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Assignment and Subletting of Leased Premises: The Unreasonable Withholding of Consent

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ASSIGNMENT AND SUBLETTING OF LEASED PREMISES: THE UNREASONABLE WITHOLDING OF CONSENT

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I. Introduction

A long-standing rule of landlord and tenant law is that leases may be assigned and premises sublet at the pleasure of the tenant, unless the lease specifically provides otherwise.[1] The law generally does not favor restrictions on the alienability of property;[2] however, if a lease states that it is non-transferable[3] or that it is transferable only upon

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1. *See* 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 246[1], at 372.85 (Rohan ed. 1975); J. RASCH, NEW YORK LANDLORD AND TENANT 320 (2d ed. 1971); 3A G. THOMPSON, REAL PROPERTY 24 (Grimes ed. 1959).

2. *See, e.g.*, Francis v. Ferguson, 246 N.Y. 516 (1927); Riggs v. Pursell, 66 N.Y. 193 (1876); *see also* POWELL, *supra* note 1, ¶ 246[1], at 372.97; RESTATEMENT OF PROPERTY § 404 (1944).

3. For the sake of brevity, the term "transfer" will be used when the text applies both to an assignment of the lease and to the subletting of the premises. Where only one of the latter terms is intended, the appropriate one will be used.

the landlord's consent, the courts will enforce the parties' bargain.[4] Absent any qualifications on his right, the landlord may withhold his consent even if that withholding is unreasonable.[5] But if the lease provides that the landlord may not withhold consent unreasonably, the landlord must establish that his actions are reasonable.[6]

This latter provision—that the landlord shall not unreasonably withhold his consent to a transfer of the lease—is the focus of this Article. Frequently used in commercial and residential leases,[7] the provision is generally assumed to have a clear and well-established meaning.[8] Several jurisdictions have even enacted statutes proscribing the unreasonable withholding of consent in certain circumstances.[9] Yet most jurisdictions which have passed such legislation do not define the concept of "unreasonable withholding of consent," presumably concluding that it has a "well-established" or "generally known" usage. Closer examination indicates, however, that the meaning of the term is neither "well-established"

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4. *See, e.g.*, Willoughby v. Lawrence, 116 Ill. 11, 4 N.E. 356 (1886); Stern v. Thayer, 56 Minn. 93, 57 N.W. 329 (1894); *see also* Clasen v. Moore Bros. Realty Co., 413 S.W.2d 592 (Mo. 1967); De Peyster v. Michael, 6 N.Y. 467 (1852).

5. *See* WARREN'S WEED NEW YORK REAL PROPERTY § 1804 (4th ed. 1976).

6. *See, e.g.*, Friedman v. Thomas J. Fisher & Co., 88 A.2d 321 (D.C. Mun. Ct. 1952); Dress Shirt Sales, Inc. v. Hotel Martinique Assocs., 12 N.Y.2d 339, 190 N.E.2d 10, 239 N.Y.S.2d 660 (1963); Ogden v. Riverview Holding Corp., 134 Misc. 149, 234 N.Y.S. 678 (Sup. Ct.), *aff'd*, 226 App. Div. 882, 235 N.Y.S. 850 (1st Dep't 1929).

7. *See, e.g.*, Rock County Savings & Trust Co. v. Yost's, Inc., 36 Wis. 2d 360, 153 N.W.2d 594 (1967) (provision is a "usual compromise" between the lessor and lessee in commercial leases); *see also* Halper, *A New Lease on Apartment Life for Tenants*, MONEY 96, 97 (June 1976) (suggesting that such provisions be included in ordinary apartment leases).

8. *See, e.g.*, Nassif v. Boston & Maine R.R., 340 Mass. 557, 565, 165 N.E.2d 397, 402 (1960)(there are "usual standards of reasonableness.").

9. *See* ALASKA STAT. § 34.03.060 (1975); DEL. CODE ANN. 25, § 5512 (b)(1974); N.Y. REAL PROP. LAW. §§ 226-b, 236 (McKinney 1968) *as amended*, (McKinney Supp. 1975). *See also* Landlord and Tenant Act, 1927, 17 & 18 Geo. 5, c. 36, § 191:

> In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, changing or parting with the possession of demised premises or any part thereof without license of consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject —
>
> (a) to a proviso to the effect that such license or consent is not to be unreasonably witheld, but this provision does not preclude the right of the landlord to require payment of a reasonable sum in respect to any legal or other expenses incurred in connection with such license or consent . . . .

See also MODEL RESIDENTIAL LANDLORD AND TENANT ACT § 2-403 (Tent. Draft, 1969).

nor "generally known." Most courts which have had occasion to interpret the phrase have either used broad generalities which are analytically meaningless[10] or have not attempted to define the phrase at all.[11] The most extensive judicial analysis merely listed general categories of objections which could form the basis for reasonable refusal to consent.[12] Moreover, even the commentators seem to have overlooked this area.[13]

The Article will attempt to analyze the common law parameters of "unreasonable withholding of consent."[14]

II. Statutory Preemptions

Legislation on federal and state levels has partially alleviated the problem of determining what is an unreasonable withholding of consent. On the federal level, the Fair Housing Act of 1968 (1968 Act)[15] prohibits any refusal to sell or rent housing to an individual because of race, religion, color, sex or national origin.[16] Accordingly, if a landlord refuses to consent to the transfer of a lease for any of the reasons proscribed by the statute, the withholding of consent is legislatively unacceptable and presumably unreasonable. Because

10. *See, e.g.*, Moore v. Bannister, 269 So. 2d 291, 293 (La. App. 1972) (objections were unreasonable when the proposed transferee was "a reputable, substantial business man who had engaged in business in the area for several years . . . ."; Haritas v. Goveia, 345 Mass. 774, 775, 188 N.E.2d 854, 855, *cert. denied*, 375 U.S. 845 (1963) (objections are unreasonable when the proposed transferees are "reputable persons of business experience and . . . means."); Grossman v. S.E. Nichols Co., 43 App. Div. 2d 674, 675, 349 N.Y.S.2d 745, 747 (1st Dep't 1973) (mem.), *aff'd mem.*, 35 N.Y.2d 985, 324 N.E.2d 888, 365 N.Y.S.2d 531 (1975) (the "reasonable requirements of assignment" are "that there be no default, that there be continued liability, and that there be full assumption by a financially secure assignee.").

11. *See* United States v. Toulmin,253 F.2d 347 (D.C. Cir. 1958); Johnson v. Jaquith, 189 So. 2d 827 (Fla. Dist. Ct. App. 1966); Edelman v. F.W. Woolworth Co., 252 Ill. App. 142 (1929).

12. American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 297 N.Y.S.2d 156 (Sup. Ct. 1969).

13. The only relevant law review article which attempts to show when consent is reasonably withheld is Note, *Effect of Leasehold Provisions Requiring the Lessor's Consent to Assignment*, 21 HASTINGS L.J. 516, 520-22 (1970). Treatises are likewise not very helpful. *See, e.g.*, RASCH, *supra* note 1, at 349 (which merely repeats the categories set forth in American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 297 N.Y.S.2d 156 (Sup. Ct. 1969); 1 AMERICAN LAW OF PROPERTY § 3.58 (Casner ed. 1952).

14. This Article will not attempt to answer collateral questions, such as whether particular consent provisions are covenants, or remedies available for breach of the provision. For a discussion of these and other related topics, see generally Annot., 54 A.L.R.3d 679 (1974).

15. 42 U.S.C. §§ 3601-31 (1970), *as amended*, (Supp. V, 1975) [hereinafter cited as 1968 Act].

16. *Id.* § 3604 (Supp. V, 1975).

there are several exceptions to the 1968 Act its provisions should be carefully examined if any question arises as to its applicability.[17]

Another relevant federal statute is the Equal Credit Opportunity Act of 1974 (ECOA).[18] This Act prohibits any creditor from discriminating against any applicant for credit on the basis of sex or marital status.[19] The statute defines credit to include the right to defer payment of a debt or to incur debts.[20] If the leasing of property, with its concommitant undertaking to pay the full rent in monthly installments is deemed to be a "credit" transaction within the purview of this Act, then the ECOA applies and pro tanto preempts the common law.

