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Allocating Operating Expenses in Commercial Real Estate Leases: Negotiating Strategies for Landlords and Tenants

Structuring Pass-Throughs, Exclusions, Gross-Up, and Expense Cap, and Other Operating Expense Provisions in Net and Gross Leases

THURSDAY, AUGUST 4, 2016

1pm Eastern    |    12pm Central    |   11am Mountain    |    10am Pacific

Today’s faculty features:

Scott D. Brooks, Partner, **Cox Castle & Nicholson**, San Francisco

Christine R. Norstadt, Founding Member, **Pursley Friese Torgrimson**, Atlanta

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SAMPLE NEGOTIATED OPERATING EXPENSE LEASE PROVISION
("REDLINED" TO SHOW CHANGES FROM LANDLORD’S INITIAL DRAFT)

6. OPERATING AND TAX EXPENSES.

   A. For the purposes of this Section 6, the following terms are defined as follows:

1. “Tenant’s Percentage” shall be that percentage set forth in Section 1(i), which percentage is the quotient of the Rentable Area of the Premises divided by the Rentable Area of the Project, and which percentage shall be subject to adjustment in the event of reduction or increase in the Rentable Area within the Premises and/or Project.

2. “Base Year Operating Expenses” shall mean the “Operating Expenses” (as hereinafter defined) incurred in the Base Year.

3. “Base Year Tax Expenses” shall mean the “Tax Expenses” (as hereinafter defined) incurred in the Base Year.

4. “Comparison Year” shall mean each calendar year during the Term from, including and after the calendar year 2005.

5. “Operating Expenses” shall consist of all costs of operation, management, ownership, maintenance and repair of the Project, as determined by accepted principles of sound accounting practice, including the following costs by way of illustration, but not limitation: electric, water, sewer and other utility charges; accounting, legal and other consulting fees; the cost and expense of insurance for which Landlord may be responsible pursuant to this Lease, or which Landlord deems necessary in connection with the Project; losses or damage attributable to deductible amounts under such insurance policies; the cost janitorial services (including, without limitation, required supplies, trash removal and hauling), security, and labor; utilities surcharges; expenditures required in order to comply with “Laws” (as defined in Section 7(a) below); costs incurred in the management of the Project including supplies, wages and salaries of employees used in the management, operation and maintenance of the Project, and payroll taxes and similar governmental charges with respect thereto, Project management office rental, and a management fee (not to exceed three percent (3%) of gross Project revenues during the initial five (5) years of the Term and thereafter not to exceed market management fees payable in connection with the management of Comparable Buildings; the cost of supplies, materials, equipment and tools required in the maintenance and repair of the Project; the cost of repair and maintenance (including, without limitation, costs of rental of personal property used in maintenance) of the structural portions, vertical transportation systems, and other mechanical and utility systems of the Project and other portions of the Project to be maintained and repaired by Landlord (including, without limitation, the plumbing, heating, ventilating, air conditioning and electrical systems installed or furnished by Landlord); the costs and expenses of gardening and landscaping, maintenance of signs (other than amounts allocable to maintenance of signs identifying particular Project occupants) and all other upkeep of the Common Areas; personal property taxes levied on or attributable to personal property used in connection with the Project; reasonable audit or verification fees (other than costs of auditing or verification by Project tenants), and costs and expenses of general repairs and maintenance, resurfacing, painting, lighting and similar items. In the event the Rentable Area of the Project is less than ninety-five percent (95%) occupied during the Base Year or any Comparison Year during the Term, then in calculating Operating Expenses for such year, the variable components of Operating Expenses shall be “grossed up” to reflect such amounts as would have been incurred had the Rentable Area of the Project been ninety-five percent (95%) occupied during such year. If the property tax assessment for all or any
portion of the Project (or Tax Expenses) for the Base Year or any Comparison Year during the Term does not reflect a real estate tax assessment (or Tax Expenses) for a fully leased, built out and occupied Project (such that future leasing, tenant improvements and/or occupancy result in an increased real estate tax assessment (and/or increased Tax Expenses)), then Tax Expenses for such year shall be adjusted, on a basis consistent with sound and neutral accounting and tax principles, to reflect a real estate tax assessment (and Tax Expenses) for a fully leased, built out and occupied Project.

