Special Drafting Issues When Leasing a Commercial Condominium

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Introduction

Owners of commercial condominium units and their tenants—when the commercial unit is located in a project that also contains residential condominium units—have a significantly more complicated relationship than do their counterparts in buildings where the landlord owns the entire structure. Standard form commercial leases often do not contain provisions that address the unique relationship between owners and owners' associations and the effect of that relationship on tenancies. Indeed, standard provisions are often either not enforceable or provide for obligations that neither the landlord nor tenant can perform. A simple reading of the project's governing documents (such as the covenants, conditions and restrictions, known as CC&Rs) will not provide sufficient guidance as to how the provisions should be changed unless the reader is also familiar with how residential condominium projects are managed and operated.

Given the recent dramatic increase in the number of mixed-use projects, which typically have commercial condominiums on the ground floor and residential units above, counsel for both parties need to know what changes should be made to commercial lease provisions to

- Protect the interests of the commercial condominium owner and the tenant; and

- Ensure that the lease accurately addresses the economic relationships and expectations of the parties.

This article highlights the most important lease provisions and suggests ways of analyzing and revising them to meet the needs of condominium owners and their tenants. This article does not, however, discuss leasing issues as they may pertain to projects that contain only industrial or commercial units or other forms of common interest developments, such as stock cooperatives or buildings held by tenants in common, although the information contained in this article may provide a framework within which to analyze leasing issues in those other forms of holding real property.

Legal Framework/Background

Why Are Condominiums Special?

The need to re-draft many standard commercial lease provisions results from the nature of a condominium and the division of ownership interests between the owner of an individual unit and the entity that owns and/or controls **[29]** the common areas of the structure. The condominium owner has two interests defined by California's Davis-Stirling Common Interest Development Act (Davis-Stirling):

- A fee simple ownership of the unit itself, which typically consists of the airspace defined by the location of the walls, ceilings, and floors as shown on the condominium plan (*i.e.,* the unit); and
- Either
  - An undivided interest as a tenant in common in the common areas of the structure containing the condominium units (which is typical for smaller developments); or

- An indirect ownership through an association to which the common areas of the development have been deeded.

See CC §§4125, 4185. Davis-Stirling mandates that all projects subject to it must be managed by an association in which each owner of a unit is a member and is governed by a board of directors. CC §4800. See, *e.g.*, Advising California Common Interest Communities, chap 2 (2d ed Cal CEB).

Similar provisions exist in the more recently enacted Commercial and Industrial Common Interest Development Act (CICIDA), which governs "a development that is limited to industrial or commercial uses by law" or by the development's recorded CC&Rs. CC §6531. See Common Interest Communities §§1.3–1.7; Forming California Common Interest Developments, chap 9 (Cal CEB). Although neither statute specifically mentions mixed-use projects, most practitioners assert that mixed-use projects containing both residential and commercial uses within the same governance structure will be governed by Davis-Stirling rather than by the CICIDA.

In practical terms, the foregoing provisions typically mean (unless otherwise stated in the CC&Rs) that the condominium owner owns the paint on the walls and the fixtures and equipment that protrude into the airspace within the unit and the owners' association controls the walls and what is behind them—including, for example, the plumbing pipes behind the wall, the heating and venting ducts behind the unit's ceiling, and even its front door. The latter are part of the common area, along with what one commonly thinks of as common areas, such as the hallways, elevators, and landscaping, in addition to the structural elements of a building such as the roof, foundation, and walls. This typical division of ownership and control can be altered by the project's CC&Rs or its recorded map or condominium plan. Indeed, there are often additional spaces not

directly connected to the airspace parcel, such as a deck or a storage or parking space, that may be assigned to a particular unit in the recorded map or condominium plan.

A clear understanding of this ownership division is critical for the owner, the tenant, and their respective counsel. Leases are not only grants of an estate in real property, but are also detailed contracts assigning the obligations and the risks between the parties. Every obligation must be reviewed to make sure that the party giving a covenant has the power to perform that covenant and that the beneficiary may reasonably expect performance.

