

What Tenants Can Expect if Landlord is Selling

By former Principal Diane Fox

If your landlord intends to sell or refinance the building in which you lease space, you will most likely first hear about it when you receive a letter requesting that you sign and deliver what's called an Estoppel Certificate to the landlord, the prospective purchaser and/or the proposed new lender (either for a refinancing of a loan by the landlord or for a new loan to the prospective purchaser). Estoppel Certificates are relied on by prospective purchasers or lenders to confirm the economics related to the building being purchased or financed.

An Estoppel Certificate is generally a statement of facts about your Lease. For example, you will be asked to confirm:

- the dates that your Lease started and expires
- the amount of your security deposit
- the total rent being paid
- the operating expense and real estate taxes
- whether you have any rights to extend the term of the Lease, expand into additional space or give back some of the space you are leasing.
- if you are in default under the Lease or believe the landlord to be in default.
- whether you are in bankruptcy or contemplating a bankruptcy filing
- the existence of any hazardous materials on your premises.

If the Estoppel Certificate is for the benefit of a lender, it sometimes may include other provisions. It could require that *before* you declare the landlord to be in default, you must first give the lender notice of the alleged default and provide the lender a right to cure (correct) it. It may also include a provision that states you will not agree to an amendment to the Lease *without* the lender's prior consent. This latter provision is one that you should attempt to delete, since you have no relationship with your landlord's lender. It is critical that any Estoppel Certificate be reviewed carefully prior to completion. If any sort of dispute arises later, you will most likely be prevented (estopped) from claiming a different state of facts.

At the time you are asked to sign an Estoppel Certificate - particularly when you are told or have reason to believe that a new loan will be obtained by your current landlord or a purchaser - your lease should also be examined to see if you are entitled to a Subordination, Non-Disturbance and Attornment Agreement (SNDA). Generally speaking, *without* an SNDA, if the then-owner of the building defaults on its loan and the lender either forecloses on that loan or a third party purchases the building at a foreclosure sale, your lease can be voided and you may be required to vacate the premises. An SNDA is an agreement between you, the property owner and the lender that allows you to stay in your premises (provided you are not in default under your Lease) and also documents your willingness to recognize the lender or the third-party purchaser as your new landlord.

Leases are often subordinate to any financing secured by the building in which your premises are located and make no mention of securing an SNDA. Some lenders simply refuse to give an SNDA to protect a tenant, but others like knowing that if the property owner defaults on its loan, the lender will still have tenants in the building who will then be paying rent to the lender. A small percentage of Leases require that the landlord receive an SNDA from its lender for the benefit of a tenant, particularly if that tenant leases a high percentage of the rentable area of the building. If that is the case, and even if your Lease says nothing about an SNDA, when you receive an Estoppel Certificate that indicates a new loan is to be obtained, you should ask whether or not an SNDA can be provided to you.

Whenever you obtain a request for an Estoppel Certificate, be sure to contact an attorney immediately to review it on your behalf.