

## CHAPTER THREE

# TENANT'S CHECKLIST OF SILENT LEASE ISSUES

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The Silent Lease Issues Subcommittee is co-chaired by S.H. Spencer Compton and Joshua Stein, who were also the primary authors of both the first and second editions of the "Tenant's Checklist of Silent Lease Issues." Members of the Tenant's Silent Lease Issues Subcommittee included David Badain, Joel Binstok, Harvey Boneparth, Mordecai Braunstein, Robert Bring, Philip Brody, Steven Cohen, Nancy Connery, Kathleen Cook, Samuel Gilbert, Holly Gladstone, Barry Goldberg, Gary Goodman, James Grossman, Andrew L. Herz, Jonathan Hoffman, Gary Kahn, Andrew Lance, Bruce Leuzzi, Benjamin Mahler, Melvyn Mitzner, John Oler, Huck Qavanaugh, Robert Reichman, Rhonda Schwartz, Karen Sherman, Barry Shimkin, David Tell, Michael Utevsky, Dana Wallach, Benjamin Weinstock and Allen Wieder.

The Tenant's Checklist of Silent Lease Issues was published in the New York State Bar Association Real Property Law Section's *New York Real Property Law Journal* (Fall 1999), and was modified and republished in *The Practical Real Estate Lawyer* (May 2000).

The Silent Lease Issues Subcommittee has also developed a separate "Landlord's Checklist of Silent Lease Issues." See Chapter 4 *infra*. That checklist seeks to identify landlords' concerns that standard lease forms cover inadequately, as well as concerns for landlords that have arisen based on trends in law and practice since about 1980. The landlord's checklist, in the opinion of the authors, is of a scope and value similar to the tenant's checklist, even though the landlord's checklist is more amorphous.

*Silence is golden—but not necessarily in a lease.*

## I. INTRODUCTION

When a prospective tenant asks you to review and negotiate a lease, you will need to think about at least two very different types of issues.

First, you will deal with issues that the express terms of the lease suggest. For example, you may ask for longer notice periods, the 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 regarding all monetary and other significant obligations, deletion of inappropriate or excessive obligations and restrictions, and correction of errors and internal inconsistencies. Finally, you will respond to any other issues that jump out based on your review of the language of the lease. To identify issues like these, you will need to read the proposed lease and propose revisions 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.

Second, you will probably want to identify and deal with issues that a landlord’s typical standard lease does not mention at all, but that may nonetheless be important to your client. These are the “silent issues” in any lease. Unlike the first category of issues, the silent issues are not necessarily easy to identify, because nothing in the landlord’s standard lease form would alert you to them.

### A. Genesis of the Checklist<sup>1</sup>

In 1999 and 2000, a subcommittee of the Commercial Leasing Committee of the New York State Bar Association’s Real Property 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 and drew many comments and responses from readers. Based on those comments, further thought, subsequent experience, and further review by members of the subcommittee, the subcommittee has updated the Tenant’s Checklist of Silent Lease Issues and is now pleased to offer a second edition of the checklist, which follows. Like the first edition, this second edi-

<sup>1</sup> **Please comment.** Changes, additions, and other improvements to this checklist are welcome. They will be taken into account as appropriate when this checklist is updated and republished. If you have suggestions for this checklist, please send an e-mail to [joshua.stein@lw.com](mailto:joshua.stein@lw.com) or [shcompton@FirstAm.com](mailto:shcompton@FirstAm.com).

tion is intended 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 to include other issues (not just silent issues) that the tenant's counsel may wish to raise in lease negotiations. Reminders were also added for some, but not all, "due diligence" a tenant might want to undertake before signing a lease. This second edition of the checklist continues that approach.

This checklist of "silent lease issues" mentions each 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. This checklist covers most issues alphabetically, which makes no logical sense at all, but reemphasizes the importance of considering the checklist as an integrated whole. Any user of this checklist should read it from beginning to end.

## **B. What the Checklist Is and Does**

This checklist discusses a tremendous range of issues, representing or at least touching 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, though, except by persuading the other party to agree to a change. A lease needs to be right the first time. Before embarking upon the relationship that this 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 use that opportunity.

### **1. Which Issues to Raise**

Depending on the market, the parties, the transaction, 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.) 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.

Conversely, if the tenant's business strategy is to prolong lease negotiations as much as possible—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. 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.

In deciding which issues to raise, a tenant may also want to think ahead and assess how those issues are likely to turn out once the tenant raises them. In a landlord-oriented market, the tenant may prefer vagueness and uncertainty (and the likelihood of a tenant-oriented judge) over the adverse certainty that might result if the tenant raised an issue and tried to clarify vague language, and the landlord clarified it in a manner that benefited the landlord. This dynamic arises whenever a lease is “vague” on any issue.

## **2. What Types of Leases?**

This checklist applies mainly 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, and realistic under the circumstances, taking into account the size and nature of the transaction, market conditions, the tenant's business and anticipated use of the premises, the needs and negotiating positions of the parties, the tenant's expectations regarding lease negotiations, the timing, and all other circumstances.”

Some items on the list are appropriate only for very large tenants who 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.

Certain issues in this checklist will apply only to certain types of leases. The checklist makes no effort at all to explain which issues apply to which leases. The checklist also makes no consistent effort to suggest how a landlord might respond to any lease provisions suggested here. Because of these limitations, this checklist is suited more to an experienced lease negotiator than to a novice. Even a novice, however, will find this checklist useful. All users should use this checklist prudently and with good judgment

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.

The checklist does not represent a position statement or recommendation by the publisher or by the New York State Bar Association or its Real Property Section, Commercial Leasing Committee, or any of their subcommittees, or any organization with which any subcommittee member is affiliated. The checklist does not define a “minimum standard of practice.” It is not exhaustive or complete. It is just a resource for leasing practitioners—no one’s smoking gun in any future dispute. 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.

When first published in the New York State Bar Association’s *New York Real Property Law Journal* in 1999, this checklist consisted of a list of topics for the lease negotiator to consider, with no statements or recommendations.