6. Notwithstanding anything to the contrary contained in this Lease, “Operating Expenses” shall not include any of the following: a. any ground lease rental; b. capital expenditures to the extent the same constitute upgrades as opposed to repairs or replacements; the parties further hereby agreeing with respect to capital expenditures, that (A) if Tenant’s share of any capital expenditure included in Operating Expenses is more than $60,000.00 $15,000.00, then such capital expenditure shall be amortized over its reasonable useful life and annual amortization of such expenditure shall be included in Operating Expenses during each year of such amortization; costs incurred for repair or damage to the Building to the extent reimbursed by insurance proceeds, provided that insurance deductibles shall be included and (B) that Tenant’s share of Operating Expenses shall not include amortization of capital expenditures pursuant to clause (A) above in the aggregate of more than $0.50 per year per square foot of Rentable Area of the Premises; c. rentals for items constituting capital expenditures (except when needed in connection with normal repairs and maintenance of the Project) to the extent the same would not be includable in Operating Expenses under clause (2) above if the applicable item had been purchased, rather than leased; d. costs incurred for restoration following condemnation to the extent reimbursed by condemnation award or for repair of damage to the Building to the extent reimbursed by insurance proceeds (provided that insurance deductibles, not to exceed $50,000.00 per casualty occurrence, shall be included in Operating Expenses), and other costs reimbursed by insurers, warranties, governmental authorities, utility companies or any other entity (other than cost reimbursements by other Project occupants as a part of their contribution to Operating Expenses); e. costs, including permit, license and inspection costs and supervision fees, incurred with respect to the installation of tenant improvements to Rentable Area within the Project or incurred in renovating or otherwise improving, decorating, painting or redecorating vacant Rentable Area of the Project or advertising, promotional or other costs in order to market space to potential tenants; f. depreciation, amortization and interest payments, except on materials, tools, supplies and vendor-type equipment purchased by Landlord to enable Landlord to supply services Landlord might otherwise contract for with a third party where such depreciation, amortization and interest payments would otherwise have been included in the charge for such third party’s services, all as determined in accordance with generally accepted accounting principles; g. reserves for future expenses beyond anticipated expenses for the current year; h. marketing costs, including leasing commissions, attorneys’ fees in connection with the negotiation and preparation of letters, deal memos, letters of intent, leases, subleases and/or assignments, space planning costs, and other costs and expenses incurred in connection with lease, sublease and/or assignment negotiations and transactions with present or prospective tenants or other occupants of the Project; i. expenses in connection with services or other benefits which are not available to Tenant or repairs or replacements to any utility systems which are dedicated to the use of a single other tenant or concession operator (where comparable utility systems are not included in the Premises); j. legal fees and related expenses and legal costs incurred by Landlord (together with any damages awarded against Landlord) due to the violation by Landlord or any tenant of the terms and conditions of any lease of space in the Project; k. overhead and profit paid to Landlord or to subsidiaries or affiliates of Landlord for goods and/or services in the Project to the extent the same exceeds the costs of such goods and/or services rendered by qualified, unaffiliated third parties on a competitive basis; l. interest, principal, points and fees on debts or amortization on any mortgage or mortgages or any other debt instrument encumbering the Project; m. Landlord’s general corporate overhead and general and administrative expenses not specifically incurred in the management, maintenance and operation of the Project, and costs of entertainment, dining, automobiles or travel for Landlord’s employees; n. costs incurred in correcting any
non-compliance of the Project with Laws where such non-compliance was existing as of the delivery of
possession of the Premises to Tenant date of this Lease and the correcting compliance work was then
required to be performed (as opposed to pre-existing non-compliance where compliance work is not
legally mandated in the absence of subsequent improvements, alterations or change in use); o. Tax
Expenses; p. costs arising from the presence of any existing Hazardous Materials (under current
interpretations of applicable Laws as of the date of this Lease) within, upon or beneath the Project; q.
costs arising from Landlord’s the negligence or willful misconduct of Landlord or any Project tenant; r.
costs arising from Landlord’s charitable or political contributions; s. and costs (other than ordinary
maintenance) for sculpture, paintings and other objects of art; t. interest and penalties resulting from
Landlord’s failure to pay Operating Expense items when due; u. accountants’ fees, arbitration fees and
other costs and expenses incurred in connection with any audit of Operating Expenses by any past or
present Project tenant or occupant; v. costs associated with the operation of the business of the partnership
or entity which constitutes Landlord as the same are distinguished from the costs of the operation of the
Project, including partnership accounting and legal matters, costs of defending any lawsuits with any
mortgagee, costs of selling, syndicating, financing, mortgaging or hypothecating any of Landlord’s
interest in the Project, costs of any disputes between Landlord and its employees (if any) not engaged in
the operation of the Project, disputes of Landlord with Project management, or outside fees paid in
connection with disputes with other Project tenants or occupants; w. costs of installing, maintaining or
lighting any signs identifying Landlord, Landlord’s manager, leasing information respecting the Project or
any Project tenants; x. Project management office rental to the extent such rental exceeds the fair market
rental for such space or the extent the space utilized therefor exceeds the space utilized for management
offices in comparably sized Comparable Buildings; y. costs of new or additional landscaping in the nature
of upgrades as opposed to replacements; z. any bad debt loss or reserves for bad debt; aa. costs of
electricity use by any Project tenant in excess of seven (7) watts connected load per square foot of Usable
Area for office electrical power and lighting (exclusive of HVAC or other base Building systems); bb.
flowers, balloons or gifts to any existing or prospective Project tenants, vendors or contractors, or any
tenant relations parties, events or promotions (unless otherwise consented to by Tenant), cc. costs of any
training or incentive programs other than for tenant life safety or other governmentally mandated or
governmentally recommended programs; dd. costs in removing or storing property of former Project
 tenants; and ee. premiums for earthquake insurance. The foregoing list of exclusions from Operating
Expenses is intended to function solely as an exclusionary listing and, except as specifically provided
above, shall not be interpreted to permit or authorize any cost or expense which would not otherwise be
considered to be an Operating Expenses under the other provisions of this Lease.

