

Structuring Financeable Ground Leases and Leasehold Mortgages

Balancing Competing Interests Among Owners, Lessees and Lenders

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Structuring Financeable Ground Leases

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Agenda

1. Why a Ground Lease?
2. What are the Essential Provisions of a Ground Lease?
3. What are the Challenges Faced and Opportunities to Allocate Risk?
4. What makes a Ground Lease Financeable?
5. What rights must a Lender have?
6. What are the key terms of the Leasehold Mortgage?
7. What about the Lessor and any Fee Mortgage Holders?

Introduction – Why a Ground Lease?

- **Lessor**

1. Opportunity to realize longer-term economic value in the property once improved and retain reversionary interest in property;
2. Transfer risk of development to lessee; and
3. Tax consequences of a sale may be suboptimal.

- **Lessee**

1. Opportunity to develop a project without carrying a significant upfront acquisition cost for the land;
2. Flexible structure that can adapt as a project moves from construction phase to operational phase; and
3. Can maintain many aspects of control over property without ownership of fee interest.

By structuring a ground lease with a clear understanding of each party's objectives, the structure provides a means to optimally allocate risks to each of the parties and an opportunity to effectively undertake real estate development projects.

Introduction – What are the key Ground Lease terms?

- Ground lease negotiations are complex and lengthy in nature focusing on:
 1. Rent and Resets;
 2. Construction;
 3. Use and Operations;
 4. Term and Rights in a Sale;
 5. Assignment and Subletting; and
 6. Casualty and Condemnation Events.

Rent and Resets

- Typically, negotiation of the rent provisions focus on:
 1. a base rent that escalates over time and
 2. periodic resets.
- Parties tend to negotiate a rent that is between five percent and seven percent of the agreed-upon value of the land subject to the ground lease (typical NYC percentage).
- The challenges that the parties face include:
 1. Determining the appropriate escalation metric and
 2. Defining the appraise scope to set agreed-upon value.

Although challenging, by structuring the revenue streams in a manner that provides the parties with a level of certainty regarding payments, the parties can align their respective interests.

Rent and Resets

Challenge: What is the appropriate escalation metric and appraisal scope to determine agreed-upon value?

Objectives

Lessor: Seeks to tie escalations to an objective measure such as the Consumer Price Index (CPI) and anchor the appraisal to highest and best use.

Lessee: Seeks to have a fixed periodic percentage rental increases, which could take the form of CPI increases subject to a cap and wants to ensure that the appraisal accounts for development limitations set by the lease.

Alignment of Interests

The parties need to spend sufficient time ensuring there is a mechanism in place to have rent payments increase over time in a manner consistent with increases in the market as a whole and crafting an appraisal scope that reflects the value of the property given potential limitations imposed by the ground lease.

Rent and Resets – Example

Lessor

- **Base Rent:** Commencing on the Commencement Date, Ground Rent for the first Lease Year through the third Lease Year, shall be an amount equal to \$250,000 per annum. Commencing with the day following the date of expiration of the third Lease Year and for the next three Lease Years Ground Rent payable beginning in the fourth Lease Year shall be the Ground Rent payable in the Third Lease Year **increased by the cumulative percentage increase in the Consumer Price Index** for each year from the commencement of the first Lease Year through the end of the third Lease Year.
- **Rent Reset:** The Ground Rent for the Lease Year following a Rent Reset shall equal 6% of the fair market value of the Land, determined as of the date six months prior to the commencement of the Lease Year following a Rent Reset. The fair market value shall be determined with reference to the **highest and best use of the Premises** as of such date and as if the Premises were **vacant, unimproved and free and clear of the Lease and of any lien or encumbrance evidencing a debt but taking into account any other encumbrances, restrictions, and covenants recorded in the land records against the Premises.**

