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MODEL INSURANCE REQUIREMENTS FOR A GROUND LEASE

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These Model Insurance Requirements for a Ground Lease (the "Model Insurance Requirements") consist of an extensive and detailed set of up-to-date insurance requirements suitable for use in a ground lease (a "Lease"). The Model Insurance Requirements appear in a separate exhibit so the parties can easily involve insurance advisers from the beginning of the transaction. That exhibit first presents a Base Case (the provisions one would ordinarily expect to see) followed by a collection of optional Bells & Whistles (extra measures one might use because of extra concerns or sensitivity or special circumstances).

This document is intended for a generic development Lease, in which Landlord owns vacant Land and Tenant will develop that Land by constructing a Building. These Model Insurance Requirements disregard any deal-specific elements and assume a generic development Lease that is typical and ordinary—nothing special or unusual. Of course, every commercial real estate transaction, however mundane, always has something atypical, extraordinarily, special, or unusual. These Model Insurance Requirements will require adjustment accordingly by a competent insurance adviser.

Although these Model Insurance Requirements relate to a Lease transaction, the requirements for a lending transaction will usually look rather similar, except that a lender will require endorsements and documentation different from those for a Landlord.

One can always say more about insurance. Joshua Stein's upcoming New Guide to Ground Leases will include an Encyclopedia of Ground Leases with an entry on Insurance, with additional comments. These Model Insurance Requirements, in slightly different form, will also appear in that New Guide. Consistent with the style sheet of that New Guide, terms typically defined in a Lease are capitalized in these Model Insurance Requirements and introductory cover notes. Anyone using these Model Insurance Requirements will need to check definitions.

INSURANCE PROCESS

As part of the closing process for any Lease, the parties need to deal with insurance, starting but not finishing with insurance requirements like those in these Model Insurance Requirements. Landlord's and Tenant's insurance advisers should review all insurance provisions in the Lease and Tenant's

insurance program, adjusting them as appropriate for the circumstances, including Tenant's development plans, the role of Subtenants, any connections with other nearby real property, requirements of other documents such as reciprocal easement agreements, and the parties' specific requirements.

That process takes time and should start when or before the legal work starts. It should take into account not only the insurance provisions themselves, but also other Lease provisions that directly or indirectly affect allocation and treatment of insurable risks, such as Rent abatement, Damage, Restoration, Indemnification,[1] Mortgages, maintenance and repair, termination rights, and waivers. An insurance adviser will want to see those sections, but these Model Insurance Requirements will constitute the main event.

COVERAGE TYPES AND AMOUNTS

These Model Insurance Requirements take into account these issues on insurance coverage types and amounts:

Coverage Limits, Generally

For all Required Insurance, Landlord and Tenant should determine minimum coverage requirements in consultation with insurance advisers. Those advisers typically suggest minimum coverage amounts, letting the clients decide whether to require more. As experts at recognizing risks, insurance advisers want to avoid the risk of "recommending" specific coverage amounts. No matter how high those amounts are, they could always turn out not to suffice when an actual large loss occurs. More coverage is always better. Any decision on higher coverage should also consider the incremental cost of the incremental coverage, which is often low.

CGL Coverage

Commercial general liability insurance typically has a coverage limit for each occurrence. It also has an aggregate limit that applies to all losses incurred in a year, at a single location or project. Sometimes that aggregate limit applies over the entire duration of a Construction project, so it might extend for several years. A multiyear duration is particularly likely in the case of a "controlled insurance program," which wraps Construction Period Insurance for Tenant and its (sub)contractors into a single policy.

Property Coverage

Property Insurance can be limited in two possible ways. First, it might provide a specific dollar amount of coverage for the insured Building. That limit typically applies on a "per occurrence" basis, with no aggregate limit. Second, Property Insurance might be written as part of a large blanket policy covering multiple locations. In that case, it would have a maximum per occurrence limit, again without an aggregate limit. A Building could sustain two or more property losses in a year. Each loss would potentially: (i) tap the entire coverage amount of the Property Insurance; and (ii) require the insured to pay a separate deductible amount. That is one of several reasons why it made a crucial difference whether the two airplane strikes on September 11, 2001, were one occurrence or two separate occurrences. To the extent it was determined the airplane strikes were two separate occurrences, each would have tapped into the full amount of Property Insurance coverage, so the carrier would have had to pay twice.

Construction Period Insurance

During Construction, special and more extensive/complex insurance requirements apply. Those requirements will often vary substantially from those which would otherwise apply, so much so that Construction Period Insurance is almost an entirely separate animal. The risks of Construction are fundamentally different in nature and magnitude than the risks of stabilized income-producing commercial real estate. And if particular Construction consists of Restoration after Damage, then Tenant's Subtenants may stop paying Subrent or may go away. Tenant's Property Insurance program will need to provide business interruption coverage to backstop that risk and assure Tenant can pay Rent during Restoration.

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Downzoning Coverage

The Bells & Whistles say that if the Building ever becomes a legal nonconforming structure as the result of a future downzoning, then Tenant must maintain Property Insurance that will compensate for the resulting loss of value if major Damage occurs and the Building cannot be Restored. A typical insurance carrier may have trouble with that concept, as the carrier expects to pay only Actual Cash Value (replacement cost of the lost improvements less depreciation) in any circumstance when the insured does not promptly Restore.

Any existing Building of substantial size could at any time experience a downzoning, and hence become nonconforming. So any document that requires Property Insurance for any substantial Building should, in theory, probably include the requirement suggested in the preceding paragraph. But no one considers this issue unless they know the existing Building is already overbuilt. The special coverage for nonconforming structures can be quite expensive or even unavailable, just because it is unusual, it doesn't fit into the usual pigeonholes, and it varies from carriers' expectations on payment of Actual Cash Value if the damaged Building is not Restored.

Tenant may push back against the whole concept, arguing that any existing overbuilt Building that complies with code is highly unlikely to suffer so much Damage that it cannot legally be fully Restored. And even if it does suffer such Damage, Landlord should be just fine with a newly constructed and modern replacement Building using the maximum development potential available under then-current Law. The parties can certainly negotiate all of this further, perhaps with an appraisal process if major Damage occurs. Or Tenant might persuade Landlord to leave the issue to Tenant and its Institutional Leasehold Mortgagee—if the Institutional Leasehold Mortgagee doesn't care, then Landlord shouldn't either.

Here is sample language for Property Insurance that covers the risk of damage to a legal nonconforming structure. The blanks will need to be filled in based on the details of local codes and zoning.

Legal Nonconforming Structure

The structure located at ________________ is a legal nonconforming structure. If this structure is damaged by either: (i) ____ percent or more of its replacement cost; or (ii) less than ____ percent of its replacement cost but the insured does not: (a) start such repair or reconstruction within ____ calendar days of that damage; or (b) complete such repair or reconstruction within ____ months after that damage and, as a result, its rights as a legal nonconforming structure are terminated (e.g., by operation of local zoning ordinances or other codes that prevent the insured from rebuilding the structure to its previous size), then this policy shall cover the diminution in fair market value of this location, without deduction for depreciation, up to an agreed amount cap for the diminution in fair market value of $________. Diminution in fair market value means the difference between: (i) the fair market value of a newly repaired or reconstructed legal, nonconforming building as it existed before the damage, without deduction for depreciation; and (ii) the fair market value of the newly repaired or reconstructed building that complies with local zoning ordinances. That diminution shall be calculated as of the date of completion of all repairs and reconstruction of the conforming structure.

The extra insurance coverage just suggested for an overbuilt Building is not the same as traditional "ordinance or law" coverage, which instead covers only incremental costs that arise because current Law requires: (i) Restoration to meet a higher standard than the Damaged Building had to meet before the Damage; or (ii) demolition of the undamaged parts of the Building.

LANDLORD'S PROTECTION

Tenant's Required Insurance needs to protect Landlord and not just Tenant. That requires consideration of the following points, among others:

Additional Insured Status

For Liability Insurance, Landlord typically insists on being named as an Additional Insured on Tenant's

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policy. In December 2019, the insurance industry changed the ISO Form CG 20 11 endorsement for Additional Insured parties. Those changes give Landlord less coverage than did the earlier April 2013 edition of that endorsement,[2] and more reason to maintain its own separate Liability Insurance policy independent of the Lease and Tenant's Required Insurance.

Even before those changes, careful Landlords hesitated to rely entirely on their Tenants' Liability Insurance. As a general principle, one should never rely exclusively on someone else's insurance. Insurance programs are often structured so the active party (Tenant or a contractor) must cover the passive party (typically Landlord) by endorsement as an Additional Insured. The December 2019 ISO Form CG 20 11 12 19 endorsement will not provide coverage if the only negligent party was someone other than Tenant or a party acting for Tenant. That circumstance is certainly conceivable. The December 2019 endorsement also does not cover construction activities.

Landlord will often try to cover construction activities by requiring Tenant's contractors to cover Landlord as an additional insured on the contractors' liability policies. That sounds good, but many Additional Insured endorsements protect only parties in privity of contract with the Named Insured Party. Landlord will flunk that test as it relates to Tenant's contractors. Again, the words of the policy are crucially important. Landlord and its insurance advisers should read the policy and not rely on insurance certificates.