In addition, many states have enacted legislation similar in scope and purpose to these federal statutes. Most states have some form of fair housing law that makes it unlawful to discriminate on the basis of race, religion, color, sex or national origin,[21] and some states have enacted legislation similar to the ECOA making discrimination unlawful in credit transactions.[22] Many states make other forms of discrimination unlawful as well[23] and some of these anti-

17. Included among the exceptions to the 1968 Act's coverage are transactions involving single family residencies or transactions not involving the services of a real estate broker or agent and not involving the publication of any notice that indicates discrimination is being practiced, 42 U.S.C. § 3603(b) (1970), or certain transactions involving a religious organization or a private club. *Id.* § 3607 (1970).

18. 15 U.S.C. §§ 1691 a-e (Supp. V, 1975) [hereinafter cited as ECOA].

19. *Id.* § 1691(a).

20. *Id.* § 1691a(d).

21. *See, e.g.*, ALASKA STAT. § 18.80.240 (1974); CAL. CIV. CODE § 51 (West 1954); COLO. REV. STAT. ANN. § 24-34-405 (1974); CONN. GEN. STAT. ANN. § 53-35 (West 1960); FLA. STAT. ANN. § 509.141 (West Supp. 1976); ILL. CONST. art. 1, § 17 (1971); ILL. ANN. STAT. ch. 24, § 11-11.1-1 (Supp. 1976); MASS. ANN. LAWS ch. 151B, § 4(6) (Michie/Law. Co-op 1976); MICH. COMP. LAWS ANN. § 564.201 (1976); MO. ANN. STAT. § 213.105 (Vernon Cum. Supp. 1976); N.J. STAT. ANN. 10:5-4 (West 1976); N.Y. EXEC. LAW § 296 (McKinney 1972); OHIO REV. CODE ANN. § 4112.02(H)(1) (Page 1973); PA. STAT. ANN. tit. 43, § 955(h) (Purdon Supp. 1976); VA. CODE ANN. § 36-86 (1976); WIS. STAT. ANN. § 101.22 (1973).

22. *See, e.g.*, CAL. CIV. CODE § 1812.30 (West Supp. 1976); COLO. REV. STAT. § 5-1-109 (1974); CONN. GEN. STAT. ANN. § 36-437 (West Supp. 1976); OHIO REV. CODE ANN. § 4112.02 (H)(3) (Page 1973); WIS. STAT. ANN. § 138.20 (1975).

23. *See, e.g.*, CAL. CIV. CODE § 54.1(b) (West 1954) (physical disability, marital status); CONN. GEN. STAT. ANN. § 53-35 (West 1960) (age, physical disability, marital status); ILL. ANN. STAT. ch. 24, § 11.11.1-1 (Supp. 1976) (physical or mental disability); KAN. STAT. § 44.1009(c)(1) (Supp. 1976) (blindness); MASS. GEN. LAWS ANN. ch. 151B, § 4(6) (Michie/Law. Co-op 1976) (age, blindness, marital status); MICH. COMP. LAWS ANN. § 564.201 (Supp. 1976) (age, physical or mental disability, marital status); N.J. STAT. ANN. § 10:5-4 (West 1976) (physical disability); N.Y. EXEC. LAW § 296.5(9)(1) (McKinney 1972) (physical or mental

discrimination provisions relate even to non-residential property.[24]

Finally, some jurisdictions have imposed a statutory requirement that the landlord must not unreasonably withhold his consent to the transfer of a lease, regardless of whether the lease contains such a provison.[25] When such legislation is applicable, it must be carefully examined to determine whether it contains any provisions that would preempt the common law meaning of the phrase. One example is the Alaska statute[26] purporting to set forth an exclusive list of reasonable grounds for refusal to consent. However, even here the common law parameters of reasonableness could help to clarify the scope of the statute. Furthermore, they would continue to govern the interpretation of commercial leases which are not subject to the statute.

III. Common Law Definitions of "Reasonableness"

The use of the "reasonable man" standard accounts for the difficulty encountered in determining whether a particular withholding of consent to the transfer of a lease is reasonable. Application of this standard makes generalization difficult, since each case must be determined on its own peculiar facts:[27]

> [T]he propriety of each refusal to consent to a proposed sublease must depend upon its own peculiar facts and circumstances. The basis asserted by defendants for their unwillingness to approve of the underletting may be justifiable in one instance, and not in another. No adjudication as to the reasonableness or unreasonableness of the defendants' conduct in the situation referred to in the complaint can be an authority as to the validity or invalidity of a similar refusal on some other occasion.

The situation is further complicated by Anglo-American legal tradition, which views each piece of real property as unique and dis-

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disability, martial status); N.Y. REAL PROP. LAW § 236 (McKinney 1968) (children); PA. STAT. ANN. tit. 43, § 955(h) (Purdon Supp. 1976) (physical or mental disability).

24. *See, e.g.*, CONN. GEN. STAT. ANN. § 53-35 (West 1960); ILL. CONST., art. 1, § 17 (1971); ILL. ANN. STAT. ch. 24 § 11-11.1-1 (Supp. 1976); KY. REV. STAT. ANN. § 344.360 (1972); S.D. COMPILED LAWS ANN. §§ 13-20(1) (Supp. 1976).

25. *See* text accompanying note 9 *supra*.

26. ALASKA STAT. § 34.03.060 (1975).

27. Allen v. Carsted Realty Corp., 133 Misc. 359, 360, 231 N.Y.S. 585, 586 (Sup. Ct. 1928), *aff'd*, 226 App. Div. 733, 233 N.Y.S. 688 (1st Dep't 1929). *See also* American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 297 N.Y.S.2d 156 (Sup. Ct. 1969).

tinct from every other piece of realty.[28] So while the circumstances surrounding the withholding of consent in different situations may be similar, the "uniqueness" of each piece of realty may require the reasonable man to react differently in each situation. These considerations undoubtedly inspired one court's classic understatement: "What constitutes the elements of unreasonableness in the act of withholding consent presents a question not simple in resolution."[29] Bearing this in mind, this Article shall attempt to isolate and explain the elements of reasonableness in withholding of consent situations.

A. Reasonableness Implies Objective Considerations

Courts determine whether the withholding of consent to a transfer of a lease is reasonable by using objective criteria only.[30] Subjective or arbitrary considerations are irrelevant,[31] as are the mere whim and caprice of the lessor.[32] An examination of relevant case law underscores this point.

In *Broad & Branford Place Corp. v. J.J. Hockenjos Co.*,[33] the lease provided that the premises, a store, could not be assigned or sublet without the prior written consent of the lessor, which was not to be withheld unreasonably.[34] The lease also provided that the premises

28. It is for this reason that the remedy of specific performance is available to enforce all contracts for the sale of realty, but does not otherwise apply except in extraordinary circumstances. "A compensation in damages will not afford adequate relief; 'for the peculiar locality, soil, vicinage, advantage of markets and the like conveniences of an estate contracted for, cannot be replaced by other than land of equal value.'" Losee v. Morey & Cramer, 57 Barb. Ch. (N.Y.) 561, 565 (1865), *quoting* Best v. Stow, 2 Sand. Ch. N.Y. 298, 301 (1861). *See also* Haffner v. Dobrinski, 215 U.S. 446 (1910); Mechanics' Bank v. Seton, 26 U.S. (1 Pet.) 298 (1828); Sinclar Refining Co. v. Miller, 106 F. Supp. 881 (D. Neb. 1952). The uniqueness notion is not merely restricted to contracts calling for the conveyance of a fee estate. It has been extended to agreements for the transfer of lesser estates such as leaseholds and easements. *See, e.g.*, H. McCLINTOCK, LAW OF EQUITY 106 (2d ed. 1948); W. WALSH, A TREATISE ON EQUITY 304 (1930).

29. Mitchell's, Inc. v. Nelms, 454 S.W.2d 809, 813 (Tex. Civ. App. 1970).

30. American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 33-35, 297 N.Y.S.2d 156, 159-60 (Sup. Ct. 1969).

31. *Id.*; *accord*, Chanslor-Western Oil & Dev. Co. v. Metropolitan Sanitary Dist., 131 Ill. App. 2d 527, 266 N.E.2d 405 (1970). *See also* Mitchell's, Inc., v. Nelms, 454 S.W.2d 809 (Tex. Civ. App. 1970); Grossman v. Barney, 359 S.W.2d 475 (Tex. Civ. App. 1962).

