

Chapter 13

Establishing and Collecting Fees

This chapter is concerned with the fees charged by a CLT land-owner to a lessee-homeowner in return for the right to occupy and use the land (or land and improvements if title is not separated) and for other services provided by the CLT. The chapter's first concern is the basic "lease fee" (sometimes called "ground rent" or "land-use fee" or "ground lease fee"), which is normally charged on a monthly basis. Other types of fees, including the "transfer fees" that are increasingly common among CLTs, are discussed at the end of the chapter.

Basic Lease Fee Considerations

The process of deciding on the amount of lease fee to be charged involves a number of considerations. We will first discuss the basic factors that all CLTs should consider in designing a lease fee; then note common types of variations and adjustments that should be provided for in establishing a fee structure. We will also review some more specialized considerations, including ways in which the IRS may be concerned with the amount of the lease fee charged by a tax-exempt organization, and ways in which mortgage lenders are also concerned with the amount of the fee.

Older CLT leases (following the version of the Model CLT Lease published in the 1991 edition of ICE's CLT Legal Manual) describe the lease fee as the sum of three components, identified as the "pass-through charge," the "administrative charge," and the "land use charge." The version of the Model published in the 2002 edition of ICE's CLT Legal Manual takes a different approach, replacing the three-part fee structure with a single fee, conceptualized in somewhat different terms. The current (2010) Model changes the approach yet again by adding a component to the fee that is dedicated to the funding of a reserve for long-term repairs to the home, so that the overall lease fee defined in the Model now consists of a "land use fee" plus a "replacement reserve fee."

Regardless of how the fee is structured and described in the lease, it is possible to identify basic considerations that should be addressed in one way or another as the lease defines the fee and determines the amount to be charged. These considerations include the following:

- passing on the direct costs of land ownership,
- funding the CLT's administrative costs,
- setting a fair charge for value received by the homeowner,
- keeping the charge affordable for the homeowner,
- providing for periodic adjustments of the amount charged,
- funding a long-term repair reserve.

Some of these considerations relate primarily to the needs and interests of the CLT; others focus on the needs and interests of the homeowner. As with other features of the CLT ground lease, some "balancing" of these two sets of interests will be necessary.

Passing on direct costs of land ownership. The CLT's direct expenses as owner of the land usually include taxes on the land, and may also include special assessments and certain insurance expenses. CLTs normally pass on these expenses to the lessee-homeowners, either by increasing the lease fee by an amount equal to the amount of the expense or by requiring the homeowners to pay the expenses themselves.

Property Taxes. CLT homeowners are normally taxed for the value of buildings and other improvements that they own on the land; the CLT itself, as owner of the fee interest in the land, bears the responsibility for taxes on the land's value, though CLT leases normally pass on the responsibility for paying this tax, as well as taxes on the improvements, to the homeowner – by one of the two methods noted above. (Regarding the ways these values are assessed to determine the amount of taxes to be paid, see Chapter 17, “Property Tax Assessment.”)

The advantage of the tax payment procedure embodied in the “old” Model Lease (treating taxes on the land as an expense of the CLT for which the CLT will be reimbursed through the “pass-through” component of the lease fee) is that the CLT, by paying the land taxes itself, is assured of the power to prevent the possible loss of control of its underlying interest in the land as a result of nonpayment of property taxes. On the other hand, the advantage of assigning responsibility for these taxes directly to the homeowner is that the CLT is relieved of the significant administrative burden of making annual adjustments in lease fee amounts, leasehold by leasehold, notifying homeowners of these changes, and following up to insure payment.

The practical consequences of the CLT's decision on how to handle land taxes are also shaped by two other factors. First, local practices vary in the extent to which taxes on land and improvements are assessed and reported separately. Though it should usually be possible to break out separate assessments – one for the CLT, one for the homeowner – getting the local tax authority to do so may require a special effort by the CLT (see Chapter 10, “Legal Issues Re. CLT Ownership,” and Chapter 17, “Property Tax Assessment”). Second, the whole question of which party has direct responsibility for paying land taxes can be rendered moot if a mortgagee requires – as mortgagees often do – that *both* the taxes on the improvements *and* the taxes on the land be paid with monthly mortgage payments and escrowed until due to the taxing authority. (As noted below, it is generally a convenience to a CLT if a mortgagee collects, escrows and pays all taxes – and perhaps other components of the lease fee as well.)