Landlord may also face exposure if: (i) a particular accident did not arise from ownership, maintenance, or use of the Premises leased to Tenant; (ii) Tenant has let its Liability Insurance lapse; (iii) Tenant reduced the coverage limits; (iv) Tenant provided a less favorable Additional Insured endorsement than the Lease requires (e.g., Tenant provides an ISO Form CG 20 11 12 19 when the Lease requires an ISO Form CG 20 11 04 13); (v) Tenant simply failed to name Landlord as an Additional Insured as the Lease requires (and Landlord didn't notice and solve the problem); or (vi) the aggregate limits of liability have been exhausted.

Landlord can try to prevent that last problem by assuring that supplemental payments under the policy, such as attorneys' fees and other defense costs, remain outside the policy limits. In other words, the policy should require the carrier to make those payments in addition to payments for actual legal liability. This potential gap goes away if the policy directly covers Landlord as either an additional insured or a named insured, as its interest may appear. In that case, however, Landlord might find itself liable for premiums or deductible amounts.[3]

Landlord often obtains its own Liability Insurance, typically on an "excess only" basis. The Lease should require that Tenant's or some other party's (e.g., the contractor's) insurance be primary and non-contributory. The primary insurance will be called upon to pay before Landlord needs to rely on its own insurance. Underwriters deeply discount Landlord's insurance premium if Landlord, as Named Insured under Landlord's own policy, routinely requires Tenant and any contractors to provide primary and noncontributory Additional Insured coverage for Landlord.[4] Conversely, if Landlord doesn't do that, it may face a higher deductible amount.

Misconduct by Insured

The Conditions of Coverage in every Property Insurance policy say that if any insured party engages in misconduct—e.g., by misrepresenting any risks or material facts or falsifying a claim—this vitiates the entire policy. The only exception is the coverage for a Mortgagee named in the policy declarations. A Mortgagee is deemed an independent insured party, so its coverage is not vitiated by misconduct of other insured parties. In Landlord's perfect world, Landlord could conceivably try to persuade the carrier to endorse the policy to give Landlord coverage "as if" it were a Mortgagee. Although Leases occasionally require such an endorsement for Landlord, it is nonstandard. Tenant would typically object to it based on impossibility or at least great difficulty or expense. Perhaps a similar endorsement, if available,

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for a Fee Mortgagee (rather than Landlord) might help bridge that gap.

LIABILITY INSURANCE IS DIFFERENT

Liability Insurance separates the insured parties. Misconduct by one vitiates the coverage for that party, but not for the others the policy covers. As long as the premium is paid, the coverage should attach. Liability Insurance carriers typically refuse, however, to commit to give notice of cancellation to anyone except the First Named Insured, i.e., Tenant. This imposes extra administrative burdens on Landlord and underscores the importance to Landlord of maintaining backup Liability Insurance.

GENERAL CONSIDERATIONS

In considering how to arrange Required Insurance for a particular Lease, the parties may also want to consider these issues of a more general nature:

Who Insures?

These Model Insurance Requirements, like the insurance provisions of most ground leases and many triple-net leases, require Tenant to obtain and maintain both Property Insurance and Liability Insurance.

For Liability Insurance, it is universally agreed that Tenant should obtain and administer the primary insurance policy. At a minimum, Liability Insurance should name Landlord as an Additional Insured. It may even identify Landlord as a named insured. Both designations are subject to some nuances and issues discussed below.

For Property Insurance, the typical case contemplates that Tenant must Restore, Rent does not abate upon Damage, and Tenant will use Property Insurance Proceeds to Restore before using them for anything else. In that case, Leases will typically require Tenant to maintain Property Insurance.

Even then, however, some insurance advisers and smart Landlords think Landlord should obtain and maintain the Property Insurance, in Landlord's and Tenant's names, as their interests may appear, and bill Tenant to prevent problems. That gives Landlord greater control, knowledge, and protection against surprises. It also spares Landlord from the need to police Tenant and review Tenant's policies for compliance, with occasional crises whenever an Insurance Impairment might occur. If Landlord obtains Property Insurance, though, Tenant and any Leasehold Mortgagee face much the same concerns in policing Landlord. Sensible allocation of these responsibilities will also depend on each party's size, sophistication, staffing, internal systems, and access to favorably priced blanket insurance coverage.

Usually it will make sense, and more "equitably" conform to the overall rights and obligations in the Lease and market expectations, for Tenant to maintain Property Insurance.

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Indemnification vs Insurance

In any Lease, Tenant will Indemnify Landlord against a broad range of risks. Some of those risks are insurable. Some are not. Liability Insurance merely backstops Tenant's indemnity as it relates to risks covered by Tenant's Liability Insurance. Tenant remains liable for the insurable risks—or risks producing exposure beyond policy limits—as well as the uninsurable and uninsured ones. Tenant's exposure will, however, typically not exceed its equity in the Leasehold Estate. No creditworthy party backstops Tenant's Indemnity obligations, except perhaps during Construction.

Consider the possibility that Landlord can validly assert a huge Indemnity claim—far in excess of policy limits and Tenant's equity in its Leasehold Estate—for an Indemnified risk. Tenant's failure to pay that Indemnity claim creates a Monetary Default under the Lease. If Leasehold Mortgagee wants to preserve the Lease, Leasehold Mortgagee will need to cure the Monetary Default by paying Landlord's Indemnity claim. In contrast, a Fee Mortgagee would not face that risk and would take comfort that the Fee Mortgage comes ahead of tort judgments against Landlord.

Leasehold Mortgagees typically live with that risk. They don't use it as the basis for a new nonrecourse

carveout or for further fine-tuning the Leasehold Mortgagee Protections. This exposure does not seem to have produced substantial losses so far for Leasehold Mortgagees. It does, however, mean Leasehold Mortgagees should care more than Fee Mortgagees about having high levels of reliable insurance coverage.

Insurance Practices

Because a typical Lease continues for many years, these Model Insurance Requirements give each party a limited right to require changes in Required Insurance based on changes in Insurance Practices over time. Landlord will, however, worry that Tenant's changes will imperil Landlord, and conversely Tenant will worry that Landlord's changes will become onerous. So the suggested language limits each party's ability to require changes, with disagreements to be resolved by Expedited Arbitration, which would have to be defined elsewhere in the Lease. Tenant may also want to limit some insurance requirements so that, at all times from the Commencement Date, they apply only to the extent consistent with Insurance Practices, without the need to seek a change in those requirements. In general, though, the parties should satisfy themselves that all Required Insurance complies with Insurance Practices at least as of the Commencement Date.

MATTERS NOT COVERED

These Model Insurance Requirements do not cover any of these matters:

Business Personal Property Insurance

In general, Tenant is not required to insure its own business personal property such as inventory and equipment, as one might require of a store tenant.[5] Whether to obtain such coverage is left to Tenant's business judgment.[6] Some business personal property, such as fire extinguishers, will be legally required to operate the Building. So Landlord faces some contingent possibility of loss if that property is not insured.

To protect Landlord from Tenant claims resulting from damage to Tenant's business personal property, the Lease should include a broad waiver of all rights and claims that could have been insured by a "Causes of Loss – Special Form" policy of property insurance, with additional coverage for loss of business income. State law may limit Landlord's ability to enforce any such waiver.[7] That gives Landlord another reason to maintain its own backup Liability Insurance.

Construction Period Insurance, on the other hand, must address business personal property, to include construction equipment, materials, and temporary facilities such as scaffolding, forms, and field offices. These Model Insurance Requirements provide for that.

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Environmental Insurance

These Model Insurance Requirements disregard environmental insurance for conditions that existed at the Commencement Date. That type of insurance mostly deals with environmental issues (not traditional insurance issues) and ties to environmental due diligence, site-specific history, risk allocation, and issues of environmental law. Policy wording will vary and require close scrutiny, even more so than for ordinary insurance coverage. Traditionally, most environmental insurance was written on a manuscript basis, tailored to reflect historical conditions. On the other hand, the industry has more recently figured out how to issue standardized pollution legal liability policies that insure against contamination that first arose after a particular date. Those policies are relatively inexpensive. These Model Insurance Requirements do require them. Although they have become more standardized, they still need a very close reading with help from environmental counsel and insurance advisers.

Separate Insurance

These Model Insurance Requirements seek only to define the insurance that Landlord and occasionally Tenant will typically require of the other. Most insurance advisers and smart Landlords recommend that Landlord carry its own backup Liability

Insurance to cover cases where either: (i) Tenant's policy lapses; or (ii) some legal quirk or Tenant's policy language limits Landlord's protection. Landlord may also want to maintain its own backup Property Insurance, protecting Landlord in cases where Tenant's Property Insurance somehow fails. That sort of backup coverage is not necessarily easy, standard, common, or cheap. Landlord will want to assure that Tenant's Property Insurance is primary, so that Landlord's Property Insurance, if any, responds only if Tenant's somehow fails. These Model Insurance Requirements contain language to that effect for any insurance Landlord decides to obtain. To the extent that Landlord obtains any insurance this paragraph suggests, Landlord may want to try to have Tenant reimburse the premiums, although that is not market standard.

Along similar lines, although these Model Insurance Requirements require Tenant to maintain certain Construction Period Insurance, those requirements consider only what Landlord requires to protect Landlord's interests. Tenant may very well require its Construction vendors to maintain more insurance and for longer periods, though Tenant will typically need to pay for it.

