Mixed-Use Development, Or As the Gastronomically Inclined Would Say, Real Estate “Fusion”: Is It Delicious or Does It Just Cause Indigestion?

The Complexities of Mixed Use and Mixed Ownership Projects and Implications for the Landlord Tenant Relationship.

Paper by Stephen Posen, Janet L. Derbawka, Nicole M. St.-Louis and Ian A. Sutherland

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1. INTRODUCTION

Mixed use and mixed ownership developments are becoming increasingly common throughout Canada and come in a myriad of forms. With uses that range from residential, retail, office, parking, hotel, and recreational (among other uses) and legal structures that attempt to organize the various interests in the project by employing any combination of vertical and horizontal subdivision methods (e.g. air rights regimes, strata title / condominium, ground leases) together with various kinds of shared facility/services agreements and reciprocal easement and operating agreements, these kinds of projects often involve complex business and legal issues that will tax even the most experienced commercial lawyer. In terms of physical aspects, ownership, tenant mix, maintenance, management and control of the shared facilities, no two developments are exactly the same. Consequently, and as a precondition to doing any commercial leasing in these kinds of mixed use / mixed ownership projects, it is necessary to carefully consider and understand the physical and legal components of the project.

In this paper, we will discuss the various legal structures used to give effect to mixed use and mixed ownership projects and the elements of those legal structures that require particular attention and consideration when negotiating commercial leases: (i) how common area maintenance (CAM) costs and repair and maintenance responsibilities are allocated among interest holders in a mixed use/ownership development; (ii) how access, parking and utilities are commonly organized in a mixed use/ownership project and the implications for commercial landlords and tenants; (iii) how responsibility for damage, destruction and personal injury are allocated; and, (iv) how tenant rights and remedies can be structured both within and outside of the commercial lease so as to fully secure, to the extent possible, the tenant's rights under the lease.

This discussion paper is not intended to be a manual for every issue that might arise in the course of negotiating a commercial lease in a mixed use/ownership project, nor are the proposed approaches for addressing the kinds of issues discussed in this paper intended to be a panacea for dealing with them. Rather, this paper is intended to get the reader thinking about the issues that arise in the context of doing commercial leasing in a mixed use/ownership project and the creative, considered and thoughtful ways commercial lawyers have approached some of the issues that commonly arise in these developments.

2. PARKING, ACCESS & SHARED FACILITIES

Content prepared by Nicole M. St.-Louis, Borden Ladner Gervais, LLP

Mixed use developments pose unique challenges for owners and tenants wishing to participate in these urban projects. The uniqueness of such projects, the complexity of the physical aspects of the development and the shared nature of ownership, raise important issues regarding control. These issues often manifest themselves in tangible, day-to-day practical problems and can challenge a tenant's ability to operate their business. Foremost for tenants are issues of access to the premises, parking and loading. In mixed use developments, the shared facilities which supply essential services to the premises can be controlled by parties other than the landlord, adding another level of complexity to lease negotiations.

In this regard, collaboration between the various owners is essential in order for mixed use development to function effectively. Underpinning this cooperation, is a sound and appropriate legal structure which allocates rights and obligations to various owners to ensure the proper functioning of the development for the benefit of all the various classes of users: office tenants, retailers, residential dwellers and the public at large.

Commercial leasing lawyers representing clients who lease space in a mixed-use development must consider a number of key points. From the outset, it is important to assess the tenant's needs with regards to the shared facilities, which will depend on the type of business operated by the tenant. The access to and usage of certain shared facilities will be of varying importance for different tenants. For example, grocery stores would have much more complex needs pertaining to loading than smaller tenants, even though all tenants will need access to these facilities for their business to survive. Similarly, access to parking may be very important to certain classes of tenants, and not at all to other tenants who rely on walk-by traffic and proximity to transit facilities.

In addition, tenants' needs may evolve over time as their business format evolves. It is vital that the lawyer has a clear understanding of the tenant's evolving needs rather than making assumptions. Lawyers should anticipate the tenant's needs and the lease should provide for sufficient flexibility to adapt to the tenant's evolving business needs and retail concepts.