The danger that a homeowner who is directly responsible for the taxes on the land may fail to pay them and thereby threaten the CLT's continued ownership of the land can be mitigated through lease provisions such as those contained in section 6.4 of the Revised Model Lease, allowing the CLT to add any delinquent taxes to the lease fee in the event that the homeowner has failed to pay the taxes directly when due.

Special Assessments. Special assessments, separate from real estate taxes, are often levied by local governments to cover the cost of public improvements such as water lines or sidewalks that provide direct benefits to particular properties. Clear provisions should therefore be made to pass these assessments on to homeowners, either directly or as an addition to the lease fee. The current Model Lease assigns responsibility for assessments directly to the homeowner. It should be noted, however, that special assessments sometimes place severe economic burdens on lower income people, who may not have asked for, or needed, the improvements they are being required to pay for. A CLT may be better able to advocate against or mitigate such burdensome measures if the assessments come directly to the CLT.

Liability Insurance. The Model Lease assigns the rights and responsibilities of land use to the homeowner and requires the homeowner to carry liability insurance on the leased premises (see Chapter 10, “Legal Issues Re. CLT Ownership,” on the liability of CLT and homeowner, and Article 9 of the Model Lease). Nonetheless, some CLTs have chosen to obtain their own liability insurance covering their interest in the land as lessor. The old Model Lease allowed the cost of this coverage to be passed on to homeowners as an addition to the pass-through

component of the lease fee. As a practical matter, CLTs with smaller holdings have had difficulty finding a reasonably priced insurance product covering just the marginal liability involved for a ground lessor in such situations. They have had to choose between buying disproportionately expensive landlord insurance or not carrying their own insurance on the land. Some have chosen the latter course. CLTs with large holdings have had better luck in negotiating appropriate insurance for this purpose. Some CLTs – both large and small – that do carry insurance on their leased land have chosen to pay for it as a part of their basic operating costs and not pass it on to homeowners (who are already paying for their own insurance), even when the CLTs' leases would allow them to pass it on as a component of the lease fee.

Funding the CLT's administrative costs. Most CLT leases based on the 1991 Model Lease, have defined the lease fee as including both an "administrative charge," conceived as covering at least a portion of the administrative expense entailed by the CLT's role as lessor, and a "land use charge," conceived as fair compensation to the CLT for the use of the land by the homeowner and theoretically earmarked for use for other-than-administrative purposes. The "administrative charge" has usually been established as a (usually very modest) fixed amount, not varying from leasehold to leasehold, and increasing over time only gradually if at all. The "land use charge," on the other hand, has been defined in terms that allow it, potentially, to vary from one leasehold to another to reflect differences in their relative value, and to vary over time to reflect both changes in the value of the property (or the value of currency) and changes in what is affordable for the homeowner.

Notwithstanding these theoretical differences, however, CLTs have generally not allocated the two parts of the fee to different uses; they have simply treated the combined fee as an addition to the overall income available to cover operating expenses. Furthermore, there is generally no direct relationship between the amount of the lease fee that a CLT has described as an "administrative charge" and the amount the CLT must actually spend in carrying out its stewardship responsibilities as ground lessor. Such responsibilities include tracking lease fee payments, monitoring compliance with occupancy and use restrictions, monitoring the condition of homes, maintaining communications with homeowners, working with residents who are having trouble meeting their financial obligations, and overseeing transfers of ownership. Some of these entail routine on-going activities involving predictable costs, but others – especially the task of dealing with transfers of ownership – are activities that must be performed at unpredictable intervals for each leasehold and may involve substantial costs. It is therefore difficult to quantify the cost of carrying out the full package of administrative and stewardship responsibilities, leasehold by leasehold, and year by year. And if it *were* possible to quantify these costs precisely, some CLTs would be likely to find that the total cost is more than the total revenue that can be generated by lease fees if the fees are to be kept affordable for the homeowners.