Assignment of Insurance Policies

Conceivably Landlord or Leasehold Mortgagee might want Tenant to assign (or collaterally assign) Required Insurance to that party. Any such assignment would go beyond the normal recognition of Landlord's and Leasehold Mortgagee's interests as contemplated by Insurance Documents issued for Required Insurance. It would be off market, might not be available, and is rarely or never seen.

Variations and Exceptions

State law may limit or require changes in these Model Insurance Requirements. Practices of particular insurance carriers may require Landlord to accept some variations or may drive the parties to find a different carrier. That process could take some time and is best not deferred to the last minute. Landlord can always waive any insurance requirement or any variation from Required Insurance. Therefore these Model Insurance Requirements never mention that possibility. It always applies automatically.

Self-Insurance and its Variations

If Tenant is (an Affiliate of) an institutional investor or some other creditworthy entity (e.g., a chain operator signing the Lease in its own name), Tenant may have a self-insurance, captive insurance carrier, or large self-insured retention program. In any such case, the parties will need to adapt and customize the Model Insurance Requirements to conform to the particular Tenant's program. Any resulting concessions and dilutions should apply only so long as the contemplated level of credit remains in place. Should the Lease be assigned in a way that removes the contemplated level of credit, or if Tenant's credit deteriorates, the original insurance requirements should once again apply.

A Different Approach?

One might think Landlord's insurance adviser could review and approve (or require changes in) Tenant's existing insurance program; the parties could memorialize Tenant's existing and satisfactory program in an exhibit to the Lease; Tenant could agree to maintain a substantially equivalent program (with the possibility of future changes based on future circumstances); and the parties could avoid saying much about Required Insurance. But insurance does not seem to work that way.

OTHER DOCUMENTS

These Model Insurance Requirements may need these exhibits, related documents or deliveries, additional information, conforming provisions in other documents, etc.:

Construction Contracts

Tenant must have its contractors and sub-contractors deliver certain Insurance Documents. Tenant will want to assure that its construction contracts align with those requirements and its contractors and subcontractors will be able to comply with them.

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Flood

Although not specific to Leases, if either party obtains a Mortgage, the Mortgagee will need to obtain a flood zone certificate as an insurance-related part of the closing process. If the property is located in a flood zone, the Mortgagee must make various disclosures to the borrower and obtain the borrower's signature to acknowledge receipt of those disclosures. The Mortgagee must then maintain that paperwork in its permanent loan file. The bank regulators care a lot about all of this and take it very seriously.

Insurance Documents

Aside from the insurance requirements themselves within the Lease, there will also be an actual insurance policy or policies. Tenant will need to deliver appropriate Insurance Documents, which will, ideally, consist of the policy itself. Tenants often hesitate to share their actual policies, but might provide copies that exclude information about other locations. If Tenant refuses to provide any version of its actual policies, then Landlord may settle for some other evidence of coverage. For examples, see the possible definitions of Insurance Documents in these Model Insurance Requirements. There is no substitute for seeing the actual insurance policy with all endorsements before closing. A one-page "Certificate of Liability Insurance" or "Evidence of Commercial Property Insurance" is typically worse than worthless because it lulls the certificate holder into thinking it has coverage when it very well might not.[8] Either way, those deliveries should be treated as serious closing documents from the beginning of the transaction, not just as a last-minute trivial detail to be checked off on someone's clipboard. Landlord's insurance advisers should review these deliveries well before the last minute.

Names of Parties

Any Insurance Documents should identify the parties they benefit, e.g., Required Additional Insureds in the case of Liability Insurance. Traditionally, real estate transactions require absolute accuracy and precision, even regarding punctuation and abbreviation, in identifying those parties. Thus, early in the transaction, Landlord and Tenant should identify the exact names and addresses of all parties the Insurance Documents should initially name. That information should be checked against the appropriate Secretary of State websites. Then appropriate Insurance Documents should be prepared and carefully reviewed in draft, well before closing.

Replacement Cost Appraisal

An appraisal that separately states "replacement cost" is useful, but not conclusive. In the case of most high-value property, the parties will often obtain "agreed value" coverage for Property Insurance. It states the agreed value of certain objects or components and eliminates any coinsurance penalty or risk.

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ADMINISTRATION

This document creates these and other issues and concerns for post-closing administration and follow-through. Some or all of these issues may justify an advice memo to the client after closing, to prevent problems or surprises.

Change of Address

If Landlord relocates, Landlord should update its contact information with the carriers and, of course, all other parties. Landlord should also file a change of address with the Secretary of State of the state where Landlord was formed, and with any corporate service company Landlord uses. Liability Insurance claims will often first appear when they are served on the Secretary of State. Landlord will want to make sure they are forwarded quickly and correctly.

Change of Use; Vacancy; Construction

If the Building experiences a change of use, vacancy of 31 percent or more of the Building for more than a very short time, or Construction (commencement, interruption, or completion), the parties should consider how this affects Required Insurance. In any of these cases, Landlord should either require assurances from the carrier (for vacancy), additional

coverages (for Construction or some changes of use), or other changes in Required Insurance, or obtain these assurances or coverages itself, whether or not at Tenant's expense. Otherwise, the change in circumstances may vitiate the insurance coverage. In some cases, that can happen automatically even without notice. Thus Landlord should keep its eyes and ears open for substantial changes in circumstances at the Building.

Claims Generally

If Landlord or Tenant becomes aware of a possible claim, this will require prompt action. If Tenant maintains insurance and Landlord receives a claim, Landlord should Notify Tenant quickly and in compliance with the Notice procedures in the Lease. Tenant (and perhaps Landlord as well) should formally Notify the insurance carrier. A nice conversation with the insurance broker will not suffice. Instead, Notice must potentially be given to a particular address, using a particular form, and enclosing certain required information. Any party giving such a Notice should comply to the letter with policy requirements. If Landlord maintains backup liability insurance, Landlord should give a similar Notice to its own carrier. After any party gives such a Notice, that party should try to obtain from the carrier written acknowledgment of receipt and formal confirmation that the carrier will defend.

Claims and Defense Costs

If Landlord files a claim under the policy as an Additional Insured, then costs of defense are typically not part of the indemnified loss, and thus do not erode the limit of coverage. That is one of many benefits to Landlord of being an Additional Insured. On the other hand, if Tenant's Liability Insurance responds to a claim against Tenant for contractual indemnity based on Tenant's Indemnities in the Lease (as opposed to a claim made directly by an Additional Insured), the costs of defense are typically part of the indemnified loss, and thus erode the limit of coverage. This is one reason a Landlord that is covered only as an Indemnitee should pay attention to the handling of any claim.

Expiration

Insurance coverage will expire periodically, typically annually. Both parties should stay on top of the renewal process and try to prevent a last-minute scramble. Those efforts will generally fail. The amount of available insurance may also change due to aggregate limits, claims experience, and shifts in the insurance market, which is often very volatile. When Tenant does renew or replace Required Insurance, Landlord should apply the same scrutiny to Tenant's deliveries that Landlord would at the original Lease closing. Landlord's diligence, and the involvement of its insurance professionals, should not end at closing but should instead continue through the Term.

Future Market Changes

As insurance markets change, Landlord's or Tenant's expectations on insurance may change. As a good example of that, industry expectations on deductibles can rise or fall over time. Depending on final wording of the insurance provisions, either party may have the right to require Tenant's insurance program to conform to those changes.

Historical Files

Insurance Documents cover a particular period, typically a year. The policy in place during that year will cover events that occur during that year, except in the unusual case of a "claims made" policy. If someone is injured during that year, they might not file suit right away. If and when they do file suit, Landlord will typically need to demand coverage under whatever insurance was in effect at the time of the injury. Thus, Landlord should keep its Insurance Documents in an organized way for at least several years, and not discard them merely because the period they cover has lapsed.

Notices

If the carrier agrees to give Landlord notices of possible Insurance Impairment, Landlord should watch for those notices and act quickly if it receives one. This may require placing replacement insurance on

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an emergency basis. A Tenant's insurance policy does not itself automatically require the carrier to notify Landlord of possible Insurance Impairment, if Landlord is merely an Additional Insured. The policy will, however, require the carrier to give notice to the actual Named Insured and its designated Mortgagee. By specific endorsement, the carrier can conceivably (though it is not necessarily likely) also agree to give notice of cancellation to other specified parties, such as Landlord. The carrier's notice may warn that the policy will go away because of a change of circumstances. In that case, Landlord will need to understand and do something about what's happening. Merely getting notice of a problem doesn't solve it.

Policies

If the carrier does not issue actual insurance policies at closing, Tenant (and Landlord, because Landlord should ideally be entitled to copies of policies) should follow through to make sure the policies are issued promptly after closing. "Insurance Binders" are temporary policies and should be treated with great caution. Landlord's insurance adviser should review the policies to confirm they provide all Required Insurance.

Updates

If Landlord conveys the Fee Estate, Landlord should have Tenant reissue all required Insurance Documents in favor of the new Landlord. Ideally, but not typically, this will happen at the closing of the conveyance. Most Leases do not provide for it. Joshua Stein's Model Ground Lease offers such a requirement as a Bell & Whistle.

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Notes

1 Tenant's Liability Insurance will not protect Landlord unless Tenant has agreed to Indemnify Landlord by written contract. Without such a written contract, "additional insured" or other status on Tenant's Liability Insurance doesn't help Landlord.

