

# Tenant's Checklist Of Silent Lease Issues (Third Edition)

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**ANY LEASE** can conceivably raise hundreds of issues, from the glaringly obvious, to the somewhat obvious, to the obscure. The words of the lease suggest many of those issues, starting with “economic” issues and continuing with “noneconomic” ones, most of which will turn out to be “economic” issues at the end of the day, if they ever actually become relevant.

When you negotiate a lease for a tenant, the easy part consists of thinking about and responding to issues that the landlord and its counsel have already raised in the draft lease. For example, if the landlord got the rent or some date wrong, you will ask the landlord's counsel to correct the error. You may ask for longer notice periods, a more extensive opportunity to cure defaults, “reasonableness” as a way to handle any number of issues, a narrowing of any open-ended tenant obligations or landlord discretion, and flexibility on use and transfers. You will also demand absolute clarity on all monetary and other significant obligations, deletion of inappropriate or excessive obligations and restrictions, and correction of errors and internal inconsistencies. To the extent that anything in the lease is incomprehensible, you will try to have it translated into comprehensible language. Finally, you will respond to any other issues that you find based on your review of the language of the lease.

When you identify all these issues, you will ask for changes based on your experience and knowledge and the tenant's specific needs. It is a reactive process that starts with the express language of the lease itself.

You must also identify what is not in the lease. If the tenant will need or want something that the lease doesn't cover, you must ask for it or it won't be there — and it won't be there for the entire term of a document that can remain in place for a very long time. That's a daunting

prospect, as it forces tenant's counsel to think outside of the framework for discussion that the landlord and its counsel defined when they circulated the first draft of the lease.

The courts won't necessarily agree with a tenant who later asserts that some missing lease provision "should be inferred" because it's consistent with the basic relationship between the parties. Instead, if it's not there, it is not part of the agreement.

That isn't necessarily the only way that a legal system might deal with leases. For example, in civil law countries, a statute defines most of the rights and obligations between landlords and tenants, filling in a lot of gaps that might otherwise constitute "silent lease issues." The parties simply need to memorialize their basic business terms. They rely on the generally applicable leasing statute for all the other rights and obligations regarding the leased premises. If the statute doesn't make sense for them, they may be able to modify it by contract. But if they don't, then the statute governs their relationship, and they don't have to contractually "think of everything."

In the United States, in contrast, if you represent any tenant, you bear the burden of identifying and dealing with issues that a landlord's typical standard lease does not mention at all but that may nonetheless matter a lot to your tenant client. These are the "silent issues" in any lease. Unlike the obvious issues covered in any landlord's lease form, the silent issues are hard to identify, because the landlord doesn't do you the favor of reminding you about them.

### **Genesis Of The Checklist**

In 1999 and 2000, a subcommittee of the Commercial Leasing Committee of the New York State Bar Association Real Property Law Section developed and published a checklist of silent lease issues for use by attorneys who represent commercial space tenants. That original checklist was republished extensively, drawing many comments and responses from readers. Based on those comments, further thought, subsequent experience, and further review by members of

the subcommittee, the authors (again with help from the subcommittee) issued a second edition of the tenant's silent lease issues checklist in 2003.

Since then, the co-authors of the tenant's checklist have continued to keep their eyes open for items to add to the checklist and other changes to make. At one point, they resolved never to publish a third edition, but changed their minds when they realized that the cumulative effect of all their notes and improvements added up to a third edition. Like the previous editions, this third edition seeks to help tenants' attorneys identify and, if they choose to, raise "silent lease issues" when they review a typical landlord's standard commercial lease.

The original "silent lease issues" checklist project expanded over time to include other issues, not just "silent" issues, that a tenant's counsel may wish to raise in lease negotiations. Reminders were also added for some, but not all, of the due diligence that a tenant (or its counsel or other advisers) might want to undertake before the tenant signs a lease. This third edition of the checklist continues that approach.

This checklist mentions each possible issue only once, even if it might reasonably belong under more than one heading. Even when an issue in one section relates closely to some other issue somewhere else, the checklist never provides a cross-reference. Any user who wants the full benefit of this checklist should read it from beginning to end.

This checklist covers most issues alphabetically, which makes no logical sense at all, but creates at least the appearance of order and accessibility. The last few sections of the checklist cover the various stages of the lease negotiation process, which don't logically belong in the same alphabetical sequence. For anyone who negotiates leases for tenants, this checklist offers a useful set of reminders about nearly everything that could matter. This checklist will even help a landlord's counsel, although any landlord's counsel may prefer the Landlord's Checklist of Silent Lease Issues, of which a third edition will soon appear.

## What The Checklist Is And Does

This checklist discusses a tremendous range of issues. Those issues represent, or at least touch on, almost every possible issue or event that could arise or occur when two parties have potentially conflicting interests in the same real property over a very long time.

A lease amounts to a private statute. The parties who must live with this statute have no way to change it except by persuading the other party to agree to a change. This might require the writing of a check, and perhaps a large one.

Thus, a lease must get it right the first time. Before embarking upon the relationship that the private statute — the lease — will govern, each party has an opportunity to shape the statute that will govern the relationship. This checklist should help a tenant and its counsel seize that opportunity.

## Which Issues To Raise

Depending on the market, the parties, their relationship and history, the nature of the transaction and its timing, the scope and terms of your engagement, and any other circumstances, you may or may not choose to raise issues from this checklist. Even if you do raise these issues, you will not necessarily prevail on any of them. But if you never even raise an issue, you cannot possibly prevail on it. You can't win it if you aren't in it.

You should only “consider” raising each checklist item, as opposed to automatically raising it because you found it on some checklist. Any checklist does not substitute for thought and judgment. And if an issue doesn't really matter or apply for the lease you are working on, don't raise it. You'll lose credibility. Even more important, before you ask for some concession, make sure the lease doesn't already give you that concession. If you raise an issue that the lease already resolved in your favor, you may lead the landlord to scrutinize and worsen what was already there, thus producing a less favorable outcome than if you had said nothing at all.

The fact that any particular lease does not reflect positions suggested here does not necessarily mean that the tenant's counsel did a bad job. To the contrary, to serve its client best, sometimes the tenant's counsel should raise no issues at all and just get the deal signed, or identify and raise issues that are outside this checklist.

Sometimes, a tenant will tell its counsel to “just raise the major issues, and don't 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. Of course, some issues the tenant may consider “minor” may have implications not known to or considered by the client or counsel. Watch out for these. Counsel your client accordingly.

If your client tells you to focus only on the critical issues because of budget, transactional, or time constraints, you may want to focus first on these sections of the lease, and the corresponding issues suggested in this checklist.

1. Use — Section 42
2. Rent (no separate section in this checklist)
3. Operating Expenses — Sections 24, 25
4. Real Estate Tax Escalations — Section 31
5. Assignment and Subletting — Sections 3, 4
6. Security Deposit — Section 37
7. Alterations (Initial Occupancy)—Section 2
8. Services by Landlord, particularly air conditioning — Section 38
9. Electricity — Section 11
10. Utilities, other than electricity — Section 43

If relevant to a particular transaction, counsel should also probably include on the “short” list of “top” issues these topics:

11. Alterations Generally, Not Only For Initial Occupancy — Section 1
12. Failure To Deliver Possession — Section 16
13. End Of Term — Section 13

#### 14. Parking, At Least For A Suburban Building — Section 27

The authors counsel against the minimalist approach suggested here. To the contrary, counsel should consider the entire lease and also at least consider raising issues suggested in this checklist. If the client insists on minimalism, counsel will want to establish a record of the client's instructions and the fact that counsel warned of the resulting risks.

On the other hand, if the tenant's business strategy consists of trying to prolong lease negotiations, an easy goal to achieve, this checklist will provide plenty of help. More than almost any other category of real estate negotiations, lease negotiations can take as much or as little time as the parties want. They give the parties an opportunity to think about and deal with an incredible array of issues: all the practicalities related to operation and occupancy of a building over an extended period. For example, the definition of "operating expenses," in and of itself, can raise dozens of knotty issues that may amount to a reinvention of cost accounting and federal income tax law.

In deciding which issues to raise, a tenant may also want to think ahead and assess how those issues may turn out once the tenant raises them. If the lease already covers an issue in a vague way, the tenant may prefer that vagueness and uncertainty over the adverse certainty that might result if the tenant tried to clarify the language in question, and the landlord clarified it in a manner that benefited the landlord. The tenant may prefer uncertainty in the lease, especially if coupled with a high likelihood of a tenant-oriented judge. In other words, keep in mind the principle that sometimes one should not ask a question unless one will like the answer.

This dynamic arises whenever a lease or other legal document is "vague" on any issue. Sometimes we would rather have the vagueness we know rather than the clarity we don't.

#### What Types Of Leases?

This checklist applies primarily to substantial commercial space leases for both retail and office tenants. Most issues here will apply to some leases but not others. You should interpret almost every item in the checklist as if prefaced by the caveats: "if applicable, appropriate, desired, possible, under the circumstances, taking into account the size and nature of the transaction, market conditions, practicalities, the tenant's business agenda and anticipated use of the premises, accounting considerations and current accounting rules, the needs and negotiating positions of the parties, what the tenant expects of lease negotiations, the tenant's instructions to counsel, the timing, and all other circumstances."

Many items on the checklist make sense only for very large tenants that might occupy all or most of a large building. If a smaller tenant raised some of these issues, a landlord might reasonably regard the tenant's requests as bizarre and overreaching, or perhaps even a bad joke. In contrast, for a chain store tenant, making the same request might seem entirely routine.

The checklist makes no effort to explain which issues apply to which types of leases. The checklist also makes no consistent effort to suggest how a landlord might respond to any lease provisions suggested here.

The checklist does not consider "triple-net" leases, ground leases, "bondable" leases, "synthetic" leases, "build-to-suit" leases, leases from a seller to a purchaser of a company, or other specialized leasing transactions, some of which are not really leases at all, but capital transactions masquerading as leases.

The discussion in this checklist sometimes states that a tenant "should" consider or even "should" obtain certain provisions. Each such statement must be taken with a bushel of salt, because the co-authors do not purport to establish or define "standard" requirements for what any lease "should" or "should not" say. Every lease represents its own negotiation, depending largely on the business and marketplace contexts. The making of definitive one-size-fits-all recommendations would thus be inconsistent with reality in the

world of commercial real estate leasing. Nevertheless, it focuses the presentation.

This checklist considers lease negotiations from the tenant's perspective. It is a tenant's checklist. The authors and all previous checklist contributors do not necessarily believe that any landlord should accept the tenant's position on any issue suggested in this checklist.

The checklist does not represent a position statement or recommendation by any co-author, publisher, subcommittee member, or any organization with

which any of them is affiliated. The checklist does not define a "minimum standard of practice." It's more like a "maximum standard of practice." It does not give anyone a "smoking gun" to prove malpractice if any particular lease omits any particular provision(s) suggested here. This checklist is not exhaustive or complete. It is just a checklist. It's a resource for leasing practitioners. It creates no legal duties or obligations. Users of this checklist are cautioned not to rely on it in any way or for any purpose. Some of its comments and suggestions may be inappropriate, or worse.

## **Tenant's Checklist Of Silent Lease Issues**

### **1. Alterations**

- 1.1 Acceptable Contractors.** Attach as an exhibit a list of pre-approved contractors, architects, and other vendors. If the landlord has approval rights, have the landlord pre-approve as many names as possible. If the landlord reserves the right to delete pre-approved names, insist that the landlord act reasonably and, in any case, that the list must always contain at least a minimum number of names in each category. To the extent that the landlord's list does not include the tenant's desired team, fix that before signing the lease. Make sure the landlord can't later remove vendors of particular importance to the tenant.
- 1.2 Flexibility.** The tenant will want to maintain some freedom in choosing its architects, engineers, other consultants and contractors. It will not want to be limited to the landlord's approved list. At a minimum, the tenant should have the right to propose, at any time, additions to the landlord's list for the landlord's reasonable approval.
- 1.3 Consent Requirements.** The landlord should consent in advance to the tenant's initial alterations and any anticipated future alterations. For nonstructural changes, try to eliminate any landlord consent requirement. Instead, just give the landlord at most the right to confirm that the intended work complies with objective and limited criteria that the lease defines. If that doesn't work, try to get the landlord to agree to be reasonable about approving any nonstructural tenant alterations. Prohibit the landlord from requiring the tenant to make any changes in alterations that would increase their cost, except because the tenant's plans do not comply with law or with objective criteria in the lease.
- 1.4 When Consent Is Not Required.** Try to persuade the landlord to agree to limit any requirement for the landlord's consent to alterations. For example, perhaps the tenant should not need the landlord's consent for decorative or minor (less than a stated cost?) alterations or partition walls. Changes in the economy and work structure may make it necessary for many tenants to have more flexibility than in the past to relocate partition walls or make other nonpermanent changes.

- 1.5 Proprietary Design Features.** If the tenant regards its space arrangements, designs, and office layouts as proprietary information, the tenant may want the landlord to let the tenant make any alterations permitted by law, with no need to obtain the landlord's consent or even to deliver plans to the landlord.
- 1.6 LEED Compliance.** If the tenant seeks to comply with LEED "green building" standards, the tenant may need to include suitable language in the lease, and modify some typical lease provisions. That subject otherwise lies outside the present checklist.
- 1.7 Multiple Floors.** A multi-floor tenant may want the right to construct internal stairs and drill through floors for cabling. Such a tenant may also want the right to use the building's internal fire staircases for access between floors. If the landlord allows the tenant to cut through the slab to install an internal staircase, the landlord will generally require the tenant to restore, either specifically or under a general alteration restoration clause. The tenant should seek to negate that requirement. If the tenant has the right to "give back" a floor to the landlord, what happens if that floor contains communications cables serving the tenant's other floors? The tenant may want the right to leave those cables in operation, even after giving back the floor.
- 1.8 Risers And Other Passages.** The tenant may want to use riser spaces, shafts, chambers, and chases to run ducts, pipes, wires and cables. Although, conceptually, limiting each tenant to its proportionate share of this space seems fair, such a limitation may not allow the tenant to meet its needs, especially if the landlord's building is inadequate (as a whole) to meet the needs of modern tenants. Try to have conduits and risers exclusively allocated to the tenant, not shared. At a minimum, try to control who else may use them, and how. The tenant may want the right to control access to any conduits and risers serving the tenant. Provisions concerning riser use may need to be coordinated with those concerning telecommunications access. The entire area of telecommunications is one where many landlords ignore applicable provisions of federal law that mandate free access. Instead, landlords seek to impose restrictions and fees that may simply be void.
- 1.9 Hoist.** The tenant may want the right to install and use an outside hoist. Conversely, if the landlord decides to install an outside hoist, the tenant may want the right to use it, and the landlord should agree to remove it as promptly as possible.
- 1.10 Limit Fees.** If the tenant agrees to reimburse the landlord for fees of its architects, engineers, or other consultants in connection with the landlord's review of any alterations, the tenant will want to limit or negotiate those fees. More generally, assuming the tenant uses its own architect and the tenant's architect is competent and licensed, why should the tenant agree to pay the landlord's architect at all?
- 1.11 Time To Remove Liens.** If the tenant's work produces liens, the tenant will want enough time to remove them, taking into account procedural requirements of applicable law and related delays. The landlord should agree not to pay any lien that the tenant has bonded or is otherwise actively and diligently contesting in compliance with the lease.
- 1.12 Right To Finance Alterations.** The tenant may want the right to finance alterations, perhaps even on a secured or quasi-secured basis. Require the landlord to assist the tenant's lender as needed, such as

by signing landlord's waivers, or at least subordinations. Consider attaching the required form of waiver or subordination to the lease. If the landlord will not let the tenant grant liens to secure equipment financing, perhaps ask the landlord to provide the financing instead, with repayment built into the rent or documented separately.

## 2. Alterations (Initial Occupancy)

**2.1 Initial Criteria And Specifications.** State the criteria and specifications for the landlord's initial construction of the building, common areas, parking lot, and any related improvements that concern the tenant in any way — not just limited to the premises.

**2.2 Entering Premises Before Lease Commencement.** The tenant may want the right to enter the premises before the lease "commences" — even if the tenant will have a free rent period after "commencement." The tenant may want to use that pre-commencement period to start preparing the space for the tenant's needs.

**2.3 Landlord's Space Preparation.** The lease should define how the landlord will prepare the space for the tenant, including the landlord's responsibilities for asbestos abatement or removal, demolition, re-fireproofing, floor leveling, and closing of floor penetrations. Does the space contain any unusual existing improvements, such as vaults, that the tenant will want the landlord to remove? What level of completion must the landlord achieve? An architect's certificate? A certificate of occupancy? Temporary? Permanent?

**2.4 Delayed Completion.** If the landlord's work is late or defective, treat this as a failure to deliver possession, or at least provide meaningful consequences, typically day-for-day additional free rent after delivery, escalating (e.g., two days free for each day of delay) if the delay continues.

**2.5 Right To Remeasure.** Allow the tenant to remeasure the square footage of the premises when the landlord has finished its work, at least for a new building or extensive remodeling.

**2.6 Existing Violations.** The landlord should agree to cure any existing violations against the building that may prevent or interfere with the tenant's intended alterations. It is up to the tenant's experts to determine whether any such violations exist and whether they would, in fact, interfere with the tenant's work. They very well might not.

**2.7 Credit Issues.** Is the landlord creditworthy? If the landlord fails to build out or contribute to the tenant's work, what can the tenant do? Most leases say that the landlord has no liability beyond its interest in the premises, if that. At a minimum, the tenant will want a right to offset against rent — with a "default interest" factor — for any landlord contribution not paid or work not performed. The tenant will also want to assure that its offset right remains valid if the landlord's lender forecloses against the property. Toward that end, the tenant might consider whether an "offset" right is such a good idea, given that most nondisturbance agreements provide that a foreclosing lender will not be bound by any "offset" rights in the lease. Instead, the tenant might want to replace the "offset" for nonperformance with language that gives the landlord an opportunity to increase the rent payable for the space if and only if the landlord

does what the landlord was supposed to do. This may produce a better result for the tenant (than an “offset” right would) under nondisturbance agreements. If the landlord has a construction loan in place for the very purpose of paying for the tenant’s improvements, the tenant could seek a direct right to receive those advances as part of negotiating the nondisturbance agreement with the lender. The feasibility of such arrangements will depend on state law about permitted uses of building loan proceeds.