In a condominium project, unless the owner of a prospective rental unit also owns or controls a majority of all the other units located in the project, the owner of the prospective rental unit does not have direct control over any of the common areas, including their maintenance, how they are insured and how much they are insured for, how they are managed, how decisions are made to repair or replace building elements that are damaged or need replacement because of age, and similar obligations. Decisions on these issues are made by the owners' association in conformance with the project's CC&Rs as well as any other management documents adopted by the owners.

What Should Counsel Review Beforehand?

Given the unusual character of commercial condominium leases, in addition to reviewing the project's CC&Rs and other governing and management documents, counsel should make two other preliminary evaluations before negotiating or drafting a lease for the unit. While this type of review could also occur with the purchase of a unit, the suggested review is critical before negotiating and drafting a lease.

First, the parties should examine the financial records and minutes of meetings of the owners' association. The association maintains the common areas and pays for all of its obligations through monthly assessments (usually referred to as "dues") authorized by the project's CC&Rs. In projects regulated by Davis-Stirling, the monthly dues must not only be sufficient to cover costs set forth in an adopted annual budget to cover ongoing operations, including regular maintenance and repair, but also to fund a reserve account to be used to pay for the replacement of major components of the project, such as the roof, exterior painting, plumbing, electrical wiring, waterproofing, and other such items. It is important for the parties to know whether

- All monthly dues have been paid or whether there are collection issues;
- The monthly dues in fact are sufficient to cover all the elements of the budget, including the reserve account; and
- Given the age of the building or reports of maintenance problems (*i.e.,* defective windows, malfunctioning elevators), major capital needs might be on the horizon.

If the latter is true, inquiry should be made about whether

- There are other sources of funds to pay for repairs (insurance, building or supplemental warranty payments, or damages recovered from successful suits against the builders and their contractors);
- The reserve accounts are sufficient to fund anticipated replacements; or
- The association contemplates adopting a special assessment during the anticipated term of the lease that would

[30]require each owner to pay additional sums to fund the needed replacements or major repairs.

Second, review the association's past and current business and management practices and records. Specifically, both owner and prospective tenant need to determine how rapidly and with what success the association addresses repair needs (or other problems that would affect an individual unit), since the unit owner is usually at the mercy of the association to deal with such things as plumbing leaks, broken elevators, and vandalism, which may occur during the term of a lease and adversely affect a tenant. Large associations often have full-time staff to meet repair needs and to keep records. Other associations hire professional management companies to undertake these tasks. Small associations may have only a volunteer owner or owners who are elected to perform these tasks. All, however, usually prepare annual budgets (required by CC §5300) and have some kind of reserve account analysis prepared from a review of the condition of the common areas. Budgets and reserve account studies often provide some insight into the condition and repair history of the common areas in the project.

What Discussions or Disclosures Might Be Conducted or Given?

Attorneys representing the owner of a commercial condominium should consider discussing these ownership and management issues with the attorney and broker representing the proposed tenant before presenting a draft of the proposed lease. Having a meaningful discussion about the lease terms can be difficult unless both parties understand the nature of a condominium and the different ownership interests. In addition, given recent case law (see, *e.g.*, *Thrifty Payless, Inc. v The Americana At Brand, LLC* (2013) 218 CA4th 1230, reported at 36 CEB RPLR 107

(Sept. 2013)), the owner may have a duty to make certain disclosures to a prospective tenant, particularly if the owners' association could pass some cost increases through to the owner and the owner anticipates passing these costs to the tenant during the lease term.

Lease Provisions Significantly Affected in Condominium Rentals

Description of the Premises and Building; Access Agreements

Every lease contains a description of the premises being leased, typically by a unit or suite or floor number. Condominium units are separate parcels of real property that are formally identified by local governmental and taxing authorities and reflected in deeds. This is the identification that should be used in a lease. For "the building," if the project has a name or a commonly used street address, it can be used, but it is essential that the "building" description identify it as a condominium project.

