

# Structuring Financeable Ground Leases and Leasehold Mortgages

Balancing Competing Interests Among Owners, Lessees and Lenders

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Today's faculty features:

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**Thursday, July 7, 2016  
1:00 PM-2:30 PM**

**Webinar: Financeable Ground Leases and Leasehold Mortgages**

Strafford Webinars

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## Introduction

Financeable ground leases are most commonly used in developments, but also in office building and industrial settings. The reasons for tenants doing so are varied, including a tenant's experience in constructing to its specific requirements, its desire to retain control over its property and its maintenance, and a financial standing that may allow it to build at a more favorable rate than a landlord, yielding a cheaper effective rent than if the landlord built the improvements. Many national chain tenants utilize these leases, given their strong balance sheets and most of these leases are on outparcels, pads or other freestanding sites. Landlords favor using these leases, because they don't have to risk their capital and efforts in building to a tenant's requirements, and because these leases provide landlords with rent on a triple net basis.

While there are many reasons to use financeable ground leases, these leases are highly specialized and are as much financial instruments as they are leases. Both the landlord and tenant must understand their rights and the ability to obtain financing (and the reallocation of risk) that these leases entail. Many of the terms that landlords and tenants are used to negotiating have different emphases based on the shifted relationship of the parties. Unlike a traditional lease, the tenant will own the improvements and these leases are typically triple net. In addition, leasehold mortgage lenders require protections and rights that would ordinarily provide security to a fee mortgagee, with neither the owner nor the fee mortgagee having rights in the improvements (at least during the term), nor in casualty proceeds and condemnation awards related to the improvements.

A number of public company tenants have utilized the structure of financeable ground leases in sale/subleasebacks, which entail a whole different set of risks and financial considerations. Department stores, big box stores, drugstore chains, banks, and fast food and other restaurants are the most common users of this financing structure.

Because of the unique terms of a financeable lease, it is imperative that landlords, tenants and lenders negotiate a letter of intent or term sheet outlining the issues we will discuss, as they are critical to a successful outcome and are outside the norm of a typical space lease and fee financing encumbering both the land and improvements, that most parties are familiar with.

In this webinar we will try to provide you with some of the terms and considerations related to financeable ground leases and tips for negotiating them from the perspectives of a landlord, tenant and lender. We will also explore some of the title issues related to these leases, as tenants utilizing these leases typically purchase leasehold title insurance, and leasehold mortgagees always require it.

## Types of Financeable Leases

Financeable leases are typically ground or pad leases (a hybrid form of ground lease in which the land underlying the ground lease is not on a separate tax lot). In some instances, such as in an urban, mixed use setting, the lease may be of a condominium unit, but in all instances, the leasehold lender will require a distinct, financeable estate, in which the tenant retains indicia of ownership of all but the land during its term. Leasehold lenders requires an estate that is tantamount to an estate for years and, as will be discussed later, financeable leases tend to be long term, triple net leases. There are a number of criteria that lenders require in making leasehold mortgages, including the term of the lease, the ownership of the improvements, the assignability of the tenant's interest in the lease, the ability to finance it (and/or the priority of the mortgage over the fee estate in the event of foreclosure), rights to casualty awards and condemnation proceeds, and rights to cure a tenant's default and/or obtain a new lease upon a default, among others. These leases tend to be used by credit tenants and are generally in the name of or guaranteed by the parent entity.

## Reversionary and Leasehold Estates

A landlord's interest in a financeable ground lease is typically referred to as a reversionary estate and the tenant's estate is a leasehold estate. Although the actual estates are simply that of landlord and tenant, this refers to the increased rights and obligations of tenants during the term and the related limitations on landlord's rights. Short of having to pay rent, tenant effectively owns everything but the land during the lease term.

### Term

The terms of financeable leases tend to be much longer than typical space leases and tend to exceed 50 years, including option terms<sup>i/</sup>. The terms of leasehold mortgages are often 20 to 25 years, which generally corresponds to the initial term of the lease (and which is far longer than the terms of most fee mortgages). Because a leasehold mortgagee wants to be able to recover its investment if it has to foreclose its loan, it often requires a lease term of at least 10-30 years longer than the maturity date of its loan, including options to extend the term.<sup>ii/</sup> One practical aspect of this is that in some states, including New York, California and Pennsylvania (among other states), a lease having a term that exceeds a threshold number of years can trigger a transfer tax (regardless if the threshold is exceeded because of initial and renewal terms and irrespective of whether any renewal option is ever exercised). In New York, as an example, a term (including renewal terms) exceeding 49 years triggers a transfer tax threshold and many tenants structure their leases around this by limiting the term<sup>iii/</sup>. However, in some states, such as California (35 years) and Pennsylvania (30 years) the term is too short to be easily financeable if the parties limit the term below the threshold, so the issue of who will pay the tax must be agreed upon. One other related issue is the exercise of renewal options, which many tenants and lenders will insist be exercised automatically or require a second notice if the tenant fails to exercise it in a timely manner. If the initial term of the lease is similar in length to the term of the leasehold mortgage (which is not unusual), the mortgagee may also insist on the renewal term being exercisable by it, if necessary.

### Construction of Improvements

Because these leases involve a tenant constructing its improvements with a mixture of mortgage proceeds and its own funds, an important set of considerations for both landlords and tenants is whether: (i) the landlord will have any obligations to demolish existing improvements, construct a pad or bring utilities to the leased premises, (ii) the tenant will be required to construct improvements, (iii) the nature of the improvements, and (iv) how long tenant will have to complete the improvements. In addition, it is important to agree on the tenant's right to remove the improvements, either during the term or at the end of the term. This issue arises because leasehold mortgagees often require that tenants be entitled to remove the improvements at the end of the term to maintain flexibility, although such right does not provide it with much in reality and the real issue is the condition the improvements must be delivered in at the end of the term and whether a tenant has an obligation to restore and rebuild the improvements in the cases of casualty or condemnation (which we will discuss later).

