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Real Estate Transactions—Residential Property

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

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Save the Dates!

Upcoming Real Property Law Section Executive Committee Meetings
Friday, October 14, Harvard Club, NYC
Wednesday, January 25, New York Hilton Midtown, NYC

Real Property Law Section Meets During NYSBA Annual Meeting
Thursday January 26, 8 a.m. – 12 p.m.
"Zombie Housing, Cyber Security, § 1031 Like-Kind Exchanges."

Thursday January 26, 2:30 p.m. – 5:30 p.m.
"Coops and Condos: Current Trends and Issues."

For registration and more information on the above events, please visit www.nysba.org/Real

Message from the Chair

Are you having fun yet?

If you are an active member of our Section, the answer is a resounding yes. If the answer is no, what are you waiting for?

Our Committee and Task Force Co-Chairs have many exciting projects planned. This is just a small sample:

- CLEs on cutting edge topics such as the new zombie housing legislation that becomes effective in December (thanks to Zombie Housing Task Force Co-Chairs Joel Sachs and Leon Sawyko), as well as employment issues relevant to coops and condos organized by Cooperatives and Condominium Committee Co-Chairs Dale Degenshein and Steven Sladkus and mock negotiations being organized by CLE Committee Co-Chairs David Zinberg and Scott Sydelnik to help practitioners expand their knowledge of lore and law, and learn how to be more effective advocates.
- The Legislation Committee Co-Chaired by Sam Tilton and Richard Nardi is keeping a vigilant eye on legislation affecting our clients' real estate investments and activities.
- Thanks to Student Affairs Committee Co-Chairs Shelby Green, David Berkey and Ariel Weinstock, most of the law schools in the state are now involved in our student intern program, and we hope to make it unanimous. Students spend a semester working uncompensated in a private law firm in exchange for course credit. They learn practical skills that give them a competitive edge, and their employers expose them to all aspects of lawyering, and serve as mentors, for a mutually rewarding experience.
- We also plan to partner with the law schools to expand our hugely successful "road show" in which seasoned lawyers and former lawyers now engaged in other professional endeavors interact with law students interested in real estate about their career paths and the ways in which they have found fulfillment. This is another brainchild of the Student Affairs Committee, for which it is to be commended.
- Law school students continue to work with our Publications Committee Co-Chaired by Vincent Di Lorenzo, Matthew Leeds, Marvin Bagwell and William Johnson to publish our Section's quarterly *Journal* featuring articles on timely topics of interest to dirt lawyers statewide (St. John's), and with our Public Interest Committee Co-Chaired by Daniel Webster and Maria DeGennaro (Touro Law Center).
- Our Website and Electronic Communications Committee Co-Chaired by Susan Scharbach and Michael Stevens is busy evaluating how we can use social media to stay in touch "in real time" with our members.
- Under the leadership of Sixth District Representative John Jones with assistance from other Executive Committee members we will publish a local practice guide for residential real estate closings in every county.
- Thanks to long-time Chair Richard Singer our Low Income and Affordable Housing Committee plans to create a comprehensive guide to HDFCs (Housing Development Fund Companies).
- Our Professionalism Committee Co-Chaired by Patricia Watkins and Nancy Connery is exploring posting on our website its summaries of recent ethics opinions relevant to dirt lawyers.
- Many other committees—Landlord and Tenant Proceedings Co-Chaired by Peter Kolodny and Paul Gruber; Commercial Leasing Co-Chaired by Sujata Yalamanchili, Deborah Goldman and Robert Shansky; Not-for-Profit Entities and Concerns Co-Chaired by Anne Reynolds Copps and Sue Golden, Real Estate Financing Co-Chaired by Richard Fries and Heather Rogers; Green Real Estate Co-Chaired by Joel Binstok and Nicholas Ward-Willis, and Title and Transfer Co-Chaired by Toni Ann Barone and Gilbert Hoffman just to name a few—have a long-standing tradition of organizing wonderful programs and meetings for the benefit of their members, and will continue to do so.
- The Attorney Opinion Letters Committee Co-Chaired by Gregory Pressman and Chip Russell will continue its best-practices conversations with members so helpful to dirt lawyers retained to close loan transactions.

None of this happens without you. Attend our programs and meetings and the social events organized by our District Representatives. Participate in the daily conversations on our Communities site. Surf our Section's website for the latest information about pending legislation and Section activities. We have over 20 active Committees and 4 Task Forces—do yourself a favor and join one. You will be richly rewarded in many ways. Virtual communication has its place and our Section certainly embraces it, but nothing can replace networking in person. I encourage students and lawyers who contact me seeking employment opportunities to join the Section, get active on a Committee and attend our social events. It is a wonderful way for prospective employers and employees to work collaboratively on important projects, and get to know one another well beyond the limits of a resume. It also is a great way to stay current in your chosen area of concentration, and develop lifelong friendships. Many of our members have been coming with their families to our summer meetings for years, and the kids and grandkids look forward to it.

I have asked Committee Co-Chairs to contact the members of their respective Committees for ideas about projects and initiatives, because we want to hear from you. Take the call. Get involved. Have some fun.

Mindy H. Stern

Model New York Language for Commercial Real Estate Transactions

By Joshua Stein

Commercial real estate lawyers who negotiate and close New York City and New York State transactions often include in their documents language and provisions that would not appear in transactional documents for real property located anywhere else. New York law requires some of those provisions. Others respond to the New York legal environment and try to prevent surprises or problems based on state-specific concerns.

This article seeks to collect, for convenient reference, New York provisions specific to the most common commercial real estate documents: deeds, guaranties, leases, loan documents and purchase and sale agreements. A final section includes state-specific provisions that could apply to any document of any kind.

For leases, and again for loan documents, this article offers two sets of sample provisions: (1) the base case, which would typically apply; and (2) special cases, which would apply only sometimes. Endnotes explain and comment on the model provisions, and when and why one might want to use them.

Any competent New York real estate lawyer will helpfully point out that New York law involves a lot more than a few paragraphs of standard language to shovel from an article into a document. But the few paragraphs of New York language offered here do provide a good starting point to think about New York law or check a set of generic documents for New York issues. Knowledge of New York law also helps.

This article limits itself to "everyday" contracts, omitting, for example, provisions specific to government contracts or any type of contract not specifically listed above.

New York City and State have a number of unusual bodies of law, such as rent regulation, tax abatements, zoning and zoning incentives, offering of for-sale apartments, subdivision approvals and environmental law. These provisions make no effort to address those bodies of law or, for the most part, any municipal codes.

Documents to be recorded in New York need a cover page tailored to the State's recording requirements, as well as an acknowledgment. One should use a New York acknowledgment. For an example, see the last section of this article, which offers New York language that could apply to any document. Each recording office may also have its own requirements, such as a prohibition on blue ink or instead perhaps a requirement for blue ink.

This collection of model clauses relates only to commercial transactions. It disregards residential leases and mortgages. Each of those transactions, particular the latter, entails among other things its own panoply of consumer disclosures and protections, which have piled on over time, often without apparent regard to the numerous disclosures and protections that the law already piled on. The main result: opacity, confusion and dead trees. Commercial transactions are in some ways much simpler and their requirements more intuitive or straightforward.

The sample clauses offered here seek to demonstrate Plain English writing: short and direct sentences, verbs, ordinary words, active voice, not too many parentheses, general principles expressed before their exceptions and presentation of concepts in an orderly and logical way. Even a non-lawyer should have no problem understanding any of these provisions, though not necessarily the logic, if any, that drives them.

These sample clauses assume the larger document already defines common capitalized terms. Any user must confirm that defined terms used in the model provisions match those in the overall document. For example, if the overall document refers to "Alterations" but these provisions refer to "Construction," then edit these provisions to match the document. Check every capitalized term. If a particular paragraph does not itself define a capitalized term it uses, then the larger document will need to do that. No paragraph in these model provisions uses a capitalized term defined anywhere outside that paragraph.

For convenient reference, this Model Document includes an Index of Defined Terms at the end. Also, these clauses assume the document defines: (a) "include" to mean "include without limitation"; and (b) any statute to include its amendments, replacements and supplements. For ease of use, this sample language does not establish defined terms for statutes, instead spelling them out every time. A user can change any of this, of course.

This Model Document does not collect generic "boilerplate" that is not state-specific or city-specific, such as jury trial waivers or attorneys' fees clauses. Sometimes this becomes a hard line to draw. In general, if particular language would appear in about the same form in any transactional document anywhere in the United States, this article omits it, even if it is very important language.

Any opinions expressed or implied are solely those of the author, and only at the moment of writing.

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1. Deeds

1.1 *Lien Law Trust Fund.* In compliance with Lien Law § 13, Grantor shall receive the consideration for this conveyance and hold the right to receive that consideration as a trust fund to be applied first to pay the cost of improvements to the Property. Grantor will apply that consideration first to pay the cost of those improvements before using any of it for any other purpose.

2. Guaranties

2.1 *Lien Law Article 3-A.* The Guarantied Obligations include Borrower's obligations to comply with Lien Law Article 3-A ("Article 3-A"). Guarantor shall Indemnify Lender regarding Borrower's failure to comply with Article 3-A.[1]

2.2 *Payment of Money Only.* Guarantor acknowledges this Guaranty is an "instrument for the payment of money only," within the meaning of Civil Practice Law and Rules § 3213.[2]

2.3 *Remedies.* To the extent that any Collateral is located outside New York State, Guarantor acknowledges that any restrictions, limitations and prohibitions in Real Property Actions and Proceedings Law §§ 1301 and 1371[3] do not apply.

3. Leases (Base Case)

Almost every Landlord for almost every Lease will typically want to include these clauses. Other clauses apply only in certain cases, as listed below.[4]

3.1 *Casualty.* The provisions of this Lease on casualty constitute an express agreement on damage or destruction of the Premises by fire or other casualty. Therefore, Real Property Law § 227, providing for this contingency absent express agreement, shall not apply.

3.2 *Conditional Limitation*. If an Event of Default[5] exists, then without limiting Landlord's other remedies, Landlord may serve on Tenant a written five-day[6] notice of cancellation and termination of this Lease (that five-day period, the "Conditional Limitation Period"). When the Conditional Limitation Period expires, this Lease and the Term shall automatically and without any further action by anyone terminate, expire and come to an end, by lapse of time, as fully and completely as if the last day of the Conditional Limitation Period were the Expiration Date. After the Conditional Limitation Period, Tenant's tenancy no longer exists. Tenant shall then quit and surrender the Premises to Landlord but remain liable as this Lease provides. This paragraph establishes a conditional limitation, not a condition subsequent.[7]

3.3 *Delivery of Premises*. Tenant waives any right it might have under Real Property Law § 223-a. Landlord's obligations under this Lease on delivery of the Premises constitute "an express provision to the contrary" as Real Property Law § 223-a contemplates.[8]

3.4 *Holdover*. If Tenant holds over after the Term then, without limiting Landlord's other rights and remedies, Tenant shall Indemnify Landlord regarding that holding over. Without limiting Tenant's liability under the previous sentence, Tenant shall Indemnify Landlord against any loss Landlord suffers because, as a result of Tenant's holding over, the next tenant of the Premises fails to take possession of the Premises or Landlord is otherwise in default, or incurs any incremental obligations, under that next tenant's lease.[9]

3.5 *Mitigation of Damages*. Notwithstanding anything to the contrary in this Lease or governing law, if Tenant defaults then Landlord has no obligation to mitigate its damages or to seek to relet.[10]

3.6 *Right of Redemption*. Tenant waives any right of redemption under Real Property Actions and Proceedings Law § 761.