- 2.8 Building Systems.** Are the existing building systems adequate? Should the landlord agree to complete any upgrades? By when? Should the landlord construct any new installations outside the tenant’s premises? What about HVAC, fire safety or other system connections? Directional and wayfinding signage? Does the tenant have any special electrical requirements? Does the tenant require any space outside the premises to install electrical, communications, or other equipment for its own use? A backup generator? Should the landlord install these things? Does the landlord have a backup generator that the tenant would like the right to use?
- 2.9 Staging Or Storage Area.** Will the tenant need any staging area, “lay-down” area, or storage area for its construction activities and move-in program? If the building has a loading dock, service elevator or outside hoist, the tenant may want the right to some guaranteed usage or priority, particularly while it moves in and out, without charge. Hourly rates for these services can otherwise be quite high.
- 2.10 Substantial Completion.** If the landlord performs the tenant’s initial alterations, “substantial completion” should require the landlord to have installed and activated all communications systems, utilities, and interior elevator service. Require the landlord to deliver a permanent certificate of occupancy if at all possible in the particular circumstances, because a temporary certificate of occupancy, which expires after 90 days (in New York City), may not suffice. Treatment of this issue will vary by location.
- 2.11 Rent Commencement.** The tenant should not pay rent until particular anchor tenants are open for business; the landlord has finished specified construction, including common areas; and the landlord has paid the tenant the agreed construction cost reimbursement.
- 2.12 New York City Commercial Rent And Occupancy Tax.** New York City commercial tenants, in certain areas of the city, pay a “commercial rent and occupancy tax” that is almost unheard of outside New York City. In a particularly formalistic (or “creative”) application of that tax, city tax officials impose a commercial rent tax on the rent that a tenant would have paid but for an express rent credit that the lease gives the tenant to compensate the tenant for work it did in building out its space. The city treats that credit as if it were a “deemed” payment of rent, hence a taxable event — ignoring the fact that the credit probably results in some other taxable increase in the stated rent under the lease. If the parties achieve the same economic result through a free rent period or some other dollar adjustment of the rent not expressly tied to the cost of the tenant’s work, the rent forgone does not trigger a commercial rent tax. So a wise New York City tenant will ask for a free rent period or a general rent abatement rather than a rent credit tied in any way to the cost of the tenant’s alterations.
- 2.13 Tenant’s Build-Out Allowance.** If the tenant performs the initial alterations for its space, then allow the tenant to apply its build-out allowance to any “hard” or “soft” costs. The landlord should disburse any remaining allowance directly to the tenant or as the tenant directs. If the landlord fails to disburse



any allowance within some reasonable period (e.g., 90 days) after the tenant properly requests it, then allow the tenant to abate rent to recover the amount due, with interest at some high rate. At least signing, should the landlord create an escrow fund for the tenant's work allowance?

- 2.14 Simultaneous Work.** Prohibit the landlord from doing any nonemergency work in or affecting the space while the tenant performs its initial build-out. If the landlord must enter the tenant's space to perform any work during the tenant's build-out, all landlord's work must conform to the tenant's and its contractors' reasonable instructions and timing requirements.
- 2.15 Tax Implications Of Build-Out Allowances.** When a landlord contributes funds to a tenant's alterations, that payment may create immediate taxable income to the tenant, though the landlord cannot recoup the same outlay except through depreciation on a schedule of up to 39 years, regardless of the lease term. Only the Internal Revenue Service wins. The tenant may wish to negotiate instead that the landlord owns (and depreciates) the tenant's improvements for tax purposes, in exchange for some other benefit to the tenant. As an alternative, the parties might characterize the allowance as reimbursement for current expenses, such as the tenant's cost of moving, buying out its existing lease, or purchasing tangible personal property like furniture, fixtures or equipment. Although the tenant may still suffer taxable income, the recharacterization will improve the landlord's position by giving the landlord either a current deduction or a much shorter depreciation period. The parties can shift this benefit to the tenant by adjusting other economics of the lease. Have an engineer or appraiser prepare a cost segregation study to determine which property can be depreciated over such shorter periods. If the amounts are significant, involve a tax lawyer to consider possible tax mitigation or deferral.

### **3. Assignment And Subletting: Consent Requirement**

- 3.1 Landlord's Consent.** Ideally, allow the tenant to assign or sublet without the landlord's approval. This seems particularly justified under particular circumstances where governing law prohibits giving any prior notice of a transaction, such as securities laws prohibiting prior notice of a merger. At a minimum, the landlord should not unreasonably withhold its consent. Try to set standards for reasonableness. Try to provide that the landlord's consent will be automatically given if the proposed transaction meets specified objective and easy criteria (e.g., net worth, reputation, no felony convictions, experience, and proposed use). In the case of a sublease, the amount of subrent to be paid should not be a permitted criterion for approving subleases. The tenant must keep paying the landlord's rent no matter what, so why should the subrent matter, unless the landlord proposes to lower the rent to match the subrent?
- 3.2 Assignment vs. Subletting.** Don't assume the conditions and procedures for assignment and subletting should always match. Even if the lease tightly restricts assignment, a tenant should often have more flexibility on subletting.
- 3.3 Simple Approval Procedure.** Make the approval process as simple and expeditious as possible. And try to complete it early in the assignment or subletting process. Instead of requiring the tenant to submit to the landlord fully executed assignment or subletting documents, ask the landlord to agree to approve or disapprove the transaction in principle — before the tenant even starts its marketing — based solely on the tenant's anticipated pricing. As a fallback, defer the landlord's approval only until the tenant has

delivered a term sheet, the identity of a proposed assignee or subtenant, and (in the case of an assignment only) financial information about the proposed assignee. These early clearance procedures seem particularly appropriate if the landlord can recapture the space if the tenant proposes an assignment or subletting.

- 3.4 Consent Form.** Attach as an exhibit the required landlord's consent form to any transfer. Goal: prevent the landlord from adding new conditions and restrictions when consenting to a particular transaction. Although such conditions and restrictions may not conform to the lease, the tenant may agree to them because there is no choice or simply because the tenant is/was not paying careful enough attention (or saving money on lawyers) at the time. The consent form should include language allowing the tenant to assign to any subtenant or assignee all of the tenant's rights against the landlord.
- 3.5 Carve-Out For Affiliates.** Expressly permit any assignments and subleases to affiliates (defined as broadly as possible) or successors, or in connection with the sale of the tenant's business. If the tenant operates multiple locations, a "sale of business" should include the sale of a single location or, worst case, some reasonable group of locations. Define "affiliate" to include trusts, estates, and foundations in which the tenant or its officers are involved. The lease should impose no burdens at all (brokerage commissions, recapture or consent rights, pricing constraints, and the like) for affiliate transactions. For an affiliate transaction, the tenant should merely agree to notify the landlord of the transaction — nothing more.
- 3.6 Suppliers, Vendors, Customers, And Others.** Let the tenant sublet (or license space) to its suppliers, vendors, or customers, as appropriate for the tenant's business convenience. Will the tenant or its principals form joint ventures or other new businesses (e.g., "new business incubators") that should have the right to share the tenant's space without any need for landlord approval?
- 3.7 Lender Approval Requirements.** The lease should not require approval from the landlord's lender for subleases or assignments. If it does, get copies of the loan documents, and check them for lender approval requirements, and insist on limiting (or at least receiving copies of) any burdensome changes in lender approval requirements in future refinancings.
- 3.8 Licensees.** The tenant should not need the landlord's consent to grant bona fide concessions or licenses.
- 3.9 Prohibited Transfers.** Try to persuade the landlord to commit to providing notice and an opportunity to cure if the tenant violates a lease restriction on transfer. Just like any other default under the lease, a tenant can and should have the right to cure that default — in this case by rescinding the transfer. The landlord will probably ask that the right to cure apply only to innocent or minor transfers, thus raising a factual dispute likely to create more trouble than it's worth.
- 3.10 Recapture Of Premises.** If the tenant requests approval of an assignment or subletting but the landlord elects to "recapture" the space, the tenant may want to have the right to withdraw the request. If the landlord recaptures the premises for any reason, the landlord should reimburse the unamortized cost of the tenant's furniture, furnishings, equipment, and improvements. Any recapture notice by the

landlord must be accompanied by mortgagee consent to be effective. If the landlord elects not to exercise a recapture right, then the landlord should not unreasonably withhold consent to the tenant's proposal.

**3.11 Assignment/Sublet Involving Other Tenants.** The landlord should consent in advance to any assignment or subletting between this tenant and other tenants in the building, whether this tenant provides or receives additional space. Ask the landlord to waive in advance, for the benefit of this tenant, any provisions in other tenants' leases that would prohibit or limit such transactions or discussions, including recapture rights, profit participation, and consent requirements.

#### **4. Assignment And Subletting: Implementation**

**4.1 Assignor And Guarantor Protections.** As a general legal proposition, when the tenant assigns the lease, the original tenant remains liable for any default by the current assignee, or any later assignee. To facilitate future transactions, the tenant may want to try to mitigate that long-term post-assignment exposure, as it may severely constrain the tenant's flexibility when negotiating a future assignment. Try to say that both the assignor and any lease guarantor have no more liability — their liability terminates — if the tenant assigns the lease and satisfies certain conditions. If the tenant cannot obtain this protection, then the tenant may ultimately need to structure any future lease transfer as a sublease.

**4.2 Guarantor Protections.** Ask the landlord to agree to give any unreleased assignor (guarantor) notice of any assignee's default and an opportunity to cure it. In any such case, the assignor's guaranty liability would terminate if the landlord did not give the notice. An unreleased assignor (guarantor) might also want a right to obtain a "new lease" if the landlord terminates the lease and the unreleased assignor (guarantor) later performs the tenant's obligations.

**4.3 Suretyship Boilerplate.** If, after an assignment, the landlord and the assignee modify or extend the lease, a typical suretyship boilerplate provision in the lease may say that the unreleased assignor and its guarantor remain fully liable under the modification or extension. Although such boilerplate may make sense in the context of an affiliate guaranty, it makes no sense for an unreleased assignor of a lease where the assignee is an independent third party. Insist that in such case the assignor's and guarantor's liability will never exceed what it would have been under the original lease.

**4.4 Stock Transfers.** If a lease treats an equity transfer as an assignment for consent purposes, the lease should not then treat it that way for purposes of requiring the assignee to assume the lease, except where the equity consists of a general partnership interest in the tenant. Many landlords' forms are written in a way that might require such an assumption of liability. If the lease deems an equity transfer to constitute a lease assignment, the tenant should exclude mergers, consolidations, initial public offerings, any change of corporate control of a substantial operating company, transfers of publicly traded stock, the sale of all or substantially all of the tenant's assets (or of all assets within some particular category), transfers among affiliates, and any transfer resulting from an exercise of remedies by a bona fide pledgee.

**4.5 Assignment Of Security Deposit.** A tenant will want the right to assign the security deposit to any assignee of the lease. If the security is a letter of credit, the landlord should cooperate in substituting

one letter of credit for another (so two letters of credit are never both outstanding at once) if the tenant assigns the lease or changes banks.

- 4.6 Confidentiality.** The landlord should agree to keep confidential any financial information that a prospective assignee or subtenant furnishes, and agree to sign a standard confidentiality agreement upon request. Such an agreement would include a requirement to return any confidential information if a transaction does not close. Similar requirements should apply for any final transfer documents delivered to the landlord. The parties may want to attach as an exhibit the form of confidentiality agreement to be signed, or build it into the lease itself to avoid delays and discussions if the agreement becomes relevant.
- 4.7 Splitting The Lease.** The tenant may want the right to sever a large lease into two or more separate and independent leases, to facilitate assignment in pieces — a more flexible exit strategy. This could produce greater flexibility down the road and perhaps tax benefits depending on the particular circumstances. It also would, in the worst case, allow the tenant to “walk away” from one lease without imperiling the other lease, if the tenant can successfully resist the landlord’s desire to cross-default the two leases. Any such cross-default would vitiate the lease-splitting effort.
- 4.8 Protections For Subtenants.** The landlord should agree to give “nondisturbance” or “recognition” rights to subtenants if the subleasing transaction satisfies certain tests. Usually one of those tests will require that the subrent must equal or exceed the rent under the lease. Any such requirement makes the nondisturbance/recognition protections relatively worthless. Instead, the tenant should insist that the landlord protect any subtenant whose subrent is at least “fair market.” But what does “fair market” mean? Comparable existing rents? Advertised rents? The phrase invites disputes. In the alternative, if any such sublease ever becomes a direct lease with the landlord, then the rent might adjust to match the lease rent, although this might defeat the whole point as viewed by a prospective subtenant. The lease should also give subtenants as much flexibility as possible, perhaps the same flexibility as the tenant, on future assignments and subletting.
- 4.9 Participation In “Profits.”** If the landlord will participate in any net “profits” that the tenant realizes from assignment or subletting, define the tenant’s costs as broadly and inclusively as possible. For example, include brokerage commissions, professional fees, build-out, costs (including rent payable to the landlord) of carrying the space vacant during a reasonable marketing period, any free rent period, transfer taxes, cost of furniture included in the transaction, and the unamortized balance of the tenant’s original improvements to the space. Try to let the tenant claim all these deductions at the beginning of the sublease term, from the first subrent dollars received, rather than amortize them over the sublease term. If the landlord insists on amortization, then at least try to include an interest factor on the unamortized balance. Once the “profit” for a sublease has been measured, the tenant should avoid paying the landlord’s share of it as a lump sum at the time of the subleasing — even with a discount factor — because the tenant may never see the alleged “profit.” Instead, any “profit” payments to the landlord should be due only to the extent the tenant actually receives the anticipated “profit.” If the subtenant or assignee defaults, allow the tenant to stop paying and perhaps even recalculate (and receive a suitable refund of) any payments already made.

- 4.10 Multiple Lease Transfers.** If the landlord is entitled to a “profit” payment for any assignment or sublease, the tenant may want to negotiate a “basis adjustment” in the case of future transactions. For example, suppose an assignee pays \$1 million for a lease assignment, and the landlord receives 50 percent of that payment. What happens when the new tenant, the assignee, later assigns that lease again? At that point, the landlord has already “taxed” the first \$1 million of increased value of the tenant’s leasehold. The lease should let the assignee treat that lease purchase payment as part of the assignee’s cost of the lease when subleasing or assigning to someone else. The assignee tenant’s deductions should include any consideration that the tenant paid to acquire the lease, straight-lined, possibly with an interest component, over the remaining term of the lease.
- 4.11 Minimum Subrent.** The lease should not prohibit the tenant from subletting its space for less than the current stated rent, because that’s exactly what the tenant will very likely need to do.
- 4.12 Estoppel Certificates.** To facilitate future lease assignments or sublets, the landlord should agree to deliver estoppel certificates as needed.
- 4.13 Bills And Administration.** If the tenant sublets, try to have the landlord agree to bill the subtenant directly for any services the landlord provides to the subtenant, and any other landlord sundry charges that apply to the subleased part of the premises. Although the tenant cannot expect to be relieved of liability for these charges if the subtenant does not pay, the tenant can avoid time and effort, and a likely series of billing errors and inconsistencies, by extricating itself from the billing process. The same goes for any other function — e.g., requesting overtime HVAC or other building services — where the tenant might otherwise act as a mere communications channel between the subtenant and the landlord. The tenant will still want to see copies of bills and notices of unpaid amounts to avoid unpleasant surprises.
- 4.14 Guarantor.** If the tenant can assign without the landlord’s consent, the tenant also needs the right to replace any guarantor with a replacement guarantor that meets certain criteria. If the assignee delivers such a replacement guarantor — or if the landlord consents to an assignment without requiring a new guarantor — the first guarantor should be released automatically.

## **5. Bills And Notices**

- 5.1 When Notice Is Required.** Define when notice is required, but also try to limit when notice is necessary. The tenant should not have to comply with notice clauses if the tenant is sending, for example, only plans for approval, ordinary communications about the construction process, disbursement requests, and the like. The lease should require compliance with formal (and tedious) notice procedures only for notices that could give rise to meaningful rights and remedies under the lease.
- 5.2 Attorneys And Managing Agents.** Let attorneys and managing agents give notices on behalf of their clients. This should apply not only to any attorney or managing agent identified in the lease, but also to any future replacement, whether or not the party making the change has formally notified the other party of the change.

- 5.3 Copies.** If the landlord gives the tenant any notice, the landlord should agree to give a copy to the tenant's central leasing personnel, and perhaps to other specified recipients, such as counsel.
- 5.4 Delivery.** The landlord should deliver formal notices by personal service or nationally recognized overnight courier. State when notices become effective. Establishing receipt of notice by email can be problematic. Emailed notices seem particularly likely to get lost in the abyss. Thus, the co-authors disfavor allowing formal notices to be given by email. On the other hand, a large organization might set up a special address for emailed notices and nothing else, with the idea that someone will check that address regularly and pay attention to, and act on, all incoming email.
- 5.5 Notices Before And After Lease Commencement Date.** Until the lease commencement date, the landlord should agree to deliver all notices to the tenant's existing address, not the premises under the new lease. Even after the commencement date, it may not make sense for formal legal notices to go to the new premises. For example, the tenant may have a central leasing office that should receive and handle all incoming notices. In those cases, do something about the typical lease language that allows the landlord, after lease commencement, to send all formal notices to the leased premises.
- 5.6 Delivery Notices.** Require the landlord to provide written notice of delivery of any part of the premises, with a punchlist of the work the landlord acknowledges remains incomplete. The premises should not be deemed delivered until the tenant has received that notice and, perhaps, a certain period of time has elapsed. The tenant may also want the notice not to become effective until the tenant has reasonably approved it. As a practical matter, a tenant is often not ready to begin using the space immediately after receiving it from the landlord. The more process, formalities, and delay the tenant builds into the rent commencement date, the less rent the tenant will need to pay for space it is not ready to use.
- 5.7 Deemed Waivers.** If the tenant will be deemed to have waived any claims because of its failure to assert them within a specified period (e.g., objections to the landlord's delivery of the premises), then the lease should require the landlord to remind the tenant of the deemed waiver provisions as part of the notice that triggers the waiver.
- 6. Building Security**
- 6.1 Description Of Program.** Describe (and require the landlord to provide) a security program in accordance with agreed criteria. The program could include package scanning and messenger interception, lobby attendant, the tenant's own lobby desk, security guards, keycards, night access doors, and specified operating hours.
- 6.2 Tenant's Security.** Let the tenant establish its own security system and connect that system to the landlord's system.
- 6.3 Windows Film.** The tenant may want the right to install blast resistant glass or film on exterior windows.