2 Sometimes Landlord can still require the old endorsement, ISO Form CG 20 11 04 13.

3 The insurance company will generally pay injured parties up to the coverage limits, regardless of deductibles. Often, the insured must then reimburse the carrier for the deductible.

4 Landlord's policy will describe the level of insurance documentation Landlord must obtain from Tenant and contractors. Often, certificates of insurance will suffice.

5 These Model Insurance Requirements do, however, require Tenant to insure its improvements and betterments, an insurance phrase with a meaning like fixtures.

6 In a space lease as opposed to a ground lease, this concern would lead Landlord to require insurance on Tenant's personal property.

7 See, e.g., New York General Obligations Law Section 5-321.

8 As a middle-ground approach that sometimes works, Landlord or its insurance adviser can review the declarations page of the policy as well as all endorsements the Lease specifically requires. Of course, this does not protect against modifications to the policy itself that trim coverage. These Model Insurance Requirements offer several possible definitions of Insurance Documents to accommodate different ways to handle this matter.

MODEL INSURANCE REQUIREMENTS FOR A GROUND LEASE

BASE CASE

EXHIBIT ____

Capitalized terms not defined in this Exhibit have the meanings: (i) in the Lease[1] to which this Exhibit is attached and of which it is part (the "Lease"); or, if not so defined; then (ii) that apply under Insurance Practices.

1. REQUIRED INSURANCE

1.1. PROPERTY INSURANCE. Tenant must maintain insurance for damage to or loss or destruction of the Building, Tenant's improvements and betterments, and Building Equipment (as this Exhibit more fully requires, "Property Insurance").[2] The Lease governs use of Property Insurance Proceeds regardless of terms of any Mortgage. These additional requirements apply to Property Insurance:

1.1.1. COVERAGE AMOUNT. Property Insurance must provide coverage for 100 percent of replacement cost (not actual cash value),[3] except excavations, foundations, and footings, without deduction for depreciation, and in an amount (or with an agreed value[4] endorsement) sufficient to prevent coinsurance.

1.1.2. LOSS PAYEES. Property Insurance must: (i) name as loss payee[5] each Mortgagee this Lease allows; and (ii) name as loss payee and additional insured Landlord as its interest may appear.

1.1.3. PERILS. Property Insurance must cover all losses caused by the perils covered by the broadest type of property insurance coverage available from time to time consistent with Insurance Practices. At the Commencement Date, this means an ISO Form CP 10 30 "Causes of Loss—Special Form" or other "open peril" policy form. Property Insurance must cover at least losses from fire, lightning, sprinkler or other water leakage, and wind. Property Insurance must also cover losses from these perils, which may be reasonably sublimited, subject to Landlord's reasonable approval: (i) earthquake, earth movement, and subsidence; (ii) Named Storm, including storm surge; and (iii) flood and rising water. If the Land is located in flood zone A or V, Tenant must

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1 Conform this Exhibit to the nomenclature in the Lease.

2 Some real estate documents refer to "casualty insurance." In the world of insurance, the term "casualty" has special meaning, not limited to Property Insurance. These Model Insurance Requirements therefore refer to Property Insurance rather than casualty insurance.

3 Replacement cost coverage should pay to replace the Damaged Building with a comparable Building at the same location, with no deduction for depreciation, but only if Restoration occurs. In contrast, actual cash value coverage will reflect replacement cost of the Damaged Building, minus depreciation, hence will result in lower insurance proceeds. It will typically correlate with Tenant's not Restoring the Damaged Building. The carrier may also limit the recovery to actual cash value if Tenant does not complete Restoration within a stated period. The diminished award for actual cash value could fall short of the Mortgage balance. That's another reason to favor Restoration. If Tenant has built a larger Building than the Lease requires, Tenant might creatively argue that Property Insurance only needs to cover the cost to replace whatever Building the Lease actually required. Such a limitation does not typically appear.

4 Landlord may want the right to approve the agreed value. Such a right does not typically appear.

5 Multiple loss payees will result in joint checks payable to all loss payees. Tenant may object to recognizing Landlord as a loss payee if Tenant paid for and owns the Building or if the Lease allows Tenant or Leasehold Mortgagee to take the insurance proceeds and run.

maintain at least the maximum Flood insurance coverage available from the National Flood Insurance Program.[6] [Property Insurance must also cover losses from terrorism.][7]

1.1.4. SPECIFIC COVERAGE REQUIREMENTS. Property Insurance must cover, by endorsement or otherwise:[8] (i) equipment or mechanical breakdown, including explosion of steam and pressure boilers; (ii) debris removal, demolition, and increased cost of construction (ordinance or law coverage);[9] (iii) Waiver of Subrogation; (iv) civil authority; and (v) Loss of Business Income, and naming Landlord as an Additional Insured as its interest may appear under a form that, subject to Insurance Practices, provides no less coverage than that provided by ISO Form CP 15 30. Loss of Business Income coverage must cover continuing ordinary operating expenses, including Fixed Rent and Real Estate Taxes, for at least 12 months, with a 12-month[10] extended period of indemnity.[11] None of this coverage may be subject to co-insurance.

1.2. COMMERCIAL GENERAL LIABILITY INSURANCE. Tenant must maintain commercial general liability insurance[12] (CGL) against claims occurring on, in, or about the Premises or (to the extent consistent with Insurance Practices) adjoining sidewalks, streets, and passageways (CGL, with the additional types of liability insurance required below, collectively, "Liability Insurance") in compliance with these requirements:

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6 Depending on location and other circumstances, Landlord will require flood coverage beyond the National Flood Insurance Program. It covers only $500,000 of property loss and zero for business interruption.

7 The bracketed language will more likely appear for trophy or high visibility office buildings; buildings with high-profile tenants such as embassies or law enforcement organizations; projects near petrochemical facilities; and buildings that draw large crowds, such as major hotels and entertainment facilities. Tenant may wish to add: "to the extent consistent with Insurance Practices." If the federal backstop goes away, Tenant may want a separate cap on terrorism insurance premiums, e.g., no more than 200 percent of all other Property Insurance premiums.

8 Tenant might add: "to the extent consistent with Insurance Practices."

9 If a significant part of a building is Damaged, Law may require the owner to demolish the rest of the building, remove the resulting debris, and rebuild an equivalent building to current code. "Ordinance or law" coverage pays those extra costs and losses. Without it, the insured bears them. This coverage does not cover the risk that Development Law, at the time of Damage, would prevent full Restoration (a "legal nonconforming" structure). The latter risk often requires special manuscripted coverage, which can incur high premiums, as more fully discussed in the cover notes. Coverage for debris removal will typically not exceed 25 percent of the amounts payable for actual Damage. It also erodes coverage that may be needed to Restore. If Damage would create unusual amounts or types of debris, such as wrecked cars in a large underground parking garage, it may make sense to require extra coverage for debris removal (e.g., the ISO CP 04 15 endorsement). If Damage would cause a significant Hazardous Substance Discharge, the Building may need additional coverage for pollutant extraction, removal, and disposal.

10 Landlords will often want 24 months, sometimes even more. Before fighting over that issue, it makes sense to investigate the cost of that extra extension to coverage. The extended period of indemnity may cover Restoration time as well as delays in Restoration and, if Tenant relies on Subrent income, Tenant's re-leasing time, including re-leasing delays because of adverse conditions in the leasing market—but only for the duration of the extended period of indemnity.

11 If Rent doesn't abate—and it absolutely should not abate if Tenant must maintain Property Insurance—then in the coverage period (after the Damage), Tenant's coverage for loss of business income should cover Tenant's "continuing ordinary operating expenses," which would include Rent. In the rare case where Rent abates upon Damage, Landlord would maintain back-up Property Insurance coverage that includes coverage for loss of incoming Rent. The real question here is whether Landlord can be an Additional Insured on Tenant's business interruption coverage to the extent of the Rent portion of the continuing ordinary operating expenses. The answer is usually no.

12 This was once called "comprehensive" general liability insurance. The insurance industry renamed it in response to court decisions that interpreted "comprehensive" broadly, i.e., to mean "comprehensive." Today's Commercial General Liability coverage covers all causes of loss not excluded. But it never covers any forms of loss beyond Bodily Injury, Property Damage, and sometimes Personal and Advertising Injury. Some legal documents still call for Comprehensive Public Liability Insurance with the Broad Form Extended Property Coverage endorsement. The industry stopped using those policy forms in 1985.

1.2.1. COVERAGE AMOUNTS. CGL must provide for limits of liability[13] not less than $______ for each occurrence and $______ in general aggregate limit per annum, all on an "occurrence" (not a "claims made") basis.[14]

1.2.2. PROHIBITED PROVISIONS. CGL must not exclude or limit, by endorsement or otherwise, coverage for Abuse and Molestation; Assault and Battery; "Insured vs. Insured" except Named Insured vs. Named Insured; Punitive, Exemplary, or Multiplied Damages (except where Law allows); or subsidence or other earth movement. Liability Coverage must not be endorsed for Limitation to Designated Premises or Project (ISO Form CG 21 44) or include a Classification Risk Endorsement; Amendment of Insured Contract Definition (ISO Form CG 24 26); a Classification or Business Description limitation; or any other exclusion or limitation reasonably unacceptable to Landlord.