3.7 *Security*. To the extent General Obligations Law § 7-103 requires: (a) Landlord shall deposit the Security in an account at a bank with a place of business in the State; (b) if the Building contains six or more family dwelling units, then that account shall earn interest at the prevailing rate earned by similar deposits with banks in the State; (c) Tenant acknowledges that Landlord has Notified[11] Tenant that Landlord shall deposit the Security at _____ Bank located at _____; (d) if the Security is deposited in an interest-bearing account, then Landlord shall be entitled to receive, as administration expenses, 1% per annum of the Security; and (e) any other interest paid by the bank shall belong to Tenant and Landlord shall hold it in trust until repaid, applied to Rent or annually paid to Tenant.[12]

3.8 *Waiver of Stay*. Tenant expressly waives, for itself and anyone claiming by or through Tenant, any rights under Civil Practice Law and Rules § 2201, for any holdover proceeding or other action or proceeding on this Lease or Tenant's rights in the Premises.

3.9 *Window Cleaning*. Tenant shall not clean, nor require, permit, suffer or allow anyone else, to clean, any window from the outside in violation of Law.[13]

3.10 *Zoning Lot Waiver—Space Lease*. Tenant, and anyone claiming through Tenant: (a) is not a "party in interest" as defined in New York City Zoning Resolution § 12-10 (definition of "zoning lot"); and (b) shall promptly on demand execute and acknowledge any document Landlord reasonably requests to confirm that or as Landlord reasonably requires so Landlord can combine the Land with any other real property as a zoning lot, or subdivide the Land from any zoning lot.

4. Leases (Special Cases)

Only some leases will require the additional clauses collected here. Endnotes offer local color on some of these clauses and when they might apply.[14] Some of these clauses might apply to all leases, but don't always appear.

4.1 *Acceptance of Rent*. If Landlord accepts any payment from Tenant after the Term expires, then Landlord shall credit it against any damages that Tenant may owe Landlord. By accepting that payment, Landlord shall not be deemed to have reinstated this Lease or to have agreed to continue or accept Tenant's tenancy or occupancy on any basis whatsoever. This paragraph constitutes "an agreement...providing otherwise" within the meaning of Real Property Law § 232-c.[15]

4.2 *ACP-5 Form.* If legally required, Landlord shall, reasonably soon after Landlord has approved Tenant's plans and specifications for Tenant's Initial Work, give Tenant an ACP-5 form showing Tenant's Initial Work is not an "asbestos job."[16]

4.3 *Depository Agreement.* Any Depository Agreement for Loss Proceeds shall require Depository to comply with the Lien Law, including: (a) a Lien Law trust fund covenant; and (b) compliance with any trust obligations under Lien Law § 70(5)(f).[17]

4.4 *Fee Estate Conveyance*. During any Construction by Tenant known to Landlord, Landlord shall immediately Notify Tenant of any conveyance of Landlord's interest in the Premises. Tenant shall, to the extent Law requires, comply with General Obligations Law § 5-322.2(1), which requires the "owner" of a building under Construction to notify the contractor, by certified mail, within five days after any conveyance of the underlying land.[18]

4.5 *Insurance*. Tenant's liability insurance shall not exclude, restrict or limit coverage for claims from injuries to employees under Labor Law § 240 or 241, or related or similar provisions.

4.6 *Landmarks Preservation*. The Premises are subject to jurisdiction of the New York City Landmarks Preservation Commission ("LPC"). As required by New York City Administrative Code, Title 25, Chapter 3 and Rules of the City of New York Title 63 (collectively, "LPC Law"), Tenant shall not in any way alter the Premises, as defined in LPC Law, without first complying with LPC Law. Tenant shall ascertain and comply with LPC Law requirements. Nothing in this paragraph limits any other Alteration restrictions in this Lease.[19] Tenant shall promptly correct or at Landlord's option reimburse Landlord's cost to correct any threatened or actual violation of LPC Law Tenant causes.

4.7 *Lien Law Trust Fund.* In compliance with Lien Law § 13, Landlord shall receive the consideration for this conveyance and hold the right to receive that consideration as a trust fund to be applied first to pay any cost of improvement to the Property for which Landlord is responsible.[20] Landlord will apply that consideration first to pay for that cost of improvement before using any part of it for any other purpose.[21]

4.8 *Modifications to Memorandum of Lease*. If the parties record a Memorandum of Lease, they shall execute, acknowledge and record an amendment to that Memorandum of Lease promptly after any amendment of this Lease, even if it changes nothing in the Memorandum of Lease.[22]

4.9 *No Implied Consent to Remaining in Possession.* If, after Tenant's default in payment of Rent or under any notice from Landlord demanding payment of Rent or possession of the Premises, Landlord accepts any Rent payment, partial or complete, that shall not constitute Landlord's "express consent in writing to permit the tenant to continue in possession" within the meaning of Real Property Actions and Proceedings Law § 711(2).[23] Landlord shall not be deemed

to have waived its right to commence and prosecute summary proceedings against Tenant under the Real Property Actions and Proceedings Law on that basis.[24]

4.10 *Prohibited Use*. As used in this Lease, the words "obscene" and "material" shall have the same meanings as in Penal Law § 235.00.[25]

4.11 *Sidewalks*. For any sidewalk this Lease requires Tenant to maintain or repair, Tenant shall perform Landlord's obligations, and shall Indemnify Landlord against any liability, under New York City Administrative Code § 7-210 and -211. Tenant shall maintain all insurance the cited sections require, naming Landlord as an additional insured.

4.12 *Stale Rent*. Tenant waives any right it might have to assert or claim a limit on the amount (or accrual period) of unpaid Rent that Landlord may seek to collect in a summary proceeding under Real Property Actions and Proceedings Law Article 7. If Tenant has failed to pay Rent for more than one month and believes or intends to assert that Tenant may suffer prejudice because of Landlord's failure to promptly exercise its remedies under this Lease for that nonpayment, Tenant shall Notify Landlord and ask Landlord to promptly exercise those remedies. Tenant assumes responsibility to fund appropriate reserves to prevent any surprise or prejudice that Tenant might otherwise suffer from any accumulation of unpaid Rent. Nothing in this paragraph limits Landlord's rights or remedies.[26]

4.13 *Summary Dispossess*. Nothing in this Lease limits Landlord's right to commence and prosecute a summary dispossess proceeding under Real Property Actions and Proceedings Law Article 7.

4.14 *Transfer Taxes.* Landlord shall pay all New York City and State transfer taxes (with interest and penalties, if any, the "Transfer Taxes"), due because of creation of this Lease. The parties shall reasonably cooperate on any Transfer Tax filings and documentation, each at its own cost. Each party shall pay any Transfer Taxes from any Transfer of its interest in this Lease. The party responsible for payment of Transfer Taxes shall control any response to any audit or other government communication on Transfer Taxes. The other party shall reasonably cooperate with any such audit or other communication, at its own cost.[27]

4.15 *Untimely Exercise*. If this Lease gives Tenant any Option(s), Tenant acknowledges that if Tenant fails to exercise an Option in the Option Exercise Period, Landlord would inevitably suffer prejudice if Landlord were required to honor Tenant's untimely exercise. The amount of prejudice may be difficult or speculative for Landlord to establish. It could include, for example, Landlord's possible loss of the ability to relet the Premises to a new tenant of Landlord's choice at then-current market rates; expenditure of Landlord's time to seek replacement tenant(s) or to prepare the Premises for reoccupancy; costs of brokers; and other costs, expenses and expenditure of time, of Landlord. Tenant recognizes that Landlord's prejudice may not be demonstrable or provable in court. In recognition of that prejudice, if any court requires Landlord to accept an Option exercise outside the Option Exercise Period, then Landlord may require that the Rent under this Lease be adjusted to equal then-current fair market rent.[28]

4.16 *Zoning Lot Waiver – Ground Lease*. Tenant and every Party-in-Interest claiming through Tenant irrevocably waives any right(s) it may have regarding any zoning lot merger or transfer of Development Rights relating to the Land, including any rights Tenant or any such Party-in-Interest may have to be a party to, to enter into, to execute or to consent or object to, any TDR Document.[29] A "Party-in-Interest" means each party-in-interest as defined in New York City Zoning Resolution ("ZR") § 12-10 (definition of "zoning lot"), as listed in a Certification of Parties in Interest certified by a title insurance company. A "TDR Document") means any of these now or later affecting the Land, as Landlord reasonably requests: (a) Declaration of Restrictions as defined in the ZR; (b) zoning lot development agreement; (c) other document to cause the Land to be merged with, or subdivided from, a zoning lot under the ZR; (d) other certificate, document or instrument of a similar nature and purpose; or (e) a consent, subordination or waiver relating to any of the documents just listed. Any TDR Document shall: (w) not directly or indirectly impair any right of Tenant under this Lease (the "Permitted Development"), including Development Rights allocated to Tenant under this Lease and Tenant's right (whether or not exercised) to develop, rebuild and occupy the Premises for the uses, building envelope and bulk this Lease allows;[30] (x) impose no affirmative obligations on Tenant, except temporary arrangements to accommodate adjacent or nearby construction at no cost or interference to Tenant and obligations not exceeding Tenant's obligations under this Lease; (y) require the owner of each of the other tax lots within a TDR Document to promptly correct any code violation within its tax lot;[31] and (z) otherwise be on ordinary and customary terms.[32] This Lease shall be subject and subordinate to any TDR Document that complies with the previous sentence. Except for Permitted Development, Tenant has no right to any unused development rights, rights to construct "floor area," or comparable rights for the Land (collectively, "Development Rights"). Tenant consents to Landlord's utilization or transfer of all unused Development Rights.

5. Mortgages and Loan Documents – Base Case

Any New York mortgage or other loan document will typically contain a few State-specific paragraphs and disclosures, summarized below. Beyond those paragraphs and disclosures, the entire document structure will need to reflect some unusual provisions of New York law, which this article does not address beyond mentioning them here.

Any mortgage that secures a refinancing of an existing loan will masquerade as an "amendment and restatement" of the existing mortgage being refinanced, to mitigate the State's mortgage recording tax. For substantial commercial transactions in New York City, that tax is 2.8% of any "new money." This requires a series of nonsubstantive affidavits, assignments and other documents, which are almost always worth the trouble.

A construction loan requires two or three sets of loan documents instead of just one, with some additional bells and whistles.

