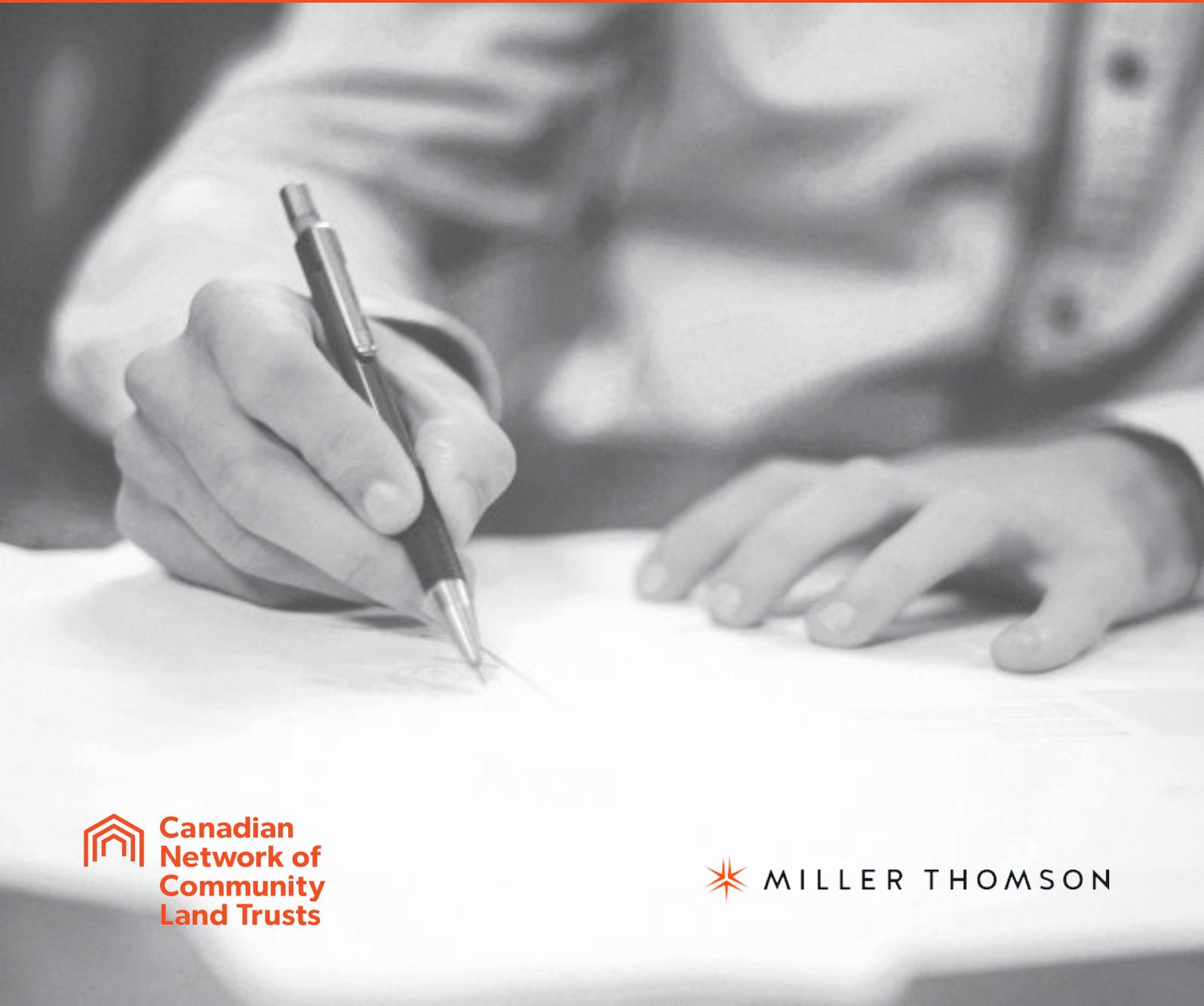


An Introduction to Commercial Leasing for Community Land Trusts



Contents

1.	Introduction	1
2.	What is a Lease?	1
	a. Understanding the Legal History of Leasing	1
	b. Freehold Interests and Leasehold Interests	2
	c. The Only Unique Legal Aspect of a Leasehold Interest is Time	3
3.	Common CLT Leasing Structures	3
	a. Ground Leases	3
	b. Third Party Commercial Leases	4
	c. Operating Leases to Housing Providers	5
4.	Key Lease Terms & Considerations	7
	a. Premises	7
	b. Rent/Monetary Obligations under the Lease	8
	c. Additional Rent, Maintenance, Operating Costs	9
	d. Construction and Financing Obligations	10
	e. Lease Registration	11
	f. Ability to Finance a Lease & Lender Protections	11
	g. Assignment and Transfer Rights	12
	h. Other Landlord Approval and Control Rights	13
	i. Mission Statement / Overriding Purpose Clauses	14
5.	Conclusion	14

About the Author



Adam Thompson is a real estate and social enterprise lawyer at Miller Thomson LLP. Adam believes housing is a human right and focuses his practice on the creation and rehabilitation of non-profit, co-operative and/or community-owned housing and commercial developments.

