
CHAMBERS GLOBAL PRACTICE GUIDES

Real Estate 2026

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USA – New York: Law and Practice
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USA – NEW YORK



Law and Practice

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Phillips Lytle LLP is a pre-eminent law firm with a highly recognised real estate practice consisting of over 50 attorneys. With offices across New York State, as well as offices in Chicago, IL; Washington, DC; and Ontario, Canada, Phillips Lytle has handled many high-profile real estate development projects. The firm has nationally recognised experience across numerous areas, including those involving institutional lenders, corporations, REITs, private developers, public utilities, municipalities, individuals and others in connection with large and small commercial, industrial, office, professional, retail and residential

projects. The practice includes national, high-volume, high-technology representation in the telecommunications, lending and foreclosure areas, as well as nationwide multilocation retail leasing and portfolio sales. Its wide-ranging experience and cross-functional capabilities enable the team to guide any size data centre project throughout the entire development process. Areas of expertise include commercial leasing, construction compliance and litigation, land use, permitting and zoning, project development, real estate finance, real estate litigation and workouts, tax, and title insurance.

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1. General

1.1 Main Sources of Law

Real estate law encompasses a broad range of skills and practice areas. To adequately represent a client, a real estate attorney must understand the nature of the client's business and the client's willingness to take risks.

A real estate practitioner must understand the myriad of potential issues that may arise for a given real estate project (typically within tax, finance, corporate, securities, environmental, energy and land use, bankruptcy, government relations, insurance and construction, among others) and have access to the breadth and expertise necessary to effectively represent clients in all relevant issues. To that end, most matters require a team approach, with lawyers who have differing expertise. In addition, practitioners must be resourceful and have the ability to communicate and negotiate effectively. Current trends typically do not impact the skills required to practise real estate law; however, one must remain aware of them to effectively assist clients in moving their real estate projects forward.

1.2 Main Market Trends and Deals

Over the past 12 months, the real estate market in New York State has shown a selective recovery rather than a broad-based rebound. In New York City, investment sales volume increased to approximately USD33.5 billion in 2025, with capital concentrating in higher quality assets and well-located properties, while older and less efficient buildings continued to lag. Office demand improved materially at the top end of the market, with trophy and amenity-rich buildings outperforming commodity office product, while obsolete office inventory remained under pressure and continued to fuel interest in adaptive reuse. Industrial and logistics assets have remained comparatively resilient, supported by long-term e-commerce, distribution and advanced manufacturing trends, and state programmes such as FAST NY continue to push shovel-ready industrial sites across Upstate New York. At the same time, the housing market continues to be shaped by supply constraints, and policy tools such as City of Yes, 485-x and 467-m have helped create a more favourable framework for new housing production and office-to-residential conversions.

The most significant real estate deals over the last 12 months also reflect this “flight to quality”. Among the marquee transactions was RXR's approximately USD1.08 billion acquisition of 590 Madison Avenue, reported as the largest New York City office sale since 2022. In the multifamily sector, one of the largest 2025 trades was the sale of 800 Fifth Avenue for roughly USD810 million. These headline transactions, together with improving Manhattan office leasing and renewed investor appetite for prime product, suggest that liquidity has returned first to premier assets, while secondary assets continue to face valuation pressure and repositioning risk.

Rising inflation and higher interest rates continued to weigh on pricing, construction starts and leverage assumptions, although the environment became somewhat more constructive in late 2025. The Federal Reserve cut rates in September 2025, but by January 2026 it left rates unchanged and continued to characterise inflation as somewhat elevated; the PCE price index was still running at 2.9% in December 2025 and at 2.8% in January 2026. As a result, many New York developers and investors have adapted by using more equity, accepting lower leverage, extending maturities, pursuing workouts where necessary, and increasingly relying on alternative capital sources, including private credit, for large transactions.

1.3 Proposals for Reform

The most significant current proposal for reform in New York State is Governor Kathy Hochul's 2026 “Let Them Build” agenda, which would amend the State Environmental Quality Review Act (SEQRA) to streamline housing and infrastructure approvals. The proposal would exempt certain housing projects from additional SEQRA review where they are already locally zoned and permitted, create clearer review deadlines, and impose a two-year outside limit for completion of an environmental impact statement in many cases. For developers and investors, the practical effect would be to reduce entitlement risk, shorten pre-construction timelines and lower carrying costs on projects that often stall in the approval phase. The proposal appears to have meaningful support from the Governor and the State Senate, but not yet from the Assembly, so it is not certain to become law in its current form. If enacted, it would most likely come

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through the 2026 legislative or budget process, and could take effect later in 2026.

Another major proposal is Governor Hochul's March 2026 plan to amend New York's 2019 Climate Act by preserving the long-term 2050 decarbonisation goals while relaxing or eliminating the statute's near-term 2030 mandates. If adopted, that reform could materially affect real estate development, particularly for owners, developers and utilities concerned about electrification costs, grid capacity and the economics of new construction. At present, however, its path is uncertain because it requires legislative approval and has already drawn resistance from many Senate Democrats. Accordingly, while the proposal is significant, it appears less likely than permitting reform to be enacted quickly, and any action would most likely occur, if at all, during the 2026 legislative session.

2. Sale and Purchase

2.1 Categories of Property Rights

The most prevalent forms of ownership are individual and joint ownership through legal entities, such as limited liability companies, limited partnerships, corporations or trusts. Currently, these legal entities remain the primary owners of commercial real estate, especially limited liability companies due to their flexibility with tax treatment and structuring the company. Typically, investors in commercial real estate take title through an entity, or series of entities, owned and controlled by the individual owners.