In the editing process for an earlier republication of the first edition of the checklist, it was decided to express the “silent lease issues” as affirmative, absolute recommendations, in the interests of a more direct and lively presentation. This second edition continues that approach. Thus, the discussion now 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 authors do not purport to establish or define “standard” requirements for what any lease “should” or “should not” say. Every lease is 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—i.e., it would be a tenant’s fantasy—in the world of commercial real estate leasing. Nevertheless, it simplifies and streamlines the presentation.

## II. TENANT’S CHECKLIST OF SILENT LEASE ISSUES

### 1. Alterations (Generally)

- 1.1 **Acceptable Contractors.** Attach as an appendix a list of pre-approved contractors, architects, etc. If the landlord has approval rights, have the landlord pre-approve as many names as possible.
- 1.2 **Consent Requirements.** The landlord should 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 any changes necessary because the tenant’s plans do not comply with law.

- 1.3 When Consent Not Required.** Try to persuade the landlord to agree to limit any requirement for the landlord's consent to alterations. For example, the landlord's consent might not be required 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. 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. (The preceding suggestion reflects concerns that were for the most part confined to "dotcom" tenants. The demise of so many "dotcom" tenants may minimize the likelihood that this issue will actually arise in future lease negotiations, but it may remain an important issue for some tenants.)
- 1.4 Flexibility.** The tenant will want to maintain some flexibility in choosing its architects, engineers, other consultants, and contractors. It will not want to be limited to the landlord's approved list.
- 1.5 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. When the landlord permits an inter-floor cut-through for a 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.
- 1.6 Risers, Etc.** 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. 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.)

- 1.7 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?
- 1.8 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.
- 1.9 Use of Sidewalk.** A ground floor tenant may want the right to install awnings, canopies, and crowd-control barriers on the sidewalk.
- 1.10 Americans with Disabilities Act of 1990 (ADA).** 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.
- 1.11 Permits.** The landlord should agree to cooperate with the tenant in the process of applying for building permits and other governmental approvals for the tenant's work.
- 1.12 Right to Finance Alterations.** The tenant may want the right to finance alterations, perhaps even on a secured or quasi-secured basis. What cooperation will the tenant need from the landlord? What documents will the tenant's lender probably request? Require the landlord to assist as needed. 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 Landlord's Space Preparation.** The lease should define how the landlord will prepare the space for the tenant, including landlord's responsibilities for asbestos abatement or removal, demolition, re-fireproofing, leveling of floors if raw space, 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? If the landlord's work is late or defective, treat this as a failure to deliver possession.

- 2.2 Consent to Tenant's Initial Work and Anticipated Work.** The landlord should consent in advance to the tenant's initial alterations and any anticipated future alterations.
- 2.3 Existing Violations.** The landlord should agree to cure any violations existing against the building that may prevent or interfere with the tenant's intended alterations.
- 2.4 Credit Issues.** Is the landlord creditworthy? If the landlord fails to build-out or contribute to the tenant's work, what are the tenant's remedies? 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 an interest factor—for any landlord contribution not paid or work not performed. If the landlord has a construction loan in place for the very purpose (in part) of paying for the tenant's improvements, the tenant might be able to obtain a direct right to receive those advances as part of negotiating the non-disturbance agreement with the lender.
- 2.5 Building Systems.** Are the existing building systems adequate? Should the landlord agree to complete any upgrades? When? Should the landlord construct any new installations outside the tenant's premises? What about HVAC, fire safety, or other system connections? Signage? Does the tenant have any special electrical requirements? Does the tenant require any space outside the premises to install electrical or other equipment for its own use? A backup generator?
- 2.6 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 or outside hoist, the tenant may want the right to some guaranteed usage or priority, particularly while it moves in and out of the building.
- 2.7 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. Consider requiring the landlord to deliver a permanent certificate of occupancy, because a temporary certificate of occupancy, which expires after 90 days, may not suffice.
- 2.8 New York City Commercial Rent and Occupancy Tax.** New York City commercial tenants pay a "commercial rent and occupancy tax" that is almost unique to New York City. In a particularly formalistic

application of that tax, city tax officials will 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 performed to build-out its space. The city treats that credit as if it were a “deemed” payment of rent, hence a taxable event. If the parties achieve the same economic result through a free rent period or some other dollar adjustment of the rent that is not expressly tied to the cost of the tenant’s work, no commercial rent tax is due on the rent forgone. 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.

**2.9 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 economies of the lease. Consider having an engineer or appraiser prepare a cost segregation study to determine which property can be depreciated over such shorter periods.

### **3. Assignment and Subletting: Consent Requirements**

**3.1 Landlord’s Consent.** Ideally, allow the tenant to assign or sublet without the landlord’s approval. At a minimum, such consent should not be unreasonably withheld. Try to provide that the landlord’s consent will be automatically given if specified objectives and easy criteria (e.g., net worth, reputation, no felony convictions, experience, and proposed use) are met. Set standards for reasonableness. Rent should not be a criterion for approving subleases. (The tenant must keep paying rent no matter what.) Don’t always assume the conditions and procedures for assignment and subletting should match. Even if the

lease tightly restricts assignment, the tenant may be able to argue for greater flexibility on subletting.

- 3.2 Simple Approval Procedure.** Make the approval process as simple and expeditious (and as early in the transaction closing process) as possible. 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) copies of the proposed assignee's financial statements. These early approval procedures are particularly important if the landlord can recapture the space upon any assignment or subletting.
- 3.3 Consent Form.** Attach as an exhibit the required form for the landlord's consent 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 be inconsistent with the lease, the tenant may agree to them because there is no choice or simply because the tenant is not paying careful enough attention at the time.
- 3.4 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 rights, etc.) for affiliate transactions.
- 3.5 Suppliers, Vendors, Customers, and Others.** Let the tenant sublet 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., the formerly hot "Internet incubators") that should be able to share the tenant's space without any need for landlord approval?
- 3.6 Licensees.** The tenant should not need the landlord's consent to grant bona fide concessions or licenses.

**3.7 Recapture Right.** 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 elects not to exercise a recapture right, the landlord’s consent to the proposed assignment or sublease should not be unreasonably withheld, conditioned, or delayed.

**3.8 Assignment/Sublet Involving Other Tenants.** The tenant should obtain the landlord’s prior consent to any assignment or subletting between the tenant and other tenants in the building, whether the tenant is providing or receiving the 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.