Adam can be reached at athompson@millerthomson.com

The Canadian Network of Community Land Trusts commissioned the creation of this guide. This guide is solely intended as a summary of general legal information and not specific legal advice. Readers are encouraged to seek independent legal counsel before engaging in any of the matters described below.

1. Introduction

The purpose of this guide is to generally summarize commercial (i.e. non-residential) leases, and outline key considerations related to and the unique context and factors relevant to Community Land Trusts (“CLTs”) when entering into such a lease. Although tailored for Canadian CLTs, much of the material should be useful to other forms of non-market and affordable housing providers, both within and outside of Canada. This guide will provide a general definition of a lease, describe the most common commercial leasing arrangements that a CLT is likely to be involved in, and then go more in depth on common provisions found in many commercial leases that a CLT is likely to encounter, highlighting key concepts to consider and, where possible, how these concepts may differ based on the nature of the lease.

This guide is not intended, and does not discuss, issues relevant to residential leases, occupancy agreements, or other forms of residential housing agreements regarding housing for individual tenants, occupants or households, and any reference to “lease” or “leasing” should be interpreted as a reference to commercial (non-residential) leasing. Residential leasing is often a highly unique and regulated area that may vary wildly from jurisdiction to jurisdiction on both the provincial and municipal level, and if readers are interested in learning more about residential leasing, feel free to contact the Canadian Network of Community Land Trusts who will be able to direct them to materials or other sources of information for their specific community.

2. What is a Lease?

At the most basic level, a lease is simply a form of property ownership that exists for all types of property, with the key distinction that a lease is only for a specific duration of time. Most people are familiar with many types of leases. You can lease a kayak for an hour at the beach. You can lease a moving van for a day to help with a move. You can lease office equipment, vehicles, art, party decorations, catering supplies, etc. And, of course, you can lease real property (often referred to as “Land”).

a. Understanding the Legal History of Leasing

The majority of Canada (e.g. not Quebec and some First Nations) has based its legal system on English common law, which is many centuries older than Canada itself. As such, property law in Canada, including the various types of ownership and distinctions between various types of property, is a twisted structure of ancient ideas and principles that have been broken apart, augmented, and reconfigured over the decades and centuries into what we now consider our current system. In short, it’s a mess, and you can (and people have) devoted hundreds of thousands of words describing all the various intricacies of how we got here and what it all means.

So, in an attempt to wrap all of that up in a couple of sentences, here is a very short summary in regard to leasing for CLTs. First, you can roughly divide property into real property (the land) and personal property (everything else). Second, while the division between real property and personal property can be highly technical, for most purposes real property

includes both the land and any buildings or other structures or improvements on the land. Third, while there are many different types of ownership (i.e. “interests in property”) that exist for real property, we will focus on “freehold interests” and “leasehold interests” in real property. Fourth, while many real property leases include both “real property” and “personal property”, often the personal property is incidental and not a material component of the lease.

As such, when we refer to a “lease” in this guide, we are referring to a commercial real property lease that grants the tenant a “leasehold interest” in the real property for the term of the lease, where the landlord retains a reversionary “freehold interest” in the real property. And further, when we refer to “land” in this guide, we are referring to the real property granted to a tenant in a lease, including both the actual land and the improvements on the actual land.

b. Freehold Interests and Leasehold Interests

Despite the legal terminology, almost everyone understands the differences between a freehold interest and a leasehold interest. The freehold interest is what most people refer to as “owning” land, and recognize this is what a landlord “owns” in regards to a lease. Likewise, the leasehold interest is what most people refer to as “renting” or “leasing” land, and recognize this is what a tenant “is provided” in regards to a lease. However, there are many misconceptions about what a freehold interest and leasehold interest actually provide. Let’s discuss two of the most common misconceptions:

i. Leasehold Interest as Lesser Ownership

Some people may believe a tenant under a lease has no ownership interest in the land. Other people might believe a tenant has an ownership interest in the land, but that the landlord’s freehold interest is superior to the tenant’s leasehold interest. In realty, though, both are perfectly valid and equal forms of ownership, and in many ways the leasehold interest is “superior” as it is only the tenant, and not the landlord, that has the right to use and occupy the land during the term of the lease.

ii. Freehold Interest is Free From Restrictions

Even if people recognize both leasehold and freehold interests as valid forms of ownership, many people believe that a leasehold interest inherently restricts a tenant’s use of the land, while freehold ownership implies ownership free of restriction. Neither of these beliefs are true.