1.2.3. SCOPE. CGL must provide coverage in substance at least as broad (subject to Insurance Practices) as that supplied by ISO Form CG 00 01, including coverage for bodily injury, death, property damage, and personal and advertising injury. CGL must provide contractual liability coverage consistent with Tenant's Indemnity obligations under this Lease, to the extent insurable in accordance with Insurance Practices, treating this Lease as an insured contract. The policy may not, without Landlord approval, be endorsed to restrict the definition of an insured contract (in a manner that varies from any provision of this Lease) or to require that the insured occurrence arise out of operations or culpable conduct of any Named Insured.

1.3. ADDITIONAL LIABILITY INSURANCE. Tenant must also maintain (or, in the case of third parties, require maintenance of) this additional liability insurance (also part of "Liability Insurance") in conformity with Insurance Practices:

1.3.1. AUTOMOBILE INSURANCE. Tenant and Builder (and any other Person driving onto the Land or the Premises to perform services for Tenant[15]) must maintain automobile liability insurance on ISO Form CA 00 01, for all owned, non-owned,[16] leased, rented, or hired vehicles (and any mobile equipment subject to compulsory insurance or financial responsibility laws), providing coverage with a combined single limit of at least $1 million. This coverage must be endorsed to: (i) recognize Landlord and all Required Additional Insureds as Additional Insureds on ISO Form CA 20 48; (ii) provide primary and noncontributory liability coverage on ISO Form CA 04 49; and (iii) include a Waiver of Subrogation.

1.3.2. EMPLOYERS' LIABILITY INSURANCE. Tenant must maintain employer's liability insurance for all employees, with limits of at least $500,000.

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13 Ordinary Liability Insurance applies whether or not Construction is underway. During Construction, higher limits might apply as part of Construction Period Insurance. For any commercial real property, Liability Insurance will typically equal or exceed $1 million per occurrence and $2 million annual aggregate, supplemented by an umbrella policy providing total coverage of at least $10 million, or $5 million for smaller and lower-risk properties. Total coverage may substantially exceed $10,000,000 for large or high-risk properties. Tenant will typically provide much of that coverage through one or more umbrella policies, as this Insurance Exhibit permits.

14 Landlord or any other beneficiary of insurance will usually prefer coverage on an occurrence basis. In some cases, however, claims-made basis may make sense. This requires involvement of insurance advisers.

15 The parenthetical requires auto coverage from practically everyone working for Tenant. Insurance advisers say auto insurance claims are the fastest growing category of real estate-related insurance claims, so the parenthetical requirement is reasonable. In the real world, Tenant will not always fully comply. But Tenant or its property manager will typically engage service providers (e.g., the pest control company that drives onto the Premises) through a purchase order or other simple document, which can include terms and conditions that cover indemnification and insurance. A careful property manager will require an indemnification agreement and insurance from everyone working on the Premises.

16 "Non-owned" coverage applies to liability claims resulting from an employee's use of a personally owned vehicle for the business.

1.3.1. LIQUOR. If any alcoholic beverages are manufactured or sold on the Premises, then Tenant must maintain liquor sales and dram shop liability coverage, on an occurrence basis, in amounts as Landlord reasonably requires consistent with Insurance Practices, each on a per location basis with umbrella liability coverage consistent with that required for other Liability Insurance.[17]

1.3.2. POLLUTION LEGAL LIABILITY. Tenant must maintain pollution legal liability coverage for at least $1 million.[18]

1.3.3. WORKERS' COMPENSATION INSURANCE. Tenant must maintain workers' compensation and disability benefits insurance covering all Persons employed, as Law requires,[19] including (to the extent consistent with Insurance Practices and Law) a Waiver of Subrogation and compliance with all requirements for Liability Insurance.

1.4. REQUIREMENTS FOR ALL LIABILITY INSURANCE. All Liability Insurance must comply with these requirements:

1.4.1. NEGLIGENCE. No Liability Insurance shall exclude coverage for negligence of a Required Additional Insured. To the extent available under Insurance Practices, negligence on the part of the Named Insured or a person acting on its behalf must not be necessary for Liability Insurance coverage for a Required Additional Insured to attach.[20]

1.4.1. REQUIRED PROVISIONS. All Liability Insurance must: (i) apply to all Additional Insureds on the same basis and to the same extent as Named Insureds to the extent consistent with Insurance Practices; (ii) not exclude, limit, or restrict coverage for injuries to employees of any insured, New York Labor Law Section 240 or 241 or related or similar provisions, "third-party over" actions, or gravity-related injuries;[21] (iii) not exclude bodily injury or property damage contractual liability; and (iv) include a Waiver of Subrogation.

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1.5. CONSTRUCTION PERIOD INSURANCE. During any Construction, including Preliminary Work,[22] and until the Completion Date or as this Exhibit otherwise requires, Tenant must (or must cause Builder to[23]) maintain this insurance ("Construction Period Insurance"), which does not limit any other Required Insurance except as expressly stated:

1.5.1. ADJACENT PROPERTY DAMAGE. Insurance against damage to property next to or near the Land caused by Construction, including excavation and construction of foundations and footings (and liability arising from

17 If the parties already know liquor will be served on the Premises, Landlord may want more detail.

18 This coverage is not yet universally required. Without it, Tenant's environmental indemnity stands on its own without insurance backing it up. If the Premises already suffer from known environmental conditions, that can entail separate environmental insurance beyond these Model Insurance Requirements.

19 In New York State, workers' compensation and employer's liability policies must generally be written without liability limits.

20 The December 2019 modifications to the Additional Insured endorsement cover Additional Insureds only if the Named Insured, or someone acting for it, is at least partially negligent. So Tenant may not be able to comply with this sentence. Hence the reference to Insurance Practices.

21 Clause (ii) recognizes some New York state-specific problems. Illinois has similar problems. So may other states. This definition will require adjustment outside New York.

22 Depending on circumstances and definitions, the parties may want this requirement to apply only in a Major Construction Period.

23 The Lease says once that Tenant can cause anyone else to perform any obligation the Lease imposes on Tenant. In reality, that is how Tenant will perform many of its obligations under the Lease, not just those on insurance. So the parenthetical language is unnecessary. Nevertheless it is universally expected in the worlds of construction and insurance.

crane operations, if applicable), in such amounts as Landlord reasonably requires and as Construction Easements or Permitted Exceptions require.

1.5.2. BUILDER'S RISK INSURANCE. Builder's risk insurance for 100 percent of completed value, on a replacement cost basis, including cost of debris removal and foundations covering Landlord and Tenant as their interests may appear. This insurance must: (i) contain a Waiver of Subrogation; (ii) grant permission to complete and occupy;[24] (iii) cover, for replacement cost, materials and equipment stored offsite (or in transit) for installation at the Premises;[25] (iv) insure against Building collapse during Construction; (v) cover products and completed operations; and (vi) continue for the Exposure Period Contractor's Liability Insurance.

1.5.3. CONTRACTOR'S CGL. Contractor's commercial general liability insurance for at least $______ per occurrence (and at least $______ annual aggregate) for bodily injury, death, and property damage, remaining in place for the entire Exposure Period, including: (i) products and completed operations coverage; (ii) contractor's protective liability for all subcontractors' operations; (iii) contractual liability, referring to the indemnity provisions of the construction contract (to the extent insurable) as an insured contract; (iv) premises-operations liability; (v) Waiver of Subrogation; (vi) coverage of all Required Additional Insureds consistent with ISO Form CG 20 10 10 01 and ISO Form CG 20 37 01 (for completed operations) on a primary and noncontributing basis; and (vii) to the extent consistent with Insurance Practices, compliance with all requirements that apply to Tenant's Liability Insurance.

1.5.4. CONTRACTOR'S POLLUTION LIABILITY INSURANCE. Contractor's Pollution Liability insurance, on ordinary and customary terms, with coverage in the amount of $______, covering Landlord and Tenant for claims arising from any Hazardous Substance Discharge caused or exacerbated by Construction.[26] This coverage must be provided on a basis specific to the Premises. It must cover claims for third-party bodily injury, property damage, and environmental damage caused by Builder, including Clean-Up costs when required by Law or as a result of third-party claims.

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1.5.5. DESIGN PROFESSIONALS E&O. For any provider of professional services, including architects and engineers, for Construction, professional liability insurance covering the professional services rendered (including errors and omissions coverage), providing coverage during the Exposure Period for that liability insurance. Coverage must equal at least $1 million per occurrence and $1 million aggregate. Architects and engineers must, however, provide at least $2 million aggregate. The retroactive date of that insurance must be no later than the date of the contract by which the professional in question was first engaged.[27]

1.5.6. COORDINATION. To the extent Required Insurance in place provides coverage at least equivalent in all respects to Construction Period Insurance, that insurance shall suffice and be deemed (part of) "Construction Period Insurance."

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24 If the policy does not grant this permission, then the builder's risk coverage may lapse automatically, instantly, and without notice if the policyholder takes beneficial occupancy of the Construction or any part of it. That lapse even affects a Mortgagee, so if a loss occurs the carrier would deny coverage and the Mortgagee might ultimately foreclose.

25 Coverage for building materials and equipment to be incorporated into the Construction is often sharply sublimited. It often excludes "materials and equipment of others." So, if the risk of loss does not rest with the named insured when a loss occurs, then the coverage may be inadequate. This is especially true when Builder is the named insured or if materials or equipment are not perfectly tendered. Construction contracts should try to shift risk of loss to whoever must maintain builder's risk coverage, even for materials and equipment that the purchaser has the right to reject (or to revoke acceptance), until and unless the vendee elects to reject them or to revoke acceptance for nonconformity.