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

**4.1 Assignor and Guarantor Protections.** As a general legal proposition, when the tenant assigns the lease, the tenant remains liable for any default by the assignee, and even any default by a subsequent assignee. To facilitate future transactions, the tenant may want to try to mitigate that long-term post-assignment exposure (which may severely constrain the tenant’s flexibility when negotiating a future assignment). Ideally, try to have the lease provide that both the assignor and any lease guarantor are released from liability 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.) As a backup, try to have the landlord agree to give any unreleased assignor and guarantor notice of any assignee’s default and an opportunity to cure it. (In such a case, assignor and guarantor liability would terminate if the landlord did not give the notice.) An unreleased assignor and guarantor might also want a right to obtain a “new lease” if the landlord terminates the lease and the unreleased assignor and guarantor later performs the tenant’s obligations. If the landlord and the assignee modify the lease, a typical boilerplate provision may say that the unreleased assignor (and its guarantor) are fully liable under the modification. Although such boilerplate may be appropriate in the context of an affiliate guaranty, it is not appropriate for an unreleased assignor of a lease. Insist that in such case the assignor’s and guarantor’s liability will never exceed what it would have been under the original lease.

- 4.2 Stock Transfers.** If a lease treats an equity transfer as an assignment for consent purposes, the lease should not, then, treat it so 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 may want to exclude any or all of the following: mergers, 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 (excluding cash or cash equivalents on the tenant's balance sheet), transfers among affiliates, and any transfer resulting from an exercise of remedies by a bona fide pledgee.
- 4.3 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 if the tenant assigns the lease or merely changes banks.
- 4.4 Confidentiality.** The landlord should agree to keep confidential any financial information that a possible assignee or tenant furnishes. The landlord should agree to sign a standard confidentiality agreement if a prospective assignee or subtenant requests it. Such an agreement would include a requirement to return any confidential information if a transaction dies. Similar requirements should apply for final sublease documents delivered to the landlord.
- 4.5 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.
- 4.6 Protections for Subtenants.** The landlord should agree to give “non-disturbance” or “recognition” rights to subtenants if the tenant satisfies certain tests. The lease should also give subtenants as much flexibility as possible—perhaps the same flexibility as the tenant—regarding future assignments and subletting.
- 4.7 Participation in “Profits.”** If the landlord will participate in any “profits” 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, rather than amortize them (typically without interest) over the term of the sublease. The tenant's profit participation payments to the landlord should be due only to the extent the tenant actually receives the anticipated "profit." If the subtenant or assignee defaults, the tenant should be able to stop paying and perhaps insist on the right to recalculate any payments already made.

- 4.8 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 tenant's deductions should include any consideration the tenant paid to acquire the lease, straight-lined over the remaining term of the lease.
- 4.9 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 save time and effort 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, however, will want to see copies of bills and notices of unpaid amounts to avoid unpleasant surprises.
- 4.10 Transfer Defaults.** 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, here cure could consist of rescission of the transfer. Why should this particular default always constitute an automatic event of default?

**4.11 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 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.

**5.2 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 (counsel and the like). If the tenant delivered a letter of credit in place of a security deposit, 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.

**5.3 Delivery.** The landlord should deliver bills and notices by personal service or nationally recognized overnight courier. State when notices become effective.

**5.4 Notices Until Lease Commencement Date.** Until the lease commencement date, the landlord should deliver all notices to the tenant's existing address, not the premises.

**5.5 Delivery Notices.** Require the landlord to provide written notice of delivery of any part of the premises. 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 is often not ready to begin using the space immediately. The more process and the more 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.)

**5.6 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 (including package scanning and messenger interception, lobby attendant, the tenant's own lobby desk, security guards, keycards, night access doors, and specified operating hours), in accordance with criteria set forth in the lease.

**6.2 Tenant's Security.** Let the tenant establish its own security system and connect that system to the landlord's system. The tenant may want the ability to install blast-resistant glass or film on exterior windows.

**6.3 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. The tenant should also seek the right to require subsequent changes to the landlord's security program if the tenant determines changes are appropriate. 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. Consents

**7.1 Quick Exercise.** The landlord should be required to grant or deny any required consent quickly. Silence should be deemed to constitute consent after a stated period. (As a compromise, the tenant might agree to remind the landlord of the response deadline in its consent request and/or to give a reminder notice if the landlord has not responded within a certain time.) Any failure to consent must specify all grounds for that failure. Those grounds must be reasonable.

**7.2 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.

**7.3 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 changes.

- 7.4 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.
- 7.5 Pre-Consent.** Are there any future changes in the tenant's needs for which the tenant wants the landlord's consent today in the lease (e.g., a pending merger, change of name, change of business)?
- 7.6 Consent.** Insist that no landlord consent may be unreasonably withheld, conditioned, or delayed.
- 7.7 Tenant Consent Rights.** Does the tenant anticipate any matters for which the landlord should seek the tenant's consent (e.g., changes in building security)? Indicate in the lease that such consent will be required.
- 7.8 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 tenant should be able to obtain damages up to a specified dollar amount. The tenant's position is 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.
- 8. Defaults and Remedies**
- 8.1 Notice and Opportunity to Cure.** The tenant should have the right to notice of, and the opportunity to cure, any monetary or other default.
- 8.2 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.
- 8.3 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. 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.

- 8.4 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, 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.)
- 8.5 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 to give the lender (for example) a brief lease extension if the lease terminates and the right to conduct an auction on the premises.
- 8.6 Holdover Rent for Partial Months.** 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 for a day’s delay in moving out.) Consider building in a short-term right to hold over at the same rent, to give the tenant some flexibility in case of delays in relocating.
- 8.7 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 relet the premises. If the landlord does mitigate its damages, it must credit any money collected against the tenant’s liability.
- 8.8 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.

- 8.9 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 (for example, prime rate rather than 4 percent per annum).
- 8.10 Default by Subtenant.** Extend the tenant's cure period in the case of nonmonetary subtenant defaults to allow the tenant time to enforce the sublease and, if necessary, obtain possession of the subleased premises.
- 8.11 Statute of Limitations.** Limit the landlord's right to collect unbilled rent once a certain amount of time has passed (e.g., eighteen months).
- 8.12 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.
- 9. Casualty**
- 9.1 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.
- 9.2 Adverse Impact on Business.** Provide that the tenant can terminate the lease or abate rent if a casualty or other event (e.g., a terrorist attack affecting some other building)—or restoration from a casualty—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.
- 9.3 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 it has adequately insured the building. 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 is often the case, it agreed

in a subordination, nondisturbance, and attornment agreement that the loan documents would govern. A major tenant will usually not tolerate this result.