In addition, in calculating Operating Expenses, if, other than as a result
of any governmental requirements or other occurrence(s) beyond the reasonable control of Landlord,
following the Base Year any new category is added to Operating Expenses or any existing category is
deleted from Operating Expenses (such as, by way of example and without limitation, Landlord’s
obtaining flood insurance for the Building if not obtained during the Base Year or no longer obtaining
flood insurance if obtained in the Base Year), and/or the scope of any previously existing category of
Operating Expenses is materially increased or materially decreased (such as, by way of example and
without limitation, Landlord’s materially increasing or materially decreasing the limit of Landlord’s
liability insurance maintained pursuant to Section 17(b)(ii) below above or below, as applicable, the limit
of such insurance during the Base Year), then (1) during such time as the costs relating to such new
category and/or such increased scope are included in Operating Expenses, the calculation of Base Year
Operating Expenses shall be increased to reflect such costs as would have been incurred had such new
category item been included in the Base Year and/or had such increased scope been applicable during the
Base Year, as applicable, giving due consideration to what the costs for such new category and/or
increased scope item(s) would have been at the time of the Base Year (as opposed to the costs therefor in
the Comparison Year in which such item(s) are first included in Operating Expenses); and (2) during such
time as the costs relating to such previously existing category is no longer included in Operating
Expenses and/or such decreased scope is included in Operating Expenses, the calculation of Base Year Operating Expenses shall be decreased to reflect such costs as would have been incurred had such previously existing category item not been included in the Base Year and/or had such decreased scope been applicable during the Base Year, as applicable. In addition, if any Project tenant (a “Direct Tenant”) pays directly to the applicable utility or service provider any item which is included in Operating Expenses for other Project tenants (including, by way of example and without limitation, a Project tenant who separately contracts and pays for provision of janitorial service to its premises), then such Direct Tenant’s premises shall be deemed vacant Rentable Area subject to the “gross up” provision for purposes of calculating such item of Operating Expenses. Operating Expenses for any particular year shall not include amounts incurred with respect to a prior year.

8. As used herein, the term “Tax Expenses” shall include any form of assessment, license fee, license tax, business license fee, transit tax or fee, commercial rental tax, levy, charge, penalty (other than tax penalties incurred as a result of Landlord’s negligence, inability or unwillingness to make payments when due) tax or similar imposition, imposed by any authority having the direct power to tax, including any city, county, state or federal government, or any school, agricultural, lighting, drainage, transportation or other improvement or special assessment district thereof, as against any legal or equitable interest of Landlord in the Project and the Premises, or any portion thereof, including, but not limited to, the following:

   a. any tax on Landlord’s right to Rent or right to other income from the Premises or as against Landlord’s business of leasing the Premises;

   b. any assessment, tax, fee, levy or charge in substitution, partially or totally, of any assessments, taxes, fees, levies and charges that may be imposed by governmental agencies for such services as fire protection, street, sidewalk and road maintenance, refuse removal and for other governmental services formerly provided without charge to property owners or occupants. It is the intention of Tenant and Landlord that all such new and increased assessments, taxes, fees, levies and charges be included within the definition of Tax Expenses for the purposes of this Lease;

   c. any assessment, tax, fee, levy or charge allocable to or measured by the area of the Premises or the Rent payable hereunder, including, without limitation, any gross income tax or excise tax levied by the state, city or federal government, or any political subdivision thereof, with respect to the receipt of such Rent, or upon or with respect to the possession, leasing, operating, management, maintenance, alteration, repair, use or occupancy by Tenant of the Premises, or any portion thereof; and

   d. any assessment, tax, fee, levy or charge upon this transaction or any document to which Tenant is a party creating or transferring an interest or an estate in the Premises, or based upon a reassessment of the Project, or any portion thereof, due to a change in ownership or transfer of all or part of Landlord’s interest in this Lease, the Project, or any portion thereof (except to the extent specifically excluded pursuant to clause (A) below).

Notwithstanding any provision of this Section 6 expressed or implied to the contrary, (A) Tax Expenses shall not include (I) Landlord’s federal or state net income, franchise, documentary transfer, inheritance or estate taxes; (II) tax penalties incurred as a result of Landlord’s negligence, inability or unwillingness to make payments when due; or (III) special assessments or special taxes initiated by Landlord as a means of financing improvements to the Project; or (IV) during the Initial Term (but not the Extended Term(s)), that portion of any increase in Tenant’s Share of Tax Expenses by more than One Hundred Thousand Dollars ($100,000.00) to the extent resulting from reassessments due to “changes in ownership” (as defined in Division 1, Part 0.5, Chapter 2 of the California Revenue and Taxation Code) of all or any
portion of the Project; (B) for purposes of calculation of Tax Expenses, assessments shall be treated as if paid in the maximum number of installments permitted by applicable Laws (with interest on any unpaid balances), whether or not so paid in installments; and (C) there shall be no duplication of items included in Tax Expenses and items included in Operating Expenses. Tax Expenses for any particular year shall not include amounts incurred with respect to a prior year. Tenant shall have such rights to reasonably contest the validity or amount of Tax Expenses as are permitted by applicable Laws, and Landlord shall reasonably cooperate with Tenant in connection therewith, provided that no such contest shall in any manner limit Tenant’s obligation to pay Tenant’s Tax Expenses Excess as and when required under this Lease.

