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Planning for vacating tenants

Whether a tenant is vacating its leased premises because its lease is expiring or is being terminated, a landlord will be well served to prepare for the surrender of the premises. Often during lease negotiations, the parties focus on issues that are important at lease commencement, but not the provisions governing the tenant's responsibilities at the end of the lease. As a result, the lease may be vague concerning the tenant's surrender obligations. When you add to that the tension between the landlord's desire – to get the space back in rent-ready condition for a new tenant – and the tenant's goal – to return the space in its as-is condition – it behooves a landlord to properly plan for this event well in advance of the tenant's move-out date. This is particularly true given the current economic climate in which more tenants may be vacating their space and be less financially sound.

First and foremost, the landlord should review the lease to determine the tenant's obligations concerning repair and maintenance, surrender conditions, default, notice and cure rights, security deposits and other applicable matters that might be relevant at the end of the lease. There may be critical timing issues to monitor. For example, a landlord would be distressed to discover 30 days before the lease expires that its letter of credit security deposit expires at the end of the lease term, but it cannot make a draw until 45 days after written notice of default to the tenant. There may be a dead-



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line associated with the return of the tenant's security deposit that compresses the landlord's time period to determine its damages. The landlord may need to obtain cost estimates and bids for the required work. Does the lease require the tenant to return the premises to the landlord in the condition in which the tenant received it? If so, the landlord should locate any documentation, photographs and videos that document such original condition. If ordinary wear and tear is excepted from the tenant's surrender obligations, how will this be established? Does the lease permit the landlord to elect which tenant improvements must be removed by the tenant at the end of the term, and if so, has that election been made? Does the lease permit landlord inspections or provide for a joint "exit" inspection with the tenant? The landlord should be mindful of any pre-approval rights over the manner in which the tenant is to perform certain removal and restoration work and whether to request a representative be present during such work.

If possible, several months before a tenant is expected to vacate its premises, the landlord should proactively schedule an inspection of the premises with a tenant representa-

and its own consultants, if desired. If the landlord is marketing the space, problems such as repair, maintenance and environmental issues may scare away the landlord's prospective tenants. An inspection will give the landlord an opportunity to find any deferred repair or maintenance items and discuss with the tenant the specifics concerning the condition in which the premises will be surrendered, including which fixtures, alterations and personal property will be removed from or left in the premises by the tenant. The parties may disagree on whether certain items are the tenant's trade fixtures or the landlord's property fixtures, and the lease may not provide all the answers. If any existing tenant improvements may prove useful to a future tenant, should the landlord allow those improvements to remain, even if the lease says otherwise? The landlord might negotiate a tenant payment of the estimated cost of removal and restoration of such improvements, but delay the work until it understands its new tenant's needs. While the amount of waste sent to the landfill might be reduced, the landlord would bear the risk of any increased costs. In those jurisdictions that have adopted the National Electric Code published by the National Fire Protection Association, abandoned cabling and telecommunications wiring must be removed from the ducts, risers and plenums of buildings. The parties should discuss who is responsible for removing this cabling, which may be an expensive undertaking.

What if the tenant is in default of its obligation to maintain, repair or restore the premises? The earlier this is discovered, the more options and time the landlord may have to enforce its remedies against the tenant and prepare the space for its future tenants. Any notices of default to a tenant should be carefully prepared so that they conform to the default and notice requirements of the lease. The landlord should check its lease files to ensure that the notices are sent to the most current tenant address(es). Does the lease grant the landlord self-help rights to repair the premises or must it provide the tenant an opportunity to cure its default? In either event, the security deposit may not cover all the landlord's costs associated with the tenant's default. In addition to its direct, out-of-pocket costs to fix the premises and enforce the lease (including attorneys' fees), the landlord also should consider claiming holdover rent from the vacating tenant, lost rent if a new tenant's occupancy of the premises is delayed, and other costs borne by the landlord as a result of the tenant's failure to return the premises to the landlord in the condition required by the lease.

Just as landlords diligently prepare for their new tenants, they also should devote appropriate time and resources to the departure of their current tenants. If they do not, they may get more – or less – than they bargained for when their tenants move out.▲