In any case, it is reasonable to insist that the full amount of the lease fee that is not explicitly restricted to specific purposes (including any pass-through of taxes and assessments and any replacement reserve fee) – should be available to help pay for the package of rights and services received by the homeowner. See Chapter 23, "Post-Purchase stewardship Tasks," and Chapter 27, "Planning for Long-Term Sustainability," for discussions of the CLT's ongoing stewardship Tasks and the question of how to pay for them.

Setting a fair charge for value received by homeowner. In describing the way the land use fee is calculated, Section 5.3 of the current Model Lease states, "First, the approximate monthly

fair rental value of the Leased Land has been established, as of the beginning of the lease term, recognizing that the fair rental value is reduced by certain restrictions imposed by the Lease on the use of the Land.” (The 2002 version of the Model uses more or less the same language regarding the calculation of the whole lease fee, which does not include a replacement reserve fee.)

How is this “fair rental value” to be calculated? Setting aside for the moment the question of how the use and resale restrictions will affect market value, let us look at how the fair rental value may be calculated in the absence of such restrictions. Usually, when a CLT home is to be sold, a professional appraisal will be commissioned by the mortgage lender involved in financing the sale. This appraisal will normally show the (approximate) value of land as separate from the value of the improvements. Once a value has been assigned to the land, this value may be translated into fair monthly rental value. Since residential land is usually not rented without improvements, it is unlikely that fair rental value of land alone can be determined with direct reference to comparable rental situations. However, appraisers can determine monthly fair rental value by applying a capitalization rate to the appraised value of the land. Or the monthly rental value can be approximated as the monthly amount that would be needed to amortize the value of the lot over an extended term. (Typically, the value is amortized over 30 to 40 years rather than over the full 99 years of a CLT lease term, since the latter approach would yield an unrealistically low monthly amount.)

Having determined the approximate fair rental value of the land in the absence of use and resale restrictions, you can address the fact that the CLT lease limits the rights of the homeowner in some ways that a more conventional ground lease would not. In particular, CLT homeowners cannot sell or sublease the improvements and leasehold interest for a market rate price. These restrictions clearly reduce the fair rental value of the leased premises, but there is no established method of calculating the exact extent of this effect, and, as noted below, CLTs tend to adjust the amount of their lease fee more in terms of what is affordable for the homeowner than in terms of the effect of use and resale restrictions. In any case, the lease fee charged by CLTs in most markets is much less than what would be charged as a market rate ground lease fee in the absence of resale restrictions. Significant exceptions can be found, however, in disinvested neighborhoods where the market value of land is nominal. CLTs working in such neighborhoods should be aware that even a very low monthly lease fee may actually exceed the amount that could be charged for conventional ground rent. This does not mean that CLT homeowners in these neighborhoods are getting a bad deal. They are usually the beneficiaries of subsidies that substantially reduce the price of the home (and therefore the cost of monthly mortgage payments), and they typically benefit from significant ongoing support services from the CLT as well. Nonetheless, it behooves these CLTs to be clear with themselves and their homeowners that the monthly “lease fee” is not really a below-market land-use charge; it is a below-market charge for a substantial package of benefits of which land use is only one component.

Keeping the charge affordable for the homeowner. As should now be clear, there are two different but overlapping rationales for reducing the CLT lease fee to a level that may be substantially lower than what might be charged as conventional market rate ground rent. We have noted that the market value of the leased land is reduced by the restrictions on use and resale that are contained in the lease, and that it is therefore reasonable to charge the homeowner a reduced lease fee in return for accepting these restrictions. For some homeowners, this basic

trade-off – lower lease fee in return for acceptance of restrictions – might result in a monthly charge that, when added to other monthly housing costs, is affordable. But for homeowners with lower household incomes, the same monthly lease fee, based on the same trade-off, might not be affordable. There may therefore be a reason to reduce the lease fee beyond what might be warranted by the trade-off.