The parties need to pay particular attention to what other areas also belong to the owner as part of the legal description of the condominium by reviewing the CC&Rs, the condominium plan, and any recorded map. The formal legal description contained in the deed may include areas such as parking or storage spaces, or these may remain as common areas but are assigned solely for the condominium owner's use in the CC&Rs and shown on the condominium plan for the project. If the tenant wants a parking space included as part of the leased premises, for example, the tenant's attorney needs to make sure it is included in the description of the premises. Conversely, if parking is not to be included in the lease, the owner's attorney should probably draft an affirmative exclusion, particularly if the parking space is dedicated to or included in the legal description of the condominium unit. Similarly, if the condominium is to be

leased for use as a bar or a restaurant that might store materials in a rear yard or adjacent patio area, the ownership of that area needs to be ascertained because, if it is controlled by the owners' association, the use could be prohibited or terminated in the future. Additionally, the attorney should review any and all access easements or similar agreements to make sure that the tenant has adequate access to the leased space or appropriate use of other areas in the project.

The parties also need to consider whether the special needs of some commercial tenants require adjustments to the description of the leased premises and whether the owners' association's consent is required for the leasing of its common area. For example, restaurants may need dedicated vents to a roof or exterior wall; banks and convenience stores may wish to have an ATM machine on an exterior wall. Each of these examples entails use of and changes to the common areas and would thus require the association's consent in the form of either an easement or a binding contract for the term of the lease and any options extending that term.

Permitted Uses and Restrictions on Use

In addition to the usual zoning and other restrictions imposed by local government entities, the permitted uses for a commercial condominium will also be governed by the project's CC&Rs and its Rules and Regulations, each of which must be reviewed and the lease made subject to their provisions. See Common Interest Developments §§9.15–9.27.

In projects subject to Davis-Stirling, there may be additional restrictions governing such matters as noise and odors that would particularly affect the occupants of residential units adjacent to or on top of the commercial

condominium. See Common Interest Communities §§6.32–6.41. Moreover, the owner of a commercial condominium in a residential project (*i.e.,* mixed-use project) may also need to be sensitive to problems that could arise depending on the nature of the use of the commercial space. For example, the owner should consider whether residents might complain about music played during daytime hours (common in many grocery or clothing stores) or excessive traffic in and out of the commercial establishment, which might take up street parking spaces. See Common Interest Developments §§9.21–9.22, 9.37–9.42. These problems would be subject to **[31]** restrictions and dispute resolution provisions of the CC&Rs and other management documents adopted by the owners' association and thus should be addressed in the lease. See "Breach and Compliance With Law; Remedies" and "Dispute Resolution" below.

The traditional lease provision on restrictions regarding changes in use of nonresidential leased property by the tenant, drafted to comply with CC §§1997.010–1997.270, should be augmented to specify (as a basis for the owner to withhold its consent to use changes) that the proposed use violates the use restrictions contained in the CC&Rs or other management documents.

Be alert to the possibility that the proposed use may violate local zoning or nuisance laws or federal criminal law, even if it complies with state laws. For example, a medical marijuana dispensary in a commercial condominium invites the risk of prosecution for the owner's aiding and abetting a crime under federal law as well as the possibility of a federal civil forfeiture action against the owner. For further discussion, see California Landlord-Tenant Practice, chap 4 (2d ed Cal CEB).

Common Area Maintenance Charges

Frequently in retail and office leases, in addition to the basic monthly rent, tenants are asked to pay all of, or increases in, the costs incurred by the owner for the maintenance and operation of the building in which the leased premises are located. These expenses are often called "Common Area Maintenance Costs" or "Operating Expenses" or "CAM" charges. See, *e.g.,* Retail Leasing: Drafting and Negotiating the Lease, chaps 9, 13–15, 20 (Cal CEB); Office Leasing: Drafting and Negotiating the Lease, chaps 6, 12, 17–18 (Cal CEB).