32. Broad & Branford Place Corp. v. J.J. Hockenjos Co., 132 N.J.L. 229, 232, 39 A.2d 80, 82 (1944); Underwood Typewriter Co. v. Century Realty Co., 220 Mo. 522, 526, 119 S.W. 400, 403 (1909).

33. 132 N.J.L. 229, 39 A.2d 80 (1944).

34. *Id.* at 230, 39 A.2d at 81.

were to be used only as a paint store (except if the lessor agreed to a different use, "which consent shall not be unreasonably withheld.")[35] The proposed sublessee intended to use the premises for the sale of poultry. Though the case was remanded for a new trial due to an evidentiary error, the court analyzed the provision as follows:[36]

> Arbitrary considerations of personal taste, sensibility, or convenience do not constitute the criteria of the landlord's duty under an agreement such as this. Personal satisfaction is not the sole determining factor. Mere whim or caprice, however honest the judgment, will not suffice . . . . The standard is the action of a reasonable man in the landlord's position. What would a reasonable man do in like circumstances? The term "reasonable" is relative and not readily definable. As here used, it connotes action according to the dictates of reason—such as is just, fair and suitable in the circumstances.

In *American Book Co. v. Yeshiva University Development Foundation, Inc.*,[37] the lessor was affiliated with an orthodox Jewish institution whose theology opposed the practice of birth control. Accordingly, the lessor refused to permit the subleasing of space to the Planned Parenthood Federation of America. The court decided that the lessor's personal, philosophical views were irrelevant:[38]

> The standards of "reasonableness" have not heretofore been clearly delineated by any single New York case, but are left to the trial court to determine in accordance with the particular factual patterns before it, and the conceptual boundaries may be only faintly discerned in the few reported cases.
>
> It would appear . . . that the purported reasons for refusal of consent by a landlord fall into two broad categories - objective and subjective. By "objective" are meant those standards which are readily measurable criteria of a proposed subtenant's or assignee's acceptability, from the point of view of *any* landlord. . . .
>
> Most of these categories form a ready basis upon which to predicate a "reasonable" refusal, and need no further elucidation.

The court concluded: "To the extent that rejection of a proposed subtenancy is based upon the supposed need or dislikes of the landlord, a policy of judicial disapproval of such subjective criteria is discernible."[39]

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35. *Id.*, 39 A.2d at 81.
36. *Id.* at 232, 39 A.2d at 82.
37. 59 Misc. 2d 31, 297 N.Y.S.2d 156 (Sup. Ct. 1969).
38. *Id.* at 33-34, 297 N.Y.S.2d at 159-60.
39. *Id.* at 34, 297 N.Y.S.2d at 161.

1. The Lessor's Identity

Objective criteria do not vary with the identity of the lessor.[40] Instead, ordinary and reasonable commercial standards are applied to determine whether refusal to agree to a transfer is reasonable — regardless of who the lessor may be.[41]

> [W]hen a religious or religiously affiliated or educational insititution operates a commercial enterprise or owns commercial property, it is to be held to the established standards of commercial responsibility, its acts and conduct being vested with no greater and no lesser sanctity than those of any other owner.

That the lessor may be a municipal corporation likewise does not change the applicable standards. In *Chanslor-Western Oil & Development Co. v. Metropolitan Sanitary District*[42] the lessor was a municipal corporation which refused to consent to the subletting of the premises unless there was a renegotiation (and presumably an increase) of rent. The lower court, in a declaratory judgment, held that the lessor unreasonably refused its consent to the subletting.[43] On appeal, the lessor argued that as a municipal corporation, it was entitled to demand a reappraisal of the rents analogous to the state taxing authority's power to reassess and revalue property.[44] But the court rejected this contention, stating that in exercising non-governmental functions, "a municipal corporation stands upon the same footing as other corporations in regard to its property."[45]

Thus, at least with regard to commercial activities,[46] the identity

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40. *See* text accompanying notes 41-47 *infra*.

41. American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 36, 297 N.Y.S.2d 156, 162 (Sup. Ct. 1969).

42. 131 Ill. App. 2d 527, 266 N.E.2d 405 (1970).

43. *Id.* at 528, 266 N.E.2d at 406.

44. *Id.* at 530, 266 N.E.2d at 408.

45. *Id.* at 529, 266 N.E.2d at 407.

46. In both *American Book Co.* and *Chanslor-Western*, the courts stressed that commercial activities, and not religious *(American Book Co.)* or governmental *(Chanslor-Western)* activities were in issue. Chanslor-Western Oil & Dev. Co. v. Metropolitan Sanitary Dist., 131 Ill. App. 2d 527, 529, 266 N.E.2d 405, 407 (1970); American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 36, 297 N.Y.S.2d 156, 162 (Sup. Ct. 1969). Thus the issue of whether different standards would apply to religious or governmental activities remains open. Indeed, *American Book Co.* noted that section 259-b of the New York Real Property Law is an exception to New York's anti-discrimination law, as it permits differences of creed to be taken into account when property is owned by a religious institution and is used "for religious purposes." 59 Misc. 2d at 36, 297 N.Y.S.2d at 162; *see also* N.Y. REAL PROP. LAW § 259-b (McKinney 1972).

of the lessor has no bearing on the standards used to determine whether refusal to consent to the transfer of a lease is reasonable. This result may be desirable from a policy standpoint since it injects some modicum of uniformity into these situations. Lessees need merely be concerned with the question of what is commercially reasonable in the circumstances; they do not have to refine this further, with reference to the lessor's character or identity. Predicting what a court will consider commercially reasonable in given circumstances is difficult enough, a far worse situation would obtain if the lessee's task were twofold, *i.e.*, to guess whether in a particular case the commercial standard applied, and then to ascertain what is objectively reasonable for a church, municipal corporation, educational institution, and so on.

Furthermore, if the lessor's identity affected the applicable standard, the standard for the same premises could change each time the property was sold. The court in *American Book Co.* recognized these potential difficulties and appropriately held that the identity of the lessor does not alter applicable standards.[47]

2. *Factors Taken Into Consideration*

In applying the objective "reasonable man" standard, an interesting but difficult problem arises concerning the factual considerations which may be evaluated in determining whether consent has been unreasonably withheld. A court must decide whether to consider only those factors which affect the particular unit whose transfer is at issue or to include factors which affect other units or properties as well.

In *Krieger v. Helmsley-Spear, Inc.*,[48] the lessor refused to consent to the subleasing of office space on the ground that the proposed sub-tenant was presently occupying office space in another building owned by the lessor. The proposed sublessee's lease in the other building was about to expire, and negotiations for a new lease were

47. American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 34, 297 N.Y.S.2d 156, 160-61 (Sup. Ct. 1969). *American Book Co.* and *Chanslor-Western* are the only reported cases which deal specifically with the issue of the lessor's identity. Both of these cases deal with commercial and not residential leases, but presumably, residential leases are governed by similar rules.

48. 62 N.J. 423, 302 A.2d 129 (1973).

in progress. The lessor withheld consent solely to prevent losing the sublessee as a tenant in its other building. Holding that the lessor unreasonably withheld his consent, the court stated: "The clause [*i.e.*, that the lessor shall not unreasonably withhold his consent] is for the protection of the landlord in its ownership and operation of the particular property—not for its general economic protection. Otherwise the landlord could refuse consent if it had vacancies in its other building."[49]

In *Houlder Bros. & Co. v. Gibbs*,[50] an English court ruled that a lessor may not consider any factors extraneous to the lessor-lessee relationship with respect to the particular premises in question. The lease in *Houlder Bros.* provided that "[the lessee], will not, during the said term, without the consent in writing of the lessor first obtained, assign, sublet, or part with the possession of the hereby demised premises, or any part thereof, such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation."[51] Conceding that the proposed assignee was respectable and responsible, the lessor nonetheless refused to permit the assignment because: "[B]y the assignment I should lose Roneo, Ld., as good tenants of No. 12 (the building adjoining No. 10, the building under lease), and because I should have great difficulty in finding any tenant for No. 12 in the present abnormal condition of trade . . . ."[52] The court held that the lessor could not base its decision on matters extraneous to the premises at issue, and held the withholding unreasonable.[53] Clearly then, where a lessor owns several properties which are not otherwise interconnected, matters affecting such other properties do not by themselves justify the

49. *Id.* at 424, 302 A.2d at 129.