### Due Diligence and Permitting

Because the tenant will be constructing a new building and other improvements to the leased premises, in connection with a financeable ground lease, the tenant should treat the lease like a development project and conduct due diligence, including without limitation geotechnical studies, a zoning and entitlement analysis, a utility availability analysis and environmental studies and should also obtain both a title commitment and a survey (with the aim of obtaining a leasehold title insurance policy). Given the investment by the leasehold mortgagee and the risks attendant with constructing a new building, the lender will likely require many of these studies, as well, in addition to requiring a title policy

for the leasehold mortgagee. Accordingly, these leases generally include a due diligence period, a period for landlord to correct any conditions or title defects (or an ability to terminate the lease if landlord won't agree to do so or if such efforts exceed negotiated thresholds) and a permitting contingency period (with an agreement by the landlord to cooperate in the permitting process or to obtain permits for the tenant).

### Triple Net

Because of the nature of financeable leases, these leases tend to be true triple net leases with tenants being responsible for taxes, maintenance and both structural and non-structural repairs and replacements, compliance with laws and all other aspects of the operation of the leased premises (other than payment of principal and interest under the fee mortgage). This is in keeping with the theme that the tenant's estate is a separate, mortgageable estate and the landlord's estate is a reversionary estate. However, the landlord may be liable for pre-existing environmental conditions. In addition, in a shopping center or office complex setting, the tenant may be liable for paying common area maintenance, if its site does not have exclusive, self-contained parking or utilizes common areas or facilities.

### Use

Because the value a leasehold mortgage will assign to a leasehold mortgage is dependent on the ability to sell or re-lease the mortgaged leasehold (and recover the balance of its loan amount), a leasehold mortgagee will require the use clause be as broad as possible, with a preference that the tenant be able to use the property for any lawful use (or any lawful use). This may be fine for freestanding premises, although many landlords will, at the very least, impose a set of prohibited uses. However, in a multitenant setting, landlords will also require the tenant not to use the premises for the same principal use as that of another tenant or in violation of any exclusive uses. In practice, this is also dependent on the credit and standing of the tenant.

### Continuous Operations

In a retail setting, most leases contain continuous operations clauses. However, because the tenant and leasehold mortgagee have such a large investment in the improvements than in a space lease, most tenants and leasehold mortgagees require that financeable leases do not contain continuous operations covenants. However, some tenants and leasehold mortgagees will agree to a go-dark provision, provided that the trigger period is long and provides plenty of opportunity for the tenant or an assignee to reopen for business (or for the leasehold mortgagee to find a suitable replacement for the tenant). The leasehold mortgage can also make going dark a default under its mortgage and typically will require the tenant to obtain its consent before doing so.

### Assignability

Another key aspect of financeable ground leases is that leasehold mortgages will generally require that the lease be freely assignable, without the requirement of obtaining landlord's consent and without any recapture rights. Any limitations that a landlord is able to obtain on the assignability of a lease (or its subletting) reduces its value to a leasehold mortgagee, given its need to have an exit strategy if the tenant defaults on the leasehold mortgage or the mortgagee has to take over the tenant's interest under the lease after a default by the tenant thereunder.

### Leasehold Mortgage Provisions (Priority of Estate)

From the ideal perspective of a leasehold mortgagee, the reversionary estate of the landlord would be subordinated to tenant's leasehold estate during the term (i.e. the lien of the leasehold mortgage

would encumber landlord's reversionary [fee] estate, so that the leasehold mortgage could foreclose on it, as well as tenant's leasehold estate, if a default occurred and was not cured) . This is rarely agreeable to a landlord, in our experience, and only occurs in a small minority of financeable ground leases. In lieu of a subordinated fee, most financeable ground leases include a leasehold mortgage provision requiring that the landlord obtain a subordination, nondisturbance and attornment agreement from any fee mortgagee upon a form that we will discuss later in the presentation, as a condition for tenant to agree to subordinate the tenant's interest in the reversionary estate (or a recognition agreement or intercreditor agreement between the fee and leasehold mortgage lenders). We have attached a sample of both landlord's (Appendix I) and tenant's (Appendix II) forms of leasehold mortgage provisions as appendices to these materials. In both instances, the key elements are a recognition of the rights of the leasehold mortgagee and of the primary lien of the leasehold mortgage in the improvements on the property, rights to notices of default under the lease and to cure any such defaults beyond the rights granted to the tenant and to receive a new lease at the leasehold mortgagee's request if the tenant defaults under the lease or mortgage or the lease is terminated due to the rejection of the lease in bankruptcy. Additionally, these clauses discuss the interplay between a fee mortgage and leasehold mortgage based on the respective interests of the parties, so that fee mortgagee will not have any right to receive casualty proceeds or condemnation awards related to the improvements. Landlords are rightfully concerned that the additional time periods to cure defaults granted to a leasehold mortgagee could cause a default under a fee mortgage, so there is tension between landlord, tenant and the leasehold mortgagee, with the landlord trying to shorten the time periods for such cure and the tenant and leasehold mortgagee trying to obtain the maximum time required for the mortgagee to evaluate any default and to make a decision whether to cure it. Moreover, if there is a legacy fee mortgage in place covering existing buildings or structures, it usually has to be replaced or amended so that it does not encumber the building and other improvements tenant will be constructing on the premises (or allow the fee mortgagee to share in casualty proceeds and condemnation awards related to such improvements). Additionally, there is a category of defaults that may occur under a lease that cannot be cured by a leasehold mortgagee, including such matters as the corporate status of the tenant or its bankruptcy and leasehold mortgagees are careful to require that it not be required to cure such non-curable defaults. The attached appendices show two approaches to these issues, although the tenant's version is closer to what leasehold mortgagees most commonly require, subject to negotiation about the length of the cure periods for monetary and non-monetary defaults.

#### Ownership of Improvements

As discussed above, a tenant under a financeable ground lease will insist that it has ownership rights in the building and improvements and the right to depreciate the value of the improvements during the term. Some tenants and leasehold mortgagees insist that such ownership right extends as far as to allow the tenant to remove the improvements, but in most instances tenants will agree to transfer ownership rights to the landlord upon the expiration of the lease term (in such condition as has been agreed upon between the parties). However, tenants and leasehold lenders will insist on language that clearly provides that the improvements belong to tenant for both lender security and tax purposes.

