

## MODEL ENERGY ALIGNED CLAUSE

### **Re: Capital Improvements to Improve Energy Efficiency** *(Amends typical commercial modified gross lease)*

#### 1.1 Operating Expenses

##### (a) Definitions

(i) “Base Year” means \_\_\_\_\_.

(ii) “Capital Improvement” means any alteration, addition, change, repair or replacement (whether structural or nonstructural) made by Landlord in or to the Building or the common areas or equipment or systems thereof, which under generally accepted accounting principles, consistently applied, is properly classified as a capital expenditure. The aggregate costs of any Capital Improvement shall be deemed to include, without limitation, architectural, engineering and expediting fees, legal, consulting, inspection and commissioning fees actually incurred in connection therewith, but shall be deemed to exclude actual or imputed financing costs in connection therewith.

(iii) “Comparison Year” means each period of twelve (12) consecutive months subsequent to the Base Year.

(iv) “Independent Engineer” means an engineer selected by Landlord from the list annexed hereto as Exhibit \_\_\_\_\_. From time to time, but not more than once during any period of twelve (12) consecutive months, Landlord and Tenant may each recommend one or more independent professional engineers licensed by the State of New York or energy management specialists, in each case with at least six (6) years’ experience in performing energy audits on commercial property similar in size and use to the Property, for inclusion on the list annexed hereto as Exhibit \_\_\_\_\_. Any such recommendation(s) by Landlord or Tenant shall be subject to the written approval of the other party, which approval shall not be unreasonably withheld.

(v) “Operating Expenses” means all costs, expenses, disbursements and expenditures (and taxes, if any, thereon) incurred by or on behalf of Landlord (and whether paid or incurred directly or through independent contractors or outside vendors) with respect to operating, maintaining, repairing, replacing, lighting, insuring, staffing, cleaning, safeguarding and managing the Building and all common areas and equipment or systems thereof, including, without limitation... (16) the cost of any Capital Improvement (as hereinafter defined) if and to the extent includable in Operating Expenses pursuant to Section 1.1(b) below, which cost shall be amortized on a straight line basis over the useful life of such Capital Improvement (such useful life to be determined in accordance with generally accepted accounting principles, consistently applied), except with respect to Capital Improvements described in Section 1.1(b)(i) below (which shall be amortized as provided in that subsection), with the annual amortization amount included in Operating Expenses for the Comparison Year in question...

(vi) “Projected Annual Savings” means the average annual base building utility cost savings anticipated to be generated by a Capital Improvement, determined using commonly applied engineering methods and an estimate provided in writing by the Independent Engineer.

(b) Capital Improvements.

Landlord may include the costs of certain Capital Improvements in Operating Expenses pursuant to Section 1.1(a)(v)(16) in accordance with the following:

(i) Capital Improvements Intended to Improve Energy Efficiency. In the case of any Capital Improvement that the Independent Engineer certifies in writing will, subject to reasonable assumptions and qualifications, reduce the Building's consumption of electricity, oil, natural gas, steam, water or other utilities, and notwithstanding anything to the contrary in Section 1.1(a)(v):

A. The costs of such Capital Improvement shall be deemed reduced by the amount of any NYSERDA or similar government or other incentives for energy efficiency improvements actually received by Landlord to defray the costs of such Capital Improvement, and shall further be reduced by any energy efficiency tax credits or similar energy-efficiency-based tax incentives actually accruing to Landlord as a result of such Capital Improvement.

B. For the purposes of this Section 1.1(b)(i), "simple payback period" means the length of time (expressed in months) obtained by dividing (x) the aggregate costs of any such Capital Improvement, by (y) the Projected Annual Savings. By way of example: If the aggregate costs of such Capital Improvement are \$2,000,000 and the Projected Annual Savings are \$500,000, then the simple payback period for such Capital Improvement is forty-eight (48) months.

C. Commencing with the first Comparison Year following the year in which such Capital Improvement is completed and placed in service, and continuing for the duration of the Adjusted Payback Period (as hereinafter defined), Landlord may include in Operating Expenses a portion of the aggregate costs of such Capital Improvement equivalent to eighty percent (80%)<sup>1</sup> of the Projected Annual Savings, so that the aggregate costs of such Capital Improvement will be fully amortized over one hundred twenty-five percent (125%)<sup>2</sup> of the simple payback period (such period of time, the "Adjusted Payback Period"). By way of example: If the aggregate costs of such Capital Improvement are \$2,000,000, the Projected Annual Savings are \$500,000 and the simple payback period for such Capital Improvement is forty-eight (48) months, then Landlord may include \$400,000 of the aggregate costs of such Capital Improvement (i.e., an amount equivalent to 80% of the Projected Annual Savings) in Operating Expenses for five consecutive Comparison Years (i.e. sixty (60) months or 125% of the simple payback period).

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<sup>1</sup> Actual cost savings from energy efficiency improvements may equal, exceed or fall short of projected savings. The discount of Projected Annual Savings (and the concomitant extension of the payback period) is intended to provide a margin of error in case actual savings fall short of Projected Annual Savings.

<sup>2</sup> See Footnote 1.