

An owner's primer on sublease consents

By Hans Lapping, Esq.

Many companies are reconsidering their real estate positions as part of their overall long-term strategic planning due to the continuing decline



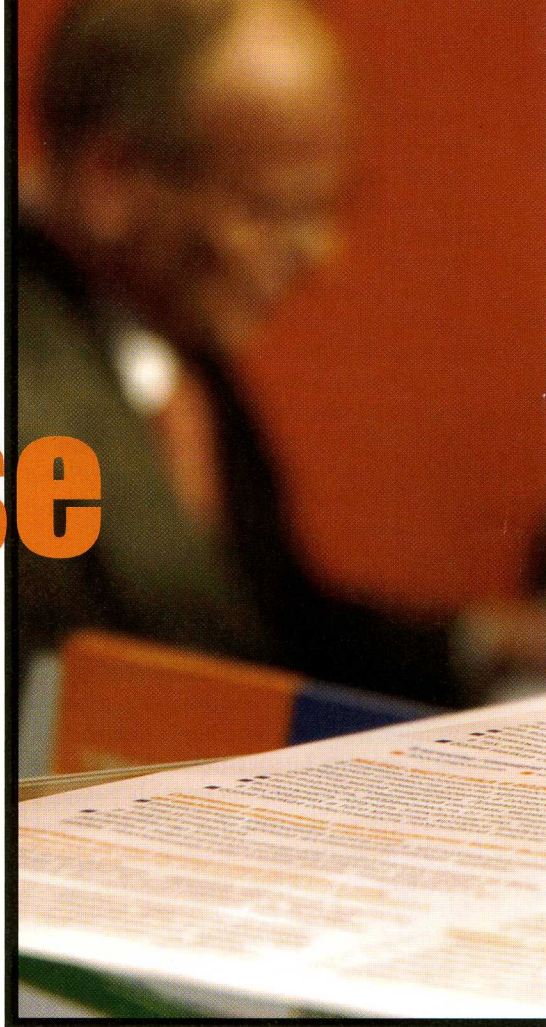
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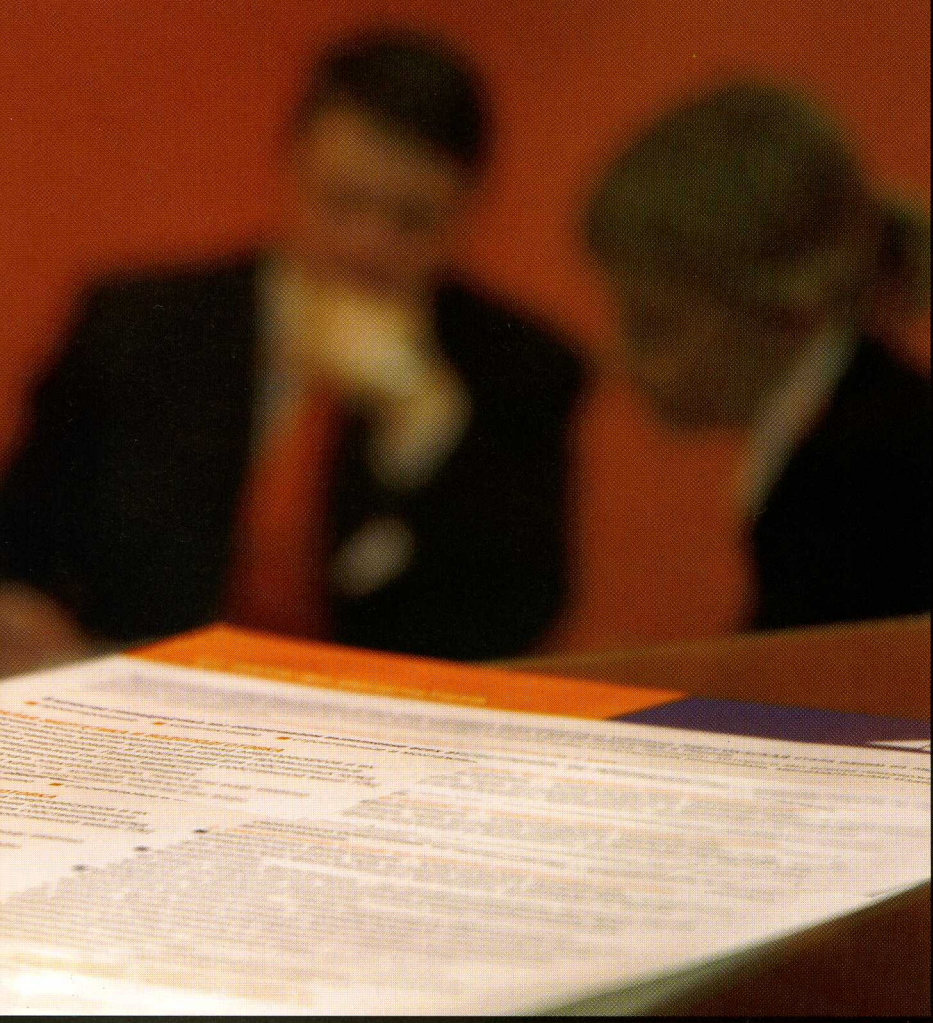
in consumer confidence and the growing concern over the domestic credit market. Undoubtedly, many companies will elect to consolidate people and resources. As a result, building owners and managers are likely to see an increase in subleasing activity during the next few years.