#### Rights and Obligations to Alter and Demolish Improvements

Other related issues involve a tenant's rights to alter or demolish the improvements (and whether such improvements must be replaced with improvements of like value and utility if they are demolished during the term). Tenants often argue that the rent they are paying for the land is unrelated to any obligation to construct improvements and that if any improvements are constructed they are not only tenant's property, but that tenant is taking the risk of paying for and constructing the improvements and that tenant's obligation to pay rent is effectively a bond. Landlords generally argue that their agreement to enter into such a lease is predicated on tenant's obligation to construct the improvements and landlord's right to re-utilize the building at the end of the term. Tenants also want flexibility in being able to alter

their improvements. Each of the landlord, tenant and leasehold mortgagee have input on these issues (especially in a shopping center setting), but most landlords insist and tenants eventually agree that, at a minimum, the tenant will initially construct its improvements. Tenants will often agree to some alteration criteria (or landlord consent rights) in a shopping center setting, but generally will be less flexible in a freestanding setting. Similarly, in most cases, tenants will agree not to demolish their improvements, unless they are damaged by fire or other casualty or have exceeded their useful life and are replaced with similar improvements.

#### End of Term Obligations

As with the last two headings, tenants and leasehold mortgagees want the maximum flexibility as to the condition the property must be returned in at the end of the term (including the right to demolish and remove the improvements) and landlords often want the improvements returned in good condition and repair, with all building systems in good working order. At a minimum, landlords do not want a partially demolished or dilapidated building remaining at the end of the term. Because these leases generally require tenants to maintain the leased premises, a compromise is to agree to return the building in good order and repair, subject to wear and tear and damage by casualty and condemnation or for tenant to be able to demolish its improvements and return it in at least the condition it was in at the beginning of the term. Although this is often a hotly contested clause, a building that is 25 or more years old (and likely much older) and which was built to a tenant's specifications, may not be that useful to a landlord and may need substantial renovations or replacement before the premises can be relet.

#### Casualty and Condemnation

Because most financeable leases require the tenant to construct a building and related improvements on its leased premises, both the tenant and leasehold mortgagee will insist that they have the right to receive casualty proceeds and condemnation awards related to the building and improvements.

Most landlords insist that a tenant restore or rebuild its improvements if they are damaged by fire or other casualty during the term, although tenants want the option not to do so, because the obligation to pay rent continues regardless of the presence of the improvements. Most landlords insist on such rebuilding (as do leasehold mortgagees if no default exists under the mortgage), but many of such leases provide that the tenant does not have to rebuild if the damage occurs during the last year (or two) of the term. In such instance, the parties often argue about who is entitled to the insurance proceeds (after repayment of the leasehold mortgage indebtedness) and the argument has the same basis as the arguments over the obligations to initially build, or to demolish the improvements. Of course, by the last year of the term, tenants generally will have depreciated their improvements and most leasehold mortgages will have been amortized (but that is not always the case).

In connection with eminent domain, a whole or substantial taking will trigger a termination. However, even a partial taking could make the premises unusable for a tenant and this concept has to be agreed upon. Unlike a space lease, in which landlord constructed and/or owns the improvements, in a financeable lease, tenants and leasehold mortgagees will ask for the value of their improvements, as well as the value of their leasehold estate, and relocation costs, if the lease is terminated as the result of a taking. Depending on the structure of a leasehold mortgage (most are self-amortizing, in our experience), tenants may sometimes agree to share some portion of the condemnation award for their improvements (e.g. based on a straight line reduction over the initial term, or useful life or some other method--generally after the leasehold mortgage is repaid), but this may not be obtainable in all instances. Other issues may include thresholds for termination or rent reductions due to a taking of parking, curbcuts or access roads (both in freestanding or shopping center settings). These often are heavily negotiated issues.

### Subordination, Non-Disturbance and Attornment Agreements

The standard subordination, non-disturbance and attornment agreement (a “SNDA”) that a fee mortgagee uses is not acceptable to a tenant or leasehold mortgagee in a financeable lease setting. Because the fee mortgagee does not have an interest in the improvements, the form of SNDA must protect both the tenant’s and a leasehold mortgagee’s rights in the improvements and any casualty proceeds and condemnation awards related to them. We have included a sample of an SNDA that is tailored to a financeable lease as Appendix III to these materials. In addition, if there is an existing fee mortgage in place, the mortgage often has to be amended (or more likely replaced), to reflect tenant’s ownership of the improvements and its (and the leasehold lender’s) rights to the casualty proceeds and condemnation awards (and this can be problematic if a small, unsophisticated lender doesn’t understand a financeable lease structure or wants to hold onto the value of what are typically outdated improvements). A required form of SNDA should be an exhibit to a financeable ground lease and a tenant should require that either the fee mortgagee execute it or an SNDA containing the same rights, as a condition of tenant taking possession of the leased premises; and thereafter when landlord finances or re-finances its reversionary estate.

### Default Provisions

Given the investments of a tenant and leasehold mortgagee in the building and other improvements, the default provisions of financeable leases require generous notice and cure periods to preserve the tenant’s and leasehold mortgagee’s rights in the assets and leasehold. Both tenants and lenders will insist that the tenant and leasehold mortgagee receive notices of monetary and non-monetary defaults and adequate cure periods to rectify such defaults. It is not unusual for financeable ground leases to require 15-30 days after notice to cure a monetary default and 30-60 days after notice for a non-monetary default (plus additional time if a non-monetary default cannot be cured in such time period, but the cure has been commenced within it). As set forth above, leasehold mortgagees will also have additional periods to a cure a default, after the expiration of the tenant’s cure period. Accordingly, in addition to considering a tenant’s creditworthiness and use, landlords should also inquire about its payment history.