B. 1. For each Comparison Year during the Term following the expiration of the Base Year, Tenant shall pay to Landlord, in the manner set forth in this Section 6(b), (1) the amount, if any, by which Tenant’s Percentage of Operating Expenses for such Comparison Year increase over the Tenant’s Percentage of Operating Expenses for the Base Year (the amount of such increase is referred to in this Lease as the “Tenant’s Operating Expenses Excess”); plus (2) the amount, if any, by which Tenant’s Percentage of Tax Expenses for such Comparison Year increase over the Tenant’s Percentage of Tax Expenses for the Base Year (the amount of such increase is referred to in this Lease as the “Tenant’s Tax Expenses Excess”). The sum of Tenant’s Operating Expenses Excess plus Tenant’s Tax Expenses Excess is referred to herein as “Tenant’s Expenses Excess”. If the final Comparison Year includes time beyond the expiration of the Term or earlier termination of this Lease, the calculation of Tenant’s Expenses Excess for such Comparison Year shall be equitably prorated by Landlord.

2. Tenant shall not be obligated to make estimated payments with respect to any estimated Tenant’s Expenses Excess until the expiration of the Base Year. On or before the expiration of the Base Year, Landlord shall deliver to Tenant a statement (the “Estimate Statement”) wherein Landlord shall estimate the Tenant’s Expenses Excess for the initial Comparison Year (the amount of such estimated Tenant’s Expenses Excess for any Comparison Year, as such estimate may be adjusted from time to time as hereinafter provided, if referred to herein as the “Estimated Excess”). The Estimate Statement shall include a breakdown of estimated Operating Expenses by general category line items. Any Estimated Excess for the initial Comparison Year pursuant to such Estimate Statement shall be paid in equal installments on the first day of each calendar month remaining during the first Comparison Year following the expiration of the Base Year. By way of example only, if the Commencement Date occurs on September 1, 2005, and the Estimated Excess for the initial Comparison Year is One Thousand Two Hundred Dollars ($1,200.00), then Tenant shall make estimated payments with respect to Tenant’s Expenses Excess for such initial Comparison Year in the amount of Three Hundred Dollars ($300.00) per month, on each of September 1, 2005, October 1, 2005, November 1, 2005 and December 1, 2005 (i.e., equal payments on the first day of each month remaining in the initial Comparison Year following the expiration of the Base Year). Other than during such initial Comparison Year, payments by Tenant of the Estimated Excess shall be made in equal monthly installments on the first day of each calendar month during the applicable Comparison Year on the basis of Landlord’s most recently delivered Estimate Statement. On or before May 1st of each Comparison Year during the Term following the initial Comparison Year, Landlord shall endeavor to deliver to Tenant an Estimate Statement of the Tenant’s Expenses Excess for the then current Comparison Year. In addition, Landlord shall have the right, not more than semi-annually, to deliver a revised Estimate Statement for a current Comparison Year, if Landlord in good faith reasonably determines that there is a material inaccuracy or omission in the then applicable Estimate Statement for such Comparison Year. Following Landlord’s delivery of such a new Estimate Statement for the current Comparison Year, Tenant shall pay to Landlord, within thirty (30) days of the delivery of such Estimate Statement, the difference between the Estimated Excess under such new Estimate Statement and the Estimated Excess under the prior Estimate Statement prorated for the then elapsed portion of the then current Comparison Year, and Tenant shall thereafter (beginning with the first calendar month following receipt of such new Estimate Statement)
make monthly payments with respect to the Estimated Excess on the basis of such new Estimate Statement until Tenant’s receipt of a subsequent Estimate Statement.

3. On or before May 1st following each Comparison Year during the Term of this Lease, Landlord shall endeavor to deliver to Tenant a statement (“Actual Statement”) which states the actual Tenant’s Percentage of Operating Expenses and the actual Tenant’s Percentage of Tax Expenses for such preceding Comparison Year. The Actual Statement shall include a breakdown of Operating Expenses by general category line items. If the Actual Statement reveals that the actual Tenant’s Expenses Excess for such preceding Comparison Year exceeds the total amount of Tenant’s payments of Estimated Excess for such preceding Comparison Year, Tenant shall pay Landlord the difference in a lump sum within thirty (30) days of receipt of the Actual Statement. If the Actual Statement reveals that the actual Tenant’s Expenses Excess for such preceding Comparison Year is less than the total amount of Tenant’s payments of Estimated Excess for such preceding Comparison Year, Landlord shall credit such overpayment toward Tenant’s Rent obligations next coming due under this Lease.