While most leases provide considerable detail as to the standard for consenting to a proposed sublease, very few leases address the actual terms and conditions of an owner's consent. As a result, many owners merely sign the form of consent proposed by the sublandlord and subtenant in the sublease, or they rush to draft an agreement. In either instance, owners oftentimes overlook important issues that may have significant impact on the owner-sublandlord-subtenant relationship and, ultimately, the overall value of the asset.

The following is a checklist of some of the critical issues an owner should consider including in his or her consent form (if not in the original lease document itself) to govern this complex relationship:

1. Consent relates merely to the act of subleasing and not to the specific terms and conditions of the sublease. It should be clear the owner has not approved, and is not bound by, the terms of the sublease.
2. The sublease is subordinate to the master lease. The sublease will automatically terminate upon the termination of the master lease.
3. The sublease is subject to all terms and conditions of the master lease. Accordingly, not only must the subtenant comply with the terms and conditions of the master lease, but, if violations should occur, the sublandlord will be deemed in default.
4. Consent to the sublease does not constitute consent to any subsequent subletting by the sublandlord or the subtenant; any further subletting shall again require the owner's prior written consent.
5. The subtenant has no recourse against the owner on any account of failure by the owner to perform obligations under the master lease. This way it is clear the subtenant's only recourse is against the sublandlord.
6. Consent does not modify, waive, impair or affect the terms of the master lease, nor does it increase the owner's obligations under the master lease.
7. Notwithstanding the consent, the sublandlord remains fully liable for the payment of all rent under the lease and for the performance of all of the sublandlord's obligations under the lease.
8. If the sublandlord is in default beyond all notice and cure periods under the lease, the subtenant, after receiving written notice from the owner, is required to pay all rent directly to the owner and perform all obligations under the master lease. The foregoing should be coupled with an express statement that the owner's receipt of any rent from the subtenant shall not be deemed to release the sublandlord from his or her obligations under the lease or otherwise form an acceptance of the subtenant as a direct tenant.
9. If the owner terminates the master lease, reenters the subleased premises or dispossesses the





sublandlord prior to the scheduled expiration of the sublease, at the owner's option, he or she has the right to succeed to the sublandlord's rights, title and interest in the sublease. In this instance, the subtenant shall attorn to the owner according to the executory provisions of the sublease, which shall be deemed to be a direct lease between the owner and the subtenant on the terms and conditions of the sublease. The consent should also provide that if the sublease does become a direct lease between the owner and the subtenant, the owner shall not be liable for any previous acts or omissions of the sublandlord; bound by any rent paid by the subtenant more than 30 days in advance of its due date; bound by any amendment to the sublease made after the date of the consent unless the owner receives a copy of the amendment; liable for any obligations of the sublandlord to make any improvements or pay any

allowances; or bound by any offsets previously accrued against the sublandlord.

10. The subtenant is responsible for maintaining the same liability insurance the sublandlord is required to maintain under the lease and must name the owner as an *additional insured* on all such policies. In addition, the consent should provide the waiver of subrogation contained in the master lease and should become a tri-party agreement between the owner, sublandlord and subtenant.
11. Consent should include representations and warranties that the sublease presented to the owner for his or her consent is a true and complete copy of the sublease and that the sublease constitutes the sole agreement between the sublandlord and subtenant relating to the subletting of the subleased premises. Among other things, this provision will enable the owner to accurately determine if the owner is entitled to any profit from the sublease,

assuming such amounts were reserved in the original lease.

12. Consent should provide that, if there is any conflict between the sublease and the consent, the terms and conditions of the sublease shall govern between the owner, sublandlord and subtenant.

Despite the fact many believe subletting is straightforward, it is one of the more complicated real estate transactions. While great care should be taken by all parties in the transaction, building owners need to be especially mindful that a poorly drafted or incomplete consent can lead to unintended liability, difficulties in managing the asset and a potentially significant challenge in financing and selling the asset. In contrast, a well-conceived consent can go a long way to ensure the transaction is a win-win-win for all involved. BOMA

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