In the vast majority of mixed-use developments, the commercial components are excluded from the condominium. This paper shall be based on this assumption.

(a) Shared Facilities Agreements

Most tenants will approach the mixed-use development at a relatively late stage of the game, meaning that issues of ownership and legal structure will already have been determined. Additional, key agreements may already have been concluded, or at least negotiations well underway. Before commencing the lease negotiation process, tenants must understand the legal structure of the development and the ownership of the various components which will constitute the shared facilities to assess how their rights may be impacted.

Knowing whether the development is set up as a condominium, or a volumetric subdivision, or a mixture of both, will help determine the type of agreements into which the owners may enter. A number of underlying agreements may need to be reviewed at this stage to understand how the development is structured, and the level of control or rights, which the landlord has over those

elements of the shared facilities critical to the tenant's operations. If the mixed use project is partly subdivided as a condominium, it is important to review the declaration, the by-laws and rules, any restrictive covenants and easements running with title, unregistered easements related to access, support and utilities, and any other contracts created on registration of the condominium plan. If the mixed-use project is also comprised of a volumetric subdivision, each space will have a separate registered title. In this type of development, the owners will often enter into easements, covenants and agreements, dealing with the integration of all the components, both from an esthetic and a practical point of view. There may also be restrictive covenants registered on title that could prevent the tenants from operating certain types of businesses, as well as existing leases containing other exclusions and restrictions.

As part of this analysis, a prudent lawyer will aim to understand the overall matrix for the ownership, control, maintenance, repair and management of all important shared facilities and the standard to which such obligations must be discharged. The tenant must understand the boundaries of the premises as well as the boundaries of the landlord's ownership. The tenant must also understand the limitations the landlord may have in granting certain rights to tenants and understand the limitations imposed on the landlord, as owner, for the portions of the project which it controls. For example, a tenant may assume that the landlord owns the parking structure located within the development, where in fact the parking is owned by another owner and not intended for the use of certain participants in the development. Alternatively, the landlord may own the parking structure for the development but may have granted certain rights to parking to other users in the project.

A tenant will skip this review at their risk. While the tenant may ask for representations and warranties in the lease as to the various aspects of the shared facilities it requires access to, from a practical perspective, an award for damages will not be a great comfort to the tenant if it is denied the ability to operate its business in the manner in which it had anticipated.

A key vehicle by which the owners can set out their respective rights and obligations in a mixed-use development is by way of shared facility agreement. While these agreements can take a variety of names and form, we have referred to such a type of agreement in this paper as a shared facilities agreement ("**SFA**"). The SFA is an effective way to oversee the relationship between the owners, set standards for the operation of the development, and protect each owner's respective interests. Lawyers drafting this type of agreement will need to create a balance between securing the rights and obligations of the parties, therefore ensuring certainty, while preserving flexibility to meet demands that may evolve over time.

Under an SFA, the parties will typically appoint managers and set their compensation. Management mechanisms will also be put in place. Often, a committee is formed, with representatives from each of the types of components present in the development. Other frequent provisions will include dispute resolution, self-help rights as well as cost-sharing mechanisms. In addition, owners will most likely want to include risk-management clauses to ensure that there will be a plan of action if unforeseen events were to disrupt the development's orderly functioning. Parties can have unique provisions, in order to address the specific elements of the project.

Another key agreement is commonly referred to as an easement and operating agreement (the "**EOA**"). The EAO creates easement over a certain portion of the development for the benefit of another. The easements can be either described specifically as certain parts shown on a reference plan, or alternatively, described in general form in the EOA. Common types of easements found in EOA's include easements for support, easements to allow certain building systems or utilities to pass through a certain portion of the project to service another, and

easements for access and vertical transportation. An EOA may also contain certain restrictions which prohibit an owner from making changes to their portion of the project without the consent of the other, thus further safeguarding any rights in existence at the time the agreement is signed.

