

**LEASEHOLD FINANCING: WHAT'S NEEDED AND WHY**

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## **I. INTRODUCTION TO LEASEHOLD FINANCING: What provisions are these leases required to include to make them financeable?**

Many retail sites are developed by lessees of the property pursuant to ground leases. In these cases, the lessee, not the underlying retail tenant (subtenant), is responsible for building the improvements for the subtenant, with the cost of construction paid from a combination of the lessee's capital and construction financing. Ultimately, when the project is completed and the underlying tenant is paying rent, the lessee will obtain permanent financing with the debt service supported by the rents derived under the sublease with the underlying tenant. The collateral which secures these loans is the leasehold interest held by the lessee and the improvements upon (or to be constructed upon, in the case of construction financing) the leased property. These leases are oftentimes referred to as ground leases.

In the typical real estate financing scenario, the fee owner of the real estate grants a mortgage against its fee interest in the property. If a loan default occurs, the fee mortgagee forecloses upon the fee interest. The fee estate is a superior interest to a leasehold estate (i.e., the leasehold estate is a subordinate interest) and therefore, absent any contractual arrangements to the contrary (such as a non-disturbance agreement), the fee mortgagee would have the right to either accept any such subordinated interests or seek to terminate them through the foreclosure process. This would be an unacceptable arrangement for a leasehold mortgagee as it would run the risk of losing its collateral if, for example, the fee mortgagee sought to terminate the ground lease through a foreclosure of the fee estate or if there were to be a termination of the ground lease for other reasons.

These materials set forth the terms and provisions which most leasehold mortgagees will require in order to make a loan which is secured by the ground lease, as well as the purpose and significance of such requirements.

## **II. OUTLINE OF KEY PROVISIONS**

To make a ground lease "financeable", lenders require certain elements to be present. Generally, they require: (i) the lease and all amendments related to it be recorded (or memoranda of them are recorded); (ii) the lease is free of mortgaging restrictions on the tenant's interest in the lease, (iii) the lease contains an affirmative statement that the lease is financeable without the lessor's consent; (iv) the obligation of the lessor to provide notices on all defaults, (v) prohibitions on surrender, modification, or amendment of the lease without the mortgagee's prior written consent, (vi) the obligation to provide estoppel certificates in favor of the leasehold mortgagee and (vii) the lease can be freely assigned by the tenant without the landlord's consent.

### **Ground Lease Requirements for Leasehold Mortgagees:**

Leasehold mortgagees have their set of underwriting requirements, as a benchmark to determine whether a ground lease is financeable. Meeting all the criteria is not required, as leasehold mortgagees may still accept it as collateral if deficiencies are deemed to be non-material. However, the loan amount may be reduced and/or the interest rate may increase if certain underwriting requirements are not satisfied. Some of the standard underwriting requirements

include: (i) required minimum length of the remaining term; (ii) tolerable rent resets during the term and any renewal terms; (iii) requirements for involvement in and approval of any settlement of a condemnation or insurance claim; and (iv) variations or acceptable deviations from ordinary rating agency criteria.

In order to make the leasehold mortgage loan, leasehold mortgagees need to be satisfied as to the following items:

- Prohibitions: The ground lease does not trigger a default based on a default under the leasehold mortgage. The ground lease allows the leasehold mortgagee to “step into the shoes” of the lessee upon a loan default. *(See Page A-1 for sample provision)*
- Rent Increases: Rent resets occur at predetermined times during the lease (every 15, 20 or 25 years, for example), to take into account increases in the value of the property, they can be on: (i) a fixed schedule, with fixed increases; (ii) CPI increases capped at 3.5 percent per year (measured as the current marketplace expectations); (iii) fair market increases or (iv) based upon long term securities, such as U.S. treasuries, as a more recent development. Due to various substantial increases in rent resets based upon fair market increases, they have fallen out of favor as if the ground lessee cannot pay the rent, the leasehold mortgagee would need to do so to keep the ground lease in good standing, as it is the collateral for the loan.
- Term: Assuming exercise of all remaining extension options, the ground lease term extends at least 30 years beyond the scheduled maturity of the mortgage loan. *(See Page A-1 for sample provision)*
- Use: The ground lease allows the present use of the existing improvements. Leasehold mortgagee’s appraisal should consider all permissible uses and other restrictions in the ground lease. *(See Page A-1 for sample provision).*
- Documents: The ground lease and each amendment thereof must be recorded (typically, this is satisfied with recording memorandums of such instruments). All future amendments or changes made must be executed by the ground lessor and the ground lessee, with the fee mortgagee’s consent.
- Estoppel Certificate: The ground lessor delivered an ordinary and customary estoppel certificate, without material exceptions, not more than last 30 days before the leasehold mortgage loan closing. *(See Pages A-1 and A-2 for sample provision)*
- Mortgage: The leasehold mortgage requires the ground lessee (mortgagor) to comply with the ground lease. The leasehold mortgagee must also satisfy all conditions for leasehold mortgages in the ground lease, if for example, there are qualifications as to acceptable lenders (institutional lender and/or financial strength tests). The ground lessor must

confirm via writing receipt of any required notice of the leasehold mortgage and of all assignments of the leasehold mortgage or ground lease. (*See Page A-2 for sample provision*)

