

# United States

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## THE CORPORATE REAL ESTATE MARKET

### 1. What have been the main trends in the real estate market in your jurisdiction over the last 12 months? What have been the most significant deals?

Over the last 12 months, the real estate market has remained stagnant as a result of the tightened credit market. Capital is relatively scarce, which has reduced overall demand for real estate and resulted in the inability of a significant number of borrowers to obtain or refinance loans secured by real estate. Vacancy rates across all sectors have increased. These factors have depressed real estate values. Recently, opportunistic buyers have returned to the real estate market seeking bargains, however, most buyers and lenders remain cautious.

Some of the most significant deals in the last 12 months include:

- In Las Vegas, MGM Mirage's sale of the 2,885 room Treasure Island Hotel and Casino to Ruffin Acquisition LLC for US\$775 million (about EUR526 million) (Q3 2009).
- In New York, CB Richard Ellis Investors' US\$355 million (about EUR241 million) acquisition of 1540 Broadway's office condos (Q1 2009).
- In Washington DC, Vornado Realty Trust's sale of a 250,000 square foot office building at 1999 K St. NW to Deka, a German investment bank, for US\$207.8 million (about EUR141 million) (Q3 2009).
- In New York, Sotheby's repurchase of its old headquarters at 501 East 71st Street from Aby Rosen's RFR Holding for US\$135 million (about EUR91.6 million) (Q1 2009).

## REAL ESTATE INVESTMENT

### 2. Please briefly outline the opportunities for investing in real estate in your jurisdiction. In particular, consider:

- The structures commonly used (for example, property companies and partnerships).
- Are real estate investment trusts (REITs) available? If so, are they commonly used?
- Institutional investors.
- Private investors.

#### Structures

Real estate is typically owned by corporations, partnerships, limited partnerships and limited liability companies. In many

cases, a separate entity is formed for the sole purpose of owning a single piece of real estate, and the parent company or investors directly or indirectly hold ownership interests in the separate entity. Lenders generally require that real property securing a loan must be owned by a separate entity (to increase bankruptcy remoteness).

#### REITs

REITs are a particular subset of corporations commonly used to own and operate real estate, because of favourable income tax treatment. Many REITs are publicly traded. The REIT structure reduces or eliminates corporate level income tax because a significant part of REIT income must be distributed to its investors (rather than held or reinvested).

#### Institutional investors

Institutional investors such as life insurance companies, financial institutions and state retirement funds directly own and finance real estate, and invest heavily in private and publicly-traded REITs. Institutional investors often enter into joint venture arrangements with private investors to acquire, develop and operate real estate.

#### Private investors

Private investors are the most significant and eclectic group of real estate investors, including privately held real estate funds, developers, foreign investors, and wealthy families.

## REAL ESTATE LEGISLATION

### 3. Please briefly set out the main real estate legislation that applies in your jurisdiction.

A mix of federal, state and local codes, regulations and case law are the main sources of real estate law. Each state has its own real estate code and related regulations. Below state level, many counties, cities and other local jurisdictions also have their own codes and regulations (for example, zoning laws and building codes are typically found at the local level). In addition, real estate transactions may have to comply with a number of federal laws, for example:

- Federal environmental statutes.
- The Federal Acquisition Regulations.
- Anti-terrorism laws.
- Anti-trust laws.
- Laws governing plant closures.

## TITLE

**4. Please briefly state what constitutes real estate in your jurisdiction. Is land and any buildings on it (owned by the same entity) registered together in the same title, or do they have separate titles set out in different registers?**

Real estate consists of land and buildings, along with certain fixtures attached to the land or buildings, which are owned by the same entity and registered together in the same title. Some land-owners enter into long-term leases of their land (ground leases) with tenants who construct buildings on the land. However, ownership of these buildings typically reverts to the land owner at the expiration of the lease.

**5. How is title to real estate evidenced, for example by registration in a public register of title? Which authorities manage the public title register?**

Generally, title to real estate is evidenced in writing, and then recorded in the land records of the appropriate jurisdiction (usually a local political subdivision such as a city, county or parish). The land records are intended to evidence title, although some information on past transactions may also be available.