Tenants are usually not parties to an SFA or an EOA. However, these agreements are still relevant to them, as they can contain provisions of importance to the operation of their business. Many, if not all, of the issues outlined below pertaining to shared facilities, parking and access, will be addressed in the SFA or EOA. Tenants will want to review any applicable SFA and OEA as part of their due diligence to determine the scope of any relevant rights and obligations and ensure that they are dealt with in a way that will not hinder their business. Tenants will also want to clearly articulate the rights and obligations between themselves and their landlord with respect to anything that is not covered in the SFA, or if additional safeguards are required.

(b) Specific Concerns Related to Shared Facilities

(i) Parking

As discussed earlier, the question as to who owns the parking is crucial in order to determine who can grant rights to a tenant. In the most common scenario, the parking facility will be owned by one of the owners of the project and will be operated by a third party who specializes in parking management. In some circumstances, the parking facility may not even be owned by any of the owners participating in the development. In other settings, there may be multiple owners who have control over different portions of the parking structure.

The needs of commercial tenants will vary depending on the nature of their respective businesses. How important is the proximity between the parking and the retail store? Will the customer make large purchases and require easy access to their vehicle? How many visitors are expected on a daily basis? Will the parking spots be occupied on an hourly or daily basis? What are the tenant's peak usage times for parking?

In general, the larger retail tenants who would be considered to add value to any mixed use project will have more bargaining power to obtain broader rights with regards to parking, while smaller tenants may have no access to parking at all, other than that made available to the patrons of the project generally. Large tenants will frequently require in their leases special arrangements in regard to parking including reserved parking stalls, exclusive vertical transportation from parking areas to their premises, cart corrals, order pick up areas, free parking periods, specific validation systems and standards in regard to lighting, cleaning, maintenance and security.
The parking owner will have to determine and complete an agreement with the other owners as to who will install, manage, maintain and control these types of services, and ensure there is a cost-sharing system. Expenses may be reimbursed with the revenue generated by the fees paid by parking users, or they may be charged to the tenants through CAM.

Generally, tenants have no privity of contract with the parking owner/operator. Therefore, they should ensure their landlord has the necessary rights to the parking that the tenant requires so they can ensure the parking rights set out in the lease are enforceable. Anchor tenants will want to provide for sufficient enforcement mechanisms in their lease to be able to compel the landlord to enforce their rights under the parking agreement. The enforcement can take many forms that can range from notice periods to bringing an action against the parking owner by the landlord.

In some instances, larger tenants may enter into an agreement directly with the parking owner. Even though relatively rare, some tenants will be allowed to step into the landlord's shoes in order

to guarantee the survival of their parking rights, and a direct enforcement mechanism.

Any well-managed parking structure will have mechanisms in place for adequate maintenance and security. Proper lighting, monitoring and emergency exits, and phones are some of the basic components required to ensure the secureness of a parking facility, whether it be indoors or outdoors. With respect to maintenance, the parties involved will need to ensure that an appropriate party, operator or manager, is responsible for the parking's cleanliness and the state of repair.

Parking facilities entail significant administrative and managerial efforts oftentimes requiring the involvement of a third-party management company, if the parking is not already owned by a third party specializing in the parking industry. This is an efficient way to ensure the parking is well-managed and taken care of, especially if the owners are already committed to other ventures, and if there are multiple owners who require coordination assistance. However, involving a non- owner third party requires a well-thought and thorough agreement to ensure the standards, responsibilities and obligations of the management company are clearly articulated, as well as a dispute resolution mechanism.

(ii) Access

(1) Loading

Adequate access to loading facilities is a critical consideration for any mixed-use development. As a general rule, and depending upon the size of the project, there will be separation of loading and freight elevators between office, residential and retail component of a mixed-use project. The heaviest users of loading facilities will often be the retail component, save for exceptional periods of activity (initial move-in for office or residential users).

The frequency and volume of deliveries will vary from one business to another. Tenants receiving a larger number of deliveries on a regular basis will require the exclusive use of at least one loading dock and may even require access to additional loading facilities that may be shared among other retail tenants. Smaller tenants will share loading docks and will be required to coordinate deliveries to ensure efficient operation of the shared loading facilities with other tenants of the project.