Although, as we have said, there is no established method of calculating the extent to which resale and use restrictions reduce the fair rental value of the leased premises, there is an established method of calculating the total monthly amount of housing cost that is assumed to be affordable (as a percentage of gross household income) for a household. For these reasons – and because affordability is a central concern for all CLT programs – CLTs have emphasized affordability as the final consideration in calculating the amount of the lease fee, and have concerned themselves less with the theoretical question of how much the use and resale restrictions reduce the fair rental value of the leased premises.

In the past, some have argued that any reductions in the lease fee that are specifically intended to achieve affordability should be tailored, from year to year, to the current needs of individual homeowners. However, most CLTs have *not* tried to tailor lease fees in this way. The necessary monitoring of household incomes, together with periodic household-by-household adjustments of lease fees, would be burdensome for both CLT and homeowner (and mortgagees as well). Most CLTs have therefore established lease fees as a single set amount that should be affordable for all households in the targeted income range.

Finally, we should emphasize that the CLT's real concern is not the affordability of the lease fee alone, but the fee's effect on the affordability of the household's total housing cost. A reduction in the lease fee can make the household's monthly cost more affordable, but so can an increase in the basic housing subsidy that is intended to yield affordable mortgage payments. For the sake of the long-term sustainability of the CLT's stewardship functions, it is important that these basic affordability subsidies be large enough so that monthly payments can include a lease fee sufficient to support those functions. See Chapter 23, "Post-Purchase Stewardship Tasks," and Chapter 27, "Planning for Long-Term sustainability," for discussion of this important matter.

Variations and adjustments in the land use fee. As we have said, CLTs that include taxes or other direct expenses as a component of the lease fee must adjust the amount of the fee as the expenses vary for each leasehold from year to year. Except for this type of adjustment, however, most CLTs have tended to charge a standardized fee. Nonetheless it is important that the fee be structured in such a way that certain kinds of variations or adjustments in the amount are possible when a situation calls for them. In particular, the following kinds of variations and adjustments should be noted.

Variations Reflecting the Different Values of Different Leaseholds. Even though a CLT may establish a "standardized" lease fee, it may still have reason to adjust the fee upward or downward for different types of leaseholds, based on:

- differences in the size or location of the leased land, or
- differences in the services to be provided by the CLT, or
- differences in what is affordable for the targeted income levels.

Periodic Adjustments Reflecting Inflation. Section 5.5 of the Model Lease provides for the adjustment of the land use fee (or total lease fee in the 2002 version) at intervals of a specified

number of years. Many CLT ground leases provide for adjustments at ten-year intervals. It is possible to provide for more frequent adjustments if the CLT is prepared to assume the added administrative burden. In any case it is important to recognize that, over the years, inflation can substantially reduce the real value (purchasing power) of a given dollar amount of fee income for the CLT, and that the CLT lease should allow the fee to be updated accordingly. Section 5.5 of the Model Lease specifically limits increases to the rate of inflation as measured by the consumer price index, but some CLTs may want the right to increase the amount of the fee, provided it remains affordable, by *more than* the inflation rate in order to cover stewardship costs more fully.

Adjustments Triggered by Removal of Restrictions. As we have said, the land use fee (or total lease fee in the 2002 model) is established as fair compensation for the use of the land, given the restrictions on use and transfer imposed by the lease. If these restrictions are removed through foreclosure or other means, the CLT has an interest in collecting the potentially higher fee that would be fair for land not so restricted. Therefore Section 5.6 of the Model Lease provides for such an increase in the event that restrictions are removed. The method for calculating the unrestricted market value of the land is described above, under “Setting a Fair Charge for Value Received by Homeowner,” as the first step in calculating the original land use fee.