**6. Please briefly set out the information and documents registered in the public register of title, for example a description of the real estate, the owner, matters affecting the title and any relevant documents.**

The land records identify the owners and interest holders of real property, along with descriptions of the real estate. Land records are typically indexed under the grantor and the grantee of real property interests, and often by description of the real property. The types of documents recorded in the land records can include:

- Deeds of conveyance.
- Mortgages or deeds of trusts.
- Other security instruments.
- Ground leases.
- Space leases (in some jurisdictions) and related documents (for example, Subordination, Non-Disturbance, and Attornment Agreements (SNDAs)).
- Covenants.
- Easements.
- Consensual and non-consensual liens.

**7. Can confidential information or documents be protected from disclosure in the public register of title?**

Generally, confidential information or documents cannot be protected from disclosure, although real property can be held by

anonymous holding companies. Some jurisdictions do not require the disclosure of certain information (that is, the purchase price) in the land records. In addition, it is possible to record abbreviated versions of certain documents that omit many terms and conditions that the parties do not wish to disclose. However, land records are publicly accessible.

**8. Is there a state guarantee of title? Is title insurance available? If so, is it commonly used?**

There is no state guarantee of title. Title insurance is available from a number of different commercial title insurance underwriters. Most owners and lenders hold title insurance. In addition, certain tenants can obtain leasehold title insurance, particularly for ground leases.

**9. How can real estate be held (that is, what types of tenure exist)?**

Real estate is typically held as a fee interest or as leasehold.

A fee interest involves the ownership of real estate. It contains a number of different subcategories, for example:

- Joint tenancies.
- Tenancies-in-common.
- Tenancies by the entirety (that is, ownership by married couples where title automatically vests in the surviving spouse on the death of the other).

Generally, for tax and liability purposes, commercial real estate owned by developers and investors is held in a limited liability company, limited partnership or similar entity (see *Question 2*).

A ground or space lease involves a possessory interest in real estate. It is limited to a period of time and contains a number of different subcategories, for example:

- Tenancy for a term of years.
- Tenancy at sufferance.
- Tenancy at will.

In addition, real estate can be held by licence. This is a contractual interest in the underlying real estate, and is appropriate for short-term interests that are subject to revocation.

An interest in real estate can also be granted by an easement. An easement is the conveyance by an owner of a limited interest in real estate, including the right to

- Use or access part of the owner's real property.
- Conduct certain activities (such as construction activities).

## SALE AND PURCHASE OF REAL ESTATE

### 10. What are the main stages and documents in the sale and purchase of real estate? In particular:

- How is real estate marketed, when does commercial negotiation occur and what pre-contractual arrangements are used?
- When is the sale contract negotiated and executed?
- When are the parties legally bound?
- When is the change of title registered?
- When does title transfer and what are the formal legal requirements to transfer real estate (for example, in writing and signed by the parties)? Is notarisation required?

#### Marketing

Sellers generally appoint brokers to market real estate. Buyers usually hire brokers to help search for real estate.

#### Commercial negotiation

Initial commercial negotiation occurs between brokers, and then takes place directly between the buyer and seller.

#### Pre-contractual arrangements

Buyers and sellers typically negotiate and execute a non-binding letter of intent, term sheet or memorandum of understanding that provides the basic transaction terms.

#### Sale contract

A sale contract is typically negotiated by lawyers appointed by the buyer and seller. The sale contract incorporates the terms contained in the non-binding letter of intent, term sheet or memorandum, and is generally executed before the buyer studies the property. Occasionally, a sale contract is executed simultaneously with a conveyance of the property.

#### When legally binding

A transaction becomes binding on the parties on execution of the purchase contract, but remains subject to any contingencies the parties include in the contract (for example, satisfactory completion of a study period). Generally, the buyer has the remedy of specific performance to force the sale of the property, if the seller fails to perform the contract. In contrast, the seller's remedy is usually limited to forfeiture of the deposit, if the buyer fails to perform.

#### Registration

Registration of a deed of conveyance typically occurs concurrently with, or immediately following, payment of the purchase price and issue of a title policy or a binding commitment for title insurance.

#### When title transfers

Title transfers on delivery of a written deed of conveyance executed by the seller. Notarisation is generally required for registration of deeds.

### 11. Does a seller have any statutory or other liability to the buyer in a disposal of real estate, for example to disclose real estate information, or in relation to title?

