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Peer to Peer 8

**Getting the Deal Signed, Sealed and Delivered ...
Delivery Conditions and Late Delivery Penalties and Complications.**

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Delivery Conditions vary from project to project and depend on the nature of the center and the leverage of the parties. Ideally, the Landlord wants the Tenant's buildout period to start as soon as possible, in order to trigger the payment of rent, although in some cases, such as a new center or a redevelopment, the Landlord may need to obtain governmental, third party or lender approvals or financing before Landlord can commit to the project and deliver the Premises to the Tenant. The Landlord will also want the Premises to be deemed to be delivered once the Tenant starts work, even if other delivery conditions are not satisfied, because Landlord will not want to pay penalties or unwind a deal once the Tenant has started construction. The Tenant wants to (i) eliminate as much risk as possible, by including as many items as it can in the delivery conditions to ensure Landlord performance of vital obligations and (ii) minimize Tenant's risk that it will be paying rent before it has completed construction and opened for business. These materials assume that Tenant will have a build-out period before rent commences, but the delivery issues are generally the same whether delivery triggers the start of a buildout period or the payment of rent.

1. **Delivery Conditions:** Delivery conditions allocate the risk of delivery and construction between the parties and often depend on the leverage of the parties. Possible delivery conditions include:
 - a. **Full Execution and Delivery of Lease:** Tenant will want to provide that the date on which the Lease has been fully executed and unconditionally delivered is the earliest possible delivery date, but if Landlord allows Tenant to have access to the Premises prior to lease execution, it will usually be pursuant to an early entry letter. Landlord will want that letter to provide that if the lease is signed, the delivery date will be deemed to be the date Tenant actually took possession of the premises pursuant to the early entry letter.
 - b. **Physical Delivery:** Delivery of physical possession of the premises to Tenant is the most basic delivery condition.
 - c. **Premises Vacant and Free of Prior Occupant's Property:** If the Premises were previously occupied, Tenant may require that the premises be delivered in broom clean condition, free of all construction debris, personal property and signage of any previous occupants.
 - d. **Landlord's Work Complete:** Tenant will want all of Landlord's Work complete at the time of delivery. Landlord will want to provide that the work be substantially complete, rather than fully complete, to ensure that Tenant's buildout clock starts while Landlord is completing any minor items of Landlord's Work that will not hinder Tenant's ability to perform its work or to operate in the premises.
 - i. If the lease contains a walk-through/punchlist process for determining when construction is substantially complete, Landlord will want to account for any time period between the time it notifies Tenant that the work is substantially complete and the time it is determined, by the walk-through process, that the work either is or is not substantially complete. At a minimum, that period of time should not count for purposes of determining when late delivery penalties accrue. Landlord will also want to provide that if it is determined that the work was, in fact, substantially complete when Landlord sent its notice, that should be the date of substantial completion for purposes of calculating the rent commencement date.
 - ii. If there is a walk-through process, the parties will also want to differentiate between punchlist items that will not delay delivery from occurring and a material items of incomplete work that must be completed in order for the Landlord's Work to be deemed to be substantially complete. Typically, an item will be deemed to be a punchlist item if it is a minor item of construction, the non-completion of which will not prevent Tenant from commencing or completing its work and will not prevent Tenant from opening Tenant's business in the premises.
 - iii. Landlord will want to consider whether (i) any of Landlord's Work should be carved out of the delivery conditions because it depends on the performance of some portion of the Tenant's Work or should be phased so that it is completed after some portion of Tenant's Work is complete and (ii) whether any of the Landlord's Work requires the cooperation of a third party (like a utility company), so that Landlord cannot commit to a specific date for such work to be complete and (iii) whether any of Landlord's Work is outside of the premises and can be completed after delivery without impacting the Tenant's Work. Any

such items of Landlord's Work should be post-delivery work that can be completed after the delivery date. Tenant will want a schedule for these items (especially if they must be complete before certain Tenant's Work can be completed or must be complete in order for Tenant to get its certificate of occupancy or operate in the Premises) and may also want to impose penalties if they are not timely completed.