### Remedies

Financeable ground leases often contain more limited remedies than those contained in space leases. Many tenants and leasehold mortgagees require that: (i) a landlord not be able to accelerate the rent or that any acceleration be based on the net present value of the remaining rent over fair market rent, (ii) a tenant be entitled to challenge a non-monetary default by a proceeding initiated within a cure period, which would stay any exercise of remedies; and (iii) a landlord will be obligated to seek to mitigate its damages.

### Exculpation of Leasehold Mortgagees

Financeable ground leases generally contain an exculpation section, exculpating the leasehold mortgagee and its shareholders, owners or principals from personal liability under the lease, even if a designee of the leasehold mortgagee becomes the tenant under the lease.

### Recording; Estoppels

While not surprising, given the investment a tenant makes in improvements in a financeable ground lease, all of the rating agencies require that the lease or a memorandum of the lease be recorded and that the landlord be obligated to provide estoppel certificates to the tenant and leasehold mortgagee.

Of course, this would be required by any competent attorney, regardless of rating agency requirements, given the nature of a financeable lease.

### Anti-Merger

Leasehold mortgagees require that the estates of the landlord and tenant will not merge if the reversionary and leasehold estates become vested in the same party, as that would leave the leasehold mortgagee without an estate to attach its lien to, whether this occurs due to an eviction, purchase or otherwise. Accordingly, financeable ground leases (or any financeable lease, for that matter) should contain an anti-merger provision.

### Rights of First Refusal or First Offer

Many financeable leases contain a right of first refusal or first offer. Because the tenant owns the improvements and generally has a separately demised parcel, it will argue that it should have the first right to purchase the parcel if the landlord wants to sell it. Landlords most commonly object to rights of first refusal because they are afraid that this right will interfere with any efforts they may make to sell the property (and reduce its price or desirability). This issue can generally be addressed by making the decision process relatively short or providing a right of first offer mechanism. In addition, tenants will generally agree that sales of the parcel as part of the sale of a larger property (e.g. the remainder of a shopping center) would be exempt from this right, as would the conveyance to family members or related entities. Any such right also has to be addressed in the leasehold mortgage, as its mortgage would have to be changed to a fee mortgage (and this may create issues if the mortgage is securitized) and the lease will undoubtedly contain anti-merger language. However, some leasehold mortgagees will agree to allow this, as it will provide it with better security.

### Rating Agency Concerns in Leasehold Mortgage Financing

Most financeable ground leases follow rating agency guidelines, either because they are intended to be part of a securitization or tenants want to preserve the flexibility of obtaining securitized financing for their leasehold interests and improvements. The following is a summary of the rating agency requirements:

Ground Lease Recording. The ground lease or a memorandum thereof must be of record.

Financeability. The ground lease must permit tenant's leasehold interest to be mortgaged by the tenant.

Term of Lease. The term of the Ground Lease must be sufficiently in excess of the term of the leasehold mortgage facility. (S&P – 20 years; Duff & Phelps – 10 years; Fitch – 10 years; Moody's – 30 years). This is to preserve the value of the collateral during the full term of the loan and takes into account the possibility of later term defaults and the need to refinance the leasehold mortgage.

Ground Lease Assignable. The ground lease must permit assignments of the tenant's interest without consent of the landlord. Among other things, a sale at mortgage foreclosure would involve an assignment of the lease; such assignment should not require landlord's consent.

Estoppel. A landlord's estoppel letter should confirm that as of the closing that the ground lease is in full force and effect, has not been modified and that there are no defaults under the lease.

Notice and Opportunity to Cure. The ground lease should provide that the leasehold mortgagee is to receive notice of and an opportunity to cure defaults under the lease. This affords the leasehold mortgagee the opportunity to cure defaults and keep its collateral in place.

New Lease. The ground lease must provide the leasehold mortgagee with the right to a new lease in the event the mortgaged lease is terminated, including by virtue of a rejection in a bankruptcy case.

Insurance/Condemnation Proceeds. The lease must call for proceeds to be applied to property restoration or to pay down the leasehold mortgage indebtedness.

Liens. The ground lease must be free of superior liens and encumbrances.

There are other considerations in evaluating and negotiating financeable ground leases, but the foregoing are the key issues that must be dealt with in any transaction.

## Appendix I

### Landlord's Form of Leasehold Mortgage Provision

#### **ARTICLE I. LEASEHOLD MORTGAGES.**

**Section 1.1** Mortgaging of Leasehold Estate. Tenant shall have the right, without Landlord's prior consent, to mortgage its interest in this Lease and any sublease(s) under one Leasehold Mortgage at any given time, and to assign this Lease and any sublease(s) as collateral security for such Leasehold Mortgage. Such Leasehold Mortgage must at all times be held by an Institutional Lender. No Leasehold Mortgage shall extend to or affect the Land or the reversionary interest and estate of Landlord in and to the Premises or any part thereof. The granting of a Leasehold Mortgage does not render, and shall not be construed to render, a Leasehold Mortgagee an assignee for purposes of this Lease. No Leasehold Mortgage shall be valid or of any force or effect unless and until (i) the Leasehold Mortgagee shall have sent to Landlord a true and correct copy of the original of the Leasehold Mortgage and each instrument affecting such Leasehold Mortgage together with written notice specifying the name and post office address of the Leasehold Mortgagee (and the officer of Leasehold Mortgagee then in charge of administering the Leasehold Mortgage, together with his telephone number), and (ii) the Leasehold Mortgage shall contain the following provisions:

(a) "This mortgage is executed upon the condition that no purchaser at an' foreclosure sale shall acquire any right, title or interest in or to the Lease hereby mortgaged, unless the said purchaser, or the person, firm or corporation to whom onto which such purchaser's right has been assigned, shall, in the instrument transferring to such purchaser or to such assignee the Tenant's interest under the said Lease, assume and agree to perform all of the terms, covenants and conditions of said Lease to be observed or performed on the part of Tenant, and moreover, that no further or additional mortgage or assignment of said Lease shall be made, [except subject to the provisions contained in Articles 10 and II of said Lease], and that a duplicate original of said assumption agreement, in form satisfactory to Landlord's counsel and duly executed and acknowledged by such purchaser or such assignee, is delivered to Landlord immediately after the consummation of such sale, or, in any event, prior to taking possession of the Premises.