Generally, in the commercial context, a real estate seller can avoid liability to the buyer by conveying the real estate in "as-is, where-is" condition and (in certain circumstances) by using a quit claim deed to transfer title. This is consistent with the general cautionary sentiment in the US that the buyer must investigate what he is buying (buyer beware). A seller is liable to the buyer for damages caused by any seller's fraud or concealment of information. Buyers typically require sellers to make limited representations about the real property, and deeds (other than quit claim deeds) typically contain title covenants. State or local laws can impose additional liability, but these laws vary widely (*see Question 13*).

### 12. Please briefly outline the real estate due diligence that is typically carried out before an acquisition (including title investigation and searches of public authorities).

Typical pre-acquisition due diligence includes:

- Examination of title.
- Examination of a physical survey.
- Environmental inspection (searches of governmental registration records and surveying and sampling on site).
- Zoning and land use analysis (to determine applicable regulatory framework).
- Building condition analysis.
- Appraisal.
- Feasibility (financial analysis, including pro formas and financial statements).
- Searches of court and bankruptcy records.
- Review of surviving leases and contracts.
- Confirmation of standing and authority of seller.

### 13. What real estate warranties are typically given by a seller to a buyer in the sale of corporate real estate and what areas do they cover?

Warranties are generally not required by law, but are a matter for negotiation. However, in certain jurisdictions, a state or local statute can require the seller or landlord to give certain warranties or representations. For example, in the District of Columbia, sellers of real estate are legally required to make representations concerning underground storage tanks and soil condition.

Warranties or representations that sellers commonly give include the:

- Authority to sell.
- Authority of signatory to execute sale and purchase documents.

- Absence of litigation related to the property, solvency of the seller and the seller's knowledge of environmental issues affecting the property.

Commercial real estate is often sold on an as-is, where-is basis. In this event, the purchase contract includes few, if any, warranties by the seller about the physical condition of the property.

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**14. Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before it bought or occupied it? For example, environmental liability, or liability under a lease.**

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An owner or occupier is generally not liable for pre-acquisition events. However, there are exceptions to this rule. Certain federal and state environmental laws impose obligations on the current owner and previous owners. In addition, state laws often impose successor liability for certain taxes, including real estate taxes and sales taxes. The parties to a sale or lease transaction can attempt to re-allocate and manage these risks in the sale contract or lease, or through purchasing title insurance or environmental insurance. New owners and occupiers typically take real property subject to all pre-existing leases, easements, covenants and restrictions.

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**15. Does a seller or occupier retain any liabilities relating to the real estate after it has disposed of it? For example, environmental liability, defects in the real estate, and contractual liability to the buyer.**

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A previous owner of real estate can be liable for environmental contamination or similar conditions (see *Question 14*). The allocation of this risk can be addressed contractually.

The seller can be liable for certain post-disposal events or site conditions based on the representations and warranties given by the seller in the contract of sale (see *Question 13*) or if the seller committed fraud. Generally, representations and warranties are merged into the deed of conveyance on delivery of the deed, but often the parties agree between themselves that certain representations and warranties will survive (either indefinitely or for an agreed period of time, or subject to a monetary limit) the closing of the acquisition/disposal.

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**16. What costs are usually paid by the buyer? What costs are usually paid by the seller?**

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**Buyer's costs**

The buyer pays the purchase price and the costs of its financing, and is typically (but not always) responsible for the costs of its own due diligence, title insurance and legal fees, though the parties may agree otherwise. Payment of other costs (such as recordation, transfer taxes and settlement fees) is allocated under local custom or agreement between the parties.

**Seller's costs**

The seller is typically responsible for the costs of its own legal fees (though the parties can agree otherwise). Payment of other costs (such as recordation and transfer taxes and settlement fees) is allocated according to local custom or agreement between the parties.

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**REAL ESTATE TAX**

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**17. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate? Who pays? What are the rates? Are there any exemptions?**

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There is no VAT or equivalent payable on the sale or purchase of real estate in the US.

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**18. Is stamp duty/transfer tax (or equivalent) payable on the sale or purchase? Who pays? What are the rates? Are there any exemptions?**

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Recordation and transfer (deed) taxes are payable in most jurisdictions in connection with the sale of real estate. Many of the applicable tax code provisions state which party is responsible for the payment of tax, although the parties to the transaction can agree otherwise on the allocation of responsibility for the payment. The tax rate varies widely from state to state (and even within some states).