The requirements of the last two paragraphs mean that any New York commercial mortgage loan, especially for construction, will require an inordinate number of documents unnecessary anywhere else. Beyond complying with those requirements, the loan documents should also include some or all of the following provisions.

5.1 *Appointment of Receiver*. Borrower covenants that the holder of this Mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.[33] Borrower waives, and authorizes Lender to waive, any requirement that a receiver post a bond. Any receiver shall have the fullest powers authorized by law.

5.2 *Assignment*.[34] If Borrower obtains mortgage financing secured by the Mortgaged Property and the proceeds of that financing suffice to repay the Loan in full,[35] then in place of delivering a satisfaction of this Mortgage in exchange for payment, Lender shall, at Borrower's request given at least ___ days before closing,[36] deliver to the new lender (in exchange for a payment equal to all sums this Mortgage then secures) an assignment of this Mortgage, and an endorsement of the Note (accompanied by the original Note or a lost note affidavit in reasonable and customary form), all in form reasonably satisfactory to Lender and Borrower's refinancing lender.[37] That assignment shall be in recordable form. The assignment and endorsement shall be made without recourse, representation, or warranty, except any ordinary and customary assurances Lender provides in any lost note affidavit.[38] When Lender assigns the Mortgage as this paragraph requires, Lender shall automatically be released from any remaining obligations and liabilities under the Loan Documents. Borrower shall pay all reasonable costs and expenses, including reasonable attorneys' fees, Lender incurs in preparing and delivering those documents or, at Lender's option, reviewing those documents prepared by Borrower or its counsel.[39] Lender need not provide any affidavit or assurance under Real Property Law § 275.

5.3 *Fixture Filing*. This Mortgage is also recorded as a "fixture filing" under Uniform Commercial Code § 9-102(a)(40). It covers goods that are or are to become fixtures related to the Mortgaged Property. For that fixture filing: (a) Lender is secured party; (b) Borrower is debtor; (c) their addresses appear in the preamble of this Mortgage and (d) the collateral consists of the Mortgaged Property, to the extent it constitutes fixtures. [A record owner of the Mortgaged Property is: _____.][40]

5.4 *Lease-Related Restrictions*. This Mortgage shall operate as the agreement described in Real Property Law § 291-f. Lender shall have the benefits of that statute.[41] Borrower shall, in each case, under documents satisfactory to Lender: (a) deliver notices under Real Property Law § 291-f to such Tenants as Lender requires, consistent with Real Property Law § 291-f, and demonstrate to Lender that Borrower did so; (b) direct each such Tenant that if Lender instructs it to do so, it shall pay its Rents as Lender directs; and (c) take such other action, as Lender now or later requires, to give Lender all protections and benefits of Real Property Law § 291-f. Borrower also authorizes Lender at any time to take any action Real Property Law § 291-f contemplates without Borrower's further joinder or confirmation.[42]

5.5 *Lien Law Covenant*. This Mortgage is made subject to the trust fund provisions of Lien Law § 13. Borrower shall receive all monies and advances secured by this Mortgage and hold the right to receive those advances as a trust fund. Mortgage shall apply that trust fund first to pay the cost of improvement before using any part of those advances for any other purpose.[43]

5.6 *Maximum Principal Indebtedness*. Notwithstanding anything to the contrary in this Mortgage, the maximum aggregate principal amount of indebtedness that is, or under any contingency may be, secured by this Mortgage (the "Secured Amount") is the sum of (1) $_____ plus (2) amounts that Lender expends after a declaration of default[44] under this Mortgage, to the extent that any such amounts constitute payment of: (a) taxes, charges or assessments imposed by law on any Mortgaged Property; (b) premiums on insurance policies for any Mortgaged Property; (c) expenses incurred in upholding the lien of this Mortgage, including any litigation to prosecute or defend the rights and lien this

Mortgage creates; or (d) any amount, cost or charge to which Lender becomes subrogated, on payment, whether under recognized principles of law or equity, or under express statutory authority; then, and in each such event, this Mortgage shall secure payment of those amounts or costs.[45]

5.7 *Mortgage Interpretation; Real Property Law § 254, 271 and 272*. The covenants and conditions of this Mortgage shall be construed to give Lender rights additional to, and not exclusive of, any conferred by Real Property Law §§ 254, 271 and 272. These provisions of Real Property Law § 254 shall, however, in no event apply: (1) subsection "4" on use and application of insurance proceeds; and (2) the part of subsection "4-a" that begins with the word "however" and continues to the end of the paragraph. This Mortgage governs where inconsistent with Real Property Law § 254, 271 or 272.

5.8 *Nonresidential Real Property*. This Mortgage does not cover real property principally improved or to be improved by one or more structures containing in the aggregate not more than six residential dwelling units each having its own separate cooking facilities.[46]

6. Mortgages and Loan Documents—Special Cases

These provisions will only sometimes appear in New York mortgages or other loan documents, either because they are unusual or apply only under certain circumstances. Some should always appear, but often don't, just because they are arcane or forgotten.

6.1 *Additional Advances*. In accordance with Real Property Law § 281, except as Lender elects otherwise in writing, this Mortgage shall secure, subject to the limitations on secured amount in this Mortgage, in addition to any indebtedness or obligation this Mortgage secures at the Closing Date, any and all future obligations and future advances that Lender may make (within 30 years after recording of this Mortgage) under the Loan Documents, including protective advances (all, collectively, "Future Advances"'). Future Advances may or may not be evidenced by separate notes executed under any loan or credit document. This Mortgage shall, except as Lender elects otherwise in writing, secure all Future Advances, with no need for any amendment, supplement or modification to this Mortgage, whether the Future Advances are "optional" or "obligatory," all to the same extent and with the same priority as if Lender had made them on the Closing Date. As Real Property Law § 281 contemplates, this Mortgage secures indebtedness under a note, credit agreement or other financing agreement that: (a) reflects the fact that the parties reasonably contemplate entering into a series of advances and (b) limits the aggregate amount at any time outstanding to the maximum amount this Mortgage states.[47]

6.2 *Mortgage Recording Tax*. Borrower shall pay, and Indemnify Lender against, all mortgage recording tax due for this Mortgage; any audits or claims related to that tax; and any interest and penalties for nonpayment.[48]

6.3 *Power of Sale*. If an Event of Default occurs, then Lender may, either with or without entry or taking possession of the Mortgaged Property, personally or by its agents or attorneys, and without prejudice to the right to bring an action to foreclose this Mortgage, sell the Mortgaged Property or any part of it through any procedures under law, including any non-judicial sale procedures available from time to time, and all estate, right, title, interest, claim and demand in, and right of redemption of, at one or more sales as an entirety, or in parcels, and at such time and place upon such terms and after notice as law permits or requires.[49]

6.4 *Streit Act.* If this Mortgage is a "mortgage investment" under Real Property Law § 125, then Lender shall have all powers, and shall perform all duties, of a trustee under Real Property Law § 126.[50]

6.5 *Transfer Tax*. Borrower shall pay, and Indemnify Lender and any grantee for, any: (a) New York City or State transfer taxes arising from any foreclosure, deed in lieu of foreclosure, or other divestiture[51] of Borrower's title to the Mortgaged Property directly or indirectly through Lender's exercise of remedies under the Loan Documents ("Transfer Taxes"); (b) audit or claim by any governmental authority on Transfer Taxes; (c) interest and penalties for failure to pay Transfer Taxes; and (d) reasonable attorneys' fees of enforcing this Indemnity.[52]

6.6 *Unused Development Rights; TDR Documents; Floor Area*. The Mortgaged Property includes, as part of the Land, the right to construct floor area on the Land, including by causing a zoning lot to contain the Land and other land (all those rights, collectively, the "Development Rights"). Borrower shall not without Lender's prior written consent (which Lender may withhold for any reason or no reason) or as the Loan Documents expressly allow: (a) encumber Development Rights except in favor of Lender[53]; (b) use or allow use of any Development Rights anywhere except on the Land[54]; (c) amend, modify or enlarge any agreement by which Development Rights were transferred to or from the Land (a "TDR Document"); or (d) exercise any right or take any action (or fail to exercise any right or to take any action) under any TDR Document that would or could (i) impair or limit any right to incorporate or use Development Rights on the

Land; (ii) move any Development Rights away from the Land or (iii) limit permitted use of any Development Rights at the Land.

7. Purchase and Sale Agreements

When a New York buyer and seller negotiate a purchase and sale agreement, they may want to include a few provisions driven by State law and practice. None are mandatory. Their absence will typically not create issues. But buyers and sellers often expect to see them. Outside the four corners of the Contract, Real Property Law § 294 allows a buyer to record a memorandum of the Contract.[55] Buyers usually don't exercise that right, partly because of the logistical tedium associated with recording any document, absent a special reason to do so, e.g., an early release of the Contract deposit from escrow, a very long closing period or a disreputable seller. If the buyer does insist on recording a memorandum of contract, the seller may ask that the buyer sign and place in escrow a release of the memorandum. That seems excessive, given the limited effect and duration of a memorandum.

7.1 *Assignment of Existing Mortgages.* To the extent that as of the Contract Date any mortgages encumber the Property and their aggregate principal amount does not exceed the Purchase Price, Seller shall [use commercially reasonable efforts to][56] cause the mortgagee(s) to assign those mortgages and the secured debt at Closing to an assignee that: (a) Buyer designates in writing at least ___ days before Closing; and (b) acquires those mortgage(s) in exchange for a payment equal to all sums they then secure. Any mortgage(s) actually assigned at Closing under the previous sentence shall constitute "Permitted Exception(s)." For any such assignment Buyer shall: (i) reimburse Seller's attorneys' fees or other costs; and (ii) pay promptly on request any fees, including an application fee, assignment fee and reasonable attorneys' fees, charged by the assignor.[57] Nothing in this paragraph implies Buyer's obligations under this Contract are subject to financing. Any mortgages not assigned to Buyer's designee do not constitute Permitted Exceptions.

7.2 *Bulk Sales Compliance (Practical Alternative)*. Buyer waives compliance with any bulk sales statute, including any bulk sales clearance requirements under the Tax Law. Seller shall Indemnify[58] Buyer on Seller's failure to comply with any bulk sales requirements.[59]

7.3 *Bulk Sales Compliance (Technically Correct Alternative)*. At least 15 Business Days before the Scheduled Closing Date, Buyer shall deliver to Seller a completed New York State Department of Taxation and Finance ("Tax Department") Form AU-196.10. Seller shall review and reasonably approve (or specify reasonable objections to) that form within five Business Days after receipt. After resolution of the Form,[60] Buyer shall deliver it to the Tax Department as required. If, when, as, and to the extent the Tax Department requires, Buyer shall: (a) withhold part of the Purchase Price at Closing and (b) deliver the withheld amount to the Tax Department.