Residential real estate owned by more than one person may take title as tenants-in-common, joint tenancy with the right of survivorship, or tenancy by the entirety for married couples.

2.2 Laws Applicable to Transfer of Title

Generally, parties are able to buy and sell real estate without complying with any jurisdictional requirements. Only certain types of parties or real property are subjected to state or local regulation – eg, certain charitable corporations must obtain the permission of the Supreme Court of the State of New York or the New York State Attorney General before transferring real property.

Similarly, a party seeking to purchase a residential home that is in default on a mortgage loan must comply with the New York State Home Equity Theft Prevention Act. Properties that are suffering from environmental contamination may require the selling party to notify the New York State Department of Environmental Conservation or subsequent parties in title of the existence of the contamination or any restrictions placed upon the real property.

2.3 Effecting Lawful and Proper Transfer of Title

Transfer of title is effectuated by the delivery and acceptance of a deed, in recordable form, to the subject real property. To be in recordable form, a deed must be signed, be acknowledged by a notary, and contain an adequate description of the property. While delivery and acceptance of a deed is sufficient to transfer title to real property, the deed must be recorded in the county clerk's office, and the applicable taxes and fees must be paid in order to perfect the transfer.

This final step is important because New York State is a "race-notice" jurisdiction. This means a party can simultaneously issue two deeds to two separate parties for the same real property. The party that wins the "race" to the applicable county clerk's office and has their deed recorded first will be the owner of the real property, provided that such party had no knowledge of the other deed.

2.4 Real Estate Due Diligence

Depending on the complexity of the acquisition, purchasers of real estate typically engage third parties, such as:

- attorneys;
- institutional lenders;
- real estate brokers;
- appraisers;
- engineers;
- surveyors;
- architects;
- general contractors;
- title insurance/search companies;
- accountants;
- insurance agents;

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- environmental consultants;
- zoning research companies;
- representatives from local municipalities; and
- other third parties.

Sophisticated purchasers often communicate directly with the above-referenced third parties. Contracts for the purchase and sale of real property typically give the purchaser a specific time period in which to conduct all real estate due diligence.

2.5 Typical Representations and Warranties

While representations and warranties in a purchase and sale contract can vary greatly, the following representations and warranties are common in commercial transactions:

- authority and capacity to execute the agreement and perform the obligations under the agreement;
- no pending or threatened lawsuits against the parties or the subject real property;
- no pending or threatened eminent domain or condemnation proceedings against the real property;
- no pending or threatened changes in the assessed valuation or tax rate applicable to the real property;
- no pending or threatened changes in the zoning classification of the real property;
- no known environmental defects with the real property or any actions being taken by any agency with respect to the environmental condition of the real property; and
- the existence and good standing of all permits and certificates necessary for legal use or occupancy of the real property.

No representations or warranties are generally provided for under state or local law. This is not true of residential transactions. For instance, with respect to newly built homes, each sale is subject to certain warranties regarding the quality of construction under the Housing Merchant Implied Warranty.

For pre-built homes, sellers are required to make certain disclosures with respect to the condition of the real property in a Property Condition Disclosure Statement. These forms require the owner to represent certain facts, including general historical, environmental,

mechanical and structural information with respect to the property.

Remedies and Protections

The remedies against a seller that breaches a representation are typically defined in the contract, including termination of the purchase agreement, specific performance, and monetary damages for out-of-pocket costs incurred by the purchaser owed to attorneys and third parties engaged to assist with the purchaser's due diligence.

2.6 Important Areas of Law for Investors

Federal and state tax law is important for an investor to consider when determining the tax consequences of any transaction. In addition, it is important for an investor to have an understanding of the New York Business Corporation Law, the Partnership Law and/or the Limited Liability Company Law so that the investor can properly determine which type of entity should be used to acquire title to real property. Finally, to confirm that the property is acceptable for the use contemplated by the investor, it is important for the investor to have an understanding of federal and state environmental law as well as local zoning and land use rules and regulations. If the real property is residential rental property, it is also important for an investor to have an understanding of New York landlord-tenant laws.

2.7 Soil Pollution or Environmental Contamination

As an owner or operator of a real estate asset, the buyer could be held strictly, jointly and severally liable for pre-existing soil pollution or environmental contamination pursuant to state and federal laws. Therefore, typical allocations of environmental risk in purchase and sale agreements are tailored to the intent of the parties, the site conditions and the actual or potential presence of contaminants of concern.

Under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), current owners and operators of a property are, except in limited circumstances, strictly liable for all response and remediation costs regarding hazardous wastes and substances that were released on a property, unless a statutory defence is established. These

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include acts of God or war, acts of third parties, and landowner liability protections, such as the innocent landowner defence, bona fide prospective purchaser defence, and contiguous property owner defence.

If the buyer spends money to clean up the contamination caused by others, there are contribution claims available under state and federal laws.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

A buyer can ascertain the permitted uses of a parcel of real estate by undertaking an analysis of the applicable zoning map and code to identify the zoning district of the parcel in question and the uses permitted by right in that district, as well as the uses permitted upon the issuance of a special use permit. In addition, a buyer should review the applicable zoning code to determine the associated bulk requirements. Further background is often available in a municipality's land use/comprehensive plan.

2.9 Condemnation, Expropriation or Compulsory Purchase

Governmental taking through eminent domain or condemnation is a possible risk in this jurisdiction. While there is only a slight risk that a governmental taking will occur, it appears more prevalent along rights of way to accommodate roadway-widening projects or the installation of public utilities.

The governmental taking process in New York State is codified in the New York Eminent Domain Procedure Law, and allows for condemnation by the filing of an appropriate map with the applicable county clerk (at which time the property set forth in the map vests in the governmental agency) or the filing of a petition to condemn, which seeks an order allowing the filing of an acquisition map. The title vests in the condemning party upon the filing of the acquisition map.