4. Any delay or failure by Landlord in delivering any Estimate Statement or Actual Statement pursuant to this Section 6(b) shall not constitute a waiver of its right to require Tenant’s payment of Tenant’s Expenses Excess nor shall it relieve Tenant of its obligations pursuant to this Section 6; provided that Tenant shall not be liable for the portion of Tenant’s Expenses Excess, if any, related to a particular Comparison Year which is not billed to Tenant by Landlord within (1) eighteen (18) months following the date when Tenant should have received the Actual Statement for such Comparison Year, as to items constituting Operating Expenses; or (2) thirty-six (36) months following the date when Tenant should have received the Actual Statement for such Comparison Year, as to items constituting Tax Expenses.

5. In the event the Term has expired and Tenant has vacated the Premises, at such time as the final determination has been made regarding Tenant’s Percentage of Operating Expenses and Tenant’s Percentage of Tax Expenses for the Comparison Year in which this Lease terminated (which determination shall be timely made), Tenant shall, within thirty (30) days following receipt of the Actual Statement for such final Comparison Year, pay any amounts due as a result of the actual Tenant’s Expenses Excess for such Comparison Year exceeding Estimated Excess paid with respect thereto and, conversely, any overpayment made in the event the actual Tenant’s Expenses Excess for such Comparison Year are less than Estimated Excess paid with respect thereto shall be remitted to Tenant by Landlord concurrently with Landlord’s delivery of the Actual Statement for such final Comparison Year. Nothing contained in this Section 6 shall in any manner result in a decrease in Monthly Base Rent. Further, in the event that Operating Expenses for any Comparison Year are less than Operating Expenses for the Base Year and/or Tax Expenses for any Comparison Year are less than Tax Expenses for the Base Year, Tenant shall not receive a credit against any Rent payable hereunder.

6. Tenant and its duly authorized representatives shall have the right to audit and copy the records of Landlord related to Operating Expenses and Tax Expenses with respect to any calendar year within six (6) months two (2) years following receipt of the applicable Actual Statement for such calendar year, upon not less than thirty (30) days’ prior written notice to Landlord, during normal business hours at Landlord’s business offices; provided that (1) Tenant shall not conduct more than one (1) such audit in any calendar year, (2) such information shall be kept in the strictest confidence by Tenant, (3) Tenant shall supply Landlord with a copy of the results of such audit within ten (10) days following Tenant’s receipt of the same, and (4) in no event may any such audit or inspection be performed by a person or entity being compensated on a contingency fee basis or based upon a share of any refund obtained by Tenant. In the event Tenant in good faith disputes the accuracy of any Actual Statement on the basis of any such audit, such dispute must be alleged in reasonable detail in written
notice to Landlord within ninety (90) days following Tenant’s completion of such audit. If actual Tenant’s Operating Expenses Excess or Tax Expenses are determined to have been overstated or understated by Landlord for any calendar year, the parties shall within thirty (30) days thereafter make such adjustment payment or refund as is applicable, and if actual Operating Expenses or Tax Expenses are determined to have been overstated by Landlord for any calendar year by in excess of five three percent (5%+3%), Landlord shall pay the reasonable cost of Tenant’s audit. Tenant shall pay in a timely manner as required by this Lease any amounts stated as due on the Actual Statement, provided that such payment shall not waive any right to audit and/or dispute by Tenant as set forth herein.
SAMPLE TENANT ORIENTED WISH LIST OF OPERATING EXPENSE EXCLUSIONS

Notwithstanding anything to the contrary set forth in this Lease, including, without limitation, the terms of this Section, Operating Expenses shall not include:

(1) any payments under a ground lease or master lease relating to the Project;

(2) costs of a capital nature, including, without limitation, capital improvements, capital repairs and capital equipment; except for those (i) acquired to reduce Operating Expenses (amortized at an annual rate reasonably calculated to equal the amount of Operating Expenses to be saved in each calendar year throughout the Term of the Lease, as reasonably determined at the time Landlord elected to proceed with the capital improvement or acquisition of the capital equipment to reduce Operating Expenses), together with interest at the actual interest rate incurred by Landlord, or (ii) incurred after the Commencement Date in order to comply with any governmental law or regulation that was enacted subsequent to the Commencement Date (but specifically not including any re-enactment or subsequent codification, local or otherwise, of any laws or regulations existing as of the Commencement Date, including without limitation the Americans with Disabilities Act or any state or local codifications thereof) provided that such capital costs shall be amortized over their useful life, together with interest at the actual interest rate incurred by Landlord; all other capital expenditures, improvements and repairs shall be excluded from Operating Expenses;

(3) rentals for items which if purchased, rather than rented, would constitute a capital improvement or equipment;

(4) costs incurred by Landlord for the repair of damage to the Building or for any other part of the Project pursuant to the terms of Section 15 of this Lease or otherwise;

(5) the cost of any item reimbursable by insurance or condemnation proceeds or which would be reimbursable from insurance required to be maintained by Landlord under this Lease (or similar insurance on parts of the Project other than the Building);