First, while many leases contain provisions that restrict a tenant’s right to use and occupy the land, these are the result of additional agreements made between the landlord and the tenant and included in the lease, and not a result of a leasehold interest in itself. There is no legal requirement that a lease restrict the tenant’s use of the land, and many longer types of leases (e.g. ground leases) have few, if any, restrictions placed on the tenant’s use of the land.

Second, it is extremely rare that a freehold interest in land is not also subject to restrictions. Almost every municipality has zoning laws restricting the use of land. Many municipalities have further building restrictions requiring approvals and permits to construct improvements on land. Further, there are often private restrictions on land, whether in the form of condominium, strata or homeowner bylaws and regulations, restrictive covenants granted to neighboring landowners (such as height restrictions or preserving view), or even just standard utility easements that can restrict certain actions and activities on land. A freehold interest in Land does not inherently provide ownership free of restriction.

c. The Only Unique Legal Aspect of a Leasehold Interest is Time

If there is one key concept to take away from this guide, it is that the only meaningful legal distinction between a leasehold interest and a freehold interest in land is time; a leasehold interest is temporary, a freehold interest is perpetual.

During the term of the lease, the tenant's leasehold interest is a legally enforceable interest in the land, granting the tenant the exclusive right to occupy and use the land until the term of the lease expires. And during the term of the lease, the landlord's freehold interest in the land is solely a reversionary interest, which in most basic terms means the landlord "owns" the right to use and occupy the land in the future once the leasehold interest expires.

Under the majority of Canadian legal systems, that is the only meaningful legal distinction when it comes to leasing. Everything else, from the term of the lease to the restrictions on use to the responsibilities of each party, is something that is agreed to between the landlord and the tenant when entering into the lease. So while the rest of the guide will summarize common leasing arrangements and provisions, always remember that almost none of this is set in stone or legally required. CLTs should, whether acting as a landlord or a tenant, always consider the specific purpose of a lease in their specific situation, and be open to the possibility for uncommon or unique provisions that may ultimately further the goals of the CLT and its leasing partners.

3. Common CLT Leasing Structures

While there is no exhaustive summary of all of the potential leasing structures regarding CLTs, the following section reviews three of the most common leasing structures that a CLT is likely to encounter: ground leases, third-party commercial leases, and operating leases to housing providers

a. Ground Leases

Some CLTs are fortunate enough to acquire a freehold interest in the land for some or all of their projects. Often, though, the only way for a CLT to acquire land for a project is through a ground lease, typically for a term somewhere between sixty to ninety-nine years in length. While sometimes a CLT might have a private landowner as the landlord under such a ground lease, typically it is a public body (e.g. a municipality, a province, the federal

government, or a respective agency or entity controlled by the same) granting the ground lease to the CLT, and the remainder of this section will assume such public body as a landlord.

One of the primary reasons that a public body will only provide a CLT a leasehold interest in the land through a ground lease is precisely due to the time restraints on a lease. In this instance the public body and the CLT are often aligned in purpose: to ensure that the ultimate future of the land, and its development and use, remains in the public sector.¹ In return, the CLT typically agrees to restrict how the land may be used or developed by the CLT, either through restrictions in the lease itself or by agreeing to registering housing agreements or other restrictive covenants on title restricting the CLT's ability to use the land other than for the predetermined use with the public body (e.g. affordability or other occupancy restrictions, restrictions on selling or transferring the land, etc.).

However, in most instances these same restrictions would be imposed on the CLT even if they were acquiring the freehold interest in the land and, as such, CLTs acquiring land pursuant to a ground lease are often in similar circumstances owning the freehold interest in the land, at least during the initial stages of the ground lease. They are usually responsible for the development and construction of the building and its ongoing maintenance, including the financing required for the same. They are almost always responsible for all maintenance and operating costs of the project, including taxes, insurance, utilities. They almost always have near total control of leasing the building to occupants or other organizations subject to the affordability or other restrictions imposed by the public body. And, in the eyes of the occupants of the project, the CLTs are often indistinguishable from the public freehold owner, at least until the ground lease approaches the end of its term and the future of the project's occupants comes into question.²

As a final note, public bodies often require that ground leases be on their respective form with their standard provisions, and CLTs may have a fairly limited ability to revise the provisions of those ground leases other than to make sure they accurately reflect the factual details of the intended project and otherwise any other provisions specific to the project.

b. Third Party Commercial Leases

Some CLTs will be involved with projects that solely provide housing, and will never have to engage in third party commercial leases unrelated to housing. However, third party commercial leasing is, and will most likely continue, to be an integral component for many CLT projects, whether for mixed use developments with retail space, day care centers for occupants and community members, dedicated car share spaces, or any other non-

¹ While not the subject of this guide, this raises the obvious question on how CLTs might further educate municipalities and other government actors on the alignment of the CLT and the public in regards to the future of the land, and how granting a CLT the freehold interest in the land might offer better long-term stewardship and protection of the land and its future use and development.