Adjustments Addressing Temporary Hardships Suffered by Homeowners. As we have noted, CLTs adopt fees that designed to be generally affordable for the income levels they serve. Nonetheless the economic stability of lower income households is vulnerable to a number of possible occurrences, such as unusual medical expenses, temporary unemployment, etc. Section 5.4 of the Model Lease therefore permits temporary reduction or waiver of the lease fee in situations where hardships such as these create unavoidable financial problems for a homeowner.

Funding a long-term repair reserve. As noted above, The current version of the Model Lease (in Section 5.1) defines the lease fee as including a “repair reserve fee” in addition to a “land use fee.” In defining the use of the replacement reserve fee, Section 5.1 says only that it is “to be held by the CLT and used for the purpose of preserving the physical quality of the Home for the long term.” The normal expectation, however, is that it will be dedicated to a reserve fund that will be used to cover long-term costs of major repairs to the home or replacement of major components of the home. Section 7.6 of the Model is reserved for provisions relating to the management and use of the reserve, but no one approach to this subject is presented as a model. Questions that should be addressed before deciding on an approach are discussed in the commentary on Section 7.6 presented in Chapter 11-B.

Though somewhat neglected in earlier years of the CLT movement, the question of how to ensure that the necessary resources will be available in the future for major repairs to CLT homes has become a serious concern among CLTs in recent years. It is strongly recommended that CLTs deal with the matter through some form of reserve fund.

It should be noted that in the case of CLT-sponsored condominiums, most if not all of the types of long-term repairs for which funds are normally reserved (roofs, exterior paint, etc.) involve the collectively owned common elements of the condominium rather than the individually owned units. Such reserves are established, held, and managed by the condominium association, though in some cases they may be collected by a sponsoring CLT

as noted below. See Chapter 14, “CLTs and Condominiums,” for further discussion of condominium reserves.

Other Lease Fee Considerations

Techniques for capturing present value of future lease fees. In the discussion above we have treated the lease fee as an ongoing monthly charge that can be applied to the CLT’s operating expenses month after month, year after year. At this point we should also note several ways in which the present value of future lease fee income may be captured by a CLT to help in covering immediate project costs. We do not recommend that CLTs pursue these approaches in most situations, since they involve trading away a potentially crucial long-term source of operating support, but there may be some situations involving extremely high land costs, where it makes sense to capture future land use fees to help defray the CLT’s up-front land acquisition costs – at least if there is a realistic expectation that other sources of funding will be available in the future to cover the CLT’s long-term stewardship costs.

Mortgage-financed lump-sum payment. It is possible to replace all or a portion of the monthly lease fee (or monthly “land use fee”) with an up-front, lump-sum payment. Since low-income CLT homebuyers normally cannot afford a substantial up-front payment, this approach will require that a mortgage lender be willing to finance not only the purchase price of the improvements but some portion of the mortgagable value of the leasehold interest in the land as a part of the price the homebuyer must pay. (The considerations involved in calculating the mortgagable value of the leasehold interest are discussed in Chapter 20, “Financing CLT Homes.”) At least one CLT has succeeded in arranging such financing to cover a portion of the cost of very expensive land for a subdivision project.¹

Lease-fee-backed securities. Another way in which the CLT may capture an up-front payment for land value is to sell to investors the right to receive the projected stream of monthly payments from homeowners (or that part of monthly payments that is not committed to cover taxes or other direct costs). At least one CLT has realized significant project capital by thus “securitizing” the present value of future lease fees and selling the resulting securities to a bank.²

Borrowing against value of the leased land. Finally, it should be noted that a CLT may utilize mortgage financing to purchase land with the expectation of using lease fee income to cover its mortgage payments. The practice depends less directly on projected lease fee payments (mortgage payments could be made with income from other sources), but the net effect for the CLT is similar to the effect of those practices that directly commit the land use charge to cover up-front project costs. Again, such practices should be considered only as a last resort in situations where project costs cannot be met in other ways but where there is a realistic expectation of covering future operating expenses from other sources.