The condemning party is required to pay just compensation (defined as the fair market value of the property) to the former owner of the property that was acquired through condemnation.

2.10 Taxes Applicable to a Transaction

For the transfer of real estate, a transfer tax is due to the New York State Department of Taxation and Finance, and is paid to the applicable county clerk upon recordation of a deed. In order to record a deed, a transfer tax return (form TP-584) must be presented to the county clerk. The state transfer tax is USD2 for every USD500 of either consideration paid or the fair market value of the real property. Local municipalities may also impose a separate transfer tax, which varies by county.

Transfer tax and the cost of filing a form TP-584 are customarily seller expenses, although this can be negotiated. In addition, "Mansion Tax" is imposed on the conveyance of residential real property where the consideration is USD1 million or more, at a tax rate of 1% of the consideration paid, and is customarily paid by the purchaser. Transfers of real property in New York City may be subject to additional taxes.

A transaction of shares in a property-owning company also triggers a transfer tax obligation if the grantee, or a group of grantees acting in concert, acquires a controlling interest (50% or greater) from one or more grantors.

There are certain standard exemptions, including conveyances:

- to the federal or state government, or their agencies or political subdivisions;
- to secure a debt or other obligation;
- to confirm, correct, modify or supplement a prior conveyance;
- made as gifts;
- that are only intended as a change of identity;
- given in connection with a tax sale;
- by deed of partition;
- made pursuant to the federal Bankruptcy Act;
- that only consist of certain contracts to sell – or options to purchase – real property; or
- not deemed a conveyance within the meaning of New York tax law.

2.11 Legal Restrictions on Foreign Investors

Regulations issued since the passage of the Foreign Investment Risk Review Modernization Act of 2018

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expose even non-controlling foreign investments to potential Committee on Foreign Investment in the United States (CFIUS) review if the investment conveys certain minimal rights in property within one of the listed proximities to specified national security installations or infrastructure. In view of the substantial penalties should CFIUS later determine a filing should have been made, as well as CFIUS' authority to block an investment or even order divestiture, filing for such review by simple declaration or more detailed notice, if applicable, would seem advisable.

Investors from "excepted investor states" (currently Australia, Canada, New Zealand and the United Kingdom) are exempt from filing for non-controlling investments, provided the investor meets the detailed criteria of relationship to the "excepted" state outlined in the regulations. Even for these states, however, the usual rules apply for the acquisition of controlling interests.

Investors should also be aware that state regulations and statutes are continually evolving, and that various new ones may restrict investments from certain sources/countries, especially in agricultural land or technology sites.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Commercial real estate acquisitions are typically financed through commercial real estate loans from institutional lenders, customarily secured by a mortgage. In addition, commercial mortgage loans are usually further supported by guarantees of payment from the borrower's individual principals. For new construction, borrowers can apply for a construction loan mortgage.

In addition to mortgage loans, purchasers of commercial real estate may obtain mezzanine financing to finance amounts beyond what is loaned by the institutional mortgage lender. Mezzanine loans are secured by a pledge of the borrower's equity interest in the entity which owns the property. Developers also

raise funds to purchase real estate by selling equity in exchange for cash contributions.

3.2 Typical Security Created by Commercial Investors

Typically, the security interest created in connection with a mortgage loan is a first-in-priority mortgage lien on the real property. If permitted by the lender, one could borrow additional money from the same or a different lender secured by a mortgage, which would be subordinate to the first mortgage. The security interest is created upon recordation.

The mortgage lender may also choose to file a Uniform Commercial Code (UCC) Financing Statement to create a security interest in any fixtures located at the property, or to perfect a security interest in other non-real estate assets of the borrower.

3.3 Restrictions on Granting Security Over Real Estate to Foreign Lenders

The Bank Secrecy Act governs the obligation of financial institutions, including lenders, to engage in strict compliance and reporting measures with regard to the prevention of possible money laundering, terrorism finance or sanctions violations in international funds transfers or guarantees. Institutions must conduct extensive diligence of the parties to such transfers, routinely report all details, and file immediate reports of suspicious activity.

CFIUS continues to expand and modify its list of installations and infrastructure subject to the special requirements discussed above; moreover, recent administration policy statements and several proposed Congressional measures seek to expand the types of property acquisitions (especially in the agribusiness area) subject to investment review, and even prohibit certain parties from such investments.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

Mortgage recording taxes vary based on the county where the property is located, but generally range between 0.75% and 1.25% of the loan amount. The county clerk will also charge a fee to record the mortgage and accompanying loan documents or the filing of UCC Financing Statements, the costs of which vary

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widely based on the type of mortgage or other document being recorded, and the length of the document.

3.5 Legal Requirements Before an Entity Can Give Valid Security

Generally, an entity can give a valid security interest over real estate assets if it owns the real estate and has complied with its charter documents and applicable law. Certain charitable entities may also be required to obtain the permission of the Supreme Court of the State of New York or the New York State Attorney General before granting a security interest in real estate assets.

3.6 Formalities When a Borrower Is in Default

In New York, a mortgage is used to create a security interest in real property. A mortgage is perfected upon its recording in the local county clerk's office.

Prior to enforcement, it is a customary requirement in a commercial mortgage for a lender to be required to send a notice of default and provide the borrower with an opportunity to cure the default. If the mortgage is considered a "home loan" under New York law, then an additional 90-day statutory notice is required to be sent before the foreclosure of a mortgage can commence.