7.4 *Governmental Notices.* Seller represents and warrants it has received no written notice that: (a) the New York City Landmarks Preservation Commission is considering calendaring or designating the Property, or has done so; or (b) the Property may be subject to rent control, rent stabilization, mandatory rent arbitration or any other form of rent regulation.[61]

7.5 *Real Estate Taxes and RPIE*. Seller represents and warrants that Exhibit __ consists of accurate and complete copies of all New York City Real Property Income and Expense Statements (each, an "RPIE") Seller filed in the two years before the Contract Date.[62] Seller shall timely file any RPIE required to be filed before Closing. If Seller or a prior owner failed to file any RPIE when required,[63] then Seller shall pay all resulting additional taxes, fines, penalties and interest. This paragraph shall survive Closing for 30 months,[64] notwithstanding any other survival period in this Contract.

7.6 *Risk of Loss.* For General Obligations Law § 5-1311[65], a "material part" of the Property means any part of the Property whose absence would reasonably be expected[66] to either: (a) reduce annual net operating income by more than __%; (b) cost more than __% of the Purchase Price to correct; or (c) affect more than ___ square feet of the Property or any means of access to the Property.

7.7 *Transfer Taxes (Buyer Pays)*. Buyer shall be responsible for, and shall Indemnify Seller on: (a) payment of any New York City or State transfer taxes due on conveyance of the Property (the "Transfer Taxes"); (b) any additional Transfer Taxes incurred because of Buyer's payment in clause "a"; (c) any audit or claim by any governmental authority on Transfer Taxes; and (d) interest and penalties for failure to pay Transfer Taxes.[67]

7.8 *Transfer Taxes (Seller Pays)*. Seller shall pay and Indemnify Buyer regarding: (a) any New York City or State transfer taxes due on conveyance of the Property (the "Transfer Taxes"); (b) any audit or claim on Transfer Taxes; and (c) interest and penalties for failure to pay Transfer Taxes.[68]

8. Any Document

8.1 *Consumer Contract Statutes*. This Agreement is not a "consumer contract" within the meaning of General Obligations Law § 5-327, or any other Law that applies only to transactions for personal, family or household purposes.[69]

8.2 *Disputes*. If any litigation arises over this Agreement: (a) if that litigation is heard in the Commercial Division, New York State Supreme Court, then the parties agree to application of the Court's accelerated procedures, Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division § 202.70(g), Rule 9)[70] and (b) the parties shall promptly enter into and submit to the court, with a request to be "so-ordered," a Stipulation and Order for the Production and Exchange of Confidential Information as promulgated by the New York City Bar Association Committee on State Courts of Superior Jurisdiction.[71]

8.3 *Governing Law*. New York internal law, disregarding any law on conflict of laws, governs this Agreement and any claims arising under it or from the parties' relationship, whether in contract, in tort or otherwise, regardless of the location of any real property.[72]

8.4 *Non-Business-Days*. If this Agreement requires Obligor to pay any sum on any day that is not a Business Day then, notwithstanding any Law to the contrary, including General Construction Law § 25,[73] Obligor shall not be credited for that payment until the date Obligor actually pays it.

8.5 *Notarial Acknowledgment Form*

STATE OF NEW YORK)
)
COUNTY OF _____)
)
_____

On the _____ day of _____ in the year 201__, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument[74] and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.[75]

8.6 *Notices*. Any attorney may give notice on behalf of his or her client.[76]

INDEX OF DEFINED TERMS

The author, Joshua Stein, chaired the Real Property Law Section for the year ending in May 2006. For more information on the author, visit www.joshuastein.com. The author acknowledges with thanks helpful contributions made by Andrew Herz, Richard Fries and Caroline Harris; his legal staff, Deborah Goldman, James Patalano and Lauren Silk and his managing editor, Karen Lively. Blame only the author for any errors or omissions. Please forward along any additions, corrections, improvements or suggestions.

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Endnotes

1. This language would apply to a guaranty of completion. It refers to arcane principles arising under the New York Lien Law, establishing some counterintuitive trust relationships and draconian consequences for violations. N.Y. Lien Law art. 3-A (McKinney 2016).
2. Under Civil Procedure Law and Rules § 3213, claimants may, instead of filing and serving a summons and complaint, start an action by serving a summons with a motion for summary judgment when that action is "based upon an instrument for the payment of money only." This may save time. It may also cost time by creating new issues. N.Y. C.P.L.R. § 3213 (McKinney 2016). Would the suggested language mitigate those issues? Perhaps.
3. Real Property Actions and Proceedings Law § 1301 concerns a Lender's ability to both foreclose on the mortgaged property and to enforce a personal claim against a Borrower or guarantor. Generally, when the mortgaged property is located in New York a Lender must elect to proceed first with foreclosure or enforcement of a personal claim, but not both at once. Section 1371 limits a Lender's ability to obtain a deficiency judgment. Traditionally these restrictions have applied only to real property collateral located in New York. Well-reasoned out-of-state cases suggest the restrictions should apply whenever New York law governs a loan. So far the New York courts have not gotten there, but this could change. The suggested language might help a Lender, though a goal-oriented court might ignore it. N.Y. Real Prop. Acts. Law §§ 1301, 1371 (McKinney 2016).
4. New York law gives Landlords no statutory lien or "distraint" right. If they want one, they must create it under the Uniform Commercial Code. N.Y. U.C.C. § 9-109 (McKinney 2016). Only then would it make sense for a Tenant to ask a Landlord to agree to waive or subordinate any such lien. Nothing about that waiver or subordination would be specific to New York. 52A C.J.S. Landlord & Tenant § 1410 (2016).
5. The document should say, once, that an Event of Default exists only until Tenant has cured it and maybe Landlord has accepted the cure. This avoids the need to refer repeatedly to an "uncured Event of Default."
6. Tenant will often negotiate for more than five days.
7. This paragraph responds to New York landlord-tenant "jurisprudence" that allows Landlord to bring a summary proceeding against a Tenant only if a Lease terminated by its terms, not if Landlord exercised a direct right to terminate. N.Y. Real Prop. Acts. Law § 711 (McKinney 2016). The distinction is rather arcane but drives much landlord-tenant jurisprudence in New York.
8. N.Y. Real Prop. Law § 223-a (McKinney 2016).
9. It has become standard to require New York tenants, if they hold over, to indemnify their landlords against the "loss" of the next tenant of the Premises as a result of holdover. This began with a court case allowing such a recovery against a law firm that didn't move out when it should have. *See Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd.*, 35 A.D.3d 317, 318, 829 N.Y.S.2d 7, 9 (1st Dep't 2006). Tenant can reasonably argue that Landlord's next lease with the next tenant, if "standard," should contain language relieving Landlord of the risk, such as the standard language on "Delivery of Premises" offered in this article. Nevertheless it is usually a landlord's market in New York. Sometimes the parties compromise by saying the holdover tenant does not become responsible for "loss" of the next tenant until the holdover has continued for some time, e.g., 30 days. Just how does one measure that "loss"?
10. This language is not statutory, just customary. It universally appears in New York commercial leases, except sometimes very large or Tenant-friendly leases. Although New York law does not require commercial landlords to exercise commercially reasonable efforts to relet at market rates, a customary measure of damages in any lease—the one that will most likely apply in most cases—does give Landlord a reasonable incentive to do exactly that.
11. The statute may require Landlord to give this Notice only after the Security has been deposited. If so, Landlord must remember to give a separate Notice after the fact. N.Y. Gen. Oblig. Law § 7-103 (McKinney 2016).
12. This paragraph just restates New York law, so it doesn't seem strictly necessary, but many Tenants ask for it and it's a good reminder for Landlords. *Id.*
13. Labor Law § 202 prohibits certain window washing techniques. N.Y. Lab. Law § 202 (McKinney 2016). Lease language often refers to that specific section, "or any other Law, including the rules of the New York City Board of Standards and Appeals." It is apparently not enough to say Tenant must comply with all laws generally.
14. As another New York-specific commercial leasing issue, if Landlord and Tenant disagree on whether certain defaults exist under a Lease, this dispute often results in a temporary restraining order or preliminary injunction to prevent Landlord from terminating the Lease, a so-called "Yellowstone injunction." The need for such an injunction arises from a somewhat arcane glitch in New York's landlord-tenant statute. N.Y. C.P.L.R. § 6301 (McKinney 2016). That glitch has existed for at least 50 years. With a Yellowstone injunction in place, the court resolves the disagreement on whether a Lease default exists, and the parties proceed accordingly. This would all work very well if the courts resolved the dispute quickly. Instead, the "status quo" gets preserved for an extraordinarily long time. This strange dynamic has achieved almost constitutional stature in New York. Great legal minds often struggle to craft language to make the "Yellowstone" process work better, or not at all, but no "standard" language exists to solve the problem. Landlord-tenant courts would probably laugh at it anyway.
15. N.Y. Real Prop. Law § 232-c (McKinney 2016).
16. This paragraph applies in New York City assuming the usual allocation of responsibility on asbestos. To prepare and sign an ACP-5 form, Landlord first needs to see Tenant's plans and specifications. Tenant will often try to set a short deadline, e.g., 5 days.
17. The literal requirements of the Lien Law require this. It affects/afflicts only ground leases, which rarely mention it. N.Y. Lien Law § 70(5)(f) (McKinney 2016).
18. That's what the words of the statute require. No available cases interpret the statute. The statute says nothing about consequences of any violation. N.Y. Gen. Oblig. Law § 5-322.2(1).
19. New York City has a very extensive landmarks preservation program. For a substantial percentage of properties in the City, particularly in Manhattan, LPC acts as a second buildings department, with power to approve even the smallest change in a building. For example, if someone wants to install a sign in a landmarked building, the approvals process requires far more work than the sign. If LPC has landmarked only the exterior of a building, then delete the words "within or" in the second sentence. New York, N.Y., Admin. Code tit. 25, ch. 3 (LEXIS 2016); New York, N.Y., R.C.N.Y. tit. 63 (LEXIS 2016).
20. N.Y. Lien Law § 13(3) (McKinney 2016).
21. This language would typically apply only to a ground lease.
22. New York law requires these additional recordings. Failure to record means the undisclosed Lease amendment does not bind third parties. Once the parties have decided to record a Memorandum of Lease, they then bear the burden of recording notice of any Lease amendment, whether or not germane to anything the Memorandum disclosed. Though this requirement sounds bizarre, it isn't really; it means that once the parties have chosen to "go public," anyone who searches the public record can rely on the public record. This may give Tenants a reason to disfavor Memoranda of Lease, especially after taking possession,

because possession puts all parties on notice of all of Tenant's rights. A Memorandum of Lease becomes unnecessary and potentially dangerous if the parties amend the Lease and forget to amend the Memorandum of Lease. Tenants typically do not record Memoranda of Lease, except for: (a) ground leases; (b) very large or institutional leases or (c) leases with significantly delayed delivery of possession. N.Y. Real Prop. Law § 291-c (McKinney 2016).

23. N.Y. Real Prop. Acts. Law § 711(2) (McKinney 2016).

24. This is a possible "overkill" provision designed to respond to occasional cases inferring that Landlord agreed to allow a defaulting Tenant to remain in possession.

