

19
89 | OVER
TWENTY
FIVE
YEARS

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Real property tax escalating in commercial condos - by Thomas Kearns

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I have written previously for this publication about the growing use of the condominium structure for commercial properties. One key benefit in using a condominium structure is that the real property taxes for the property are divided and separately assessed to each unit. Some thought and expertise is needed to draft property tax escalation clauses in space leases for New York City commercial condo units. Here are a few examples:

- For units not yet separately assessed – It can take several months from the date a declaration of condominium is recorded for the City's Department of Finance to break up a building's tax assessment into the assessments for the separate units. If during this period a deal with the tenant is reached and it calls for an escalation of taxes over a base year, how do you calculate that base year when the taxes for the base year have not yet been separately assessed?
- Potential future condo – Similarly, if a landlord wants to reserve the right to convert the building in the future, the lease should expressly permit the conversion to a condominium structure and provide for an equitable way to recalculate the base year.

- If, instead of an escalation over a base year amount the tenant agrees to pay all taxes charged to the condo unit, the lease needs to be clear as to what space comprises the unit. If the unit contains more than the tenant's space, paying all of the taxes on that unit would be unfair to the tenant. The lease should provide a mechanism for the tax escalation to be adjusted if the unit is subdivided or combined with other space.

Fortunately there are experts at estimating how property taxes are assessed and, in a condominium, subdivided. Tax escalation clauses, however, need to provide flexibility for landlords and comfort to tenants that they won't be gouged. At a minimum, make sure that your lease specifically provides that the taxes relate to the condo unit itself, not the "Building," "Premises" or other generic term. Research the current status of the tax assessment so that you or your lawyer can draft the clause knowing all the facts.

If a base year will need to be adjusted, make sure that the lease clause permits the landlord to do so in an equitable way.

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