



# Office Leasing: Agreement of Lease (Pro-landlord Long Form NY)

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The following subordination clause is excerpted from a Standard Document on our website for a long-form agreement for the leasing of office space in a multi-tenant office building, drafted in favor of the landlord. Though an office lease is primarily governed by state and local laws, the information contained in this resource is useful and relevant to landlords and tenants in every state. This Standard Document has integrated notes with important explanations and drafting and negotiating tips.

## AGREEMENT OF LEASE

### ARTICLE VIII

#### SUBORDINATION

**8.01 Subordination.** This Lease shall be subject and subordinate to each and every Master Lease and to each and every Mortgage. This clause shall be self operative and no further instrument of subordination shall be required from Tenant to make the interest of any Lessor or Mortgagee superior to the interest of Tenant hereunder; however, Tenant shall execute and deliver promptly any instrument[, in recordable form,] that Landlord, any Lessor or Mortgagee may request to evidence and confirm such subordination. If the date of expiration of any Master Lease shall be the same day as the Expiration Date, the Term shall end and expire twelve (12) hours prior to the expiration of the Master Lease. Tenant shall not do anything that would constitute a default under any Master Lease or Mortgage, or omit to do anything that Tenant is obligated to do under the terms of this Lease so as to cause Landlord to be in default thereunder. If, in connection with the financing of the Real Property, the Building or the interest of the lessee under any Master Lease, or if in connection with the entering into of a Master Lease, any lending institution or Lessor

shall request reasonable modifications of this Lease that do not increase Tenant's monetary obligations under this Lease, or materially adversely affect or diminish the rights, or materially increase the other obligations of Tenant under this Lease, Tenant shall make such modifications.

DRAFTING NOTE

### Subordination

This provision provides for the unconditional and automatic subordination of the tenant's lease to all current and future mortgages and master leases, whether or not such structure is currently in existence

The subordination clause of an office lease typically provides for the automatic subordination of the tenant's lease to the landlord's current and future mortgages. The subordination of the tenant's lease to the landlord's future mortgage is confirmed (or established if the lease is not automatically subordinated) when the tenant and the landlord's lender (and sometimes, the landlord) enter into a Subordination, Non-disturbance and Attornment Agreement (SNDA).

The SNDA provides for:

- Subordination of the tenant's lease to the landlord's mortgage.
- The landlord's mortgage lender's promise to not disturb the tenant's tenancy if the lender forecloses on the landlord's mortgage loan.
- The tenant's promise to make all rental payments to the landlord's mortgage lender if the landlord defaults under its mortgage loan.

For additional information about SNDAs and negotiating tips see *Practice Note, Office Leasing: Key Provisions in an Office Lease: Subordination, Non-disturbance and Attornment Agreement* (<http://us.practicallaw.com/6-503-7910>) and *Standard Document, Subordination, Non-disturbance and Attornment Agreement (SNDA) (Pro-Lender)* (<http://us.practicallaw.com/4-503-3456>).

### Tenant

The SNDA is a critical instrument that protects the tenant's leasehold rights by prohibiting the lender from having the ability to terminate the tenant's lease if the lender forecloses on the landlord's mortgage.

The tenant can either:

- Negotiate the SNDA during the lease negotiations and sign the SNDA and lease at the same time.
- Condition the commencement date of the lease on the receipt of a signed SNDA from the landlord's lender in a form that is reasonably acceptable to the tenant.
- Require that the landlord use either its best efforts or, at least, its commercially reasonable efforts, to obtain an SNDA within 30, 60 or 90 days from the commencement date of the lease.

The ideal situation is to sign the SNDA and lease at the same time. If the lease is for large space the tenant should require that the SNDA be recorded with the county clerk's office.

In connection with the landlord's future mortgages, the tenant should also try to negotiate that the lease's subordination to any future mortgage be conditioned on the tenant's receipt of a signed SNDA reasonably satisfactory to the tenant. Conditioning the lease's subordination to future mortgages is unusual and is typically reserved for large space tenants with significant creditworthiness. The majority of small- to medium-sized space tenants many times do not receive an SNDA from the existing lender and their leases are usually automatically subordinated to any future mortgages.



For an example of a conditional subordination clause for future mortgages that can be used with this lease, see *Standard Clause, Office Leasing: Conditional Subordination Clause* (<http://us.practicallaw.com/0-504-4800>).

### Landlord

The landlord may have difficulty financing its building if the leases are not automatically subordinated to all future mortgages.

