of this hypothetical proposed exchange.

II. Multiple Property Exchanges

Generally, when an exchange involves multiple assets, the fact that the assets in the aggregate comprise a business or an integrated economic investment does not cause the exchange to be treated as a disposition of a single piece of property for purposes of the like-kind exchanges.[49] Therefore, unless an exchange can be divided into exchange groups of the same type, the analysis should be done on the property-by-property basis.[50] Under this hypothetical proposed exchange, there will be only one exchange group: exchanging five condominium units for three cooperative apartments.

III. Exchanges Between Related Parties

Generally, there is no requirement under Section 1031 that either replacement property or relinquished property be held for any particular length of time, except in the case of exchanges between related persons.[51] Specifically, gain or loss on the exchange between related persons must be recognized if either the property transferred or the property received is disposed of within two years after the exchange.[52] Furthermore, any two persons are considered related for purposes of Section 1031 non-recognition treatment if they are regarded as brothers, sisters, spouses, ancestors, and lineal descendants.[53] If the owner of the LLC was related as defined above to the real estate developer, then he or she would be limited by the two-year holding rule that involves related party exchanges.

IV. Basis of Like-Kind Property and Holding Period

In a multiple property like-kind exchange, the total basis of properties received in each of the exchange groups is (1) the total adjusted basis of the properties transferred by the taxpayer within that exchange group, (2) increased by the amount of gain recognized by the taxpayer with respect to that exchange group, (3) increased by the amount of the exchange group surplus or decreased by the amount of the exchange group deficiency, and (4) increased by the amount of excess liabilities assumed by the taxpayer that are allocated to that exchange group.[54] Furthermore, the holding period of the property acquired in a like-kind exchange includes the period that the taxpayer held the original property.[55]

V. Character of Potential Gain

Based on the discussion above, it appears that the owner's proposed exchange probably would not qualify for non-recognition treatment under Section 1031. If all of the properties transferred have appreciated, the owner will have to recognize gain on this proposed exchange. Section 1001(a) relates to gain or loss from the sale or other disposition of property. Gain or loss is measured by subtracting the adjusted basis of the property from the amount realized on the disposition.[56] Furthermore, gain on the sale or other disposition of property may be characterized as either ordinary or capital.[57]

According to Section 1221, capital gain is realized from the sale or exchange of a capital asset, which usually includes most property not connected with a trade or business.[58] Section 1221 specifically excludes real estate used in a trade or business.[59] Since the owner's condominium apartments would probably be considered as real estate used in a trade or business and would not be considered capital assets, the owner would

not be able to take advantage of the preferential capital gains tax rate and would be subject to ordinary tax rates depending on the appropriate tax bracket.

VI. Conclusion

After reviewing the hypothetical transaction, it appears that it would not qualify for non-recognition treatment under Section 1031. As such, if tax-free treatment is desired, the transaction must be restructured. Perhaps, the LLC could transfer title back to the owner and have the owner hold the property for a period of time, while renting it out. If that approach is too costly, the owner could seek a private letter ruling to settle uncertainties with both the exchange element and with the like-kind requirement. Also, perhaps a better strategy would be not to convert the future cooperative apartments completely for personal use and use it as a vacation property, if so, very minimally.