- 6.4 New Measures.** The landlord should be required to obtain the tenant's consent for any new security measures (e.g., messenger interception) or changes in existing measures. This would, for example, allow the tenant to prevent establishment of security measures if the tenant considered them unnecessary overkill. The tenant should also seek the right to require changes to the landlord's security program if the tenant determines changes make sense. A tenant's exercise of these consent or control rights should impose no liability on that tenant for criminal actions of third parties or other adverse events.
- 7. Casualty**
- 7.1 Right To Terminate.** If a material casualty occurs and the landlord either cannot or does not restore the premises within a specified time period, or if the casualty occurs during the last two or three years of the lease term, let the tenant terminate the lease.
- 7.2 Adverse Impact On Business.** Allow the tenant to terminate the lease or abate rent if a casualty or other event (e.g., a terrorist attack affecting some other building) — or restoration from any such casualty or other event — causes any temporary or permanent material change in the tenant's permitted use (e.g., loss of nonconforming use status), access, parking, traffic volume, pedestrian volume, or visibility of the premises.
- 7.3 Extent Of Restoration; Interaction With Loan Documents.** Ideally, require the landlord to restore in all cases — whether or not the landlord has adequate insurance proceeds, i.e., whether or not the landlord decided to adequately insure the building. Perhaps, require the landlord to maintain a minimum required net worth or personal guaranty to cover the risk of insufficient insurance. Beware of the terms of subordination, nondisturbance and attornment agreements, which may, in effect, modify the restoration requirements of the lease to conform to those of the loan documents. If the tenant negotiates a broad obligation to restore but the landlord's loan documents let the lender take the money and run, then the tenant loses if, as often happens, the tenant agreed in a subordination, nondisturbance and attornment agreement that the loan documents would govern. A major tenant will usually not tolerate this possible outcome.
- 7.4 Abatement During Restoration.** Try to abate rent, escalations, alteration fees and any other payments during all restoration — both the landlord's and the tenant's — especially if major fixtures must be restored. Avoid any suggestion that rent abatement is available only to the extent that the landlord happens to receive rent insurance proceeds. It should be the landlord's job to maintain suitable rent insurance. The tenant shouldn't bear the risk of the landlord's failure to do so. The landlord should refund prepaid rent and other items. These measures will often be a "win-win" for both parties, because the landlord often can insure the loss (on a property-wide basis) more easily, economically, consistently, and reliably than can all the tenants individually.
- 7.5 Other Premises.** If a casualty affects only improvements outside the tenant's premises, don't allow the landlord to terminate the tenant's lease unless the landlord: (1) makes the tenant whole (e.g., reimburses the tenant's amortized investment in the space); and (2) terminates all other similarly situated leases. And if the tenant's occupancy assumes the continued existence of other nearby buildings (such as a multi-

building “re-tail mecca” destination), allow this tenant to terminate if some level of casualty affects those other buildings, even if it doesn’t affect the tenant’s building.

**7.6 Landlord’s Waiver Of Right To Sue.** Even without a waiver of subrogation, the landlord should agree not to sue the tenant for negligently causing a casualty that a typical casualty insurance policy would have covered.

**7.7 Lease Extension.** Ask the landlord to agree to extend the lease termination date to compensate the tenant after a loss for any period when the tenant could not use and occupy the premises. Even if the lease terminates, if the premises are tenantable and may legally be occupied, seek some short extension of the lease term to give the tenant additional time to operate and ease the transition to new premises.

**7.8 Time To Restore.** Limit or perhaps even negate any landlord right to obtain an extension of time to restore in the case of a force majeure event. The tenant might reasonably take the position that the tenant simply doesn’t want to wait around very long to see if the landlord decides to, and does successfully, restore.

## **8. Condemnation**

**8.1 Partial.** Require the landlord to restore the premises in the case of a partial condemnation, at least to the extent of available condemnation proceeds. If the partial condemnation affects the premises or more than some percentage of the whole building, the tenant may still want the right to terminate the lease.

**8.2 Separate Claim.** A tenant wants to be able to submit a separate claim to the condemning authority for: (1) the value of the leasehold estate; and (2) moving expenses, trade fixtures, goodwill, advertising and printing costs, phone lines and damages for interruption of business. Landlords and lenders rarely tolerate item (1), but may accept it provided that the tenant’s award does not diminish sums payable to the landlord and its lender.

**8.3 Physical Impairments.** The tenant may want a right to terminate or abate rent if any condemnation, including a road widening or other change, materially and adversely affects the tenant’s business, such as by impairing parking, access (e.g., loss of curb cuts), traffic volume, or visibility. Similarly, if a condemnation affects nearby property within a multi-building “retail mecca” destination project, then the tenant may want the right to terminate, even if the condemnation doesn’t affect the tenant’s own building.

**8.4 Landlord Participation.** The landlord should agree not to instigate, support, or cooperate in any condemnation or taking of the tenant’s leasehold interests, rights under a reciprocal easement agreement, or any other interest in the property. If the landlord violates that prohibition (for example, if the landlord enlists a governmental authority to cut off the tenant’s exclusivity rights to facilitate expansion of the landlord’s regional mall), then all rent should abate and the lease should allow the tenant to terminate and recover significant liquidated damages.

## **9. Consents**



- 9.1 Quick Exercise.** Require the landlord to grant or deny any required consent quickly. After a certain period, silence should be deemed consent. As a compromise, the tenant might agree to remind the landlord of the response deadline in its consent request or to give a reminder notice if the landlord has not responded within a certain time. Insist that no landlord consent may be unreasonably withheld. And if the landlord cannot unreasonably withhold consent, the lease should say, once, that the landlord also cannot unreasonably condition or delay consent.
- 9.2 Reasonableness vs. Objectivity.** Legal documents often use “reasonable consent” as a technique to solve many problems. No one quite knows what it means, beyond inviting litigation. If particular categories of consent seem particularly problematic, consider defining “reasonableness,” by defining objective standards that the tenant must meet in whatever matter would otherwise need the landlord’s “reasonable” consent. Then, instead of giving the landlord a “consent” right just give the landlord a “confirmation” right, i.e., the right to confirm that whatever the tenant wants to do does in fact meet the objective standards. If the landlord thinks it doesn’t, then the landlord bears the burden of saying why.
- 9.3 Expedited Dispute Resolution.** Some major leases build in an expedited dispute resolution procedure for certain consents — assignments, subletting, alterations — and even designate the third party who will decide the dispute. If that third party can’t serve, then the lease may designate alternatives. Reports from the field indicate that one of the great advantages of such expedited dispute resolution procedures is that they almost never actually need to get used.
- 9.4 Pre-Consent.** Does the tenant anticipate any possible future changes in the tenant’s needs for which the tenant wants the landlord’s consent today (e.g., a pending merger, change of name, change of business)?
- 9.5 Grounds For Disapproval.** If the landlord decides not to consent, then the landlord’s notice to that effect should specify all grounds for that failure, so the landlord can’t manufacture other grounds later. The tenant could go a step further and require that any notice of disapproval must also specify reasonable changes in the proposal that would lead the landlord to approve it.
- 9.6 Use Of Name.** The landlord should consent to the tenant’s use of the building’s name and likeness in the tenant’s promotional and publicity materials.
- 9.7 Site Plan.** For new construction, the tenant may want the right to consent to the landlord’s site plan (particularly as it relates to parking) and any substantial changes.
- 9.8 Press Releases.** The landlord should obtain the tenant’s approval of press releases, tombstones, and announcements about the lease. The landlord should not disclose any terms of the lease without the tenant’s consent. Will the tenant want any such press release to identify — or not identify — the tenant’s broker, counsel, or other advisers? The lease should not preclude the tenant from posting the lease on any securities disclosure website, if required by law.
- 9.9 Tenant Consent Rights.** Does any tenant anticipate any matters for which the landlord should seek the tenant’s consent, such as changes in building security? Indicate in the lease that such consent will be required.

**9.10 Damages.** For unreasonable denial of consent, try to trim back the standard lease language by which the tenant waives any right to recover damages. Perhaps the lease should allow the tenant to recover damages up to a specified dollar amount, or at least a reimbursement of the tenant's attorneys' fees in establishing that the landlord acted unreasonably. The tenant's position seems particularly compelling where the lease requires the landlord's consent in connection with the sale of the tenant's business, and the landlord withholds consent — in violation of the lease — and thus derails the tenant's entire transaction.

## **10. Defaults And Remedies**

**10.1 Notice And Opportunity To Cure.** The tenant should have the right to notice of, and the opportunity to cure, any monetary or other default. Request a double cure period before the landlord can exercise its right to terminate the tenant's lease. Why should lease termination be easy?

**10.2 Default Triggered By Bankruptcy.** Although "ipso facto" clauses are typically unenforceable against a debtor-tenant, beware of any event of default triggered by someone else's bankruptcy, for example that of a guarantor. A landlord can typically declare and enforce any such event of default against the tenant without a problem.

**10.3 Limited Liability.** Limit the tenant's liability and the liability of the tenant's general partners to their interest in the lease. Allow for release of departing or deceased partners.

**10.4 Limitation On Landlord's Remedies.** Limit the landlord's remedies (for example, to exclude lease termination or eviction) for defaults or disputes below a threshold level of materiality. Request that the landlord obtain an order from the court before it can exercise any right to terminate the lease. Why should the risk of lease termination hang over the tenant for every possible lease default or alleged default, and hence almost every conceivable (even minor) dispute with the landlord? Also, ask the landlord to waive any right to recover consequential damages from the tenant.

**10.5 Nonmonetary Defaults.** The tenant might want to eliminate all "nonmonetary" defaults. This can be accomplished by requiring the landlord to convert any "nonmonetary" default into a monetary default by curing it and sending the tenant a bill for reimbursement (a provision common in old Woolworth's leases — though apparently it was not enough to save the chain from oblivion). As an alternative, provide that so long as the tenant remains current in its monetary obligations, the landlord cannot exercise certain remedies (e.g., lease termination) for a nonmonetary default until the landlord has obtained a court order. In practice, of course, a court will often put the landlord in the same position anyway, regardless of what the lease says, such as through the "Yellowstone" procedure in New York.

**10.6 Future Equipment Financing.** Require the landlord, as well as its mortgagee, to waive or subordinate any statutory or other liens on fixtures, equipment, and other personal property of the tenant, either in all cases or if the tenant's asset-based lender requests it. To allow such a lender to exercise its remedies and remove any financed equipment, the landlord should also agree to enter into a landlord's consent, joined in by the landlord's mortgagee. This document could give the lender a brief lease extension if the lease terminates, and the right to conduct an auction on the premises.

- 10.7 Holdover Rent.** Prorate holdover rent on a per diem basis for partial months. As a practical matter, that may be the single most important concession for a tenant to request in the typical “boilerplate” of any lease, which will usually impose a month’s holdover rent — often at double the contractual rent — for a day’s delay in departing. Establish a short-term right to hold over at the same rent, to give the tenant some flexibility in case of delays in relocating. Try to negate any holdover rent during some limited period, if the parties are negotiating a lease extension in good faith for the premises, or the tenant is diligently negotiating for space in another building. Try to eliminate holdover rent at any time when a new tenant is not ready to occupy the premises. In New York, Real Property Law section 229 imposes double holdover rent by statute. Have the landlord waive it.
- 10.8 Mitigation Of Damages.** The landlord must seek to mitigate damages. (New York still imposes no such requirement on commercial landlords.) For example, the landlord must try to re-let the premises. If the landlord does mitigate its damages, it must credit any money collected against the tenant’s liability.
- 10.9 Waiver Of Self-Help.** Ask the landlord to waive any right of self-help (to retake possession) and any right to lock out the tenant.
- 10.10 Acceleration Of Rent.** If the landlord has the right to accelerate all rent as liquidated damages, first try to eliminate this remedy. If you can’t, seek the following: (1) the tenant gets credit for fair and reasonable rental value; and (2) the highest possible discount rate (for example, prime rate rather than four percent per annum).
- 10.11 Default By Subtenant.** Extend the tenant’s cure period in the case of nonmonetary defaults arising from the actions of a subtenant. Try to give the tenant time to enforce the sublease and, if necessary, to obtain possession of the subleased premises.
- 10.12 Statute Of Limitations.** Limit the landlord’s right to collect unbilled rent, particularly escalations, once a certain time has passed (e.g., 18 months).
- 10.13 Piercing The Veil.** Require the landlord to waive any theory that might let the landlord “pierce the corporate veil” of the tenant named in the lease. The landlord should acknowledge it has no claims against the tenant’s principals or affiliates under any circumstances, including tort-based theories relating to the lease or the premises, except to the extent they have actually signed a guaranty. Recognize that the “corporate” or “limited liability company” separateness may not be as sacrosanct as lawyers usually assume it is.
- 10.14 Reletting Costs.** To the extent that the lease requires the tenant to reimburse the landlord’s cost to “relet” the space after the tenant’s default, try to limit that obligation to apply to only an equitable portion of the landlord’s reletting expenses. For example, perhaps the tenant should pay reletting costs only to the extent reasonably allocable to the reletting period within the original lease term. If the reletting covers one year of the remaining lease term and nine later years, the tenant should pay only 10 percent of the reletting costs.
- 11. Electricity**

- 11.1 Totalized Submeter Readings.** Landlord should totalize readings from multiple submeters, using a third-party service and appropriate security controls to limit access to submetering equipment and computers.
- 11.2 Usage Survey.** Let either party, not just the landlord, initiate a usage survey. The tenant may want, or may want to require the landlord, to periodically test electrical submeters for accuracy.
- 11.3 Rate For Submetered Electricity.** The tenant should pay for submetered electricity using the same tariff under which the landlord purchases electricity. If the landlord purchases electricity from a private provider, the rate the tenant pays should not exceed the public utility's rate. If the landlord is required to stop providing power to the premises (one of those many bizarre hypothetical possibilities that every significant lease seems to address, perhaps because it once happened somewhere somehow), then the landlord should pay the tenant for the conversion costs of obtaining alternate sources of power.
- 11.4 Sufficient Wattage.** The landlord should assure the tenant that the existing electrical system provides enough power for the tenant's present and anticipated needs, usually expressed in watts per usable (or sometimes rentable) square foot.
- 11.5 Additional Electrical Capacity.** The tenant should be able to obtain more electrical capacity if needed, quickly, at a defined or ascertainable cost. The landlord should reserve a certain number of watts per foot for the tenant, even if the tenant will not need it at first. If the tenant later needs more electricity but the building has no available capacity, the resulting delays in obtaining additional capacity may hurt the tenant's business.
- 11.6 Location For Power Delivery.** Specify the delivery point for electrical power.
- 11.7 Tenant's Emergency Generator.** Let the tenant install an emergency generator and fuel tank, or other arrangements for fuel storage and refueling. Allocate ownership, responsibilities (including responsibilities for regular testing and refueling), and costs between the landlord and the tenant. The tenant should have the right, but not the obligation, to remove this equipment at the end of the lease term.
- 11.8 Backup Electrical Operation.** The landlord should give the tenant prior notice before any scheduled electrical shutdown or testing of the landlord's emergency generators. Limit the frequency of such shutdowns and the periods when the landlord can test its emergency generators. These generators, when running, can produce background noise about as subtle as jet engines.
- 11.9 Building Generator.** Give the tenant the right to use the building generator. The landlord should reserve a certain amount of generator capacity for the tenant and agree to keep the fuel tanks full. The tenant may also want the right to monitor the landlord's generator maintenance and testing activities. A landlord will usually expect the tenant to reimburse a share of these costs, but that is ultimately a business negotiation.
- 11.10 Capacity.** The landlord should allow the tenant to reserve additional riser space and additional capacity in the bus duct or other main electrical distribution system.

- 11.11 Retroactivity.** Try to limit the period during which the landlord can retroactively bill the tenant for increased rates or usage.
- 11.12 Auditing.** Allow the tenant to audit electrical bills, the same way the tenant can audit operating expenses, and perhaps under similar procedures. The tenant should also have the right to request that a qualified third party periodically check the landlord's meters for accuracy.
- 11.13 Maintenance.** Require the landlord to maintain and periodically calibrate any submeters, and maintain evidence that the landlord has done so.
- 12. Elevators**
- 12.1 Freight Elevators For Moving.** Ask to use the freight elevators to move in and move out. The tenant should seek the use of several elevators — e.g., all the passenger elevators in the building — on weekends and at night for the same purposes. Ideally, all this elevator usage, or at least a certain number of hours of usage, should be free, both for the move in and the move out.
- 12.2 Night Service.** The lease should provide that “night service” for elevators (restricted or limited service) cannot begin before a specified time. Require the landlord to have a minimum number of elevators in service at all times.
- 12.3 Changing Elevator Banks.** Prohibit the landlord from reconfiguring elevator banks. If the tenant's space is the first stop, it should remain so.
- 12.4 Exclusive Service.** The tenant may want exclusive elevator service for certain floors. The tenant may want idle cars parked at, or returned to, the tenant's floor for the tenant's convenience.
- 12.5 Routine Repairs.** Require the landlord to perform routine elevator repairs and maintenance only outside business hours, and within a certain turnaround time (shorter if multiple elevator cars are out of order).
- 12.6 Waiting Time.** Specify the maximum average waiting time for elevators. Establish measures to monitor elevator performance. In particular, a major office tenant might require the landlord to install in the ground floor elevator lobby a video display showing the elevator system and the status of each car. This would give the most likely critics of elevator performance — people waiting for an elevator — an immediate ability to know what to complain about (e.g., too many cars out of service). Establish consequences if elevator performance falls short of agreed benchmarks.
- 12.7 Security Measures.** Give the tenant the right to approve any institution or modification of elevator security measures, including 24-hour keycards and turnstiles to the elevator area. Does the tenant want to require any such measures?
- 12.8 Service Contract.** Require the landlord to maintain an elevator service contract that obligates the maintenance contractor to respond to a stuck elevator within a certain very short time frame.