To preserve the landlord's ability to finance its building without any tenant-induced delays, the landlord should ensure that:

- All its leases are automatically subordinate to all current and future mortgages.
- The subordination of the leases to any future mortgages are not conditioned on the delivery of an SNDA to any of the tenants.
- The subordination provision contains lender-protective language that limits the lender's liability to the tenant (see *Drafting Note, Attornment*).
- The tenant agrees to any lease modification reasonably requested by the lender, but provided that the modification does not materially reduce the tenant's rights or materially increase the tenant's obligations under the lease.
- The tenant's time to return the signed SNDA to landlord is expressly limited.
- The SNDA should not be in recordable form, unless the lease is for large space and the parties have specifically agreed to have the SNDA recorded.

The landlord may consider using commercially reasonable efforts to obtain an SNDA for the tenant. The landlord should ensure that the lease provides that if the landlord obtains an SNDA, the tenant will pay for the landlord's fees and expenses, including the lender's fees and the landlord's attorneys' fees.

**Section 8.02 Attornment.** If at any time prior to the expiration of the Term, any Master Lease shall terminate or be terminated for any reason or any Mortgagee comes into possession of the Real Property or the Building or the estate created by any Master Lease by receiver or otherwise, Tenant agrees, at the election and upon demand of any owner of the Real Property or the Building, or of the Lessor, or of any Mortgagee in possession of the Real Property or the Building, to attorn, from time to time, to any such owner, Lessor or Mortgagee or any person acquiring the interest of Landlord as a result of any such termination, or as a result of a foreclosure of the Mortgage or the granting of a deed in lieu of foreclosure, upon the then executory terms and conditions of this Lease, subject to the provisions of Section 8.01 hereof and this Section 8.02, for the remainder of the Term, provided that such owner, Lessor or Mortgagee, or receiver caused to be appointed by any of the foregoing, as the case may be, shall then be entitled to possession of the Premises and provided further that such owner, Lessor or Mortgagee, as the case may be, or anyone claiming by, through or under such owner, Lessor or Mortgagee, as the case may be, including a purchaser at a foreclosure sale, shall not be:

- (a) liable for any act or omission of any prior landlord (including, without limitation, the then defaulting landlord); or
- (b) subject to any defense or offsets which Tenant may have against any prior landlord (including, without limitation, the then defaulting landlord); or
- (c) bound by any payment of Rental which Tenant may have made to any prior landlord (including, without limitation, the then defaulting landlord) more than [SPELL OUT NUMBER] ([NUMBER]) [Business Days/days] in advance of the date upon which such payment was due; or

(d) bound by any obligation to make any payment to or on behalf of Tenant, including, without limitation, payments on account of any Tenant Fund; or

(e) bound by any obligation to perform any work or to make improvements to the Premises, except for:

(i) repairs and maintenance pursuant to the provisions of Article V, the need for which repairs and maintenance first arises after the date upon which such owner, Lessor, or Mortgagee shall be entitled to possession of the Premises;

(ii) repairs to the Premises or any part thereof as a result of damage by fire or other casualty pursuant to Article XI hereof, but only to the extent that such repairs can be reasonably made from the net proceeds of any insurance actually made available to such owner, Lessor or Mortgagee; and

(iii) repairs to the Premises as a result of a partial condemnation pursuant to Article XII hereof, but only to the extent that such repairs can be reasonably made from the net proceeds of any award made available to such owner, Lessor or Mortgagee; or

(f) bound by any amendment or modification of this Lease made without its consent; or

(g) bound to return Tenant's security deposit, if any, until such deposit has come into its actual possession and Tenant would be entitled to such security deposit pursuant to the terms of this Lease.

The provisions of this Section 8.02 shall enure to the benefit of any such owner, Lessor or Mortgagee, shall apply notwithstanding that, as a matter of law, this Lease may terminate upon the termination of any Master Lease, shall be self operative upon any such demand, and no further instrument shall be required to give effect to said provisions. Tenant, however, upon demand of any such owner, Lessor or Mortgagee, shall execute, at Tenant's expense, from time to time, instruments, in recordable form, in confirmation of the foregoing provisions of this Section 8.02, satisfactory to any such owner, Lessor or Mortgagee, acknowledging such attornment and setting forth the terms and conditions of its tenancy. Nothing contained in this Section 8.02 shall be construed to impair any right otherwise exercisable by any such owner, Lessor or Mortgagee. Notwithstanding the provisions of this Section 8.02, this Lease shall not terminate by reason of the termination of any Master Lease without the prior written consent of the Mortgagee of the Mortgage which is a first mortgage on Landlord's interest in the Real Property or the leasehold estate created by such Master Lease.

