What a Lender Wants ?
What Lender Needs ?

THE FINANCEABILITY REQUIREMENTS FOR DOCUMENTS IN COMMERCIAL REAL ESTATE FINANCING

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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.

Types of Documents and Transactions

- SNDA
- Ground Lease
- Tenants In Common
- Preferential Rights
- Waiver of Surface Rights
- Restrictive Covenants
- Vendor's Lien
- Post Closing Agreements
- Subordination/Joinder of Purchaser

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.

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.*

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.

Title search: What a Lender Wants? What Lender Needs?

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