26 Much more could be said here. For example, Hazardous Substances Discharge does not include mold. Landlord's insurance adviser may identify specific additional requirements.

27 If anyone asks to be added as an Additional Insured on this policy, the carrier's answer will usually be no.

1.6. GOVERNMENTAL REQUIREMENTS. If any Government requires any insurance related to the Premises, Tenant shall obtain and pay for it.

2. STANDARDS FOR ALL INSURANCE

All Required Insurance must meet these requirements, and contain these provisions, by endorsement or otherwise:

2.1. ADDITIONAL PROVISIONS. Policies must contain additional provisions as Landlord reasonably requires consistent with Insurance Practices.

2.2. CARRIERS. All carriers must: (i) have a policyholders' rating of A-/VII[28] or better, based on the latest rating publication of Property/Casualty Carriers by A.M. Best Company, Inc., or an equivalent rating if that rating ceases; and (ii) be licensed or otherwise authorized[29] to do business in the State.

2.3. DEDUCTIBLE/RETENTION. Any Required Insurance shall not have a deductible or self-insured retention amount above $25,000.[30] Named Storm, flood, earthquake, earth movement, and subsidence coverages may, however, have a higher deductible consistent with Insurance Practices.

2.4. LANDLORD PROTECTION. Landlord's interest and coverage must not be invalidated by any: (i) negligence of Tenant, Landlord, any Mortgagee, or any other person with any interest in the Premises; or (ii) Involuntary Transfer.[31]

2.5. NOTICE TO LANDLORD. Each policy must be endorsed to require the carrier to give Landlord 30 days (10 days for cancellation for nonpayment) prior Notice of any policy cancellation or nonrenewal.[32]

2.6. PRIMARY COVERAGE. All policies must be written as primary policies, without requiring contribution from (or providing coverage only in excess of) any other coverage (primary, umbrella, contingent, or excess) of any Additional Insured. If any Additional Insured obtains its own separate or additional coverage, then that coverage will be excess, secondary, and noncontributing.

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28 The letter grade reflects Best's Financial Strength Rating. "A-" means excellent. The roman numeral "Class" category reflects the carrier's financial size or policyholders' surplus, an insurance term that relates to financial strength. Class VII means a carrier has a policyholders' surplus between $50 million and $100 million. Many Government agencies accept Class VII, so these Model Insurance Requirements set it as a floor. Any Lease can require a higher or lower standard. Class VIII means a carrier has a policyholders' surplus between $100 million and $250 million. Class X means $500 million to $750 million. Leases and loan documents typically set minimum carrier criteria at the levels just mentioned in this footnote, sometimes lower if the carrier has a favorable reinsurance program. Class XIV, which some advisers recommend, means $1.5 billion to $2 billion of policyholders' surplus–a standard that only about a dozen carriers can meet. An insurance consultant can best advise on these matters.

29 The term "admitted" is narrower and is used only in non-excess-and-surplus lines. The term "authorized" allows more carriers. If a carrier is authorized but not admitted, it will not need to comply with all the same rules and regulations that apply to carriers admitted in the state. Landlord will typically allow carriers that are authorized even if they are not admitted. This should be discussed with insurance advisers.

30 This is a low number. For larger properties, portfolios, or substantial owners, an insurance adviser may recommend a higher deductible.

31 Landlord would like to go a step further, and have its Property Insurance immunized against any "act" of Tenant, such as Tenant's misrepresentations on an insured risk or claim, misconduct in placing coverage or handling claims, or occupancy for uses more hazardous than the policy allows. A Mortgagee would obtain that protection. Landlord typically cannot. This is an argument for Landlord to control Property Insurance and pass the premiums through to Tenant.

32 Landlord would also like notice of "any material change" in the policy. Carriers generally reject that. Carriers typically agree to give Landlord the notice described in text, at least for Property Insurance though not necessarily for Liability Insurance.

3. ADDITIONAL COVENANTS

3.1. ADDITIONAL INSUREDS. Wherever this Exhibit requires insurance covering Additional Insureds, that coverage must, to the extent consistent with Insurance Practices, be: (i) at least equivalent to that provided under ISO Form CG 20 11 01 96 or equivalent (in the case of Tenant's coverage) or ISO Form CG 20 37 10 01 and ISO Form CG 20 10 10 01 (in the case of insurance provided by contractors); and (ii) no less favorable to the Additional Insureds than the coverage provided to the Named Insureds.

3.2. CHANGED REQUIREMENTS. Either party may reasonably request an adjustment of any insurance requirements of this Exhibit to conform to changes in Insurance Practices. If Landlord's additional requirements conform to those of any [Leasehold] Mortgagee [that is an Institution], then they shall automatically be deemed reasonable, and Tenant shall comply with them.[33] A party exercising rights to adjust coverage under this section must: (i) do so no more than once every three years; and (ii) give at least six months prior Notice of the requested change.[34]

3.3. DISPUTES. The parties shall resolve through Expedited Arbitration any disagreement on Tenant's compliance with this Exhibit, Insurance Practices, or the scope of Required Insurance. Tenant shall nevertheless, even during Expedited Arbitration, maintain with Landlord all Insurance Documents this Exhibit expressly requires.

3.4. ENHANCED LIABILITY INSURANCE. If Tenant, its Builder, or anyone else with whom Tenant contracts carries liability insurance that is higher in amount or broader in scope than Required Insurance (that liability insurance, the "Enhanced Liability Insurance"), then: (i) the Required Additional Insureds must be named as (and shall be deemed to be) additional insureds for the Enhanced Liability Insurance; and (ii) the minimum Liability Insurance that Tenant, Builder, or Tenant's contractual counterparty must carry shall increase to match the Enhanced Liability Insurance, so long as it remains in effect.

3.5. INFLATION ADJUSTMENTS. Dollar figures in this Exhibit, including coverage and deductible amounts, shall be Inflation-Adjusted.[35] That does not apply to any insurance requirement that: (i) refers to value or a formula; or (ii) otherwise does not use a particular dollar figure.

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3.6. LANDLORD'S INSURANCE. Landlord may, at its option, maintain for its benefit secondary, contingent, or backup insurance covering any of the same risks as Required Insurance, but responding only if Required Insurance has lapsed or become unavailable for any other reason. In no event will Landlord have any liability to Tenant if it does not maintain this coverage. Tenant will not be entitled to the benefits of any such insurance if Landlord maintains it.

3.7. NO REPRESENTATION OR OBLIGATION. Neither party represents that the forms, limits, scope, or terms of Required Insurance are adequate. Landlord has no obligation to enforce anything in this Insurance Exhibit or to confirm that Tenant's insurance program complies with Required Insurance. The requirements for Tenant's insurance program solely benefit Landlord and Fee Mortgagees.

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33 Tenant might propose the converse: If an Institutional Leasehold Mortgagee accepts less than this Insurance Exhibit requires, Landlord must go along. See the Bells & Whistles for some language along these lines.

34 Landlord may prefer to: (i) say only Landlord can exercise rights under this paragraph; and (ii) delete the last sentence.

35 Inflation adjustments may not suffice. The Bells & Whistles would allow Landlord to adjust Required Insurance to match the standards of similar properties over time.

3.8. NO SEPARATE INSURANCE. Tenant shall not carry insurance (whether additional, separate, concurrent, or contributing) for any risk against which this Exhibit requires Tenant to insure, unless, for that insurance, Tenant has complied with all requirements of this Exhibit that apply to Required Insurance of the type in question.

3.9. POLICY ALTERNATIVES. Tenant may provide any Required Insurance through: (i) a combination of primary and excess liability or umbrella policies; (ii) a blanket insurance policy; or (iii) a risk purchasing group or similar cooperative insurance program. In each case, coverage must: (i) specify per-location limits for the Premises, consistent with this Exhibit, without potential reduction for any claim arising from any other location;[36] and (ii) follow the form of, have the same policy period as, and comply with all requirements for the primary coverage, including required carrier rating and Required Additional Insured coverages.

3.10. POLICY COMPLIANCE. Tenant shall comply with all: (i) conditions and requirements in Required Insurance; and (ii) orders, policies, recommendations, regulations, requirements, and rules of any board of fire underwriters, fire or insurance rating organization, or other body exercising similar functions that has or asserts jurisdiction over, or otherwise make rates or findings for, the Premises. Tenant shall do nothing that will or might cause an Insurance Impairment.

3.11. TENANT'S OBLIGATIONS. This Exhibit does not limit any obligation of Tenant under this Lease outside this Exhibit, including any Indemnity by Tenant. Tenant shall pay all deductible or self-insured retention amounts for claims under Required Insurance.