² The potential issues facing housing occupants of buildings when a ground lease expires is outside the scope of this guide, but we would be remiss if we didn't highlight this as another serious issue regarding ground leases that a CLT might successfully use in advocating for a freehold interest in the land.

housing related leases for the project. Sometimes a CLT will want to include these sort of leases in a project as a benefit to the occupants, while other times they will be necessary to the project itself, whether to make the project financially viable (e.g. market rent for a commercial space to subsidize the project), required as a condition to funding (e.g. grant programs for day care centers), otherwise imposed upon the project by a public body (car share services required by a development permit).

In many ways these type of non-housing commercial leases are the least complicated type of lease for a CLT. In general commercial leases are far more standardized than ground leases or operating leases for housing operators, with many commonly accepted provisions and practices regarding rent payment, maintenance obligations, use restrictions, and general terms. That isn't to say that negotiating such a lease is simple, but rather that there are many resources available to a CLT to assist with negotiating the business terms and finalize a non-housing commercial lease.

The complication with these types of leases, though, often comes through other restrictions placed on the CLT. For instance, a ground lease will often restrict or outright prohibit a CLT from leasing space to anyone other than a non-profit housing operator or directly to occupants of the building. Further, many sources of public financing that may be available to a CLT are strictly limited to the provision of housing, and using those funds to construct space for retail leasing or any other non-housing part of the building may be prohibited. As a final example, the bylaws of a CLT may only provide for purposes related to housing, and any other form of commercial lease would violate those bylaws.

This isn't to say that CLTs will be, or should be, prohibited from third party commercial leasing at their projects. However, the inclusion of any third-party commercial leasing at a project needs to be considered and accounted for from the very inception of a project, and CLTs will sometimes have to be creative in structuring a project that allows for third party commercial leases without running afoul of the potential restrictions imposed on the project or the CLT itself.

c. Operating Leases to Housing Providers

For some CLTs, whether they have a freehold or leasehold interest in their project, will enter directly into residential leases, occupancy agreements or other forms or residential tenancy arrangements directly with the occupants of the housing units in the building. However, another common method for CLTs to provide housing at their projects is to enter into a lease with a housing provider for some or all of the building (to be generally referred to as "operating leases" in this guide). There are multiple reasons for a CLT to use an operating lease model at a project, many of which are beyond the scope of this guide. However, some common reasons include:

i. CLT is not a Housing Operator

Some CLTs are organized to perform, and perfectly qualified and capable to perform, the day-to-day operations of a housing project. However, if a CLT is primarily focused on the acquisition and long-

term stewardship of land in a community, then the operating lease model allows the CLT to focus on its acquisition and stewardship goals while allowing more appropriate organizations to operate and maintain the project on a day-to-day basis. Operating leases put in place for these reasons will often shift much of the responsibility for operations, maintenance, and tenanting onto the operating tenants.

ii. Project is intended for a Co-operative

A CLT might want to lease a building to a housing co-operative to use, occupy and maintain the building. This is typical when a co-operative might not have the resources to acquire and/or develop the project itself, and the CLT is able to develop or acquire the project with the intention of providing the co-operative occupancy rights therein, while maintaining the long-term stewardship of the land with the CLT. Often these operating leases may be similar to the operating leases for CLTs that are not housing operators. However, in some instances the co-operative may be an affiliated or “captive” co-operative where the CLT has certain control rights over the co-operative, in which case the operating lease will often specify many of these control provisions. Further, if the CLT is qualified and knowledgeable in operating housing projects, it might reserve more of the maintenance, long-term operations and tenanting restrictions for itself.

iii. Financing, Separation of Assets, More Localized Control

There are many other reasons you might want to separate the CLT’s long-term interest with the land from the housing provider occupying and operating the housing project. It can allow more flexibility if the CLT is acquiring and/or financing multiple assets, especially if the assets are otherwise unrelated. It can provide more security to the individual occupants if their right to occupy the building is separated from the CLT and the CLT defaults on one of its agreements (e.g. foreclosure on the building by a lender, or a municipality terminating the ground lease to the CLT). Finally, it may just be to allow the occupants of a building to have more control over the day-to-day operation of their own building when the CLT owns multiple projects.