(6) costs, including permit, license and inspection costs, incurred with respect to the installation of tenants’ or other occupants’ improvements made for tenants or other occupants in the Project or incurred in renovating or otherwise improving, decorating, painting or redecorating space for tenants or other occupants of the Project;

(7) depreciation and amortization;

(8) marketing and promotional costs, including but not limited to leasing commissions, real estate brokerage commissions, and attorneys’ fees in connection with the negotiation and preparation of letters, deal memos, letters of intent, leases, subleases and/or assignments, space planning costs, and other costs and expenses incurred in connection with lease, sublease and/or assignment negotiations and transactions with present or prospective tenants or other occupants of the Project;

(9) costs of services, utilities, or other benefits which are not offered to Tenant or for which Tenant is charged for directly but which are provided to another tenant or occupant of the Project, including, but not limited to, above Building standard heating, ventilation and air-conditioning, janitorial services and exclusive use Common Areas;
(10) costs incurred by Landlord due to any violation of the terms and conditions of any lease of space or occupancy agreement in the Project;

(11) costs and the overhead and profit increment paid to Landlord, to affiliates or partners of Landlord, partners or affiliates of such partners, or affiliates of Landlord for goods and/or services in the Project to the extent the same exceeds the costs or the overhead and profit increment, as the case may be, of such goods and/or services rendered by unaffiliated third parties on a competitive basis in Comparable Buildings;

(12) interest, principal, attorneys’ fees, environmental investigations or reports, points, fees and other lender costs and closing costs on debts or amortization on any mortgage or mortgages or any other debt instrument encumbering the Building or the Project or any part thereof or on any unsecured debt;

(13) Landlord’s general corporate overhead and general and administrative expenses, including costs relating to accounting, payroll, legal and computer services which are partially or totally rendered in locations outside the Project;

(14) salaries of officers, executives or other employees of Landlord, any affiliate of Landlord, or partners or affiliates of such partners or affiliates, other than any personnel engaged exclusively in the management, operation, maintenance, and repair of the Building (but not leasing or marketing), and working in the Building management office and not typically included in the management fee being paid and included in Operating Expenses; provided such individuals do hold a position which is generally considered to be higher in rank than the position of the manager of the Building or the chief engineer of the Building;

(15) all items and services for which Tenant or any other tenant in the Project is required to reimburse Landlord (other than through Tenant’s Percentage or any other tenant’s share of Operating Expenses);

(16) advertising and promotional expenditures, including but not limited to tenant newsletters and Project or Building promotional gifts, events or parties for existing or future occupants, and the costs of signs (other than the Building directory) in or on the Project identifying the owner of the Building or any other building in the Project or other tenants’ signs and any costs related to the celebration or acknowledgement of “Holidays,” as that term is defined in Section ____, below;

(17) electric power or other utility costs for which any tenant directly contracts with the local public service company;

(18) costs incurred in connection with any governmental laws and regulations applicable to the Project, including, but not limited to life, fire and safety codes, including any codes relating to the installation or existence of fire sprinklers, environmental and “Hazardous Materials” laws and federal, state or local laws or regulations relating to disabled access, including, but not limited to, the Americans With Disabilities Act;

(19) costs, penalties, fines, or awards and interest incurred as a result of Landlord’s negligence in Landlord’s operation of the Project, violations of law, negligence or inability or unwillingness to make payments and/or to file any income tax, other tax or informational returns when due;
(20) costs which are covered by and reimbursable under any contractor, manufacturer or supplier warranty;

(21) costs arising from the negligence, or intentional acts of Landlord or its agents, or of any other tenant, or any vendors, contractors, or providers of materials or services selected, hired or engaged by Landlord or its agents;

(22) costs arising from the presence or removal of Hazardous Materials located in the Building or the Project, including, without limitation, any costs incurred pursuant to the requirements of any governmental laws, ordinances, regulations or orders relating to health, safety or environmental conditions, including but not limited to regulations concerning asbestos, soil and ground water conditions or contamination regarding hazardous materials or substances;

(23) costs arising from Landlord’s charitable or political contributions;

(24) costs arising from any type of insurance maintained by Landlord which is not required or allowed to be maintained by Landlord pursuant to Section ___ of this Lease;

(25) costs for sculpture, paintings or other objects of art or the insuring, repair or maintenance thereof;

(26) costs (including in connection therewith all attorneys, fees and costs of settlement judgments and payments in lieu thereof) arising from claims, disputes or potential disputes in connection with potential or actual claims, litigation or arbitrations pertaining to Landlord and/or the Building and/or the Project;

(27) costs, including but not limited to attorneys’ fees associated with the operation of the business of the partnership or entity which constitutes Landlord as the same are distinguished from the costs of operation of the Building, including partnership accounting and legal matters, costs of defending any lawsuits with any mortgagee, costs of selling, syndicating, financing, mortgaging or hypothecating any of Landlord’s interest in the Building, Project or any part thereof, costs of any disputes between Landlord and its employees, disputes of Landlord with Building or Project management or personnel, or outside fees paid in connection with disputes with other tenants;

(28) costs incurred in removing and storing the property of former tenants or occupants of the Project;