In most leases, these clauses are quite extensive, covering a wide variety of expenses from management costs associated with onsite offices and personnel to common area repair costs, real property taxes, insurance premiums, and utilities that are not separately metered to the tenant. Other leases, commonly referred to as triple net leases, require the tenant to essentially step into the shoes of the owner and pay all of the expenses associated with the leased space. In either situation, the parties must carefully evaluate all costs associated with the operation of the unit, how the costs are paid and by whom, and the likelihood of substantial increases in the costs. See *Thrifty Payless, Inc. v The Americana At Brand, LLC* (2013) 218 CA4th 1230.

Initially, the owner of a commercial condominium should ascertain which costs are paid directly by the owner. These typically include real estate taxes (all such taxes are individually assessed to each condominium owner, not the owners' association), insurance obtained by the owner to cover liability and losses to the interior of the unit, any services provided by the owner to the interior of the unit (*i.e.,* janitorial, internal facility repairs), and the owner's individual management expenses (*i.e.,* through a management company). These

could be treated as one would treat any CAM expense. See Common Interest Developments §§9.25–9.26A.

Next, the owner should decide whether all or a portion of the dues or other assessments paid to the owners' association should be recovered from the tenant as part of the rent. An average person's perception is that association dues cover regular maintenance, insurance costs, and upkeep of all the common areas; thus, it seems logical and reasonable that a tenant in a commercial condominium should reimburse the owner for the amount of the dues if the lease anticipates a CAM payment. This perception is only partially correct—the tenant faces major problems if the owner asks the tenant to reimburse the owner for

- The monthly dues paid to the association; or
- Any special assessment imposed by the association that the owner is obliged to pay in the future.

Annual Dues

The dues amount the association needs to raise to meet its annual budget typically increases each year and could increase significantly. Assessments are usually separately adopted financial obligations to cover the cost of completing a particular capital project and often require large lump-sum payments. See Common Interest Communities, chap 5; Common Interest Developments §9.26. In older projects or ones that have suffered from construction defects, the books and records (including minutes of the meetings of the board or owners) may reveal discussions about anticipated financial problems or the need to raise additional funds. Tenants and their counsel should carefully review these historical documents to determine the usual or average rates of increase in the monthly dues and the likelihood that the association might adopt a special assessment

and, if so, what the owner's share of any such assessment might be. Even if the numbers do not seem unreasonably large, tenants might wish to seek a limitation or cap on their exposure for increases in dues and may want to remove entirely any obligation to pay a special assessment for a capital improvement project.

Reserve Accounts

Condominium projects subject to Davis-Stirling must maintain reserve accounts to cover the cost of replacing major components of the project. See CC §§4178, 5300, 5500–5560, 5565. These function as savings accounts to fund future capital replacements (*i.e.,* a new roof) or major repairs, such as painting the exterior of the project. Tenants rarely agree to pay capital costs; if they do, they often require that the capital expenditure result in a reduction in operating and maintenance costs for which the tenant is responsible and that the capital expenditure be appropriately amortized over the life of the improvement. Reserve account funds rarely meet these tests and, more importantly, may be used so far in the future that the tenant will obtain no benefit from the replacement or major repair. At a minimum, counsel for the prospective tenant should consider negotiating the removal of the reserve account payment amounts from any **[32]** dues reimbursement clause. On reserve accounts, see Common Interest Communities §§5.71–5.84; Common Interest Developments §§3.70, 3.108, 3.111.

Disclosures and Inspections

Owners might be well advised to disclose the issues regarding annual dues and reserve accounts at the beginning of lease negotiations even if the prospective tenant fails to raise them. See *Thrifty Payless, Inc. v The Americana At Brand, LLC* (2013) 218 CA4th 1230.

Although increases in dues and assessments should concern the tenant, the parties should probably review the actual numbers involved in any proposed pass-through of dues and assessments before getting involved in heated negotiations. If the initial anticipated total amount of dues to be paid by the tenant to the owner as additional rent is in line with market expectations of what a tenant would pay an owner, the parties might want to focus negotiations on limiting future increases in the amounts to be paid. This is similar to tenants requesting a cap or other limitation on the payment of increases in real property taxes if there is concern that the owner might transfer the property during the term of the lease.