Of the three leases described in this section, operating leases probably contain the least amount of standardization when it comes to the operating lease provisions and each party’s responsibility under the specific operating lease. Further, the power balance between the parties is often much more situational than in the other leasing contexts; in ground leases, public bodies are often able to impose terms through their standard form of lease on a take it or leave it basis, whereas in most third party commercial leases the parties are equals working at arms-length from each other. For operating leases, though, a captive co-operative is going to have a very different ability to negotiate than an established, unaffiliated housing operator, and each will have very different expectations in regard to how the operating lease arrangement, and the responsibilities and restrictions of the parties therein, are

structured. However, this also provides for greater flexibility for both the CLT and the housing operator, and tailoring each operating lease to the bespoke project at hand may allow for a project to succeed where a more standardized leasing arrangement would fail.

4. Key Lease Terms & Considerations

In this section we will provide a general description of certain key concepts found in many leases, including possible variations on how they are implemented and potential considerations when incorporating these concepts in a lease. This list is not, and is not meant to be, an exhaustive list. Many of these concepts remain the same in a ground lease, a third party commercial lease or an operating lease, but for the purpose of this guide these provisions will be addressed mainly in the setting of an operating lease, and we will call out any different considerations that may be applicable to a ground lease or third party commercial lease. Finally, we would like to reiterate from above that, at its most base form, the only legal requirement for a lease is the length of its term; everything else is simply what the parties agree to.

a. Premises

While seemingly straightforward, how the parties define the premises can have a major impact on the lease and the provisions within. In short, the premises is defined as the actual area leased to the tenant. The actual definition of the premises is important as it often determines which party is responsible for what obligations in regards to a project (or the portion of the project leased to the tenant). In a ground lease the premises is almost always all of the land and any buildings or other improvements on the land, with the tenant being responsible for everything and the landlord having no responsibility for the project. In a third party commercial lease the premises is almost always the interior of the retail space in the building being occupied by the commercial tenant, with an additional right to access the common areas of the building, where the tenant maintains the interior space but the landlord is responsible for maintaining the building itself and the common areas. However, when it comes to an occupancy lease, the premises might be all of the land and buildings, might just be the building (but not the surrounding land and any landscaping), might be just a single floor of the building, or might just be the individual housing units themselves with the right to access the common areas. As such, the definition of the premises in an occupancy lease will affect many other provisions of the lease (e.g. maintenance responsibility and cost, insurance requirements, structural repairs, tax liability, etc.), and the premises should be finely tailored to properly reflect the parties intentions for the project.¹

¹ As an aside, there is often confusion about whether, under the Canadian legal system, you can separate ownership of the building from ownership of the land in regard to leases, and how this relates to the “Classic US CLT Model” where the CLT retains ownership of the land while selling or leasing the building to a community member. Without spending too much time on the subject, there is nothing inherent in either the American or Canadian legal system that allows for that system to work in the US while also prohibiting that system to work in Canada. While the Classic US CLT Model employs other ownership structures besides leases, the leasehold form of the Classic US CLT Model is simply when a CLT owns the freehold interest in the land and grants leasehold interest to the community member, usually as a ground lease of vacant land where the tenant then finances and constructs their home on the land. This is no different than any municipal ground lease of vacant land to a CLT where the CLT then constructs, finances and operates the building on the land. At the termination of both leases the leasehold interest is terminated and the “ownership” reverts back to the freehold interest holder (e.g. the CLT in the Classic

b. Rent/Monetary Obligations under the Lease

The most critical issue for both parties in almost any lease arrangement will be determining what sort of rent, payments, or other monetary obligations, if any, are imposed upon the tenant under the lease. Often defined as “Base Rent” or “Basic Rent” under a lease, the following are some of the standard arrangements for the payment of rent:

i. Free rent

Some leases will not require the tenant to pay any form of rent or other payments to a landlord under a lease. For instance, if the tenant agrees to finance and construct a new building, and operate it for tenants and other uses in the area, the landlord may be willing to accept the social benefit of these actions in lieu of rent. Further, in many cases the landlord would gain ownership of the building at the end of the lease term, assuming there is still usable life in the building at that time. Free rent would most likely be applicable for a ground lease or operating lease, although a nominal prepaid amount of rent (as discussed below) would be more common.

ii. Prepaid Rent

Pre-paid rent is a one-time payment of rent, most often made at the commencement of the lease. This might be a nominal fee where the lease is being provided by a public body as its way of financially supporting the project (many ground leases from municipalities are for an upfront payment of \$10). However, in the third party commercial leasing context, or in a ground lease where the landlord is not financially supporting the project, the prepaid amount of rent is often the full market value of the leased premises at the time of the commencement of the lease, adjusted according to the length of the lease term (or, in other words, a one-time purchase price for the right to lease the land). Prepaid leases for market value are also fairly common in the co-operative housing sector, specifically where the landlord was a private land owner as opposed to a CLT or other non-profit housing provider.

iii. Mandatory Periodic Rent

The most common form of rental payment for most leases, where the landlord requires annual, monthly, weekly or some other periodic mandatory rental payment. The amount of periodic rent is often (A) a fixed rate for the entire term, (B) a rate with fixed periodic increases set out in the lease, or (C) a rate that is set for a certain amount of time and then renegotiated periodically (e.g. every five years, often based on inflation or market appraisal at the time). Mandatory periodic rent is almost standard in short-term (e.g. less than ten year) commercial leases, is less common for CLTs under ground leases or for housing operators under operating leases.