- Status/No Default: When the borrower/mortgagor is not the original ground lessee, the ground lessor must have acknowledged them as the new ground lessee for the purposes of the ground lease. Thus, the ground lease remains in full force and effect. At the time of closing, no (uncured) default must exist with respect to the ground lease. This can be achieved through the estoppel certificate (noted above): “To Lessor’s actual knowledge, no condition exists that, but for the passage of time or giving of notice, or both, would result in such a default.” (*See Pages A-2 and A-3 for sample provision*)
- Title: Except for permitted exceptions affecting the real property: (i) the leasehold estate is subject to no lien or encumbrance superior or equal in priority to the leasehold mortgage and (ii) the fee estate is subject to no lien or encumbrance including any fee mortgage, superior or equal in priority to the ground lease. (*See Page A-3 for sample provision*)
- Underwriting: The underwriting of the leasehold mortgage loan: (i) treats ground rent as a priority expense, like real estate taxes and insurance premiums, and (ii) fully considers any ground lease terms that impair the value of the leasehold estate.

More generally, beyond the above closing requirements, the ground lease needs to include the following items which in many instances are favorable to the lessee itself vis-à-vis the ground lessor, but also benefit and protect the leasehold mortgagee:

- Construction: The ground lessee should have the ability to alter, construct and modify improvements without the ground lessor’s consent. To achieve this, he may need to bargain over “reasonable standards” to ensure completion, payment (to the ground lessor), and preservation of value. (*See Pages A-3 and A-4 for sample provision*)
- Estoppel Certificates: These clauses are important to ensure that the ground lessor agrees to give and certify in writing, at either the ground lessee or leasehold mortgagee’s request: (i) that the ground lease is in full force and effect; (ii) whether the ground lease has been amended; (iii) that to the ground lessor’s knowledge the ground lessee is not in default; (iv) the date through much rent has been paid; and (v) and other factual matters as reasonably requested.

The estoppel certificate serves as a basis for the leasehold mortgagee to confirm whether the lessee is in good standing under the ground lease, and to have the comfort and assurance regarding important factual matters relating to the ground lease which the leasehold mortgagee is relying upon in making its loan. (*See Page A-4 for sample provision*) The effect of the estoppel is to prevent the ground lessor from later asserting claims or facts which are at odds with the statements it made in the estoppel certificate (*i.e.*, the ground lessor has “estopped” itself from doing so and therefore needs to be careful with respect to the statements it is making therein).

- Ground Lessee Rights: Ground leases often include rights in favor of the lessee to extend (or renew, as it is also often referred to) the term, for one or more options containing a preset number of years (5, 10, 15, 20, etc.) and sometimes also to purchase the fee interest. If the lessee were to opt to not exercise these rights, they must notify each leasehold mortgagee. Within 30 days receipt of notice, the leasehold mortgagee may exercise the right on the ground lessee's behalf. If a leasehold mortgagee does this, they only need to meet the requirement of payment of money to the ground lessor. (*See Page A-4 for sample provision*)
- Leasehold Mortgagee's Rights: It is imperative that the ground lease includes express leasehold mortgagee protections, including that: (i) the ground lessee may, without the ground lessor's consent, mortgage or collaterally assign the ground lease to any leasehold mortgagee that meets certain agreed upon standards (see above as to whether the ground lease requires that the leasehold mortgagee must be an institutional lender and/or satisfy a financial strength test); (ii) any leasehold mortgagee may accomplish foreclosure, assignment in lieu of foreclosure, sale through bankruptcy or similar proceeding, or other involuntary divestiture of the ground lessee's leasehold estate; and (iii) anyone whose title derives directly or indirectly (and through any number of intervening assignments) from an involuntary transfer may assign this ground lease. These features enable the leasehold mortgagee to have an exit strategy, not just for itself, but future ground lessees and future leasehold mortgagees, which makes the ground lease marketable, and more likely to yield its highest value upon a sale, whether achieved through a refinancing, foreclosure, bankruptcy or otherwise.

These provisions give an enormous amount of bargaining power and discretion into the hands of the leasehold mortgagees regarding what happens during a default. Leasehold mortgagees may assume tenancy or pick the next tenant (receiver). (*See Pages A-4 and A-5 for sample provision*) However, the leasehold mortgagee has financed the valuable improvements, and has generally devoted more capital to the property than the lessee, and the amount of its loan is also generally considerably higher than the land value retained by the fee owner / ground lessor.