Rent and Resets – Example

Lessee

- **Base Rent:** Commencing on the Commencement Date, Ground Rent for the first Lease Year through the third Lease Year, shall be an amount equal to \$250,000 per annum. Commencing with the day following the date of expiration of the third Lease Year and for the next three Lease Years Ground Rent payable beginning in the fourth Lease Year shall be the Ground Rent payable in the Third Lease Year increased by the cumulative percentage increase in the Consumer Price Index for each year (**such annual percentage increase to be capped at 2.5%**) from the commencement of the first Lease Year through the end of the third Lease Year.
- **Rent Reset:** The Ground Rent for the Lease Year following a Rent Reset shall equal 6% of the fair market value of the Land, determined as of the date six months prior to the commencement of the Lease Year following a Rent Reset. The fair market value shall be determined with reference to the **use by the Tenant of the Premises as of such date and as encumbered by the Lease and taking into account any other encumbrances, restrictions, and covenants recorded in the land records against the Premises but not taking into account any lien or encumbrance evidencing a debt and as if the Premises were unimproved.**

Participation

Challenge: How do the parties craft a participation provision given the unknowns associated with the project at the time of entering into the ground lease?

Objectives

- **Lessor:** Provides an opportunity to realize additional value, particularly in the event of a highly successful project. Prefers to have participation calculated off of a gross revenue number.
- **Lessee:** Make sure that participation payments are reflective of the project's success. Prefers a net number because it is more reflective of the true success of the project.

Alignment of Interests

Given the unknowns, the parties will need to work through different scenarios to develop a participation structure that works for both parties. Since participation will likely involve a calculation of net revenue, the parties will need to negotiate a transparent process to determine the participation rent.

Participation – Example

Lessor

- **Percentage Rent**: In the event that five percent of monthly Gross Revenues exceeds the applicable monthly Minimum Base Rent, the **Percentage Rent shall be equal to the difference between five percent of monthly Gross Revenues and the monthly Minimum Base Rent**. No Percentage Rent shall be due if five percent of monthly Gross Revenues is less than or equal to the monthly Minimum Base Rent. For example, if Gross Revenues for a month are \$1,000,000, and monthly Minimum Base Rent for that month is \$40,000, then Percentage Rent for that month will be $((\$1,000,000 \times .05) - \$40,000) = \$10,000$.
- **“Gross Revenue” shall mean any revenues and income derived and actually received by or for Tenant from the Premises** but shall not include proceeds from sale, finance, refinance, condemnation or casualty of the Premises. Gross Revenues shall be accounted for in conformity with GAAP or other reasonable accounting system adopted by Tenant and reasonably approved by Landlord.

Participation – Example

Lessee

- **Percentage Rent:** In the event that five percent of monthly Net Income exceeds the applicable monthly Minimum Base Rent, the Percentage Rent shall be equal to the difference between 10 percent of monthly Net Income and the monthly Minimum Base Rent. No Percentage Rent shall be due if five percent of monthly Net Income is less than or equal to the monthly Minimum Base Rent. For example, if Net Income for a month is \$500,000, and monthly Minimum Base Rent for that month is \$40,000, then Percentage Rent for that month will be $((\$500,000 \times .10) - \$40,000) = \$10,000$.
- “Net Income” shall mean difference between (1) the gross income actually received by Tenant from the operation of the Premises and (2) the expenses incurred by Tenant in connection with such operation.

Construction

Challenge: How do the parties establish a process that provides the lessor with sufficient comfort that construction occurs while not limiting the lessee's ability to manage its own project?

Objectives

- **Lessor:** Negotiate into the ground lease rights to make sure construction proceeds within an agreed-upon schedule.
- **Lessee:** Ensure that lessor's oversight rights are minimal and do not impede the project's development.

Alignment of Interests

Parties can integrate provisions that are consistent with those that a lessee's lender will have, and the lessor can provide appropriate notice and cure provisions to enable the lessee and its lender to address situations where construction does not proceed according to plan.

Construction

Lessor

- **Construction Work**: Tenant shall not commence any Construction Work **until Landlord shall have approved the proposed plans and specifications in the manner provided in this Lease**.
- **Inspection**: Landlord and its representatives shall have the right, upon reasonable notice to Tenant during regular business hours, to visit the Premises to observe the performance by Tenant of the Construction Work (including the means, methods, procedures and techniques utilized by Tenant) to ensure that such Construction Work is undertaken substantially in accordance with the approved plans and specifications, construction schedules, Legal Requirements and this Lease. Landlord shall have the right to attend a Tenant's job and/or safety meeting.

Lessee

- **Construction Work**: **Tenant shall have the right, at Tenant's sole cost and expense, to construct any and all Improvements which are necessary to complete construction on the Premises**; provided that all Improvements on the Premises shall be constructed in accordance with the terms of this Lease and in accordance with all applicable development approvals and Legal Requirements.