- iv. Landlord will also want to consider whether there are any ways in which Tenant can delay Landlord in delivering the premises with the Landlord's Work substantially complete. For example, if Landlord has to deliver utilities to a mutually agreed upon location or make slab cuts that depend on the Tenant locating its vertical transportation, Landlord will want to ensure that its timing obligations for delivery do not begin to run (or get extended) if Tenant does not provide Landlord the necessary information required for Landlord to complete the applicable work within a certain time frame.
- v. Tenants are often reluctant to allow post-delivery work because they do not want to work side by side with Landlord, which can result in disputes regarding delays. If a tenant has some flexibility in its timing, it may insist that all of Landlord's Work (or, all of the Landlord's Work inside the premises) be substantially complete before Tenant takes possession. If Landlord and Tenant are going to be required to work side by side, the parties should require cooperation between the parties and their respective contractors and the party with leverage may insist that a delay in their construction caused by the fact that the parties are working side by side is counted as a delay by the other party. If the parties are going to work side by side, Tenant might require a construction schedule to be developed and approved by Tenant before it accepts delivery, with penalties if milestones on the schedule are not met. This imposes discipline on the process and ensures that Tenant is not harmed by the side by side construction. Tenant might also insist that rent commencement not occur until a certain number of days after the post-delivery work is complete (See Section below regarding **Rent Commencement Tied to Different Time Periods With Respect to Different Conditions**)
- vi. Some tenants will require certain baseline conditions to be satisfied at delivery, even if they are not specifically included in the scope of Landlord's Work, such as all work necessary to ensure that the Premises are delivered structurally sound, in compliance with applicable Laws and free of Hazardous Substances. Some landlords will fight these conditions, arguing that Tenant should inspect the Premises and that if it is later discovered that any of these conditions is not satisfied, Landlord is responsible for these items and will address them. Landlord does not want Tenant to argue that the delivery date did not occur because a structural issue no one expected occurs after delivery. Repair of such an item would likely extend the buildout period under a force majeure or Landlord delay provision, but Landlord will not want the buildout period to start over.
- e. **SNDA's Delivered:** Tenant will want to ensure that it gets an SNDA from exiting lenders/ground lessors before it starts spending money on construction, so it will want to make this a delivery condition. If Landlord is willing to commit to getting Tenant an SNDA, it will want to negotiate it at the same time as the lease or try to avoid tying it to delivery because it will not want to delay delivery based on an SNDA Condition.
- f. **Common Areas Complete:** Tenant will want to ensure that the Common Areas are complete to the extent necessary to enable Tenant's contractors and employees to have access to the Premises and to perform the initial Tenant's Work. In some cases, the work in the common areas may be more extensive than this, in which case, Landlord may want to try to include some of this work in the post-delivery work, so that it can get the space delivered more quickly and complete the work outside the premises while the Tenant is doing its work.
- g. **Contingency Expiration:** Often leases will contain contingencies, including, for example, contingencies relating to title, survey, geotech report, environmental report, third party approval, exclusive waivers, acquisition or financing). Tenant must look carefully at both the Landlord and the Tenant contingences and, if Tenant does not want to commence construction, or even perhaps plans, before certain contingencies are satisfied, then such contingencies should be tenant contingencies and the delivery date should be no sooner than a certain number of days after such contingencies are satisfied or waived. Whether Landlord will agree to tie delivery to tenant contingencies will depend on the leverage of the parties. Landlord will want Tenant to

commence its plans and prepare to start construction as soon as possible after the lease is signed and will not want the tenant to wait until contingencies are satisfied.

h. **Payment of First Installment of Construction Allowance:** If the Tenant has negotiated for payment of a portion of the construction allowance at the time of possession, it will likely require Landlord to pay that installment of the allowance as a delivery condition. This will incentivize Landlord to timely pay the installment of the allowance.