Lease fee concerns relating to federal tax-exemption. As noted in Chapter 6, “Tax Exemption,” most CLTs qualify for federal tax exemption under Section 501(c)(3) of the Tax Code on the basis that their activities, including the leasing of land, are performed for charitable purposes. Lessees pay for some portion of these activities through the lease fee. In determining the charitable status of CLTs, the IRS is therefore interested in how lease fees are established, how they are subsidized, and who benefits from the subsidy. A subsidized lease fee for a leasehold that does not serve a charitable purpose (either by assisting a low-income household or by serving another charitable purpose as described in Chapter 6) may constitute an

inappropriate use of the CLT's resources and, if found to be a general practice of the CLT, might jeopardize its 501(c)(3) tax exempt status.

We should emphasize that a 501(c)(3) organization is *not prohibited* from leasing land (or selling or renting a home) to higher-income individuals or other non-charitable entities for non-charitable purposes *as long as such lessees pay market-rate fees* for what they receive. CLTs that do lease land for such non-charitable purposes should be prepared to demonstrate that the lease fee has been calculated, on a reasonable basis, as a market rate ground rent. (See the discussion above under "Setting a Fair Charge for Value Received by Homeowner.")

Lease fees and CLT homebuyer financing. As discussed in Chapter 20, "Financing, CLT Homes," lenders considering making mortgage loans to CLT lessee-homeowners have several types of concern with the amount of the lease fee. In processing loan applications, they are, first of all, concerned with the fee as part of the borrower's monthly housing cost – along with principal, interest, taxes and insurance – which must be addressed in the underwriting process to determine the affordability of a given mortgage amount. By charging a higher lease fee, a CLT will normally reduce the amount of mortgage debt that will be considered to be affordable (unless the amount of subsidy is increased).

A lender processing a loan request is also concerned with the lease fee as a determinant of the mortgagable value of the leasehold interest in the land, which in turn will affect the loan-to-value ratio for a loan of a given amount. The leasehold interest in the land has mortgagable value to the extent that the fee is less than a market-rate fee would be. A market-rate fee would tend to approximate the amount of monthly mortgage payment that would be required if the homeowner were purchasing the land outright – which would mean, in effect, that the land is already fully mortgaged, with no additional mortgagable value remaining. This matter is discussed more thoroughly in relation to mortgage concerns in Chapter 20, "Leasehold Mortgage Financing."

Mortgage lenders seeking FHA mortgage insurance will have to concern themselves with specific FHA regulations affecting leasehold mortgages. On occasion, these specific provisions have been written into a lease rider to satisfy FHA requirements. (Possible new FHA provisions for CLT leasehold mortgages are currently being discussed with FHA. These may or may not include lease fee provisions.)

Finally, mortgage lenders have an ongoing concern with the fact that a failure by the homeowner to pay the lease fee would be a default under the terms of the lease. To insure against such a default and protect their interest in the leasehold, some lenders require that the lease fee be paid to and escrowed by the lender or servicer of the mortgage, along with the monthly installments of taxes and insurance costs that are typically escrowed in such situations.

Collecting monthly fees. A number of CLTs – especially those that primarily serve low and very low income households with little or no previous homeownership experience – have struggled with the challenge of collecting a separate lease fee payment from households accustomed to making only one (rent) payment each month. In these cases, it can be a convenience to both the homeowner and the CLT if a mortgage lender is willing to collect the entire lease fee for eventual payment to the CLT, so the homeowner only has to make one payment each month to cover all basic homeownership costs, and the CLT does not have to make the special effort that may otherwise be required to collect a *second* monthly payment from the homeowner. Other CLTs, however, believe that it is important that they collect

monthly fees directly from homeowner because they don't want to lose the regular contact and communication that the process entails.