- Loss: If any time damage occurs to the improvements by fire or other casualty or if there is any condemnation proceeding with respect to the property: (i) both the ground lessor and ground lessee must promptly notify the leasehold mortgagee; (ii) the leasehold mortgagee may participate in any adjustment, negotiation, or settlement of insurance proceeds or condemnation awards and shall have the right to approve any settlement; (iii) any such funds shall be held by a financial institution, chosen by the leasehold mortgagee, that complies with rating agency standards for any depository loss of proceeds; (iv) those funds will be released from time to time to pay for restoration under reasonable disbursement procedures; and (v) except upon a total condemnation, this ground lease shall continue and the ground lessee shall restore the remaining premises. (*See Pages A-5 and A-6 for sample provision*)

The leasehold mortgagee ideally wants the ultimate discretion as to how insurance proceeds are to be used if there is a major casualty, as utilizing the proceeds of a casualty or condemnation to restore the improvements may not yield a sufficient property value to support the debt. In this case, the leasehold mortgagee may want to use the proceeds to pay down the loan, which is at odds with the interests of the ground lessor, the fee mortgagee and the ground lessee.

- Multiple Leasehold Mortgagees: If multiple leasehold mortgagees seek to exercise rights under a ground lease, then the most senior may do so to the exclusion of other leasehold mortgagees. *(See Page A-6 for sample provision)*
- New Lease: In the event of a ground lease termination due to a ground lessee default or if the ground lessee rejects it in bankruptcy, the ground lessor shall notify each leasehold mortgagee. A leasehold mortgagee may require the ground lessor, by notice, to enter a new lease with that leasehold mortgagee or its designee (receiver). This retroactively replaces the old tenant with a new one, and parties act as if the ground lease was never terminated. When parties enter a new lease the ground lessee must cure all monetary defaults and agree to cure any other curable defaults within a reasonable time. The ground lessor must waive all defaults specific to the former ground lessee or those that are incurable. *(Sees Pages A-7 and A-8 for sample provision)*
- No Merger: If the leasehold estate or the fee estate are ever commonly held, they shall remain separate and distinct estates and not merge unless all the leasehold mortgagees consent. *(See Page A-8 for sample provision)* If the leasehold mortgagee were to take title to the leased property through an assignment in lieu of foreclosure, this affords the leasehold mortgagee with the proverbial “second bite at the apple” to thereafter foreclose out any intervening liens or other interests which are subordinated to the leasehold mortgage.
- No Personal Liability: No leasehold mortgagee or anyone acting for it shall have personal liability under this ground lease unless it becomes the ground lessee. That liability ends when it assigns, abandons, or surrenders this ground lease. *(See Page A-8 for sample provision)*
- Notice and Opportunity to Cure: Even after the period where the ground lessee defaults under the ground lease, and all notice and opportunity to cure periods have expired, the ground lessor must notify each leasehold mortgagee, before exercising any right or remedy (the most important of which of course, being exercising the right to terminate the ground lease) and must allow the leasehold mortgagee a period of time to cure the default (typically at least 30 days, however non-monetary defaults can take longer and can have considerably longer cure periods). For example, if the default cannot be reasonably cured in that time, then each leasehold mortgagee shall have such additional time as it reasonably needs, so

long as it proceeds with reasonable diligence. Additional time is given if the cure requires a retaking of the premises. After curing, the ground lessor will waive all defaults specific to the former ground lessee and/or all defaults that are not curable. So long as the leasehold mortgagee's cure periods have not expired, the ground lessor cannot terminate the ground lease for the ground lessee's default. Bear in mind, that the leasehold mortgagee may be funding the ground rent out of its own pocket (through protective advances under the terms of its loan documents) to keep the ground lease from being terminated or would have to make good on all rents to get a new lease if it were terminated. From the point of view of the ground lessor, it has a presumably creditworthy backstop to the defaulting ground lessee, which is a logical basis for these protections given to the leasehold mortgagee, which go beyond those afforded to the ground lessee.

- Notices: Notices given by the ground lessor are ineffective against a leasehold mortgagee unless the ground lessor has also given a copy of the applicable notices to the leasehold mortgagee. (See Pages A-8 and A-9 for sample provision)
- Preservation of Ground Lease: Without the consent by the leasehold mortgagee – (i) the ground lease may not be amended, cancelled, modified, restated, surrendered, terminated by agreement, or waived; (ii) the ground lessor cannot accept voluntary surrender or abandonment of this ground lease; (iii) the ground lessee shall have no power or authority to treat this ground lease as terminated if the ground lessor rejects it in bankruptcy; (iv) the ground lessee shall not subordinate this ground lease to any fee mortgage or other interest in the premises. Any action violating the previous sentence shall be void. It shall not bind any leasehold mortgagee. (See Page A-9 for sample provision)
- Priority of Fee Mortgages: Every fee mortgage is and shall be and must state that it is, subject and subordinate to this ground lease and all estates derived from this ground lease, and any replacement new lease. (See Pages A-9 and A-10 for sample provision)
- Transfers: The ground lessee may assign this ground lease (or sublease any or all premises) subject only to satisfaction of [reasonable standards; meaning parties may set these standards during contract drafting]. However, any restrictions on assignments should not apply to any foreclosure, assignment in lieu of foreclosure, bankruptcy sale or any subsequent transfer by the leasehold mortgagee. The ground lessor must agree not to disturb the possession, estate, or quiet enjoyment of any space subtenant, or at a minimum, any subtenant or sublease which satisfies certain reasonable minimum standards. (See Page A-10 for sample provision)

### III. APPENDIX OF SAMPLE PROVISIONS

#### 1) TRANSACTIONAL REQUIREMENTS

##### a) Prohibitions

i) As to any such Leasehold Mortgage in favor of a Leasehold Mortgagee, Landlord consents to provisions therein, at the option of Tenant, effective upon any default in any such Leasehold Mortgage for the rights of the Leasehold Mortgagee or the receiver to enter and take possession of the Premises, to manage and operate the same, to collect the subrentals, issues, and profits therefrom (subject to the rights of Landlord hereunder), and to cure any default under the Leasehold Mortgage or any default by Tenant under this Lease.