i. **Earliest Possible Possession Date:** Most tenants will have a schedule for constructing stores and will not want to take possession of the premises much earlier than the date they have scheduled for commencement of work. Tenant will not want to insure the premises or be responsible for its condition or for the payment of utilities, until Tenant is ready to construct. In some cases, a tenant may be willing to start its buildout clock, but will still want the ability to delay delivery of physical possession until it is ready to construct. Accounting rules may also affect a Tenant's willingness to take possession, since the date Tenant takes possession may affect leasehold improvement amortization periods under the lease. If a tenant has provision allowing it to delay opening and rent commencement during certain blackout periods, it may also want the right to delay the possession date by an equal number of days for the reasons described above.

2. **Rent Commencement Tied to Opening:** Generally, the rent commencement date occurs when Tenant opens for business, even if all of the delivery conditions are not satisfied. In some cases, a tenant with leverage may be able to negotiate to pay a percentage of gross sales in lieu of stated rent, if it opens prior to the date on which all of the delivery conditions are satisfied or it may be able to impose other penalties if delivery conditions are not satisfied, even if it has opened. Tenant will argue that it has constructed and ordered merchandise and should be able to open without giving up the incentives built into the lease to ensure that Landlord satisfies each of the delivery conditions. Landlord will argue that the Tenant is using the premises and should not be unjustly enriched by penalties for late satisfaction of delivery conditions that have not kept Tenant from opening. The resolution of these issues will depend on the nature of the delivery conditions that are not satisfied, whether they will actually impact Tenant's operations and/or sales and the leverage of the parties.

3. **Delivery Conditions That Should Not Trigger Penalties:** Tenants often include requirements in the delivery conditions that are more appropriately included in the rent commencement date provisions or as lease contingencies because they should not trigger late delivery penalties. In the alternative, any late delivery penalty section should carve out late delivery attributable to these conditions. Tenant wants to ensure that its buildout clock does not start to run before it is ready to construct and Landlord wants to ensure that its rent starts as soon as possible and does not want its rent to be dependent on Tenant's construction and permitting timetable. Whether Tenant is able to negotiate these delivery or rent commencement conditions will depend on the leverage of the parties.

a. **Plan Approval:** Tenant may want to tie the delivery date or rent commencement to Landlord approval of Tenant's plans for the initial Tenant's Work (or a certain number of days after Landlord approval of Tenant's plans for the initial Tenant's Work). Tenants with leverage may be able to limit the scope of Landlord's approval right to only structural, exterior, signage or building systems matters. A Landlord may want to approve the plans for the initial Tenant's Work and relax the standard for later alterations.

b. **Construction Permits:** Tenant may want to tie the delivery date or rent commencement to availability of construction permits (including signage permits) (or a certain number of days after availability of construction permits). Landlord should always require that this condition be satisfied based on when the permits are available. Tenant should not be able to delay the start of its buildout period by not picking up its permits.

i. Tenant may want to provide that the construction permits cannot not contain conditions or requirements that are not acceptable to Tenant. If Landlord is willing to agree to this, Landlord will want to ensure that Tenant will be reasonable in determining whether a condition or requirement that is acceptable. Tenants with a lot of leverage may not be willing to agree to reasonable because they will not want to argue with Landlord about whether a design change required by the permitting authority is acceptable.

ii. Landlord will want to address what happens if Tenant is seeking a variance of any type. For example, Landlord may be willing to tie the rent commencement date to signage

permits, but only if Tenant is not seeking a variance or Landlord may limit the period for Tenant to obtain the signage permits, if Tenant is seeking a variance. Landlord should also insist on approving the variance, if it may have an impact on other tenants or portions of the center (e.g., if it will reduce the available signage for any other premises located within the center). Landlord will also want to consider whether Tenant seeking a variance might push the rent commencement date into a blackout period.