DRAFTING NOTE

### Attornment

The attornment provision of a subordination clause provides that the tenant will treat the lender as if it were the landlord if the landlord defaults under its mortgage. If the landlord defaults under its mortgage, then the tenant agrees to make all payments due under the lease to the lender.

The attornment clause also limits the scope of the lender's liability if it does take over the landlord's role under the lease.

### Tenant

The tenant should pay particular attention to the limitation of the lender's liability clause that is typically found in the attornment provision. Even when the tenant recognizes the lender as its new landlord, the tenant's ability to have adequate recourse against the lender is severely restricted by this clause. For example, in Section 8.02 the lender's liability is limited in connection with:

- Any prior landlord's acts or omissions.
- Any tenant defenses or offset rights under the lease.

- Advance payments of rent made by the tenant beyond a specific number of days that is negotiable, but which can be 30 days.
- Payment obligations of the landlord under the lease, including any tenant improvement allowance.
- The performance obligations of the landlord under the lease, including the tenant's build-out.

The tenant should ensure that if the landlord is performing an extensive initial build-out for the tenant, or has provided the tenant with a significant tenant improvement allowance, that an adequate bond or security is posted by the landlord to cover the cost of the initial build-out or the tenant improvement allowance.

Under the terms of Section 8.02 the lender will not be obligated to perform build-out or grant the allowance if the landlord defaults under its mortgage. The tenant will have to attorn to the lender while not having any recourse against the lender to enforce the landlord's obligations to the tenant for the build-out or the tenant improvement allowance.

For more negotiating tips regarding the preservation of the tenant's rights under the lender's limited liability provision, see *Standard Document, Office Leasing: Subordination, Non-disturbance and Attornment Agreement (Pro-Lender): Drafting Note: Limitation of Liability* (<http://us.practicallaw.com/4-503-3456>).

**Section 8.03 Estoppel Certificate.** From time to time, within [SPELL OUT NUMBER] ([NUMBER]) [Business Days/days] next following request by Landlord, any Mortgagee or any Lessor, Tenant shall deliver to Landlord, such Mortgagee or such Lessor a written statement executed by Tenant, in form [reasonably] satisfactory to Landlord, such Mortgagee or such Lessor:

- (a) stating that this Lease is then in full force and effect and has not been modified (or if modified, setting forth all modifications);
- (b) setting forth the date to which the Fixed Rent, Escalation Rent and other items of Rental have been paid;
- (c) stating whether or not, to the best knowledge of Tenant, Landlord is in default under this Lease, and, if Landlord is in default, setting forth the specific nature of all such defaults; and
- (d) certifying as to any other matters reasonably requested by Landlord, such Mortgagee or such Lessor.

Tenant acknowledges that any statement delivered pursuant to this Section 8.03 may be relied upon by any purchaser or owner of the Real Property or the Building, or Landlord's interest in the Real Property or the Building or any Master Lease, or by any Mortgagee, or by an assignee of any Mortgagee, or by any Lessor.

DRAFTING NOTE

### Estoppel Certificate

This clause requires the tenant to deliver to the landlord an estoppel certificate when the landlord requests one. An estoppel certificate is a statement of certain facts relating to the lease.

The landlord typically requests an estoppel certificate from the tenant when the landlord is either financing its building or selling the property. The lender or the purchaser usually provides the landlord with their form of estoppel certificate for each (or a specified percentage) of the tenants to sign.

The tenant has a certain number of days to sign the estoppel certificates and return it to the landlord. The landlord can use ten days for the tenant's response period, but this number is negotiable.

For more information and negotiating tips for estoppel certificates, see *Standard Document, Office Leasing: Tenant Estoppel Certificate* (<http://us.practicallaw.com/5-503-1923>).

## Tenant

The tenant should know that an estoppel certificate is negotiable and that it can be tailored to reference any information the tenant wishes to document.

If there is a breach of any of the landlord's covenants, such as the landlord's failure to supply adequate heating as required under the lease, then the tenant should ensure that any breach is referenced in the estoppel certificate. The statements made in the estoppel certificate may prevent the tenant from arguing anything to the contrary at a later date.

When the tenant is provided with an estoppel certificate to sign, the tenant should review it carefully and ensure that:

- Everything stated in the estoppel certificate is true and correct.
- A copy of the lease and all amendments to the lease are attached to the estoppel certificate by the landlord for the tenant's verification.
- The scope of the estoppel certificate does not go beyond what the tenant must provide under the terms of the lease.

