

Estoppel Certificates: A Review Checklist from a Tenant's Perspective



Andy Jacobson

is a partner in the Real Estate Group at Maslon Edelman Borman & Brand, LLP in Minneapolis, Minnesota. His practice covers a broad range of commercial real estate issues, with particular focus on commercial and retail leasing, land use, telecommunications, as well as design and construction-related agreements. Andy is a frequent author and speaker on real estate subjects and teaches Real Estate Transactions at the University of St. Thomas School of Law. A graduate of Boalt Hall School of Law at the University of California, Berkeley, Andy is also a registered architect, having earned his Bachelors of Architecture from California Polytechnic State University, and practiced architecture prior to attending law school. Andy is a member of both the Minnesota and California bars and can be reached at andy.jacobson@maslon.com.

Andy Jacobson

Timely return of the certificate is easy cooperation.

ESTOPPEL CERTIFICATES ARE one of the more common (and often mundane) documents that must be dealt with by landlords and tenants. Typically, the purpose of the estoppel certificate is to establish a factual snapshot in time of the status of a lease, as part of the due diligence process conducted by investors, purchasers, and lenders of commercial property. Most commercial leases will include express requirements for the tenant to execute estoppel certificates upon request, although the specificity of such provisions can vary dramatically from lease to lease. Below are the basic steps to consider when reviewing estoppel certificates from a tenant's perspective.

Most frequently, the initial form of the estoppel certificate will be generated by the counsel for the lender or potential purchaser of the property. Some, but not many, leases will include an agreed-upon form for an estoppel certificate as an exhibit in the lease itself, although lenders and buyers often ignore the agreed-upon form and send their preferred standard form instead. From a tenant's perspective, the primary goal is to ensure that the estoppel certificate remains a factual snapshot and does not morph into an amendment to the lease that increases the tenant's obligations or reduces its rights.

STEP ONE • Upon receipt of a proposed estoppel certificate, it is good practice to first check the underlying lease to determine precisely what the lease requires of the tenant with respect to estoppel certificates. At the minimum, the lease will typically specify the required turnaround time for the tenant to respond or the frequency with which the landlord is entitled to request an estoppel certificate from the tenant. Some leases will also specify the topics that must be addressed in the estoppel certificate. Note that the scope of many requested estoppel certificates exceeds what the tenant is required to provide by the lease.

STEP TWO • Someone familiar with the administration of the lease should confirm that the description of the “lease” in the estoppel certificate is correct (i.e., includes all addenda and amendments and any relevant side letters or agreements). Failure to fully list all of the documents that comprise the lease could result in the tenant losing the benefit of the omitted items after a purchase or foreclosure.

STEP THREE • Someone on the business/real estate side of the tenant’s operations who is familiar with the lease administration should confirm that all the factual items stated in the estoppel certificate (e.g., current rent, security deposit, premises square footage, rent paid through a certain date, landlord has paid all tenant inducements, landlord has completed all required construction, tenant has accepted possession of the premises, no landlord defaults exist, etc.) are all true and correct and, if not, modify the estoppel certificate appropriately.

STEP FOUR • An estoppel certificate should be limited to objective facts that directly pertain to the lease (e.g., attached copy of the lease is correct and complete, current rent is \$____, lease term expires on _____, tenant has or does not have certain rights (e.g., expansion, extensions, purchase options). Again, the estoppel certificate should merely be a

snapshot of the current status of and performance under the lease. Particular caution should be exercised when an estoppel certificate is requested early in a lease term or shortly following an extension or renewal, in which the tenant is asked to acknowledge that all of the landlord’s work has been completed or that all tenant inducements have been received by tenant. Failure to refer to an unmet landlord obligation may result in the tenant losing the benefit of that landlord obligation, should there be a sale or foreclosure of the property. It is also good practice to specify that any such statements by the tenant in the estoppel certificate only apply to landlord obligations that have accrued prior to the date of the estoppel certificate.