- 9.4 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 need to be restored. The landlord should refund prepaid rent and other items. These measures will often be a “win-win” for both parties, because the landlord can often insure the loss (on a property-wide basis) more easily and economically than can each tenant individually.
- 9.5 Other Premises.** If a casualty affects only improvements outside the tenant’s premises, the landlord cannot terminate the tenant’s lease unless the landlord: (1) makes the tenant whole, and (2) terminates all other similarly situated leases.
- 9.6 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.
- 9.7 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 term to give the tenant additional time to operate and ease the transition to new premises.
- 9.8 Time to Restore.** Negate (or limit) any landlord right to obtain an extension of time to restore in the case of a force majeure event.
- 10. Condemnation**
- 10.1 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 \_\_\_ percent of the whole building, the tenant may still want the right to terminate the lease.
- 10.2 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.

**10.3 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.

## **11. Electricity**

**11.1 Totalized Submeter Readings.** The readings from multiple submeters should be totalized, 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.

**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.

**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.

**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 be using it initially. (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 responsi-

bilities for regular testing and refueling), and costs between the landlord and the tenant. The tenant should have no duty to remove this equipment at the end of the 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.
- 11.10 Capacity.** The landlord should allow the tenant to reserve additional riser space and additional capacity in the buss 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.

## **12. Elevators**

- 12.1 Freight Elevators for Moving.** Ask to use the freight elevators without charge 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 should be free.
- 12.2 Night Service.** The lease should provide that “night service” for elevators (restricted or limited service) cannot begin before a specified time. Require a minimum number of elevators to be 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 cars not being used to be 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.

- 12.6 Waiting Time.** Specify the maximum average waiting time for elevators.
- 12.7 Security Measures.** The tenant should have approval rights over the institution and 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 \_\_\_ minutes.
- 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 term. As a compromise measure, the tenant might agree to remove any 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. Require the landlord to give a reminder notice at least \_\_\_ months, but no more than \_\_\_ months, before the end of the term if the landlord intends to enforce the restoration requirement.
- 13.2 Restoration.** If the tenant must restore, then let the tenant: (a) perform any necessary restoration work rather than paying the landlord to do it; (b) enter the premises for some reasonable period after the end of the lease term as needed; (c) during the post-term restoration period, pay only an equitable per diem payment rather than holdover rent; and (d) 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 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, and in reasonable detail, within the objection period. If the landlord's objections are minor and the tenant resolves them within a reasonable period, the tenant should no longer be required to pay any rent during that reasonable 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 term.

- 13.4 Removal of Personal Property.** Let the tenant enter the premises for a short time after the lease expires in order to remove the tenant's personal property.
- 13.5 Demolition Clause.** If the tenant cannot negotiate away a "demolition" clause, then the landlord should not be able 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.
- 13.6 "For Rent" Signs.** The landlord should not post "for rent" signs until the term has actually ended.
- 13.7 New Location Sign.** For a reasonable time after the lease has terminated, the tenant may want to be able 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 together with accrued interest and an administrative fee if not paid promptly.
- 13.9 Holdover Rent.** Holdover rent should not apply for some limited period when the parties are negotiating a lease extension in good faith for the premises or for space in another building. Try to eliminate holdover rent at any time when a new tenant is not ready to occupy the premises. Also, try to negotiate the right to a short-term lease extension to avoid holdover rent problems or if a retail tenant wants to stay through the holiday season.
- 13.10 Subtenant Problems.** Sometimes a tenant cannot vacate solely because a subtenant fails to surrender its subleased premises. To protect the tenant in such a case, try to limit the tenant's liability, by having it apply 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 be liable for holdover rent for the entire leased premises, even though the tenant has

moved out and the subtenant's holdover affects only a tiny corner of one floor.<sup>2</sup>

**13.11 Receipt and Release.** Require the landlord to issue a receipt and release upon request at the end of the lease term.

#### **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 the common areas. If the square footage of the building is increased, the denominator should increase accordingly. Exclude basement/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?

**14.3 Mixed Uses.** In a mixed-use building (including office with retail on the ground floor), are all tenant types being treated the same way or at least equitably? Should they be? 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.

**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.

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<sup>2</sup> Tenants need to 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 (an increased security deposit?) regarding its obligation to vacate, and the sublease might convert to a license arrangement. A strong tenant might ask the landlord to bear the risk of subtenant holdover.

- 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/or by combing through and comparing the various definitions.
- 14.6 Lease Termination During Calendar Year.** Apportion escalations in the event that the lease terminates during a calendar year. (Otherwise, the landlord could argue that annual calculation procedures obligate the tenant to contribute to an entire year's escalations.)
- 14.7 "Base Year."** Any "base year" should fully include all expenses. Were any expenses not yet being fully incurred? Did any exclusions apply? Was the landlord not providing full building services?
- 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 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, 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 fringe benefits cannot be excluded, try to define how they are calculated.
- 14.11 Consumer Price Index Adjustment.** For a consumer price index (CPI) adjustment, the lease 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, consider negotiating fixed rent increases in place of all pass-throughs of expenses.

- 14.14 Waiver of Escalations.** Escalations should be deemed waived if 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.** Make sure subtenants and assignees can rely on the landlord's estoppel certificate, not just lenders.
- 15.3 Form.** Attach an acceptable form of estoppel certificate as an exhibit to prevent subsequent issues. Limit the assurances the tenant must provide, both substantively and by adding "knowledge" requirements and as many other qualifiers as possible. Avoid restating the terms of the lease; tell the lender to read the lease and rely on the estoppel certificate only for comfort that the lease has not been secretly amended.
- 15.4 Legal Fees.** Should the landlord reimburse the tenant for its legal fees in researching 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 involving additional rent. Alternatively, the tenant should reserve its rights on these claims. A typical 10-day requirement to deliver an estoppel certificate is too short for the tenant 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.
- 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 signer.
- 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.
- 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). Consider requiring 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 recently did so, that particular ruling was reversed on appeal.<sup>3</sup> Just in case, though, add the typical recitations that attempt to validate any liquidated damages clause.