For those that do require monthly payment directly to the CLT itself, it is critical that the obligation not be allowed to slide. If a CLT does not appear to notice when fees are not paid when due and does not take firm action to follow up regarding overdue fees, a homeowner will quite naturally assume that prompt payment is relatively unimportant – perhaps less important than meeting other pressing needs that compete for a share of a lower income household's financial resources. CLTs should follow a strict policy of sending a written notice regarding unpaid fees immediately upon the expiration of a "grace period" of a specified number of days. The current Model Lease (in new section 5.7) provides for interest to be charged on unpaid fees beginning on the day the fee is due, but with first-month interest being forgiven if the fee is paid within that first month. For CLTs using this model it is recommended that a "late notice" be sent at least by the middle of that first month to lessees who have not paid. The notice should explain that the "interest clock" has been started but that the interest will not have to be paid if the regular fee is paid before the end of the month. If the fee remains unpaid for more than a month, it is recommended that a second notice be sent, showing the amount due as including the accrued interest, and warning that continued failure to pay can result in a formal notice of default and that, if not "cured," a default can eventually lead to very serious consequences. It is also important, at this point if not before, to try to reach the homeowner by phone or in person to determine whether there is a particular reason why the fee has not been paid. If there is a reason involving serious hardship for the household, such as serious illness or job loss, the CLT may defer the immediate obligation and negotiate a new payment schedule, or, in some cases, may reduce or waive the obligation for some period of time (a possibility recognized by Section 5.4 of the Model Lease).

Finally, if there are no grounds for reducing or waiving the fee and if repeated non-payments accumulate over a number of months, so that a substantial debt results, the CLT may take the homeowner to court to collect what is owed, or may, when the home is eventually sold, collect the amount owed out of the proceeds of sale, as provided in Model Lease Section 5.8, which also provides for a lien on the home to ensure that what is owed will in fact be paid when the home is sold. Legal issues related to such "worst case" situations, and the steps by which they may be resolved, are discussed in Chapter 24, "Dealing with Worst Cases."

Additions to lease fees. The total amount of lease fee owed by a lessee at a given time can be increased by several factors.

Penalties for lease violations. Some CLT leases include provisions for assessing monetary penalties for non-monetary defaults, i.e. for violations of requirements or restrictions such as the occupancy requirement or use restrictions. These penalties are usually treated as additions to the lease fee, the payment of which the lease specifically requires. They may be assessed as either a lump sum that is immediately payable or as a sum to be added to the monthly lease fee for a specified number of months, or until the violation in question has been cured.

Other additions to lease fees. CLT leases generally provide that any amounts owed by the homeowner to the CLT are to be treated as additional lease fee, for which payment is required as a condition of the lease – so that a failure to pay constitutes a default under the lease. The Model Lease specifically provides for addition to the lease fee of interest charged for late payment of fees (Section 5.7), reimbursement due to the CLT for taxes paid on behalf of the

homeowner (Section 6.4), and reimbursement due to the CLT for payments made to discharge liens on the home or leased land (Section 7.4).

Monthly fees collected for other entities. In some situations, CLTs also collect monthly payments for other entities that have some relationship to the leasehold in question – such as condominium associations or neighborhood associations to which the homeowner has a necessary obligation. The details of the CLT’s role in collecting such fees – and the specific obligations of the CLT in the event of non-payment – should normally be spelled out in a contract between the CLT and the other entity.

In the case of fees collected for other entities such as condominium associations, it should be understood by all parties that the additional fee is not a *component* of the lease fee; it is established by the authority of the other entity and is owed to the other entity. It is collected by the CLT on the same basis that a mortgagee may collect and escrow the CLT’s own lease fee. There may be other situations, however, where an additional fee is established by the authority of the CLT lease itself – for instance in the case of a CLT-developed subdivision where the creation of a home owners association is dictated by the terms of the lease. In such cases, the HOA fee may (if it is so advised by the CLT’s attorney) be treated as a component of the lease fee.

In agreeing to collect, account for and pass on fees for another entity, a CLT must of course be prepared to accept added administrative responsibilities. Those responsibilities may include at least the initial follow-up steps regarding non-payment discussed above. (Since the other entity’s fee will be combined with the CLT’s lease fee, a failure to pay one will normally mean a failure to pay the other.) However, the CLT should not assume responsibility for paying any portion of another entity’s unpaid fees that are ultimately uncollectable. See Chapter 14, “CLTs and Condominiums,” regarding issues specific to condominium fees.