##### b) Term

i) The term of this Lease shall commence on the date hereof (the “Commencement Date”) and shall continue in effect until [fifty (50) / seventy-five (75) / ninety-nine (99)] years after the Commencement Date (the “Term”), unless sooner terminated as provided herein.

ii) Lessee shall have the right, without Lessor’s consent, to mortgage its Leasehold Estate and to execute and deliver a Leasehold Mortgage encumbering this Lease and the Leasehold Estate at any time and from time to time during the Initial Term; provided, however the maturity of such Debt must be a date that is [thirty (30)] years prior to the expiration date of the Term of this Lease.

##### c) Use

i) Tenant shall use and occupy the Leased Premises during the Term only for the construction and operation of a [residential apartment complex/industrial warehouse/office and related uses] (the “Permitted Use”) and for no other purpose or purposes, without the prior written consent of Landlord.

#### 2) CLOSING REQUIREMENTS

##### a) Estoppel Certificate

i) At any time and from time to time upon the written request of Landlord, Tenant, or any Lender, Landlord or Tenant, as the case may be, shall deliver to the party requesting the same a certificate executed in recordable form stating: (a) whether or not this Lease is in full force and effect; (b) the date on which this Lease will terminate; (c) whether or not this Lease has been modified or amended in any way and attaching a copy of such modification or amendment; (d) whether or not any defaults exist under this Lease to the knowledge of the party executing the certificate, and specifying the nature of such defaults, if any; (e) the status of Rent payments; and (f) any other facts regarding the operation of the Lease which Landlord, Tenant, or any Lender may reasonably request.



ii) Either party shall at any time and from time to time, upon not less than [10] days prior written notice by the other party or Mortgagee, execute, acknowledge and deliver to such party a statement in writing certifying that this Ground Lease is unmodified and in full force and effect (or if there has been any modification thereof that the same is in full force and effect as modified and stating the modification or modifications and that there are no defaults existing, or if there is any claimed default stating the nature and extent thereof); and stating the dates to which the Rent, Taxes and other charges set forth in this Agreement have been paid. It is expressly understood and agreed that any such statement delivered pursuant to this Section may be relied upon by any permitted assignee or sublessee of the leasehold estate of the Ground Lessee, or any prospective purchaser of the estate of the Ground Lessor, or any lender, including Mortgagee, or prospective assignee of any lender, including Mortgagee, on the security of the Leased Premises or the fee estate or any part thereof and any third person.

b) Mortgage

- i) The lien of the Mortgage is approved and authorized under this Ground Lease. The parties to this Lease understand and agree that the lien of the Mortgage also extends to the fee interest of the Lessor under the Ground Lease.
- ii) The parties acknowledge and agree that this Ground Lease shall not be subordinate to the Fee Mortgage and this Ground Lease shall not terminate upon a deed in lieu of foreclosure or a foreclosure of the Fee Mortgage.
- iii) Notwithstanding the foregoing, so long as the Mortgage Loan is outstanding, the sale related rights under this subsection shall be subject to the Mortgage Loan Documents.

c) Status/No Default

- i) To the best of the Lessor's knowledge, there is no default by Lessee or Lessor, nor has any event or omission occurred which, with the giving of notice or the lapse of time, or both, would constitute a default.
- ii) Lessor has not received written notice that it is in violation of any governmental law or regulation applicable to its interest in the Property and has no reason to believe that there are grounds for any claim of any such violation.
- iii) Neither the Lessor nor the Lessee is in default under any of the terms, covenants or provisions of the Ground Lease, and the Lessor knows of no event, circumstances or condition which, but for the passage of time or the giving of notice, or both, would give rise to any obligation on the part of the Lessor or the Lessee which, if not performed, would constitute a default or an event of default under the Ground Lease by the Lessee or the Lessor thereunder, or would constitute a defense to the enforcement of the Ground Lease by the Lessee, or would otherwise constitute the basis for a claim or cause of action against the Lessee.
- iv) Lessor has not received any notice from any third party or governmental authority (a) alleging a violation of any law, rule, order, or regulation pertaining to the Property or the use or occupancy of the Property, or (b) alleging any delinquency in the payment

of real estate taxes, assessments, water rents or charges, or other impositions on the Property.