The applicable local tax code generally contains a number of exemptions, including transfers to affiliates, intrafamilial transfers, purchase-money finance transactions, acquisitions of land for particular governmental or other tax-exempt purposes and acquisitions of land by tax exempt entities. There are also techniques and structures available to avoid or minimise recordation or transfer taxes (see *Question 19*).

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**19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios?**

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Recordation and transfer tax regimes vary widely by state. As a result, the techniques and structures available to avoid or minimise recordation or transfer taxes also vary widely.

In some states, recordation or transfer taxes are only imposed on recordation of a deed. In such states, the parties can avoid these taxes by transferring the ownership interests in the entity that owns the real property, rather than transferring the property itself.

Some states allow the parties to allocate the purchase price between the real property and the personal property located on the real property. In such states, the parties can realise a tax benefit for making such an allocation, where the tax rate for the sale of personal property is lower than recordation or transfer tax rates.

## HOLDING BUSINESS PREMISES

**20. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria? If yes, please give brief details.**

There are voluntary energy efficiency targets, and in some states, mandatory energy efficiency guidelines. A small number of states have adopted legislation to reduce greenhouse gas emissions, by capping emissions and allowing trading of unused emission allowances. In addition, a handful of states are requiring or incentivising specified levels of energy efficiency in new construction and renovation projects, through building code requirements or legislative action. Voluntary programmes include those identifying or certifying products and buildings that help reduce energy consumption.

**21. Is it common for companies to manage their real estate portfolios and their accommodation needs by using third parties, for example through outsourcing transactions? If yes, please give brief details.**

Use of third party property managers is common, although many companies perform this function internally. Companies generally engage third-party real estate brokers when selling, purchasing, financing and leasing property, although larger companies may employ staff brokers.

**22. Are there restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security for ownership or occupation?**

Generally, there are no such restrictions. The US Internal Revenue Code (under the Foreign Investment in Real Property Tax Act (FIRPTA)) requires buyers of an interest in US real estate to withhold tax if the seller is a foreign person. FIRPTA disclosure forms require foreign-registered or foreign-controlled entities to disclose their status under FIRPTA, so that anticipated income taxes can be withheld from the seller, where appropriate. In addition, reporting requirements under the US Patriot Act and certain US Department of Commerce regulations can apply to a sale of real estate to a foreign entity.

**23. Does change of control of a company affect its holdings of real estate?**

Legal ownership of real estate is not generally affected by a change of control of the company. However, a change of control can violate the requirements of a lease, mortgage, deed of trust, loan agreement or similar agreement. In addition, in certain jurisdictions, a change of control can be treated as a real estate transfer held by the entity, and therefore may be subject to recordation or transfer taxes.

**24. In what circumstances can local or state authorities purchase business premises compulsorily? Is the purchase price market value?**

Federal and state authorities, and certain quasi-governmental authorities, have the power of eminent domain to condemn (purchase) private property for public purposes. The meaning of "public purpose" has been the subject of recent litigation. Through enabling legislation, state authorities have delegated to local governments (municipalities, counties, cities and parishes) the right to exercise this power.

Federal and state constitutional protections require the purchase price to equal the fair market value of the property. However, what is "fair market value" is often the subject of disputes and/or litigation.

**25. Are municipal taxes paid on the occupation of business premises, for example business rates? Are there any exemptions?**

Real estate taxes are generally calculated based on the value of the business premises. Municipal taxes and tax rates vary widely, and are typically based on a rate established by multiplying the assessed value of the property (often minus a base amount of assessed value that will not be taxed) by the applicable tax rate.

Statutory exemptions are sometimes available, but vary widely from jurisdiction to jurisdiction. Special assessments for infrastructure work and the increasing use of business improvement districts provide additional taxes in many urban jurisdictions.

## REAL ESTATE FINANCE

**26. How are acquisitions of large real estate portfolios or companies holding real estate generally financed?**

Acquisitions are generally financed by debt or equity, or a combination of both. Construction loans, permanent financing (that is, debt secured by real property) and mezzanine financing (that is, subordinated debt or preferred equity secured by a company's assets) are frequently used to finance real estate acquisition (see *Question 28*). Sale and leasebacks, among others, can also be used. Many lenders now require a special purpose entity to be set up to protect against bankruptcy, and to facilitate the securitisation of credit.