Endnotes

1. I.R.C. § 61(a)(3); Treas. Reg. § 1.61-6(a).
2. *See generally* I.R.C. § 1031.
3. I.R.C. § 1031(a).
4. Treas. Reg. § 1.1002-1(d) (2013).
5. I.R.C. § 1031(b).
6. *See* Chase v. Comm'r of Internal Revenue, 92 T.C. 874, 883 (1989) (holding that petitioners in a limited partnership corporation were not entitled to non-recognition of gain under I.R.C. § 1031(a) because in disposing of its property interest, their corporation "transferred investment property but did not receive like-kind property in 'exchange'").
7. I.R.S. Priv. Ltr. Rul. 98-18-003 (December 24, 1997) (determining that taxpayer did not engage in an exchange qualifying for non-recognition under 26 U.S.C.S. § 1031(a) because "there was no transfer of replacement property to taxpayer so as to complete an exchange[;] [i]nstead, Taxpayer received cash, and various real properties were transferred to its partners in payment for the Relinquished Property").
8. *Id.*
9. *Id.*
10. I.R.S. Priv. Ltr. Rul. 98-07-013 (November 13, 1997); see *also* I.R.S. Priv. Ltr. Rul. 2007-32-012 (May 11, 2007) (determining that the assets of each LLC would be treated as assets of taxpayer, making the actions of the LLCs attributable to taxpayer, and the acquisition of replacement property by the third LLC would be treated as acquisition by taxpayer); I.R.S. Priv. Ltr. Rul. 97-51-012 (September 15, 1997) (holding that "[t]axpayer will be treated as both the transferor of the relinquished properties and the transferee of the replacement property [and t]he acquisition of the replacement property by each non-electing LLC, wholly-owned by Taxpayer, will be deemed an acquisition by Taxpayer"); *see also* I.R.S. Priv. Ltr. Rul. 200732012; *see also* I.R.S. Ltr. Rul. 9751012.
11. *See generally* Terrence Floyd Cuff, *Some Comments on Single-Member LLCs and Section 1031 Exchanges*, 6 Business Entities 4, 28 (2004); Stuart Levine & Fred T. Witt, *One-Member LLCs: Planning with Little Boxes*, 15 Tax Mgmt. Real Estate J. 238, X (1999).
12. I.R.C. § 1031(a)(1).
13. Treas. Reg. § 1.1031(a)-1(a), (b).
14. *See* Oregon Lumber Co. v. Comm'r, 20 T.C. 192, 197 (1953).
15. Treas. Reg § 1.1031(a)-1(b).
16. *See* Koch v. Comm'r, 71 T.C. 54 (1978).
17. *Id.*
18. *See* I.R.S. Priv. Ltr. Rul. 9038030 (June 25, 1990).
19. *See* I.R.S. Priv. Ltr. Rul. 8938045 (June 28, 1989).
20. *See* I.R.S. Priv. Ltr. Rul. 8810034 (Dec. 10, 1987); *see also* I.R.S. Priv. Ltr. Rul. 8445010 (July 30, 1984); *see also* I.R.S. Priv. Ltr. Rul. 8443054 (July 24, 1984).
21. *See generally* Federal Tax Coordinator ¶ 1-3068 (2d ed. 2013).
22. I.R.S. Priv. Ltr. Rul. 200631012 (April 13, 2006).
23. Treas. Reg. §1.1031(a).
24. *Id.*
25. *See* Boise Cascade Corp. v. Comm'r, 33 T.C.M. 1974-315 (1974).
26. *Id.*
27. Treas. Reg. § 1.1031(a)-1(c)(2).
28. I.R.C § 1031(a)(1).
29. *See* Moore v. Comm'r, T.C. Memo 2007-134, 93 T.C.M. (CCH) 1275 (2007).
30. *See* Starker v. U.S., 602 F.2d 1341, 1350 (9th Cir. 1979).
31. *Sales and Other Dispositions of Assets*, 544 Internal Revenue Serv (2012).
32. Treas. Reg. § 1.1031(a)-1.
33. *Id.*
34. *See* Neil E. Harl, Section 1031: Pitfalls and Policy Implications (National Agricultural Bankers Conference, "Energy in Agricultural Banking," Presentation, Nov. 14, 2009); *see also* Mark A. Andersen, *Like-Kind Exchanges of Real Estate (Deferred, Reverse and Build-to-Suit)* (May 2012); *cf.* I.R.C. § 1031(a)(2)(A) (stands for the proposition that if one of the properties used in the exchange is held primarily for sale or solely for personal use, the exchange of that property would not qualify for non-recognition under Sec. 1031).
35. *Id.*
36. *See* Treas. Reg. § 1.1031(a)-1(a)(1). Where a taxpayer seeking non-recognition treatment is a dealer in that property, gain or loss will be recognized to the taxpayer because he held the property primarily for sale to customers.
37. I.R.C. § 1031(a)(2)(A) (stands for the proposition that if one of the properties used in the exchange is held primarily for sale or solely for personal use, the exchange of that property would not qualify for non-recognition treatment under Section 1031).
38. *See* Kurzet v. Comm'r, T.C. Memo 1997-54 (1997), *aff'd and rev'd*, 222 F.3d 830 (9th Cir. 2000).
39. *See* Baker v. Comm'r, T.C. Memo 1983-61, 45 T.C.M. (CCH) 635 (1983).
40. *See* Kurzet v. Comm'r, T.C. Memo 1997-54 (1983), *aff'd and rev'd*, 222 F.3d 830 (9th Cir. 2000).
41. *See* Rev. Proc. 2008-16, 2008-10 I.R.B. 547.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. I.R.C. § 1031(a)(2).
48. *Id.*
49. Rev. Rul. 72-151, 1972-1 C.B. 225 (1972) (explaining that a multiple asset exchange is not treated as a disposition of a single piece of property even when the aggregate of the assets comprise a business).
50. *Id.*
51. I.R.C. § 1031(f)(1).
52. *Id.*
53. I.R.C. § 267(b)(1), (c)(4).
54. Treas. Reg. § 1.1031(j)-1(b) (2005).
55. *See* Lindsley v. Comm'r, T.C. Memo 1983-729, 47 T.C.M. (CCH) 540 (1983) (clarifying that the holding period of the property acquired in a like-kind exchange tacks on to the holding period of the original property).
56. I.R.C. § 1001(a); *see also* Treas. Reg. § 1.1001-1 (2007).
57. I.R.C. § 61 (2013); *see* I.R.C. § 1221.
58. I.R.C. § 1221(a).
59. I.R.C. § 1221(a)(2).