(29) the cost of any work or services performed for any tenant (including Tenant) at such tenant’s cost;

(30) (i) the cost of installing, operating and maintaining any specialty service, observatory, broadcasting facilities, luncheon club, museum, athletic or recreational club, or child care facility, and (ii) the cost of installing, operating and maintaining any other service operated or supplied by or normally operated or supplied by a third party under an agreement between a third party and a landlord;

(31) the cost of correcting defects in the design, construction or equipping of the Project or in the Project equipment;
(32) the cost of any work or service performed for any tenant of the Project (other than Tenant) to a materially greater extent or in a materially more favorable manner than that offered to Tenant;

(33) premiums for insurance to the extent Landlord is directly (and not through Operating Expenses) reimbursed therefor;

(34) the cost of furnishing and installing non-Building standard replacement bulbs and ballasts in tenant spaces;

(35) the cost of any labor, service, materials, supplies or equipment, which is not comparable to the prevailing market rate for such labor, service, materials, supplies or equipment at the time in the Comparable Buildings;

(36) the cost of any parties, ceremonies or other events for tenants or third parties which are not tenants of the Building, whether conducted in the Building, Project or in any other location;

(37) reserves of any kind, including but not limited to replacement reserves, and reserves for bad debts or lost rent or any similar charge not involving the payment of money to third parties;

(38) costs incurred by Landlord in connection with rooftop communications equipment of Landlord or other persons, tenants or occupants on the Building or the Project;

(39) costs relating to any management office for the Building including rent, or for any other management office in the Project;

(40) all assessments and premiums shall be paid by Landlord in the maximum number of installments permitted by law and shall not be included as Operating Expenses except in the year in which the assessment or premium installment is actually paid;

(41) payment of any management fee, whether paid to Landlord or an outside managing agent, in excess of the lesser of (i) the prevailing management fee per rentable square foot charged in the Comparable Buildings, and (ii) an amount equal to the product of (A) two percent (2%) and (B) the actual amount of gross revenues for the Building;

(42) any costs expressly excluded from Operating Expenses or Real Property Taxes elsewhere in this Lease or included as Real Property Taxes;

(43) costs for services normally provided by a property manager where Operating Expenses already include a management fee;

(44) costs incurred in connection with the original construction of the Building or the Project or any addition to the Project or in connection with any renovation, alteration or major change in the Building or the Project, including but not limited to the addition or deletion of floors;

(45) any costs, fees, dues, contributions or similar expenses for industry associations or similar organizations;
(46) any costs associated with the purchase or rental of furniture, fixtures or equipment for any management, security, engineering, or other offices associated with the Project and Common Areas or for Landlord’s offices or the offices of other landlords of the Project or for the Common Areas of the Building or Project;

(47) any compensation paid to clerks, attendants or other persons in commercial concessions operated by Landlord in the Building or Project;

(48) the entertainment expenses and travel expenses of Landlord, its employees, agents, partners and affiliates;

(49) costs incurred by Landlord due to the violation by Landlord of the terms and conditions of any contract or agreement relating to the Project or any part thereof, including any “Project Documents,” as that term is defined below;

(50) costs of traffic studies, environmental impact reports, transportation system management plans and reports, and traffic mitigation measures or due to studies or reports relating to obligations or the terms of the Project Documents;

(51) all assessments and special assessments due to deed restrictions, Project Documents and/or owners associations which accrue against the Project;

(52) any improvement installed or work performed or any other cost or expense incurred by Landlord in order to comply with the requirements for obtaining or renewal of a certificate of occupancy for the Building or Project or any space therein;

(53) any fees, bond costs or assessments levied on the Project by any rapid transit district (or any other governmental entity having the authority to impose such fees, bond costs or assessments for mass transit improvements);

(54) any costs or expenses relating to any provisions of any development agreements, owner’s participation agreement, covenants, conditions, restrictions, conditional use permits, easements or other instruments encumbering the Project or any part thereof or other agreement relating to the development, entitlement, construction or financing of the Project (collectively, the “Project Documents”), including any initial payments or costs or ongoing payments or costs made in connection with any child-care facilities, traffic demand management programs, transportation impact mitigation fees, water and sewage conservation, recycling, housing replacement and linkage fees, special assessment districts, infrastructure and transportation assessments, art programs, or parking requirements and programs;

(55) Real Property Taxes allocable to the tenant improvements of Tenant or other tenants or occupants in the Building or Common Areas which are in excess of $____ per rentable square foot;

(56) any costs recovered by Landlord to the extent such cost recovery allows Landlord to recover more than 100% of Operating Expenses for any Lease Year from tenants of the Building, and in connection therewith, Landlord shall reduce the amount of Operating Expenses by any refund or discount received by Landlord in connection with any expenses previously included in Operating Expenses;
(57) any profit made by Landlord in connection with Landlord’s collections of Operating Expenses;

(58) any costs for which Landlord has been reimbursed or receives a credit, refund or discount, provided if Landlord receives the same in connection with any costs or expenditures previously included in Operating Expenses for a Lease Year, Landlord shall immediately reimburse Tenant for any overpayment for such previous Lease Year;

(59) any costs incurred in connection with the installation, operation, repair and maintenance of all elevators in the Building;

(60) any costs incurred in connection with any systems and equipment, including without limitation, any Building HVAC System, which do not service the Premises;

(61) costs, expenses, taxes or assessments associated with or relating to separate items or categories or subcategories of Operating Expenses to the extent such items, categories or subcategories were not part of Operating Expenses for the Base Year;

(62) the portion of any item of Operating Expenses which increases in excess of market increases over the amount of such item included within Operating Expenses for the Base Year.