25. N.Y. Penal Law § 235.00(1), (2) (McKinney 2016).

26. Courts have used "stale rent" as a basis to kick Landlords out of court, though more often in residential than commercial cases. Failure to pay, continued long enough without action by Landlord, results in no further obligation to pay. This paragraph seeks to respond to that jurisprudence. Rather than use this language, Landlord would be well advised not to allow "stale rent" to accrue. *Marriott v. Shaw*, 151 Misc. 2d 938, 940, 942, 574 N.Y.S.2d 477, 480, 481 (1991).

27. Space leases do not ordinarily attract Transfer Taxes. New York State imposes a tax on ground leases and some other leases. New York City taxes "key money," regardless of Lease duration. N.Y. Tax Law § 1201 (McKinney 2016). Landlord has the legal obligation to pay Transfer Taxes. If Tenant pays them, that payment constitutes more "consideration," as if Tenant paid Landlord's credit card bill to induce Landlord to enter into the lease, and attracts more Transfer Tax.

28. This paragraph is nonstandard. It responds to New York cases allowing late exercise of Options based on the theory that late exercise causes no prejudice to Landlord. Whether or not an Option already contemplates fair market Rent, then perhaps Landlord should collect a fee for its trouble in dealing with any late exercise.

29. Landlord and Tenant will often negotiate some other arrangement for Development Rights, such as: (a) Tenant can bring them to the Land, and Landlord must sign TDR Documents; (b) TDR Documents cannot cause anyone to incur obligations regarding other real property; (c) Landlord can pay for any Development Rights Tenant brings to the Land, with Rent adjustment; (d) Landlord cannot transfer unused Development Rights to other land; (e) either party can sell unused Development Rights and the other must sign TDR Documents toward that end; and (f) one party grants another a power of attorney to sign TDR Documents. This paragraph provides the vocabulary and starting point for any of these arrangements. They will also require help from counsel experienced with zoning and ground leases, which can become very tricky. If either party ever needs the other to cooperate on any TDR Documents, substantial time pressure will often exist, so the parties may want to build in some monetary incentives.

30. The concept of Permitted Development assumes the Lease allows Tenant to use certain Development Rights, but others remain available and Landlord can sell them. That is just one of many possible permutations, and not necessarily the most likely one. But it provides a reasonable starting point.

31. When TDR Documents combine multiple tax lots into a single zoning lot, a major code violation on one of the "other" tax lots in the zoning lot could impair development anywhere in the zoning lot. That cannot be avoided, but (a) in general, the risk arises only for major code violations, not minor ones; and (b) TDR Documents can address it.

32. This last clause could create trouble and disputes. If a transfer of Development Rights could become important, the parties may want to go into more detail, attach forms or have a dispute resolution mechanism. Landlord will want the right to "reasonably approve" any TDR Document.

33. Real Property Law § 254(10) says the preceding sentence must be construed to mean essentially this:

> If any Event of Default exists, Lender may apply for and obtain appointment of a receiver of the Mortgaged Property. Lender may do so as a matter of right and without regard to, or any need to disprove, the adequacy of the security for the Secured Obligations. Lender may have a receiver appointed without notice to Borrower.

For that reason, Lender should include the exact language suggested in text just before this footnote, although that will not necessarily assure quick appointment of a receiver. Also, Lender's counsel may worry that the Legislature will modify § 254(10) or that it is somehow not clear enough or that a court might not believe it. In that case, Lender's counsel would include more extensive language as suggested above in this footnote. Beyond dealing with appointment of a receiver, Real Property Law § 254 goes much further. It allows a Lender to record a very short mortgage, in which each sentence is tailored to the rules of construction in Real Property Law § 254. Based on that mechanism, a "New York mortgage" could consist almost entirely of the short-form language that Real Property Law § 254 contemplates. Most Lenders use their own forms of mortgage, ignoring the statute. N.Y. Real Prop. Law § 254(10) (McKinney 2016).

34. This paragraph is driven by New York State's mortgage recording tax, as introduced in the opening paragraph of this section. This paragraph is Borrower-friendly. Most Lenders accept it. Those who don't may look forward to future opportunities for leverage or revenge. Unless the loan documents require it, Borrower has no legal right to an assignment upon refinancing.

35. Lender may want to say Borrower loses the right to an assignment if Borrower: (a) is in default; (b) is in default beyond applicable cure periods; or (c) has ever been in default at any time in the preceding __ months. Borrower would respond by saying (a) any such limit is "off market", and (b) if the refinancing cures the default, as it usually will, Lender has no basis to punish Borrower and in fact should be pleased to assist.

36. Prior notice seems reasonable. In practice these requests often arise at the last minute because Borrower doesn't think about the issue until then, particularly for a financing where New York real property constitutes only incidental collateral.

37. Borrower may want to ask Lender to agree to make limited representations and warranties: (a) Lender holds the Note and Mortgage; (b) Lender has not already assigned them to anyone else, except assignments that have terminated; (c) the outstanding principal balance (possibly); and (d) the person signing the assignment has authority to do so. If Lender later decides to make life difficult for Borrower (e.g., because Borrower made life difficult for Lender), then Lender may refuse to give any representations or warranties whatsoever. Hence, Borrower might want to require them in advance in the documents. Even at that stage, Lender may refuse.

38. For a syndicated financing, the loan documents should not only require the lead Lender to assign the mortgage, but also each Lender in the group to endorse its note, if it receives one. Otherwise, the Borrower may find itself at the mercy of one or two banks that do not want to cooperate. Even if all the other banks in the group agree to cooperate, Borrower's inability to obtain an assignment of just one or two pieces of the loan may frustrate Borrower's ability to claim any mortgage recording tax credit at all, depending on the structure of the syndicated loan documents. Syndicated loans and lenders tend to approach financing from a practical and business-driven perspective. They sometimes don't adequately consider the vagaries of New York mortgage recording tax.

39. The "old" Lender will typically terminate all Loan Documents except the Mortgage and Note, subject to survival of any indemnities in the Loan Documents, even if the "old" Lender

assigns the Note and Mortgage to a "new" Lender. If the same Borrower remains in place, the next Lender may worry about lingering liabilities of that Borrower.

40. This paragraph is not strictly state-specific but appears because any New York local counsel reviewing a Mortgage will want to see it. Uniform Commercial Code § 9-502(b)(4) says a financing statement, including a mortgage filed as one, must: "if the debtor does not have an interest of record in the real property, provide the name of a record owner." N.Y. U.C.C. § 9-502(b) (McKinney 2016). If Borrower holds only a leasehold, even if the parties recorded a memorandum of lease, the parties often identify the fee owner of the property here. Hence the bracketed language.

41. Real Property Law § 291-f allows a lender to restrict lease amendments and rent prepayments by certain commercial tenants, giving the Lender by statute some benefits of a non-disturbance agreement. First, the Mortgage must contain those restrictions. Second, the Lender must give a Tenant notice of those restrictions. Third, the Tenant must have a remaining Lease term of at least five years. N.Y. Real Prop. Law § 291-f (McKinney 2016).

42. Borrower may want to give the 291-f notices, allegedly to try to prevent issues with Tenants. If Lender accommodates that request, Lender will want to make sure Borrower actually delivers the notices.

43. This language can help preserve priority of the Mortgage against later mechanics' liens. Purchase money mortgages do not need it. Construction loan mortgages do need it, but also much more, beyond the scope of this article.

44. The language on "declaration of default" is important. Not just any Lender advances qualify.

45. Although this language is somewhat awkward, the tax authorities have blessed very similar language.

46. This language should appear on the cover of the Mortgage so a recording clerk can find it easily. It helps the clerk decide if the mortgage qualifies for certain small mortgage recording tax discounts, which do not apply to commercial transactions, and in allocating mortgage recording tax revenue depending on the property location.

47. For a substantial loan, Borrower may prefer to record (and pay mortgage recording tax) on separate mortgages for Future Advances only when made. The use of multiple mortgages can also give Lender meaningful extra flexibility in enforcement if the Loan goes into default, if Lender also holds any guaranty of the Loan. N.Y. Real Prop. Law § 281(2) (McKinney 2016).

48. Lender may wish to obtain this assurance from the Guarantor, as well as by obtaining a $25 endorsement to Lender's policy of title insurance.

49. This paragraph reflects New York's non-judicial foreclosure statute, which was largely written and spearheaded by Richard S. Fries of the New York City real estate bar. It applied only to commercial real property and created a balanced, intelligent and "fair" process for judicial foreclosure. N.Y. Real Prop. Acts. Law § 1403 (McKinney 2016). It lapsed during the Financial Crisis of 2008/2009. At that moment in economic history, the Legislature did not want to renew any statute that simplified any foreclosures, even just commercial ones. The Legislature has not changed its mind. Id. Many New York mortgages still include non-judicial foreclosure language, in the hope that if the State revives non-judicial foreclosure, the mortgage will already qualify for it. There is no reason to think that will be the case. Thus this language is an early candidate for deletion. New York continues to set national records for the duration of judicial foreclosure actions, even if uncontested.

50. This statute gives junior participants in a Mortgage certain rights and protections. Though often disregarded, those rights and protections often vary from industry expectations as embodied in a typical junior/senior participation agreement. A well written participation agreement will waive as much as possible in Real Property Law § 126.

51. If Lender receives an equity pledge, then a foreclosure sale under that equity pledge will usually also trigger Transfer Taxes.

52. Lender may wish to obtain this assurance from a creditworthy guarantor.

53. As a practical matter, Borrower would have great difficulty pledging unused Development Rights to any other lender. There are ways to do it, but not very well. If Borrower contemplates any such separate pledge, this language will require adjustment.

54. Borrower's development strategy may contemplate exactly such a transfer of Development Rights. That will require adjustment of the language, preceded by Lender's careful underwriting analysis.

55. N.Y. Real Prop. Law § 294 (McKinney 2016).

56. Buyer's financial model may assume Buyer will achieve the mortgage tax savings an assignment would yield. If Buyer does not achieve those savings, Buyer may want to adjust the purchase price. From Buyer's perspective, it may not suffice for Seller to "try" or even "try really hard" to achieve a mortgage assignment. Sellers, in contrast, typically try to treat a mortgage assignment as a matter of grace and kindness—trying to do a wonderful favor for Buyer.

57. Seller may want to be paid for this accommodation, such as 50% of Buyer's mortgage recording tax savings. Conversely, Buyer may think Seller should pay any transaction costs for the assignment, as part of delivering the total package of value Buyer is paying for—not just deigning to do Buyer a favor.

58. This indemnity will have little value coming from the typical Seller, particularly given the relatively long exposure period. It will be worth even less if Seller seeks to treat this indemnity the same as a representation or warranty subject to a limited claims period, floors, caps and other complexity.