**27. How is real estate commonly used to raise finance?**

Real estate can be used by its owner as collateral for a loan or other financing arrangement, the proceeds of which can be used for any purposes permitted under the loan agreement. A tenant can pledge its leasehold interest (usually in a ground lease) for the same purpose, subject to the terms of the lease.



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**28. What are the most common forms of security granted over real estate to raise finance? How are they created and perfected (that is, made valid and enforceable)?**

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Real estate-related debt financings commonly require security in the form of:

- Mortgage liens (including an assignment of leases and rents).
- A pledge of interests in the direct and/or indirect owners of the entity that owns the real estate.
- One or more sponsor guarantees (in many cases).

Under a mortgage, a borrower grants to the lender a lien on real property to secure repayment of the loan made by the lender. The lien is generally created on acceptance by the lender of delivery of the fully executed and acknowledged mortgage document. The lien is perfected on recordation of the mortgage in the appropriate land records and generally takes priority over liens recorded later in time. An assignment of leases and rents (which can be in the mortgage document or in a separate recorded agreement) provides the lender with the right to take control of cash flow from the property following a loan default.

A pledge of interests in the direct or indirect owners of the real estate is typical in mezzanine financing, where the lender does not receive a lien on the underlying real estate, and effectively receives a security interest that is subordinate to the first lien mortgage. In some cases, the first lien mortgage lender also receives a pledge of these interests as security. The security interest is created on execution and delivery by the pledgor and the lender of a pledge agreement, assuming value has been given by the lender to the borrower (that is, a loan has been made). The security interest can be perfected by filing a Uniform Commercial Code (UCC) financing statement in the appropriate filing office. If the pledged interests are certificated securities, the security interest can alternatively be perfected by delivery of possession of the certificates to the lender.

Sponsor guarantees, whether in the form of a payment guarantee and/or a limited recourse guarantee, are typically required in construction loans, and are often required by lenders in connection with other real estate-related loans. Although these guarantees are not strictly collateral, they can be critical to credit enhancement that lenders often seek, and they are particularly useful in providing credit enhancement to the lender in case of borrower insolvency. A guarantee is generally enforceable on execution and delivery to the lender by the guarantor.

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**29. Is real estate securitisation common in your jurisdiction? If yes, please give brief details.**

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Over the past decade, the most common form of securitisation in US commercial real estate markets has been an active market in commercial mortgage backed securities (CMBS). In a CMBS transaction, commercial mortgage loans originated by banks and other lenders are pooled. The cash flows arising from mortgage loans are divided into different classes or tranches of securities. The securities are rated by the rating agencies and then distrib-

uted in the capital markets. Until the recent downturn in the US economy, and in particular, US commercial real estate markets, CMBS loans provided a critical source of liquidity to US commercial mortgage markets, creating a vital marketplace, and resulting in competitive loan pricing for borrowers.

Although the CMBS markets were extremely robust in 2006 and 2007, with more than US\$200 billion (about EUR135.7 billion) in transactions in both years, the moribund trend that began in 2008 (about US\$75 billion (about EUR51 billion) of CMBS bonds issued) has devastated the CMBS markets. In October 2009, there were no CMBS transactions. Although the US government has enacted stimulus legislation intended to revive US CMBS markets, to date those efforts have not produced encouraging results.

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## REAL ESTATE LEASES

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**30. Are contractual lease provisions regulated or freely negotiable?**

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State and local law can regulate certain aspects of lease transactions. However, the landlord and tenant generally have freedom to negotiate the terms of their transaction.

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**31. How are rent levels usually reviewed and are there restrictions on this? Is VAT (or equivalent) payable on rent?**

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There are two main types of rental arrangements:

- Triple net leases (the tenant pays a base amount of rent and all insurance, real estate taxes and operating expenses other than capital items).
- Full service leases (the tenant pays a base amount of rent and increases in insurance, real estate taxes and operating expenses over the base year).

There are often annual and/or periodic rent increases built into the underlying lease. These are typically a set percentage, on a dollar per square foot basis or on an inflation index. Leases also often provide for the exercise of any future renewal or extension rights at the current market rates (perhaps with a specific discount).

VAT is not payable on rent (*see Question 17*). Rent is considered as part of the landlord's income and is taxed on its profits. Landlords often attempt to pass on the real estate tax burden to their tenants. In certain jurisdictions (for example, Florida), direct tax is assessed on certain rents.