US CLT Model and the municipality in the municipal ground lease model). There are many reasons the Classic US CLT Model is more prevalent in the United States than in Canada, but those reasons stem from an inherent philosophical difference between the countries, including the United States' general preference towards private land ownership and private operation of affordable housing.

iv. Revenue Based Rent

Unlike mandatory periodic rent, where a minimum payment is required regardless of circumstance, an example of a lease with a revenue based rent would be an agreement for a tenant to pay all or a portion of the project's excess revenue, if any, to the landlord (i.e. any revenue after paying all operating costs, funding reserves, making necessary capital improvements, etc.). This is a common arrangement for many operating leases, where the CLT as landlord often doesn't start receiving rental payments until long after the project has stabilized and any existing debt has been significantly repaid. Further, some ground leases with public bodies also require the payment of excess revenue to the City on the justification that if the City financially supported the project with a free ground lease, then the City should reap the benefit if the project ever starts earning excess revenue (however, many such ground leases allow the CLT to keep a portion of the excess revenue provided that excess revenue is applied towards other affordable housing activities).

c. Additional Rent, Maintenance, Operating Costs

In addition to base rent, the lease will also determine who is responsible for the payment of operating costs (including taxes and utilities) and performing maintenance for the premises. The lease may also require that the Landlord pay those costs directly, but then the tenant reimburse the landlord for those costs in period installments (often characterized as "Additional Rent" in many leases). As discussed above, in ground leases it is common for a tenant to be responsible for, and directly pay, all of the operating costs and perform all of the maintenance for the premises. Likewise, in most third party commercial leases the tenant is responsible for performing and paying for the maintenance costs of its interior premises, but then reimburses the landlord for its share of the landlord's common area maintenance costs (often stylized as "CAM" or "CAM Costs") through the payment of additional rent.

For occupancy leases, though, the responsibility for the performance of maintenance and the payment for operating costs can vary from lease to lease. For instance, a truly third party co-operative might be responsible for the payment and performance of all maintenance and operating costs, especially in a situation where the CLT has leased the entire lands and building to the co-operative as the premises for a fixed prepaid rental amount or for a fixed periodic rental payment. On the other hand, a housing provider that only operates a portion of the housing units would probably not be required to maintain the common areas of a CLT project. Further, a housing provider might be responsible for all maintenance and operating costs for the project, but the CLT landlord might reserve the right to approve annual budgets or even require control over operating expense reserves to ensure the building is maintained. This would be especially common in a situation where the operator is only required to pay excess revenue as rent or in a situation where the operator is an affiliate or otherwise controlled by the CLT.

d. Construction and Financing Obligations

There are many, many ways in which a lease may incorporate construction and financing obligations, and this is not intended to cover most of them (e.g. tenant improvement obligations or allowances, responsibilities for the repair and replacement of capital improvements or amortization of capital improvement costs, etc.). However, it is not uncommon for a ground lease to require a CLT to finance and construct a building on the vacant premises. In those situations, we wanted to identify some key concepts to consider:

i. Subject to Financing

Some ground leases will require a CLT to construct the building regardless of whether the CLT is able to secure financing for the construction. However, a CLT should try to ensure that any such construction obligations are conditioned on being able to secure reasonable financing for the construction or, if the CLT is not able to secure reasonable financing by some predetermined deadline, terminate the ground lease without any further liability to the CLT. Some leases may also require a CLT to secure construction financing as a condition to lease commencement (i.e. for when the CLT's obligations under the lease start). If there isn't some condition on securing financing then a CLT might find itself under an extremely long lease where it is required to insure, maintain, and be liable for the vacant land or, worse, is in default for failing its construction obligations (and the landlord might have the right to sue for damages).

ii. Oversight/Deadlines

In addition to the construction obligations being conditioned on securing financing, a CLT should also strongly consider the amount of oversight, input and control the landlord will require over the construction process. Will there be hard construction deadlines that might put the CLT in default if construction runs long? Does the landlord have the right to approve the design of the project, plans and specifications, contractors, construction contracts and budgets, or change orders? Ideally, a CLT construction obligation would simply be to commence and diligently pursue construction without any deadlines or other landlord approval rights, although this will often be an area of compromise under the ground lease.