The length of a mortgage foreclosure action may vary greatly depending on the jurisdiction within the State of New York, the type of mortgage involved and the litigiousness of the parties. Once commenced, a commercial mortgage foreclosure action may take as little as one year to complete. Conversely, in the City of New York, it is estimated that a standard foreclosure of a home loan will take approximately six years.

Generally, the administrative laws and orders that restricted mortgage foreclosure actions during the COVID-19 pandemic have been lifted or removed.

3.7 Subordinating Existing Debt to Newly Created Debt

It is possible for existing secured debt to become subordinated to newly created debt in any circumstances, but ideally parties should take several steps in their documentation to avoid pitfalls.

3.8 Lenders' Liability Under Environmental Laws

Lenders are generally exempt from liability under federal and state environmental laws as long as the lender does not take title to, or "participate in the management" of, a contaminated property. Requiring a borrower to take action to address contamination, or renegotiating the terms of the secured interest, does not generally equate to "participating in the management" and will not subject a lender to liability. However, holding decision-making control over day-to-day activities or the environmental compliance of the site (ie, hazardous waste management), controlling expenditures or taking title to the property may make a lender liable.

3.9 Effects of a Borrower Becoming Insolvent

When a security interest is created and a foreclosure action is commenced prior to the filing of a bankruptcy by the borrower, the mortgage lien is generally secure and will typically survive the bankruptcy unless discharged by payment during bankruptcy. However, attempts to enforce the mortgage or pursue the foreclosure action are generally stayed unless and until the automatic bankruptcy stay is lifted.

3.10 Taxes on Loans

On 22 January 2021, New York State Assembly members reintroduced legislation which would require the recording of, and payment of recording tax on, mezzanine debt and preferred equity investments related to the real property whenever a mortgage is recorded with respect to the property. However, this legislation was not enacted.

4. Planning and Zoning

4.1 Planning and Zoning Framework

The primary policy that regulates land use in New York is the "Home Rule" concept, under which each individual municipality in the State (City, Town or Village) is entitled to regulate land use and make land use decisions. As a result, even though zoning is a police power vested in the State, various enabling acts adopted by the State Legislature vest primary land use authority in local municipalities. Each municipality typically has a Planning Board and a Zoning Board of Appeals

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(ZBA) to act as the primary authorities for review and approval of development plans. Each municipality also has a Code Enforcement Officer charged with enforcing the land use regulations within the municipality.

4.2 Development Process, Challenges and Enforcement

Typically, development rights are obtained through the discretionary land use approval process. Site plan approval is typically handled by a local Planning Board. Variances from the land use code (area and use) are handled by the ZBA. Special use permits can be reviewed and approved by the Planning Board, the ZBA or the governing legislative body, depending on the municipality. All applications for discretionary approval must go through an appropriate environmental review pursuant to the SEQRA. Any party aggrieved by a land use decision may appeal such decision to the New York State Supreme Court in a proceeding known as an “Article 78 action” (referencing Article 78 of the New York Civil Practice Laws and Rules). Such party must establish that they are specially harmed, different from the public at large, by the decision being challenged in order to maintain an Article 78 action. Generally, decisions are entitled to deference and can only be reversed if proven to be “arbitrary and capricious”.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

There are several types of entities available to investors to acquire and hold real estate, including, but not limited to:

- limited liability companies;
- corporations; and
- partnerships.

Limited liability companies are the most commonly used entity type to acquire real estate because they are typically characterised by flexible organisational governance, they offer limited liability protection to all members, and members can define their contractual obligation in the company’s operating agreement to

tailor it to reflect their business agreement and financial arrangements.

5.2 Main Features and Tax Implications of the Constitution of Each Type of Entity Corporation

A corporation is an association of shareholders formed under the New York Business Corporation Law that is a legal entity separate and distinct from its shareholders with the capacity for perpetual existence to:

- acquire, hold and dispose of property;
- sue or be sued; and
- have such other powers as may be conferred upon it by law.

Owners of a corporation are shareholders, who typically do not manage the day-to-day affairs of the corporation. Shareholders elect directors and approve extraordinary transactions and activities of the corporation.

The primary benefit of corporations is that the shareholders are generally not personally liable for the debts and obligations of the corporation, and liability is limited to the assets of the corporation. Directors and officers are generally not liable to shareholders or the corporation for their actions or inactions with respect to the corporation, provided that they act in a manner that is consistent with their fiduciary duties of care and loyalty. Corporations do not afford the same level of flexibility as partnerships and LLCs.

Limited Liability Company

An LLC is an unincorporated organisation of one or more persons having limited liability for the contractual obligations and other liabilities of the business. An LLC is a hybrid business organisation that combines the flexibility of governance and economic arrangements of a partnership and a corporation. The primary benefit of an LLC is that it:

- offers its members limited liability protection akin to shareholders of a corporation;
- is taxed like a partnership (except for a single-member LLC or unless the owners elect corporate tax treatment); and

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- is governed by contract, whereby the operating agreement is the primary document defining the rights of members, the duties of managers and the financial arrangements among the LLC's members.

Members and managers are generally not liable for the debts, obligations or liabilities of the LLC solely by reason of being a member or manager.

Partnership

A partnership is a voluntary agreement between at least two persons who bring together their money, property, labour or skills to conduct a business and share profits and losses. In this jurisdiction, commercial real estate is more often held in limited partnerships than general partnerships due to their liability structures. General partners are jointly liable for the debts and obligations of the partnership, while limited partners are not liable for the contractual obligations of a partnership unless they are also general partners or they participate in the control of the business.

Whether a general partnership or limited partnership, the partners do not have a separate interest in the property and are therefore obliged to treat partnership property as joint property. This is often a deterrent to some commercial real estate owners or investors who value the freedom to deal with their undivided interest in the property as would be permitted under a co-ownership arrangement.