Careful thought must be put into the design and location of loading facilities to ensure continuous access and efficiency. Ideally, loading docks will be as far as possible from the residential units and main pedestrian areas, to avoid any noise complaints and interference with pedestrian movements. It must also be conveniently located to ensure easy transportation of merchandise from the dock to the recipient. Often, this will take the shape of exclusive corridors and vertical transportation for goods to be transported to tenants for ease of accessibility. The timing of deliveries is an important consideration to ensure the maximum efficiency of loading docks. Some mixed-use developments may restrict the time of day during which deliveries can be received in order to reduce the risk of nuisance and conflict with other users.

Often, mixed use developments will hire a dock master who will ensure that drivers arriving at the loading space will have an assigned dock, who will coordinate and maximize the use of the available loading docks. All of these issues will often be addressed in an SFA, between the owners themselves if multiple owners are sharing loading facilities and the costs passed on to the tenant of the project further to the terms of their leases.

Where access to loading facilities is not within the portion of the projected owned by the landlord, the tenant will want to ensure that the access at law is guaranteed by way of an easement, either registered on title separately and described by way of a reference plan, or more generally described in an easement and operating agreement governing the project.

(2) Access to the premises

Another key consideration is how visitors, tenants and the public at large will access the premises. Naturally, tenants will want potential customers to easily locate and access their premises, through appropriate signage, fluid circulation and with a prime location. Larger tenants will be able to command marquee locations within the development which benefit from the greatest visibility, access and proximity to transit hubs. The smaller retail tenants will have less bargaining power, and will be relegated to secondary locations within the project.

Mixed use developments will typically have a number of various entrances and access points to be used for different purposes. The owners of residential units will often prefer to have their own, distinct entrance for privacy and security. These entrances will require authorized access 24/7. There may also be access to and from the retail locations directly from the residential lobby, when possible. Often, there can be separate entrances for some of the commercial components of the development. For example, a restaurant located within the premises which has opening hours that are beyond those of the retail stores may require a different access point. In order to diminish or avoid access to the premises during after-hours, the entrance leading to the retail stores could lock at a certain time, and a separate door will allow after-hours access to the restaurant. If there is no separate door for after-hours business, and premises are accessible at any time of the day or night, the lease should anticipate the need for increased security.

Once again, where certain accesses to the tenant's premises may be contained within the portion of the project owned by the landlord, the tenant will want to ensure that the access at law is guaranteed by way of an easement, either registered on title separately and described by way of a reference plan, or more generally described in an easement and operating agreement governing the project.

(3) Utility Facilities

Owners of mixed-use projects very often share with other owners critical infrastructure, such a central transformer, power plant, hydro vault or HVAC system. The proper maintenance and repair of this equipment is crucial to the orderly functioning of the tenants' business operations. The question of the existence of services and right of access for the maintenance, repair and replacement of easements will generally be addressed in the EOA.

As a further step, it is critical that the owners have an agreement dealing with the performance of certain duties associated with the utility facilities. The rights and obligations associated with utilities, as well as the cost of operating, maintaining and replacing same, can be dealt with in an SFA. The various owners will often grant rights of ways to allow utility systems to pass through the different divisions to serve other parcels. Such agreements will also provide a cost reallocation related to maintenance of the systems among the owners. SFAs may also grant self-help rights to some owners who may have the right to complete repairs themselves when necessary. They may have unlimited access by way of easement or right of way, or only under certain circumstances. The SFA should include, among other matters, the cost allocation for such services, who is

responsible to seek the services of that third party, what remedies are available if the third party is in breach and how to vary the third party's obligations. These costs will then be passed on to the tenants of the development through CAM charges.

Tenants should ensure that their landlord is party to such an agreement and that the SFA contains sufficient protections to ensure the uninterrupted operation of the tenant's business operations. Tenants should also review the SFA and ensure that one of the owners has the responsibility to maintain and repair the utility facilities, and should determine the scope of any self-help rights available to their landlord. Tenants should also consider the inclusion of appropriate remedies in their leases in the event of service interruption, including compelling the landlord to exercise any self-help remedies available under the SFA.