- 16.2 Lender’s Approval.** If the lease is conditioned on a lender’s (or any other) 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 timing 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, 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 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? Not during the holiday season?

## 17. Fees and Expenses

- 17.1 Reasonableness.** Limit fees and expenses to those which are reasonable, actual, and out-of-pocket. Do not agree to allow fees “as set 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.

<sup>3</sup> *Bates Advertising USA, Inc. v. 498 Seventh, LLC*, 739 N.Y.Supp.2d 71 (App. Div. 2002).

- 17.2 Legal Fees and Expenses.** Exclude legal fees and expenses relating to a claimed default if no default exists or the landlord otherwise does not prevail.
- 17.3 Reimbursement to Prevailing Party.** 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.
- 18. Heating, Ventilation, Air Conditioning**
- 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 from time to time.
- 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, this tenant should get the benefit of that lower rate.
- 18.3 Allocation of Charges.** Allocate overtime HVAC charges among multiple simultaneous users.
- 18.4 Notice for Overtime.** Minimize or eliminate any prior notice requirement for overtime HVAC.
- 18.5 Discount.** Give the tenant a discount on overtime HVAC if the tenant commits in advance to specified levels of usage.
- 18.6 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? Who pays costs? 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?
- 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.

## 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 such 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.
- 19.2 Right To Cure.** Let the tenant cure the problem if the landlord fails to perform—even if that failure is caused by force majeure. If the landlord fails to reimburse the tenant’s cure costs, then let the tenant offset rent. Consider the interaction between this rent offset and any rent abatement arising from casualty and condemnation.
- 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.** Let the tenant 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.
- 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 provide evidence of such insurance on the tenant's request.
- 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.
- 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 that deductible will be funded in the event of a casualty. Whose risk is the deductible? Will that payment constitute an operating expense?
- 20.7 Insurance Advice.** Send the insurance and casualty provisions of the lease to the tenant's insurance adviser for review and comment.
- 20.8 Terrorism Insurance.** To the extent that the definition of "operating expenses" includes insurance the landlord obtains, decide how to treat the cost of terrorism insurance for purposes of the base year. Given the gyrations in cost and availability of terrorism insurance, any base year since September 2001 may include an artificially high or artificially low cost for terrorism insurance. As one solution, the tenant might exclude terrorism insurance from operating expenses completely. Make it the landlord's problem as a risk of owning real estate.
- 21. Landlord's Access to Premises**
- 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 \_\_\_ months of the term only).
- 21.3 Frequency.** Limit how often the landlord can enter the premises.
- 21.4 Sensitive Areas.** Should the lease prohibit or restrict the landlord's 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.
- 21.9 Placement of Pipes and Conduits.** If the landlord wants to reserve the right to install pipes and conduits, the tenant may want to limit exactly where—such as only within existing walls or above ceilings. Should the landlord be required to minimize any damage associated with the installation or maintenance of these conduits?
- 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 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.

## 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 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 (other than a scheduled termination in accordance with its terms).<sup>4</sup>
- 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 afforded a leasehold mortgagee.
- 22.3 Financing, Generally.** Does the tenant anticipate entering into any other financing arrangements that might affect the landlord, the lease, or the premises? If so, consider adding appropriate language to the lease to preserve the tenant's flexibility.

## 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 "structural" (broadly) to avoid future disputes over what it means. Try to have it cover as much of the building as possible except 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. Consider whether to require the landlord to maintain service contracts. Let the tenant and its advisers inspect building systems.
- 23.3 Standard for Maintenance.** The landlord should maintain the building and common areas (including any empty shop spaces, and all common areas on any multi-tenant floor, whether or not fully occupied) in an attractive and first-class manner. "Maintenance" should include provision of security. Require the landlord to repaint and recarpet periodically.

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<sup>4</sup> For the lease to be truly "mortgageable," it needs much more than this. See Joshua Stein, "Model Leasehold Mortgagee Protections," The ACREL Papers (Oct. 1999).

- 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. 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 that is above standard (considered for the space as a whole).
- 23.5 Cleaning Hours.** Specify the earliest time at which cleaning may commence.
- 23.6 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.
- 23.7 Garbage Removal.** Define the location, access, timing, and other arrangements for garbage removal. The landlord should provide separate recycling containers or areas.
- 23.8 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 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: (a) these were the statements actually used for pass-throughs to existing tenants; and (b) future operating expenses will be calculated 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.

- 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 year-end, especially when the tenant pays monthly operating expense escalation estimates on account.
- 24.5 New Expense Items.** If the landlord later incurs new categories or items of expense that were not being incurred when the lease was signed (e.g., a new earthquake insurance program or expanded security), ask 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 rights to examine and question the landlord’s operating expense calculations. Those rights should survive the termination of the lease. The lease should give the tenant reasonable time to: (1) notify the landlord 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.
- 24.8 Base Year.** The audit right should include 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 \_\_\_ percent.
- 24.10 Most Favored Nation; Landlord’s Discovery of Error.** If some other tenant’s audit discloses a discrepancy, the landlord should auto-

matically give this tenant the benefit of any resulting adjustment to operating expenses—even if this tenant does not ask for it. If the landlord forgets to do so, the landlord must pay interest at a penalty rate. Also, 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 the better deal to this tenant, the landlord should pay a penalty (but don't call it that).

**24.11 Choice of Auditing Firm.** The lease should not limit the tenant's right to engage a firm of its own choosing (e.g., 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 Tenant-Specific Exemptions.** Look for justifications to support exemption from particular expenses (e.g., elevator expenses for a ground floor tenant).

**24.14 Confidentiality.** If the landlord requires the tenant to agree to sign a confidentiality agreement regarding any future lease audit, insist that the form of agreement be attached to the lease, or that the agreement be built into the lease. Either approach avoids the risk of extended delays in trying to negotiate a confidentiality agreement when the need arises.