5.3 REITs

Real estate investment trusts (REITs) are available in the United States and New York, although typically they are formed under Maryland law. New York follows the federal income taxation of REITs, but subjects REITs to state corporate franchise tax if they are subject to federal income tax. REITs can be publicly traded or privately held, and are available to foreign investors.

There are plenty of advantages of using REITs:

- they provide investors with the opportunity to invest in a diversified estate portfolio;
- they may provide for more flexibility in terms of tax-efficient sales of real estate by investors looking to exit a real estate portfolio; and

- depending on applicable tax rates, income generated by REITs may be subject to less aggregate federal income tax than real estate held through other types of entities.

The requirements for qualifying as a REIT are numerous and complex, but the primary statutory requirements are that:

- the REIT is managed by one or more trustees or directors;
- the beneficial ownership of the REIT is evidenced by transferable shares or by transferable certificates of beneficial interest;
- the REIT would be taxable as a domestic corporation but for Sections 856 through 860 of the Internal Revenue Code of 1986, as amended (the "Code");
- the REIT is neither a financial institution nor an insurance company subject to specified provisions of the Code;
- the beneficial ownership of the REIT is held by 100 or more persons;
- at all times during the last half of each taxable year, not more than 50% in value of the outstanding shares of the REIT are owned, directly or indirectly, through the application of certain attribution rules, by five or fewer individuals;
- the corporation makes an election to be taxable as a REIT, or has made this election for a previous taxable year that has not been revoked or terminated, and satisfies all relevant filing and other administrative requirements established by the IRS that must be met to elect and maintain REIT status;
- the REIT uses a calendar year for federal income tax purposes and complies with the record-keeping requirements of the Code and Treasury regulations promulgated thereunder;
- at the end of any taxable year, the REIT must not have any undistributed earnings and profits that are attributable to a non-REIT taxable year; and
- the REIT meets other tests regarding the nature of its income and assets, and the amount of its distributions.

5.4 Minimum Capital Requirement

New York State does not have a minimum capital requirement to start up any type of entity.

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5.5 Applicable Governance Requirements Corporations

The day-to-day management of a corporation's activities is the responsibility of the directors of the corporation, who generally delegate such management to officers. Certain significant matters associated with the governance and operation of the corporation may require the approval of the corporation's shareholders. Corporate governance is dictated by the provisions of the certificate of incorporation, by-laws and statutory law.

Limited Liability Companies

An LLC is presumed to be managed by its members unless the articles of organisation provide that the management is carried on by managers. Except as provided in the operating agreement, each member of an LLC is entitled to vote in proportion to the member's share of current profits. The articles of organisation of an LLC may provide for classes or groups of members having such relative rights, powers, preferences and limitations as the operating agreement of such LLC may provide. Members in a member-managed LLC, and managers in a manager-managed LLC, who exercise management powers or responsibilities have the duty of care and loyalty.

Limited Partnerships

Limited partnerships are managed by at least one general partner. Limited partnership governance is dictated by the terms of the limited partnership agreement, with the limited partnership law setting forth statutory defaults. In order to insulate the limited partners from unlimited liability, the general partner must be solely responsible for the management and operation of the partnership business. The limited partners cannot participate in the management or operation of the business.

A limited partner who does take part in the control, management or operation of the business of the limited partnership, including signing any documents on behalf of the partnership in its own capacity as a limited partner, risks being exposed to unlimited liability.

The Corporate Transparency Act was passed by Congress in 2021 and imposes a new beneficial ownership reporting requirement on both newly formed entities

and those that are currently in existence. The objective of the legislation is to make it more difficult for bad actors to shield their identity or facilitate illegal transactions through entities that may be opaque to federal governmental authorities in terms of the identity of individuals that own and operate those entities.

5.6 Annual Entity Maintenance and Accounting Compliance

New York corporations and limited liability companies have biennial statement fees of USD9 each. These fees are subject to change.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

A lease and a licence are two common legal arrangements that allow a person, company or other organisation to occupy or use real estate that it does not own.

A lease is a contract between a landlord and a tenant whereby the tenant is given the exclusive right to occupy the landlord's property for an agreed-upon time period. A lease is an interest in real property that can be transferred to another, subject to restrictions contained in the lease agreement.

A licence is an agreement granting a limited use of a property. A licence is not an interest in real property. A licence is typically terminable by the licensor, not transferable and not exclusive, and may be subject to a right of relocation.

6.2 Types of Commercial Leases Net Leases

The tenant pays rent, as well as all or a portion of the operating expenses for the property, such as taxes, insurance, maintenance and utilities. Parties sometimes refer to net leases as single net leases, double net leases or triple net leases. The distinctions are not absolute, but, in a triple net lease, the tenant pays all costs and expenses with respect to the real property.

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Gross Leases

The landlord provides services and pays the operating expenses for the property, and such expenses are typically factored into the tenant's rent. In addition, the tenant typically pays escalation charges with regard to real property taxes and operating expenses. In Class A office buildings, the tenant typically pays its proportionate share of taxes and operating expenses over the negotiated base year, but the customary practices vary by location.

In retail leases, the tenant typically pays its proportionate share of such taxes and expenses from the first dollar.

Ground Leases

The landlord leases the land to the tenant. The tenant pays ground rent, covers all costs and expenses, and owns and is responsible for all improvements to the premises. Upon the expiration of the lease, possession of the land and ownership of any improvements revert to the landlord.

6.3 Regulation of Rents or Lease Terms

There is no commercial rent regulation in New York State. The terms of commercial leases are a matter of negotiation between the parties, subject to case law and statutes pertaining to specific issues. For example, statutes provide that a lease cannot contain a waiver of a landlord's responsibility for its negligence.