(c) Conclusion

Any lawyer encountering a file involving a mixed-use development will be well-served to examine issues related to control over shared facilities in a more comprehensive way, together with a keen understanding of a client's business needs.

3. COMMON AREA MAINTENANCE (CAM) COSTS & REPAIR AND MAINTENANCE

Content prepared by Janet L. Derbawka, Norton Rose Fulbright Canada LLP / S.E.N.C.R.L., s.r.l.

(a) Common Area Maintenance (CAM) Costs – How are these Allocated?

Mixed-use developments present complex business and legal issues with respect to the allocation of common area maintenance ("CAM") expenses. In a stand-alone retail or office building, it may be appropriate to allocate CAM expenses on a per square foot basis. This cost-allocation methodology is based on the assumption that the tenants or occupants use, access and rely on the building's common areas in the same or similar manner. However, mixed-use developments consisting of multiple different users will generally require more comprehensive CAM expense allocations.

The appropriate method of cost allocation will vary depending on the nature of the mixed-use development. Determining the appropriate method of cost allocation can be challenging, as it may require the balancing of retail, residential, office, parking and various other interests. A project which contains retail, office and residential mixed-use elements might have one level of CAM charges that applies equally to all retail tenants in a development, another level that relates only to the office tenants and another level that relates just to the owners of the residential component of the development. There may, however, be overlap between the variety of users as to various amenities, the cost of which has to be allocated among the various users.

Unique building configurations and different tenant lease requirements challenge even the most experienced landlords when trying to allocate CAM fairly in a mixed-use development. For example, leasable space configuration is a basic difference between an office and a retail lease. Retail space is mostly horizontal and is made up of expansions that are contiguous and coterminous to the original space. Retail space is based on leasable or occupied square footage and excludes lobby and common area. In contrast, office space is vertical and can have several individual non-contiguous suites that roll up into the total square footage for any one lease. Office space may be stated as rentable square footage and include common areas and lobbies.

Additionally, office landlords often use a "gross-up method" to gross-up or extrapolate operating expenses to a stated percentage occupancy level in the building. The gross-up clause kicks in when the building is not fully occupied. Suppose the lease allows the landlord to gross up to a stated 95 percent occupancy level, and the current occupancy level of the building is less. The landlord would then be allowed to increase the operating expenses as if the building were occupied at the 95 percent level. However, not every operating expense account is "grossed up." Only variable expenses that change with the level of occupancy should be adjusted. The concept of a "gross up" is generally not included in retail leases.

To overcome some of these issues, operating expense pools are often used to divide CAM expenses amongst the different types of users of a mixed-use development. For example, in a project with both retail and office use elements, there might be one level of CAM charges that applies equally to all users of the retail element in a development, another level that relates only to the users of the office element. Retail users may share in marketing costs that are not applicable to office portions of the project while office users will be charged for janitorial services and elevator repair and maintenance which are typically not used by the retail component. Equity should dictate how expenses are allocated among the different owners and different uses. For some categories of expenses, it may be appropriate to allocate expenses pro rata among all owners or based on

square footage. Other expenses may be more appropriately allocated on the basis of a weighted formula that accounts for the different density, frequency and nature of the uses made by each party

Additional considerations apply when condominium corporations are added into the mix. The landlord, as the owner of the condominium units comprising the premises, will be required to pay "common element expenses" pursuant to the condominium documents. From a landlord perspective, it is best for the lease to provide that the tenant is required to reimburse the landlord for 100% of these costs. From a tenant perspective, reserve fund contributions and special assessments should not be passed through to the tenant. A tenant who usually excludes structural repairs and replacements may be unable to exclude same when such charges get passed through to the tenant in the form of "common element expenses". Tenants need to be mindful of the language in their leases to try and minimize or eliminate any chance of duplication of charges. Additionally, charges incurred by landlords pursuant to various operating agreements or shared facility agreements will usually be passed through to a tenant and these agreements should be reviewed by the tenant and its counsel to ensure the tenant understands the nature and extent of such inclusions in CAM.