50. [1925] 1 Ch. 575.

51. *Id.* at 580.

52. *Id.* at 581.

53. *Id.* at 583. The court stressed the importance of the lessor-lessee relationship:

> I think that one must look at these words in their relation to the premises, and to the contract made in reference to the premises between the lessor and lessee; in other words, one must have regard to the relation of lessor and lessee inter se, or, perhaps one may add, to the due and proper management of the property . . . . But I do not think the words of the covenant can be so interpreted as to entitle the lessor to exercise the right of refusal when his reason given is one which is independent of the relation between lessor and lessee, and is on grounds which are entirely personal to the lessor, and wholly extraneous to the lessee.

Id.

refusal to consent to a transfer of lease.

Where ownership of several premises is interconnected, matters involving all of the lessor's properties may be considered. In *Kroger Co. v. Rossford Industrial Corp.*,[54] the owner of a shopping center refused to permit the assignment of a store's lease because it was not informed of the use to which the store would be put. While the original lease contemplated use of the property as a retail food store, the proposed assignment allowed any use of the premises other than as a retail food store.[55] The court held that the owner's refusal to consent was reasonable because the store was part of an integrated shopping center and it was possible that the nature of the sublessee's occupancy could adversely affect the entire shopping center. Withholding of consent was justified not because of the sublessee's potential effect on the leased premises alone, but rather because of its possible effect on other related premises. This result may depart from the rule that in the absence of any lease restriction, a transferee may employ premises for any legally permissible use.[56]

A similar conclusion was reached in an English case, *Governors of Bridewell Hospital v. Fawkner & Rogers.*[57] There, the lessor refused to consent to an assignment of a lease to the Salvation Army, claiming that "the use of the premises for the purposes of the Salvation Army might deteriorate the other property held by the corporation as governors of the hospital."[58] The lease provided that the premises could not be transferred without the lessor's consent, but that consent was not to be unreasonably withheld. The court upheld the lessor's position:[59]

> Here was a body of gentlemen, holding a considerable estate in the City of London, and they had to consider not merely the tenant of any particular premises forming part of that estate . . . but the well-being of the whole estate. It might be that one property was intended to be held for a purpose which, however excellent in itself, might deteriorate the other properties.

Clearly, when an integrated realty complex is involved, it is proper for the lessor to consider the effects of the transfer on the entire complex.

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54. 51 Ohio Op. 2d 382, 25 Ohio Misc. 43, 261 N.E.2d 355 (C.P. 1969).
55. *Id.* at 383, 25 Ohio Misc. at 44, 261 N.E.2d at 356.
56. *Id.*
57. 8 T.L.R. 637 (1892).
58. *Id.*
59. *Id.*

This reasoning clearly extends to multiple units within a single building. In *Premier Confectionery (London) Co. v. London Commercial Sale Rooms, Ltd.*,[60] a store and a kiosk in one building were operated by a single lessee under two separate leases. Pursuant to a lease requirement, both properties were being used as tobacconist shops. The lessee went bankrupt and the liquidator (trustee) sought to assign the lease of the kiosk only. The lease provided that the lessor's consent was a prerequisite to transfer, but under English law[61] this was subject to an implied provision that consent was not to be withheld unreasonably. The lessor withheld consent on the ground that it would suffer economic harm if forced to lease the two properties separately. The kiosk held a competitive advantage over the store because it was so situated that it drew business away from the store and its rent was only one-third that paid by the store.[62] The lessor feared that if the kiosk was rented independently of the store, it would become impossible to lease the store at its current rental. The court held that the lessor was entitled to consider how the transfer of the kiosk would affect the other property in the building. Since the lessor's fears were reasonable, so was its refusal to consent.[63]

Thus, when several properties form an integrated unit, the effect of a sublease on the entire unit may be considered in determining whether a refusal to consent is objectively reasonable. When common ownership is the properties' only shared characteristic, factors affecting non-transferred properties may not be considered in determining whether consent to a transfer is reasonably refused.

No precise rule can determine the line between these two categories; the trier of fact will have to decide each case on its own distinctive facts and circumstances. Perhaps the most practical way to determine whether properties are interrelated is to adopt a "reasonable lessee" standard. Thus, where the mythical reasonable man, acting as a lessee, knows or should know that a given lessor owns other premises, then the lessor should be allowed to grant or withhold consent based upon factors affecting such other premises.

Since it is customary for a lessor to own an entire building (as

60. [1933] 1 Ch. 904.
61. Landlord and Tenant Act, 1927, 17 & 18 Geo. 5, c. 36, § 19(1).
62. [1933] 1 Ch. at 910-11.
63. *Id.* at 911-13.

opposed to just one store or one floor in a building), reason dictates that he should be permittd to object to transfers which may adversely affect other units within the building. If the building belongs to a larger unit of a type customarily owned by one person (such as a shopping center or residential development), the lessor should be able to consider factors affecting the larger unit as a whole. But where common ownership is not necessarily the rule (*e.g.*, adjoining buildings may or may not be held by the same owner), the lessor should not be permitted to consider factors affecting other premises. What is customary will depend on the locale and the types of premised involved.

B. Objective Reasonableness

A two-step test determines whether a refusal to consent to transfer of a lease is reasonable. First, it must be determined whether the lessor's reason is unacceptable per se, even if true. An example of a per se unacceptable reason would be any reason that is subjective rather than objective. For instance, if the lessor, for no objective reason, albeit honestly, dislikes the proferred transferee. Second, if the lessor's reason is not per se unacceptable, the reason must be scrutinized to determine if it is objectively acceptable under the circumstances.

1. Per Se Unacceptable Reasons

The original lease is the governing instrument; its terms control all of the relationships involved — not just the relationships between the lessor and the lessee but also between the lessor and all subsequent transferees. Any attempt by the lessor or lessee to go beyond the terms of the lease is impermissible and is per se unacceptable. Thus, a lessor may not condition his consent to a transfer upon a revision of the lease terms. In *Chanslor-Western Oil & Development Co. v. Metropolitan Sanitary District,*[64] the lessor refused to consent to a subletting unless there was a reappraisal of the premises and an increase in rent. The court held that consent was unreasonably withheld because the lessor was bound by the original

64. 131 Ill. App. 2d 527, 266 N.E.2d 405 (1970).

lease, which did not provide for such rent increases.[65]

If the original lease does not limit the use to which the premises could be put, the lessor may not impose any such restrictions as a condition for granting consent. In *Roundup Tavern, Inc. v. Pardini*,[66] the original lease placed no restrictions on the business which could be operated on the leased premises. The lessor, however, objected to the proposed use of the premises as a tavern and withheld his consent to the assignment.[67] The court held this reason invalid because the original lease did not proscribe this use.[68]

In *Edelman v. F. W. Woolworth Co.*,[69] the lessors withheld consent to the subletting of a store because the proposed sublessee would compete with the lessors,[70] who conducted a similar retail store one block away. The original lease contained no limitation upon the use of the store. The court held that the refusal to consent was unreasonable: "[I]f . . . the plaintiffs had desired to prevent the subletting of the premises to a business competitor they should have so stated in the lease. Not having done so, we think their objection to the subtenant, namely, that he would be a business competitor of plaintiffs, was arbitrary and unwarranted."[71]

Just as the lessor is bound by his original bargain and cannot change the terms of the lease, he cannot refuse to consent merely because his lessee will make a profit on the transfer.[72] A fortiori, he cannot insist on receiving a share of the lessee's profit as the price

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65. *Id.* at 530, 266 N.E.2d at 408. The court stated:

> [T]he District [lessor] contends that . . . it may condition consent on a reappraisal of the land and the establishment of a new rent schedule. In our view, it cannot be seriously maintained that the parties contemplated a re-negotiation of the rental each time consent to a sublease was requested. Such an interpretation is inconsistent with the detailed provisions of the lease . . . . Consequently, we hold that defendant's withholding of consent on the condition of reappraisal and establishment of a new rent schedule is arbitrary and unreasonable.