**24.15 Credit.** Try to get credit for any income the landlord derives from common areas (e.g., signage).

**24.16 New Buildings.** Part of the business negotiation of a lease in a new building will be the negotiation of a fair base year. The parties are both at greater risk since there is no operating history. The parties may need 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 the following 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).
- 25.2 Americans with Disabilities Act.** ADA compliance costs, particularly when triggered by the operations of other tenants.
- 25.3 Advertising.** Advertising expenses, including the cost of maintaining any Web site.
- 25.4 Art.** The purchase or maintenance of any artwork or sculpture.
- 25.5 Breach of Lease.** Costs incurred because any party breaches any lease.
- 25.6 Capital.** Costs that under generally accepted accounting principles consistently applied would be considered capital or are otherwise outside normal costs and expenses in connection with the operation, cleaning, management, security, maintenance, and repair of similar buildings; or 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 reduction.
- 25.7 Collateral Source.** Any cost reimbursed by insurance proceeds (or that would have been so reimbursed, if the landlord had carried customary insurance), any condemnation award, or an indemnification from any third party.
- 25.8 Contributions.** Any charitable or political contributions the landlord might decide to make.
- 25.9 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," and so on.
- 25.10 Environmental.** Costs of testing for, handling, remediating, or abating asbestos and other hazardous materials or electromagnetic fields, or the cost to remove chlorofluorocarbons (CFCs) or accomplish other future retrofitting driven by as-yet-unknown future environmental concerns, or to purchase environmental insurance.

- 25.11 Excessive Management Fees.** Management fees in excess of those charged in comparable buildings, particularly where the property manager is an affiliate of the landlord.
- 25.12 Executive Salaries.** Salaries for officers above the level of building manager.
- 25.13 Fines.** Fines and penalties the landlord must pay as a result of failure to comply with law, code, etc.
- 25.14 Food Court.** Costs related to food court tenants to the extent they exceed normal costs (or allocate food seating area as tenant space).
- 25.15 Holidays.** Any holiday decorations or gifts (or impose a reasonable limit).
- 25.16 Construction.** The cost to perform initial construction and to correct initial construction defects (and such costs for any future alterations or additions).
- 25.17 Mall Advertising.** Retail tenants should consider trying to opt out of any mall advertising program, or cap the amount of their contribution.
- 25.18 Negligence.** Costs incurred as a result of the landlord's negligence.
- 25.19 Other.** Next year's newest area of legal concern (for inspiration, check the latest new and improved carve-outs from "nonrecourse" treatment in mortgage finance transactions).
- 25.20 Ownership-Related Costs.** Ground rent; mortgage interest, principal and transaction costs; build-out of tenant space; clean-up of the landlord's construction projects of any kind; and general and administrative expenses (overhead).
- 25.21 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.)
- 25.22 Professional Fees.** Brokerage fees and commissions; legal fees and expenses to negotiate and enforce leases; accounting fees.
- 25.23 Costs Related to 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); reimbursed or reimbursable by specific tenants other than through pro rata rent escalations (e.g., fees for excessive use of utilities); or caused by the acts or omissions of particular other tenants.

**25.24 Telecom Installation.** Either exclude costs or offset 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, consider negotiating a wide-open right to sublet excess space until needed (if this makes business sense under the circumstances).

**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 different terms than 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 expire or terminate, or has expired or terminated. The landlord should agree not to negotiate any extension or renewal that could impair the tenant’s claims to the space.

**26.4 Excess Space Notices.** Whether or not the tenant has pre-emptive 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.

**26.5 Early Termination Options.** The tenant may want early termination options, either complete or partial (“shed rights”).

**26.6 Renewal Option.** Often tenants will seek a right to renew the 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. Know the

renewal rent before the option exercise is final and binding. Try to time the process to give the tenant time to move if the rent, as finally determined, is unacceptable.

- 26.7 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. 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 be receiving such an allowance, the definition of “fair market rental value” should not pretend otherwise.
- 26.8 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 to a condominium, the tenant may want the right to purchase one or more units.
- 26.9 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.
- 26.10 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.
- 26.11 Base Years.** For any lease renewal, reset the base years for escalations.
- 26.12 Rule Against Perpetuities.** Consider the possible impact of the rule against perpetuities on any option rights in the lease or ancillary to the lease.
- 26.13 Option Timing.** Scrutinize 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?
- 27. Parking**
- 27.1 Specific Requirements.** Define the location, number, and pricing (or assurance of no fee) for parking spaces (reserved and unreserved). Attach a parking diagram as an exhibit. Prohibit the landlord from

changing the parking arrangements without the tenant's consent. The tenant may want to seek some 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.
- 27.3 Building Expansion.** If the landlord expands the building, the 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), although some of these uses are now regarded as less objectionable than in the past.
- 27.5 Location/Quantity of Employee Parking.** Insist that the landlord enforce employee parking restrictions against other tenants.
- 27.6 Snow.** Require the landlord to clear snow 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.
- 28.6 Revenue Maximization.** The tenant should avoid any obligation to operate or to “maximize” revenues. The tenant should not make any representation concerning the volume of its business. Expressly negate any “implied” obligations along these lines.
- 28.7 Special Categories.** The tenant may wish to negotiate a lower percentage rate for particular low-margin activities or categories of sales.
- 28.8 Free Rent.** Any free rent period should abate percentage rent, too.
- 28.9 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 assignment be permitted even if the percentage rent changes, 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 feet up, then roof above posts; frequency; 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; 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.

**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. Consider providing for liquidated damages or some other mechanism to quantify damages. Include recitations to validate any liquidated damages formula.

### **30. Radius Clauses**

**30.1 Physical Scope.** Try to limit the physical scope of any radius clause—ideally, 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; and (4) any stores operated by any possible future acquiror of the tenant's business.

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

**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 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.

**31.2 Substitute or Additional Taxes.** Devote close attention to how "substitute or additional taxes" are defined. Confirm they are truly appropriate for pass-through to the tenant.

- 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 "\$\_\_\_ 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.
- 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 who leases only part of a building lacks standing to contest taxes. Whether the tenant leases only part of the building or the whole thing, 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 must be reminded, then the landlord should pay a penalty 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 an issue in negotiating a subsequent 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. The land-

lord should not collect a separate "management fee" for its services in contesting real estate taxes.