d) Title

- i) It is expressly acknowledged and understood that Landlord does not consent, and has not by the execution and delivery of this Ground Lease consented, to the imposition of any liens on Landlord's interest in the Property by any party. Tenant will not suffer or permit to be enforced against the Property, or any part of it, any mechanic's, materialman's, contractor's, or subcontractor's lien or other lien arising from any design or construction of the Improvements, however it may arise. If any mechanic's, materialmen's, or other types of liens or lien claims are filed against Tenant's leasehold interest or otherwise against the Property or any other interest of Landlord, however the liens or claims arise or result, including but not limited to, from the acts or omissions of Tenant, Tenant will promptly secure the release of the same, or if Tenant wishes in good faith to contest any lien or claim, Tenant may do so by appropriate legal proceedings. If Tenant does not secure the release, Landlord may, after [five (5)] days' written notice to Tenant following a final judgment, pay the lien or claim and secure the release, and Tenant will immediately reimburse Landlord for all sums so spent, together with interest at the annual rate of [five percent (5%)], from the date paid by Landlord to the date of reimbursement by Tenant. On final determination of the lien or claim, Tenant will promptly pay any judgment rendered with all proper costs and charges and will have the lien released and judgment satisfied. No work that Landlord requires or permits Tenant to perform in or at the Property will be deemed for the use or benefit of Landlord, and the liens of laborers, materialmen, suppliers, or other parties otherwise entitled to file liens against the Property will not attach to Landlord's interest in the Property or to any other interest of Landlord.
- ii) Ground Lessee may, at any time or from time to time during the Ground Lease Term encumber by mortgage or other security instrument, assignment or otherwise, Ground Lessee's interests under this Ground Lease and leasehold interest in the Project hereby created, for any lawful purpose. In no event, however, shall Ground Lessee be permitted to encumber the fee interest in the Project Site or the Site Improvements.

**3) MINIMUM PROTECTIONS**

a) Construction

- i) Tenant is not under any obligation to commence construction of any improvements on the Premises, but if Tenant begins constructing its building it will diligently pursue such construction to completion of an enclosed shell. Tenant may make such improvements to the Premises as it determines, and may thereafter improve, expand, contract, reconfigure, demolish, or otherwise alter Tenant Improvements as Tenant deems in its best interests subject only to the terms and conditions hereof. If the granting of one or more easements is necessary to provide utilities to Tenant Improvements, Landlord agrees that it will execute any appropriate documentation presented by Tenant to provide for such easements without undue delay, and Landlord will not have the right to unreasonably withhold such execution and/or such easements.

b) Estoppel Certificates

- i) Landlord and Tenant shall at any time and from time to time upon not less than [thirty (30)] days prior written request from the other party execute, acknowledge and deliver to the requesting party, in form reasonably satisfactory to such requesting party, a written statement certifying, if true, that this Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), that neither party is in default hereunder, the date to which the rental and other charges have been paid in advance, if any, or such other accurate certification as may reasonably be required by such requesting party. It is intended that any such statement delivered pursuant to this Section may be relied upon by any prospective purchaser or Leasehold Mortgagee, or any assignee or sublessee of Tenant and their respective successors and assigns.

c) Ground Lessee Rights

- i) Preemptive Rights shall mean any renewal, expansion, or purchase option, right of first refusal or first offer, or other preemptive right this Lease gives Tenant. If Tenant does not timely exercise any Preemptive Right under this Lease, Landlord shall promptly notify Leasehold Mortgagee. Until [thirty (30)] days after Leasehold Mortgagee has received such notice, Leasehold Mortgagee may exercise such Preemptive Right by notice in writing from the Leasehold Mortgagee to Landlord given as otherwise provided in this Lease (“Mortgagee Preemptive Right”). Any such notice shall fulfill all Lease provisions or conditions relating to the extension of the Lease Term or the exercise of any option, privilege or right relating thereto and any contrary, or additional, provisions shall be of no force or effect.

d) Leasehold Mortgages

- i) Tenant shall have the right at any time and from time to time, without Landlord’s consent, to mortgage, pledge, grant deed(s) of trust, or otherwise encumber the leasehold estate created hereby and all or any portion of the right, title, and interest of Tenant hereunder, and to assign, hypothecate, or pledge the same, as security for the payment of any debt to any Leasehold Mortgagee; provided that no Leasehold Mortgagee, trustee, or other Person claiming by, through or under any instrument creating any such encumbrance on the leasehold estate created hereby shall by virtue thereof acquire any greater right in the Premises than Tenant then had under this Lease, except for the rights expressly granted to such Leasehold Mortgagee, trustee, or other Person under the terms of this Lease; and provided, further, that such Leasehold Mortgage, and the indebtedness secured thereby, shall at all times be and remain subject to all of the conditions, covenants, and obligations of this Lease and to all of the rights of Landlord and its mortgagee hereunder.
- ii) As to any such Leasehold Mortgage in favor of a Leasehold Mortgagee, Landlord consents to provisions therein, at the option of Tenant: (i) for an assignment of Tenant’s share of the net proceeds from any award or other compensation resulting from a total or partial taking of this Lease; (ii) that a default by Tenant under this Lease shall constitute a default under any such Leasehold Mortgage; (iii) for an assignment of