Id.

66. 68 Wash. 2d 513, 413 P.2d 820 (1966).

67. *Id.* at 515, 413 P.2d at 821.

68. *Id.* at 515-16, 413 P.2d at 821-22.

69. 252 Ill. App. 142 (1929).

70. For a more detailed discussion of the competitor issue, see text accompanying notes 134-36 *infra*.

71. 252 Ill. App. at 145.

72. *See* Moore v. Bannister, 269 So. 2d 291 (La. App. 1972), where the lessor's silence was deemed tacit approval of a subleasing, although the sublessee was paying more than double the rent paid by the lessee.

for his consent.[73] Even where the lessor withholds consent because he desires to reobtain the use of the premises, he continues to be bound by the original lease provisions and his consent is unreasonably withheld.[74] Several English cases have gone so far as to say that the lessor's consent is unreasonably withheld even when he offers to pay the lessee the same price that the transferee is to pay for the proposed transfer.[75]

Although virtually all of the cases indicate that the original lease governs and limits the lessor's conduct, one notable exception deserves discussion. In *United States v. Toulmin,*[76] the lessor refused to approve a proposed sublease and assignment[77] whereby the insolvent tenant would retain legal title to, as opposed to merely a right to be paid for, certain fixtures installed by the tenant. The majority held that the lessor's refusal to consent was reasonable because,[78]

> the uninterrupted use of the fixtures . . . was essential to the continued enjoyment of the property under the sub-lease and assignment, and thus to the landlord's receipt of rent. The proposed retention by the then insolvent tenant of complete legal title, instead of its lesser equitable monetary interest, in the fixtures might well have allowed the tenant's creditors to interrupt or terminate that enjoyment and receipt of rent.

If the principle that the lessor is bound by the lease provisions were applied here, it would seem that the lessor should not have been permitted to withhold consent. Judge Bazelon recognized this in his dissenting opinion: "Complications resulting from shared property rights in fixtures seem . . . irrelevant. They would grow from the provisions of the lease and should be held to have been within the contemplation of the parties when they bargained for a right to sublease."[79]

The precise meaning of *Toulmin* is very difficult to determine since the facts involved are not presented in detail. Adding to the

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73. Bedford Inv. Co. v. Folb, 79 Cal. App. 2d 363, 180 P.2d 361 (1947).

74. Cedarhurst Park Apartments, Inc. v. Milgrim, 55 Misc. 2d 118, 284 N.Y.S.2d 330 (Nassau Dist. Ct. 1967).

75. *In re* Winfrey & Chatterton's Agreement, [1921] 2 Ch. 7; Bates v. Donaldson, [1896] 2 Q.B. 241.

76. 253 F.2d 347 (D.C. Cir. 1958).

77. The opinion does not explain the exact nature of the proposed transfer. It merely refers to a "proposed sublease and proposed assignment." *Id.* at 348.

78. *Id.*

79. *Id.* at 349 (Bazelon, J., dissenting).

confusion is the court's puzzling statement that this is not a case where "the landlord was unreasonably attempting to modify or revoke the original lease terms relating to the fixtures."[80] The court's statement can be interpreted in two diametrically opposed ways: (1) that any modification in the original lease terms is *ipso facto* unreasonable; or (2) that in some instances, such as the present one, certain modifications of the original lease terms can be reasonable.

In addition the court stated that "The landlord acted on advice of counsel, who pointed out to him *reasonable objections relating to both the proposed sub-lessee-assignee* and to the terms of the proposed sub-lease and assignment."[81] If there were reasonable objections relating to the proposed transferee, the entire discussion of the objections to the terms of the proposed sublease and assignment were beside the point. The dissent discounts this possibility because the only objection the lessor expressed was that the sublease would leave ownership of the fixtures in the insolvent tenant.[82]

Whether *Toulmin* is an example of a hard case making bad law or whether its facts are so unusual that it is limited to them is not of critical importance. Nonetheless, it stands, over the able dissent of Judge Bazelon, as perhaps the only case that does not strictly limit the lessor by the terms of the original lease.

Two further observations are in order concerning per se unreasonableness. First, the discussion has heretofore focused upon lease terms which restrict the lessor by creating a limited territory in which he can move, but beyond whose borders lie per se unreasonableness. However, it is also settled that the original lease terms similarly limit what the lessee can do. Thus, in *Mitchell's, Inc. v. Nelms,*[83] the court held that the lessor acted reasonably in refusing to consent to a sublease which would bind him to a longer term at a lower rent.[84] The lease provided that if a new tenant was found by September 1, 1962, the new tenant would have a right to a fifty year term. Otherwise the lease terminated in six years subject to an option to extend for ten more years. Similar provisions governed the

80. *Id.* at 348.
81. *Id.* at 348 (Bazelon, J., dissenting) (emphasis added).
82. *Id.* at 349.
83. 454 S.W.2d 809 (Tex. Civ. App. 1970).
84. *Id.* at 815.

rent.[85] The proposed sublease was entered into after September 1, 1962, but purported to grant a fifty year term; the rent was based on the pre-September 1, 1962 formula. The lessor refused to consent to the sublease unless he received a substantial increase in rent. The court held this refusal reasonable because the lessee was acting beyond the scope of the original lease.[86]

The second observation is that the lessor cannot object to a transfer merely because it involves an assignment *and* a sublease instead of either one alone. In *Fabulous Stationers, Inc. v. Regency Joint Venture,*[87] the lease provided that the lessee could "assign or sublet this lease only with the written consent of the landlord, first had and obtained, which consent the landlord shall not unreasonably withhold."[88] The contemplated arrangement called for a sublease until such time as the full purchase price was paid; then the tenant would assign the lease to the sublessee and the sublessee would reassign the lease in escrow as a security device in the event of any subsequent default by the sublessee. The lessor did not object to either an assignment or a sublease, but he did object to a combination of the two. The court held that it was doubtful whether the word "or" in the lease prevented a combined arrangement and in view of the ambiguity, it resolved the provision against its draftsman, the lesser.[89]

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85. *Id.* at 811.

86. *Id.* at 814-15. Likewise, in Filmways, Inc. v. 477 Madison Avenue, Inc., 36 App. Div. 2d 609, 318 N.Y.S.2d 506 (1st Dep't 1971), *aff'd mem.*, 30 N.Y.2d 597, 282 N.E.2d 119, 331 N.Y.S.2d 31 (1972), the lessor refused to consent to a sublease because he objected to the fact that the sublease did not restrict the right of the sublessee to further sublet, nor did it place limitations on the sublessee's occupany, similar to the limitations placed on the lessee by the lease. The majority in the appellate division, as well as in the court of appeals, held that the lessor's refusal to consent was unreasonable because the sublessee was, in actuality, bound to the same terms and conditions as were contained in the original lease. 36 App. Div. 2d at 609, 318 N.Y.S.2d at 506, *aff'd*, 30 N.Y.2d at 598, 282 N.E.2d at 119, 331 N.Y.S.2d at 31.

The dissenters in both the appellate division and the court of appeals reasoned that the document which purportedly limited the sublessee's rights was invalid, and hence the sublessee would have greater rights than provided in the lease. 30 N.Y.2d at 601-03, 282 N.E.2d at 122, 331 N.Y.S.2d at 33-35 (Scileppi, J., dissenting) (mem.); 36 App. Div. 2d at 609-10, 318 N.Y.S.2d at 507 (McGiven, J., dissenting) (mem.). In any event, it seems clear that if a transferee could get greater rights than contained in the lease, even the majority in *Filmways* would concede that the lessor would be acting reasonably in refusing his consent.

87. 44 App. Div. 2d 547, 353 N.Y.S.2d 766 (1st Dep't 1974).

88. *Id.* at 547, 353 N.Y.S. 2d at 767-68.

89. *Id.* at 547, 353 N.Y.S.2d at 768.