Because the tenant reimbursement on a commercial condominium may be a combination of traditional CAM expenses and some or all association dues, it might be wise to consider two separate reimbursement provisions (one addressing CAM expenses and the other addressing association dues) to avoid drafting problems and ensure clarity.

One last problem to evaluate in drafting a CAM or dues reimbursement provision involves inspection rights. Traditional CAM provisions typically give the tenant the right to review the owner's books and records for purposes of ascertaining the accuracy of the owner's computation of the CAM expenses. While these provisions are easily enforced when the owner's direct costs are involved, it may be more difficult for a tenant to obtain the right to review the books and records of the owners' association. The project's CC&Rs, any other management documents, and the relevant Davis-Stirling provisions (see CC §5205) should be reviewed to determine when and how the owner has a right to review those books and records. Under CC §5205(b), a condominium owner has the right to designate a representative to review and copy the association's books and

records, but the owner may want to consider whether such a right should be delegated to the tenant and how such a request could be otherwise handled. On inspection rights, see Common Interest Communities §§2.96–2.99; Common Interest Developments §§3.112, 7.156.

Maintenance and Repairs

As noted above, the condominium unit owner typically is responsible only for the interior portions of the airspace unit, while the owners' association maintains everything else. This division of ownership and the respective obligations arising from each ownership interest raise two separate areas of concern regarding maintenance of the leased unit, which the lease should address:

- The owner's initial representations about the condition of the unit and common areas; and
- The owner's promises to repair conditions affecting the tenant's use of the unit or the common areas.

Typically, owners represent or even warrant that, at the beginning of the lease term, the various component parts of the premises and the building in which the premises are located are in good working order and repair. New tenants often want to know that the roof, HVAC system, plumbing, and electricity are in good working order. There may be other parts of the common areas (*i.e.,* elevators, delivery areas with roll up doors, and parking) that also need to be in good condition for the tenant's use.

An owner who leases a commercial condominium should not make such representations and warranties to a prospective tenant if the owner does not have current first-hand knowledge of the physical condition of the common areas. Most owners lack such

knowledge because they do not have the association's files and records and may not be privy to complaints from other owners. Even those who sit on the association's board of directors or otherwise participate in management should be somewhat wary of making representations and warranties. Some owners may lack such knowledge because they are not in possession of the unit. That said, owners should certainly disclose any information about known defective conditions or past problems and consider making a representation about the owner's lack of knowledge. Additionally, tenants should bargain for obtaining copies of the association's records or be permitted some level of inspection if the condition of the common areas is critical to the tenant's business. See Common Interest Communities §§2.109–2.128.

The parties need to decide who is responsible for making what kind of repair affecting the condominium unit and then specify that in the lease. The owner's attorney must determine

- Which repairs are to be made by the owners' association and which are to be made by the owner; and
- Whether the costs of one or both will be passed through to the tenant.

For example, in some projects, the association makes all plumbing repairs, while others leave those to the unit owner unless sewer pipe issues are involved.

For repairs that must be made by the owners' association, the parties need to understand how repair requests are to be made, whether the request must come through the owner, and what applicable procedures were adopted by the association.

Owners might also wish to augment the release and waiver of liability provisions of the lease to limit the unit **[33]** owner's

liability for problems endured by the tenant that are caused by the association's failure to make proper and prompt repairs.

Signage

Traditionally, both the owner's policies and local ordinances regulate signage. The type of signage permitted for a condominium in a project subject to Davis-Stirling will also be governed by the CC&Rs and any other management documents adopted for the project. Counsel for both parties must carefully review those provisions. The owners' association may need to approve the content of the sign itself, its size, and its placement, since it is most likely to be placed on the project's common areas (off a wall or in a door). There may also be aesthetic concerns, reflecting matters of taste or sensitivity. For example, lighted or flashing signs that residents might find offensive even during daylight hours may be prohibited. See Common Interest Communities §6.15.