Tenant's right, if any, to terminate, cancel, modify, change, supplement, alter, or amend this Lease; (iv) for an assignment of any sublease to which any such Leasehold Mortgage is subordinated, subject to the rights of Landlord hereunder; and (v) effective upon any default in any such Leasehold Mortgage – (A) for the foreclosure of the Leasehold Mortgage pursuant to a power of sale or by judicial proceedings or other lawful means and the subsequent sale of the leasehold estate to the purchaser at the foreclosure sale and a sale by such purchaser and/or a sale by any subsequent purchaser, (B) for the appointment of a receiver, irrespective of whether any Leasehold Mortgagee accelerates the maturity of all indebtedness secured by the Leasehold Mortgage, (C) for the rights of the Leasehold Mortgagee or the receiver to enter and take possession of the Premises, to manage and operate the same, to collect the subrentals, issues and profits therefrom (subject to the rights of Landlord hereunder), and to cure any default under the Leasehold Mortgage or any default by Tenant under this Lease, and (D) for an assignment of Tenant's right, title, and interest in and to the premiums for or dividends upon any insurance with respect to Premises, whether paid or to be paid.

e) Loss

- i) If any portion of the Premises shall be taken or condemned for a public or quasi-public use or purpose by any competent authority (hereinafter called a "Taking") and as a result thereof, it shall be economically unfeasible or illegal for Tenant or the Subtenants to use and occupy the balance of the Premises for their intended purposes, then at the option of Tenant in such event, this Lease shall terminate upon delivery of possession of the applicable portion of the Premises to the condemning authority. Landlord and Tenant shall share in any condemnation award or any judgment for damages caused by such Taking (hereinafter called the "Award"), with Landlord being allocated the fair market value of its fee simple interest in the Premises "subject to" the Lease, including its interest as landlord under this Lease and reversionary interest in the other improvements located on the Premises (the "Landlord's Interest"), and Tenant being allocated the fair market value of its leasehold estate and its interest in all improvements to the Premises paid for by Tenant, subject to Landlord's reversionary interest therein (the "Tenant's Interest"). Notwithstanding the foregoing to the contrary, in the event Tenant encumbers its interest in the Premises, the Tenant's Interest in the Award shall be disbursed in accordance with the terms and provisions of such leasehold mortgage, and Leasehold Mortgagee may, in its reasonable discretion, direct that the Tenant's Interest in the Award be applied to the repayment of Tenant's indebtedness to Leasehold Mortgagee.
- ii) Unless this Lease shall be terminated as aforesaid, Tenant shall, with reasonable promptness (subject to delays covered by matters beyond Tenant's reasonable control), cause the remainder of the Premises to be repaired and restored to a complete architectural unit as nearly as commercially reasonably possible to their value, condition, and character immediately prior to such taking. For such purposes, if Tenant encumbers its interest in the Premises, the full amount of the Tenant's Interest in the Award will be deposited with the Leasehold Mortgagee, and Leasehold Mortgagee shall disburse such Award to be applied towards the cost of such repairs and restorations. Any portion of the Tenant's Interest in the Award that shall not have been

expended for such repairs or restorations shall be paid to Landlord in respect of Landlord's Interest and to Tenant in respect of Tenant's Interest. Notwithstanding the foregoing to the contrary, in the event Tenant encumbers its interest in the Premises, the Tenant's Interest in the Award shall be disbursed in accordance with the terms and provisions of such leasehold mortgage, and Leasehold Mortgagee may, in its reasonable discretion, direct that the Tenant's Interest in the Award be applied to the repayment of Tenant's indebtedness to Leasehold Mortgagee.

f) Loss Proceeds

- i) All insurance proceeds collected under the insurance referred to in this Agreement shall be held by Tenant or deposited with the Leasehold Mortgagee to be made available to Tenant for repairs and restorations of the Premises required to be made by Tenant hereunder. The Leasehold Mortgagee shall pay out such funds from time to time upon the written direction of Tenant's architect, provided the Leasehold Mortgagee and Landlord shall first be furnished with waivers of lien, contractors and subcontractors sworn statements and such other evidence of costs and payments so that the Leasehold Mortgagee can verify that the amounts disbursed from time to time are represented by completed in-place work and that said work is free and clear of possible mechanic's liens. Any excess funds remaining with the Leasehold Mortgagee after the completion of such repair or restoration of the Premises shall be paid to Tenant. Rent hereunder shall not abate and Tenant shall remain liable for the payment of Rent and Tenant shall remain liable for the payment of all Impositions payable by Tenant pursuant to this Agreement during the period of any restoration. Notwithstanding the foregoing to the contrary, in the event Tenant encumbers its interest in the Premises, insurance proceeds may be disbursed in accordance with the terms and provisions of such Leasehold Mortgage, and Leasehold Mortgagee may, in its reasonable discretion, direct that any such insurance proceeds be applied to the repayment of Tenant's indebtedness to Leasehold Mortgagee.

g) Multiple Leasehold Mortgages

- i) Landlord and the Tenant hereby agree that any and all property insurance proceeds and/or condemnation awards received by the Tenant or the Landlord in connection with the Property shall be treated as set forth in the most senior Permitted Leasehold Mortgage. If no Permitted Leasehold Mortgage is outstanding, such proceeds shall be payable to Tenant and may be applied to restore the Improvements and Equipment.
- ii) Upon foreclosure or assignment in lieu of foreclosure of the Leasehold Estate, the most senior Permitted Leasehold Mortgagee shall have the right to acquire the Lease in its own name or the name of a nominee without consent or approval of Landlord.