Use and Operations

Challenge: How do the parties establish a structure that protects the lessor's interest in seeing its property activated and potentially participating in success while also allowing the lessee to make adjustments if market conditions warrant?

Objectives

- **Lessor:** Incorporate prescriptive use and continuous operation provisions that go beyond standard provisions prohibiting noxious uses.
- **Lessee:** Provide for flexibility to allow for future modifications to address situations where the market for the intended use does not materialize or market preferences change over time.

Alignment of Interests

To address these competing concerns and to implement a structure that provides flexibility, the parties can agree to include a set of parameters that if met would provide the lessee with an opportunity to make modifications to use as market conditions warrant.

Use and Operations – Example

- **Lessor**

- **Permitted Uses:** Tenant represents, warrants and covenants that the Premises shall be developed and maintained and **may be used solely for the Permitted Uses in accordance with the Operations Plan attached hereto as Exhibit A.** Following the Completion of any Improvements, **Tenant shall maintain such Improvements in a first-class condition.** “Permitted Uses” shall mean _____.

- **Lessee**

- **Permitted Uses:** Tenant represents, warrants and covenants that the Premises shall be developed and maintained and may be used solely for the permitted uses in accordance with the Operations Plan attached hereto as Exhibit A. **Following the fifth Lease Year, in the event that the vacancy rate for the Premises exceeds _____ %, Tenant shall have the right to modify the permitted uses under the Operations Plan to allow for other uses permitted by applicable law provided that such modifications are subject to the consent of Landlord, which shall not to be unreasonably withheld or delayed.**

Term and Rights in a Sale

Challenge: How can lessor be given sufficient flexibility with respect to the sale of its fee interest while addressing lessee's interest in potentially acquiring such fee interest?

Objectives

Lessor: Typically seeks to preserve its reversionary interest and minimize any right lessee may have on lessor's right to sell.

Lessee: Seeks to have the strongest set of rights possible in the event lessor seeks to sell its fee interest.

Alignment of Interests

Parties can craft a provision that provides for an appropriate option right so that the lessee is given an opportunity to purchase while lessor is given the chance to seek out the highest value for its interest.

Term and Rights in a Sale – Example

Lessor

- **ROFO:** Landlord shall be entitled to deliver a written notice to Tenant specifying that it proposes to convey its interest at a minimum gross purchase price and upon certain other material terms and conditions. . . If Tenant elects, or is deemed to have elected, not to purchase such interest, then Landlord shall have the right to convey the fee interest in a transaction to a third party purchaser for a minimum gross sales price equal to not less than ninety-five percent (95%) of the offer price and substantially on such other terms and conditions as are set forth in the Offer Notice, provided that the closing shall occur no later than one hundred eighty (180) days following the date of the Tenant's response.

Lessee

- **Purchase Option:** Tenant shall have the right to purchase Landlord's fee interest in the Premises at any time after _____. The consideration for the purchase shall be the fair market value of the fee simple interest in the Premises as unencumbered by the Lease.

Assignment and Subletting

Challenge: How do the parties craft transfer restrictions that provide the lessor with the comfort of knowing that the lessee will not exit before project completion and with knowing that a party with the necessary financial resources to pay the ground rent and the property management expertise will manage the project over the long term?

Objectives

- **Lessor:** Particularly during the project's pre-stabilization phase ensure that the lessee retains control over project management given the reliance on the lessee's expertise.
- **Lessee:** Provide for sufficient flexibility to bring additional equity partners into the project and to allow for the potential disposition of the lessee's interest upon completion of construction.

Alignment of Interests

Agreed-upon transfer restrictions can ensure that lessee remains in control of project during construction and can provide for an ability to bring in additional equity investors while also providing the lessee with more expansive transfer rights upon project stabilization.

Assignment and Subletting— Example

Lessor

- **Permitted Transferee: Prior to Final Completion, the Tenant shall not have the right to assign its interest in the Lease without the consent of Landlord, to be given in Landlord's sole discretion.** If the Project has achieved Final Completion, a Permitted Transferee shall be an entity that: (a) **has a net worth of not less than** One Hundred Fifty Million and 00/100 Dollars (\$150,000,000.00) and **liquid assets of not less than** Fifty Million and 00/100 Dollars (\$50,000,000.00) (each subject to CPI Adjustment), (b) **is not a Prohibited Person**, and (c) **is a Qualified Property Manager**, or shall concurrently with obtaining Operational Control and at all times thereafter, engage a management company that is a Qualified Property Manager.