STEP FIVE • Where a lease includes pass-through charges (e.g., operating expenses, insurance, real estate taxes), it is important to make sure that the statements made by the tenant in the estoppel certificate do not create a waiver of any rights the tenant may have under the lease to audit, inspect or otherwise challenge the landlord’s books and records pertaining to the calculation of those pass-through charges. For example, when a tenant discovers that it has been overcharged on pass-through charges, it is not uncommon for the tenant to realize that those same overcharges occurred in prior years.

STEP SIX • Many estoppel certificates include language similar to the following: “and no event or state of facts has occurred which, with the passage of time or giving of notice or both, would constitute a default by either landlord or tenant under the lease.” I typically delete this language because it is somewhat nonsensical, in that it assumes what the status of the lease will be in the future. For example, if tenant provided lender with an estoppel certificate in June, tenant will not yet have paid rent for September (a fact or event in existence), if that state of facts or event (really more of a nonevent) were to continue into mid-September (i.e., with the passage

of time), tenant would be in default. There may also be existing facts or conditions that could ripen into a tenant or landlord default of which tenant is not then aware.

STEP SEVEN • As a general rule, only a lender or potential buyer should be able to rely upon the statements from the tenant in an estoppel certificate. Landlords will sometimes attempt to use an estoppel certificate to wipe the slate clean of any potential existing defaults. Accordingly, good practice is to delete any language in the estoppel certificate that provides the landlord with the right to rely on any statements by the tenant made in the estoppel certificate.

STEP EIGHT • Tenants should delete any provisions in the estoppel certificate that could constitute a representation or warranty by the tenant that expands the tenant's obligations beyond what is required under the lease. For example, instead of stating that the tenant is "in full compliance with all laws" or that the tenant has "not brought or stored any hazardous materials upon the premises," limit the statement to tenant being "in compliance with its obligations under the lease" with respect to compliance with laws and/or hazardous materials. Note that lenders often try to slip language into estoppel certificates pertaining to hazardous materials and environmental laws that will go far beyond the tenant's obligations on those topics in the lease (e.g., "To the best of tenant's knowledge, no hazardous substances or materials have been generated or stored at or released from the Premises during the term of the Lease"). Occasionally, the language will be so broad that it may even include an environmental indemnity from tenant to the lender or potential purchaser. Unless expressly required under the lease, all such language should be deleted.

STEP NINE • To the extent that any statement in an estoppel certificate involves actions or events

(e.g., landlord or tenant is not in default), rather than the static factual content (e.g., term, rent, etc.), qualify any such statements to the "best of tenant's knowledge" or to "tenant's actual knowledge" and, if applicable, define that the term "actual knowledge" is limited to the actual knowledge of specific, named individuals. For example, when a tenant has acquired a premises through an acquisition and does not have institutional knowledge of the history about the premises or has been a very long-term tenant, information may exist in the tenant's files or with individuals that have since retired or otherwise left the tenant's organization that is institutionally known by the tenant, but is not actually known by the individuals responsible for the current day-to-day operation of the premises or actually known by those completing the estoppel certificate. In addition, a tenant should delete any proposed statements in the estoppel certificate that are outside tenant's knowledge, that are ascertainable from the public records, or that are clearly within landlord's knowledge. For example, lenders will sometimes seek a statement from the tenant that the tenant knows of no prior loans, deeds of trust, or mortgages by the landlord. In that instance, the landlord has the best knowledge on the topic and any mortgage or deed of trust should be recorded and part of the public record and thus will be disclosed by the lender's title work. When applicable, consider modifying any statements like "tenant has no offsets or defenses" with the qualifier "current" as well as "known" (or based on tenant's "actual knowledge").