- 31.9 Base-Year Reassessment.** If the base year is reassessed downward, reduce base rent by the amount of the tax savings.
- 31.10 Abatement or Deferral Program.** If any tax abatement or deferral program might be available, the landlord should agree to apply for it. 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 benefits that the tenant expected to obtain. (Some argue that the value of every geographically targeted benefit program will simply be negotiated into rents and hence land value within the targeted area, and therefore have no effect except to increase land values in that area.)
- 31.11 Artificially Low Assessments.** If, under local assessment rules, the first year's free rent produces an artificially low tax assessment that year, 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.
- 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 ("out parcels"); 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.

**31.14 Reduced Taxes.** If real estate taxes ever fall below base-year taxes, give the tenant a credit against base rent.

## **32. Representations and Warranties**

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

**32.1 Asbestos and Hazardous Materials.** The premises are free of asbestos and other hazardous materials. The landlord should provide any document required to confirm this, 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 arising out of any environmental conditions that existed before the tenant took possession, whether or not the landlord caused them.

**32.2 Certificate of Occupancy.** Attach a true and correct 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 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 who was evicted from the space; other tenants in the building, etc.).

- 32.6 Submetering.** 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 should 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.
- 32.12 Parking.** The landlord has received no notice of any condemnation of any parking, and the landlord plans no changes in parking or circulation.
- 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 the need to comply existed before the lease was executed.
- 33.2 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 in the manner the lease contemplates.
- 33.3 Permits.** The landlord should cooperate in obtaining permits, such as by signing applications and providing necessary existing information, all within a short turnaround time. Require the landlord to be responsible for ADA and all other baseline legal compliance.
- 34. Restrictions Affecting Other Premises**
- 34.1 Competing Stores.** Consider prohibiting the landlord and its affiliates from renting to competing tenants within a certain area, particu-

larly where the landlord operates its properties under an identifiable brand name (a new trend).

- 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. 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 \_\_\_ feet 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 (e.g., welfare offices, public auction houses, etc.), particularly if incompatible with “high-end” business offices .
- 34.4 Additional Construction.** Limit the location and type of any additional construction the landlord can perform (e.g., on “out parcels”).
- 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 (e.g., kiosks) 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.
- 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 tenant approval for the plans for all such work, or at least the visible part (e.g., finishes) of the landlord's work.

**34.9 Exclusive Uses.** The tenant may want exclusive rights for certain uses.

### **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.

### **36. Sale of Property**

**36.1 Assumption of Obligations.** The purchaser should assume all obligations—including all existing undischarged obligations—of the landlord, including the obligation to return the tenant's security deposit and refund any previous rent overcharges. Some landlord's lease forms say that the old landlord is not responsible, but neither is the new 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.

### **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 land-

lords require an administrative fee (similar to that mandated by statutes in New York). Agree on its amount.

**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, 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 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.

**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 are particularly desirable 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 including chases (channels on the underside of the floors). The landlord should agree not to damage or remove such systems.

**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.

**38.3 Service Shutdowns.** Limit the landlord's ability to shut down building services, particularly for essential tenant functions (e.g., heating, ventilation, and air conditioning; or electricity for data center). Require ample prior notice, and let the tenant reschedule the shutdown.

**38.4 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.

- 38.5 Windows.** Let the tenant 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.
- 38.6 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?
- 38.7 Non-Occupancy Credits.** If the tenant is not in occupancy, the landlord should give the tenant credit for any variable costs that the landlord avoids (e.g., cleaning). (Such a provision appears in some government leases, but rarely, if ever, in commercial leases.)
- 38.8 Receipt of Deliveries.** Specify the location, arrangements, timing, and fees (none) for the tenant's receipt of deliveries. Coordinate with the security program as necessary.
- 38.9 Contact Person.** Require the landlord to designate a single exclusive (or at least "primary" or "backup") contact person for all questions, problems, and issues regarding the premises, together with a 24-hour emergency telephone number to call if problems arise outside business hours.
- 38.10 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.
- 38.11 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 construction work during the tenant's peak months of business.
- 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). The tenant should be able to make future changes in its signage. Make the tenant's sig-

nage rights as transferable as any other rights under the lease. Use of logo or distinctive company typeface should also be permitted.

- 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).
- 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. 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? Consider prohibiting 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 listings if the landlord uses a computerized directory.
- 39.6 Flagpoles.** The tenant may want the exclusive right to use any flagpoles at the property.
- 39.7 Billboards.** Prohibit the landlord from installing billboards or other signs anywhere on the premises or outside the windows of the building, even if such billboards or other signs are allegedly transparent from the interior of the building.

#### **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 as an exhibit.
- 40.2 Nondisturbance Agreement from Mortgagees and Ground Lessors.** The landlord should deliver at lease signing a nondisturbance agreement from all mortgagees and ground lessors. Attach the form of nondisturbance agreement to the lease and require future mortgagees to sign it at the closing of their loans. 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 (which may say something about the practical importance of these agreements).

- 40.3 Conditions for Subordination.** If the lease is “subordinate,” subordination should be conditioned on the landlord’s having delivered specified nondisturbance protections from holders of senior estates (e.g., in the form attached to the lease). Don’t settle for “best efforts.” The tenant cannot be obligated to “subordinate” to any mortgage if such mortgage is subordinate to any mortgage or any other lien that has not given the tenant nondisturbance protections. (Foreclosure on that latter, more senior, mortgage could wipe out both the more junior mortgage and the tenant.)
- 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 negotiations of nondisturbance agreements.
- 40.6 Compliance with Mortgages.** Avoid any covenant 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.
- 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.
- 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, lease amendments, etc.) and try to trim back if excessive. Ask the lender to pre-approve as much as possible. 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 nondisturbance 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) 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, 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 the 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 No Waiver.** The tenant's payment of rent with knowledge of a landlord default should not waive the default.

**41.5 "Exculpation" Clause.** Where 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.

## **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, 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 the 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., in the case of a force majeure event, alterations, inventory-taking, other brief closings). Limit the time within which the landlord may decide to recapture.
- 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. Let the tenant relocate this equipment if necessary to improve performance. The landlord should agree that future rooftop users will be prohibited 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. If this will require structural reinforcement, the landlord should consent to it, and ideally pay for it. For any rooftop 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 rooftop equipment or connecting lines at the end of the term.
- 42.8 Use of Sidewalks and Exterior Areas.** Will the tenant 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.** Let the tenant use building common facilities, such as cafeteria or health clubs, auditoriums, conference facilities, and common lavatories if the premises does not include lavatories. The lease should state the minimum operating hours (24 hours in the case of lavatories and other essential facilities) and 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.