Lessee

- **Permitted Transferee:** A Permitted Transferee shall be an entity that: (a) **has sufficient financial means** to pay and perform all of its obligations under the Lease and (b) **is or employs a property manager** with experience managing comparable properties.

Casualty and Condemnation Events

Challenge: How do you craft a provision that reflects the lessor's interest in having the project restored in the event of a casualty while not overly burdening the lessee with an absolute obligation?

Objectives

- **Lessor:** Ensure that the lessee is carrying sufficient insurance and require that the lessee restore the project in event of casualty.
- **Lessee:** Preserve the flexibility to determine how best to proceed based on the extent of the damage in the event of a casualty and account for the potential requirements of the lessee's lender who will seek to control the use of any casualty proceeds.

Alignment of Interests

Craft provision that establishes a clear definition of major casualty so parties can agree as to when there is a requirement to restore and provide for control of insurance proceeds in such an event.

Casualty and Condemnation Events – Example

Lessor

- **Casualty:** If less than substantially all of the Improvements on the Premises shall be damaged or destroyed by fire or other casualty or cause (a "Casualty"), then Tenant shall give prompt written notice thereof to Landlord, and this Lease shall continue in full force and effect, and Tenant shall proceed at Tenant's own cost and expense and in conformity with the requirements of this Lease with reasonable diligence and promptness to restore the Improvements as nearly as practicable to substantially the same condition, design and construction as that which existed immediately prior to such Casualty. Substantially all of the Premises shall be deemed to have been damaged or destroyed by Casualty if 75% percent or more of the rentable area of the Improvements shall be damaged or destroyed.
- **Insurance Proceeds:** If the estimated cost to restore is less than _____, insurance proceeds shall be paid to Tenant to restore Improvements. If the estimated cost to restore is equal to or greater than _____, insurance proceeds shall be paid to a bank or trust selected by the Landlord to as Depository.

Casualty and Condemnation Events – Example

Lessee

- **Casualty:** If less than substantially all of the Improvements on the Premises shall be damaged or destroyed by fire or other casualty or cause (a "Casualty"), then Tenant shall give prompt written notice thereof to Landlord, and this Lease shall continue in full force and effect, and Tenant shall proceed at Tenant's own cost and expense and in conformity with the requirements of this Lease with reasonable diligence and promptness to restore the Improvements as nearly as practicable to substantially the same condition, design and construction as that which existed immediately prior to such Casualty. Substantially all of the Premises shall be deemed to have been damaged or destroyed by Casualty if 50% percent or more of the rentable area of the Improvements shall be damaged or destroyed. In the event of a Casualty occurring during the last 10 years of the Lease Term, substantially all of the Premises shall be deemed to have been damaged or destroyed by Casualty if 25% percent or more of the rentable area of the Improvements shall be damaged or destroyed.
- **Insurance Proceeds:** In the event of a Casualty during such time as a Leasehold Mortgage is in effect, the Leasehold Mortgagee shall have the right to direct the use of such insurance proceeds, In addition, if such Leasehold Mortgagee (by reason of its acquiring a portion of the Leasehold Estate) shall be obligated under this Lease to restore all or any portion of the Improvements, then such obligation shall be limited to the amount of such insurance proceeds.

Financing a Ground Lease Interest

The nuts and bolts

A typical scenario for leasehold mortgages

- Borrower is constructing a building but doesn't own the fee (and may or may not have an option to purchase the fee).
- When constructed, Borrower owns the building (although it becomes the fee owner's at the end of the lease, subject to any option to purchase the fee).