### 13. End Of Term

- 13.1 Duty To Restore.** The tenant will want to disclaim any obligation to restore (i.e., remove the tenant's alterations) at the end of the lease term. As a compromise measure, the tenant might agree to remove any of the tenant's improvements that are unusual, particularly difficult to remove, or improperly made, or if the landlord reasonably required restoration as a condition to consenting to the tenant's work. But, what's "reasonable"? Instead, try to specify an objective test for determining what the tenant must remove. It may make sense to attach an exhibit, defining specific items that the tenant must remove at the end of the term. The lease might still need to deal with possible additions to the list if the tenant did more work later in the lease term. Require the landlord to give a reminder notice at least a certain number of months, but no more than some shorter number of months, before the end of the lease term if the landlord intends to enforce the restoration requirement.
- 13.2 Restoration.** If the tenant must restore, then let the tenant: (1) perform any necessary restoration rather than pay the landlord to do it; (2) enter the premises on favorable terms for some reasonable time after the end of the lease term as needed; (3) during the post-term restoration period, pay only an equitable per diem payment (or nothing at all) rather than holdover rent; and (4) meet only a "substantial completion" standard rather than a higher standard that might apply to delivery of new space. Once the tenant notifies the landlord that the work is done, the landlord should have a short time to object. Silence should be deemed approval. Require the landlord to specify all objections, in reasonable detail, within the objection period. If the landlord's objections are minor and the tenant resolves them within a reasonable period, then the tenant should no longer be required to pay any rent (if the tenant agreed to pay any rent) during the post-term restoration period.
- 13.3 Condition Of Returned Premises.** The tenant should have no duty to return the premises in any particular condition. For example, it should have no obligation to replace a worn-out compressor in the last year of the lease term.
- 13.4 Removal Of Personal Property.** Let the tenant enter the premises for a short time after the lease expires to remove the tenant's personal property.
- 13.5 Demolition Clause.** If the tenant cannot negotiate away a "demolition" clause, then don't allow the landlord to terminate under that clause unless the landlord: (1) gives reasonable notice; (2) acts in good faith; (3) terminates the leases of all other tenants; (4) has entered into a binding noncancellable demolition agreement; (5) has obtained a demolition permit; and (6) deposits the lease termination payment in escrow. If the tenant can think of anything else to require, the tenant should do so, all toward the goal of delaying the lease termination as long as possible.
- 13.6 "For Rent" Signs.** The landlord should not post "for rent" signs until the lease term has actually ended. The landlord should agree to remove any "for rent" signs as soon as the landlord has signed a new lease for the space, or perhaps even when the landlord and the next tenant have entered into a nonbinding term sheet.

- 13.7 New Location Sign.** For a reasonable time after the lease has terminated, the tenant may want the right to install a sign directing customers to the tenant's new location.
- 13.8 Prepaid Rent.** Upon any termination not arising out of the tenant's default, the landlord must promptly refund prepaid rent and other payments, with accrued interest. If the landlord doesn't do it promptly, perhaps charge an administrative fee.
- 13.9 Subtenant Problems.** Sometimes a tenant cannot vacate solely because a subtenant fails to surrender its own subleased premises, which might consist of only a small part of the tenant's premises. To protect the tenant in such a case, try to limit the tenant's liability, by limiting such liability only to the part of the premises that the subtenant failed to surrender or, at most, to the entire floor that includes those premises. Absent such a concession, the tenant may find itself liable for holdover rent for an entire multi-floor leased premises, even though the tenant moved out and the subtenant's holdover affects only a tiny corner of one floor. Tenants should understand this risk when evaluating prospective subtenants and negotiating subleases. As one way to mitigate the risk, the tenant might have the sublease expire six months before the main lease, at which point the tenant would require the subtenant to deliver appropriate estoppel certificates and other assurances (such as an increased security deposit or a stipulated judgment of eviction) to back its obligation to vacate, and the sublease might convert to a license arrangement. A strong tenant might ask the landlord to agree to bear the risk of subtenant holdover.
- 13.10 Receipt And Release.** Require the landlord to issue a receipt and release upon request at the end of the lease term.
- 13.11 Inspection.** Require that the parties jointly inspect the premises at the end of the lease term to identify, in a written punchlist, any issues the landlord intends to raise. If the landlord doesn't raise them at the inspection, then the landlord can't raise them later.
- 14. Escalations (Generally)**
- 14.1 Proportionate Share Computation.** In computing the tenant's proportionate share, if the rentable square footage (the numerator) includes the tenant's share of the common areas, confirm that the denominator also includes all common areas. If the square footage of the building increases, then the denominator should also increase accordingly. Exclude basement and mezzanine space from the numerator. Avoid contributing to the landlord's land banking or costs of carrying dead space.
- 14.2 Over-Reimbursement.** Do all of the tenants' percentages add up to 100 percent, or is the landlord being over-reimbursed for escalations? Are the anchor tenants paying their share, or is that share being shifted to the other tenants? If the latter, this tenant probably can't do anything about it, but may want to take the cost shifting into account in negotiating other terms of the lease.
- 14.3 Mixed Uses.** In a mixed-use building, including office with retail on the ground floor, does the landlord treat all tenant types the same way or at least equitably? Should the landlord do that? Should certain parts of the project be excluded from the tenant's escalation formulas? More generally, the existence of multiple uses in the same building can make any allocations much harder to understand and much more

subjective, i.e., it creates much more room for abuse, and makes the abuse that much harder to find. If possible, the tenant should contribute only to an allocation of costs within the particular single-use component of the project that the tenant actually occupies. The tenant may want to go a step further and negotiate a fixed contribution to expenses, or even a “gross” rent number.

- 14.4 Occupiable Space.** The lease should allocate escalations based on occupiable space (as the denominator), not occupied space. Let the landlord pay the full operating costs for all unoccupied space.
- 14.5 Multiple Escalations.** The lease should not allow multiple escalations that give the landlord duplicative recoupment of a cost increase, or double-count any charges included in operating expenses or elsewhere. For example, the marketing director’s salary should be either an operating expense or a charge to the marketing fund, but not both. Anything treated as “real estate taxes” should not also be treated as “operating expenses.” These principles can be expressed both generically and by combing through and comparing the various definitions, watching for overlap.
- 14.6 Lease Termination Mid-Year.** Apportion escalations if the lease terminates during a calendar year. Otherwise, the landlord could argue that annual calculation procedures and payment schedules obligate the tenant to contribute to an entire year’s escalations.
- 14.7 “Base Year.”** Any “base year” should fully include all expenses. Did the landlord not yet incur any ordinary expenses in the base year? Did any exclusions apply? Was the landlord not providing full building services? Was the building new, so the landlord could rely on contractors’ warranties instead of paying for regular repair and maintenance?
- 14.8 Cap On Escalations.** The tenant might try to negotiate an annual limit on escalations—either a specific dollar figure, a percentage, a percentage of the consumer price index (“CPI”), or the comparable cost increases in a “basket” of comparable buildings, if such information can be obtained.
- 14.9 Free Rent Period.** Does the “free rent” period apply to escalations or just base rent?
- 14.10 “Porter’s Wage” Escalation.** For “porter’s wage” escalations (relatively rare in modern leases), the lease should exclude fringe benefits and the value of “time off.” Try to limit the measure to reflect only the base hourly rate. If you cannot exclude fringe benefits, try to define how to calculate them.
- 14.11 Consumer Price Index Adjustment.** For a CPI adjustment, should measure any increase consistently from the starting year of the lease, rather than from the preceding year’s CPI. The adjustment clause should specify exactly which CPI index is being used and what happens if that index stops being issued.
- 14.12 Escalations Below Base.** State that if an escalation amount falls below the original base, the tenant should receive a credit against fixed rent.
- 14.13 Fixed Rent Increases.** To avoid controversy over calculating escalations, negotiate fixed rent increases in place of all pass-throughs of expenses.



**14.14 Waiver Of Escalations.** The landlord should waive any escalations not billed within a certain period.

**15. Estoppel Certificates**

**15.1 By Whom.** Both the landlord and the tenant should agree to furnish estoppel certificates. How often?

**15.2 Who Can Rely.** Allow subtenants and assignees to rely on the landlord's estoppel certificate, not just lenders. If the tenant delivers an estoppel certificate, negate any right for the landlord to rely on it; only allow third parties to rely.

**15.3 Form.** Attach an acceptable form of estoppel certificate as an exhibit to prevent subsequent issues or creative efforts by the landlord to turn future estoppel certificates into lease amendments. Limit the assurances the tenant must provide, both substantively and by adding "knowledge" requirements and as many other qualifiers as possible. Avoid restating any lease terms, except where they can't be determined from the face of the lease, such as the actual commencement date if uncertain. Tell the lender, or anyone else relying on an estoppel certificate, to read the lease. They should rely on the estoppel certificate only for comfort that the landlord and the tenant have not secretly amended the lease, and to confirm facts outside the four corners of the lease.

**15.4 Legal Fees.** Require the landlord to reimburse the tenant for its legal fees in researching, reviewing, and preparing future estoppel certificates.

**15.5 "Knowledge."** Qualify appropriate sections of any estoppel certificate to apply only to the tenant's knowledge, especially for issues of additional rent. Also, think about what "knowledge" means. Actual knowledge? As an alternative, say that the tenant reserves its rights on these claims. A typical 10-day requirement to deliver an estoppel certificate doesn't give the tenant enough time to conduct adequate due diligence to knowingly surrender claims involving complicated and potentially debatable billing of operating expenses and utility charges. This is particularly true when the tenant is a large company with multiple departments involved in overseeing the lease.

**15.6 Conflict Of Terms.** If the estoppel certificate and the lease conflict, the lease should govern. The delivery of an estoppel certificate should not be deemed to waive or modify any rights or remedies of the tenant.

**15.7 Failure To Sign.** Negate any liability of the tenant (e.g., claims of "tortious interference") if the tenant does not sign the estoppel certificate. Limit the landlord's remedy to an injunction, a deemed estoppel, or a nuisance fee. This is just like the landlord's desire not to incur liability for derailing a transaction if the landlord unreasonably withholds consent to an assignment or transfer.

**16. Failure To Deliver Possession**

**16.1 Remedies.** Let the tenant terminate or receive a substantial rent abatement if the landlord does not deliver possession by a certain date. Also try to get day-for-day, or better, rent credit for the delay. Require the landlord to pay for or provide temporary space or pay the tenant's holdover damages in its present space. If the lease sets a formula for any payment or credit to the tenant for delayed delivery,

courts may test it as “liquidated damages,” although when a New York court did so, that particular ruling was reversed on appeal. (*Bates Advertising USA, Inc. v. 498 Seventh, LLC*, 739 N.Y. Supp. 2d 71 (App. Div. 2002).) Just in case, though, add the typical recitations that attempt to validate any liquidated damages clause. Beyond establishing consequences for the landlord’s failure to meet a delivery date, establish consequences if the landlord fails to meet individual interim milestones. Those milestones might relate, for example, to completion of HVAC upgrades or construction of demising walls, the walls that separate this tenant’s space from common areas and space leased to other tenants.

- 16.2 Lender’s Approval.** If the lease is conditioned on a lender’s (or anyone else’s) approval, set an outside date for approval and let the tenant terminate if the landlord misses that date. Try to have the landlord deliver the approval when the parties sign the lease, particularly if the tenant is under time pressure to resolve its occupancy arrangements.
- 16.3 Termination Of Lease.** If the tenant terminates the lease because the landlord does not timely deliver possession or obtain any required approval, the landlord should refund all payments and redeliver any other documents (such as letters of credit) delivered on lease signing. Also ask the landlord to agree to compensate the tenant for the tenant’s costs.
- 16.4 Late Delivery Of Premises.** The landlord should push back all rent abatements and adjustments as well as the expiration date (and base years, at some point) if the landlord delivers the space late.
- 16.5 Relocation.** If possible, delete any clause that allows the landlord to relocate the tenant to other space. Otherwise, if the tenant agrees to give the landlord a right to relocate the tenant, require: (1) the new premises must be physically higher (or no more than \_\_\_ floors lower) than the existing premises; (2) the landlord must pay all direct and indirect relocation costs (e.g., new letterhead, announcements, rewiring costs); (3) the configuration, size, and layout of the new premises must meet the tenant’s reasonable approval; (4) the tenant need not relocate until the new premises are fully built out, and legally occupiable, all at the landlord’s expense; (5) a free rent period; and (6) instead of relocating, allow the tenant to terminate the lease, particularly if less than a certain period remains in the lease term. The landlord should also have no right to relocate the tenant more than once.
- 16.6 Seasonal Businesses.** For seasonal businesses, the tenant may not want to be obligated to initially open for business during its slow season. Try to control periods or dates during which the landlord may deliver the premises. A certain day of the week? Only outside the winter holiday season?
- 17. Fees And Expenses**
- 17.1 Reasonableness.** Limit fees and expenses to any that are reasonable, actual, and out-of-pocket. Do not agree to allow fees “as established by landlord” or as “modified from time to time” or “based on landlord’s standard schedule.” The tenant should not be required to pay fees for any review of plans (or possible subtenants) by the landlord’s internal personnel, even if those persons are professionals.
- 17.2 Legal Fees And Expenses.** Make the obligation to reimburse attorneys’ fees run both ways. Whoever prevails should recover attorneys’ fees, including the value of in-house counsel’s time. Exclude legal fees and expenses relating to a claimed default if no default exists or the landlord otherwise does not prevail.

**17.3 Indemnification.** The tenant should be responsible only for the direct consequences of its own acts and omissions. Keep any indemnity narrow. Negate tenant liability for consequential damages.

## **18. Heating, Ventilation, And Air-Conditioning (“HVAC”)**

**18.1 Specifications.** Specify required HVAC service, with variations by day of week and season, both during and outside business hours. Require the landlord to air-condition all interior public areas. Obtain the right to test air quality and other characteristics from time to time. Remember that HVAC includes “heating” and “ventilation,” not just air conditioning, so the specifications should address those services as well.

**18.2 Rates.** The lease should state the rates (and the basis of rates) for overtime HVAC. Squeeze out any profit component. If the landlord later charges any other tenant a lower rate, the landlord should agree to notify this tenant, and this tenant should get the benefit of that lower rate.

**18.3 Installation.** If the landlord must install any HVAC system, the lease should also require the landlord to get the system working properly. That means installing all meters, controls, and thermostats, in locations satisfactory to the tenant, and testing and balancing the system.

**18.4 Allocation Of Charges.** Allocate overtime HVAC charges among multiple simultaneous users. Otherwise, the landlord may charge each tenant the full cost to the landlord of providing overtime HVAC for the entire building.

**18.5 Notice For Overtime.** Minimize or eliminate any prior notice requirement for overtime HVAC. Even if the tenant misses the notice deadline, the landlord should agree to try to provide overtime HVAC.

**18.6 Discount.** The landlord should give the tenant a discount on overtime HVAC if the tenant commits in advance to specified levels of usage for a specified period. With sufficient notice, the tenant should still have the right to withdraw or change its usage commitment.

**18.7 Water Treatment.** Require the landlord to add appropriate chemicals to any HVAC-related water lines to prevent pipe corrosion and system breakdowns. The landlord should maintain records of these treatments and give them to the tenant upon request. The tenant may want the right to test the HVAC system to confirm that the landlord is properly treating the water lines.

**18.8 Miscellaneous Issues.** Should the tenant have the right to install supplemental HVAC? How much condenser water must the landlord provide? Chilled water? Who owns the equipment? How much will installation and usage cost? Who must repair/restore? Should the tenant be able to reconfigure building standard HVAC as needed for supplemental service? Will the tenant need access to fresh-air louvers? Where?

## **19. Inability To Perform**

**19.1 Force Majeure.** Give force majeure protections to the tenant, not just the landlord. The landlord must give notice of a force majeure event within a specified time, or lose the right to claim that event as force

majeure. Any delays that result from a contractor that the landlord required the tenant to use (or perhaps even merely approved) should constitute force majeure for the tenant's obligations.

**19.2 Right To Cure.** If the landlord fails to perform an obligation, let the tenant cure the failure to perform, even if the landlord can argue that its failure is caused by force majeure. If the landlord fails to reimburse the tenant's cure costs, with interest at some high rate, then let the tenant offset rent.

**19.3 Force Majeure Exceptions.** Although force majeure clauses always have a certain logic and fairness to them, should the tenant always allow the landlord the potentially open-ended extensions of time that a force majeure clause might justify? If the lease requires the landlord to restore after casualty within a certain time, should the landlord be entitled to an endless extension of time? What about delivery of the premises? What about maintenance of the roof? At some point, the force majeure clock should stop ticking or the rent abatement clock should start ticking, perhaps at double speed — even for force majeure delays.

## 20. Insurance

**20.1 Common Standard.** The tenant should have no obligation to provide more insurance than similar tenants customarily maintain in similar buildings, or to provide insurance at rates that are not reasonable.

**20.2 Type Of Insurance.** Allow the tenant to carry blanket insurance, self-insure, or use a “captive” carrier. In the case of a large corporate tenant, the insurance requirements should conform to the tenant's company-wide insurance program. If that program later changes, the lease should allow the tenant's insurance deliveries to conform to the tenant's changed program.

**20.3 Waiver Of Subrogation.** Insurance policies should contain a waiver of subrogation clause. The lease should then contain matching waiver and release language.

**20.4 Property And Liability Insurance.** The landlord should carry property and liability insurance, and give the tenant evidence of that insurance on request. The tenant may also want the right to see copies of the landlord's insurance policies, a requirement that landlords often impose on tenants.

**20.5 Effect Of Sublease.** To the extent that the tenant subleases the premises, the lease should state that the subtenant's insurance coverage and insurance certificates (if otherwise substantially in compliance with the lease) will meet the tenant's insurance obligations. On the other hand, small subtenants will often expect to provide less insurance than a direct tenant. Avoid any suggestion in the lease that every subtenant's insurance must meet the insurance standards of the direct lease.

**20.6 Landlord's Deductible.** A major tenant may care about the size of the landlord's deductible (both a minimum and a maximum) and how the landlord will fund that deductible in the event of a casualty. Whose risk is the deductible? Will that payment constitute an operating expense?

**20.7 Terrorism Insurance.** If the tenant believes terrorism insurance may rear its head again as an issue in the world of commercial real estate, think about whether the lease should deal with it in any particular

way. For example, the tenant might conclude that operating expenses should exclude any costs related to terrorism insurance. Make it the landlord's problem as a risk of owning real estate.

## 21. Landlord's Access

- 21.1 Prior Notice.** How much and what type of prior notice should the landlord give to gain access to the tenant's premises?
- 21.2 Purpose Of Access.** Limit the landlord's access to certain defined purposes (e.g., repairs, inspection, or to show the premises to prospective future tenants within the last few months of the lease term only).
- 21.3 Frequency.** Limit how often the landlord can enter the premises.
- 21.4 Sensitive Areas.** Should the lease prohibit or restrict landlord access to "special spaces" (bank vault, securities vault, network control rooms, and the like) for cleaning and other purposes? If the tenant regards its entire operation as proprietary and "top secret," then perhaps the lease should not allow the landlord access at all, absent an emergency.
- 21.5 Time Of Access.** Should access be limited to certain hours (business hours, after hours)?
- 21.6 Authorized Personnel.** Precisely who among the landlord's employees, agents and contractors should have access?
- 21.7 Presence Of Tenant's Representative.** The tenant may want its representative to be present whenever the landlord is on the tenant's premises. This is particularly important in any area where the tenant has sensitive, dangerous, or expensive personal property.
- 21.8 Disruption And Security.** Require the landlord to minimize interference with the tenant's business and comply with the tenant's reasonable instructions and security requirements, even if this requires the landlord to use overtime labor. If the landlord's personnel or contractors cause any damage or theft, make the landlord responsible.
- 21.9 Landlord's Installations.** If the landlord wants to reserve the right to install pipes and conduits somewhere in the premises, the tenant may want to limit exactly where — such as only within existing walls or above ceilings, or at locations that the tenant reasonably approves. Require the landlord to minimize and repair (or pay to repair) any damage associated with the installation or maintenance of these conduits. Expressly negate any right for the landlord to install any new structural supports or other improvements not requested by the tenant within the premises. Perhaps also provide for significant liquidated damages if the landlord violates the restrictions in the preceding sentence.
- 21.10 Storage Of Materials.** If the landlord stores materials in the premises for making repairs, limit that right to apply only to those materials necessary for repairs within the premises. This can be particularly problematic if the premises includes a terrace — a tempting storage area for long-term exterior projects. In any case, the landlord should store materials in the premises (or an adjacent terrace) only for short periods.