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BERGMAN ON MORTGAGE FORECLOSURES:
Assigning the Mortgage—No Need to Substitute Plaintiff—Again

By Bruce J. Bergman

So here is the crazy thing that happened in a new case [*IndyMac Bank F.S.B. v. Thompson*, 99 A.D.3d 669, 952 N.Y.S.2d 86, 2012 N.Y. (2d Dept. 2012)].

The plaintiff bank began a mortgage foreclosure action and then during the course of that action assigned its mortgage. This is hardly unusual. Because of that assignment, though, the trial court, on its own, directed dismissal of the complaint—which means dismissal of the whole case—founded upon the assignment of the note and mortgage to another entity during the pendency of the action.

As practitioners well know, there is nothing wrong with assigning a mortgage during a foreclosure and there is no need to have changed the name of the plaintiff to the new owner of that mortgage. The rule repeatedly enunciated by the courts is that substitution of a party is not required unless the court may direct it, which it didn't do here. [Citing CPLR 1018; *CitiMortgage, Inc. v. Rosenthal*, 88 A.D.3d 759, 931 N.Y.S.2d 638; *Nations Credit Home Equity Servs. v. Anderson*, 16 A.D.3d 563, 792 N.Y.S.2d 510; *Lincoln Sav. Bank, FSB v. Wynn*, 7 A.D.3d 760, 776 N.Y.S.2d 908; *Central Fed. Sav. v. 405 W. 45th St.*, 242 A.D.2d 512, 662 N.Y.S.2d 489.]

Just to put this in further perspective, when the mortgage is assigned during a foreclosure, it is reasonable and appropriate to amend the caption to substitute a new plaintiff—at whatever the next stage of the case may be. That avoids a special motion, which incurs fees and can cause delay. Of course, if this occurs after the judgment has issued, there is no next stage and so no substitution is made.

The law on this point comes from CPLR 1018 and has often been affirmed by courts. One would think it would be well understood and widely known in the courts. Case law, however, advises to the contrary. Trial courts on more than a few occasions have dismissed foreclosures for want of having substituted a new party after an assignment—even though that is absolutely not required.

Here, the lower court's error may be seen as even more egregious because it dismissed the case *on its own* rather than upon someone's request. How the court decided this was necessary and appropriate is puzzling indeed.

Happily, the trial court's error was reversed on appeal so the lender's action was reinstated. But as we are compelled too often to observe, the lender suffered dismissal of its action and then the time and cost of an appeal to have it reinstated. It should not happen, but such are the not unusual vicissitudes of prosecuting a mortgage foreclosure action in the Empire State.

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in Who's Who in American Law and he is listed in Best Lawyers in America and New York Super Lawyers.

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