iii. Rebuilding Obligations

Almost all leases will address the responsibility for a landlord or tenant to rebuild/replace a building or their premises following a casualty or other destruction. However, it is especially important to consider where a CLT was required to construct the building and to provide similar protections to its initial construction obligations. For instance, a CLT should consider a provision granting you the ability to terminate the lease if the cost to rebuild exceeds available insurance proceeds or you are otherwise unable to reasonably finance reconstruction. Further, are you required to rebuild to the same plans and specifications, or should the CLT be allowed to

determine a new design or building that is better suited for its current needs. Finally, a CLT might want the ability to terminate the lease and not rebuild the building if the casualty happens near the end of the lease term, allowing the parties to enter into a new lease with new requirements for the new building.

e. Lease Registration

Lease registration in the applicable land title office is governed by the relevant legislation applicable to each jurisdiction, and this guide is not meant to go into the specifics of lease registration in each such jurisdiction. However, as a general overview, registering a lease in the applicable land title office creates a public record of the tenant's leasehold interest and provides legal notice of the tenant's leasehold to any potential third parties. There are two main reasons that a tenant would want to register a lease.

First, registration of a lease provides the tenant protection over subsequent registered interests, primarily that any future purchaser of the freehold interest is purchasing the land subject to your leasehold interest and will not be able to terminate the lease after acquiring the land. In essence, registering a lease provides security of tenure to the tenant, whether that is the CLT under its ground lease, a commercial tenant in the project, or the housing operator and the underlying occupants of the housing units.

Second, in most jurisdictions you need to register the leasehold interest as a condition to any leasehold mortgage the tenant requires. Under a ground lease, this would be the ability for the CLT to acquire construction financing secured by a mortgage on the ground lease (and not, for instance, on the municipality's freehold interest, which the municipality normally would not allow). A third party commercial tenant might also require its lease to be registered to obtain tenant improvement financing or general operating credit financing secured by the prepaid lease. Likewise, an independent co-operative might also require a registered lease if it needed to finance ongoing maintenance obligations under its occupancy lease.

However, there are many situations where it might not be ideal, or even permitted, to register a lease, specifically third party commercial leases and some operating leases. These primarily arise from financing requirements for the project as it can impact a lender's ability to secure their mortgage or otherwise reduce a lender's ability to recoup on a loan during a foreclosure. There is no standard when it comes to allowing or prohibiting lease registration, and a CLT should try to provide itself as much flexibility as possible in any lease registration provisions to account for current or future needs of the project.

f. Ability to Finance a Lease & Lender Protections

Even when a lease is registered in the applicable land title office, many leases include provisions that prohibit a tenant mortgaging its leasehold interest without landlord consent. One reason for a landlord to have consent rights is to control who its tenant under the lease will be in the future, as a foreclosing lender would be able to sell or assign the CLT's interest in the lease to a third party that the landlord may not desire or want to engage with. As such, many landlords will impose the ability to

approve a future tenant following a lender foreclosure, reducing the potential resale value at foreclosure and likewise reducing the lender's ability to recover its losses if the CLT defaults under the loan.

Further, many lenders will not finance a mortgage secured by a leasehold interest unless the lease (or another agreement with the tenant and the landlord) provide the lender certain rights and provisions to protect the lender's mortgage and ability to foreclose if the tenant defaults on its loan. In addition to trying to preserve resale value following foreclosure, lenders often require the right to cure defaults under the lease itself and to prevent landlords from terminating the lease (which would, in turn, terminate the mortgage of the lease).

While not an exhaustive list of these provisions, a CLT should consider the following provisions on any ground lease where it has construction obligations, or alternatively if a housing provider tenant will need to finance its leasehold interest under an occupancy lease:

i. Consent to Mortgages

A CLT as tenant under a lease will want to minimize the ability for its landlord to have approval or consent rights over any mortgage of the CLT's lease, while a CLT as landlord would need to preserve its right to make sure an acceptable housing operator remains in place following a foreclosure on an operating lease.

ii. Standstill/No Termination

Most lender's will require that the landlord provide the lender notice, and ample opportunity to cure, any defaults of a tenant under the lease, and otherwise prohibit a landlord from terminating the lease due to the tenant's default. As such, a CLT will want to include the same rights for potential lender's under a ground lease, but will also need to consider its needs to protect the occupants of a building, and the building itself, in a situation with a defaulting housing operator under an occupancy lease.