What makes a lease financeable

- Triple net
- Broad “use” provisions, in case circumstances change over the course of the lease.
- Lengthy lease term
 - Usually between 25-30 years at a minimum, with options to renew for another 20 years.
 - Substantially longer than the stated maturity of the leasehold mortgage – check latest Rating Agency requirement.
 - Should contain an option to purchase to purchase fee interest

What makes a lease financeable

- Right to mortgage:
 - Ground Lessee must have the absolute and unconditional right, without Ground Lessor's consent (but on notice to Ground Lessor), to execute and deliver leasehold mortgage(s) at any time and from time to time during the term of the Ground Lease
- Anti-merger provision
 - Ground Lessor's and Ground Lessee's interests may never merge
 - Leasehold mortgagee's collateral could otherwise disappear
- Estoppels
 - Ground Lessor must be required to give estoppels to Leasehold Mortgagee
 - Ground Lessor should also obtain estoppels from fee mortgagee in favor of leasehold

What makes a lease financeable

- Acknowledgment of rights of Leasehold Mortgagee
 - Agreement that Ground Lessor will recognize Leasehold Mortgagee and its rights to notice and cure, in a recordable writing.
 - Ground lessor's covenant to obtain non-disturbance agreement from its fee mortgagee(s) in favor of Leasehold Mortgagee, in a recordable writing
 - Rights of Leasehold Mortgagee to (i) notice and cure rights and (ii) a new lease
 - Rights of Leasehold Mortgagee to exercise renewal options (and options to purchase)
 - Rights to apply casualty insurance proceeds/condemnation awards to outstanding mortgage amount
 - Subordination of any Ground Lessor repurchase rights or ROFRs to the Leasehold Mortgage (otherwise interferes with remedies)
- No acceleration of remedies or self-help
 - This interferes with the rights of Leasehold Mortgagee.

What makes a lease financeable

- Amendments
 - No amendments to the Ground Lease without Leasehold Mortgagee's consent
- Assignment/Subletting
 - Must not require Ground Lessor consent
 - Ground Lessor cannot have right to recapture space assigned or sublet.
- Casualty/Condemnation
 - Application of proceeds must be subject to Leasehold Mortgagee rights under loan documents
 - No requirement to rebuild (but there is always a requirement to leave in safe condition)
 - Ground lessee must have rights to sue for an award for loss of improvements (fee owner may sue separately for loss of land).

What makes a lease financeable

- Notice and cure rights of Leasehold Mortgagee (also included in recognition agreements)
 - **THIS IS THE CRUX OF A LEASEHOLD MORTGAGEE'S DEFENSE OF ITS COLLATERAL – THE RIGHT TO CURE AND OBTAIN A NEW LEASE, IF NECESSARY**
- Leasehold Mortgagee may initiate and complete a foreclosure and exercise any other rights and remedies under Leasehold Mortgage
- Ground Lessor will accept cure from Leasehold Mortgagee without Leasehold Mortgagee becoming bound or liable under the Ground Lease or be deemed a “mortgagee-in -possession”. Leasehold Mortgagee must have a right to simultaneous delivery of any notice of default or termination sent to Ground Lessee (and no such notice is effective unless Leasehold Mortgagee receives it)

What makes a lease financeable

- Leasehold Mortgagee should have longer cure rights for defaults –
 - an extra thirty days for monetary default
 - an extra sixty days for a non-monetary that can be cured without having to take possession.
 - And if possession is required in order to cure the default, then, as long as Leasehold Mortgagee gives notice of its intent to institute proceedings to gain possession, the additional cure period should last as long as it takes to obtain possession as long as Leasehold Mortgagee initiates within 30 days of notice and diligently prosecutes such proceedings plus a reasonable amount of time to cure once Leasehold Mortgagee or its designee is in possession
 - If Leasehold Mortgagees forecloses, fee owner agrees to execute a new lease with Leasehold Mortgagee or its designee.

What makes a lease financeable

- Even if Leasehold Mortgagee failed to timely exercise its cure rights, Ground Lessor still must give Leasehold Mortgagee a Termination Notice and Leasehold Mortgagee has a period (usually 30 days) during which it may require Ground Lessor to enter into a new lease with a new ground lessee, provided that the new ground lessee commits to cure all defaults under the old ground lease within the prescribed cure periods.
- If Ground Lessee or any Affiliate is a debtor in a bankruptcy proceeding and rejects the Ground Lease Ground Lessor will deem such rejection as an assignment of the Ground Lease to Leasehold Mortgagee unless Leasehold Mortgagee refuses the assignment (not sure why this would happen). (If the deemed assignment is not permitted, then Ground Lessor will enter into a new lease with Leasehold Mortgagee or its designee.)