**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?

**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).

**43. Utilities, Generally (Excluding Electricity)**

**43.1 Entry Point.** The landlord should bring all utilities to a defined entry point on the perimeter of the premises.

**43.2 Special Requirements.** Require the landlord to allow the tenant or its service providers to install T-1 lines, multiple points of entry, and other special telecommunications facilities, including cabling and connections from service providers to the premises.

**43.3 Free Choice of Carrier.** Let the tenant 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 is required and what must be negotiated.

**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. Miscellaneous**
- 44.1 Right To Remeasure.** Let the tenant remeasure the square footage of the premises when the landlord has finished its work (at least in a new building).
- 44.2 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.
- 44.3 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.
- 44.4 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.
- 44.5 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?
- 44.6 Initial Criteria and Specifications.** State the criteria and specifications for the landlord's initial construction of the building, common areas, parking lot, and so forth.
- 44.7 Engineering Issues.** Counsel should work with the tenant's engineers and other consultants to identify needs, standards, and specifications for all building services and the landlord's alterations.
- 44.8 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. The contribution should be based on the expected useful life of the improvement or replacement relative to the remaining term of the lease.
- 44.9 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, which the tenant should be entitled to offset against rent?

- 44.10 Change in Zoning.** Let the tenant 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.
- 44.11 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.
- 44.12 Strike.** If a strike occurs, the landlord should agree to establish a separate gate for the striking union 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.)
- 44.13 Hoist.** The tenant may want the right to install and/or use one or more outside hoists. Conversely, the landlord should agree to remove promptly any hoist that the landlord installs for construction.
- 44.14 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.
- 44.15 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.
- 44.16 Board Approval.** If the tenant will require its own internal board or other approval to ratify a contemplated transaction, provide for such condition in all letters of intent, term sheets, leases, and other documents.
- 44.17 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.
- 44.18 Relocation.** If the tenant agrees to give the landlord a right to relocate the tenant, require: (1) that the new premises must be physically

higher (or no more than \_\_\_ floors lower) than the existing premises; (2) that the landlord must pay all direct and indirect relocation costs (e.g., new letterhead, announcements, rewiring costs); (3) that the configuration, size, and layout of the new premises must meet the tenant's reasonable approval; (4) that the tenant need not relocate until the new premises are fully built out at the landlord's expense; (5) a free rent period; and (6) that if the landlord exercises the relocation right, the tenant can terminate the lease, particularly if less than \_\_\_ years remain in the term.

**44.19 Recapture.** 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.

#### **45. Due Diligence**

As noted above, this checklist should not be regarded 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:

- 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?
- 45.2 Title Search.** Perform a title search and review, or an on-line search to confirm ownership of the fee (easily available in many areas). Review the landlord's certificate of occupancy. Consider performing other municipal searches.
- 45.3 Square Footage.** Calculate the actual square footage and scope of the premises. Do all of the landlord's exclusions of space from the premises make sense? For example, should the elevator lobby be part of the 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?

- 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 the following due diligence issues regarding 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?
- 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?
- 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.
- 45.12 Disposition of Present Premises.** What are the tenant's plans for disposing 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, sight lines for the ten-

ant's satellite dishes, and more mundane issues such as floor load capacities.

- 45.14 Security.** Is the landlord's security program consistent with the tenant's desires?
- 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? A certain level 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.

#### **46. Preliminary Arrangements and Considerations**

- 46.1 Brokerage.** Is the brokerage agreement in place and are the commission negotiations completed?
- 46.2 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.
- 46.3 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 (e.g., a tenant must sometimes apply before "committing" to the new location).
- 46.4 Premises Off the 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. Should the parties agree to a break-up fee? A reimbursement of expenses and attorneys' fees if the deal dies?
- 46.5 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.

**46.6 Tenant's Procedures.** Understand the tenant's (and the landlord's) internal approval procedures, including any documentation requirements and likelihood for delay.

**46.7 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.

#### **47. 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:

**47.1 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., "out parcels").

**47.2 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.

**47.3 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.

**47.4 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.

**47.5 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 con-

sents or approvals, and deliver copies of any necessary consents or approvals at closing.

- 47.6 Opinion of Landlord's Counsel.** Such an opinion could be limited to authorization and execution and related issues, without entering the morass of issues raised by “enforceability.”
- 47.7 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. Remember that in New York a lease coupled with a purchase option may be subject to transfer tax. 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).
- 47.8 Title Insurance.** Consider obtaining a policy of leasehold title insurance.
- 47.9 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.
- 47.10 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).
- 47.11 Landlord's Approval.** Request the landlord's approval of plans and specifications for initial work (if not attached as an exhibit to the lease).
- 47.12 Diagram of Premises.** The lease should have an exhibit consisting of a precise diagram of the premises. Confirm that the tenant, the broker, and other advisers reviewed and approved the diagram.
- 47.13 Guaranty.** Any guaranty of a lease will raise its own issues. A discussion of these issues is beyond the scope of this checklist.
- 47.14 Internal Approvals.** Request any documents necessary to evidence the tenant's internal approval of the contemplated lease (resolutions, consents, or the like).

**47.15 Brokerage Commission.** Request evidence of payment of any brokerage commission.

#### **48. 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:

**48.1 Advice and Administration Memo.** The tenant may desire its counsel to prepare a memorandum to summarize any proactive and non-obvious actions 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.

**48.2 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.

**48.3 Filings, Etc.** 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.

**48.4 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 not only the operating expenses for that year but also for the base year.

**48.5 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.

**48.6 Options; Rent Adjustments.** The parties should memorialize all option terms and rent adjustments in writing.

**48.7 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.

**48.8 Future Lease Transactions.** Any future lease amendments (or negotiated termination of the lease) may require the landlord’s mortgagees’ consent.

**48.9 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.

**48.10 Notices.** Keep track of changed notice addresses and notify parties of any change to the tenant’s notice address.

**48.11 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.