- iii. If the buildout period is tied to the availability of construction permits, Landlord may want to insist on a termination right, if Tenant does not obtain its permits within a certain period of time, in order to ensure that its property is not tied up for an indefinite period of time while Tenant tries to come to an agreement with the applicable permitting authorities. This is especially important, if Tenant adds language providing that the permits must not contain any conditions that are not acceptable to Tenant or that conflict with Tenant's basic design for the premises. Usually Tenant will want this date to be a date that is far in the future, since Tenant will have spent a lot of money preparing plans and will not want to lose the lease because it has not been able to obtain permits. Landlord might agree to allow Tenant to extend the contingency period if Tenant is diligently pursuing its permits and there is a reasonable likelihood that Tenant will be able to obtain them.
- iv. Landlord might also want to require that Tenant allow Landlord to assist Tenant in obtaining its permits, if the Tenant is not able to obtain the permits within a certain period. Landlord may have a lot of experience with the permitting authorities in the jurisdiction, especially if it is in the process of constructing or redeveloping the center and it may think that it will be able to help the Tenant gets the permits sooner, which will start the Tenant's buildout clock.
- v. In some cases, a tenant will want to tie the start of its buildout period to obtaining a liquor license or other operational permit, but landlords are usually reluctant to agree to this and will expect Tenant to have done its due diligence and to be knowledgeable about whether it will get its operational permits before it signs the deal. In some cases, however, if there is a real risk of Tenant not being able to obtain the applicable operational permit (e.g., a liquor license in a jurisdiction with limited numbers of liquor licenses) and the Tenant will not do the deal without the permit and the activities it permits, the parties may agree to a contingency that allows the Tenant (and, if the applicable operational issue is important to Landlord, the Landlord also) to terminate if it is not able to obtain the applicable permit. As discussed above, Tenant will not want the buildout period to commence until this contingency has been satisfied or waived. Landlord will not want the Tenant to terminate the lease after Tenant has started constructing, so it may agree to this, but should insist that if the Tenant does take possession and commence construction, then the contingency shall be deemed to be waived.

c. Plan and Permit Submission Requirements:

- i. If the buildout period does not commence until Landlord approves Tenant's plans and/or Tenant obtains its building permits, Landlord should (i) insist on a time table for plan submissions/revisions and/or for applying for permits (as applicable) and (ii) require Tenant to use reasonable efforts to comply with Landlord's or the permitting authorities' requirements, as applicable, with respect to any submission of the Tenant's plans, in order to obtain such party's approval of such submission or in order to obtain a building permit, as applicable, and (iii) in the case of the building permit, require Tenant to otherwise use diligent, reasonable and good faith efforts to obtain its building permit, and if Tenant does not comply with the foregoing requirements, then the buildout period should either be determined without regard to the timing of plan approval or availability of permits or the buildout period should be reduced, day for day, for each day that Tenant does not comply with these requirements. Tenant will want to insure that the reduction of the buildout period does not apply unless plan approval or availability of permits, as applicable, is the last delivery condition to be satisfied.
- ii. If customary in the jurisdiction, Landlord may want to require that Tenant use a permit expeditor (and perhaps Landlord's expeditor, who is familiar with both the jurisdiction and the center), as a condition to tying rent commencement to permits.