Insurance

The division of ownership also affects insurance issues. The owners' association carries both property and liability insurance covering the common areas. Each condominium owner may obtain a special policy designed for condominiums that covers the owner's ownership interests and personal property. Each condominium owner should also obtain liability coverage.

The insurance provisions of the CC&Rs for the particular project should be reviewed carefully because some provide that the association's policies will cover certain losses within the condominiums. See, *e.g.,* Common Interest Developments §§7.203–7.221. Similarly, some CC&Rs may require the condominium owner to obtain liability insurance covering losses suffered by other condominium owners caused by the owner's negligence and may even require indemnification of the association for certain actions.

The condominium owner should not only make sure that all insurance requirements are met, but should also be advised to disclose to a prospective tenant the coverage of any other policies, or the absence of any coverage, that might affect the tenant and the tenant's business. Moreover, regardless of what is required by the CC&Rs, tenants should be required to maintain public liability coverage and to name both the condominium owner and the owners' association as additional insureds.

Subrogation issues are substantially similar to those in unsubdivided structures, except that the owners' association is an additional party to be considered. The parties should consult the CC&Rs for both coverage requirements and subrogation provisions so that all parties who are required to be covered are in fact covered by the policies.

Destruction

Understanding who is in control of the decisions regarding repair or rebuilding of a building after a natural disaster or a fire or flood is critical in negotiating and drafting the damage and destruction clauses of a lease. See, *e.g.,* Common Interest Developments §§7.222–7.243. Because the condominium owner owns only the interior air, the paint on the walls, and the fixtures protruding into the unit, the owner can covenant to repair only those areas. The owner cannot covenant to repair damage to structural walls and ceilings and the common areas providing access to the leased unit because those areas are controlled by the owners' association, whose actions will be governed by its CC&Rs, which typically contain detailed provisions regarding what happens if the property is damaged or destroyed.

In light of this, an owner cannot enter into the standard commercial lease destruction clause, which typically requires the owner to make certain repairs and replacements based on cost

or length of time for repairs. Thus, since the owner and the tenant are at the mercy of the owners' association, the parties need to evaluate the circumstances under which rent will be abated and lease termination rights will be given. The amount of rent owing for the period of time within which repairs can be made may be the most appropriate measure of damages to the tenant.

Carefully review the insurance policies currently held by the parties to make sure that all risks are covered, particularly the loss of rental income and other losses due to business interruption, and that risks are appropriately shared between the parties. If coverage is not adequate, the lease will require additional specified coverage as a covenant of the lease, the breach of which is an event of default. On distribution of insurance proceeds, see Common Interest Communities §2.147.

Breach and Compliance With Law; Remedies

In any "compliance with law" paragraph, also require compliance with the project's CC&Rs and any other management documents (such as House Rules, Articles, and Bylaws). The owner's enforcement of a breach of these obligations, as a breach of the lease subject to eviction, should be relatively straightforward. See, *e.g.,* Common Interest Developments §7.72. The owner should, however, pay particular attention to any timeframes in those documents within which any breach must be cured and require earlier compliance in the lease, to avoid the owners' association taking action. The owner's interests are best served if the lease also specifies that the owner has the right to obtain forfeiture of possession for "any" failure of the tenant to comply with or perform any lease covenant or provision; an eviction for such a breach is more likely to be upheld. See *Boston LLC v Juarez* (2015) 240 CA4th Supp 28,

reported at 38 CEB RPLR 156 (Nov. 2015) (upholding residential eviction because tenant failed to obtain renter's insurance even after being given 3 days to comply).