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**32. Is there a typical length of lease term and are there restrictions on it? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term? If yes, please give details.**

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The length of a lease term is determined by negotiation. Many leases last between five and ten years (in some cases, with a right for the tenant to extend or renew the lease), although some leases may be significantly shorter or longer depending on the

requirements of the parties. Long-term leases (that is, 30 years or more) may be subject to transfer or recordation (deed) taxes in some states.

Tenants of business premises have no security of occupation or renewal rights. However, renewal rights can be negotiated as part of the underlying lease. If the lease does not contain a renewal right, the tenant must vacate the leased premises at the end of the lease term. If the tenant fails to vacate when required, the landlord can either:

- Initiate legal action to evict the tenant.
- Continue to accept rent from the tenant under the terms of the lease.

To discourage the tenant from continuing possession of the premises after the expiration of the lease term, many commercial leases allow the landlord to collect holdover rent equal to 150% or 200% of the base rent. The timing and efficiency of the eviction process varies widely between jurisdictions.

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### **33. What provisions or restrictions typically apply to the disposal of the lease by the tenant (for example, can the tenant assign or sublet the lease with the landlord's consent)?**

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Leases typically include restrictions relating to the subletting of all, or part of, the leased space or the assignment of all, or part of, a commercial lease. Most leases require the landlord's consent before subletting or assigning, but some may only require the tenant to notify the landlord of its intention to sublet or assign the lease (for example, sublettings or assignments to an affiliate of the tenant). Landlords often agree to be reasonable in granting or withholding their consent, or list the factors they take into consideration in determining whether to grant or withhold their consent.

Any profits made from subletting are often split between the landlord and the primary tenant after deducting applicable subletting expenses.

An assigning tenant generally remains liable under the lease after assignment.

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### **34. Can tenants usually share their business premises with companies in the same corporate group? If yes, on what terms?**

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The landlord's consent is usually required before the tenant can share its business premises. However, subject to the lease, affiliates of tenants are generally allowed as assignees or subtenants, without requiring the landlord's consent.

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### **35. Who is usually responsible for keeping the leased premises in good repair?**

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Obligations to repair premises are usually set out in the lease. The tenant is generally required to maintain and repair the non-structural parts of the premises. The landlord is generally required to maintain and repair all base building components and structures, and all systems in the building and premises. Generally, the landlord is also entitled to recover costs from the tenant for damages the tenant has caused to the premises.

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### **36. Who is usually responsible for insuring the leased premises?**

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Generally, tenants are required under the lease to hold different types of insurance to cover, among others, any liabilities, personal property and leasehold improvements. Landlords generally hold liability insurance, building insurance and rent interruption cover, although they are not generally obliged by the lease to do so.

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### **37. On what grounds can the landlord usually terminate the lease? Please briefly outline any restrictions or procedure that applies. Can the tenant terminate the lease in certain circumstances?**

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The landlord's right to terminate the lease is regulated by the terms of the lease. Generally, the lease can be terminated when the tenant:

- Fails to pay rent or other lease charges when due.
- Fails to observe lease covenants and conditions.
- Becomes bankrupt or insolvent (or when the tenant's guarantor becomes bankrupt or insolvent).
- Abandons the premises.

In addition, the landlord generally has the right to terminate a lease if the leased premises is condemned by a governmental authority, or in the event of major fire damage or a similar event. Different notice and remedy periods apply to each of the various events of default, and these periods are regulated by the lease.

The tenant's termination rights are generally subject to notice and cure periods that are negotiated and included in the lease. The tenant can negotiate a right to terminate the lease in the following circumstances:

- The landlord fails to deliver the premises in the agreed period of time.
- If essential utility services (for example, water or electricity) are not available for an extended period of time.
- If there is an eminent domain action (*see Question 24*).

Some leases can also provide a limited termination right at certain dates during the term of the lease (often for a negotiated termination payment), or for the failure to provide quiet enjoyment of the premises.

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### **38. What is the effect of the tenant's insolvency (under general contract terms and insolvency legislation)?**

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Tenant insolvency or bankruptcy is considered an event of default under standard leases (*see Question 37*). If the tenant becomes insolvent or bankrupt, the landlord can seek payment from third party guarantors and letters of credit. However, if a bankruptcy action is filed, the landlord cannot exercise any rights directly against the tenant (for example, termination of the lease, obtaining possession of the premises or applying any cash security deposit). Instead, the landlord must comply with applicable bankruptcy laws and procedures. In bankruptcy proceedings, the

tenant has the right to terminate the lease in a specified period of time in return for payment of an amount specified in the bankruptcy code.

