

**LEASE DUE DILIGENCE WHEN ACQUIRING  
INCOME-PRODUCING COMMERCIAL PROPERTIES**  
**ICSC 2018 LAW CONFERENCE**

*Lease due diligence starts with the Purchase Agreement and ends with the Tenant Estoppel Certificate.*

Key considerations to take into account at the outset of the transaction:

- Purchaser's short and long term plans for property
- Scope of lease due diligence
  - key financial and business terms
  - exclusivities and permitted uses
  - co-tenancy, cease operations
  - special provisions, tenant inducements
  - material or unique ongoing obligations
  - tenant's right to renew, expand, terminate, assign, sublet, purchase
  - tenant security, indemnitors, guarantors
  - Restrictions on landlord or property
  - landlord's right to relocate premises; demolish, alter and construct buildings
  - parking requirements, signage rights
- Timing of review
- What are the options for addressing lease/tenant issues
- Consider how best to confirm the facts

**WHEN ACTING FOR A PURCHASER:**

1. Purchase Agreement:
  - (a) **Vendor Representations and Warranties** - to be verified in tenant estoppel certificates
  - (b) **Due Diligence Deliveries** - all leasing documents (leases, amendments, assignments, subleases, occupancy and license agreements), area certificates, warranties, parking agreements, tenant files, rent rolls, list of security deposits, letters of credit, landlord's work, tenant inducements, third party cost sharing agreements
  - (c) **Right to Interview Tenants**
  - (d) **Adjustments** - how will outstanding landlord's work, tenant inducements, free rent periods and leasing commissions be adjusted? Options include: (i) vendor agreeing

to complete/pay prior to closing; (ii) purchaser receiving credit on statement of adjustments.

- (e) **Estoppel Certificate** - is an extension of the vendor's representations and warranties. Verifies the current state of the tenancy, lease and premises to be inherited by purchaser.
  - (f) **Template Estoppel** - Ideally, purchaser prepares template form of estoppel to be sent to tenants (either attached to purchase agreement, or delivered to vendor during due diligence period). In either case, a purchaser will want to ensure that it has sufficient time to complete its due diligence and has the right to provide the vendor with additional/specific provisions to be included in any estoppel before it is sent to the tenant. This will ensure that the estoppels reflect anything caught by the purchaser's due diligence.
  - (g) **Estoppel Certificate Delivery Date** (purchaser's condition) - ensure date is in advance of closing to allow purchaser time to review and address any issues raised in estoppels.
  - (h) **Major Leases vs. Non-Major Leases**
  - (i) **Required Tenant Estoppels** – i.e. estoppels that must be received by purchaser as a condition of transaction or closing. Consider appropriate threshold to be satisfied (e.g. estoppels from all Major Tenants; a percentage of rentable area).
2. Due Diligence:
- (a) **Review Lease Documents**
  - (b) **Prepare Lease Summaries**
  - (c) **Review Title to Property** – any registrations that affect the leases/tenants? (e.g. restrictive covenants, exclusivities)
  - (d) **Conduct Tenant interviews**

**WHEN ACTING FOR A SELLER:**

- 1. **Vendor Representations and Warranties** – try to limit and quantify
- 2. **Estoppel Certificate** – tenant only required to provide form of certificate contemplated in its lease

**Replacement Estoppel Certificates**