2. *Reasonableness as a Function of Facts and Circumstances*

Determining which reasons may be the basis for a reasonable refusal to consent to the transfer of a lease present difficult questions of law. Acceptable reasons generally fall into three categories: (1) objections concerning the financial status of the proposed transferee; (2) objections concerning the reputation or identity of the transferee; and (3) objections concerning the proposed use or occupancy of the premises.[90]

a. *Financial Considerations*

Since the lessor is entrusting to the lessee and to any subsequent transferee a very valuable property for an extended period of time, the financial ability of the person using the property is an obviously important concern to the lessor. The lessor's interest extends beyond the simple assurance that the rent will be paid on time; the transferee must be financially able to comply with all of the lease requirements. Fulfillment of lease obligations to keep the premises in good repair or to remodel or restore the premises after a specified number of years are as important as the monthly rent receipts. Similarly, where the lease requires that the premises be used as a "first class" theatre, hotel, or other similar venture, it is to the lessor's interest to assure himself that the tenant in possession has the financial wherewithal to do more than just meet the monthly rental payment.[91]

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90. In American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 33, 297 N.Y.S.2d 156, 160 (Sup. Ct. 1969), the court listed four categories of objections:

(a) financial responsibility

(b) the "identity" or "business character" of the subtenant — *i.e.*, his suitability for the particular building

(c) the legality of the proposed use

(d) the nature of the occupancy—*i.e.*, office, factory, clinic, or whatever.

However, the authors, while basically in agreement with the court's analysis, have combined (c) and (d) into one category dealing generally with objections to the proposed use and occupancy of the premises and we have also expanded category (b) to encompass also personal objections to the proposed transferees and not merely objections dealing with the suitability of the transferee for the particular building.

91. Although from a logical point of view this seems to be a most basic consideration (since what is involved is a money-making venture by the lessor), it is surprising to find that no reported cases even attempt to generalize as to the considerations encompassed by the

It is impossible to formulate mathematically precise rules to determine when a lessor's refusal to consent is unreasonable; however, certain guidelines are evident from the cases. For instance, it is not necessary that the proposed transferee actually be insolvent to be objectionable. It is sufficient that the transferee has a history of being delinquent in meeting financial obligations. In *Mowatt v. 1540 Lake Shore Drive Corp.*,[92] the Seventh Circuit held that the board of directors of a cooperative apartment building acted reasonably when it refused to consent to the transfer to a proposed subtenant who "was slow in payment, and had suffered 4 judgments in 2 years."[93] The board was also reasonable when it refused to consent to a transfer to a person who "had reneged or defaulted on a number of substantial charitable pledges" and whose financial capacity to fulfill the lease was therefore in question.[94]

Mowatt also raises the possibility that if the proposed transferee had gone through a bankruptcy proceeding, this might also be a sufficient cause for withholding consent. However, in *Mowatt*, the board of directors was also aware of rumors that the proposed transferee's brother was involved in illegal activities and one person who had given a written recommendation on behalf of the proposed transferee, later withdrew it orally. Thus, it is unclear whether a proposed transferee's bankruptcy would be sufficient cause for withholding consent.[95] Nevertheless, the court listed it as one of the factors validly taken into account by the board of directors.[96]

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terms "financial ability" or "financial means of the transferee." Many cases refer to financial considerations but do not explain what they are. *See, e.g.*, Moore v. Bannister, 269 So. 2d 291, 293 (La. App. 1972)(It is unreasonable when the transferee is "a reputable, substantial business man . . . who is actually paying more than double the rent as sublessee than lessee is paying . . . ."); Haritas v. Goveia, 345 Mass. 774, 775, 188 N.E.2d 854, 855, *cert. denied*, 375 U.S. 845 (1963)(It is unreasonable where the assignees were "reputable persons of business experience and financial means."); Grossman v. S.E. Nichols Co., 43 App. Div. 2d 674, 349 N.Y.S.2d 745 (1st Dep't 1973), *aff'd mem.*, 35 N.Y.2d 985, 324 N.E.2d 888, 365 N.Y.S.2d 531 (1975) (reasonable requirements for consent are: "that there be no default, that there be continued liability, and that there be full assumption by a financially secure assignee."). Perhaps because financial ability is such a basic consideration it is taken for granted and no attempt is made to analyze its precise meaning. *But see* Reget v. Dempsey-Tegler & Co., 70 Ill. App. 2d 32, 216 N.E.2d 500 (1966).

92. 385 F.2d 135 (7th Cir. 1967).

93. *Id.*

94. *Id.* at 138.

95. *Id.*

96. *Id.* It should be noted that this transferee's company was also the defendant in a

In determining whether a proffered objection to the transferee on financial grounds, another perplexing issue arises when the original tenant offers to guaranty the payment of rent by the transferee. Does this guaranty automatically vitiate the lessor's objection? *Adams, Harkness & Hill, Inc. v. Northeast Realty Corp.*,[97] holds that it does. The lease in *Adams* provided that the lessor's written consent to an assignment or sublease was not to be unreasonably withheld.[98] When the lessee submitted the name of the proposed subtenant, the lessor demanded the subtenant's complete financial statement. The lessee provided some financial information, but not the full financial statements requested. He also assured the lessor "that [he] would agree to be responsible for the payment of rent" if the subtenant was accepted.[99] The lessor refused to consent. The court affirmed the trial court's finding that consent was unreasonably withheld: "[t]his finding was warranted by the evidence, particularly in view of the undisputed evidence that Harkness [the lessee] had offered to guarantee the payment of the rent by Mann [the proposed subtenant] for the entire term of the lease."[100]

A contrary view is espoused in *Johnson v. Jaquith*,[101] which holds that there are other considerations besides the mere payment of the rent and that a guaranty of only the payment of the rent does not obviate all other possible objections.[102]

The lease in *Johnson* contained various covenants whereby the lessee agreed to maintain the premises in good repair, to indemnify the lessor for all claims arising out of the lessee's use of the premises, and to repair any damage caused by removal of fixtures pursuant to the lease.[103] When the lessee attempted to obtain the lessor's

substantial lawsuit brought on grounds of fraud. *Id.* In Riggs. v. Murdock, 10 Ariz. App. 248, 458 P.2d 115 (1969), the court held that the lessor acted reasonably in refusing to consent to a proposed subtenant who "had a poor payment record and difficulties with the law." *Id.* at 250, 458 P.2d at 117, 119. Since the court was specific about this proposed subletting, it is difficult to gauge the relevant potency of the financial considerations as opposed to objections dealing with the character of the subtenants. However, it would appear, in the absence of any indication to the contrary, that both were equally valid reasons.

97. 361 Mass. 552, 281 N.E.2d 262 (1972).
98. *Id.* at 553, 281 N.E.2d at 264.
99. *Id.* at 554, 281 N.E.2d at 264.
100. *Id.* at 557, 281 N.E.2d at 265.
101. 189 So. 2d 827 (Fla. App. 1966).
102. *Id.* at 829.
103. *Id.* at 828.

consent to an assignment, the lessor refused to consent unless he was furnished with a copy of the assignee's certified financial statements. Although the lessee offered to guaranty the "rent payments," the court held that the refusal was reasonable because there were factors other than payment of the rent that the lessor was entitled to consider.[104]

Analyzing the *Adams—Johnson* split, it seems that *Johnson* is clearly the better reasoned view, since there are many financial considerations other than the mere payment of rent.[105] Furthermore, if the lessee is the original tenant who signed the lease, local law often dictates that by virtue of his privity of contract with the lessor he will always remain liable for the rent.[106] Under the *Adams* rule this lessee would always be able to transfer his lease to anyone regardless of the lease provisions requiring the lessor's consent.

This analysis of financial considerations must discuss two other situations. The first involves *United States v. Toulmin.*[107] Although the precise limits of *Toulmin* are impossible to define, the opinion clearly raises the possibility that an insolvent lessee could be subjected to greater restrictions than a solvent one. In the usual situation, the lessee retains legal title to his fixtures until the end of the lease term or until such time as the lease prescribes. Transfer of the lease in the interim would seem to have no bearing upon this. However, under *Toulmin,* it seems that the lessor can refuse to consent to the transfer on the sole ground that the lessee is insolvent—even if the lessee is not in default of any provision of the lease.[108] Notably, both the majority[109] and the dissent[110] pointed out that the lessee's

104. *Id.* at 829. *See also* Grossman v. Barney, 359 S.W.2d 475 (Tex. Civ. App. 1962), where the lessors were not furnished with sufficient financial data about the proferred sublessee and the lessee offered to guaranty payment of the rent. Here the court found that there were other considerations apart from the rent and the lessor did not act arbitrarily in refusing to consent to the subletting. *Id.* at 477. It should be noted, however, that the lease here did not contain a provision permitting transfer only with the lessor's consent, such consent not to be unreasonably witheld.