To the extent that an expense is not specifically included or excluded as a component of Operating Expenses in the definition of “Operating Expenses,” whether such expense shall be treated as an Operating Expenses shall be determined in accordance with generally accepted accounting principles consistently applied. After written request (the “Operating Expenses Notice”) by Tenant, at Landlord’s option, either (i) Landlord shall diligently pursue claims for reductions in the Operating Expenses, (ii) Tenant may pursue such claims with Landlord’s concurrence, in the name of Landlord, or (iii) Tenant may pursue such claims in the name of Landlord without Landlord’s concurrence. In the event that Landlord does not elect either item (i) or (ii), above, within thirty (30) days of receipt of the Operating Expenses Notice, Tenant shall thereafter have the right to pursue such claims under item (iii), above. If either Landlord agrees to pursue such claims or concurs in the decision to pursue such claims but elects to have them pursued by Tenant, the cost of such proceedings shall be paid by Landlord and included in Operating Expenses when such expenses are paid. If Tenant pursues such claims without obtaining Landlord’s concurrence and such contest is successful, then the cost of such proceedings, but in no event more than the cumulative savings achieved, shall be included in Operating Expenses when paid by Tenant, and Landlord shall pay or reimburse to Tenant such cost.
SAMPLE TENANT ORIENTED LIMITATIONS ON REAL PROPERTY TAXES

All Real Property Taxes which may be paid in installments shall be paid by Landlord in the maximum number of installments permitted by law and not included in Real Property Taxes except in the year in which the assessment is actually paid. Notwithstanding anything to the contrary set forth in this Lease, Real Property Taxes shall not include (i) any excess profits taxes, franchise taxes, gift taxes, capital stock taxes, inheritance and succession taxes, estate taxes, federal and state income taxes, and other taxes to the extent applicable to Landlord’s general or net income (as opposed to rents or receipts), (ii) taxes on tenant improvements in any space in the Building or the Project based upon an assessed level in excess of $____ per rentable square foot, (iii) penalties incurred as a result of Landlord’s negligence, inability or unwillingness to make payments of, and/or to file any tax or informational returns with respect to, any Real Property Taxes, when due, (iv) any other taxes or assessments charged or levied against Landlord which are not directly incurred as a result of the operation of the Building or which are incurred in connection with Project Documents, (v) any real estate taxes directly payable by Tenant or any other tenant in the Building under the applicable provisions in their respective leases, (vi) any special assessments or taxes from any city, county, state or federal government or agency, including, but not limited to, such items as parking income taxes, metro-rail assessments, etc., (vii) any costs or expenses relating to any provisions of any Project Documents, including any initial payments or costs or ongoing payments or costs made in connection with any child-care facilities, traffic demand management programs, transportation impact mitigation fees, water and sewage conservation, recycling, housing replacement and linkage fees, special assessment districts, infrastructure and transportation assessments, art programs, or parking requirements and programs, (ix) any items included as Operating Expenses or specifically excluded as Operating Expenses and (x) costs, expenses, taxes or assessments associated with or relating to separate items or categories or subcategories of Real Property Taxes to the extent such items, categories or subcategories were not part of Real Property Taxes for the Base Year. After written request (the “Tax Notice”) by Tenant, at Landlord’s option, either (i) Landlord shall diligently pursue claims for reductions in the Real Property Taxes of the Building, Project or any part thereof, in which event Landlord shall provide Tenant with detailed information as to how Landlord will pursue such claims, (ii) Tenant may pursue such claims with Landlord’s concurrence, in the name of Landlord, or (iii) Tenant may pursue such claims in the name of Landlord without Landlord’s concurrence. In the event that Landlord does not elect either item (i) or (ii), above, within thirty (30) days of receipt of the Tax Notice, Tenant shall thereafter have the right to pursue such claims under item (iii), above. If either Landlord agrees to pursue such claims or concurs in the decision to pursue such claims but elects to have them pursued by Tenant, the cost of such proceedings shall be paid by Landlord and included in Real Property Taxes in the Lease Year such expenses are paid. If Tenant pursues such claims without obtaining Landlord’s concurrence and such contest is successful, then the cost of such proceedings, but in no event more than the cumulative tax savings achieved, shall be included in Operating Expenses in the Lease Year such expenses are paid, and Landlord shall pay or reimburse to Tenant such cost. Tenant may give a Tax Notice prior to the issuance of the actual tax bill by the taxing authority or receipt by Tenant of a billing from Landlord for Tenant’s Percentage thereof.