59. This paragraph describes customary practice on bulk sales compliance. Sometimes a Buyer will want to escrow some sales proceeds for sales tax exposure, particularly with an operating business. The next paragraph describes how the parties are "supposed to" deal with bulk sales compliance. The author is not aware of any circumstance where waiving bulk sales compliance led to any loss or issue, even though the statute makes the Buyer responsible for the Seller's unpaid sales tax if the parties don't file.

60. This Form requires filing a copy of the Contract with the Tax Department. Few Buyers and Sellers like the idea of sharing their Contract with the Tax Department, a requirement that has nothing to do with the stated purpose of bulk sales clearance.

61. Clause "b" refers to a massive statutory scheme, nearly unique to New York City, where government agencies have determined the rents landlords can charge for certain apartments for over half a century. New York, N.Y., Admin. Code § 26-501 (LEXIS 2016). Anyone acquiring a New York City rental apartment building should engage counsel with special expertise in this type of building. It requires unique due diligence as well as tailored Contract language, which cannot be distilled into a few clauses.

62. New York City law requires the owner of certain income-producing real property to file, by June 1, a report of income and expenses for the previous calendar year. The City uses this information to determine the assessment of the property for real estate tax purposes, with an overall goal of capturing in real estate taxes about a quarter to a third of the owner's gross revenue. New York, N.Y., Admin. Code § 11-208.1 (LEXIS 2016).

63. Seller may want to limit this obligation to the period of Seller's ownership.

64. The City has two years to assess these fines and penalties. New York, N.Y., Admin. Code § 11-208.1 (LEXIS 2016).

65. GOL § 5-1311 states that Seller retains the risk of any "material" (undefined) loss until Buyer takes possession or closes. After a "material" loss, Seller cannot enforce the Contract. After any other loss, Buyer gets a price adjustment. The parties can contract around the statute. N.Y. Gen. Oblig. Law § 5-1311 (McKinney 2016). The language suggested in text offers one possible definition

of "material." The parties may prefer some other definition, especially if Buyer plans to redevelop the Property. Or they might leave "material" undefined and deal with it if it ever becomes relevant – saving some legal fees in their negotiations in exchange for bearing a small risk of a dispute later—in which case, delete this paragraph entirely.

66. Either party would like to make the determination, in its reasonable judgment. The parties can add a dispute resolution procedure.

67. By statute Seller has primary liability for Transfer Taxes, but if Seller doesn't pay, Buyer has secondary liability. N.Y. Tax Law § 1404 (McKinney 2016). Thus, Buyer should care about any positions Seller takes and Seller's creditworthiness. If Buyer pays Transfer Taxes otherwise payable by Seller, that's deemed additional taxable consideration, just as if the Contract required Buyer to pay Seller's restaurant bill. The intricacies of Transfer Tax rules mean the parties can save a few pennies by having Buyer pay Transfer Taxes and adjusting Purchase Price accordingly.

68. *Id.*

69. Ordinarily the nature of the transaction will be obvious. In those cases, this paragraph seems unnecessary. If uncertainty exists, this paragraph might help, but a court will probably still reach its own conclusion. So should counsel. Many special requirements apply to consumer contracts. For example, General Obligations Law § 5-327 says that if any consumer contract requires a consumer to pay the other party's legal fees, then that obligation automatically becomes mutual. N.Y. Gen. Oblig. Law § 5-327 (McKinney 2016).

70. These procedures, the so-called "Rocket Docket," seek to limit discovery and streamline the litigation process. Ordinarily whichever party favors quick resolution of a dispute will want the special procedures to apply. They are by no means "industry standard" yet. N.Y. Unif. R. for Trial Cts. (22 N.Y.C.R.R.) § 202.70(g) (LEXIS 2016).

71. In any business litigation, though the parties will disagree on the facts, the law and other things, they will usually agree they want to preserve confidentiality. Thus they may already have every incentive to enter into a stipulation of this type. Still, the language suggested here may make sense, though it is not "market standard."

72. If a transaction involves only New York real property and only parties located in New York, why might any other state's possibly apply? That is a great question. But most New York contracts do expressly choose New York law. They often also include a consent to jurisdiction and a consent to venue, both with generic language rather than anything New-York-specific.

73. This statute allows payment on the next business day, but requires calculation of interest as if the payment were made on the non-business-day when due. For a large loan, the difference could matter. N.Y. Gen. Constr. Law § 25 (McKinney 2016).

74. Domestic Relations Law § 236B(3) requires a prenuptial agreement to be acknowledged in the same manner as a deed. N.Y. Dom. Rel. Law § 236B(3) (McKinney 2016). The Court of Appeals, the State's highest court, invalidated an otherwise issue-free prenuptial agreement because its acknowledgment lacked the phrase starting with "personally" and ending with "instrument." See Galetta v. Galetta, 21 N.Y.3d 186, 193-94, 969 N.Y.S.2d 826, 830 (2013).

75. Any recordable document needs a notarial acknowledgment. For any other document, an acknowledgment may avoid some issues of proof. An acknowledgment does not prevent fraud. Real Property Law § 309-a(1) prescribes the language offered here but also expressly allows other language that "conforms substantially" to the statutory language. N.Y. Real Prop. Law § 309-a(1) (McKinney 2016). The author has resisted that invitation to create a Plain English form of acknowledgment. If the signer signs out of state, Real Property Law § 309-b(1) requires the same form of acknowledgment, with the jurat at the beginning adjusted to indicate the jurisdiction where the signing occurred. N.Y. Real Prop. Law § 309-b(1) (McKinney 2016). Real Property Law § 309-a(2) and 309-b(2) offer a special form of acknowledgment for signature by a subscribing witness. N.Y. Real Prop. Law §§ 309-a(2), -b(2) (McKinney 2016).

76. An unfortunate New York case held that attorneys could not give notice on behalf of their client because the notice recipient bargained for notice from the counterparty, not the attorney; hence this sentence. That case has been widely ignored. *Siegel v. Kentucky Fried Chicken of Long Island, Inc.*, 108 A.D.2d 218, 67 N.Y.2d 792, 793 (2nd Dep't 1985).

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The Sound and the Fury: The Law of Noise in Rental, Cooperative and Condominium Housing

By Adam Leitman Bailey and Dov Treiman

As New York City experiences ever denser housing, the problems of noise resound ever more clearly. The noise has gotten louder for many reasons. First, more families have chosen to reside in this City, and one of the loudest and unrepresented groups of violators has been screaming children. Second, newly constructed buildings are built with more glass and less insulation and other materials that would block the noise making—thus, noise travels farther and louder. Third, to use every inch of the home, owners are altering their units to remove the guts of the residence, making noise protections disappear. Fourth, many noise problems can be treated with wall to wall insulated carpeting in all places except for the bathrooms and kitchen. However, many residents refuse to carpet their homes, and many rental, cooperative and condominium leases and bylaws do not effectively require such means of carpeting in their leases, or bylaws or house rules.[1] As a result, noise complaints have become one of the most popular complaints and noise litigation has spiked. Like the flash of a neon light,[2] this article attempts to explain the noise laws and remedies in New York.

Because rental buildings and cooperatives are a form of rental housing, noise issues speak to the warranty of habitability, which are generally, but not exclusively, enforceable in the Housing Court. Condominiums, in which each unit is a separate piece of real estate and there is no landlord-tenant relationship, find noise controversies heard only in the Supreme Court, generally by way of injunctive action, although such actions are available in cooperatives as well.

Three sets of law govern noise in *all* dwellings in New York City: municipal ordinances regarding noise, municipal ordinances regarding construction, and the common law of nuisance. Because of the essential landlord-tenant nature of cooperative dwelling, the warranty of habitability governs there as well.

The Noise Control Code

Sound is something that is scientifically absolute and measurable with the methods of science. Noise can be defined like a weed, "an unwelcome intrusion." However, The Noise Control Code[3] does not deal with the subjective factors that make a particular sound unpleasant to one person and pleasant to another (such as the sound of a passing train) but rather measures sound levels in scientifically absolute terms: frequencies and decibels.[4] Its main objective is to limit excessive and unreasonable sounds that would be a menace to the health, comfort, and welfare of city-dwellers, regardless of the type of building they live in.[5] Bowing to the subjective nature of noise, The Noise Code varies its limitations of unreasonable sounds, depending on the hour of the day. It also limits the days and times construction can take place, the level of sounds air conditioners and circulation devices may cause, and the permissible times that animals may cause noise.[6]

Architectural Isolation

The most common noise problem in residential housing is neighbor-to-neighbor noise, especially upstairs/downstairs neighbors where the floor that is supposed to *isolate* noise from traveling to the apartment below actually acts like a violin sound box and *amplifies* the sound. NYC Building Code §27-769 requires the "acoustical isolation of dwelling units."[7] While modern concrete slab floor buildings readily pass these requirements, the thousands of wooden-floored buildings in the City often fail, as do many walls, regardless of the composition of the flooring, and the abatement measures the law requires are expensive. Naturally, cooperatives and condominiums seek to pass these costs to the individual unit owners, but by law, both the Board and the unit owners are responsible for the units' compliance with law.[8]

Nuisance

While case law establishes that municipal violations are not a prerequisite to establishing private nuisance,[9] Noise Code violations are generally *prima facie* nuisances.[10] Experience teaches that while police are trained to detect that a barking dog or a television violates noise laws, it is generally a matter of pure luck when a building inspector detects that a unit violates the acoustical isolation requirements. However, several acoustical engineers in the City specialize in making just such determinations and are available as expert witnesses, although it may require a court order to get the access for them to perform their necessary tests.

Courts are generally hostile to noise claims. For example:

> It has long been well established that "apartment-house living in a metropolitan area is attended with certain well-known inconveniences and discomforts" and one cannot expect a noise-free environment. "The peace

> and quiet of a rural estate or the sylvan silence of a mountain lodge cannot be expected in a multiple dwelling."[11]

And, the Court of Appeals has stated that "not every intrusion will constitute a nuisance. 'Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other…. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors and confusion incident to city life.'"[12]

Private Nuisance

To establish noise as a *prima facie* private nuisance, a plaintiff must show an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, and (4) caused by another's conduct in acting or failure to act.[13] "Intent" means that the actor was acting for the purposes of causing the interference, or knows that the interference was resulting or substantially certain to result from his or her conduct.[14] The objectionable conduct must also be characterized by a pattern of continuity or recurrence in order to constitute a nuisance.[15] The First Department has also sustained dismissals of the Housing Part where the record lacked proof that there was "excessive or unreasonable noise."[16]

A frequent remedy for private nuisance is an award of compensatory damages. However, for most unit owners, this is cold comfort. Most unit owners do not want to be paid for the noise they have suffered so much as they want an injunction against the continuing of the noise—whether that be by cessation of noisy conduct (something very hard to enforce) or by construction of noise-suppressing walls, ceilings, and floors (something very expensive). Typical governing documents require 80% carpeting for this very reason, but if the fundamental construction is flawed, other more aggressive improvements will be necessary, like, for example, floating floors *under* the carpeting.[17]

In *Brown v. Blennerhasset Corp.*,[18] the occupants complained of the neighboring unit producing noise including heavy footsteps, snoring, and a dishwasher. The First Department held that such noises were not unreasonable as they were incidental to normal occupancy. However, because the plaintiff's expert stated that the noise could not be abated via carpeting or padding because the penetration of noise was attributable to the construction of the building, the Court granted leave to amend the complaint so as to allege breach of the warranty of habitability against the cooperative corporation. If there were proof of violation of §27-769, the Court should have awarded an injunction mandating the amendment of the building so as to isolate the noise.