105. *See* text accompanying notes 119-22 *infra.*

106. *See, e.g.,* Peiser v. Mettler, 50 Cal. 2d 594, 328 P.2d 953 (1958); Chicago Title & Trust Co. v. Kesner, 296 Ill. App. 187, 16 N.E.2d 175 (1938); Gillette Bros. v. Aristocrat Rest., Inc., 239 N.Y. 87, 145 N.E. 748 (1924).

107. 253 F.2d 347 (D.C. Cir. 1958). *See* notes 76-82 *supra* and accompanying text.

108. *Id.* at 349 (Bazelon, J., dissenting).

109. *Id.* at 348. ("This is not a case where a landlord has witheld his consent solely because of the insolvency of the tenant. . .").

110. *Id.* at 349 (Bazelon, J., dissenting). "My colleagues do not hold that the tenant's

insolvency alone is not sufficient justification for the lessor's withholding of consent. Neither opinion, however, seemed to realize that the court's holding paves the way for this possibly unjustified result.

The other situation is presented in the English case of *In Re Town Investments Ltd.*[111] In *Town Investments*, the court held that a lessor reasonably withheld his consent to a transfer which provided that the lessee would receive a large lump-sum from the transferee upon the signing of a sublease, followed by low, below market level monthly rental payments.[112] The court was convinced that if the lessors subsequently attempted to sell or mortgage the premises, the low monthly rent would prove an embarrassment and result in a lower sales price or a lower mortgage.[113] While this case is unusual, it nevertheless demonstrates that all relevant considerations will be taken into account in determining whether consent is being unreasonably withheld.

b. Reputation or Identity of the Transferee

Of the three categories of potentially acceptable objections which a lessor may raise in opposing transfer of a lease this category seems to be the most subjective. It is perhaps therefore not surprising to discover that the case law provides very few guidelines. However, it is firmly established that purely subjective reasons for refusing consent are per se unacceptable.[114]

The only other definitive principles, at least in a commercial setting, are that a lessor may not withold his consent because the proposed transferee engages in "controversial" activities or because the proposed transferee has different religious or philosophical views.[115] As the court stated in *American Book Co.*:[116]

> If indeed the potential for controversy were a serviceable standard for measuring the acceptability of a subtenancy, many of our most socially useful

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insolvency gives the landlord the power to prevent subleasing generally . . . . So long as the tenant does not default, his involvency does not affect his tenancy." *Id.*

111. (1954) 1 Ch. 301.

112. *Id.* at 301-04.

113. *Id.* at 315.

114. *See* text accompanying notes 64-89 *supra.*

115. American Book Co. v. Yeshiva Univ. Dev. Foundation, Inc., 59 Misc. 2d 31, 35-36, 297 N.Y.S.2d 156, 162 (Sup. Ct. 1969).

116. *Id.* at 36-37, 297 N.Y.S.2d at 162-63.

> institutions would be homeless vagrants on the streets, and our buildings would be tenanted by bland, unexceptionable models of propriety and dullness. Even proponents of unpopular ideas are entitled to a roof over their heads. Landlords are not censors—their dominion is over realty, not ideas.

The court also noted that even if the lessor objected to the transfer on philosophical or religious grounds, this was not a sufficiently reasonable basis for withholding consent.[117]

Mowatt v. 1540 Lake Shore Drive, Corp.,[118] and *Riggs v. Murdock*[119] listed numerous objections to the identity or reputation of prospective transferees which might be reasonable grounds for refusing to consent to a transfer: (1) a widespread and longstanding reputation in financial circles indicating that the transferee's brother was involved in illegal activities;[120] (2) the transferee's company was subject to a substantial lawsuit on the ground of fraud;[121] (3) the transferee had previous difficulties with the law;[122] or (4) the transferees, husband and wife, were inclined to make angry scenes in public, sufficient to make observers uncomfortable.[123]

Except for the fourth reason, all of the other reasons were coupled with additional objections.[124] Therefore, it is unclear whether each reason by itself is sufficient to justify a lessor's refusal to consent to a transfer. Moreover, the first, second, and fourth reasons, arose in a situation which involved the transfer of residential leases in a cooperative apartment house.[125] Whether these reasons would be sufficient in a commercial context remains an open question.

Pletz v. Standard Homes Co.,[126] suggests that misconduct by the proposed transferee may be another possible ground for withholding consent. In *Pletz,* the assignee refused to disclose the intended use

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117. *Id.* at 37, 297 N.Y.S.2d at 163.

118. 385 F.2d 135 (7th Cir. 1967).

119. 10 Ariz. App. 248, 458 P.2d 115 (1969).

120. 385 F.2d at 137. However, additional facts compounded the situation; the transferee had undergone a bankruptcy proceeding and a written recommendation on his behalf had been orally withdrawn. *Id.* at 137-38.

121. *Id.* at 138. But in addition, the transferee had reneged or defaulted on a number of charitable contributions and his financial reliability was therefore in question. *Id.*

122. 10 Ariz. App. at 250, 458 P.2d at 117. Here again, however, the transferee also had a poor payment record. *Id.*

123. 385 F.2d at 138.

124. *See* notes 120-22 *supra* and accompanying text.

125. *See* Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135 (7th Cir. 1967).

126. 342 S.W.2d 621 (Tex. Civ. App. 1961).

of the premises.[127] Additionally, during the course of the negotiations about a possible assignment, a news story appeared that the proposed assignee already had an option to sublease the premises;[128] testimony at trial revealed that the proposed assignee had sought to induce a school district to condemn a portion of the subject premises; and finally, there was testimony that the proposed assignee, or some of his commercial tenants in the area, had used the subject premises as a dump.[129] The court held that consent was reasonably withheld in these circumstances.[130]

It is unclear whether these grounds, standing alone, are sufficient to justify the lessor's refusal to consent to a proposed transfer, since the "misconduct" grounds were coupled with another clearly sufficient ground — failure of the proposed transferee to disclose his intended use of the premises[131] — and the court did not indicate which of the reasons formed the basis of its decision.

c. *Proposed Use or Occupancy of the Premises*

In the absence of any lease restrictions,[132] the lessee (and the transferee) may use the premises in any lawful manner not materially different from that for which the premises were adapted.[133] Similarly, where the lease does not restrict the use to which the premises can be put, the lessor may not withhold consent merely because the proposed transferee will compete either with the lessor[134] or with

127. At one point the proposed assignee did state that he was "going to take a bulldozer and run through that main building." *Id.* at 621. However, it is unclear whether he was serious. In any event, this does not amount to a disclosure of how he intended to use the property.

128. *Id.*

129. *Id.*

130. *Id.* at 621-22.

131. *See* discussion accompanying note 144 *infra*.

132. *See* text acccmpanying notes 66-71 *supra*.

133. Thus, in Roundup Tavern, Inc., v. Pardini, 68 Wash. 2d 513, 413 P.2d 820 (1966), the lessor refused to consent to an assignment of a lease on the sole ground that the assignee proposed to use the premises as a tavern. No lease restriction limited the use of which the premises could be put, and the court accordingly held that the lessors had acted unreasonably in witholding his consent to the transfer. *Id.* at 515, 413 P.2d at 820. *See* Texaco, Inc. v. Greenwich-Kinney, Inc., 39 App. Div. 2d 877, 333 N.Y.S.2d 544 (1st Dep't 1972), *aff'd mem.*, 32 N.Y.2d 910, 347 N.Y.S.2d 67 (1973), where the lease did restrict the permissible uses of the premises and the court enforced the restriction.

