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## REAL ESTATE E-BRIEF

### Estoppel Certificates: Estop Questioning My Lease

Landlords and tenants often need a way to verify for third parties the current existence and status of a lease. An estoppel certificate is a certification by one party to a lease of certain facts relating to the lease. In its most basic form, an estoppel certificate involves the landlord or tenant summarizing the basic terms of the lease and certifying to an identified third party that the lease is in full force and effect, that the lease agreement constitutes the entire lease agreement between the parties, and that neither party is in default under the lease. The effect of the estoppel certificate is to affirm the terms of the lease and to prevent or “estop” the party signing it from later contradicting, disputing or recanting the statements contained therein.

A landlord often requests a tenant estoppel certificates when the landlord is financing, refinancing or selling the underlying property. Lenders and buyers will often list this as a requirement of the transaction. In fact, most commercial leases contain a provision concerning the tenant’s duty to provide an estoppel certificate at the landlord’s request. However, an estoppel certificate might also be requested from the landlord when a tenant seeks to sublease or assign its interest or is seeking a business loan or leasehold mortgage.

Lease provisions concerning estoppel certificates come in

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many varieties, from a generic description to attaching a prescribed form to the lease. While an estoppel certificate lease provision may not be the focus during lease negotiation, the language describing the parties' rights and obligations with respect to estoppel certificates is important as it often determines the minimum requirements with which the parties must comply. The following offers some specific considerations for landlords and tenants negotiating a tenant estoppel certificate provision.

The Landlord's Perspective: A Landlord may want to include the following:

- Require the tenant to provide a signed estoppel certificate **upon request** by the landlord and make failure to do so a breach of the lease.
- Set forth **minimum requirements** for an estoppel certificate that are sufficient to satisfy most potential lenders or purchasers.
- Require the tenant to sign and return any required estoppel certificate within a **specified time period** and that the failure to do so may trigger a default under the lease or other remedies.

The Tenant's Perspective: A Tenant may want to negotiate the following:

- Limit the landlord's right to request an estoppel certificate to **certain situations**.
- Closely **examine the nature and extent** of the certifications required in an estoppel certificate. For example, the tenant may seek to specifically limit the matters to which the tenant will certify or seek to qualify certain certifications with respect to the "tenant's actual knowledge" or similar language.
- Avoid language **deeming the tenant to have signed** an estoppel certificate or authorizing the landlord to sign an estoppel certificate on behalf of the tenant as

the tenant's attorney-in-fact.

- Attempt to **limit remedies** available to the landlord upon tenant's failure to provide an estoppel certificate.
- Incorporate language **obligating the landlord** to provide an estoppel certificate upon tenant's request.

Additional considerations come into play when an estoppel certificate is actually requested. **Whether you are the landlord or the tenant, legal counsel can be a valuable resource when negotiating the terms of the estoppel certificate provision in a lease and preparing an estoppel certificate in performance of your obligations.**

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