## PLANNING LAW/ZONING

### 39. What authorities regulate planning control and which legislation applies?

Planning control is predominantly the responsibility of state and local authorities. State-enabling legislation gives local jurisdictions (that is, municipalities and counties) the power to regulate land use through zoning and land-use controls. Local government bodies prepare development plans and zoning maps for their jurisdiction. Any real estate development that is made in accordance with these plans and maps is typically allowed "as of right". If the development varies from these requirements, (for example, in terms of land use, density, parking, and so on), an application must be made to a local planning authority, and initial enforcement steps are taken at that level. There are normally administrative appeal options at local government level followed by redress in the courts.

### 40. What planning consents (for example, planning permission or building permits) are required and for which types of development?

Real estate development that is made in accordance with existing development plans and zoning maps is typically allowed "as of right". If the development varies from these requirements, (for example, in terms of land use, density, parking, and so on), an application must be made to a local planning authority (see *Question 39*). In addition, construction permits (for example, demolition, excavation, grading and building) are required during construction. After completion of construction, a certificate of occupancy must be obtained before a building can be used and occupied for its intended purpose.

### 41. In relation to planning consents:

- Which body grants initial planning consents?
- Do third parties have the right to object? If yes, please give brief details.
- In what circumstances is there a public inquiry?
- How long does an initial decision take after receipt of the application?
- Is there a right of appeal against a planning decision? If yes, please give brief details.

#### Initial consents

Planning applications are generally made to a planning commission, zoning commission or board of zoning appeals at local authority level.

## REAL ESTATE ORGANISATIONS

### Building Owners and Managers Association International (BOMA)

**Main activities.** BOMA is an international advocacy association that provides information to its members on office building development, leasing, building operating costs, energy consumption patterns, local and national building codes, legislation, occupancy statistics and technological developments.

W [www.boma.org](http://www.boma.org)

### International Council of Shopping Centers (ICSC)

**Main activities.** ICSC is the international trade association of the shopping centre industry. It advocates advancing the development of the shopping centre industry and aims to establish the individual shopping centre as a major institution in the community.

W [www.icsc.org](http://www.icsc.org)

### US Green Building Council (USGBC)

**Main activities.** USGBC is an organisation that develops and advocates standards for cost-efficient and energy-saving green buildings. USGBC administers the Leadership in Energy and Environmental Design (LEED) green building certification programme.

W [www.usgbc.org](http://www.usgbc.org)

### Commercial Real Estate Development Corporation (NAIOP)

**Main activities.** NAIOP is a national organisation for developers, owners and related professionals in office, industrial and mixed-use real estate. NAIOP provides networking opportunities, educational programmes and research to its members.

W [www.naiop.org](http://www.naiop.org)

### Urban Land Institute (ULI)

**Main activities.** ULI is an education and research institute focused on land use policy.

W [www.uli.org](http://www.uli.org)

### Third party rights

Third parties (for example, owners of nearby property, neighbourhood residents and community organisations) can object to planning and zoning applications. In some jurisdictions, quasi-governmental bodies can also object on behalf of residents or other interested parties.

### Public inquiries

Hearings and open meetings are required for most planning and zoning applications.

### Initial decision

The length of the process necessary for an initial decision, and also to obtain planning permission depends on a number of factors, including the:

- Complexity of the request.



- Caseload of the reviewing body.
- Objections to requested relief.
- Number of parties involved.

### Appeals

Applicants have the right to appeal most decisions. This right can be exercised by a party in connection with the approval or denial of a request, or in connection with the conditions imposed for the approval. Most jurisdictions require appeals to be made within the local planning structure, followed by an opportunity to request appeals in courts of law.

### REFORM

#### 42. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

There are few national proposals for reform. At federal level, there have been some incentives to encourage real estate development

in blighted areas, by providing tax credits and, in certain cases, relief from federal income tax on gains from sales of developed property.

States and localities have begun adopting sustainable development and smart growth practices, to guide growth by restricting infrastructure provisions and building permit approvals in environmentally sensitive, rural and undeveloped areas.

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