3.12. WAIVER OF SUBROGATION. To the extent [this Exhibit requires any party to maintain] [any party actually obtains][37] any insurance with a Waiver of Subrogation in favor of a party, the party required to maintain that insurance waives and releases the other party and its Related Persons (and in the case of Tenant's release of Landlord, also all Required Additional Insureds) from all claims and rights of recovery caused by or resulting from perils that such insurance covers (up to the policy limits) or would have covered (up to the policy limits) had it been obtained.[38]

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4. DELIVERIES

4.1. CONTRACTORS. Tenant shall cause its contractors to give Landlord copies of: (i) Insurance Documents for any liability insurance that any Construction Document requires any such contractors (or if this Lease requires, sub-contractors) to maintain in favor of Landlord or Tenant; and (ii) copies of their liability insurance policies, from which details of other locations may be redacted, with proof of payment of premiums and endorsements adding all Required Additional Insureds[39] as additional insureds on a primary and noncontributory basis.[40]

36 Large Tenants might not satisfy this requirement. Landlord may respond by requiring more umbrella liability coverage.

37 Choose one bracketed phrase and delete the other.

38 Joshua Stein's Model Ground Lease Base Case also includes Tenant's very broad waiver of claims against Landlord to the extent those claims were insured, or could have been insured, under the Property Insurance the Lease requires. The Model Ground Lease Base Case also includes Tenant's broad waiver of claims for damage to Tenant's personal property. But see N.Y. General Obligations Law Section 5-321, which invalidates waivers of Landlord's liability for negligence. The Model Ground Lease Base Case does not require Tenant to obtain insurance for that damage.

39 Many Additional Insured endorsements in Construction contracts limit Additional Insured status to the parties for whom the Named Insured performs Construction. Subcontractors do not work for Landlord. So the usual endorsement would not cover them.

40 Tenant may balk at the breadth of the requirements for insurance to be delivered by contractors and subcontractors. Nevertheless, many Landlords insist on those deliveries.

4.2. IMPAIRMENT. If Tenant receives notice of any actual or threatened Insurance Impairment, Tenant shall within two Business Days give Landlord a copy.[41]

4.3. INSURANCE DOCUMENTS. On the Commencement Date, and no later than 10[42] days before any expiration or cancellation of Required Insurance, Tenant must give Landlord Insurance Documents renewing or replacing the expiring or terminating Required Insurance, expiring at least one year from delivery.[43]

4.4. REQUIRED INSURANCE FAILURE. If Tenant fails to provide any Required Insurance or Insurance Documents, then Landlord, after giving Tenant two Business Days Notice,[44] may at its option arrange replacement insurance at Tenant's expense. Landlord must Notify Tenant promptly after doing so. Tenant must reimburse Landlord's Costs to obtain that insurance. When Tenant provides the Insurance Documents the absence of which triggered the replacement coverage, Landlord must, to the extent permissible, cancel any replacement insurance, for Tenant's account. Landlord's right to arrange replacement insurance at Tenant's expense does not: (i) excuse any insurance-related obligation of Tenant or any Default resulting from Tenant's failure to maintain Required Insurance or deliver Insurance Documents;[45] or (ii) limit any Landlord right or remedy under this Lease.

4.5. POLICIES. From time to time, in each case within five Business Days after Landlord's request, Tenant shall give Landlord copies of all insurance policies and endorsements this Exhibit requires, not limited to Insurance Documents.[46] Details of other locations may be redacted.

5. DEFINITIONS

These definitions apply in this Exhibit:

5.1. EXPOSURE PERIOD. The "Exposure Period" means, for Liability Insurance, a period that begins when this Lease first requires that Liability Insurance and ends when the statute of limitations and statute of repose have expired for all claims that it covers or would cover. For any Construction Period Insurance, except Liability Insurance, the Exposure Period: (i) begins when on-site Construction begins; and (ii) ends on the Completion Date for that Construction.

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41 Landlord might try to: (i) obtain a similar commitment from Tenant's insurance broker; and (ii) trigger an automatic incurable Event of Default if Tenant fails to comply with this obligation. Both extra measures are unusual and would probably concern a Tenant.

42 Landlord would like to receive Insurance Documents for a renewal policy at least 30 days before expiration. But that just doesn't happen. Any renewal typically causes a last-minute scramble, with new Insurance Documents sometimes arriving the day before expiration, or later. It is reasonable to require new Insurance Documents 10 days before expiration, but Landlord should still recognize that it probably won't happen. Tenant may propose to deliver replacement Insurance Documents "as soon as practicable but in any event no later than the existing coverage expires." It still often won't happen.

43 Tenant might request the right to maintain insurance for less than a year, particularly at the beginning of the Term, to synchronize renewals with a larger insurance program. Tenant will typically reject any requirement to pay insurance premiums for a period of more than a month at a time.

44 Landlord might not want to give any Notice. Landlord would typically want to force-place first, talk later. Landlord can usually force-place insurance if Tenant is out of compliance with any Required Insurance, even if Tenant's noncompliance is minor. There is no substantial compliance cushion. This should of course be confirmed with insurance advisers.

45 See Thee Aguila Inc. v ERDM, Inc., B263005, 2016 WL 3029560 (Cal. Ct. App. May 19, 2016) (Landlord's right to force-place substitute insurance means Landlord cannot declare Lease default for Tenant's failure to insure). This is, however, a California case.

46 This requirement may be quite burdensome. Discuss with insurance adviser. It is important, though. It allows Landlord to confirm that Tenant's actual insurance complies with the Lease. The insurance may vary from the Insurance Documents Tenant delivered, depending on how the Lease defines Insurance Documents. See the comments accompanying that definition.

5.2. INSURANCE DOCUMENTS. The "Insurance Documents" means these documents, identifying Tenant as the insured and where appropriate as the First Named Insured and otherwise fully evidencing all Required Insurance: (i) ACORD 28 evidence of Commercial Property Insurance; (ii) ACORD 25 Certificates of Liability Insurance;[47] and (iii) a copy, certified by the carrier, of each policy constituting part of Required Insurance, including declaration pages, Schedule of Forms and Endorsements, and a full copy of all endorsements and other provisions that apply to Landlord or Fee Mortgagees, including recognition of all Required Additional Insureds,[48] all in ordinary and customary form reasonably satisfactory to Landlord. Details on locations other than the Premises may be redacted.[49]

5.3. INSURANCE IMPAIRMENT. An "Insurance Impairment" means any cancellation, modification, nonrenewal, premature termination, or premium increase for any Required Insurance.

5.4. INSURANCE PRACTICES. "Insurance Practices" means then-current, at the time of determination, ordinary, customary, and commercially reasonable insurance practices, requirements, and standards for buildings of a type, use, size, height, construction, location, and other characteristics generally similar to the Building.[50] Insurance Practices take into account, among other things, then-current Law and requirements of Mortgagees that are Institutions.

5.5. ISO. "ISO" means the Insurance Services Office, Inc., and its successor organizations. If no successor exists, then references to ISO shall refer instead to an insurance industry organization performing similar functions. Any dispute under this paragraph shall be resolved by Expedited Arbitration.

5.6. ISO FORM. Any reference to an "ISO Form" means, without modification: (i) unless a particular edition is specified, the then latest version of that form published by ISO, or any replacement, successor, or substantially equivalent form; and (ii) if a form is discontinued without replacement or if ISO no longer exists, then insurance coverage or endorsements on substantially the same terms as the last ISO version of the specified form,

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47 Tenant will ordinarily prefer to deliver only ACORD 25 and 28 documents. They state on their face that Landlord cannot rely on them. Case law confirms, and the certificates themselves go out of their way to announce, that certificates of insurance are legally worthless. Tenant's broker typically prepares them. But Landlord has no privity of contract with Tenant's broker or carrier, hence no claim for negligent misrepresentation. Even if a certificate is accurate as far as it goes, it often says so little as to be inadequate. It doesn't describe coverage exclusions. It doesn't say whether supplemental payments (e.g., attorneys' fees) erode coverage or are outside the policy limits. It omits conditions of coverage that make the insurance illusory. In practice, Landlord will often accept certificates of insurance, based on the high practical likelihood that they are accurate. That leaves open a perfectly preventable risk, which seems anomalous for a process that is supposed to reliably reallocate risks. There is no substitute for obtaining and carefully reviewing the actual policies of insurance.

48 The policy may automatically include as Additional Insureds Landlords and other parties that Tenant agrees by contract to name as additional insureds. If, however, Landlord can't see the policy itself, Landlord can't confirm it has that provision or actually provides the correct coverage. Even when the policy does provide for an "automatic" endorsement, Landlord's insurance advisers will want to see the exact language of the Additional Insured Endorsement, which often comes with limitations.

49 Tenant, especially if a large company, will often resist providing a copy of the entire insurance policy (clause "iii"). In that case, Landlord should try to obtain as many of the items listed below as possible. If Tenant delivers all these items, though, there isn't much left to hide, so Tenant may as well have delivered the entire policy:

(iii) policy declaration pages showing all Required Insurance; (iv) all endorsements evidencing Required Insurance (e.g., Waivers of Subrogation, Required Additional insureds, loss payee, obligations to notify Landlord or Additional Insureds, or otherwise relating to Landlord or Required Additional Insureds); (v) Schedule of Forms and Endorsements; (vi) each Coverage Form and, where pertinent, Causes of Loss form with declaration pages attached; (vii) Common Policy Declarations, Terms, and Conditions; and (viii) other insurance documentation sufficient to reasonably evidence that Tenant maintains all Required Insurance.