**21.11 Repair Work Outside Business Hours.** If the landlord's work in or affecting the premises will cause inconvenience, noise, odors, or the like, the landlord should work only outside business hours. If the tenant needs the landlord to repair any critical area or function quickly, require the landlord to do so, even if the landlord must hire overtime labor.

**21.12 Hazardous Materials.** If the landlord will use hazardous materials for any work in or affecting the premises, the landlord should agree to notify the tenant in advance and provide "material safety data sheet" disclosures. If the landlord will make the premises uninhabitable during business hours, should the landlord provide substitute space?

## **22. Leasehold Mortgages And Tenant's Financing**

**22.1 Landlord's Consent.** Ask the landlord to consent in advance to the tenant's grant of leasehold mortgage(s). The landlord should also agree to execute a recordable memorandum of lease. Any leasehold mortgagee should have the rights to: (1) receive notice of default from the landlord; (2) cure; and (3) obtain a new lease from the landlord if the original lease terminates, except a scheduled termination in accordance with its terms. For the lease to be truly "mortgageable," it needs much more than this.

**22.2 Equity Pledges.** If the tenant's owners pledge their equity as collateral for a loan, the pledgee may want protections under the lease like those of a leasehold mortgagee.

**22.3 Financing, Generally.** Does the tenant anticipate entering into any other financing arrangements, such as equipment or inventory financing, that might affect the landlord, the lease, or the premises? If so, add appropriate language to the lease to preserve the tenant's flexibility. Plan ahead to obligate the landlord to comply with any likely requirements of the tenant's equipment lessor or other financing source.

## **23. Maintenance And Cleaning**

**23.1 Structural Repairs.** Require the landlord to maintain and repair the "structure" of the building (including the roof, the foundation, and other structural elements) and maintain and repair common areas, parking lots, garages and sidewalks. Define "structure" (broadly) to avoid future disputes over what it means. Try to have it cover as much of the building as possible except most improvements unique to a particular tenant.

**23.2 Building And Systems Maintenance.** The landlord should maintain electrical, plumbing, sewage, HVAC, and other building systems, at least to the point of entry into the premises. Require the landlord to maintain service contracts. Let the tenant and its advisors inspect building systems and monitor or confirm the landlord's maintenance program.

**23.3 Standard For Maintenance.** The landlord should maintain the building and common areas in an attractive and first-class manner, which the tenant may want to define in a specific way. That obligation should extend to any empty shop spaces, and all common areas on any multi-tenant floor, whether or not fully occupied. "Maintenance" should include the provision of security. Require the landlord to repaint, recarpet, and repave periodically.

- 23.4 Cleaning Standards.** Specify standards for the landlord's cleaning services, both within the premises and in common areas. Limit the scope of possible "extras." Try to define the pricing of "extras." Cleaning standards are an economic issue and potentially a huge profit center for a landlord. Review and negotiate them accordingly. If the cleaning standards say the landlord does not need to clean any "computer areas," how much space will this exclude for a modern office? If the landlord wants to disclaim any responsibility for cleaning of certain areas (food preparation, etc.), obtain a credit for the value per square foot of the "building standard" cleaning not provided. As an alternative, ask the landlord to give the tenant an allowance. Then the tenant should only be responsible to pay for any cleaning in the space that is above standard.
- 23.5 Cleaning Hours.** Specify the earliest time at which cleaning may commence, and the time by which it must finish.
- 23.6 Cleaning Personnel.** The tenant may want the right to approve individuals or cleaning crews that provide cleaning services to the space. The tenant may also want to request background checks for these individuals. If the staffing changes, the tenant may want the same rights for any replacement cleaning staff members. The tenant may also want to require bonding of the cleaning staff.
- 23.7 Right To Terminate.** The tenant may want to be able to terminate the landlord's cleaning services and take over cleaning of all common areas or just the premises, with a rent credit. If the landlord maintains storage and locker areas specific to the premises, for the landlord's cleaning staff, then if the tenant takes over cleaning, the tenant will want the right to use those storage and locker areas.
- 23.8 Garbage Removal.** Define the location, access, timing, and other arrangements for garbage removal. The landlord should provide separate recycling containers or areas.
- 23.9 Repairs Covered By Insurance.** Require the landlord to make repairs — even if otherwise the tenant's obligation — where the need arises from an event covered by insurance that the landlord carried or should have carried.
- 24. Operating Expenses — Calculation And Auditing**
- 24.1 Statement By Professional.** An independent managing agent or (better) a certified public accountant should prepare the landlord's statement of operating expenses. Attach as a lease exhibit the landlord's operating expense statements for the preceding few years. Ask the landlord to confirm that: (1) these were the statements actually used for pass-throughs to existing tenants; and (2) the landlord will calculate future operating expenses the same way.
- 24.2 Time For Revision.** Set a time limit for the landlord's revisions to operating expense statements—and make that limit subject to a "time of the essence" qualifier. The tenant may want to require the landlord to issue an audit confirmation letter waiving any unbilled charges beyond a certain point from when the operating expense statement is prepared.

- 24.3 Gross-Up.** In any year the building is not fully occupied, operating expenses are often “grossed up” as if the building had been fully or nearly fully occupied during the entire year. Confirm that the base year and adjustment year are treated consistently and that the “gross-up” calculations make sense.
- 24.4 Timing Of Operating Expense Statement.** The landlord should provide the annual operating expense statement within a reasonable time (90 to 180 days) after fiscal year-end. To give the landlord an incentive for promptness, the tenant might insist that monthly estimated operating expenses payments must stay the same (for the next year) until the landlord has completed its operating expense statement justifying an increase. And if the statement shows a decrease, then the tenant should immediately obtain the benefit of that decrease (with interest?) and a suitable rent credit.
- 24.5 New Expense Items.** Building management standards sometimes change over time, usually upwards (e.g., higher security standards or new types of insurance or new regulatory compliance costs). When that happens, the landlord may incur new categories of expense that the landlord did not incur during the base year, which would require the tenant to bear the entire cost of that new expense, not just increases above the base year. Therefore, if the landlord later incurs new categories or items of expense that were not being incurred when the lease was signed, the tenant may want to require the landlord to “gross up” the base year to reflect what this expense would have been if the landlord had already been incurring it the day the lease was signed.
- 24.6 Right To Review And Challenge.** The tenant should have the right to examine and question the landlord’s operating expense calculations. Require that any expense the landlord incurs be reasonable, ordinary and customary, not just actual. Allow the tenant to challenge any expense as unreasonable. Those rights should survive any lease termination. The lease should give the tenant reasonable time to: (1) notify the landlord that it wants to audit expenses; (2) conduct and complete the audit; and (3) specify if, and how, it contests the landlord’s calculations. Avoid any schedule that requires the tenant to provide more detail than is reasonable at any particular stage of the process. If the tenant discovers egregious errors, let the tenant reopen operating expenses from earlier years, even if the time to do so has otherwise expired.
- 24.7 Books And Records.** Require the landlord to keep books and records for a specified number of years in a single place under a unified system. In the likely event this information is stored electronically, give tenant the ability to access it in useful electronic form (e.g., spreadsheets rather than PDF files). Allow the tenant to copy those books and records for any audit of operating expenses.
- 24.8 Base Year.** The tenant’s right to audit should also cover the base year, expiring no earlier than the expiration date for the right to audit the first operating year. The tenant may wish to audit the base year at the same time that it audits the first operating year.
- 24.9 Landlord’s Responsibility For Audit Cost.** The landlord should pay the cost of audit (credit it against the next month’s rent) if the audit discloses an overcharge of more than some stated low percent



age. Beware of language that refers not to an overcharge but to an overstatement of operating expenses; that's a harder threshold to meet.

- 24.10 Most Favored Nation; Landlord's Discovery Of Error.** If some other tenant's audit discloses a discrepancy, the landlord should automatically give this tenant the benefit of any resulting adjustment to operating expenses, even if this tenant does not ask for it. If, on a particular issue, the landlord makes a better deal with any other tenant, this tenant should get the benefit. If the landlord fails to timely disclose any benefits of the types contemplated in this paragraph, then the landlord should pay interest at a high rate, and perhaps also an administrative fee. Don't call it a penalty, though.
- 24.11 Choice Of Auditing Firm.** The lease should not limit the tenant's right to engage a firm of its own choosing, such as a contingent fee lease auditor, to examine the landlord's books and records.
- 24.12 Parking Lots.** Treat the cost of filling potholes and restriping as an operating expense, but resurfacing as a capital expense to be borne by the landlord without reimbursement. Require resurfacing at least once every \_\_\_ years. Exclude any parking lot maintenance costs for at least \_\_\_ years after the commencement date.
- 24.13 Cost Of Capital Improvements.** If the estimated cost of any capital improvement or replacement for which the tenant is responsible exceeds a specified amount, perhaps varying based on the remaining term of the lease, then allow the tenant to terminate the lease or require the landlord to contribute to the cost. Base that contribution on the expected useful life of the improvement or replacement as compared against the remaining lease term. Beware of unrealistic limits on the amortization period for any capital or quasi-capital outlays by the landlord.
- 24.14 Tenant-Specific Exemptions.** Look for justifications to support exemption from particular expenses (e.g., elevator expenses for a ground floor tenant).
- 24.15 Confidentiality.** If the landlord requires the tenant to sign a confidentiality agreement for any future lease audit, insist that the form of agreement be attached to the lease, or that the agreement be built into the lease. (Why do we need a separate agreement?) Either approach avoids the risk of extended delays in trying to negotiate a confidentiality agreement when the need arises.
- 24.16 Credit.** Try to get credit for any income the landlord derives from common areas (e.g., signage).
- 24.17 New Buildings.** Part of the business negotiation of a lease in a new building will relate to the negotiation of the base year for any escalations. The parties are both at greater risk here, because the building has no operating history. Initially, the base year should reflect regular base operating costs and should not include savings that result from new construction (for example, lack of maintenance costs because a contractor's warranty covers all problems). The tenant may want to adjust the base year to a year (or average of several years) in which the landlord has achieved a certain occupancy level (e.g., 100 percent).
- 25. Operating Expenses — Exclusions**

The tenant may desire to exclude at least these items from operating expenses:

- 25.1 Above-Standard Cleaning.** Costs of cleaning portions of the building that have cleaning requirements higher than the tenant's (e.g., cleaning some other tenant's employee cafeteria or special mahogany conference rooms).
- 25.2 Americans With Disabilities Act.** Americans with Disabilities Act of 1990 ("ADA") compliance costs, particularly when triggered by operations of other tenants.
- 25.3 Advertising.** Advertising expenses, including the cost of maintaining any website.
- 25.4 Art.** The purchase, maintenance, or insurance of any artwork or sculpture.
- 25.5 Bad Acts.** Costs incurred as a result of the landlord's negligence or intentionally wrongful acts (good luck finding and proving either of those).
- 25.6 Breach Of Lease.** Costs incurred because any party breaches any lease.
- 25.7 Capital.** Costs that under generally accepted accounting principles consistently applied would be considered capital outlays or are otherwise outside normal costs and expenses for operation, cleaning, management, security, maintenance and repair of similar buildings. As an alternative, perhaps allow capital expenditures if: (1) the tenant approves any expenditure above a certain level; or (2) an expenditure is justified by the cost of repairs or undertaken to reduce operating expenses, and then only to the extent that the landlord demonstrates actual cost reduction.
- 25.8 Collateral Source.** Any cost reimbursed by insurance proceeds (or that would have been reimbursed if the landlord had carried customary insurance), any condemnation award, or any indemnification from any third party.
- 25.9 Construction.** The cost to perform initial construction and to correct initial construction defects, as well as such costs for any future alterations or additions.
- 25.10 Contributions.** Any charitable or political contributions the landlord might decide to make.
- 25.11 Development-Related Payments.** Exactions paid to any governmental body or community organization, including those for infrastructure, traffic improvements, curb cuts, roadway improvements, transit costs, "impact fees," statues of government officials, and so on.
- 25.12 Environmental.** Costs of testing for, handling, remediating, or abating asbestos and other hazardous materials or electromagnetic fields; the cost to remove chlorofluorocarbons or accomplish other future retrofitting driven by future environmental concerns not yet imagined; or the cost to purchase environmental insurance. If the landlord decides to make changes to achieve some level of LEED compliance, make that the landlord's cost, not the tenant's.

- 25.13 Excessive Management Fees.** Management fees beyond those charged in comparable buildings, particularly where the property manager is an affiliate of the landlord.
- 25.14 Executive Salaries.** Salaries for officers above the level of building manager.
- 25.15 Fines.** Fines and penalties the landlord must pay as a result of failure to comply with law, code, etc.
- 25.16 Food Court.** Costs related to food court tenants to the extent they exceed normal costs. As an alternative, allocate food seating area as tenant space (paid for by the food court tenants), perhaps with extra weighting because of the heavy cleaning requirements.
- 25.17 Holidays.** Any holiday decorations or gifts. In the alternative, impose a reasonable limit on these costs.
- 25.18 Mall Advertising.** Any mall advertising program, or, as an alternative, cap the amount of the tenant's contribution.
- 25.19 Other.** Next year's newest area of legal concern (for inspiration, check the latest carve-outs from "non-recourse" treatment in mortgage finance transactions).
- 25.20 Other Tenants.** Any costs for a service not provided to this tenant and included in its rent (for example, the incremental cost of a higher level of service provided to office or retail tenants); costs reimbursed or reimbursable by specific tenants other than through pro rata rent escalations (e.g., fees for excessive use of utilities); or costs caused by the acts or omissions of particular other tenants.
- 25.21 Ownership-Related Costs.** Ground rent; mortgage interest, principal and transaction costs; build-out of tenant space; clean-up of any landlord's construction projects; and general and administrative expenses (overhead).
- 25.22 Payments To Affiliates.** Fees and expenses paid to the landlord's affiliates in excess of market rates. (But what's market and how do you know? The tenant may want preapproval rights.)
- 25.23 Professional Fees.** Brokerage fees and commissions; legal fees and expenses to negotiate and enforce leases; and accounting fees.
- 25.24 Telecom Installation.** Either exclude costs or offset them against the income the landlord receives.
- 26. Options**
- 26.1 Additional Space.** The tenant may want an option, right of first refusal or right of first offer for additional space.
- 26.2 Sublet Excess Space.** As a fallback, negotiate a wide-open right to sublet excess space until needed.
- 26.3 First Refusal Mechanics.** For a right of first refusal, seek a "second bite at the apple" if the landlord later decides to market the space in smaller pieces or on terms different from those originally contemplated. Also, scrutinize the conditions that trigger the right of first refusal. Landlords' form leases often

let the tenant exercise a first refusal right only if the space has become “vacant and available.” What does this mean? If the landlord negotiates a new lease for the space before an old lease expires, does that new lease mean the space is not “vacant and available”? The test should be whether an existing lease will (or has) expire(d) or terminate(d). The landlord should agree not to negotiate any extension or renewal that could impair the tenant’s claims to the space. Try to attach an exhibit to the lease identifying exactly when the tenant’s right of first refusal will arise, to the extent presently knowable.

**26.4 Excess Space Notices.** Whether or not the tenant has preemptive rights to extra space, the landlord should agree to advise the tenant regularly of any space that becomes available, giving as much notice as reasonably possible under the circumstances. As a practical matter, if the tenant wants the space, the parties may be able to negotiate something at that point.

**26.5 Recapture From Other Tenants.** If the landlord can exercise its right to recapture space from another tenant, the tenant may want the authority to require the landlord to exercise its recapture right for the tenant’s benefit. The recaptured space would then become part of this tenant’s premises.

**26.6 Early Termination Options.** The tenant may want early termination options, either complete or partial (“shed rights”). But what happens if the terminated space includes critical communications facilities serving the rest of the tenant’s space? The tenant will want the right to leave those in place.

**26.7 Renewal Option.** Often tenants will seek a right to renew the lease term. In such cases, the tenant must scrutinize and confirm it can live with whatever conditions, requirements and procedures the landlord tries to attach to the renewal option. Landlords have been known to require that rent can never go down during the renewal term and the renewal right can be exercised only by the initial tenant. Try to time the process to give the tenant time to move if the rent, as finally determined, is unacceptable. Also, allow the tenant to assign any renewal options as part of a lease assignment.

**26.8 Appraisal.** If rent during the option term depends on an appraisal, allow the tenant to withdraw its option exercise if the tenant disapproves of the new rent as finally determined. In practice, this may give the tenant some reasonable ability to re-negotiate the rent (a one-way downward negotiation opportunity), regardless of what the appraisal says. Set objective appraisal criteria. Does the definition of “fair market rental value” make sense? Does it give the landlord “credit” for value-enhancing measures (e.g., a tenant improvement allowance) that the landlord will not in fact deliver to the tenant? If the tenant won’t receive such an allowance upon renewal, the definition of “fair market rental value” should not pretend otherwise. And if the tenant paid for above-standard interior work, then “fair market rental value” should not reflect the value of that work. “Fair market value” should instead assume that the landlord delivered the space in the same condition as on the starting date.

**26.9 Purchase Option.** The tenant may want the right to purchase the building if the landlord intends to sell it or if the equity owners of the landlord intend to sell a substantial portion of their equity. If the landlord converts the building into a condominium, the tenant may want a preferred right to purchase one or more units.