134. Edelman v. F.W. Woolworth Co., 252 Ill. App. 142 (1929).

another tenant.[135] Yet if the lease proscribes competition with other tenants, this is reasonable ground for the lessor to refuse to consent to a transfer.[136]

One example of an objectionable use is breaking up the premises into fragments and separately transferring each fragment. *Time, Inc. v. Tager*[137] involved the Time-Life building, "a prestige building," in New York City's Rockefeller Center.[138] Despite a lease provision stating that the premises could only be sublet "in whole,"[139] the lessor had previously consented to a sublease of half the premises. When a new subtenant moved into the remaining half over the lessor's refusal to consent, the lessor exercised his option to terminate the lease. The lessor thereafter entered into leases with the two subtenants who were already in the premises. The tenant sued the lessor for breach of covenant (*i.e.*, unreasonably refusing to consent) and for unlawful interference with his contractual relations with the subtenants.

The court recognized that the lessor's entry into direct leases with the rejected subtenants was "persuasive in indicating that the subtenants were perfectly acceptable in their own right and that the landlord could raise no substantial objection as to their financial responsibility, or their respectability, or the character of their business."[140] Nevertheless, the court held that the lessor acted reasonably in refusing to consent to the subletting:[141]

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135. Theunissen v. Huyler's, Inc., 25 F.2d 530 (D.C. Cir. 1928); *see also* Pletz v. Standard Homes Co., 342 S.W. 2d 621 (Tex. Civ. App. 1961).

136. Butterick Publishing Co. v. Fulton & Elm Leasing Co., 132 Misc. 366, 229 N.Y.S. 86 (Sup. Ct. 1928); *see also* Arrington v. Walter E. Heller Int'l Corp., 30 Ill. App. 3d 631, 333 N.E.2d 50 (1975).

137. 46 Misc. 2d 658, 260 N.Y.S. 2d 413 (N.Y. Civ. Ct. 1965).

138. *Id.* at 659, 260 N.Y.S.2d at 415.

139. *Id.* at 658, 260 N.Y.S.2d at 414.

140. *Id.* at 659, 260 N.Y.S.2d at 415.

141. *Id.* When a lessee is faced with the burden of proving that a lessor's consent was unreasonably witheld, one dispositive way of meeting this burden of proof is to show that the lessor, after rejecting the proferred transferee, entered into a lease (whether of the same premises or of other premises in the same building) with the rejected transferee.

Since *Time, Inc.*, involved a "prestige" building, the lessor's refusal to consent was held reasonable. But when there are no such special considerations, such refusal will be held unreasonable. Gamble v. New Orleans Housing Mart, Inc., 154 So. 2d 625 (La. App. 1963). *See also* Health and Beauty Studios, Inc. v. Gray, 48 App. Div. 2d 632, 368 N.Y.S.2d 200 (1st Dep't 1975); In Dress Shirt Sales, Inc. v. Hotel Martinique Assoc., 12 N.Y.2d 339, 190 N.E.2d 10, 239 N.Y.S.2d 660 (1963), the court held that such conduct, at least when coupled with a payment by the lessee to the lessor to release the lessee from its obligations under the

> It is one thing to permit a tenant to assign or sublet to a successor-in-interest or a purchaser of its business. It is quite another to permit a tenant in a prestige building to subdivide and lease out space to numerous subtenants at a profit to himself. The refusal of a landlord under such circumstances to grant consent appears to be entirely justifiable. The owner of a prestige building, in order to maintain its status and desirability, may well require that space in its building be rented in substantial blocs lest the premises be Balkanized so that it becomes known as veritable rabbit-warren of "hole-in-the-walls" and rented desk spaces.

The extent to which multiple subleases are objectionable in "non-prestige" buildings, remains undecided. Presumably, there comes a point where further subdivision of premises makes it the non-prestige equivalent of a rabbit-warren of "holes-in-the-walls" and is objectionable.[142]

Another reasonable objection is to the use of the leased premises in a manner that does not comport with the intended use of the entire property. In *Kroger Co. v. Rossford Industrial Corp.*,[143] the lessor was held to have reasonably refused to consent to a transfer in the absence of assurances that the premises, which were located within the shopping center, would be put to a use consistent with the general use of the shopping center. It should be noted that to the extent that *Kroger* permitted the lessor to bar a use of the premises not prohibited by the lease, it is an exception to the rule that the lease governs relationships between all parties. However, it is a most limited exception.

3. *Miscellaneous Considerations*

All of the objections heretofore discussed presuppose that the lessor has received information sufficiently detailed to enable him to make a fully informed appraisal of the circumstances. If the tenant or the transferee refused to disclose any pertinent informa-

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lease, amounted to a fraud on the lessee. *Id.* at 342, 239 N.Y.S.2d at 662. Here, however, since the lease did not provide that the lessor could not unreasonably withold its consent to the transfer of the lease, the court held that there was no actionable wrong. *Id.* at 342-44, 239 N.Y.S.2d at 662-64.

142. Premier Confectionary (London) Co. v. London Commercial Sale Rooms, Ltd. [1933] 1 Ch. 904, is an example of a situation where multiple transferees were deemed reasonably objectionble. *See* text accompanying notes 60-63 *supra.*

143. 51 Ohio Op. 2d 382, 25 Ohio Misc. 43, 261 N.E.2d 355 (C.P. 1969)

tion, the lessor is not required to act at his peril; failure to submit the necessary data is itself sufficient ground to justify the lessor's refusal to consent.[144]

In addition, an interesting problem arises when the transfer, which requires the lessor's consent, occurs as a result of the incorporation of the previous tenant. Thus, if the only change is one of form *(i.e.,* where all of the tenant's previous activities and assets are transferred to the corporation), there appears to be no reason why the lessor should be able to withhold his consent.[145]

In *Grossman v. S.E. Nichols Co.,*[146] store facilities were rented to a two-man partnership pursuant to thirteen leases. Upon the death of one of the partners, the remaining partner incorporated (pursuant to the partnership agreement) and transferred all partnership assets and liabilities to the corporation. The lessor refused to consent to the assignments of the leases. After finding that the lessor's stated objections on financial grounds were baseless, the court held that since there was substantial identity between the assignor and assignee and since the corporation was otherwise an unobjectionable tenant, the lessor's consent was unreasonably withheld.[147]

If, however, more than a mere change in form is involved, the lessor's objections would appear to be judged by all of the criteria discussed herein.

IV. Conclusion

When a lease provides that the lessor's consent is needed for a transfer of the lease but that such consent shall not be unreasonably withheld, the basic framework for deciding whether a refusal to

144. Johnson v. Jaquith, 189 So. 2d 827 (Dist. Ct. App. 1966); Kroger Co. v. Rossford Indus. Corp., 51 Ohio Op. 2d 382, 25 Ohio Misc. 43, 261 N.E.2d 355 (C.P. 1969); Pletz v. Standard Homes Co., 342 S.W.2d 621 (Tex. Civ. App. 1961); A. Harris & Co. v. Campbell, 187 S.W. 365 (Tex. Civ. App. 1916).

The court in *Johnson v. Jaquith* indicated that:

> Until plaintiff [lessor] was furnished satisfactory proof of the financial ability of the proposed assignee to meet all of the obligations under the lease the plaintiff was justified in refusing to consent to an assignment of the lease.

189 So. 2d at 829.

145. *See* Grossman v. S.E. Nichols Co., 43 App. Div. 2d 674, 349 N.Y.S.2d 745 (1st Dep't 1973), *aff'd mem.*, 35 N.Y.2d 985, 324 N.E.2d 888, 365 N.Y.S.2d 531 (1975).

146. 43 App. Div. 2d 674, 349 N.Y.S.2d 745, (1st Dep't 1973), *aff'd mem.*, 35 N.Y.2d 985, 324 N.E.2d 888, 365 N.Y.S.2d 531 (1975).

147. 43 App. Div. 2d at 675, 349 N.Y.S.2d at 747.

consent is reasonable or unreasonable is provided by the lease itself. Neither the lessor nor the lessee or transferee may alter, or go beyond, the lease terms. Within the boundaries of the lease, objective considerations based on financial grounds, on the identity or reputation of the proposed transferee or on the proposed use of the premises will provide reasonable grounds for a refusal to consent. Refusals based upon other considerations will be unreasonable.