- iii. The parties will want to be sure that it is very clear in the lease who is responsible for any necessary permits.
- d. **Third Party Approval Obtained:** Both Landlord and Tenant will want to ensure that the parties have obtained any required third-party approvals before the parties go forward with the deal. The following are examples of conditions that may trigger anchor or other third party approval rights or springing rights (such as the right of another tenant to go on a pylon, if a smaller tenant is given the right): (i) Landlord or Tenant is doing work in the common areas or Tenant is seeking a staging area in the common areas, (ii) Tenant has unusual signage rights, (iii) Tenant wants dedicated parking spaces, (iv) Tenant wants an outdoor seating or selling area, (v) Tenant has a use that is often limited or prohibited under prohibited use clauses (e.g., a bar), (vi) Tenant's construction is likely to occur during holiday season or (vii) increasing the height of a building's facade. Certain tenants in shopping centers impose restrictions that are well known in the industry (and may be of record), so the cotenants should be considered by the Tenant to determine if anything Tenant is doing might trigger an approval right.
- e. **Exclusives Are Waived:** Tenants will want to review verbatim versions of exclusives and prohibited uses and will want to require that necessary waivers be obtained. Landlord may not be willing to provide the exclusives to tenants that do not have leverage, in which case, the Tenant may want to require a representation from Landlord that there are no exclusives or prohibited uses that conflict with Tenant's use and an indemnity if the representation is incorrect. A tenant with leverage will want this representation to apply even if the applicable exclusive or prohibited use is of record.
- f. **Possession Cotenancy Satisfied:** If the center is new or being redeveloped, Tenant may want a possession co-tenancy or a co-tenancy that requires that Landlord have signed leases for a certain percentage of the GLA, so Tenant is not constructing well in advance of the other tenants at the property and will not be opening before the center has a critical mass of tenants.
- g. **Other Pre-Conditions to Tenant Commencing Construction:** Tenants with leverage may try to tie rent commencement to a certain number of days after other conditions occur that must occur before Tenant can start construction, in order to minimize the risk of the buildout period expiring before Tenant has completed construction. Examples include:
 - i. Structural steel being ordered, if Tenant is constructing the core and shell.
 - ii. Landlord approval of Tenant's contractor, if Landlord has an approval right.
 - iii. Tenant entering into a contract with a general contractor. This assures Tenant that the buildout period will not commence until Tenant has completed plans, any value engineering has been completed and Tenant has a price for the work.
 - iv. Tenant receiving an acceptable Geotech or environmental report.

A tenant must have a lot of leverage to get these types of conditions and given that the tenant can influence how quickly these types of conditions can be fulfilled, Landlord may only be willing to give Tenant a certain period to obtain these items or will insist on milestones that must be accomplished by tenant, in order for these conditions to apply.

- 4. **Limited Windows for Delivery:** If a Tenant has a lot of leverage, it might limit the periods during which Landlord can deliver the Premises. This ensures that Tenant will not have to start construction during holiday or another period when it might be difficult for Tenant to commence construction. Tenant will also not want to take delivery at a time that would result in the end of the buildout period occurring during a slack season or during holiday season, when opening might be difficult. If Landlord agrees to this, it should try to limit the delivery condition to physical delivery or only items within Landlord's control and will want to address how tenant delays and force majeure affect the delivery. In addition, the Landlord may try to insist that if Tenant takes possession outside of a delivery window, the date Tenant takes possession is the delivery date, even if it is not in the delivery window. Landlord will also want to ensure that the buildout period, combined with these delivery windows does not result in a buildout period that ends during a blackout period, when Tenant is permitted to delay rent commencement and opening. If Landlord has leases at the center with other powerful tenants, it will want to look at these delivery windows and the Tenant's proposed buildout period in the context of any other restrictions on the timing of construction at the center imposed by other parties at the center.

