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**The Financeability of Documents ?**  
(Lender Requirements For Your Documents in Commercial Real  
Estate Financing)

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Niles Holmes has participated in various facets of the real estate business since 1984. After receiving his master's degree in real estate, Niles was employed as a commercial real estate appraiser and completed all of the educational requirements for the MAI designation. Subsequently, Niles was employed by a large life insurance company for five years as an investment officer. His duties included real estate lending, foreclosures, workouts, management and sales of acquired properties covering a five state territory. Niles' legal experience also includes serving as the general counsel of a publicly traded small business lending concern and mortgage REIT. Niles was formerly a shareholder in the Dallas office of Winstead P.C. where he served as a member of the firm's opinion committee and as Chairman of the Real Estate Lending Practice Group. Niles is Board Certified in Commercial Real Estate Law by the Texas Board of Legal Specialization and is "av-preeminent" rated by Martindale Hubbell for more than 15 consecutive years. Niles has been named as a *Super Lawyer* for the State of Texas for the years of 2007 through present. In 2015 and continuing through present, Niles and Niles Holmes PC was named as a *Best Lawyer* and *Best Law Firm in Texas* by the U.S. News and World Report. Niles is an Executive Professor at Texas A&M University-College Station, Mays Business School, Master of Real Estate Program. Niles is a frequent speaker and program coordinator specializing in commercial real estate lending topics including workouts, financial covenants and tenant in common lending. These educational and professional experiences give Niles a unique business and legal perspective to any transaction.

#### **Education**

Southern Methodist University, Dedman School of Law  
 J.D., cum laude, 1992

Order of the Coif; Southwestern Law Journal; Staff SMU Law Review Editor;  
 American Jurisprudence Award – Real Estate

Texas A&M University; M.Agr., in Land Economics and Real Estate, 1984

Texas A&M University; B.S., Animal Science, 1982

#### **Professional Memberships & Affiliations**

State Bar of Texas; Dallas Bar Association; Southwest Association of Bank Counsel; The College of the State Bar of Texas, American College of Mortgage Attorneys, Fellow

#### **Community & Civic Involvement**

Lakepoint Baptist Church, Rockwall, Texas

#### **Presentation Topics**

- Author/Speaker, The Financeability of Documents ? Lender requirements For Your Documents in Commercial Real Estate Financing, Advanced Real Estate Law Course (July 2022)
- Author/Speaker, Program Coordinator, What's Really Negotiable in Lender Transactions ? (What a Lender wants! What a borrower needs!), Mortgage Lending Institute, University of Texas School of Law (September 2021)
- Author/Speaker, Can we Still Get a Loan ? Current Issues and Alternatives in Commercial real Estate Financing, Advanced Real Estate Law Course (July 2021)
- Author/Speaker, Program Coordinator, Modification and Workout Documentation: This Time It's Contagious, Mortgage Lending Institute, University of Texas School of Law (September 2020)
- Author/Speaker, What's Really Negotiable in Lender Transactions ? (What a Lender wants! What a borrower needs!), Advanced Real Estate Drafting Course (August 2020)
- Author/Speaker, Program Coordinator, How to Lose a Client With 10 or More Outdated Loan Provisions!, Mortgage Lending Institute, University of Texas School of Law (September 2020)
- Author/Speaker, HVCRE Changes and Other Federal Codes, Restrictions and Guidelines to Commercial Real Estate Lending, Mortgage Lending Institute, University of Texas School of Law (September 2018)
- Author/Speaker, Financial Covenants for Commercial Real Estate Lending Transactions, Mortgage Lending Institute, University of Texas School of Law (October 2012)
- Author/Speaker, Evolving Loan Structures, Mortgage Lending Institute, University of Texas School of Law (September 2011)
- Author/Speaker, Drafting Creative Financing Documents, Advanced Real Estate Drafting Course (March 2011)
- Author/Speaker, Real Estate Workouts, Advanced Real Estate Drafting Course (March 2010)
- Author/Speaker, Commercial Lending Coordinator, Financial Covenants for Lawyers, Advanced Real Estate Law Course (July 2004)
- Author/Speaker, Preforeclosure Documentation II (This time it is getting personal!), Advanced Real Estate Drafting Course (March 2004)
- Author/Speaker, Commercial Lending Coordinator, Workouts in the 21st Century, Advanced Real Estate Law Course (July 2003)
- Author/Speaker, Program Coordinator, Preforeclosure Documentation, Advanced Real Estate Drafting Course (March 2003)
- Author/Speaker, Form of Lender's Texas Title and Survey Objection Letter, Advanced Real Estate Drafting Course (March 2002)
- Author/Speaker, Texas Annotated Deed of Trust, Mortgage Lending Institute, University of Texas School of Law (October 1999)
- Author, Purchase and Sale Agreements, CLE International (October 1994)

**The Financeabilty of Documents ?  
Lender Requirements For Your Documents in Commercial Real Estate Financing**

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## I. INTRODUCTION

In the beginning of a transaction, there are often detailed negotiations of rights, responsibilities by and between developers, sellers, purchasers, tenants and joint venture partners. Unfortunately, one important party in the transaction is not represented during these negotiations, the lender! This typically becomes problematic as a part of the financing transaction and the result of these initial negotiations is the transaction is not financeable without substantial and painful discussions with lender's counsel. The scope of this article is to relate and discuss the typical contexts of this problem including suggestions that the other parties may include in their initial negotiations.