(b) Repair & Maintenance in Mixed-Use Developments – Who is Responsible?

Repair and maintenance obligations in mixed-use developments can present a web of complex issues for commercial leasing lawyers to unravel.

A mixed-use development may be made up of several buildings with multiple levels. The ground level may be used for commercial purposes and consist of multiple retail outlets. The upper levels of the building may consist of only residential units. The ownership structure of the building may also be varied. For example, the residential component of the building may be in the form of strata ownership, but the parking garage directly below may be leased to the tenants directly from the developer.

Providing for continuing routine maintenance and repair would normally be a simple matter, but in an integrated mixed-use development the matter becomes more complicated. At the outset, the party who is responsible for the performance of each item of maintenance and repair must be identified, as should standards for repair and maintenance. Likewise, the cost of maintenance and repair, to the extent that more than one party benefits from the improvements being maintained, will have to be equitably allocated.

When damage occurs to a commonly owned or used physical portion of the mixed-use development, who bears the obligation and the cost of repair? The answer may not be specified in any condominium bylaws or in any one particular agreement. Mixed use developments are commonly subject to range of agreements that affect how the development will be operated. These agreements take a variety of different forms, and may include, for example, reciprocal easement agreements, parking agreements, shared facilities agreements, and general operating agreements.

In complex mixed-use developments divided into multiple ownership structures, one of the most difficult drafting challenges is the creation of effective enforcement mechanisms with respect to repair and maintenance obligations.

With respect to commercial leases, landlords need to ensure that they have not covenanted under the lease to do things which are a condominium corporation's responsibility. For example, common element areas of a condominium are the responsibility of the condominium corporation so the landlord's lease should not include an covenant on the landlord's part to maintain and repair these areas. Where the landlord owns the entire commercial area, then the usual covenants would remain with respect to the "common areas" of the commercial portion, but an acknowledgement should be obtained from the tenant that the landlord is not responsible for the "common element" areas of the condominium.

Consideration should also be taken as to whether there are any portions of the common elements that the condominium corporation is not responsible to maintain and repair (e.g. exclusive use common elements). If there are, who will maintain and repair these areas?

If building repairs are needed, working out the logistics of access may also be challenging. Particularly in mixed-use developments that span across multiple occupancies and tenancies.

It is paramount that commercial landlords and tenants understand the scope of their repair and maintenance obligations and who they are contracting with before entering into a lease agreement in a mixed-use development.

Commercial leasing lawyers are tasked with working out these complexities and must be alive to the potential issues that can arise in mixed-use developments. A tenant and its lawyer should review all project documentation and ascertaining how repair and maintenance responsibilities have been delineated between the various parties.

4. DEFAULT & REMEDIES

Content prepared by Ian A. Sutherland, Stewart McKelvey

As the discussion that precedes this section highlights, whether acting for a commercial landlord or a tenant leasing space in a mixed use and / or mixed ownership project, it is critically important to have a good understanding of both the physical aspects and legal structure of the mixed use / ownership project to avoid the traps, gaps and common pitfalls that lie just below the surface of the commercial lease being negotiated.

To the extent the tenant's commercial leasing lawyer has not been involved in the development of the project or the preparation of the initial project documents, it is even more critical that he/she take the time to familiarize him/herself with both the physical aspects of the project and the documents that form the basis of the development's legal structure. It is only with this knowledge that the tenant's lawyer can identify those aspects of the typical landlord / tenant relationship and the project that are not within the landlord's (or tenant's) control and from whom the tenant might ultimately need to have recourse in the event the obligation is not ultimately within the control of the landlord.