5. **Rent Commencement Tied to Different Time Periods With Respect to Different Conditions:** If Tenant has the leverage to require multiple delivery conditions, the parties might tie rent commencement to a certain number of days after each condition is satisfied, with the number of days depending on the impact the condition will have on the Tenant's construction. For example, the buildout period might end on the latest to occur of (i) 180 days after delivery of the premises with the pre-delivery work substantially complete and (ii) 60 days after the post-delivery work is substantially complete and (iii) 30 days after the common areas are substantially complete.
6. **Buildout Period Commences When Tenant Commences Construction:** Generally, Landlord will want to insist that if the Tenant commences construction, the buildout clock starts because Landlord will not want to pay penalties or allow for termination of the lease if the Tenant is in the space constructing on a timely basis. In these cases, if the Tenant has negotiated for other delivery conditions, the Tenant can elect not to commence construction, but if it does, the buildout clock should start.
7. **Landlord Right to Push Delivery Date:** If the Landlord is constructing the center or redeveloping the center, given the construction process and the possibilities of construction delays, there may be some uncertainty about when Landlord will be able to deliver the premises. If so, Landlord may want a right to push the anticipated delivery date with a certain amount of notice.
8. **Blackout Period:** Many tenants will try to include a blackout provision in their leases that allows them to defer the rent commencement date and the requirement to open for business, if the rent commencement date would otherwise occur during a period when Tenant does not want to open, generally because it is a slow sales period. Even if the Tenant has restricted delivery to certain periods, it may still want a no-opening provision to protect against force majeure or landlord delays that push the rent commencement date into a slow period. Typically, a Landlord will not agree to this, if the anticipated delivery date would cause the rent commencement date to occur during the no-opening period, so this clause usually comes into play only if Landlord delivers the premises late or Tenant's construction is delayed by force majeure or landlord delays. If Landlord grants such a right, it should be sure to provide that if Tenant does open for business during a no-opening period, the rent commencement date will be deemed to have occurred on the date Tenant opens for business. Landlord should also consider whether each delivery condition that is added to the lease will increase the likelihood that the rent commencement date will occur during a no-opening period.
9. **Tenant Delays of Delivery of Possession:** Landlord will want to ensure that it is not penalized if late delivery is caused by tenant delays, such as Tenant change orders or failure to timely approve Landlord's plans. Sometimes leases treat tenant delays like force majeure and extend the required delivery date to the extent completion of Landlord's Work (and thus delivery) is delayed by acts of Tenant or its agents, employees or contractors, but given that the Tenant has caused the delay, rather than simply extending the required delivery date, Landlord will want delivery to be deemed to have occurred on the date that it would have occurred, but for the tenant delay, so that the buildout period starts when it would have if the tenant delay had not occurred. This means rent will commence sooner than it would have if the tenant extends the required delivery date and delays actual physical delivery.
10. **Delays by Landlord or Tenant Require Notice:** Generally, if either party wants to claim that the other party delayed its construction, it will be required to give the delaying party notice of the delay, so that the delaying party can address and eliminate the cause of the delay. Sometimes the parties will agree that notice of a delay must be given within a certain period in order for the delay to be held against the delaying party, but often the delay will not be communicated to the relevant people at the delaying party immediately, so, as a compromise, the parties might agree that if notice of the delay is not given to the delaying party with 5 days after the date on which the delay occurs, any additional delay after the 5 days until the delaying party received notice, will not count against the delaying party.
11. **Landlord Delays of Construction or Opening:** Tenant will want to ensure that its Buildout period is extended to the extent that it is delayed in performing its construction or delayed or prevented from opening for business due to landlord delays. This should include if Tenant is delayed in obtaining its certificate of occupancy or any other permit due to a code violation or other condition at the center (that was not caused by Tenant) or because Landlord has not obtained the certificate of occupancy for the center.
12. **Force Majeure Delay:** Tenant will want to ensure that its buildout period is extended to the extent that it is delayed in performing its construction or delayed or prevented from opening for business due to force majeure. Landlord will want to ensure that the required delivery date is extended to the extent that

Landlord is delayed in completing the landlord work or delivering the premises due to force majeure. Force majeure should not include events that are within the control of the parties' agents, employees or contractors because these should be Landlord or Tenant delays, as applicable. This is an important distinction, particularly if the parties decide to cap the extension of the time for performance of obligations that are delayed by force majeure, as discussed below.

