



DOCUMENT BLOATATION AND A RESPONSE

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Documents grow. They never shrink. When attorneys develop and update their templates for documents they use repeatedly, each little piece of growth comes from smart people thinking hard, sometimes too hard, often reflecting idiosyncratic concerns based on their experiences. Other times the growth happens because of circumstances of a particular deal, leading to customized negotiations, sometimes overnegotiations.

Many issues that we work through in this process may well arise again, later. It won't be efficient to reinvent the wheel next time. So we should instead maintain template documents that benefit from past negotiations and deal-specific idiosyncrasies that often turn out to be not so idiosyncratic. That way, the next deal will benefit from all the work done on previous deals. Maybe the negotiations will be quicker, easier, and cheaper.

Ground leases in particular merit this treatment. They raise a series of issues again and again, and they often last for about a century. How can the landlord know the tenant will complete its project and preserve the building? How can the tenant obtain flexibility? How can future rent resets protect the landlord from inflation while protecting the tenant from Armageddon? How much cooperation will the landlord need to provide for easements, transfers of development rights, filings, and so on? Above all, how can both landlord and tenant know they can always obtain nonrecourse financing on favorable terms?

As the parties think through these issues for each

deal, they come up with smart new provisions, many suitable to add to the ground lease template. And so the template grows.

For every new ground lease transaction, one can start with the template and then take out whatever doesn't apply. It becomes an arduous task. Many special provisions in the template ripple into other provisions, so you can't just chop paragraphs. You have to excise with a light hand and discerning eye everything you don't need. As a result, the encrusted complexity of the template ends up defeating its purpose. The template requires too much work to tailor to the deal and to rid it of those encrustations.

There must be a better way. And there is!

In updating my own ground lease template for my upcoming book on ground leases, I decided to blow up the template and start over. Rather than try to make it cover everything that might arise, I kept a minimalistic "base case" ground lease, which covers only the basic bases, the provisions you always expect in any ground lease. It's thorough and complete enough so no one can ever assert it has a glaring gap or deficiency. It says what it needs to say.

Then I collected everything else—all the historical encrusted bloatation from past deals—in a separate document, which I call my ground lease "bells and whistles." That's a collection of optional provisions that might sometimes apply, for example because of special facts, special sensitivities or concerns, or someone's desire to have more protections or more requirements on some issue that the base case ground lease handles in a more basic way. My bells and

whistles have the benefit of all the thought that went into negotiating them in past deals, but they don't distract the user of the base case ground lease. They're just available for review, reference and use as needed.

This all sounds very straightforward and logical. But it's not as easy as it sounds. Each time I decide some paragraph is a bell and whistle rather than part of the base case, I run the risk that someone else, after the fact, will think otherwise.

I've been through those discussions, too. It's the same story every time: The parties signed a pared-down and simplified ground lease to meet the urgent timing needs of a transaction, minimize negotiations, and control legal fees. Three years later, someone decides the lease needs a few paragraphs it doesn't have. Those might have qualified as bells & whistles under my nomenclature. Usually a future buyer or mortgagee of the leasehold figures out a way to live with that sort of concern, but sometimes they don't. When that happens, the parties have a problem.

It's not so easy to slim down a bloated document. Each paragraph represents a judgment call. Some paragraphs are good, unlikely to raise controversy, so why not just leave them in, even if they're very unlikely to ever apply and not essential or detrimental to financeability? Answer: If you want to shorten and simplify the document, then you need to shorten and simplify the document. But you have to focus on recategorizing, or at least vastly simplifying, accumulated verbiage that is unnecessary or very unlikely to apply. And you have to be right about how you do that.