h) New Lease

- i) If this Lease shall terminate for any reason prior to the expiration of the Lease Term and if Landlord shall obtain possession of the Premises thereafter, Landlord agrees that any Leasehold Mortgagee shall have the right, for a period of [sixty (60)] days subsequent to such termination of this Lease and notice to the Leasehold Mortgagee thereof, to elect to demand a new lease of the Premises of the character and, when executed and delivered and possession of the Premises is taken thereunder, having the effect hereinafter set forth. Such new lease shall be for a term to commence at such termination of this Lease and shall have as the date for the expiration thereof the same date stated in this Lease as the date for the expiration hereof. The rental thereof shall be at the same rate as would have been applicable during such term under the provisions of this Lease, had this Lease not so expired or terminated, and all the rents, covenants, conditions, and provisions of such new lease, including, but not limited to, the conditional limitations set forth in this Lease, shall be the same as the terms, conditions, and provisions of this Lease. If any such Leasehold Mortgagee shall elect to demand such new lease within such [sixty (60)] day period, such Leasehold Mortgagee shall give written notice to Landlord of such election; and, thereupon, within [thirty (30)] days thereafter, such Leasehold Mortgagee shall, at the time of the execution and delivery of such new lease, pay to Landlord all rent which would have become payable hereunder by Tenant to Landlord to the date of the execution and delivery of such new lease, had this Lease not terminated, and which remain unpaid at the time of the execution and delivery of such new lease, and shall have cured Tenant's failure to comply with any terms, provisions, or covenants of this Lease, other than the payment of rent or other sums of money, which is capable of being cured. Any such new lease as contemplated in this Section may, at the option of the Leasehold Mortgagee, be executed by a nominee of such holder, without the Leasehold Mortgagee assuming the burdens and obligations of Tenant thereunder beyond the period of its ownership of the leasehold estate created hereby. In connection with the execution and delivery of any such new lease of the Premises pursuant to this Section, Landlord shall also convey to such Leasehold Mortgagee (or its nominee or designee), by special warranty deed, bill of sale and other appropriate conveyancing documents, all improvements in the Premises.
- ii) If this Lease or Tenant's rights hereunder are terminated, whether by reason of default of Tenant or Landlord, rejection or disaffirmance of this Lease in any bankruptcy case, voluntary surrender and acceptance, or otherwise, then, the first priority Permitted Leasehold Mortgagee or its respective nominee shall have the option, exercisable by written notice to Landlord given within [thirty (30)] days after Landlord has delivered to that Permitted Leasehold Mortgagee notice of the termination, to receive from Landlord a new lease (the "New Lease") of the Property, effective as of the date of such termination, for the remaining term of this Lease at the Rent and on the same terms, covenants and conditions as this Lease. If a Permitted Leasehold Mortgagee exercises this option to obtain a New Lease, that Permitted Leasehold Mortgagee shall pay to Landlord all outstanding amounts of money owing to Landlord by Tenant under this Lease (but without a late fee or default interest on any such amounts) and shall cure all non-monetary defaults that can be cured, and if the Permitted Leasehold Mortgagee cures Tenant's default, the Permitted Leasehold Mortgagee then shall be subrogated to the rights of Landlord against Tenant for those obligations that the Permitted Leasehold

Mortgagee has performed. The Permitted Leasehold Mortgagee shall not be liable for or otherwise required to cure any defaults of Tenant that are personal to Tenant (such as, for example, any default arising by virtue of any bankruptcy, insolvency, or dissolution of Tenant). The New Lease shall be superior to all rights, liens, and interests granted at any time on the Landlord's interest in the Property and to all rights, liens, and interests intervening between the date of this Lease and the granting of the New Lease.

i) No Merger

- i) There shall be no merger of this Ground Lease, or of the leasehold estate created by this Ground Lease, with the fee estate in the Site by reason of the fact that this Ground Lease, the leasehold estate created by this Ground Lease, or any interest in this Ground Lease or in any such leasehold estate, may be held, directly or indirectly, by or for the account of any person who shall own the fee estate in the Site or any interest in such fee estate. No such merger shall occur unless and until all persons at the time having an interest in the fee estate in the Site and all persons having an interest in this Ground Lease, or in the leasehold estate created by this Ground Lease, shall join in a written instrument consenting to and effecting such merger and shall duly record the same.
- ii) Except upon the expiration of the term of this Lease or upon other termination of this Lease pursuant to an express right set forth herein, there shall be no merger of this Lease nor of the Leasehold Estate created by this Lease by reason of the fact that the same person may acquire or own or hold, directly or indirectly, this Lease or the Leasehold Estate created by this Lease or any interest in this Lease or in any such Leasehold Estate, unless and until Landlord and Tenant, or their respective successor or assigns, shall enter into a written instrument effecting and acknowledging such merger.