Recently in *150 West 21st LLC v. Doe*,[19] the First Department found there are was no "actionable nuisance." Here, the landlord brought the action against tenants that allegedly made a "handful of complaints over the course of more than one year" to the upstairs neighbor. The Court found that this "did not constitute a recurring or continuing pattern of objectionable conduct that threatens the comfort and safety of others in the building," and that the landlord failed to submit evidence to support the allegations.[20]

In the case of rentals, the First Department has held that where landlord had surrendered control of the unit to another tenant who was causing the nuisance, a cause of action for nuisance could not be sustained against the landlord because the landlord did not create the nuisance.[21] However, that speaks to the generation of the noise, not architectural failure to sufficiently prevent its transmission.

While condominium boards are not subject to the implied warranty of habitability, condominium boards are required, pursuant to RPL 339(v)(1)(i), to include by-law provisions "that are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners."[22] Unit owners can therefore obtain relief from noise interference through private nuisance claims and injunctive relief.

Warranty of Habitability

Unlike condominiums, cooperatives and rental units *are* bound by the statutory Warranty of Habitability.[23] They are required to ensure that there is no unreasonable interference with shareholders' and tenants' ability to use their premises for residential purposes.

In *Kaniklidis v. 35 Lincoln Place Housing Corp.*,[24] the plaintiff-shareholders of a cooperative complained over the course of several years of noise from heavy walking, banging, and a washer-dryer coming from the apartment above. The plaintiffs brought suit, alleging that the co-op "breached warranty of habitability, the proprietary lease, and the covenant of quiet enjoyment, which constituted a private nuisance."[25] However, the Second Department held that showing numerous complaints alone is not enough and that "plaintiffs failed to show that the noises they complained of were so excessive that they were deprived of the essential functions that a residence is supposed to provide."[26] Similarly, in *Armstrong v. Archives LLC*,[27] the First Department found that the trial court erred in granting summary judgment for the tenant because there were material issues of fact as to "whether the alleged noise emanating from the neighboring apartment was 'so excessive that [plaintiff was] deprived of the essential functions that a residence is supposed to provide.'"[28]

In contrast, the plaintiffs in *Nostrand Gardens Co-Op v. Howard*[29] were successful in establishing their claim that

the landlord breached the warranty of habitability and obtaining an abatement of rent. The plaintiffs provided evidence showing the nature, scope, and duration of the breach and that the noise emanating from the apartment neighboring the tenant was excessive and occurred during unreasonable hours.

Where liability is found for breach of warranty of habitability, the "measure of damages is the difference between the fair market value of the premises if they had been as warranted and the value of the premises during the period of the breach."[30] In cooperatives, these numbers tend to be vastly lower than in conventional landlord-tenant housing.

Condominiums: Nuts and Bolts

Utilizing expert testimony and conducting sound tests is helpful in establishing liability. In the case of *Hohenberg v. 77 W. 55th St. Associates*,[31] the plaintiffs resided in the unit as tenants until the building was converted into a condominium. As such, the board of managers became responsible for common areas of the building. The plaintiffs showed that they made numerous complaints to the board and that they expended a considerable amount of money to change the layout of the apartment to ameliorate the penetrating noise and vibration. The Court found that the board failed to take actions to correct the interference complained of and awarded damages to the plaintiffs.[32] Similarly, in *JP Morgan Chase Bank v. Whitmore*,[33] the owner of a condo unit produced expert testimony. The Second Department accepted the unit owner's expert testimony and awarded damages in her favor.

It is important to note that motions to compel sound testing should include facts that indicate that such testing is "material and necessary."[34] In the case of *Constantiner v. Sovereign Apartments, Inc.*,[35] the plaintiffs moved for the court to compel defendants to allow a bed and area rug to be temporarily removed to allow for sound testing. The First Department affirmed the denial of the motion on the grounds that removal of the bed required disassembly. The Court found that the plaintiffs failed to establish that removal of the bed and rug was "material and necessary, as it would not provide evidence of any noise conditions as they actually exist."[36]

Conclusion

Courts have been hostile to noise complaints. While there are several possible theories with which to frame various claims for relief, only the most extreme cases are going to see any relief actually granted. Plaintiffs are going to have to be prepared for expensive litigation, using expensive and highly specialized expert witnesses. However, if the Plaintiffs overcome these hurdles, the Defendants can find the litigation extremely expensive and the physical mitigation of the problem even more so.

Endnotes

1. To see a properly drafted, effective and tested carpeting provision drafted by the authors for Blumberg Excelsior, Inc, go to https://www.blumberglegalforms.com/Forms/59.pdf, paragraph 20(p). or http://alblawfirm.com/forms/.
2. The Sounds of Silence, Simon & Garfunkel, Columbia Records, 1964, Recorded at Columbia Studios in New York City, written in Queens, New York.
3. N.Y. City Admin. Code tit. 24, ch. 2, § 201 (Westlaw 2016).
4. *See* N.Y. City Admin. Code tit. 24, ch. 2, § 218 (Westlaw 2016).
5. *See* N.Y.C. Dep't of Envtl. Prot., *A Guide to New York City's Noise Code: Understanding The Most Common Sources of Noise in the City*, 1 (2014), available at http://www.nyc.gov/html/dep/pdf/noise code guide.pdf (last visited on September 2, 2016).
6. *See* N.Y. City Admin. Code tit. 24, ch. 2, §§ 222, 227, 235 (Westlaw 2016).
7. N.Y. City Bldg. Code tit. 27, ch. 12, § 769, 289 (2014), http://www.nyc.gov/html/dob/downloads/bldgs_code/bc27s12.pdf.
8. *See* N.Y.C. Admin. Code § 27-232 (an owner includes "any other person having legal ownership or control of premises").
9. *See* 61 W. 62 Owners Corp. v. CGM EMP LLC, 77 A.D.3d 330, 334, 906 N.Y.S.2d 549 (1st Dep't 2010).
10. *See* Bd. of Mgrs. of the 257 W. 17th St. Condos. v. 257 Assoc. Borrower LLC, 2015 N.Y. Misc. LEXIS 142, 15, 2015 N.Y. Slip Op 30072U (Sup. Ct., New York County 2015)
11. Mariani v. Rogers, 25 Misc. 3d 1206(A), 901 N.Y.S.2d 907, 2009 N.Y. Slip Op 51984U (N.Y. City Ct., 2009).
12. Nussbaum v. Lacopo, 27 N.Y.2d 311, 315, 265 N.E.2d 762317, N.Y.S.2d 347 (1970) (quoting Campbell v. Seaman, 63 N.Y. 568, 569 (1876)).
13. Berenger v. 261 W. LLC, 93 A.D.3d 175, 182, 940 N.Y.S.2d 4 (1st Dep't 2012) (quoting Copart Indus. v. Consol. Edison Co., 41 N.Y.2d 564, 570 (1977)).
14. *Id.*
15. Tsangarinos v. Attaway, 43 Misc. 3d 142(A), 993 N.Y.S.2d 646 (Sup. Ct. App. T. 1st Dep't 2015).
16. Frankel v. 71st St. Lexington Corp., 46 Misc. 3d 149A, 13 N.Y.S.3d 850 (Sup. Ct. App. T. 1st Dep't 2014).
17. Floating floors absorb sound, shock, and vibration by having a sandwich of flooring, absorbers like springs or rubber, and another layer of floor.
18. Brown v. Blennerhasset Corp., 113 A.D.3d 454, 979 N.Y.S.2d 27 (1st Dep't 2014).
19. 150 W. 21st LLC v. Doe, 50 Misc. 3d 140A, 31 N.Y.S.3d 922 (Sup. Ct. App. T. 1st Dep't 2016).
20. *Id.*

21. Bernard v. 345 E. 73rd Owners Corp., 181 A.D.2d 543, 581 N.Y.S.2d 46 (1st Dep't 1992).
22. N.Y. Real Prop. Law § 339(v)(1)(i) (McKinney 2016).
23. N.Y. Real Prop. Law § 235(b) (McKinney 2016).
24. 305 A.D.2d 546, 759 N.Y.S.2d 389 (2d Dep't 2003).
25. *Id.*
26. *Id.*
27. Armstrong v. Archives LLC., 46 A.D.3d 465, 847 N.Y.S.2d 583 (1st Dep't 2007).
28. *Id.* at 465, 847 N.Y.S.2d at 584.
29. Nostrand Gardens Co-Op v. Howard, 221 A.D.2d 637, 634 N.Y.S.2d 505 (2d Dep't 1995).
30. *Id.* at 638 (citing *Park West Mgmt Corp. v. Mitchell*, 47 N.Y.2d 316, 329, 391 N.E.2d 1288, 1295, 418 N.Y.S.2d 310, 317).
31. Hohenberg v. 77 W. 55th St. Associates, 118 A.D.2d 418, 499 N.Y.S.2d 83 (1st Dep't 1986).
32. *Id.* at 419.
33. JP Morgan Chase Bank v. Whitmore, 41 A.D.3d 433, 43, 838 N.Y.S.2d 142, 144 (2d Dep't 2007).
34. Constantiner v. Sovereign Apartments, Inc., 126 A.D.3d 532, 2 N.Y.S.3d 897 (1st Dep't 2015).
35. *Id.*
36. *Id.*

Adam Leitman Bailey is the founding partner of Adam Leitman Bailey, P.C. Dov Treiman is a partner at the firm.

The Real Property Law Section is now accepting applications for its two law student scholarships in the amount of $5,000 each. The scholarships will be awarded in 2017.

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2013 – Leanne Monique Welds
2014 – no scholarship awarded
2015 – no scholarship awarded
2016 – David Ullman—Columbia Law School

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United States Supreme Court to Review "Parcel as a Whole" Concept

By Daniel M. Lehmann

On January 15, 2016, the Supreme Court of the United States granted certiorari from *Murr v. State of Wisconsin*.[1] As a result, the Court will be considering whether the "parcel as a whole" concept of *Penn Central Transportation Company v. City of New York*[2] establishes a rule in regulatory takings cases that two legally distinct, but commonly owned, contiguous parcels must be combined for takings analysis purposes.