(b) The mortgagee waives all right and option to retain and apply the proceeds of any insurance or the proceeds of any condemnation award toward payment of the sum secured by the mortgage to the extent such proceeds are payable to the Landlord or are used by the Tenant in restoring the Building an improvements.

(c) This mortgage and all rights of the mortgagee hereunder are, without the necessity for the execution of any further documents, subject and subordinate to any Mortgages now or hereafter made, as said term is defined in the Lease hereby mortgaged. Nevertheless, the holder of this mortgage agrees from time to time upon request and without charge, to execute, acknowledge and deliver any instruments requested by the Landlord under the Lease hereby mortgaged to evidence the foregoing subordination."

**Section 1.2** Mortgaging of Leasehold Estate. Landlord agrees that so long as any such Leasehold Mortgage shall remain unsatisfied of record or until written notice of satisfaction is given by the holder thereof to Landlord, the following provisions shall apply:

(a) There shall be no cancellation, surrender or material modification of this Lease by joint action of Landlord and Tenant without the prior consent in writing of the Leasehold Mortgagee (but nothing herein shall prevent Landlord from terminating this Lease upon an Event of Default as provided herein).

(b) Landlord shall, upon serving Tenant with any notice of default (which notice shall specify the nature of the default) or termination, serve a copy of such notice upon the Leasehold Mortgagee. The Leasehold Mortgagee shall thereupon have the same period as provided Tenant, after service of such notice upon it, to remedy or cause to be remedied the defaults complained of, and Landlord shall accept such performance by such Leasehold Mortgagee as if the same had been done by Tenant.

**Section 1.3** Nullification Notice. Notwithstanding anything to the contrary herein contained, if any Default shall occur which pursuant to any provision of this Lease entitles Landlord to terminate this Lease and if, before the expiration of thirty (30) days from the date of service of a copy of the notice of termination upon a Leasehold Mortgagee pursuant to Section 1.1(b), the Leasehold Mortgagee shall have notified Landlord of its desire to nullify such notice (such notification from the Leasehold Mortgagee being herein referred to as a "Nullification Notice"), then in such event Landlord shall not be entitled to terminate this Lease by reason of the default specified in the Nullification Notice and any notice of termination theretofore given shall be void and of no effect, provided that within thirty (30) days after service of the Nullification Notice the Leasehold Mortgagee shall have cured any monetary defaults then existing hereunder (including, without limitation, any interest, penalties and late charges which have accrued thereon) and shall have complied or commenced the work of complying with any non-monetary obligations then in default (and diligently and continuously prosecutes same to completion).

**Section 1.4** Effect of Nullification Notice. If Landlord's notice of termination shall have been nullified pursuant to Section 1.3 Landlord shall not have the right subsequently to terminate this Lease so long as the Leasehold Mortgagee or its nominee or successor continues to pay the Rental due hereunder and the Leasehold Mortgagee proceeds with reasonable diligence to complete or cause the completion of the work of curing non-monetary defaults (and diligently and continuously prosecutes same to completion). The giving of a notice of default or termination by Landlord pursuant to the provisions of this Article does not impair Landlord's right to give, nor impair Tenant's and the Leasehold Mortgagee's right to receive, such notices for other defaults that may arise hereunder and the giving of such notices shall be subject to the provisions of this Article.

**Section 1.5** New Lease. Landlord agrees that, in the event of a termination of this Lease, Landlord shall upon request of any Leasehold Mortgagee (and whether or not a Nullification Notice may have been given) enter into a new lease of the Premises with the Leasehold Mortgagee or its designee for a term equal to what would have been the remainder of the term of this Lease if this Lease had not been terminated, which new lease shall be effective as of the date of such termination and shall be at the same Rental and upon the same terms, provisions, covenants and agreements as are herein contained, subject only (a) to the same conditions of title as this Lease is subject to on the date of the execution hereof and any liens or encumbrances or other matters (i) which were caused or created by Tenant, (ii) which are required by law or (iii) which the Tenant was obligated to discharge under the terms of this Lease and (b) to the rights, if any, of parties then in possession of any part of the Premises, provided that:

(a) Said Leasehold Mortgagee shall make written request upon Landlord for such new lease within forty-five (45) days after the termination of this Lease;

(b) Said Leasehold Mortgagee or its designee executes and delivers such new lease within forty-five (45) days after the execution and delivery of the new lease by Landlord to said Leasehold Mortgagee in response to the request made pursuant to subparagraph (a) above;

(c) Said Leasehold Mortgagee shall pay to Landlord at the time of the execution and delivery of said new lease any and all sums which would at the time of the execution and delivery thereof be due pursuant to this Lease, but for such termination, including, without limitation, any interest, penalties and

late charges which have accrued thereon, together with any costs and expenses, including reasonable attorneys' fees, which Landlord shall have incurred by reason of such termination;

(d) Said Leasehold Mortgagee upon the execution of such new lease cures within thirty (30) days thereof (unless such default requires work to be performed, acts to be done, or conditions to be removed which cannot by their nature reasonably be performed, done or removed, as the case may be, within such thirty (30) day period, in which case no default shall be deemed to exist so long as Leasehold Mortgagee shall have commenced curing the same within such thirty (30) day period and shall diligently and continuously prosecute the same to completion) all non-monetary defaults of which it has notice (and which are susceptible of cure by Leasehold Mortgagee) remaining uncured under this Lease as of the date of execution and delivery of the new lease;

(e) Landlord shall not warrant possession of the Premises to the tenant under the new lease or title thereto, but the tenant under such new lease shall have the same right, title and interest, in and to the Premises to the extent, if any, that Tenant had therein and thereto prior to the termination of this Lease; and

(f) Such new lease shall be made expressly subject to the rights, if any, of the Tenant under the terminated lease.