- 26.10 Reminder Notices.** Require the landlord to send reminder notices of any upcoming option exercise deadline, but not more than \_\_\_\_ days, or less than \_\_\_\_ days, before the deadline. Extend the deadline and the lease expiration date if the landlord delays sending notice.
- 26.11 Short-Term Extension.** Try to negotiate the right to a short-term lease extension, at the tenant's option, to avoid holdover problems if the tenant suffers delays in moving. The landlord will probably want some significant prior notice before the tenant exercises any such short-term extension right, but if the tenant agrees to too much time, then the short-term extension right becomes worthless, as it cannot deliver the flexibility that the tenant needs.
- 26.12 Base Years.** For any lease renewal, reset the base years for escalations, or make sure the rent revaluation process assumes continuation of the old base years (nonstandard but theoretically a slight bit better for the tenant).
- 26.13 Rule Against Perpetuities.** Think about the possible impact of the rule against perpetuities on any option rights in the lease or ancillary to the lease.
- 26.14 Option Timing.** Scrutinize and work through all the time periods for any option, and confirm that the tenant will be able to take the actions required within each time period. Do all the time periods work together? Do they give the tenant enough time for its internal review and approval processes in deciding whether to exercise a renewal option? If the tenant exercises an option defectively, require the landlord to notify the tenant promptly and allow some additional time to exercise the option correctly.
- 27. Parking**
- 27.1 Specific Requirements.** Define the location, number, and pricing (or assurance of no fee) for parking spaces, reserved and unreserved. If any other tenant has the right to reserved parking, then this tenant should also have reserved parking equivalent in amount, proximity, type (covered, uncovered), and signage, adjusted for relative occupancy. Attach a parking diagram as an exhibit. Prohibit the landlord from changing the parking arrangements without the tenant's consent. In any case, the tenant may want to seek some number of reserved, covered, indoor, or otherwise "premium" parking spaces.
- 27.2 Bicycles And Motorcycles.** The landlord should provide parking for bicycles, mopeds and motorcycles in a convenient location. If the tenant wants to allow bicycles, skateboards, and the like into the tenant's space, make sure the lease allows it, without making special arrangements such as use of the freight elevator or giving advance notice.
- 27.3 Building Expansion.** If the landlord expands the building, the overall parking ratio shouldn't worsen.
- 27.4 High Parking Uses.** The tenant may wish to prohibit nearby high parking uses (e.g., movie theater, trade school, restaurant). Some of these uses are, however, regarded as being less objectionable than they once were.
- 27.5 Location/Amount Of Employee Parking.** Insist that the landlord enforce employee parking restrictions against other tenants.

- 27.6 Snow/Maintenance.** Require the landlord to clear snow promptly from, and otherwise maintain, the parking area.
- 27.7 Lighting.** Set standards for lighting of common areas and parking decks — especially important to a 24-hour operation.
- 27.8 Patterns.** Prohibit the landlord from interfering with or changing traffic patterns in the parking lot areas.
- 27.9 Fences.** The tenant may want the right to require the landlord to install a fence to segregate parking areas from adjacent heavy-usage facilities.
- 28. Percentage Rent**
- 28.1 Rent Abatements.** Rent abatements or other rent reductions should not reduce percentage rent breakpoints (to avoid an anomaly where the breakpoint drops because of negotiated rent abatements, resulting in percentage rent payments increasing by a like amount).
- 28.2 Partial Year Gross Sales.** Annualize first year and last year gross sales, with a seasonal adjustment, to prevent excessive percentage rent if the tenant opens or closes in its peak season.
- 28.3 No Partnership.** State that the parties do not intend to establish a partnership or joint venture.
- 28.4 Exclusions From “Gross Sales.”** Depending on the type of business, the lease should exclude or subtract certain items from “gross sales,” such as: sales made by concessionaires, sales not in the ordinary course of business, sales to employees up to a certain percentage or only if at a discount, sales taxes, refunds, returns, credit card fees, custom tailoring, and monogramming. The tenant will want to avoid any suggestion that the landlord can collect percentage rent on the tenant’s catalog or Internet sales.
- 28.5 Time Limits.** Impose time limits on the landlord’s right to audit. Prohibit use of contingent fee auditors. If the landlord performs an audit, then the landlord should give the tenant a copy of the audit report even if it produces no adjustments.
- 28.6 Termination Right.** The tenant may want to request the right to terminate the lease if its sales fall below some specified threshold. If either party terminates because of a termination right like this, then the tenant may want the landlord to reimburse the tenant’s unamortized leasing and improvement costs, perhaps up to a cap.
- 28.7 Revenue Maximization.** The tenant should avoid any obligation to operate or to “maximize” revenues. The tenant should not make any representations on the volume of its business. Expressly negate any “implied” obligations along these lines.
- 28.8 Special Categories.** The tenant may wish to negotiate a lower percentage rate for particular low-margin activities or categories of sales.

**28.9 Free Rent.** Any free rent period should abate percentage rent too.

**28.10 Use.** Tie percentage rent to the tenant's use of the premises. What happens if the tenant assigns to another operator with a different use? Request that the lease allow assignment even if this change the amount of percentage rent, provided the assignee agrees to pay at least the same total rent as the assignor did in its last year of operation.

## **29. Quiet Enjoyment**

**29.1 No Default.** Beware of "quiet enjoyment" conditioned on no default. Condition quiet enjoyment instead only on the landlord's not having terminated the lease.

**29.2 Sidewalk Sheds And Scaffolding.** The tenant may want the right to reduce the rent if a sidewalk shed, fence, or scaffolding for any construction project in the building impairs access or visibility. For any such installation: (1) try to set limits (duration; minimum clearance; cannot block windows; just posts for 30' up, then roof above posts; frequency; and purpose); (2) seek the right to install advertising signs at the landlord's expense and at no charge to the tenant; (3) prohibit any other advertising signs, particularly for competing businesses; and (4) require the landlord to remove promptly all unauthorized postings or graffiti on any sidewalk shed or similar temporary fence, and to light the underside of any installation described in this paragraph. For retail tenants, try to prohibit such structures during peak sales seasons. A significant daily no-fault fee for the landlord's maintenance of any of these structures might solve many problems.

**29.3 Dumpsters, Staging Areas, Lay-Down Areas.** Try to control where the landlord may install these items. Prohibit them in parking areas.

**29.4 Remedies.** If the landlord breaches the covenant of quiet enjoyment, the tenant cannot easily prove the amount of the injury or damages. Provide for liquidated damages or some other mechanism to quantify damages, ideally measured on a daily basis. Include the necessary recitations to validate any liquidated damages formula.

## **30. Radius Clauses**

**30.1 Physical Scope.** Try to limit the physical scope of any radius clause, i.e., a clause that prohibits a retail tenant from competing within a certain distance of the premises. Ideally, limit the radius to only a mile or two, depending on the site and the tenant's plans.

**30.2 Exclusions.** If the tenant must agree to a radius clause, carve out: (1) existing stores; (2) any new stores purchased in a future corporate transaction; (3) relocation of existing stores within any retail property where the tenant is already doing business; (4) any stores operated by any possible future acquiror of the tenant's business; and (5) any other brand names that the tenant operates.

**30.3 Termination.** Try to terminate the radius clause at a certain date; if the tenant has achieved a certain level of percentage rent; or if the landlord has achieved a certain occupancy level.

- 30.4 Near End Of Term.** In the last few years of the lease term, the radius clause should terminate, to facilitate a graceful shift to a new location. In the alternative, allow the tenant to open a new store nearby provided that the tenant protects (or partly protects) the landlord from any decrease in percentage rent during the remaining lease term.
- 31. Real Estate Tax Escalations**
- 31.1 Definition Of Property.** Confirm that the property to which the real estate tax escalation applies does not include other parcels or improvements; or, if it does, understand the likely future real estate taxes on those parcels or improvements.
- 31.2 Substitute Or Additional Taxes.** Devote close attention to how “substitute or additional taxes” are defined. Confirm that they are truly appropriate for pass-through to the tenant. One might more appropriately treat them as equivalent to income taxes.
- 31.3 Landlord’s Tax Protest.** For the base year, review any landlord tax protest filing to understand the landlord’s theories for low value. Will those theories inevitably vanish next year, producing built-in increases? In the lease, express the base-year real estate taxes as a specified number of dollars per square foot. Avoid referring to the taxes payable in a particular tax year, because such a reference could increase escalations if the landlord successfully protests base-year taxes. Base-year taxes never go up; they just go down if the landlord gets lucky.
- 31.4 Installment Payments.** Require the landlord to pay real estate taxes in installments, as taxes are due. In any event, calculate tax pass-throughs as if the landlord were paying in installments over the longest period allowed.
- 31.5 Special Assessments.** The landlord should pay special assessments in installments and treat them as taxes only to the extent they fall within the lease term.
- 31.6 Right To Contest.** Require the landlord to contest taxes or, if the landlord does not, give the tenant the right to do so in the landlord’s name or in the tenant’s own name, as necessary. Check statutory and case law requirements as to who may contest taxes. For example, in New York a tenant that leases only part of a building lacks standing to contest taxes. The parties may need to make other arrangements, and the lease should provide for those. Whether the tenant leases all or only part of the building, any tax contest will still require cooperation and delivery of necessary information and signatures by the landlord. Require the landlord to contest taxes if a certain proportion of tenants so request. Require the landlord to warn the tenant of any tax contest deadline to give the tenant enough time to contest if the landlord does not wish to do so.
- 31.7 Tax Refunds.** Require the landlord to pay the tenant its share of tax refunds promptly, even if the lease has expired. The landlord should also notify the tenant of any such refunds promptly when received. If the landlord fails to do so, or the tenant needs to remind the landlord, then the landlord should pay a default interest rate or some multiple of the amount due to the tenant. Landlords have been known to forget to give former tenants their share of any subsequent refunds of real estate taxes they paid. This



can produce a nontrivial profit center for the landlord, and a significant issue in negotiating a later purchase and sale of the building.

- 31.8 Tax Protest Costs.** Any contingent fees paid to real estate tax counsel should be arm's length and commercially reasonable. What's "commercially reasonable"? The landlord should not collect a separate "management fee" for its services in contesting real estate taxes. That's a burden of ownership.
- 31.9 Base-Year Reassessment.** If the reassessment for the base year goes down, try to reduce base rent by the amount of the tax savings, to make up for the resulting increase in real estate tax escalations.
- 31.10 Abatement Or Deferral Program.** The landlord should agree to apply for any available tax abatement or deferral program. The risk of loss of tax abatements already granted (e.g., for failure to comply with governmental procedures) should belong to the landlord, not the tenant. For any future abatement or deferral programs, negotiate whether the benefits belong to the landlord or the tenant and, if the latter, identify exactly what cooperation the landlord must provide and when. How exactly does the application process work? Beware of repricing the base rent in a way that indirectly returns to the landlord any tax abatement/deferral benefits that the tenant expected to obtain. Some argue that the value of every geographically targeted tax abatement or deferral program will simply be negotiated into rents and hence land values within the targeted area, and therefore have no effect except to increase local land values at the expense of the local taxing authority.
- 31.11 Artificially Low Assessments.** If, under local assessment rules, the first year's free rent produces an artificially low tax assessment that year, then the assessment may automatically rise by the same amount in future years. The tenant may then, over the years, pay extra tax escalation payments far beyond the value of the free rent. This depends very much on local tax assessment procedures, but the tenant must understand them.
- 31.12 Exclusions.** Real estate tax escalations should exclude: penalties and/or interest; excise taxes on the landlord's gross or net rentals or other income; income, franchise, transfer, gift, estate, succession, inheritance, and capital stock taxes; taxes on land held for future development ("outparcels"); increases in real estate taxes resulting from construction during the lease term if not done for the benefit of tenants generally, or if it does not create additional proportionate rentable area; termination of interim assessment; loss or phase-out (whether or not scheduled) of abatement or exemption; corrections of underpayments in previous periods; acquisition of development rights from other property; increases resulting from the landlord's failure to deliver required information to the taxing authority or other failure to comply with the taxing authority's requirements; and, if possible, sale of the property. If the landlord transfers unused development rights in a way that reduces the landlord's net real estate tax expense, confirm that the tenant will participate in any savings that result.
- 31.13 New Buildings.** Depending on when in the progress of the building project the lease is being negotiated, the tenant should confirm that the base year will reflect complete construction and full assessment of the building. This may require a retroactive adjustment of base taxes, depending on how the particular jurisdiction handles new construction.

## 32. Representations And Warranties

The tenant may wish to ask the landlord to provide representations and warranties, including these:

- 32.1 Asbestos And Hazardous Materials.** The premises are free of mold, asbestos and other hazardous materials. The landlord should provide any document required to confirm that status for purposes of building permit applications, such as a New York City ACP-5 form, showing that the tenant's work will be a non-asbestos job. The landlord should indemnify the tenant against liability (and delay-based losses) arising out of any environmental conditions that existed before the tenant took possession, whether or not the landlord caused them. And the landlord should agree to clean up those conditions.
- 32.2 Certificate Of Occupancy.** Attach a true, correct, and complete copy of the certificate of occupancy as an exhibit. The landlord should represent that the tenant's use as permitted under the lease won't violate the certificate of occupancy or the landlord's other leases or agreements.
- 32.3 Commissions And Brokerage Fees.** The landlord has paid or will pay all brokerage fees and commissions for the lease. If the tenant cares about its relationship with the broker, the tenant may want the right to offset rent and pay the broker (particularly for any commissions due on future renewals or expansions) if the landlord does not.
- 32.4 Impact And Hookup Fees.** The landlord has paid or will pay all impact fees, hookup charges, and other governmental exactions imposed on the project, and will not recapture them through any escalation.
- 32.5 Rights Of Third Parties.** The landlord's entry into the lease does not violate any rights of third parties, such as the prior tenant that was evicted from the space or other tenants in the building.
- 32.6 Submetering.** All equipment is in place and in good working order for any submetering of utilities the lease contemplates.
- 32.7 Utilities.** Adequate utility locations and capacity are available both within the building and at the premises.
- 32.8 Violations.** The premises are subject to no outstanding violation of any code, regulation, ordinance, or law, and the landlord agrees to cure existing violations at the landlord's expense, not recaptured through any escalation.
- 32.9 Validity Of Lease.** Each party represents and warrants to the other that the lease has been duly authorized, executed and delivered, and is valid and binding.
- 32.10 Zoning.** The property is properly zoned and the tenant's permitted use under the lease is legal.
- 32.11 Construction Plans.** Landlord plans no construction at the property, except ordinary tenant improvements.

**32.12 Notices; Plans.** The landlord has received no notice of any condemnation, including any grade change of any street or any partial condemnation. The landlord plans no changes in parking or circulation. The landlord has no present plans to do anything that would require the tenant's approval or require entry into the tenant's premises.

### **33. Requirements Of Law**

**33.1 Responsibility For Compliance.** The landlord should be responsible for compliance with existing and new laws (including ADA) if the compliance applies generically to the property (e.g., "mere office use") or any noncompliance already existed before the lease was executed.

**33.2 Regulatory Flexibility For Tenant.** Allow the tenant to sell or assign the lease (or go dark) if required by law or through a settlement with any government agency.

**33.3 Americans With Disabilities Act Of 1990.** The tenant should have no duty to bring any elements of the existing building into ADA compliance (e.g., elevator buttons), unless (perhaps) the tenant actually alters that particular element of the building. Make the landlord responsible for ADA and all other baseline legal compliance.

**33.4 New Requirements.** The landlord should comply with any new legal requirement if the potential noncompliance did not result from the tenant's actions, and failure to comply may impair the tenant's alterations or use as the lease contemplates, or could otherwise adversely affect the tenant.

**33.5 Permits.** The landlord should agree to cooperate with the tenant in obtaining permits, and other governmental approvals that tenant may need, such as by signing permit applications (even before approving the tenant's work) and providing necessary existing information. Establish a tight turnaround time for any necessary landlord signatures. Don't allow the landlord to use the permit signing process as a back door technique to disapprove work that the lease otherwise obligates the landlord to allow.

**33.6 Change In Zoning.** The landlord should allow the tenant to terminate if a change in zoning or other law (or inability to obtain or maintain necessary permits or adequate parking) prevents or impairs the tenant's operation of its business, in whole or in part.

### **34. Restrictions Affecting Other Premises**

**34.1 Competing Stores.** Prohibit the landlord and its affiliates from renting to competing tenants within a certain area, particularly where the landlord operates its properties under an identifiable brand name. For a major tenant, prohibitions of this type may raise antitrust issues, which are beyond the scope of this checklist. New York law invalidates this type of prohibition in bank leases, allowing anyone damaged by such a prohibition to recover treble damages. New York Banking Law Section 674-a.

**34.2 Use Of Building.** Prohibit the landlord from changing the use of the overall building or any part of it — such as turning the older and less rentable half of a regional mall into a call center or community college. Restrict the type of retail tenancies or other uses in the building (e.g., no fast food). Consider issues

of density, traffic, parking, demographics, compatibility, likelihood of picketing or controversy, security concerns, and other potential problems affecting building use and other tenants.

- 34.3 Prohibited Uses.** For retail properties, prohibit flea markets, carnivals, petting zoos, clothing drop-off boxes, kiosks (especially if competitive or within a certain distance of the entrance or windows of the premises), drive-up booths, and the like, elsewhere on the landlord's property, including common areas. For office buildings, prohibit uses that attract large volumes of people, particularly if incompatible with first-class business offices (e.g., poverty benefit or advocacy offices, drug rehabilitation clinics, welfare offices, certain types of auction houses).
- 34.4 Additional Construction.** Limit the location and type of any additional construction the landlord can perform (e.g., on "outparcels").
- 34.5 Minimum Operating Hours.** Establish minimum operating hours for the property as a whole or for specific other tenants.
- 34.6 Landlord's Activities And Kiosks.** Limit the landlord's activities and installations on the sidewalk (or common area of a mall) within a specified area near the premises.
- 34.7 Scope Of Restrictions.** To the extent that the lease restricts the landlord's activities, consider how broadly those restrictions should apply. Ideally, they should affect both the existing structure and any future expansion in which the landlord has any interest, or for which the landlord or an affiliate presently controls the site. Try to have the landlord agree not to enter into a reciprocal easement agreement or otherwise facilitate any nearby construction by others unless the counterparty agrees to honor the same restrictions. The tenant may even want the right to approve any future reciprocal easement agreement or amendments to the existing agreement.
- 34.8 Public Areas.** The tenant should control (or have the right to require, within reason) future changes to public areas, lobbies, elevators, parking lots and other common areas. Require the landlord to renovate and update these areas periodically to keep them consistent with first-class standards as they change from time to time. Require the tenant's approval for the plans for all such work, or at least the visible part (e.g., finishes) of the landlord's work. The tenant may want the right to require the landlord to prohibit smoking in public areas even if governing law does not.
- 34.9 Exclusive Uses.** The tenant may want exclusive rights for certain uses. As a fairly ordinary example, a coffee store may want the exclusive right to sell coffee within the landlord's shopping center. A careful landlord will push back and try to fine-tune any exclusives to assure they don't impair the landlord's overall leasing program. Every time the landlord chips away at the exclusive, this may make it less useful and valuable for the tenant. The tenant will want to make sure that any exclusive still serves its intended purpose and protects the tenant's investment.
- 34.10 Adjacent Work.** If a third party will pay compensation for inconvenience caused by work on an adjacent or nearby site, should the landlord or the tenant receive it?