iii. Lender's Right to Avoid Affordability Restrictions

Some lenders will not finance a project with affordability restrictions unless the lender is afforded the right to change, modify or otherwise remove restriction entirely in a foreclosure. We think that it is in the interest of the entire non-market housing sector that any CLT or other housing provider not provide a lender the ability to destroy affordability protections, and, at least for now, many of the public sector lenders will agree to keep certain tenant/use/affordability restrictions in place following foreclosure provided they were approved by the lender when entering into the loan.

g. Assignment and Transfer Rights

Most leases provide a landlord the right to approve any assignment or transfer of the tenant's leasehold interest in the lease to another party. As discussed above, lender's will often require the right to transfer the

leasehold interest in a foreclosure without the landlord consent, or sometimes without consent if the new tenant fulfills certain requirements (e.g. a co-operative or other non-profit housing operator). However, a CLT should also try to secure a right to transfer its leasehold interest lease to an affiliate entity, or otherwise in some other form of restructuring, where the new tenant remains under the same control as the CLT or is otherwise a new CLT with similar objectives. This will allow for more flexibility for CLTs to grow and restructure as they mature, especially in light of a ground lease that might exist well into the next century.

h. Other Landlord Approval and Control Rights

As is hopefully becoming apparent, most key provisions ultimately revolve around a landlord trying to maximize a tenant's obligations under a lease while likewise maximizing the landlord's control over the premises. In addition to the approval and control rights regarding construction, rebuilding, lease registration, financing, and assignment, there are a few more common areas where this balance between tenant autonomy and landlord control arise:

i. Affordability Restrictions

The landlord may impose affordability or other restrictions/requirements on the tenancing of the residential units. This is most common in ground leases arrangements (or where a CLT is otherwise granted a freehold interest in the land from a public body) where the restrictions may be in the lease itself or a separate housing agreement or other restriction. And while a CLT may be in favour of and aligned with those affordability restrictions, it is still beneficial to keep these restrictions as minimal as possible and otherwise rely on the purpose of the CLT to provide affordability. For instance, if the project requires different affordability requirements to remain viable in the future, even if the landlord agrees, it might be impossible or extremely difficult to obtain the public body's authority to modify the lease or other registered restrictions. Further, in the case where there is a separate housing operator under an occupancy lease, a CLT's ability to modify affordability requirements may be the difference in keeping a project viable. To the extent possible, a CLT should attempt to craft any necessary affordability requirements with the ability for those requirements to be modified without expressly amending the lease.

ii. Approval of Tenants and Occupants

Similar to the affordability provisions, even if a landlord and CLT are aligned on the preferred housing operator, co-operative or the underlying occupants of the housing units, it is still best for a CLT to try and limit any landlord approval or consent rights of the various tenants and occupants of a project to provide the CLT maximum flexibility over time to maintain the long-term viability of the project.

iii. Permitted Use

Depending on the length of the lease, it is possible that a CLT might determine there is a better use for the land than the current housing project. Most leases often require the landlord to approve any changes in use, but to the extent that a CLT is provided opportunities to change the use without landlord consent will help the CLT's long-term stewardship of the land. One example may be a landlord granting the CLT the ability to change the use of the land provided the new use continues to further the CLT's purpose, whether expressed directly in the lease (see below) or otherwise as outlined in the CLT's governing documents.

i. Mission Statement / Overriding Purpose Clauses

One type of provision we have tried to encourage many CLTs and other non-profit housing providers to include in their leases and other related agreements is to include a mission statement of the CLT and an overarching purpose clause. In essence, this is a provision where the parties are able to acknowledge the mission of the CLT, the parties history of cooperation, commitment and shared goal in furthering that mission, their desire to work in good faith throughout the term of the lease in support of that mission, and pursuant to that shared mission, the landlord and the CLT will always attempt to cooperate and work together to resolve any issues that might arise during the term of the lease despite any provisions of the lease to the contrary. While this provision might provide little legal remedy if the parties failed to work cooperatively in the future, it can, for instance, help a CLT provide comfort to a landlord when requesting that the landlord reduce its general approval rights under a lease, such use or affordability restrictions, construction oversight, assignments to new CLTs, or otherwise limit any of the Landlord's ability to control the CLT or its tenants or occupants use and operation of the land. In short, the CLT is asking the landlord to trust the CLT as a proper steward of the land pursuant to the CLT's mission statement and without specific restrictions, but the landlord is also allowed the opportunity to voice concerns from time to time and both parties agree to work out any issues in good faith.

5. Conclusion

In conclusion, the leasing framework for each CLT project is inherently project-specific and must be shaped by both the nature of land ownership and the long-term objectives of the project. While the common structures outlined here represent the models most frequently used by CLTs, the appropriate approach will always depend on the unique characteristics, constraints and aspirations of the particular development. Ultimately, the specific leasing structure will not only protect the CLT's long-term stewardship interest but also provide clarity and stability for all parties involved.