Transfer Fees

A CLT’s management of the resale of homes entails significant costs. The revenue stream contributed by monthly lease fees can help to cover these costs, but most CLTs today arrange to receive a separate one-time payment at the time of resale, with the intention of covering some or all of the costs entailed for the organization by the resale. Such payments can be structured in any of several ways.

1. If the CLT exercises its option, takes title to the home and then resells it, the CLT can just mark up the price to the new buyer and take a certain amount of “profit” from the transaction.
2. If the CLT exercises its option and then assigns the option to another buyer, it can charge the buyer a fee for the assignment of the option.
3. If the homeowner sells directly to another qualified household, the CLT can charge a fee (to be added to the price paid by the buyer) for its role in confirming the eligibility of the buyer, overseeing the transaction, and issuing a new lease.
4. If the CLT does not plan to recover its costs from the buyer in any of these three ways, it may charge a marketing fee to the seller (comparable to a conventional realtor’s commission).

The first three of these methods increase the price paid by the buyer but do not affect the amount received by the seller. Only the fourth method would normally reduce the amount that the seller would otherwise receive under the terms of the CLT’s resale formula. (It is possible,

of course, to adopt a resale formula that will increase the resale price by the amount of the “marketing fee,” in which case this fee becomes just another form of transaction fee that is ultimately paid by the buyer.)

No special provision in the lease is needed to establish the possibility of method # 1, as long as the CLT has an unqualified right to exercise a purchase option. If the homeowner has a right to sell directly to a qualified buyer of her own choosing, however, the CLT may *not have* a chance to utilize method #1.

A CLT that wants to be able to use method #2, the assignment-of-option fee, should establish its right to do so in the lease – either specifically as an assignment fee or as a form of the transaction fee used in the case of #3. If the CLT’s right to charge such a fee is not explicitly stated in the lease, a CLT might argue that, since the terms on which it can assign its purchase option are not restricted in any way by the lease, there is no reason why it should not charge a fee to the assignee if it wishes. While this argument might be technically defensible, it should be noted that such a fee will increase the total cost of the home for the buyer and will therefore affect the marketability of the home for the homeowner who wants to sell. If marketability is to be affected in this way, the homeowner should be forewarned that such is a possibility. The possibility of an assignment fee being charged should therefore be stated in the lease.

Clearly, the CLT’s right to use method #3 must be established in the lease. But once established, it gives the CLT a means of recovering costs even if the purchase option has not been exercised. Provision for this most broadly applicable type of transfer fee is included in Section 10.12 or 10.13 (depending on which version of Article 10 is used) of the Model Lease – and is now recommended for all CLT leases.

A CLT’s right to charge the seller a marketing fee (method #4) must be established in the lease if the CLT is to be able to charge such a fee in all resale circumstances. If, on the other hand, the CLT simply wants to *offer* certain marketing services to a homeowner, upon receipt of the homeowner’s notice of intent to sell, a fee for those services might be established through a contractual arrangement at that time. It should be noted that a marketing fee that is charged to the seller and does not increase the purchase option price is likely to have greater negative financial impact on the seller than other types of fees will have on a buyer, since transfer fees that are added to the buyer’s price can normally be financed and will add only marginally to the buyer’s monthly mortgage payments.

The maximum amount that can be charged for any of these types of fees is usually established in the lease, as a percentage of the resale price – usually not more than the percentage that would be charged by a conventional real estate broker for selling the home. The CLT can of course choose, on a case-by-case basis, to reduce or waive the fee to increase the affordability of the resale price.

¹ OPAL CLT on Orcas Island, Washington, arranged Rural Development financing that covered a portion of the land cost as well as construction costs for new homes.

² Jackson Hole Community Housing Trust, Jackson, Wyoming, successfully developed this practice under the direction of then Executive Director Jess Lederman, who had extensive previous experience as a mortgage banker.