Also review the effect of any association action against the owner arising from conduct by the tenant. At a minimum, the owner should consider making any adverse finding by the association conclusive regarding a breach of the lease, and the tenant should make every effort to be a party to any proceeding instituted by the owners' association. **[34]**

Subordination and Nondisturbance

Most leases provide that the lease is subordinate to any mortgage or lien that the owner voluntarily allows on the property. Tenants often seek a covenant obligating the owner to obtain (or attempt to obtain) a nondisturbance agreement from the holders of these encumbrances, to protect their tenancy from termination in the event of a foreclosure. See, *e.g.*, California Mortgages, Deeds of Trust, and Foreclosure Litigation §§6.84–6.98 (4th ed Cal CEB). In a condominium project, the lease will also be subordinate to the CC&Rs, which usually contain provisions giving the association a lien on the condominium for unpaid dues and other assessments levied by the association and the power to foreclose on those liens. See, *e.g.*, Common Interest Communities §§5.35–5.63; Common Interest Developments §§7.191–7.196.

Tenants should attempt to seek nondisturbance agreements from the owners' association, but the parties should be aware that it might be difficult to obtain such an agreement. Unlike lending institutions, which frequently deal with nondisturbance requests, the association may have never received such a request and may need to seek legal advice to determine whether the

request should be granted and, if granted, whether it should be conditioned.

The tenant may also want to consider whether it wants the right to pay outstanding dues and assessments if the owner defaults in making such payments to the association. If such payments are made, clearly the lease should detail how the tenant is to be reimbursed for these payments (perhaps as an offset against its rental obligation). Similarly, a tenant should consider what other remedies might be appropriate if the tenancy is terminated as a result of a foreclosure resulting from nonpayment of dues and assessments.

Alterations and Tenant Improvements

CC&Rs as well as other management documents often contain

- Extensive provisions regarding what improvements to a condominium will be permitted; and
- Rules governing the manner in which alterations and improvements to condominiums may be undertaken.

The parties should carefully review these provisions at the earliest possible time in the lease negotiations. The tenant should pay particular attention to these provisions if it is undertaking any or all of the initial tenant improvements. See Common Interest Communities, chap 6; Common Interest Developments §§7.74–7.80.

The owner should be aware that association approval will be required for any construction work that involves plumbing or electrical changes or additions, because those installations are typically part of the common areas owned by the association. Indeed, in such situations, if the association consents to such work, it may require that its contractors be used or bonds obtained. The need to obtain the association’s approval may not

only affect what can be done, but also the length of time the project will take to be completed. Moreover, additional costs may be involved if the association is a required party for any insurance policies or completion bonds.

Dispute Resolution

In addition to the traditional provisions regarding lease breaches, the parties need to specify that a breach of the lease includes any tenant conduct that would violate the project's CC&Rs, Rules and Regulations, Articles, and Bylaws, or any other management documents. In addition to requiring compliance with these documents, the parties should also evaluate the dispute resolution provisions of the project's CC&Rs. See Common Interest Communities, chap 7; Common Interest Developments §§7.306–7.307.

Typically, if the association asserts that a breach of the CC&Rs has occurred, before instituting legal action, it must

- Notify the unit owner; and
- If the matter is not resolved, offer to participate in the internal alternative dispute resolution process described in the CC&Rs.

There may be different dispute resolution provisions depending on the nature of the alleged breach. See CC §§5900–5985.

The parties to a commercial lease in a mixed-use project should carefully consider how proceedings involving an alleged breach by the tenant asserted by the owners' association will affect their respective rights. The tenant should consider whether it should have the right to participate in any such proceedings against the owner and whether it would want to intervene in any civil court proceeding against the owner. The owner would want to ensure that it is in a position to protect

its rights and have the easiest path to an eviction (as well as having sufficient evidence) if removing the tenant becomes necessary. However finally negotiated between the parties, the lease should include clear language about the effect of a proceeding instituted by the owners' association.

Conclusion

As the number of mixed-use projects increases and as these projects age, disputes about the rights and obligations of owners and tenants located in these projects will arise. Careful forethought as well as a clear understanding of the **[35]** respective ownership rights of the owner, the tenant, and the owners' association may prevent such disputes.