**34.11 Beware Of Ownership Variations.** To the extent the landlord agrees to any provisions suggested above, beware of limiting those provisions to any property “owned by the landlord and its affiliates.” Third parties, often not even affiliates of the landlord, may own parts of what appears to be a single integrated building. In these cases, the tenant will need to focus on the governing easements and declaration documents for the building as a whole, triggering a level of investigation often reserved only for major tenants.

## 35. Rules And Regulations

**35.1 Nondiscriminatory Enforcement.** Require the landlord to impose and enforce its rules and regulations in a nondiscriminatory way. If the tenant so requests, the landlord should impose and enforce those rules and regulations against other tenants.

**35.2 New Rules.** New rules should be reasonable and of the type customarily imposed for similar buildings. New rules should require the tenant's approval. If the landlord wants to give the tenant a short period to object to any new rules, insist that the landlord give the tenant formal notice of any new rule, along with a reminder of the short period in which the tenant may object.

**35.3 Interference With Permitted Use.** The tenant should have no obligation to comply with any rule or regulation if such compliance would interfere with tenant's use permitted under the lease, or otherwise does not conform to the tenant's rights under the lease.

**35.4 Third-Party Enforcement.** The lease should prohibit any other tenant from enforcing the lease against the tenant. Expressly negate any third-party beneficiaries of the lease, or anything in it.

## 36. Sale Of Property

**36.1 Assumption Of Obligations.** Upon any sale of the landlord's property, the purchaser should assume all obligations — including all existing undischarged obligations — of the landlord, including the obligation to return the tenant's security deposit; refund any previous rent overcharges; and allow the tenant to conduct any permitted audits. The purchaser should also assume the landlord's insurance requirements and any net worth restrictions. Some landlord's lease forms say that the old landlord is not responsible, but neither is the new one. The tenant theoretically ends up with claims against no one.

**36.2 Transfer Of Security Deposit.** Require the landlord to transfer the security deposit to any purchaser of the property and assure that the purchaser gives the tenant a written confirmation of receipt. Insist that the tenant have the right to offset rent if the landlord does not comply with these requirements.

**36.3 Rental Payments To Purchaser.** The tenant should not be required to pay rent to a purchaser until the tenant has received notice of the sale and purchase and directions on where and how to pay.

**36.4 Only One Landlord.** If the landlord transfers its interest in the building, the tenant should never have two landlords — even if they speak with one voice.

## 37. Security Deposit

- 37.1 Interest.** Require the landlord to hold the security deposit in an interest-bearing account with all interest to be paid to the tenant. Many landlords require an administrative fee, like that contemplated by statute in New York (New York General Obligations Law section 7-103(2)). Although a landlord's form may not quantify such a fee, the tenant should insist on doing so, or eliminate the fee.
- 37.2 Letter Of Credit.** The tenant should be entitled, at any time, to substitute a letter of credit or other alternative form of security. If the tenant thereafter fails to maintain the letter of credit, the landlord should be free to draw upon it, but such failure should not constitute a lease default and the tenant should continue to have the right to deliver a letter of credit. If the tenant delivers a letter of credit backed by a reimbursement agreement signed by a third party (e.g., the tenant's venture capitalist), then the landlord should also agree to give that third party a copy of any notice from the landlord, or at least any notice of default or other notice that could result in a letter of credit draw. If the lease no longer requires a letter of credit at some point, require the landlord to sign whatever cancellation documents the letter of credit issuer requires.
- 37.3 Return.** The landlord should promptly return the security deposit after the lease expires. But what happens if landlord doesn't?
- 37.4 Reduction.** Let the tenant reduce the security deposit over time, at least if the tenant is not in default. If the tenant has any concern about the landlord's creditworthiness, such reductions make particular sense in the last year or two of the lease term.
- 38. Services By Landlord**
- 38.1 Existing Systems.** Let the tenant use existing cabling and other systems. The landlord should agree not to damage or remove such systems. These rights should extend to the tenant's use of wiring pathways located on the underside of the tenant's floors. For the tenant to gain access to those pathways, the landlord may need to exercise access rights under the leases of the "downstairs" tenants. The landlord should agree to do so for this tenant's benefit.
- 38.2 Performance Standards.** Set performance standards or criteria for any landlord services (e.g., comparable to those provided in a "basket" of other buildings). Provide that if the building experiences an unreasonable number of false alarms or life safety system breakdowns or problems, the tenant can perform an audit, perhaps at the landlord's expense, and require changes. The landlord should be responsible for any failure to supply services to the tenant unless (perhaps) that failure is due to causes beyond the landlord's control. The landlord should, though, perhaps have some obligation to control those circumstances, or at least establish measures so that services can continue even if predictable surprises occur, such as power outages.
- 38.3 Service Shutdowns.** Limit the landlord's ability to shut down building services, particularly for essential tenant functions (e.g., HVAC or electricity for data center). Require ample prior notice, and let the tenant reschedule the shutdown.

- 38.4 Engineering Issues.** Counsel should work with the tenant's engineers and other consultants to identify needs, standards, and specifications for all building services, particularly heating, ventilation, and air conditioning, and the landlord's alterations.
- 38.5 Strike.** If a strike occurs, the landlord should agree to establish a separate gate for the striking union in order to minimize any interference with the tenant. If the landlord or any other tenant uses a labor force that causes disharmony with the tenant's labor force, require the landlord to remove the former labor force from the building. Most leases express only the converse proposition. Delegate to the tenant the landlord's legal authority to exercise the landlord's right to remove trespassers, protesters, etc.
- 38.6 Management Company Replacement.** The tenant may want a right to require the landlord to replace the management company or the leasing broker if specified standards are not being met.
- 38.7 Windows.** Allow the tenant to abate rent if windows are bricked up or covered over for any reason. The landlord should install (and repair/replace) sunscreen or other film on windows if needed, or at least give the tenant the right to do so.
- 38.8 Promotional Fund.** Should the landlord agree to operate — or not to operate — any promotional association, fund, or other similar activities? Should the lease require that all other tenants participate?
- 38.9 Nonoccupancy Credits.** If the tenant is not in occupancy, the landlord should give the tenant credit for any variable costs that the landlord avoids, such as cleaning. Such a provision appears in some government leases, but rarely, if ever, in commercial leases.
- 38.10 Receipt Of Deliveries.** Specify the location, arrangements, timing, and fees (none) for the tenant's receipt of deliveries. Try to allow deliveries at any time of day or night. Coordinate with the security program as necessary.
- 38.11 Contact Person.** Require the landlord to designate a single exclusive (or at least "primary" or "back-up") contact person for all questions, problems, and issues about the premises, with a 24-hour emergency telephone number to call if problems arise outside business hours.
- 38.12 Overtime Services.** The cost of any overtime services should be shared with any other tenants using such services at the same time. The tenant should receive a "most favored nation" rate.
- 38.13 Lobby Or Parking Lot Renovations.** If the landlord undertakes lobby or parking lot renovations, the landlord must complete them quickly and give the tenant access to the premises equivalent to that which existed before work began. The landlord should shield from view any unsightly construction areas. Prohibit any (nonemergency?) construction work during the tenant's peak months of business. The tenant may want to have the right to give the landlord reasonable instructions regarding how the landlord performs any work that affects the premises or its access or visibility.
- 38.14 Work Outside Premises.** What construction projects or alterations might the landlord undertake outside the leased premises that might cause the tenant concern or hurt the tenant's business? Try to identify them and negotiate appropriate restrictions or rent credits.

**38.15 Continuation Of Services.** The landlord should continue to provide services to tenant even if the tenant is in default. The tenant should lose services only if the landlord has validly terminated the tenant's lease.

**38.16 Other Tenancies.** If a tenant cares about the existence and continuation of other nearby tenancies (e.g., a high-end retail store that wants to be part of a high-end retail environment), the lease will often impose co-tenancy requirements. The tenant may have the right to terminate if the landlord doesn't line up or retain a certain level of neighboring leases. The tenant need not open unless a certain number of nearby high-end retail leases have opened or open simultaneously. And if major nearby spaces "go dark," the tenant may also have the right to terminate. As an alternative to terminating, the tenant may also have the right to switch to percentage rent without a floor, typically only for a certain period.

**38.17 Confidentiality.** If the lease requires the tenant to give the landlord any financial, sales-related, or other sensitive information about the tenant, the landlord should agree to keep it confidential. Generally, the tenant should insist that the landlord keep the lease, and all its terms, confidential. That would include, for example, a promise that neither the landlord nor the landlord's counsel will disclose (or use against the tenant in other negotiations) any concessions that the tenant made in negotiating this particular lease. If the tenant provided the lease form, then the tenant should insist that the landlord and its counsel will preserve the confidentiality of the lease form, and not re-use it for other transactions, whether with this tenant or anyone else.

## **39. Signage And Identification**

**39.1 Signage Requirements.** The lease should describe the signage requirements (for lobby, floor lobbies, elevators, exterior entry areas, driveways, roadway pylons, rooftop, common areas, and other exterior locations) for the tenant and any subtenant(s). Allow the tenant to install temporary signage during construction and change its signage over time. If signage space is limited, the tenant should be given the right to use the next available signage space. Make the tenant's signage rights as transferable as any other rights under the lease. Also allow the tenant to use its logo or distinctive typeface or other graphic elements. If the tenant intends to illuminate its signage, the lease should allow that.

**39.2 Other Parties' Signage.** Establish requirements for, and otherwise set controls for, other tenants' signage and the landlord's overall signage program, including future changes. The tenant may want to limit identifying signage for other tenants, particularly those competitive with the tenant.

**39.3 Signage Position.** Does the tenant want the top position on any pylon sign? Second from top? Largest position on any other sign(s)?

**39.4 Name Of Building.** Prohibit the landlord from naming the building after the tenant, any other tenant, or any competitor of the tenant. Make it clear that the landlord has no right to use the tenant's name for anything. Does the tenant want affirmative naming rights? Prohibit the landlord from using the tenant's name in any landlord advertising.



- 39.5 Directory Entries.** Require the landlord to provide building directory entries for the tenant and any subtenant or assignee. If the landlord tries to limit those entries, do those limitations make sense? Does the tenant contemplate needing directory entries for parties other than the tenant and its subtenants or assignees, such as joint ventures or other new entities? Prohibit any other tenant from being more visible or using its logo in the building directory unless this tenant has the same right. Don't limit the number of the tenant's directory listings at all if the landlord uses a computerized directory.
- 39.6 Flagpoles.** The tenant may want the exclusive right to use any flagpoles at the property. As an alternative, the tenant may want to limit the flags that the landlord or any other tenant may fly on those flagpoles.
- 39.7 Billboards.** Prohibit the landlord from installing billboards or other signs anywhere on the building or outside the windows of the building, even if such billboards or other signs are allegedly transparent from the interior of the building. Prohibit the landlord from blocking the tenant's signage.
- 40. Subordination And Landlord's Estate**
- 40.1 Proof Of Fee Estate.** The landlord should represent that it owns the fee estate. Perhaps attach a copy of the landlord's deed or title policy as an exhibit.
- 40.2 Nondisturbance Agreement From Mortgagees And Ground Lessors.** At the time of lease signing, the landlord should deliver a nondisturbance agreement from every mortgagee or ground lessor. Attach the form of nondisturbance agreement to the lease and require future mortgagees to sign it when they close their loans, and future ground lessees to sign it when they come into the picture. Beware of allowing the landlord to deliver such an agreement after the lease has been signed, with a right for the tenant to terminate if it is not timely delivered. In practice, such a right will rarely be exercised. That may, of course, say something about the practical importance of these agreements.
- 40.3 Conditions For Subordination.** If the lease is "subordinate," condition that subordination on the landlord's having delivered specified nondisturbance protections from holders of senior estates, ideally in the form attached to the lease. Don't settle for "best efforts." The lease should not require the tenant to "subordinate" to any mortgage if that mortgage is subordinate to any mortgage or any other lien that has not given the tenant nondisturbance protections. Foreclosure on that other, more senior, mortgage could wipe out both the more junior mortgage and the tenant's leasehold estate.
- 40.4 Debt Service Should Not Exceed Rent.** When the tenant leases all or most of the space or an entire building, the tenant may want the landlord to agree that the debt service payable under any fee mortgage will not exceed the rent under the lease.
- 40.5 Negotiations Of Nondisturbance Agreements.** Require the landlord to reimburse the tenant for legal fees for any nondisturbance agreement negotiations.
- 40.6 Compliance With Mortgages.** Avoid any covenant by the tenant to be bound by, and do nothing to violate, any present or future mortgages. Such a provision may amount in part to an "end run" around

negotiated nondisturbance rights and priorities as well as other lease provisions, starting with casualty, condemnation, restoration, and use restrictions.

- 40.7 Rent Redirection Notice.** If the landlord's lender delivers a rent redirection notice to the tenant, state that the tenant may comply without liability even if the landlord disputes its lender's right to deliver the notice. The landlord should agree to reimburse the tenant's legal fees in reviewing, analyzing, and figuring out how to respond to any such notice from a lender.
- 40.8 Landlord's Lender's Approval Rights.** Understand the approval rights of the landlord's lender under its loan documents (e.g., assignment, subletting, alterations, lease amendments, etc.) and try to trim back if excessive. Ask the lender to pre-approve as much as possible. Going forward, try to eliminate lender approval requirements. Ask the landlord to agree never to enter into any loan arrangements (or amendments to existing loan documents) that would prevent the landlord from agreeing to subsequent minor or ministerial amendments of this lease, excluding any that could materially adversely affect the lender.
- 40.9 Definition Of Landlord.** Include successors and assigns in the definition of "Landlord."
- 40.10 "Replacement" Mortgages.** If the tenant agrees to be "subordinate" to mortgages — without non-disturbance protection — in any way that might come back to haunt the tenant (for example, casualty and condemnation issues), limit the "subordination" to refer only to any mortgages that are currently in place, and not to any replacement or future mortgages.
- 41. Tenant's Remedies Against Landlord**
- 41.1 Set-Off And Termination.** The tenant may cure the landlord's defaults (after notice), set off the cost of cure (with interest at a high rate) against rent, and terminate the lease. The tenant can set off against rent for claims against the landlord or any judgment against the landlord that is returned unsatisfied (or, if the landlord is in bankruptcy, then based upon the mere filing of a claim in the bankruptcy). The tenant may want similar remedies if any representation or warranty by the landlord is inaccurate. Review the assumptions that support the tenant's decision to enter into the lease. For example, let the tenant terminate if the nearby courthouse, train station, army base, university, or other business-driving installation moves or closes. Let the tenant terminate if the municipality enacts a minimum wage law and it affects a substantial portion of the tenant's employees.
- 41.2 Abatement.** The tenant may want the right to abate rent if essential building services (access, electricity, other utilities, elevators, air-conditioning, etc.) are disrupted, or if the landlord is in default for longer than a specified period (after notice?). Trigger rent abatement rights based upon \_\_\_\_ or more days of problems during any \_\_\_\_ day period, rather than requiring that any single problem must continue for \_\_\_\_ days before the tenant may abate. If any such rent abatement continues for more than a certain period, then let the tenant terminate.
- 41.3 Self-Help.** The tenant may want emergency self-help rights (including the right to install temporary equipment or service arrangements) if a water leak, power failure, or communications failure imperils

the tenant's computer systems, communications systems, or other mission-critical equipment or operations. Allow only a very short period before this self-help right accrues for any fundamentally important function of the tenant, such as the tenant's network control center or computer system. The landlord should reimburse the tenant's reasonable self-help expenses.

**41.4 Payment Not A Waiver.** The tenant's payment of rent with knowledge of a landlord default should not waive the default.

**41.5 "Exculpation" Clause.** When an "exculpation" clause limits the landlord's liability to the landlord's interest in the property, try to include the following within the definition of the landlord's interest in the property: rental income, insurance proceeds, escrow funds, condemnation awards, the landlord's interest in security deposits, and sales and refinancing proceeds. For certain major landlord obligations — e.g., completion of build-out or return of a security deposit — consider whether "exculpation" makes sense or whether, to the contrary, the tenant should insist on some level of creditworthy assurances from someone beyond a single-asset landlord, or perhaps a letter of credit.

**41.6 Other Tenants' Closure.** The tenant may want the right to terminate the lease (or pay only percentage rent) if specified other retail tenants shut down. This could even apply to an office building if occupancy drops to a level where the tenant's staff feels uncomfortable working in the building even if the landlord continues to provide services.

**41.7 Other Business Relationships.** Do the landlord and the tenant have any other relationship (e.g., purchase and sale of a business) that might give rise to tenant claims against the landlord for which the tenant should be entitled to offset against rent if the landlord does not pay after some extended notice and warning period?

## **42. Use**

**42.1 Any Lawful Use.** Try to allow "any lawful use" or at least "any lawful retail/office use" of the premises.

**42.2 Permitted Uses.** Describe permitted uses generically to avoid restricting future use by a subtenant or assignee (e.g., "medical or other health practitioner's offices" or "executive offices" rather than "podiatrist's offices" or "main headquarters of XYZ Corp."). If the tenant anticipates making unusual uses of the space (e.g., for basketball courts, pets, bicycles hanging from the ceiling, sleeping facilities, etc.), confirm that the lease and applicable law will not prohibit these uses.

**42.3 Future Change Of Use.** Build in flexibility for future change of use if any possibility exists of a change in circumstances (e.g., likely technological obsolescence of the tenant's business).

**42.4 Incidental Uses.** Obtain pre-approval for incidental uses, such as automated teller machines ("ATM"), food, training, duplicating, ancillary retail, gym, day care, other amenities, network control center, etc. If necessary, the tenant can usually agree that these facilities will be open only to the tenant's employees and invitees who are already on the premises to do business with tenant.