**Section 1.6** Confirmation of this Article. Landlord shall upon Tenant's request execute, acknowledge and deliver to Tenant and/or each Leasehold Mortgagee an agreement prepared at the cost and expense of Tenant and in form reasonably satisfactory to such Leasehold Mortgagee and Landlord, confirming all or any of the provisions of this Article.

**Section 1.7** Payment of Landlord's New Lease Expenses. The Leasehold Mortgagee receiving any new lease pursuant to the provisions of this Article shall pay all of Landlord's costs and expenses (including attorneys' fees) incident to Landlord's entering into such new lease.

## Appendix II

### Tenant's Form of Leasehold Mortgage Provision

#### **ARTICLE I. Mortgaging of Leasehold Estate and Reversionary Estate.**

##### **Section 1.1 Mortgaging of Leasehold Estate.**

Tenant may, without the consent of Landlord, mortgage or otherwise encumber the Leasehold Estate (which mortgage or other encumbrance is hereinafter referred to as the "Leasehold Mortgage"). The mortgagee under the Leasehold Mortgage or the other holders of the indebtedness secured by the Leasehold Mortgage (the "Leasehold Mortgagee") shall notify Landlord (and any Fee Mortgagee, as hereinafter defined), in the manner provided in Section \_\_\_ for the giving of notice, of the execution of such Leasehold Mortgage and the name and place for service of notice upon such Leasehold Mortgagee. Upon such notification of Landlord that Tenant has entered into a Leasehold Mortgage, Landlord hereby agrees for the benefit of such Leasehold Mortgagee, as follows:

(a) Landlord does hereby assent to such Leasehold Mortgage, any assignment of Tenant's rights in and to this Lease in connection with such Leasehold Mortgage, and to any subsequent sale or transfer of the Leasehold Estate as permitted in such Leasehold Mortgage.

(b) Until all obligations of Tenant to Leasehold Mortgagee under the Leasehold Mortgage (the "Loan Obligations") shall have been completely paid and performed, and the Leasehold Mortgage shall have been discharged, Landlord shall not take any action to terminate this Lease for default in the obligations of Tenant hereunder without first complying with the requirements of this Section 1.1.

(c) Until the Loan Obligations shall have been completely paid and performed, and the Leasehold Mortgage shall have been discharged, neither Landlord nor Tenant shall amend or modify this Lease, or exclude any parcel from this Lease, without Leasehold Mortgagee's prior written consent. Any such amendment, modification or exclusion without Leasehold Mortgagee's prior written consent shall not be binding upon Landlord, Tenant, or its or their successors or assigns.

(d) In the event the ownership of the fee and leasehold interests in the Premises become vested in the same person or entity, then as long as the Leasehold Mortgage shall remain outstanding, such occurrence shall not result in a merger of title. Rather, the Lease and the Leasehold Mortgage thereon shall remain in full force and effect.

(e) Landlord shall send to Leasehold Mortgagee, in the manner provided in Section \_\_\_, a true, correct and complete copy of any notice to Tenant of a default by Tenant under this Lease at the same time as and whenever any such notice of default shall be given by Landlord to Tenant, addressed to Leasehold Mortgagee at the address last furnished to Landlord by such Leasehold Mortgagee. No notice by Landlord shall be deemed to have been given to Tenant unless and until a copy thereof shall have been so sent to the Leasehold Mortgagee. Tenant irrevocably directs that Landlord accept, and Landlord agrees to accept, performance and compliance by Leasehold Mortgagee of and with any term, covenant, agreement, provision, condition or limitation on Tenant's part to be kept, observed or performed under this Lease with the same force and effect as though kept, observed or performed by Tenant.

(f) Notwithstanding anything provided to the contrary in this Lease, this Lease shall not be terminated because of a default or breach hereunder on the part of Tenant until and unless:

(i) Notice of any such default or breach shall have been delivered to Leasehold Mortgagee in accordance with the provisions of Section 1.1(e) above;

(ii) With respect to a default or breach that is curable solely by the payment of money, Leasehold Mortgagee has not cured such default or breach within [sixty (60)] days following the expiration of any of Tenant's notice and cure period set forth in this Lease; and

(iii) With respect to a default or breach that is not curable solely by the payment of money, Leasehold Mortgagee has not cured such default or breach within [ninety (90)] days following the expiration of any of Tenant's notice and cure periods set forth in this Lease, or, if such default or breach is curable but cannot be cured within such time period, (aa) Leasehold Mortgagee has not notified Landlord within such time period that it intends to cure such default or breach, (bb) Leasehold Mortgagee has not diligently commenced to cure such default or breach, and (cc) Leasehold Mortgagee does not prosecute such cure to completion.

(iv) Furthermore, notwithstanding anything to the contrary contained herein, if Leasehold Mortgagee determines to foreclose or cause its designee to foreclose the Leasehold Mortgage or to acquire or cause its designee to acquire the Leasehold Estate or to succeed or cause its designee to succeed to Tenant's possessory rights with respect to the Leasehold Estate or to appoint a receiver before it effectuates the cure of any non-monetary breach or default by Tenant hereunder, the cure periods set forth above shall be tolled for any period during which foreclosure proceedings, or legal proceedings to succeed to Tenant's possessory rights, or proceedings to appoint the receiver are conducted, as the case may be. Any such proceedings shall be commenced promptly after the notice of default is delivered to Leasehold Mortgagee and shall be diligently prosecuted. Promptly after Leasehold Mortgagee or a designee of Leasehold Mortgagee acquires the Leasehold Estate pursuant to foreclosure proceedings or otherwise or succeeds to Tenant's possessory rights or promptly after a receiver is appointed, as the case may be, Leasehold Mortgagee or its designee shall cure said breach or default.