Sometimes an estoppel certificate includes subordination clauses affirming the tenant's subordination to the lender's mortgage. The tenant should try to delete from the estoppel certificate any references to subordination because subordination of the lease should be provided for in an SNDA. By having an SNDA the tenant can ensure its lease will not be prematurely terminated by a lender that forecloses on the landlord's property (see above *Drafting Note, Subordination*).

If the lease is for large space, the tenant can also insert a clause requesting that the landlord provide an estoppel certificate. A tenant may need an estoppel certificate from the landlord if it is:

- Assigning its interest in the lease.
- Subleasing a large portion of the premises.
- Obtaining a leasehold mortgage, if permitted by the lease.
- Obtaining working capital loan facility.

For example, the tenant can insert the following provision as a second paragraph for Section 8.03:

[From time to time, within [SPELL OUT NUMBER] ([NUMBER]) [Business Days/days] next following request by Tenant but not more frequently than twice in any twelve (12) month period, Landlord shall deliver to Tenant a written statement executed by Landlord:

(a) stating that this Lease is then in full force and effect and has not been modified (or if modified, setting forth all modifications);

(b) setting forth the date to which the Fixed Rent, Escalation Rent and any other items of Rental have been paid;

(c) stating whether or not, to the best knowledge of Landlord (but without having made any investigation), Tenant is in default under this Lease, and, if Tenant is in default, setting forth the specific nature of all such defaults, and

(d) certifying as to any other matters reasonably requested by Tenant and related to this Lease.]



The landlord has a certain number of days to sign the estoppel and return it to the tenant. The tenant can use seven days for the landlord's response period, but this number is negotiable.

**Section 8.04 Right to Cure Landlord's Default.** As long as any Master Lease or Mortgage shall exist, Tenant shall not seek to terminate this Lease by reason of any act or omission of Landlord until Tenant shall have given written notice of such act or omission to all Lessors and Mortgagees at such addresses as shall have been furnished to Tenant by such Lessors and Mortgagees and, if any such Lessor or Mortgagee, as the case may be, shall have notified Tenant within [SPELL OUT NUMBER] ([NUMBER]) [Business Days/days] following receipt of such notice of its intention to remedy such act or omission, until a reasonable period of time shall have elapsed following the giving of such notice, during which period such Lessors and Mortgagees shall have the right, but not the obligation, to remedy such act or omission.

DRAFTING NOTE

### Right to Cure Landlord's Default

This clause provides that the tenant cannot terminate its lease if there is a landlord default unless and until the tenant has:

- Provided the lender or the ground lessor with a notice of the landlord's default.
- Allowed the lender or the ground lessor the opportunity to cure the landlord's default within a reasonable period of time.

The number of days a lender or ground lessor has to notify the tenant of its intent to cure the landlord's default can be ten business days after the receipt of the tenant's notice of the landlord's default. This notice period, however, is negotiable.

**Section 8.05 Zoning Lot Merger and Development Rights.** Tenant hereby irrevocably waives any and all right(s) it may have in connection with any zoning lot merger or transfer of development rights with respect to the Real Property which would cause the Premises to be merged with or unmerged from any other zoning lot pursuant to such Zoning Resolution or to any document of a similar nature and purpose, and Tenant agrees that this Lease shall be subject and subordinate to any Declaration of Restrictions or any other document of similar nature and purpose now or hereafter affecting the Real Property. In confirmation of such subordination and waiver, Tenant shall execute and deliver promptly any certificate or instrument that Landlord reasonably may request.

DRAFTING NOTE

### Zoning Lot Merger and Development Rights

Section 8.05 provides for a waiver by the tenant of any rights it may have in connection with:

- **Zoning lot mergers.** A zoning lot merger is the joining of two or more adjacent zoning lots into one new zoning lot. Unused development rights may be shifted from one lot to another, as-of-right, only through a zoning lot merger.
- **Transfers of development rights.** A transfer of development rights allows for the transfer of unused development rights from one zoning lot to another in special circumstances, usually to promote the preservation of historic buildings, open space or unique cultural resources.

The provision also provides for the subordination of the lease in connection with any current or future declaration of restrictions. The tenant must deliver an instrument to the landlord to evidence

its waiver and subordination. This is similar to the subordination clause in that the tenant is being asked to subordinate its lease to an instrument of record. The tenant may, therefore, wish to negotiate similar rights to those in the subordination clause relating to an increase of obligations or a decrease of rights.

This provision is important for the landlord if it anticipates converting the building into a condominium or undertaking any further development of the real property.

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