j) No Personal Liability

- i) Absent any default in any such Leasehold Mortgage for the rights of the Leasehold Mortgagee or the receiver to enter and take possession of the Premises, to manage and operate the same, to collect the subrentals, issues and profits therefrom (subject to the rights of Landlord hereunder), and to cure any default under the Leasehold Mortgage or any default by Tenant under this Lease, neither Leasehold Mortgagee nor its partners, members, shareholders, officers, directors, employees, agents or consultants shall be liable to Landlord or any successor in interest or person claiming by, through or under Landlord in the event of any default or breach, or for or on account of any amount which may be or become due, or in any claim, cause or obligation whatsoever under the terms of this Lease.

k) Notices

- i) Landlord will give to Leasehold Mortgagee a copy of each notice of default given by Landlord to Tenant ("Landlord Notice") at the same time as any Landlord Notice is given by Landlord to Tenant, addressed to Leasehold Mortgagee at its address last furnished to Landlord. No notice by Landlord to Tenant will be deemed to have been

duly given to Leasehold Mortgagee until a copy of it has been served on the Leasehold Mortgagee in the manner provided in this Ground Lease.

l) Preservation of Ground Lease

i) That Mortgagor will not amend, modify, release, surrender or terminate the Ground Lease, or waive any right or remedy of Mortgagor thereunder and, in the event of the bankruptcy of Lessor under the Ground Lease, Mortgagor will not without Mortgagee's prior written consent, elect to treat the Ground Lease as terminated under the Bankruptcy Code, and will object to any attempt by Lessor to terminate the Ground Lease in bankruptcy. Any such election made without Mortgagee's prior written consent will be void. Mortgagor will not subordinate or consent to the subordination of the Ground Lease to any mortgage, lien, or encumbrance on the interest of the Lessor, without, in each such instance, the prior written consent of Mortgagee. Mortgagor will not permit the fee title to the real property covered by the Ground Lease to merge with the Leasehold Estate but will keep such estates separate and distinct notwithstanding the union of such estates in Lessor, Mortgagor or a third party, by purchase or otherwise, and in the case Mortgagor acquires the fee title or any other estate in the real property covered by the Ground Lease, this Mortgage will attach to and be a lien upon such fee title or other estate so acquired without further assignment, mortgage or conveyance by Mortgagor. If the Ground Lease is terminated due to the default of Mortgagor thereunder and if Mortgagee or its assignee acquires from Lessor a new lease of the Property, Mortgagor will have no right, title, or interest in or to such new lease or the leasehold estate created thereby.

ii) Mortgagor shall not, without the prior consent of Mortgagee, surrender the leasehold estate created by the Ground Lease or terminate, cancel, modify or supplement the Ground Lease, and Mortgagor hereby assigns to Mortgagee, as further security for the payment of the Debt, all of Mortgagor's rights and privileges, as tenant under the Ground Lease, to surrender the leasehold estate created by the Ground Lease or to terminate, cancel, modify or supplement the Ground Lease, and any such surrender, termination, cancellation, modification or supplement without the prior consent of Mortgagee shall be void and of no force and effect. If Mortgagor fails to perform or observe any term of the Ground Lease to be performed or observed by it thereunder, then, without waiving or releasing Mortgagor from any of its obligations hereunder, Mortgagee shall have the right, but shall be under no obligation, to pay any sum and to take any action (including entry upon the Mortgaged Property) to cause such performance or observance on behalf of Mortgagor, so that the rights of Mortgagor under the Ground Lease are unimpaired and free from default, even if the existence or the nature of Mortgagor's default is being questioned or denied by Mortgagor or another person. Mortgagee shall be subrogated to the rights of the Ground Lessor with respect to any such sums paid by Mortgagee.

m) Priority of Fee Mortgages

i) Mortgagor's interest in the Ground Lease is not subject to any Liens or encumbrances superior to, or of equal priority with, the Mortgage other than the ground lessor's related fee interest. The Mortgage is subject and subordinate to this Ground Lease and all estates derived from this Ground Lease, and any replacement new lease.



n) Transfers

- i) Except as otherwise provided in this Section and Section [ ] regarding Involuntary Transfers<sup>1</sup>, Tenant shall not assign this Lease or sublet the whole or any part of the Premises (collectively, "Transfer") [without the prior written consent of Landlord, which consent shall not be unreasonably withheld, conditioned, or delayed. If Tenant elects to initiate a Transfer of this Lease, Tenant shall provide Landlord with a written notice setting forth the reasonable details of such Transfer. If Landlord's consent is required for a Transfer, Landlord shall notify Tenant whether the proposed Transfer is approved or rejected not later than ten (10) Business Days after receipt of written notice thereof from Tenant. If Landlord does not consent to a proposed Transfer, Landlord shall provide Tenant with a reasonably detailed written explanation as to the reasons for withholding such consent.] [, unless the proposed transferee meets the following criteria: \_\_\_\_\_.] Landlord hereby agrees not to disturb the possession, estate, or quiet enjoyment of any proposed transferee whose Transfer [is consented to] [meets the required criteria].

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<sup>1</sup> Defined as foreclosure, assignment in lieu of foreclosure, bankruptcy sale or similar transfers resulting from a default by the ground lessee.