6.4 Typical Terms of a Lease

The term of a typical commercial lease is five to 15 years, but the term of a typical ground lease is 30 to 100 years. It should be noted that New York State and City transfer taxes may be due on any lease with a term of more than 49 years, and under other circumstances.

The tenant is typically responsible for maintaining and repairing the space it occupies, whereas a landlord is typically responsible for repairing and maintaining the common areas, the structure, the exterior of the building and surrounding property.

Rent payments are typically made on a monthly basis, although rent may be paid annually or quarterly in a ground lease.

6.5 Rent Variation

Rent typically increases either annually or once every three or five years, usually by a predetermined amount, depending on the terms of the lease.

6.6 Determination of New Rent

Increases in rent under a commercial lease are typically determined by negotiation prior to entering into a lease. Increases can be expressed in terms of a fixed dollar amount, a per-square-foot amount, a percentage increase or a formula based on, for example, the Consumer Price Index or fair market rental value.

6.7 Payment of VAT

Value-added tax, or other taxes or governmental levies, are typically not payable on New York rent. An exception is the New York City Commercial Rent Tax (CRT) that is imposed on the rent paid by tenants of commercial property located south of the centreline of 96th Street in Manhattan.

6.8 Costs Payable by a Tenant at the Start of a Lease

A tenant may be responsible for all or a portion of the cost to build out its leased premises to the specifications required for its operation. Landlords and tenants will negotiate the condition in which the landlord must deliver the space to the tenant, which can range from as-is to "white box" to turnkey. Landlords are responsible for all costs associated with bringing the premises to the required condition, and tenants perform and pay for all additional work necessary for its use. Landlords will often also agree to pay a tenant improvement allowance, which the tenant can use to offset the costs of its work.

Alternatively, the landlord may be responsible for building out the space to meet the tenant's needs. This is known as a "turnkey" lease and may include a cap on the landlord's construction costs, with the tenant being responsible for excess costs.

6.9 Payment of Maintenance and Repair

Landlords are typically responsible for paying for the maintenance and repair of common areas used by several tenants, such as lobbies, elevators, parking lots and gardens. However, tenants are often responsible for reimbursing the landlord for their pro rata

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share of operating expenses. Reimbursement sometimes commences from the first dollar and sometimes over a base amount, depending on negotiations and the structure of the lease.

Ground leases are triple net leases whereby the tenant covers all expenses for maintenance and repair obligations of the leased properties.

6.10 Payment of Utilities and Telecommunications

Telecommunications and utilities are typically paid for by the tenants. Each tenant's space is either metered or submetered for electricity, or the tenant reimburses the landlord for electric costs pursuant to a formula.

The charges for heating, ventilation and air conditioning (HVAC) depend on how the property is engineered. Each tenant may have its own cooling system, or the tenants may be served by a building-wide cooling system during business hours and subject to significant charges for after-hours HVAC. Tenants may also control supplemental HVAC systems to provide overnight cooling, typically for IT and telecom installations.

6.11 Payment of Property Taxes

Other than under a gross lease or if the parties otherwise agree, a tenant is typically responsible for its share of real estate taxes or its share of increases in real estate taxes. When a tenant is the sole occupant of a property (eg, under a ground lease), the tenant will pay 100% of the real estate taxes, assuming its parcel is separately assessed, and will likely be required to pay those taxes directly to the municipality.

6.12 Insurance Issues

The landlord and tenant each have to insure their respective interests in the real estate, subject to the terms negotiated and included in the lease. Negotiated issues include whether rent abates because the space becomes unusable, for example, due to a casualty, pandemic or other force majeure, and who is required to maintain business interruption insurance.

6.13 Restrictions on the Use of Real Estate

A landlord can impose restrictions on a tenant's use of the real estate via the permitted use provision, which typically lists specific permissible and prohibited

uses of the space, and allows the landlord to declare a default and exercise available remedies if the tenant engages in an unpermitted use. The tenant's use can also be restricted by local zoning laws, as well as building and health regulations. Retail leases often also grant exclusive uses to tenants, which are limited to the tenant's specific product line and/or other competitors.

6.14 Tenant's Ability to Alter and Improve Real Estate

Tenants are typically permitted to alter or improve the real estate during the lease with the landlord's approval, and landlords generally allow merely cosmetic alterations without prior approval. A lease usually contains a limit on the cost and type of alterations a tenant can make without the landlord's approval.

6.15 Specific Regulations Commercial Leases

Commercial leases are generally governed by the agreement between the parties. However, there are laws and licensing requirements that are specific to particular uses, such as the operation of hotels, restaurants, banks, etc.

Residential Leases

The regulations and laws that apply to residential leases were overhauled by the Statewide Housing Stability and Tenant Protection Act of 2019 (HSTPA). Some residential buildings are subject to rent stabilisation regulations that establish caps on the amount of rent landlords can charge and the amount of increases they can impose. In addition, some residential tenancies are protected by older rent control laws. The HSTPA has made it more difficult for landlords to "deregulate" units that are subject to such regulations.

Carbon Emissions

In New York City, Local Law 97 targets greenhouse gas emissions from several classes of buildings by mandating significant emissions reductions. Owners of covered buildings will need to retrofit and upgrade systems to meet stringent energy standards, which ramp up over time. 2030 is a significant target date for many such upgrades. In the leasing context, landlords typically seek to shift the expense of Local Law 97 compliance to their tenants, but the extent of tenants'

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exposure can be negotiated in the lease and limited in certain respects.