- 42.5 Duty To Operate; Recapture.** A tenant will prefer to have no duty to open or operate, implied or otherwise. If the landlord counters with a request for a recapture right if the tenant goes dark for a specified period, carve out permitted closures (e.g., for “force majeure event,” alterations, inventory taking, other brief closings). Limit the time within which the landlord may decide to recapture. Require the landlord to reimburse the tenant’s leasing and improvement costs if the landlord recaptures in these cases.
- 42.6 Satellite Dishes And Antennas.** The landlord should allow the tenant to install satellite dishes and antennas on the roof, either at no charge or for a defined or ascertainable charge. Allow the tenant to relocate this equipment if necessary to improve performance. The landlord should agree to prohibit future rooftop users from interfering with the tenant’s use.
- 42.7 Rooftop, Generally.** The tenant may also want the right to install its own backup generators, supplemental air-conditioning, and other equipment on the roof or elsewhere. If this will require structural reinforcement, the landlord should consent to it, and ideally pay for it. For any rooftop or other off-premises equipment, the tenant will also want the landlord’s consent, without charge, to the running of any wires, cables, connections, and lines between the premises and the tenant’s rooftop equipment. A tenant will prefer not to be obligated to remove any equipment or connecting lines at the end of the lease term.
- 42.8 Use Of Sidewalk.** A ground floor tenant may want the right to install awnings, canopies, and crowd control barriers on the sidewalk. Will the tenant otherwise need to use the sidewalk or the exterior of the building for special events, temporary installations, or other purposes? Exterior loudspeakers? Exterior laser or light displays?
- 42.9 Conflict With Other Leases.** The lease should not say that the tenant’s use may not conflict with other leases or mortgages — unless this lease defines exactly what those other leases or mortgages prohibit.
- 42.10 Common Facilities.** Allow the tenant to use building common facilities, such as cafeteria or health clubs, auditoriums, conference facilities, and common lavatories if the leased premises do not include lavatories. The lease should state the minimum operating hours (24 hours in many cases) and maintenance and cleanliness standards for common facilities and any cost for such uses.
- 42.11 Exclusive Use.** The lease should give the tenant the exclusive use of terraces or other identified outdoor space or facilities adjacent to the tenant’s premises. The landlord should maintain and clean these areas according to specified standards.
- 42.12 24 Hour/365 Day Access.** The tenant should obtain 24-hour access, 365 days a year, via elevator or (if the elevator is broken) stairway. Unless the leased premises are on a very low floor, think about establishing consequences (monetary payments) if the elevators break down to the point where the tenant can’t obtain access to the floor, though this level of breakdown rarely actually happens.
- 42.13 Reception, Security, Other Facilities.** Will the tenant want to install any reception, security, package handling, messenger, or other facilities in the lobby, basement, ground floor, or other common area

of the building? If so, the lease should allow them and negate any obligation to pay rent for the affected space.

**42.14 Storage Areas.** In addition to the premises, the tenant may want to lease storage space available in the building. Any such arrangements should be coterminous with the lease and not, for example, a revocable license.

**42.15 Competitors.** Even for nonretail space, try to prohibit the landlord from leasing space in the building to the tenant's competitors (creating a risk of a competitor's taking the tenant's staff, customers or clients). Specify other prohibited uses.

### **43. Utilities, Generally (Except Electricity)**

**43.1 Entry Point.** The landlord should bring all utilities to a defined entry point on the perimeter of the premises, not just wherever the landlord decides to bring them. Decide what entry point works best for the tenant, for each utility service.

**43.2 Special Requirements.** Require the landlord to allow the tenant or its service providers to install T-1 and fiber optic lines, multiple points of entry, and other telecommunications facilities, including cabling and connections from service providers to the premises. Recognize that these technologies and related tenant requirements will change over time.

**43.3 Free Choice Of Carrier.** Allow the tenant to use any carriers or utilities it wishes for telecommunications and other services. The landlord must, without charge, cooperate as needed, such as by signing papers, providing closet space in the basement, and providing information. Requirements of federal law may actually mandate some of the foregoing. The tenant's counsel should check just what law requires and what must be negotiated. Of course, law could change.

**43.4 Excess Capacity.** If generators or fuel systems in the building have excess capacity, require the landlord to preserve that excess capacity (without allocating it to other tenants) to maximize the backup value of those systems to this tenant.

**43.5 Alternative Providers.** Limit the landlord's right to change power or telecom providers.

### **44. Preliminary Arrangements And Considerations**

**44.1 Brokerage.** Is a brokerage agreement in place. Are the commission negotiations completed?

**44.2 Term Sheets And Letters Of Intent.** Attorneys should deal with term sheets and letters of intent early in the lease negotiation process to raise and resolve major issues while it is relatively easy (and inexpensive) to do so. These preliminary documents should state they do not bind anyone, except relating to such matters as confidentiality.

- 44.3 Board Approval.** If the tenant will require its own internal board or other approval to ratify a contemplated transaction, provide for that condition in all letters of intent, term sheets, lease drafts and other preliminary documents.
- 44.4 Tax Incentives.** Can the tenant qualify for any tax incentives, abatements, deferrals, rebates, subsidies, or other governmental benefits? Check the timing requirements and pitfalls for any application. Often, a tenant must apply before “committing” to a new location.
- 44.5 Warranties.** If the landlord has the benefit of any warranties for the building, the tenant may want to be a beneficiary of those warranties and have the right to enforce them directly against the warrantor.
- 44.6 Premises Off Market.** During the lease negotiations, ask the landlord to agree to remove the space from the market and not to negotiate with other parties for a specified period. In particular, ask the landlord to remove any “for lease” signs at the premises, while the parties negotiate. Should the parties agree to a break-up fee? A reimbursement of expenses and attorneys’ fees if the deal dies?
- 44.7 Tenant’s Professionals.** Select, coordinate and negotiate the contracts of the tenant’s other professionals: architect, broker, engineer, facilities consultant, signage designer, space planner, and so forth. Try to get architects started early. Architects usually cost less than either lawyers or rent. The tenant’s architect should review the lease while it is being negotiated.
- 44.8 Tenant’s Procedures.** Understand the tenant’s (and the landlord’s) internal approval procedures, including any documentation requirements and likelihood for delay.
- 44.9 Backup Lease Negotiations.** Consider negotiating multiple leases at the same time, though perhaps at various stages of negotiations, to be able to recover quickly if the lease negotiations for a particular premises break down or the landlord decides to lease to some other tenant.

## **45. Due Diligence**

As noted above, no one should regard this checklist as exhaustive or complete. This is particularly true as it applies to the following list of “due diligence” investigation that the tenant’s counsel may wish to perform, or make sure other tenant advisers perform:

- 45.1 Existing Condition Of Premises.** Is the existing condition of the premises satisfactory? What personal property is included? Should the landlord be required to remove — or be required to leave in place — any existing improvements or personal property? Is there anything about the space, or the building as a whole, that the tenant would not want the landlord to change? If so, the lease should prohibit the landlord from making such changes, or else the tenant won’t be able to stop them.
- 45.2 Title Search.** Perform a title search and review, or an online search to confirm, ownership of the fee (easily available in many areas). Check any prior recorded documents that might affect this tenant. Review the landlord’s certificate of occupancy. Perform other municipal searches.

- 45.3 Square Footage.** Calculate the actual square footage and scope of the premises. Do all of the landlord's exclusions and inclusions of space make sense? For example, should the elevator lobby be part of the premises? Does the landlord propose that the premises include any mechanical space or equipment that the tenant won't really use? And compare the landlord's "rentable" square footage (sometimes rather creatively calculated) against the actual "usable" or "carpetable" square footage (as measured) of the premises. What space in the building does the landlord treat as "building common areas," thus increasing the rentable square footage of this tenant's premises? Do any of those "building common areas" really benefit only particular tenants rather than all tenants in the building? After adjusting for the "loss factor" (the percentage reduction from "rentable" to "usable" space), do the economics still make sense? Might the tenant be paying for any unusual spaces or installations that really should be entirely irrelevant to the leased premises?
- 45.4 Special Permits.** Do any unusual uses require special permits or that special measures be taken to obtain necessary permits (e.g., liquor licenses, sidewalk cafes)? How long will that process take, and what will it require? What other permits might the tenant need, such as public assembly? If the tenant anticipates delay or possible failure in obtaining one of these permits, the tenant should, at a certain point, have the right to terminate the lease.
- 45.5 Ventilation.** Does the space provide adequate ventilation, or adequate pathways for the tenant to install new ventilation?
- 45.6 Escalations.** The tenant, and particularly its accounting and leasing personnel, may want to consider at least these due diligence issues on escalations:
- (A) *Capital Projects.* What capital projects are underway or contemplated today? Does the tenant agree with how the landlord plans to treat them?
  - (B) *Historical Operating Expenses.* What are the historical amounts for operating expenses and taxes? Review the underlying financial information, presentation, characterization and documents, including sample escalation statements.
  - (C) *Pre-Programmed Increases in Tax Assessment.* Investigate any built-in future increases in the tax assessment (e.g., termination of interim assessment, upcoming loss or phase-out of existing abatement or exemption). Is the building fully assessed? Does anything about the tax assessment for the building suggest future increases are unusually likely? For any major lease, issues like these may justify retaining special counsel just to advise on real estate taxes.
- 45.7 Telecommunications Capacity.** Investigate available capacity and pathways for telecommunications and other utilities.
- 45.8 Technological Requirements.** Check the tenant's network and other technological requirements.

- 45.9 Rooftop.** Check lines of sight for a rooftop satellite dish or antenna. Can the roof support any heavy equipment the tenant will install? Will the tenant be able to get the equipment up to the roof?
- 45.10 Present Occupancy.** What is the present occupancy of the premises to be leased? What is the practical likelihood of delays in possession?
- 45.11 Tenant's Existing Lease.** Review the existing tenant's lease for expiration date, holdover penalties, etc. If the tenant will need a short extension, ask for it early in the process, as the tenant's existing landlord may become less accommodating over time.
- 45.12 Disposition Of Present Premises.** If the tenant has "too much" time remaining on the tenant's existing lease, how does the tenant plan to dispose of the premises it now occupies? Does the tenant understand any uncertainties and risks in that process?
- 45.13 Engineering.** The tenant's engineers should consider a range of issues, including the adequacy, directness, and feasibility of pathways for utilities and services for the premises, and more mundane issues such as floor load capacities.
- 45.14 Security.** Does the landlord's security program meet the tenant's expectations?
- 45.15 Submeter.** If the premises are submetered, does any submeter serve space outside the premises?
- 45.16 Operating Requirements.** Does the tenant have any unusual operating requirements, procedures or expectations? Specific expectations on usage of loading docks, freight elevators, security guards, or lobby operations? Anything outside the premises? Identify these and state them in the lease.
- 45.17 Environmental Concerns.** Consider whether an environmental review is necessary.
- 45.18 Violations.** Check for any notices of violation filed against the property that could impair the tenant's ability to obtain necessary permits. Also, check for any litigation against the landlord.
- 46. Lease-Related Closing Documents**

At closing, any significant lease transaction may require a number of documents other than the lease itself. Counsel should resolve these documents as part of the process of negotiating the lease. They might include any of the following:

- 46.1 Memorandum Of Lease.** Mention any "exclusive use" rights and other lease provisions that restrict the landlord's activities on other premises. Record the memorandum against all affected real property (e.g., "outparcels").



- 46.2 Nondisturbance Agreement.** See the “lender’s form” nondisturbance agreement as soon as possible, so it can be negotiated and signed along with the lease. Attach it as an exhibit as the standard for future nondisturbance agreements.
- 46.3 Reciprocal Easement Agreement.** For a new retail mall or mixed-use project, the tenant may want to have a role in establishing and approving any reciprocal easement agreement that the landlord intends to record against the project.
- 46.4 Recognition Agreement And Estoppel from Ground Lessor.** If the landlord actually leases the building from a third party (a “ground lease”), any space tenant may want appropriate protections and assurances from the underlying fee owner. The tenant should generally insist on having that agreement in place at the same time the tenant signs its lease.
- 46.5 Written Authority For Agent.** If the landlord’s agent signs the lease (or any future amendment or estoppel certificate), the landlord should deliver a copy of a written authorization to sign.
- 46.6 Additional Consents.** Does the landlord need any consents or approvals? This is especially important if the landlord is a governmental entity or charity. Approvals could be internal or require cooperation from lenders, ground lessors or other third parties. The landlord should represent and warrant that it needs no further consents or approvals, and deliver copies of any necessary consents or approvals at closing.
- 46.7 Opinion Of Landlord’s Counsel.** One could limit such an opinion to authorization and execution and related issues, without entering the morass of issues — angels dancing on a pin — raised by “enforceability.”
- 46.8 Transfer Taxes.** Beware of transfer taxes generally. The calculation and allocation of any transfer taxes on the creation of the lease, including the treatment of any transfer of personal property, should be embodied in a closing document. In New York, some leases attract transfer tax, whether or not the parties record a memorandum of lease. Transfers of personalty may attract a sales tax. Prepare all necessary transfer tax returns, including required calculations and exhibits (e.g., copy of the entire lease, if required). Get them signed and filed.
- 46.9 Title Insurance.** Consider obtaining a policy of leasehold title insurance, or at a minimum an updated title search.
- 46.10 Unusual Security Arrangements.** Unusual security arrangements — letters of credit, delivery of marketable securities, and the like — should be structured and documented. The landlord’s lender and conceivably other third parties may also need to get involved in these discussions. Those third parties may ultimately become the “critical path” to signing the lease. They often have rigid documentation requirements applied by rigid people.

- 46.11 Leasehold Insurance.** Consider separate casualty insurance coverage for a valuable leasehold. If the lease requires insurance, comply with those requirements (e.g., insurer's ratings, additional insureds, evidence of insurance).
- 46.12 Insurance Advice.** Send the insurance and casualty provisions of the lease to the tenant's insurance advisor for review and comment. Confirm the tenant's broker can actually issue the contemplated insurance coverages, and in a timely manner.
- 46.13 Landlord's Approvals.** Obtain and confirm the landlord's approval of plans and specifications for initial work. Attach the plans and specifications as a schedule to the lease. If the tenant enters into any immediate subleases, have the landlord approve those at the time of lease signing.
- 46.14 Diagram Of Premises.** Include an exhibit consisting of a precise diagram of the premises. Confirm that the tenant, the broker, and other advisors reviewed and approved the diagram. Try to make this happen early in the process. The landlord may think it is "obvious" that certain spaces should be excluded or included, but the landlord may be wrong.
- 46.15 Guaranty.** Any guaranty of a lease will raise its own issues. A discussion of these issues lies beyond this checklist.
- 46.16 Internal Approvals.** Any documents necessary to evidence the tenant's internal approval of the contemplated lease (resolutions, consents, or the like).
- 46.17 Rent Bill.** Instructions for how to pay rent under the lease, if not incorporated into the lease, and calculation of the first rent bill.
- 46.18 Brokerage Commission.** Evidence of payment of any brokerage commission.
- 46.19 Client Instructions.** If the client instructed counsel to do anything less than a full lease review and negotiation, counsel should maintain some written record of those instructions and a record that counsel warned the client about the risks of "minimalism" in lease negotiations. Memories are short.

#### **47. Post-Closing Items**

Like any other real estate transaction, a tenancy under a lease may require post-closing legal attention in order for the tenant to preserve its rights. The following are a few items that the tenant's counsel may want to handle or at least mention to the tenant:

- 47.1 Advice And Administration Memo.** The tenant may desire its counsel to prepare a memorandum to summarize any proactive and nonobvious actions that the tenant should take to protect its position under the lease. Such a memo might, for example, describe the deadlines and process for objecting to the landlord's delivery of the space; escalation statements; or provision of building services.

- 47.2 Ticklers For Deadlines.** The tenant may want to make tickler file entries for tax protest deadlines, option and/or renewal exercise dates, letter of credit renewal dates, and any other deadlines.
- 47.3 Future Filings.** If the lease contemplates that the tenant will make any nonintuitive filings, or take any other nonstandard actions, the tenant's counsel may wish to bring those matters formally to the tenant's attention. This list might also include any necessary filings for available governmental incentives.
- 47.4 Escalation Audits.** Note the deadlines to initiate any audit of the landlord's operating expenses or other escalations. For the first year of operating expenses, audit the operating expenses not only for that year but also for the base year.
- 47.5 Tax Protests.** The tenant should understand the deadlines for tax protests and any actions the tenant should take to preserve and exercise any rights to require the landlord to protest taxes.
- 47.6 Commencement Date Letter.** When the commencement date has actually occurred, confirm it in writing, and reconfirm the expiration date and any other dates keyed off the commencement date.
- 47.7 Options; Rent Adjustments.** The parties should memorialize all option terms and rent adjustments in writing.
- 47.8 Estoppel Certificates.** If the landlord asks the tenant to sign an estoppel certificate, the tenant should take it seriously, start researching the facts immediately, and take advantage of the opportunity to put pressure on the landlord to solve any problems that the tenant identifies. Courts do take estoppel certificates seriously. The tenant should not simply "sign and return." If the lease allows the tenant to require estoppel certificates of the landlord, the tenant may occasionally wish to do so, just to avoid future issues or surprises.
- 47.9 Future Lease Transactions.** Any future lease amendments (or negotiated termination of the lease) may require consent from the landlord's mortgagee. Raise that issue early in the discussion. The landlord may otherwise think the tenant won't really insist.
- 47.10 Recordation.** If the parties signed a memorandum of lease, then the tenant should make sure it actually gets recorded, and recorded correctly.
- 47.11 Effect Of Memorandum Of Lease.** If the tenant recorded a memorandum of the original lease, then New York law in effect requires an amendment to the memorandum to be recorded (and accompanying transfer tax returns to be filed) whenever the parties amend the lease. Even if the amendment changes nothing that the recorded memorandum of lease disclosed, New York law requires the additional recording to give notice of the mere fact that the lease was amended. The tenant should insist on such an additional recording. For simplicity, both the landlord and the tenant may prefer to embody any future amendment in a single recorded document, assuming nothing in it must stay confidential.

- 47.12 Notices.** If the tenant has relocated its main office or legal department, then the tenant may need to notify all its contractual counterparties of the new address. This may require the tenant to do some digging in its contract files. If the tenant has filed any notice of address for service of process with any Secretary of State's office (e.g., the tenant's state of formation and any state where the tenant has qualified to do business) or corporate service company, the tenant should update those filings as well. Who else needs to know about the tenant's change of address, and what level of formality will that change of address require? Don't assume an ordinary emailed or bulk-mailed announcement will do the job. Similarly, going forward, the tenant should watch for change of address notices from the landlord or a mortgagee (for example, every time the building is sold or refinanced). The tenant should update its records accordingly.
- 47.13 Nondisturbance Agreements.** If a future mortgage lender requires the tenant to sign a nondisturbance agreement for a closing, insist that the agreement not become effective unless the lender signs and returns it to the tenant at closing or within a short time thereafter.

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