(v) Notwithstanding anything provided to the contrary in this Lease, this Lease shall not be terminated because of a default or breach hereunder on the part of Tenant which is a "Non-Curable Default" (as hereinafter defined). For the purposes of this Lease the term "Non-Curable Default" shall mean a non-monetary Default related to the status of, or actions by, Tenant, as contrasted with conditions related to the Premises; so that the filing of a bankruptcy petition by or against Tenant or the appointment of a receiver of Tenant's assets would be examples of a Non-Curable Default, whereas the failure to maintain or repair the Premises or pay Rent would be examples of Defaults which a Leasehold Mortgagee would be required to cure.

(g) Without the written consent of Leasehold Mortgagee, Landlord agrees not to accept a cancellation or voluntary surrender of this Lease at any time while the Leasehold Mortgage shall remain a lien on the Leasehold Estate; and any such attempted cancellation or surrender of this Lease without the written consent of Leasehold Mortgagee shall be null and void and of no force or effect. Landlord and Tenant further agree for the benefit of Leasehold Mortgagee that, so long as any such Leasehold Mortgage shall remain a lien on said Leasehold Estate, Landlord and Tenant will not subordinate this Lease, or any New Lease entered into pursuant to Section 1.1(j) below, to any mortgage or deed of trust that may hereafter be placed on Landlord's Reversionary Estate unless the Fee Mortgagee shall have entered into the Subordination and Non-Disturbance Agreement required by Section 1.2, or consent to any prepayment of any rent, without securing the prior written consent of such Leasehold Mortgagee.

(h) It is acknowledged that the Leasehold Mortgage may be assigned by Leasehold Mortgagee in accordance with its terms. Notwithstanding anything stated to the contrary in this Lease, the following transfers shall be permitted and shall not require the approval or consent of Landlord:

(i) A transfer of the Leasehold Estate at foreclosure sale under the Leasehold Mortgage, whether pursuant to the power of sale contained therein or a judicial foreclosure decree, or by an assignment in lieu of foreclosure, or

(ii) Any subsequent transfer by Leasehold Mortgagee or its nominee or designee if Leasehold Mortgagee, or such nominee or designee, is the purchaser at such foreclosure sale or under such assignment in lieu of foreclosure.

(iii) Any such transferee shall be liable to perform the obligations of Tenant under this Lease only so long as such transferee holds title to the Leasehold Estate, provided that upon any conveyance of title, such transferee's transferee expressly assumes and agrees to perform all of the obligations under this Lease; provided further, that the liability of any Leasehold Mortgagee that obtains title to the Leasehold Estate shall be limited to Leasehold Mortgagee's interest in the Leasehold Estate.

(iv) Following any transfer described in Section 1.1(h)(i) above, all Non-Curable Defaults existing under this Lease prior to such transfer shall be deemed waived without further notice or action of any party.

(v) Any transfer described in this Section 1.1(h) shall not serve to relieve Tenant or any guarantor of its obligations or liabilities under this Lease or any guarantee.

(i) Any policy of hazard insurance insuring Landlord shall contain an endorsement waiving the insurer's right of subrogation as against Leasehold Mortgagee and Tenant.

(j) If this Lease is terminated because of Tenant's default hereunder or for any other reason or is extinguished for any reason (including, without limitation, rejection of this Lease by a trustee in bankruptcy), then Leasehold Mortgagee may elect to demand a new lease of the Leasehold Estate (the "New Lease") by notice to Landlord within thirty (30) days after such termination, subject to the following obligations and provisions:

(i) The New Lease shall be for the remainder of the Term of this Lease (including the right to thereafter extend the Term for any then-unexercised Renewal Periods), effective on the date of termination, at the same Rent and shall contain the same covenants, agreements, conditions, provisions, restrictions and limitations as are then contained in this Lease. Such New Lease shall be subject to all then-existing subleases demising space within the Premises.

(ii) The New Lease shall be executed by Landlord within thirty (30) days after receipt by Landlord of notice of Leasehold Mortgagee's or such other acquiring person's election to enter into a New Lease.

(A) Simultaneously with the execution of the New Lease, all existing monetary defaults shall be cured;

(B) Within thirty (30) days after the execution of the New Lease, Leasehold Mortgagee shall cure all existing non-monetary defaults which are curable, or, if any non-monetary default is curable but cannot be cured within such time period, (aa) Leasehold Mortgagee shall notify Landlord within such time period that it intends to cure such default or breach, (bb) Leasehold Mortgagee shall diligently commence to cure such default, and (cc) Leasehold Mortgagee shall diligently prosecute such cure to completion.

(C) Upon the execution of the New Lease, all Non-Curable Defaults existing under this Lease prior to such execution of the New Lease shall be deemed waived without further notice or action of any party.

(iii) Any New Lease and the leasehold estate created thereby shall, subject to the same conditions contained in this Lease, continue to maintain the same priority as this Lease with regard to any Leasehold Mortgage or any other lien, charge or encumbrance affecting the Premises. Concurrently with the execution and delivery of the New Lease, Landlord shall assign to the tenant named therein all of its right, title and interest in and to moneys, if any, then held by or payable to Landlord which Tenant would have been entitled to receive but for the termination of this Lease.

(iv) If Tenant refuses to surrender possession of the Leasehold Estate, Landlord shall, at the request of Leasehold Mortgagee or such other acquiring person, institute and pursue diligently to conclusion the appropriate legal remedy or remedies to oust or remove Tenant and all subtenants actually occupying the Leasehold Estate or any part thereof who are not authorized to remain in possession hereunder. Any such action taken by Landlord at the request of Leasehold Mortgagee or such other acquiring person shall be at Leasehold Mortgagee's or such other acquiring person's sole expense.

(k) The provisions of this Section 1.1 shall be binding upon and inure to the benefit of Leasehold Mortgagee's successors and assigns. To the extent of any inconsistency between the terms and provisions contained in other sections of this Lease and the terms and conditions set forth in this Section 1.1, the terms and conditions set forth in this Section 1.1 shall govern and control.