Penn Central

In *Penn Central*, the United States Supreme Court considered "whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation.'"[3]

There, New York City, under its Landmarks Preservation Law, designated Grand Central Terminal, which was owned by plaintiff Penn Central, a landmark and the city tax block Grand Central occupied a landmark site.[4] Penn Central subsequently applied to the Landmarks Preservation Commission for permission to construct a 55-story office building to be cantilevered above the existing façade and to rest on the roof of Grand Central.[5] Penn Central also applied for permission to construct a 53-story office building on a portion of the Grand Central site.[6]

The Commission rejected both applications. Penn Central sued, arguing that the application of the Landmarks Preservation Law had taken its property without just compensation in violation of the Fifth Amendment. The trial court held for Penn Central, the Appellate Division reversed,[7] and the Court of Appeals affirmed.[8] The United States Supreme Court affirmed.

The Court's decision is well known for clarifying the test for how far is "too far"[9] for a regulation's restrictions. As the Court explained in *Penn Central*, the test requires an "ad hoc" factual inquiry considering factors of the economic impact of the regulation, its interference with distinct investment-backed expectations, and the character of the government action.

In considering Penn Central's argument that the Landmarks Law deprived Penn Central of any gainful use of its air rights above Grand Central, the Court stated that to agree would mean that it erred, not only in previously upholding laws restricting the development of air rights, but also in approving those prohibiting both the subjacent and the lateral development of particular parcels.[10]

The Court dismissed Penn Central's argument and reasoned that, amongst other things, the Court must consider the nature and extent of the interference with rights in the parcel as a whole, explaining that

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site.[11]

No Clear Guidance or Definition on What Is the Parcel as a Whole

In *Keystone Bituminous Coal Association v. DeBenedictis*,[12] Pennsylvania passed an act to prevent coal mine subsidence caused by the extraction of underground coal. The act contained a section that required 50% of the coal beneath applicable structures to be kept in place in order to provide surface support.[13]

The petitioners stated that Pennsylvania law recognized a "support estate" in land, in addition to the "mineral estate" and "surface estate," and argued that the 50% rule of the act constituted a taking of their property (the physical coal and the entire destruction of the property's support estate) without compensation in violation of the Fifth Amendment.

The United States Supreme Court disagreed. It stated,

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.[14]

The Court quoted *Penn Central*'s "parcel as a whole" reasoning and also reasoned, "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking because the aggregate must be viewed in its entirety."[15] Though these reasons did not solve all of the definitional issues that may arise in defining the relevant mass of property, these reasons underpinned the Court's rejection of the petitioners' arguments that the taking of its physical coal constituted a compensable taking. The Court held that, under the investment-backed expectation prong of *Penn Central*, there was "no basis for treating the less than 2% of petitioners' coal as a separate parcel of property."[16]

The Court also rejected the petitioners' support estate argument. The Court stated that

> the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface. Because petitioners retain the right to mine virtually all of the coal in their mineral estates, the burden the Act places on the support estate does not constitute a taking. Petitioners may continue to mine coal profitably even if they may not destroy or damage surface structures at will in the process.[17]

Five years later, in *Lucas v. South Carolina Coastal Council*,[18] the Court again avoided the difficult issue of determining what is the "denominator of the fraction," although the Court observed that "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court."[19]

The Court again confronted this issue in *Palazzolo v. Rhode Island*,[20] but ultimately did not decide it. In *Palazzolo*, Rhode Island effectively regulated the petitioner Palazzolo's undeveloped beachfront properties as coastal wetlands, which greatly limited development. The petitioner brought an inverse condemnation action, arguing that the wetlands regulations had taken his property without compensation in violation of the Fifth Amendment.[21]

To revive the *Penn Central* economic impact prong of his claim by reframing it, the petitioner argued for the first time that the upland parcel of his property was distinct from the wetlands portions, so he should be permitted to assert a taking limited to the wetlands portions of his property. Addressing this argument, and referring to *Penn Central*, the Court stated,

> This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole,[22] but we have at times expressed discomfort with the logic of this rule,[23] a sentiment echoed by some commentators.[24]

However, the Court did not decide the issue because the petitioner did not make the argument in the state courts and did not present the issue in the petition for *certiorari*. Instead, "The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails."[25]

The Court last mentioned "the parcel as a whole" in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[26] The Tahoe Regional Planning Agency issued two moratoria that virtually prohibited all development on Lake Tahoe for a period of 32 months. The petitioners claimed that the moratoria constituted a *per se* taking of property without compensation under the Fifth Amendment.[27]

Specifically, the petitioners sought to frame the case under the *per se* taking rule by arguing that the Court could "effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria."[28] The Court rejected the petitioners' argument. The Court began by noting that it must focus on *Penn Central*'s "the parcel as a whole" and on *Andrus v. Allard*'s[29] "full bundle of property rights."[30] The Court then concluded that "Petitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.' We have consistently rejected such an approach to the 'denominator' question."[31] Thus, the Court found that the property could not be disaggregated into temporal segments corresponding to the moratoria and then analyzed to determine whether the petitioners were deprived of all economically viable use during each period.[32] Justice Thomas, in the footnote in his dissent, noted his puzzlement at the majority's decision to embrace the "parcel as a whole" doctrine as settled.[33]

Murr v. State of Wisconsin

The Murrs' parents purchased Lot F, a parcel of land on the St. Croix River, in 1960. They built a cabin on it. In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which was left undeveloped. The Murrs' parents transferred Lot F to the Murrs in 1994 and Lot E in 1995. This brought the lots under common ownership and resulted in a merger of the two lots under a mid-1970s local ordinance, which prohibited individual development or sale of adjacent lots under common ownership unless an individual lot has at least one acre of net project area. But, if abutting commonly owned lots do not contain one acre, the ordinance provides that the abutting lots together suffice as a single, buildable lot. Combined, Lots E and F contain approximately .98 acres of net project area.

The Murrs sought a variance to separately use or sell their two contiguous lots. The zoning board denied their application, the Wisconsin trial court affirmed, the Wisconsin appellate court affirmed, and the Wisconsin Supreme Court denied the petition for review.

Subsequently, the Murrs filed a complaint arguing that the local ordinance effected a taking without compensation. Specifically, they argued that the ordinance deprived them of practically all of the use of Lot E because it could not be sold or developed as a separate lot. They did not include any claim for the taking of Lot F. The Wisconsin trial court rejected the Murrs' complaint. The Murrs argued to the Wisconsin appellate court that the trial court erred by examining the beneficial uses of Lots E and F in combination and that "there [wa]s a genuine issue of material fact as to whether Lots E and F were used together such that they may be considered as one for purposes of the regulatory takings analysis."

The Wisconsin appellate court, citing the Wisconsin Supreme Court, stated that "the issue of whether contiguous property is analytically divisible for purposes of a regulatory takings claim was settled[.]"[34] "[B]efore considering whether a regulatory taking has occurred, 'a court must first determine what, precisely, is the property at issue[.]'"[35]

The Murrs argued that the Wisconsin Supreme Court case was distinguishable "because that case turned on the owner's ability to use one large parcel, whereas the Murrs assert[ed] they have been wholly deprived of the use of at least one of their two separate parcels."[36]

Quoting *Penn Central*'s "parcel as a whole," the appellate court rejected this argument. "There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, contiguousness is the key fact[.]"[37] It is well-established in the state that "contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."[38] As there was no dispute that the Murrs' property sufficed as a single, buildable lot under the local ordinance, the appellate court held that the Murrs were not deprived of all economic use and there was no taking.[39] The Wisconsin Supreme Court denied the petition to review.

Conclusion

The United States Supreme Court has its work cut out for it in determining whether Lots E and F, two separate parcels, created, purchased, and taxed as legally separate lots, purchased for different reasons and never developed together, should be considered as "the parcel as a whole" when anyone else other than the Murrs would be permitted to develop Lot E because of the separate, and not common, ownership exception under the local ordinance.

Endnotes

1. 859 N.W.2d 628, 359 Wis. 2d 675 (2014), *rev. den'd*, 366 Wis. 2d 59, 862 N.W.2d 899, *cert. granted*, 136 S. Ct. 890 (2016).
2. 438 U.S. 104, 130-131 (1978).
3. *Id.* at 107.
4. *Id.* at 104.
5. *Id.* at 116.
6. *Id.* at 117.
7. 50 A.D.2d 265, 377 N.Y.S.2d 20 (1st Dep't 1975).
8. 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977).
9. *Pennsylvania Coal Company v. Mahon* expanded the protection of the Fifth Amendment Takings Clause, holding that just compensation was also required for a regulatory taking, a restriction on the use of property that went "too far." 260 U.S. 393, 415 (1922).
10. 438 U.S. at 130, citing *Welch v. Swasey*, 214 U.S. 91 (1909), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and *Gorieb v. Fox*, 274 U.S. 603 (1927).
11. *Id.* Justice Stevens, in his dissent of *Dolan v. City of Tigard*, called this the nondivisibility principle. 512 U.S. 374, 401 (1994).
12. 480 U.S. 470 (1987).
13. *Id.* at 470.
14. *Id.* at 497 (internal quotation marks and citation omitted).
15. *Id.*, quoting *Andrus v. Allard*, 444 U.S. 51 (1979).
16. *Id.* at 471.
17. *See also Concrete Pipe and Prod. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993) (citations omitted).
18. 505 U.S. 1003 (1992).
19. *Id.* at 1054; *See also id.* at 1016-17, n. 7 (comparing *Pennsylvania Coal Company v. Mahon*, holding law restricting subsurface extraction of coal effected a taking, to *Keystone Bituminous Coal Association v. DeBenedictis*, holding nearly identical law did not effect a taking). *Lucas* created the rule that where a regulation deprives land of all economically beneficial use, it is a *per se* taking requiring just compensation.
20. 533 U.S. 606 (2001).
21. *Id.* at 606.

22. *Id.* at 631, citing *Keystone*, 480 U.S. at 497.
23. *Id.*, citing *Lucas*, 505 U.S. at 1054.
24. *Id.*, citing Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 16-17 (1987); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994).
25. *Id.* at 609.
26. 535 U.S. 302, 326-27, 331 (2002).
27. *Id.* at 302.
28. *Id.* at 303.
29. 444 U.S. 51 (1979).
30. *Tahoe-Sierra,* 535 U.S. at 326-27.
31. *Id.*
32. *Id.* Instead, the Court's analysis should start by asking whether there was a total taking of the entire parcel, and if not, then use the *Penn Central* framework.
33. *Id.* at 355 (Thomas, J., dissenting).
34. *Murr v. State*, 859 N.W.2d 628, 359 Wis. 2d 675 (2014), citing *Zealy v. City of Waukesha*, 201 Wis. 2d 365 (1996).
35. *Id.* at 628.
36. *Id.*
37. *Id.* at 630.
38. *Id.*
39. *Id. But see*, *e.g.*, *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 458 (Mass. 2006) (conflicting with Wisconsin); *City of Coeur D'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002) (conflicting with Wisconsin); *Dep't of Transp., Div. of Admin. v. Jirik*, 498 So. 2d 1253 (Fla. 1986) (conflicting with Wisconsin); *Palm Beach Isles Ass'n v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (conflicting with Wisconsin); *Am. Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981) (conflicting with Wisconsin).

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N.Y. Real Property Law Journal

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