50 The parties could refer to a radius for similar properties, or the County, or limit the definition to buildings built or substantially redeveloped in the 10 years before the date of determination. Or they could live with the language in text, which seems reasonable.

to the extent consistent with Insurance Practices. Any ISO Form may be replaced by any other form providing equivalent coverage subject only restrictions and limitations equivalent to those in the ISO Form.[51]

5.7. REQUIRED ADDITIONAL INSUREDS. The "Required Additional Insureds" means Landlord and such additional or other Persons as Landlord designates from time to time by Notice to Tenant, consistent with Insurance Practices, such as managers and Fee Mortgagees. Landlord initially designates these Persons, at these addresses, as Required Additional Insureds: [list persons and addresses].[52]

5.8. REQUIRED INSURANCE. The "Required Insurance" means all insurance this Lease requires of Tenant.

5.9. WAIVER OF SUBROGATION. A "Waiver of Subrogation" means a provision in, or endorsement to, any Required Insurance,[53] by which the carrier: (i) allows the insured, before a loss or claim occurs, to waive its and the carrier's right to recover against parties responsible for that loss or claim; and (ii) waives all rights of recovery by way of subrogation or assignment against such party(ies) for any loss or claim the policy covers.[54]

MODEL INSURANCE REQUIREMENTS FOR A GROUND LEASE

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1. ADDITIONAL AGREEMENTS ON INSURANCE

1.1. COORDINATION WITH MORTGAGE. Notwithstanding anything else in this Exhibit, Tenant shall be deemed to be in full compliance with this Exhibit if Tenant provides all insurance coverage required by a Leasehold Mortgagee that is an Institution and that coverage: (i) benefits Landlord and the Required Additional Insureds directly, in a manner consistent with Insurance Practices; and (ii) has been confirmed through Insurance Documents delivered to Landlord.[55]

1.2. COORDINATION WITH MORTGAGE. To the extent and only so long as a Leasehold Mortgagee requires Tenant to maintain any insurance coverage (or provide any insurance-related documents or deliveries) beyond Required Insurance, this Exhibit incorporates those additional requirements by reference as part of Required Insurance. Tenant shall comply with all those additional requirements, including delivery of corresponding Insurance Documents, for the benefit of Landlord and all Required Additional Insureds, in addition to all requirements of this Exhibit.

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51 Some insurance advisers disfavor the flexibility implied by the previous sentence.

52 Customarily the Required Additional Insureds must be identified with extreme accuracy and precision. Failure to identify them correctly may impair their insurance protection.

53 Waivers of Subrogation can sometimes cover Liability Insurance. More often, though, similar issues are handled through Additional Insured status.

54 Most Property Insurance policies have a Waiver of Subrogation. Leases and other transactional documents must still close the loop by having the parties waive claims against one another for property loss or damage. Because subrogation rights belong to insurance carriers and not to the contractual parties, any waivers of subrogation agreed between the contractual parties, but not the carrier, are generally ineffective. Other insurance types, such as workers' compensation coverage, don't always automatically include a Waiver of Subrogation. There, it must be specifically requested, which may lead to special requirements, including extra premiums. Some state Laws prohibit Waivers of Subrogation in workers' compensation coverage.

55 This paragraph is inconsistent with the next. Don't use both. Select and edit as appropriate.

1.3. EQUIPMENT BREAKDOWN. To the extent that Tenant's equipment breakdown coverage requires Tenant to obtain (or file with any Government) inspection reports, Tenant shall upon Landlord's request promptly give Landlord copies of all those reports.[56]

1.4. EXISTING INSURANCE PROGRAM. Landlord has approved Tenant's existing insurance program, a copy or summary of which appears as Exhibit ____ ("Existing Insurance"). To the extent that the Existing Insurance varies from Lease requirements, Landlord waives that noncompliance. [To the extent that Existing Insurance exceeds Lease requirements, Tenant agrees to maintain and continue that excess program so long as it conforms to Insurance Practices.] That does not limit either party's right to seek changes in Tenant's insurance program as this Exhibit otherwise allows.[57]

1.5. FINANCING. Tenant shall not finance any insurance premiums under any arrangement that could result in Insurance Impairment if Tenant fails to make payments due under the premium financing or otherwise.[58]

1.6. INDEMNITY. Neither this Article nor Tenant's Liability Insurance limits Tenant's Indemnity obligations under the Lease. If Tenant fails to maintain any Required Insurance, then Tenant shall pay all amounts that the Required Insurance would have paid if maintained.[59] Tenant's liability shall not be limited to the amount of premiums not paid. Landlord's right to arrange replacement insurance is intended only to benefit Landlord. The existence of that right shall not limit Tenant's liability, as described in this paragraph, for failure to maintain Required Insurance.

1.7. LANDLORD'S LIABILITY INSURANCE. Landlord shall [at Tenant's expense] maintain commercial general liability insurance against claims for bodily injury or property damage for which Landlord is legally responsible (and not covered by Tenant's Liability Insurance) occurring on or about the Premises or (to the extent consistent with Insurance Practices) adjoining sidewalks, streets, and passageways, with liability limit of $______ for each occurrence and $______ in aggregate per annum.[60]

1.8. LEGAL COMPLIANCE. To the extent any Law categorically prohibits carriers from providing any Required Insurance, the requirement for that insurance shall be deemed to have been limited accordingly.

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56 Mechanical breakdown coverage typically allows the carrier to inspect covered systems once or twice a year, typically matching local code requirements. In New York City, noncompliance may lead to violations and closures.

57 This paragraph effectively makes the detailed Required Insurance language in the Lease meaningless, replacing it with another perfectly reasonable but off market way to define Required Insurance, i.e., an exhibit that defines Actual Insurance based on what Tenant actually does. If the parties agree to it, they should consider the possible need for known future changes, such as when Tenant starts Construction.

58 This prohibition sometimes appears. Most Tenants do, however, want to finance insurance premiums and pay monthly. Carriers have learned that this form of financing creates a nice profit center. If Tenant misses a payment, the premium financier can cancel the policy. But the carrier must always give Landlord 10 days' notice of cancellation—at least for Property Insurance—so Landlord can act to prevent the cancellation. Landlord may, of course, prefer to avoid that drama entirely. Tenant may be sympathetic to Landlord's concerns but will argue that premium financing is quite ordinary and makes business sense for Tenant, so Landlord should live with it. In today's world, Tenant will typically prevail.

59 Some courts would limit Tenant's liability to the amount of unpaid premiums, even if a loss occurred that should have given rise to a substantial insurance claim. The language in text seeks to prevent that result.

60 Tenants sometimes request this coverage based on mutuality. Given Tenant's complete control of the Premises, Tenant probably has no basis to look to Landlord to provide insurance for any Premises-related risks, unless Landlord retains some possessory interest in the Premises or adjacent property. Landlord may, however, choose to maintain this coverage for its own benefit. Before agreeing to maintain the insurance described here, Landlord should confirm its availability. Tenant would like to be named as an Additional Insured, and to have Landlord's coverage identify this Lease as an insured contract, but the carriers will hesitate to do that.

1.9. NONCONFORMING BULK. To the extent that, at any time, Tenant could not legally Restore ZFA after Damage, Property Insurance shall require the carrier to pay Depository (for Landlord's benefit) the amount (less any permitted deductible) this Lease requires Tenant to pay Landlord as a result of that Damage. That requirement must be evidenced by an endorsement in form and substance reasonably satisfactory to Landlord.

1.10. PLATE GLASS. Tenant shall maintain plate glass insurance for the Premises consistent with Insurance Practices.

1.11. REIMBURSEMENT. Tenant shall reimburse Landlord's Costs to: (i) maintain any backup or secondary insurance covering risks comparable to those covered by Required Insurance,[61] but Landlord shall reasonably allocate those premiums across multiple properties if applicable; and (ii) review Insurance Documents to determine whether they comply with this Insurance Exhibit.

1.12. REPORTING. Tenant shall, from time to time as Landlord requests for any Required Insurance, give Landlord: (i) loss run reports evidencing that all outstanding claims have been lodged, reserved for, or paid; and (ii) such reasonably available evidence as Landlord reasonably requests to confirm that the carrier has acknowledged and is defending any claims for the benefit of Landlord. In the event of any claim, Tenant shall keep Landlord fully informed on Tenant's communications with the carrier and give Landlord such acknowledgments of claim and other confirmations from the carrier as Landlord reasonably request.

1.13. VACANT LAND. Notwithstanding anything else in this Exhibit, so long as the Premises consist entirely of vacant land, Tenant need not maintain Property Insurance.[62]

1.14. VERIFICATIONS. Landlord may at any time seek to verify directly with any carrier or broker the status of any Required Insurance. Tenant shall promptly sign any consent Landlord requests toward that end.

1.15. WRAP-UP INSURANCE. Tenant may provide Construction Period Insurance through a so-called "wrap-up program" ("Wrap-Up Program"). Any Wrap-Up Program must: (i) comply with all requirements for Construction Period Insurance, including on delivery of Insurance Documents and on Required Additional Insureds; (ii) provide coverage fully equivalent to Construction Period Insurance, for the entire Exposure Period; and (iii) have a general commercial liability limit of at least $______ per occurrence and in aggregate and an excess liability limit of $______. Tenant must comply with the carrier's requirements for security for large-deductible insurance policies. If paid or reserved claims have substantially diminished the amount of insurance remaining available, Tenant shall comply with Landlord's reasonable requests to increase the aggregate limits.

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61 Adjust to reflect scope of any insurance for which Landlord seeks reimbursement. This Bell & Whistle does not commonly appear in Leases.

62 Although this paragraph sounds intuitively reasonable, Landlord should check it with insurance advisers for each specific transaction. Circumstances may justify some Property Insurance even for vacant land.