What needs to be in the Leasehold Mortgage

- **Obligation to pay rent and additional rent:**

Ground Lessee shall promptly pay all rent, additional rent, Impositions, or other charges due and payable under the Ground Lease not later than the date upon which the same become due and payable by Ground Lessee pursuant to the provisions of the Ground Lease.

- **Performance of all obligations under the Ground Lease:**

Ground Lessee shall perform and observe all of the terms, covenants and conditions required to be performed and observed by Ground Lessee under the Ground Lease within the stated opportunity to cure periods provided in the Ground Lease or such lesser opportunity to cure periods as are provided in Article II of this Mortgage, and shall do all things necessary to preserve and to keep unimpaired Ground Lessee's rights under the Ground Lease.

What needs to be in the Leasehold Mortgage

- Mortgagee's Right to Cure Ground Lessee Defaults.

If Ground Lessee shall fail to pay any base rent or additional rent required under the Ground Lease or any all real estate taxes, assessments, water and sewer charges or any other governmental levies and charges which shall be assessed . . . become a lien upon or against the Property, . . . or to make any other payment required to be paid by Ground Lessee under the Ground Lease at the time and in the manner provided in the Ground Lease or if Ground Lessee shall fail to perform or observe any other term, covenant . . . under the Ground Lease, then, without releasing Ground Lessee from any of its obligations under this Mortgage, Mortgagee shall have the right, but not the obligation, to pay base rent or additional rent and/or any Impositions, or other payment, and may take such action as may be appropriate to cause such other term, covenant or condition to be promptly performed or observed on behalf of Ground Lessee, to the end that Ground Lessee's rights, under the Ground Lease shall be kept unimpaired from default, and Ground Lessee shall permit Mortgagee to enter upon the Property with or without notice . . . for such purpose.

What needs to be in the Leasehold Mortgage

- Notices

Ground Lessee shall: (i) promptly notify Mortgagee in writing of any notice from Ground Lessor of default by Ground Lessee of any of the terms, covenants, or conditions to be performed or observed by Ground Lessee under the Ground Lease; (ii) promptly notify Mortgagee in writing of the receipt by Ground Lessee of any notice from the Ground Lessor under the Ground Lease of termination of the Ground Lease pursuant to the provisions of the Ground Lease; and (iii) promptly cause a copy of each such notice received by Ground Lessee to be delivered to Mortgagee.

- Prohibited Acts.

Ground Lessee shall not, without the prior written consent of Mortgagee, consent to any agreement which releases the Ground Lessee from any of its obligations under the Ground Lease, exercise any option to purchase the Property contained in the Ground Lease, or consent to or permit any waiver, modification or cancellation of any provision of the Ground Lease, the surrender or termination of the Ground Lease, or the subordination of the Ground Lease to any mortgage of the fee interest of the Lessor of the Property. Ground Lessee shall not sell, transfer or assign the Ground Lease or any portion of Ground Lessee's interest therein without the prior written consent of Mortgagee and the Ground Lessor first had and obtained.

What needs to be in the Leasehold Mortgage

- No Merger

If Ground Lessee acquires the fee estate in the Property, Ground Lessee agrees that there shall not be a merger of the fee and leasehold estates without the prior written consent of Mortgagee.

- Bankruptcy

- If Ground Lessee is in bankruptcy, Leasehold Mortgagee is deemed assigned the right to assume or reject the Ground Lease (and if that assumption is unenforceable, then Ground Lessee will get prior consent of Leasehold Mortgagee before assuming or rejecting the Ground Lease.
- Ground Lessee assigns to Leasehold Mortgagee all claims and rights to the payment of damages arising from any rejection of the Ground Lease by Ground Lessor.
- If Ground Lessor (in any bankruptcy proceeding of Ground Lessor) tries to transfer the Property free and clear of any Ground Lease under Section 363(f), Ground Lessee covenants object to the transfer and assert and pursue its right to adequate protection of its leasehold estate under Section 363(e).