For example, in many mixed use / ownership projects organized as condominiums, the obligation to repair and maintain the common areas, the building envelope and the mechanical and electrical services (which often service the entire building) and the obligation to repair and rebuild these common element components after an event of substantial damage and destruction does not typically reside with the unit owner / landlord with whom the tenant has a lease (and contractual relationship), rather it often resides with the condominium corporation with whom the tenant has no direct relationship (either by contract or otherwise recognized under applicable condominium legislation). As a consequence, the way in which a landlord and tenant might ordinarily organize their respective obligations with respect to repair and maintenance under a standard commercial lease simply don't work. Another approach needs to be taken that recognizes and gives effect to how these common element components are dealt with under applicable condominium legislation and condominium documents.

(a) Consistency of Lease with Third Party Documents

Given the likelihood that multiple project documents (in addition to the lease) will affect the landlord tenant relationship in a mixed use/ownership project that is organized as a condominium, it is not uncommon for a tenant to request from a landlord a representation that (A) the condominium documents will not be inconsistent with the tenant's rights under the lease, or (B) have a material adverse impact on the tenant's use and enjoyment of the premises, or (C) impose additional obligations on the tenant under the lease. These landlord representations are especially important in situations where the condominium documents have not yet been finalized. Similarly, the landlord will typically insist upon a tenant covenant to comply with the applicable condominium legislation and condominium documents and seek from the tenant an acknowledgment that in the event of conflict between the lease and the applicable condominium legislation and documents that the applicable condominium legislation and documents shall prevail.

(b) Obligations Performed by, and Owed to, Third Parties

Having identified how the physical aspects and legal organization of the project impact the manner in which the landlord and tenant might typically organize the landlord tenant relationship in respect

of certain lease provisions and items, focus shifts to how best to address those items (some of which may now be dealt with in other project documents to which the tenant will certainly not be a party and the landlord may not be a party). While some larger tenants (especially those who participate in the early stages of a project's development) might have some success negotiating direct covenants from those third parties involved in the project (e.g. where the premises and the parkade intended to service the premises are in separate ownership, a large retail tenant might enter into a direct agreement with the owner / manager of the parkade who is not the landlord), more often than not, direct covenants from third parties are not offered or available to tenants.

As a starting point, the landlord will typically attempt to carve out from its typical obligations under the lease any item which is identified as being outside of its control, and will often require an acknowledgment from the tenant that the obligation is being performed by a third party and the tenant cannot look to the landlord for performance. In some instances, the landlord will offer to use reasonable commercial efforts to cause the third party to perform its obligations, or where the obligation is owed by the condominium corporation, the landlord might covenant with the tenant to vote in a manner to cause the condominium corporation to perform its obligations. This fairly typical landlord approach has the potential to leave an unsophisticated tenant without a covenant (and often without a remedy since most tenant remedies require a breach of a landlord covenant). Tenants should reject this approach to dealing with landlord covenants of any import to the tenant. In addition (or alternatively), the tenant might seek to extend the definition of landlord default under the lease to include any default by the condominium corporation or other third party identified as owing an obligation to the landlord which is ultimately for the benefit of the tenant. The tenant will likely find that the landlord has similarly extended the definition of tenant default to include any tenant non-compliance with the condominium documents or any act or omission by the tenant that would cause the landlord to be in default of its obligations under a third party agreement.

Generally, the landlord and tenant are left with securing rights and obligations as between them to compel the other (to a lesser or greater extent depending on their relative bargaining power) to: (A) comply with any obligations owed to third parties (for example, a covenant by the tenant to comply with the declaration and by-laws of the condominium corporation which governs the unit leased by the tenant), or (B) enforce any rights the other might have against third parties for its benefit (for example, a covenant from the landlord to enforce its rights under an agreement between the landlord and the third party owner of a parkade for parking made available to the tenant under the lease). The tenant should ensure that any landlord costs of enforcement are borne by the landlord and not passed on to the tenant as additional rent.

In addition to securing a landlord obligation to (A) enforce any rights the landlord might have in its agreement with third parties, or (B) cause the condominium corporation in which the landlord is an owner/member to perform its obligations under the applicable condominium legislation and the condominium documents, the tenant should also secure a positive obligation from the landlord (i) to assist the tenant in securing any consents required from the condominium corporation in connection with alterations to the unit or any common elements (exclusive use or otherwise), among other consents that might be required in connection with the tenancy, and (ii) not to exercise its voting rights in a manner that adversely affects the tenant.