13. **Cap on Force Majeure:** The parties may agree to cap force majeure, usually for both parties, but force majeure is, by definition, out of the performing party's control, so this cap will not cause the performing party to perform in a timely manner, it will simply result in remedies being triggered for late performance that is caused by force majeure (such as rent abatement for the tenant if the premises are delivered late due to force majeure and rent for the Landlord, if the Tenant is delayed in finishing construction and opening due to force majeure), which will mitigate the effect of the late performance on the non-performing party. Some parties will not agree to cap force majeure, because it is not within the parties' control. In some cases, compromises will be made that will be applicable to the effect of force majeure delays in construction for both parties (such as, for example, providing that if a force majeure delay extends more than a certain number of days beyond the cap on force majeure delays, the performing party can terminate the lease, unless the non-performing party agrees to increase the cap on force majeure). The parties may also agree that force majeure is capped only for purposes of certain remedies and not for others, so that force majeure might be capped for purposes of determining when late delivery triggers a rent abatement, but not for purposes of determining when late delivery triggers a tenant right to terminate.
14. **Notice of Late Delivery:** If Landlord is not going to deliver on time, Tenant will want Landlord to notify Tenant no later than a certain number of days prior to the required delivery date, to enable Tenant to attempt to minimize its damages and reschedule its contractors and merchandise delivery. If the Tenant has leverage, it may be able to get a remedy if Landlord fails to provide this notice (such as, for example, an abatement of Minimum Rent for each day that Landlord is late in providing such notice). Tenant's argument for such a penalty is that there are costs associated with late delivery that might be mitigated by advance notice to Tenant of the late delivery, so if Landlord fails to provide the advance notice, there should be some mitigation of these costs at Landlord's expense, through a rent abatement. Landlord may be unwilling to commit to an official notice and may argue it is not necessary for the reasons described in Section 15 below.
15. **Notice of Delivery Date:** A tenant with leverage may insist on advance notice of the actual delivery date. This will allow the Tenant to mobilize its contractor and to try to ensure it will be ready to start construction as soon as possible after the delivery date. Landlord may argue that this type of notice is not necessary because Landlord and Tenant will be in frequent contact during the construction process and Tenant will know, without receiving a notice, when possession is likely to occur. If Landlord agreed to give the notice and then failed to deliver the notice, the Tenant will not really be harmed because it will likely know when delivery will occur and, accordingly, any extension of the buildout period due to a failure to give the advance notice is not warranted. Landlord might agree to give Tenant a verbal or email update of the status of the Landlord's Work and the estimated delivery date upon request, as a compromise. If Landlord agrees to give advance notice of delivery, Landlord will want to limit this to a notice of the anticipated date of physical possession, rather than the date on which all of the delivery conditions are satisfied.
16. **Remedies for Late Delivery:** The most frequently used remedies for late delivery are abatement and termination rights, but there are other ways that the parties can address late delivery. The relative leverage of the parties will determine what penalties the Landlord will agree to. Landlord should always try to limit penalties to late physical delivery of the premises, or, at a minimum, provide that penalties cease to accrue as soon as tenant commences construction. Landlord will also always want to provide that if it gives specific remedies for late delivery, these are the sole remedies for late delivery.
 - a. **Rent Abatement:** Tenants will often request rent abatement as a remedy for late delivery, both to incentivize Landlord to perform and to offset some of Tenant's costs, in the event of a late delivery. If Landlord has leverage, it may be able to negotiate a grace period before the penalty starts to accrue, but a Tenant may insist that Landlord simply pick a reasonable date, that includes some cushion, and commit to it, so that Tenant can schedule its contractors and put the project on its schedule. Tenant will not want its store opening schedule disrupted and, accordingly, would prefer to give Landlord a required delivery date with cushion, rather than a grace period before a penalty accrues. The lease may contain several clauses that could result in an abatement of rent, so Tenant should require the lease to provide that if rent is abated or

subject to credit or offset under more than one section of this Lease at a given time, then such abatements, credits and offsets will be applied one after another, as necessary, so that Tenant gets the full benefit of each such abatement, credit and offset. Landlord will want to make it clear that any particular day of delay only triggers one penalty and is not double counted for penalty purposes, even if it is a day of failed delivery for 2 or more conditions.