6.16 Effect of the Tenant's Insolvency

The effect of a tenant's insolvency on its lease obligations is governed by the applicable bankruptcy, insolvency and creditors' rights statutes.

When the tenant files for bankruptcy, an "automatic stay" is imposed that initially restricts the enforcement of remedies or the termination of the lease by the landlord. Thereafter, there are specific requirements under bankruptcy law with respect to whether a lease is to be assumed or rejected.

6.17 Right to Occupy After Termination or Expiry of a Lease

A tenant typically does not have a right to occupy the relevant real estate after the expiry or termination of a commercial lease. However, commercial leases typically have a "holdover" provision stating that a tenant who continues to occupy the premises after the expiry or termination of the lease must pay a multiplier of the rent for the last month of the lease (typically 150% to 200%) and become a month-to-month tenant or a tenant at sufferance. A landlord can only evict a month-to-month tenant upon notice, whereas an action to evict a tenant at sufferance may be commenced at any time after the expiry or termination of the lease, subject to applicable laws.

6.18 Right to Assign a Leasehold Interest

Assignments of leasehold interests are negotiated by landlords and tenants. Typically, tenants are permitted to assign their leasehold interest or sublease all or a portion of the leased premises with the landlord's consent, or to assign to an affiliate or a successor to the tenant by merger, consolidation or acquisition of all or substantially all of the tenant's assets without the landlord's consent. Landlords will want to see financial information regarding the new subtenant, and may require tenants to remain liable for their obligations under the lease and/or to pay the landlord's attorney costs in relation to the consent for the assignment or sublease.

6.19 Right to Terminate a Lease

There are several events that typically give the landlord or the tenant the right to terminate the lease. For example, the lease typically states that if the landlord fails to complete the build-out of the space, the tenant has the right to terminate after a certain date.

The parties typically have a right to terminate in the event of a casualty if the space is not restored within a certain period of time. In addition, a landlord can terminate the lease if the tenant defaults and fails to cure the default – eg, by failing to pay rent.

A tenant may negotiate the right to an early termination of the lease, but such early termination rights are often expensive as tenants may need to pay a termination fee, reimburse a landlord for its unamortised costs and continue to pay rent for a negotiated period of time.

6.20 Registration Requirements

There are no registration requirements under New York law, other than with respect to regulated residential apartments. Memoranda of leases may be recorded in the county's land records. However, not all landlords agree to execute a memorandum of lease because landlords do not want the memorandum of lease encumbering title to the property. Recording fees are paid by a per-page formula and are generally paid by the party requesting and recording the memorandum of lease.

6.21 Forced Eviction

A tenant can be forced to vacate in the event of default (such as failure to pay rent) or upon the expiration of the lease. Such actions are governed by the Real Property Actions and Proceedings Law (RPAPL) of the State of New York.

In residential leases, the HSTPA amended the RPAPL to extend the time periods in non-payment proceedings. The HSTPA eliminated oral demands to vacate and increased the notice period for written demands to 14 days, while also increasing the tenant's time to provide an answer to ten days. In addition, the HSTPA amended RPL Section 235-e to require that tenants be reminded if rent is not received within five days of the due date. Failure to provide such a reminder can

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be used as an affirmative defence in a non-payment proceeding. The time period for completion of an eviction action varies from jurisdiction to jurisdiction.

Good Cause Eviction in Residential Leases

In April 2024, New York State passed a “good cause eviction” law, which applies to New York City and any other municipalities that opt in. Where the good cause eviction law is in effect, landlords must prove that they have good cause to refuse to renew a residential lease, and certain limitations are placed on rent increases. Tenants have a presumed right to renew a lease at the end of the term, unless an exception applies.

6.22 Termination by a Third Party

Portions of the leased premises may be taken by the government through eminent domain (condemnation). Condemnation provisions in leases are negotiated by landlords and tenants. Typically, in the event of a condemnation that takes a significant portion of the leased premises such that it is no longer usable for the tenant’s purposes, the parties have the option to terminate the lease. Typically, the landlord retains the right to the majority of the claim, and tenants have the right to claim for their fixtures and relocation costs associated with the condemnation.

6.23 Remedies/Damages for Breach

In commercial leases, remedies and damages for a tenant breach and termination of a lease are negotiated between landlords and tenants. There are no statutory or customary limitations on damages a landlord may collect.

Security deposits are negotiated between landlords and tenants. If landlords hold a security deposit, it can be in cash or letter of credit.

7. Construction

7.1 Common Structures Used to Price Construction Projects

Several structures are used to price construction projects.

- First, there is a traditional fixed price or lump sum contract in which the contractor (or a construction

manager) bears all of the risk for the job and must complete the job for that cost.

- On the other hand, in a cost-plus contract, the owner pays the contractor its cost plus a fee, making any cost overruns the owner’s responsibility.
- In a guaranteed maximum price (GMP) arrangement, also referred to as a not-to-exceed price, the owner will reimburse the contractor for costs and fees up to a maximum; this offers the owner more protection than a cost-plus contract because the contractor is responsible for any additional costs that exceed the GMP.
- Finally, in a unit price contract, the contract price is based upon the price of individual units of work, for which the contractor provides a specific price. The owner must compensate the contractor for every unit the contractor completes.

7.2 Assigning Responsibility for the Design and Construction of a Project

In New York, the design of a project must be completed by licensed design professionals, which include Professional Engineers (PE) and Registered Architects (RA). Traditionally, construction projects consist of a designer for the design phase and a contractor for the construction phase, in a process called design-bid-build. Typically, an architect leads the design phase of a project, employing additional professionals as sub-contractors. The contractor manages the construction phase of the project.