## II. LENDER REQUIREMENTS FOR COMMERCIAL REAL ESTATE DOCUMENTATION

### A. SNDA

The most common issue of lender priority is the subordination of tenant's rights under a lease. The most effective means is that of a clear subordination clause in the lease. An acceptable lender favored subordination clause can range from a heavily Lender weighted clause to a more reasonable clause that would include many of included in a full subordination non-disturbance and attornment agreement. The inclusion of either of these types of clauses in a form lease should preclude the necessity of protracted SNDA negotiations with less sophisticated tenant representatives. Examples of a typically acceptable clause of subordination are as follows:

*Tenant agrees that its interest under this Lease shall be subordinate to any mortgage, deed of trust or similar device now or hereafter placed upon the Premises by Landlord and such subordination shall be effective without the necessity of the execution by Tenant of any additional document for the purpose of evidencing or effecting such subordination. Provided, if the mortgagee or beneficiary under said deed of trust or lender for whose benefit any other security device is created requests, and, upon notice to Tenant of such request, Tenant will execute any instruments required to evidence such subordination. Likewise, such mortgagee or beneficiary under said deed of trust or lender for whose benefit any other security device is created may elect, by notice to Tenant, to make this Lease superior to such mortgage or deed of trust or other security device; and in the event of any such election, Tenant will execute any instruments required to evidence such superiority. If any such mortgagee or beneficiary under said deed of trust, or another purchaser of the Premises upon a foreclosure (a "**Successor Owner**") succeeds to the interest of Landlord under the Lease, then, at such Successor Owner's election, this Lease shall continue in full force and effect and Tenant shall make full and complete attornment to Successor Owner as substitute landlord upon the same terms, covenants and conditions as provided in this Lease.*

*Tenant accepts this Lease subject and subordinate to any50 mortgage(s), deed(s) of trust, ground lease(s) or other lien(s) now or subsequently arising upon the Premises, the Building or the Property, and to all renewals, modifications, refinancings and extensions thereof (collectively referred to as a "Mortgage").<sup>51</sup> The Party having the benefit of a Mortgage shall be referred to as a "Mortgagee". This clause shall be self-operative, but upon request from a Mortgagee, Tenant shall execute a commercially reasonable subordination agreement in favor of the Mortgagee. In lieu of having the Mortgagee be superior to this Lease, a Mortgagee shall have the right at any time to subordinate its Mortgage to this Lease. If requested by a successor-in-interest to all or a part of Landlord's interest in the Lease, at such successor's option, Tenant shall, without charge, attorn to the successor-in-interest to all or a part of Landlord's interest in the Lease, at such successor's option, Tenant shall, without charge, attorn to the successor-in-interest. Landlord and Tenant shall each, within ten days after receipt of a written request from the other, execute and deliver an estoppel certificate to such requesting party as is reasonably requested by such requesting party (including a Mortgagee or prospective purchaser), which estoppel certificate shall include statements certifying that this Lease is unmodified (except as identified in the estoppel certificate) and in full force and effect, describing the dates to which rent and other charges hereunder have been paid, representing that, to such party's actual knowledge, there is no default (or stating the nature of the alleged default) and indicating other matters with respect to the Lease that may be reasonably requested.*

## **B. Ground Lease**

As a result of the incredible non-uniformity of ground leases in transactions, the financing of a ground lease can become quite problematic and acrimonious . The financeability of a ground lease may be achieved by either a properly drafted ground lease with a simple ground lessor estoppel or a complicated combination of a ground lease amendment and estoppel. The type of financing dictates the minimum requirements for a ground lease transaction. In the case of a commercial mortgaged backed transaction (“**CMBS**”) loan structure, or a Fannie Mae Freddie Mac (“**Agency**”) loan, the inquiry is merely the review of the promulgated standards of such lending source. In the case of a less structured non-securitized lending source, such as commercial banks and insurance companies, each lender may have internal requirements or simply rely on their legal counsel to review and determine the financeability of the ground lease. Fannie Mae promulgated Forms 6479 and 6495 reflect FNMA’s requirements. Form 6479 is the form of Ground Lease Review Checklist. Form 6495 is the form of Ground Lessor Estoppel. The form of Ground Lessor Estoppel assumes that the analysis of the Ground Lease Review Checklist concludes that the ground lease satisfies all of the 27 checklist requirements. Thus, in the event that a lawyer is negotiating the initial ground lease they should be careful to include and confirm all of the required items that are outlines for either Agency type loan. The compliance with these requirements including an appropriate form of ground lessor estoppel will most likely be acceptable to any other type of lender. Unfortunately, in the typical ground lease financing the ground lease already exists and will need to be amended by a combination ground lessor estoppel and lease amendment to achieve the lender requirements. An agreed form of such a document should be included or otherwise vetted in the initial letter of intent and purchase and sale agreement

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## Title search: Financeability of Documents

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