What needs to be in the Leasehold Mortgage

- Bankruptcy (cont'd)

- Ground Lessee agrees that --in case of Ground Lessor's or Ground Lessee's bankruptcy case – that Leasehold Mortgagee is entitled to adequate protection and Ground Lessee shall provide immediate and continuous adequate protection of Leasehold Mortgagee's interests to the extent possible under applicable law. Such adequate protection includes (to the extent permissible under applicable law):
 - Leasehold Mortgagee shall be deemed a party to the Ground Lease (but without any obligations thereunder) for purposes of Sections 363 and 365, and shall have standing to appear and act as a party in interest in relation to any matter arising out of or related to the Ground Lease or the Property;
 - Ground Lessee shall serve Leasehold Mortgagee with copies of all notices, pleadings and other documents received by Ground Lessee relating to or affecting the Ground Lease or the Property; and
 - Upon Leasehold Mortgagee's request, Ground Lessee shall assume the Ground Lease, and shall take such steps as are necessary to preserve such Ground Lessee's right to assume the Ground Lease, including without limitation, (i) obtaining extensions of time to assume or reject the Ground Lease under Subsection 365(d) of the Bankruptcy Code to the extent it is applicable, (ii) objecting to any attempt by any Ground Lessor (in the event of a bankruptcy proceeding filed by or against any Ground Lessor) to sell or transfer the Property free and clear of the Ground Lease under Section 363 of the Code and (iii) timely asserting and pursuing its right to adequate protection under Section 363(e) of the Code in such event.
 - Ground Lessee shall join with and support any request by Leasehold Mortgagee to grant and approve adequate protection of Leasehold Mortgagee's interests including such economic and monetary protections as determined by Leasehold Mortgagee to adequately protect Leasehold Mortgagee's interests.

Fee Mortgage Recognition by Fee Mortgagee in favor of Leasehold Mortgagee

- Key provision:
 - Enforcement of any provisions of the Fee Loan Documents, including but not limited to foreclosing the Fee Mortgage or granting a deed in lieu thereof, shall not terminate or in any way affect the Lease, the leasehold estate create thereby, the Leasehold Mortgage or the lien created thereby; and
 - Neither Leasehold Mortgagee, Ground Lessee nor any person claiming through or under Leasehold Mortgagee or Ground Lessee shall be named or joined as a party defendant in any action, suit or proceeding which may be instituted or taken by Fee Mortgagee for the purpose of enforcing or foreclosing the Fee Mortgage, by reason of any default or event of default under the Fee Mortgage or any other Fee Loan Documents, unless required by law.
- Define “Fee Mortgagee” and “Leasehold Mortgagee” broadly.
 - Also, make sure that that Fee Mortgagee includes successors and assigns, any purchaser at a foreclosure sale under the Fee Mortgage, any grantee of a deed in lieu of foreclosure of the Fee Mortgage.
 - Allow for transfers and assignments of the leasehold mortgage on the secondary market or otherwise
- Recorded document

Ground Lessor Recognition Agreement in favor of Leasehold Mortgagee

- Recognize the Leasehold Mortgagee as permitted under the Lease
- Reiterate Ground Lessor's obligation to give notice and opportunities to cure and rights to a new lease (as described above)
- Limit any liability to Leasehold Mortgagee's interest in the Ground Lease
- Recorded document

Ground Lessor Estoppel to the Leasehold Mortgagee (minimum)

- Acknowledge the Leasehold Mortgagee and its entitlement to the protections, notices, etc. of a Leasehold Mortgagee under the ground lease [doesn't hurt to restate the distribution of casualty proceeds]
- Affirm that the Ground Lessor is the owner of the fee and the lease has not been assigned
- State whether or not the Ground Lessor is an affiliate of Ground Lessee (this raises merger issues and whether Ground Lessor should subordinate the fee interest).
- Annex a true, complete and correct copy of the ground lease
- State the current rent and state the other obligations of Ground Lessee, like payment of real estate taxes, etc. (or refer to the schedule of ground lease)
- State whether or not there is fee mortgagee
- State whether or not there has been any notice of condemnation proceeding
- State whether or not there is a default
- State that Ground Lessor knows that Leasehold Mortgagee is relying on the estoppel in making the loan.

Fee Mortgagee Estoppel (if you can get it)

- The Mortgage is in full force and effect and has not been modified, amended.
- State whether or not there is a default
- Fee mortgagee is actually the holder of the debt.
- The stated maturity date is _____.
- The outstanding principal balance of the Mortgage does not exceed \$_____.
- State whether or not there has been any notice of condemnation proceeding
- State the fee mortgagee or knows that Leasehold Mortgagee is relying on the estoppel in making the loan.