However, design-build delivery systems are becoming more popular, in which the design and construction services are constructed by a single entity using one contract. This arrangement reduces costs in both design and construction, provides a single point of responsibility, and can greatly shorten the delivery schedule by overlapping the design phase and the construction phase.

The third type of project delivery system is called a construction manager at risk (CMAR) method, which is a derivative of the design-bid-build process. However, instead of the designer overseeing the design phase and a contractor overseeing the construction phase, a CMAR acts as a consultant to the project owner during the development and design phases, and then acts as general contractor during the con-

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struction phase. The CMAR holds all the contracts for the subcontractors and commits to delivering the project within a guaranteed maximum price.

7.3 Management of Construction Risk

Construction risk is managed by:

- indemnification;
- warranties;
- limitations of liability;
- waivers;
- insurance provisions; and
- retainage.

Indemnification is limited by New York General Obligations Law Section 5-322.1, which prohibits a party involved in the construction, alteration, repair or maintenance of a building from contracting with another to indemnify or hold it harmless for injuries or damage to property caused by its own negligence, although the party may require indemnification for damages caused by the negligence of parties other than itself.

Warranties are almost always limited in duration by express contract provision. New York General Business Law Section 777-a specifically creates warranties applicable to the sales of new construction homes that include a one-year warranty that the home will be free from defects due to poor workmanship, and a six-year warranty that the home will be free from material defects.

Limitations of liability and waivers of damages are limited to the extent that the liability or damages were in contemplation of the parties at the time of entering into the contract, but will not be enforced if they purport to protect a party from liability for conduct that constitutes fraud, gross negligence or wilful misconduct. The most common limitation of liability in construction contracts is a waiver of consequential damages.

Insurance is often used to address the risks occasioned by the limitation on indemnity, and owners and contractors will often require to be added as an additional insured on the contractor's or subcontractor's commercial general liability policy, respectively.

Finally, retainage is used to reduce risk and incentivise contractors or subcontractors to complete a project by withholding a portion of payment until agreed-upon milestones are met. New York recently introduced a new law (New York General Business Law Section 756-c) that reduces the amount of retainage that can be withheld from a contractor or subcontractor on a private construction project to 5% of the contract sum for projects with costs that are equal to or greater than USD150,000. Before this law, parties could agree to withhold "a reasonable amount" of retainage.

7.4 Management of Schedule-Related Risk

Contract provisions require contractors and subcontractors to adhere to schedules prepared by the construction manager or architect on behalf of the owner. Owners can receive compensation for delays if provided for in the contract, most often in the form of liquidated damages. Alternatively, owners can recover actual damages to the extent damages can be proven. While not common, contracts will sometimes provide contractors with cash incentives to exceed scheduling milestones or costs below budget.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

The most common form of additional security to guarantee a contractor's performance is a performance bond. In most, if not all, public projects and in many private projects, the owner will require the general contractor to post a performance bond.

7.6 Liens or Encumbrances in the Event of Non-Payment

Contractors and designers may file liens to encumber property in the event of non-payment, pursuant to the New York Lien Law. Generally, in New York, a mechanic's lien can be filed at any time during the progress of a project, but no later than eight months after the completion of the contract or the final furnishing of labour or materials. For single-family dwellings, a mechanic's lien must be filed within four months of completion of the contract or the final furnishing of labour or materials.

The owner can discharge a mechanic's lien by depositing with the county clerk a payment equal to the amount claimed in the lien, with interest to the time

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of the deposit, or by posting a bond equal to 110% of the lien.

7.7 Requirements Before Use or Inhabitation

An owner must obtain a certificate of occupancy stating a legal use and/or type of permitted occupancy of a building before a building may be occupied. A certificate of occupancy has no expiration date.

8. Tax

8.1 VAT and Sales Tax

New York State does not have a value-added tax. New York State sales tax only applies to the sale or lease of tangible personal property and selected services; it does not apply to the sale or purchase of real estate.

8.2 Mitigation of Tax Liability

Parties occasionally use a Consolidation Extension and Modification Agreement to reduce mortgage recording tax. Provided both the existing lender and the new lender agree, the existing lender assigns its mortgage to the new lender, which will then amend the terms of the mortgage for refinance or purchase of the property. A buyer will then pay mortgage tax on the difference between the outstanding balance of the seller's existing mortgage and the buyer's new mortgage, rather than paying tax on the entire amount of the new mortgage.

8.3 Municipal Taxes

In Upstate New York, municipal taxes are typically not paid on the occupation of business premises nor on the payment of rent.

8.4 Income Tax Withholding for Foreign Investors

Foreign investors are generally subject to a 30% withholding tax on certain US source income, including real property rental income. In certain cases, an income tax treaty may reduce the withholding tax rate.

The Foreign Investment in Real Property Tax Act requires the purchaser of real property owned by a foreign investor to withhold a 15% tax on the total amount realised on the purchase. Foreign investors in partnerships are subject to a 15% withholding tax on the sale of their partnership interests.

8.5 Tax Benefits

Benefits include depreciation deductions for taxpayers with respect to improvements made to real property.

In addition, to the extent that the owner of the real estate used in a trade or business financed the acquisition of, or improvements to, the property with debt, the interest is deductible. Generally, the amount of interest that can be deducted is limited to 30% of the taxpayer's adjusted taxable income, but real estate businesses that meet certain requirements can elect to fully deduct their entire interest expense.

Individuals who own real estate directly or through a pass-through entity pay tax on any long-term capital gain recognised at significantly lower rates than other types of income.

Real property owners who hold property for investment, or for use in a trade or business, may dispose of that property in tax-efficient ways not available to other types of property, such as through Section 1031 of the Internal Revenue Code.

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