- b. **Termination Right**: At some point, Tenant will want to walk away from the project, if the delivery is late. From Landlord's perspective, this is a remedy to be avoided or to apply only after a lengthy cure period, since it is likely that Landlord will have spent a lot of money and perhaps completed a lot of tenant specific work at the premises that will be not have value for the next tenant. In addition, the Landlord does not want to have to negotiate a new lease and have the space remain vacant while it does so. The relative leverage of the parties will determine this issue. If a Tenant has leverage, it may argue for a limit on force majeure extension of the date on which Tenant can terminate the lease so that after a certain period (perhaps a year or more), Tenant can move on, regardless of what has caused the delay in delivery.
- c. **Damages**: Most Landlord's will not agree to pay unspecified damages in the event of late delivery (and will not, under any circumstances, want to agree to cover lost profits or other consequential damages, though this may be an issue if Tenant is closing another store to come to the center or will have to hold over if delivery is late). If Landlord agrees to a damages provision, it will want to specifically identify the actual damages it will be responsible for and will want to try to negotiate a cap.
- d. **Reimbursement of Costs**: Generally, if a tenant exercises a termination right, it will negotiate for Landlord to reimburse Tenant for Tenant's costs associated with the lease, including (i) architectural, design and engineering costs for the preparation of preliminary plans and final plans and specifications, (ii) legal costs for the negotiation of this Lease, (iii) costs for obtaining construction permits and (iv) costs spent on construction materials to be used at the Premises that cannot be cancelled or re-used elsewhere. Some tenants may try to also obtain reimbursement for internal payroll and travel costs for Tenant's in-house construction personnel working on the project. If Landlord agrees to this, it will usually insist on a cap.
- e. **Delivery Penalties Should Not Commence until Tenant is Ready to Commence Construction**: A Landlord with leverage may insist the delivery penalties not take effect unless Tenant has all of its construction permits and is actually ready to start construction. The argument is that Tenant is not harmed by the late delivery if it is not ready to commence construction. A Tenant with leverage will not want to agree to this because it will view the delivery penalties as incentive to maintain the schedule and will not want Landlord to have any basis for delay.
- f. **Self-Help**: Tenant may want the right to complete the landlord work, if Landlord does not complete it and deliver the space by a certain date, but most tenants do not actually want to take over landlord work and this remedy is only likely to be used if (i) there is minor landlord work remaining to be completed and Tenant simply can't get Landlord to perform, or (ii) there is post-delivery work to be completed before Tenant opens and Tenant is willing to finish the work, rather than wait for a non-performing landlord to perform, because it does not want its schedule disrupted. Landlord will want to consider whether it should limit this right to only work in the Tenant's premises or in an identified portion of the common area that is critical to Tenant's operation.
- g. **Reimbursement of Increased Construction Costs**: A tenant with leverage may be able to require Landlord to reimburse Tenant for any costs incurred by Tenant to keep its contractor mobilized until Landlord delivers physical possession of the Premises to Tenant with all of Landlord's Work substantially complete. This might include any increase in the contract price obtained by Tenant as a result of re-bidding its contract, if Tenant is required to re-bid its contract with its contractor due to Landlord's late delivery. If Tenant is able to obtain reimbursement, it will likely also require Landlord to allow it to offset this reimbursement amount, with interest, if it is not timely paid to Tenant. If Landlord is willing to agree to this, it will likely want a cap on these costs and will want to ensure that it is only obligated to pay these costs to the extent the extra costs were incurred solely due to its late delivery.

- h. **Reimbursement of Overtime Costs:** A tenant with leverage may also require Landlord to reimburse Tenant for its overtime costs, if, despite the late delivery, Tenant is able to compress its work schedule in order to complete its work and open on its original anticipated delivery date. The theory is that Landlord gets its rent earlier and should be willing to reimburse Tenant for any overtime costs it incurred in order to open on time, despite the late delivery. Landlord should seek to cap the reimbursement based on some measure of the rent Landlord receives that it would not have received, but for the Tenant's use of overtime. In addition, Landlord should require that any such overtime costs be separately billed by Tenant's contractor and that Tenant's contractor furnish a reasonably detailed invoice for such costs. If Tenant is able to obtain reimbursement of these costs, it will likely also require Landlord to allow it to offset this reimbursement amount, with interest, if it is not timely paid to Tenant.