STEP TEN • Often the easiest way to deal with a questionable item in an estoppel certificate is to tie the tenant's representation back to the lease, in order to prevent any argument that the estoppel certificate constitutes an expansion of tenant's obligations or a reduction or waiver of tenant's rights. For example, lead with language such as "to the fullest extent required of tenant under the lease, tenant

has . . .” or end the provision with “. . . except as otherwise expressly provided in the lease . . .”

STEP ELEVEN • Tenants should delete provisions in the estoppel certificate that involve the tenant undertaking any affirmative obligation to the lender or potential purchaser requesting the estoppel certificate. Common examples of such provisions include a lender or purchaser asking the tenant to agree to: (i) provide lender or purchaser with copies of any notices from tenant to landlord; (ii) subordinate the lease to any lender or other party; (iii) attorn to any lender should it foreclose or otherwise acquire the property following a default under the loan by landlord; (iv) not terminate the lease without first providing lender or purchaser with the opportunity to cure the default; and (v) pay rent directly to lender upon receipt of a notice from lender that landlord is in default under its loan. While some of these provisions may be appropriate in a subordination agreement and/or a nondisturbance agreement that is executed by the lender, landlord and tenant, these provisions do not belong in a tenant estoppel certificate which is only executed by the tenant.

STEP TWELVE • When appropriate, it may make sense to add a general, overriding qualifier at the end of the estoppel certificate that clarifies that the estoppel certificate is not intended by tenant to amend or waive any rights or obligations of the tenant under the lease and, in the event there should be a conflict between the estoppel certificate and the lease, the lease will prevail.

Because of their nature, estoppel certificates often arrive unexpectedly and require a quick response from the tenant. One efficient way to promptly respond to a requested estoppel certificate is to hand mark the document with specific changes, then return a PDF of the hand-marked document (signed by tenant) to the landlord. By returning a signed version of the modified estoppel certificate, the tenant eliminates an assertion by the

landlord that the tenant has failed to meet its obligations under the lease to process and execute an estoppel certificate in a timely manner. If the landlord provides the estoppel certificate to the tenant in Word format, a TrackChanges or another redlined formatted document illustrating the tenant’s revisions, signed by the tenant, will typically satisfy the lease requirements and be accepted by Landlord. Purchasers and lenders occasionally push back on changes made to their preferred form of estoppel certificate. However, unless the lender, potential purchaser, or landlord can cite a specific provision in the lease that requires the tenant to include a specific item in the estoppel certificate, the lender and landlord have no real leverage in the discussion with tenant nor justification for the request. Often, the most effective response to a complaint from a potential purchaser, lender, or landlord regarding changes to an estoppel certificate is to state “please show me in the lease where the tenant is required to provide your requested provision or language in the estoppel certificate” or “I believe that tenant has fully complied with its obligations under the lease regarding estoppel certificates, but if you believe I have missed something, please point me to the applicable provision in the lease.” While the potential purchaser, landlord, or lender may grumble, complain and attempt to cajole concessions from the tenant, many simply accept the modified and signed estoppel certificate, rarely will a loan or purchase transaction fail to close simply because a tenant would not agree to include concessions in its estoppel certificate that are not required in the lease. Even if that situation did occur, if the tenant has complied with its obligations under the lease, it is not responsible for the failed transaction.

CONCLUSION • One final caveat to remember is that the tenant and landlord usually have an ongoing relationship under the lease. As a result, it does not make much sense for a tenant needlessly

to upset the landlord; cooperating a bit more than required in the lease often benefits the landlord/tenant relationship. The easiest component of cooperation is to be timely in returning the requested estoppel certificate. Landlords often are more concerned with the return of a completed estoppel certificate in a timely manner, rather than modifica-

tions made by the tenant in that document. Also, conceding on minor issues in the estoppel certificate that do not materially and adversely harm the tenant's position is often a prudent strategy and puts the tenant in a position to be able to claim that it has provided the landlord more items in the estoppel certificate than were required under the lease .

**To purchase the online version of this article,
go to www.ali-cle.org and click on "Publications."**