Also, tenants should familiarize themselves with the remedies enjoyed by condominium corporations or other third parties where the landlord defaults in its obligations under the condominium documents or applicable third party agreements. As noted above, while some larger

tenants might have some success negotiating direct covenants from those third parties involved in the project, many will not. At a minimum, tenants should secure a positive obligation from the landlord to provide notice of: (A) any default by the landlord to the condominium corporation or other third party under any applicable project documents, and, where applicable, (B) any meeting or vote of the owners of the condominium corporation that affect the tenant or its premises.

Under applicable condominium legislation, a unit owner's default in the payment of common expenses creates a lien in favour of the condominium corporation for the unpaid amount. In some jurisdictions like Ontario, a condominium corporation may also, by notice to the tenant, require that the tenant pay to the condominium corporation the rent (or any portion thereof) due under the lease in an amount sufficient to satisfy the unpaid amount owed to the condominium corporation.

(c) Remedies

While a landlord will typically have recourse to its usual remedies under the lease for any tenant breach, a tenant should consider, what if any remedy over and above a claim for damages against the landlord it might need in order to ensure that any third party obligations which ultimately benefit the tenant are in fact performed. These additional tenant remedies generally fall into two categories: (A) those intended to motivate the landlord to compel the third party to perform its obligations, and (B) tenant self-help remedies.

The termination of, or other dealing with, a third party agreement, or an amendment to the condominium documents that, in each case, either prevents the tenant from using the premises for the purpose contemplated under the lease, or results in a substantial or material interference with the tenant's business or use of the premises, may not be capable of being adequately compensated in damages and, in each case, the tenant should consider whether an alternate tenant remedy is appropriate. In some circumstances, such a termination or material amendment to a third-party agreement should give rise to a tenant right to terminate the lease, or a rent abatement. There might be other instances where an expanded landlord indemnity is appropriate especially in circumstances where defaults by the condominium corporation or other third parties identified as owing an obligation to the landlord (which is ultimately for the benefit of the tenant) do not constitute a landlord default under the lease. Landlords will generally resist tying any covenants the performance of which are not within their exclusive control, to these expanded tenant remedies.

A covenant from the landlord to appoint the tenant as a proxy to exercise its voting rights in respect of matters that directly affect the tenant might be one way to ensure that in a vote of the members of a condominium corporation on matters that directly affect the tenant, the landlord's vote is cast in a manner consistent with the tenant's interest under the lease, however, in my view this remedy is of limited value where the votes of the landlord/member are insufficient to carry the vote at the meeting of members.

Where the landlord has agreed to enforce, for the benefit of the tenant, those obligations of the condominium corporation or a third party with whom it has an agreement, larger tenants might be able to secure from the landlord an assignment of those enforcement rights, to the extent those rights of enforcement are assignable. Like any assignment of rights of this kind, the exercise of this remedy should remain the sole discretion of the tenant and should not preclude the tenant from relying on, and enforcing, the landlord's underlying covenant.

Tenants need to be careful about relying too heavily on self-help remedies in mixed-use/ownership projects, for the simple reason that it's complicated. For example, in the case of an obligation owed by the landlord under the lease which is acknowledged as being an obligation of the condominium corporation or other third party to the landlord (and one that is ultimately for the benefit of the tenant), even if the breach of such obligation would give rise to a tenant self-help remedy, the lack of privity of contract or other direct legal relationship recognized at law between the tenant and the third party would preclude the tenant from enforcing its self-help remedy against the third-party. Moreover, in some circumstances, the attempt to exercise a self-help remedy might well put the tenant offside its obligations under the lease to comply with either the third party agreement or the condominium documents (e.g. repairing a common element component in a condominium that the landlord has agreed to repair under the lease, but in respect of which the repair and replacement is the responsibility of the condominium corporation under the condominium documents).