(l) The terms of this Section 1.1, and the rights of Leasehold Mortgagee, and the obligations of Landlord and Tenant arising hereunder shall not be affected, modified or impaired in any manner or to any extent by (a) any renewal, replacement, amendment, extension, substitution, revision, consolidation, modification or termination of any of the Loan Obligations; (b) the validity or enforceability of any document evidencing or securing the Loan Obligations; (c) the release, sale, exchange or surrender, in whole or in part, of any collateral security, now or hereafter existing, for any of the Loan Obligations; (d) any exercise or nonexercise of any right, power or remedy under or in respect of the Loan Obligations; or (e) any waiver, consent, release, indulgence, extension, renewal, modification, delay or other action, inaction or omission in respect of the Loan Obligations, all whether or not Landlord shall have had notice or knowledge of any of the foregoing and whether or not it shall have consented thereto.

(m) Any and all buildings and improvements owned by Tenant prior to any termination of this Lease after a Default of Tenant shall automatically pass to, vest in and belong to Leasehold Mortgagee, and shall not become the property of Landlord unless and until the final expiration or sooner termination of this Lease not followed by a New Lease as provided in Section 1.1(j).

## **Section 1.2           Mortgaging of Reversionary Estate.**

(a) In the event that, at any time prior to the execution of this Lease and the recordation of the Memorandum of Lease in accordance with Section \_\_\_ hereof, Landlord has mortgaged or otherwise encumbered the Premises, Landlord shall deliver to Tenant a Subordination, Non-Disturbance and Attornment Agreement (an "SNDA") containing terms substantially identical to the terms of the document so entitled annexed hereto as **Exhibit \_\_\_** and incorporated herein by this reference, duly executed by the holder of any such mortgage or encumbrance (the "Fee Mortgagee"), and Tenant shall promptly execute and return such SNDA to Landlord or the Fee Mortgagee.

(b) In the event that, at any time after the execution of this Lease and the recordation of the Memorandum of Lease in accordance with Section \_\_\_ hereof, Landlord mortgages or otherwise

encumbers the Reversionary Estate, Landlord shall be required to deliver to Tenant a SNDA containing terms substantially identical to the terms of the document so entitled annexed hereto as **Exhibit \_\_** and incorporated herein by this reference, duly executed by the Fee Mortgagee, and Tenant shall promptly execute and return SNDA to Landlord or the Fee Mortgagee.

Appendix III

Form of Financeable Lease SNDA

Prepared by and after recording return to:

\_\_\_\_\_, Esq.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Space above this line for Recorder's use only.*

**SUBORDINATION AND NON-DISTURBANCE AGREEMENT**

**THIS SUBORDINATION AND NON-DISTURBANCE AGREEMENT**, dated as of \_\_\_\_\_, 20\_\_ (the "Agreement") is entered into by \_\_\_\_\_, with an address at \_\_\_\_\_ (the "**Fee Mortgagee**"), Landlord and Tenant (as those terms are defined below).

**WHEREAS**, \_\_\_\_\_, a \_\_\_\_\_ limited liability company, having an address of \_\_\_\_\_ ("**Landlord**") is the owner of certain real property located at \_\_\_\_\_, in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of \_\_\_\_\_, as more fully described on **Exhibit A** attached hereto (the "**Premises**"); and

**WHEREAS**, Landlord and \_\_\_\_\_, a \_\_\_\_\_ limited liability company, with its principal place of business at \_\_\_\_\_ ("**Tenant**") have entered into a certain Ground Lease, dated as of \_\_\_\_\_ (the "**Ground Lease**") with respect to the Premises and shall record a Memorandum of Lease with respect thereto; and

**WHEREAS**, the Fee Mortgagee is the holder of a certain Deed to Secure Debt, Assignment of Rents, Security Agreement and Fixture Filing dated \_\_\_\_\_, recorded \_\_\_\_\_ in Deed Book \_\_\_\_\_, Page \_\_\_\_\_ of the Official Records, in favor of Fee Mortgagee (the "**Fee Mortgage**") on the Premises; and

**WHEREAS**, pursuant to the terms of the Ground Lease, Landlord is required to deliver to Tenant a Subordination and Non-Disturbance Agreement from the holder of any mortgage on Landlord's reversionary fee interest in the Premises;

**NOW THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned hereby agrees as follows:

**1. Assent to Ground Lease.** Fee Mortgagee hereby acknowledges receipt of a full and complete copy of the Ground Lease and does hereby assent to the Ground Lease and to all of the terms and provisions thereof.

**2. Subordination.** Notwithstanding the priority of recording, the Ground Lease and any renewal, replacement, amendment, extension, substitution or revision thereof shall be, and hereby is, subject and subordinate to the lien of the Fee Mortgage, subject to the further recognition and non-disturbance provisions herein.

**3. Non-Disturbance.** Fee Mortgagee hereby agrees to be bound by all of the terms and conditions of the Ground Lease in the event Fee Mortgagee becomes the owner of Landlord's reversionary fee interest in the Premises by reason of foreclosure, deed in lieu of foreclosure or otherwise. Notwithstanding the subordination provided in Section 2, so long as an Event of Default on Tenant's part (beyond any applicable notice, grace or cure period) does not exist under the Ground Lease, Tenant's possession of the Premises and Tenant's rights and privileges under the Ground Lease, or any extensions or renewals thereof, shall not be diminished or interfered with by Fee Mortgagee, and Tenant's occupancy of the Premises shall not be disturbed by Fee Mortgagee for any reason whatsoever during the term of the Ground Lease or any such extension or renewal thereof, except as would be permitted for Landlord to do so.

Notwithstanding anything to the contrary in the Ground Lease, Fee Mortgagee shall not be liable for or bound by any of the following matters:

(a) Any claim for damages of any kind whatsoever as the result of any breach by Landlord that occurred before the date of attornment unless, to the extent that any such breach by Landlord continues after the date of attornment, at the time of such breach by Landlord Tenant has received a Rent Payment Notice (as defined below) and is paying Rent to the Fee Mortgagee pursuant thereto and Tenant has given Fee Mortgagee prior written notice of such default and the right to remedy such default pursuant to Section 6 below.

(b) Any payment of rent or security that Tenant may have made to or deposited with Landlord or any obligation to pay Tenant any sum(s) that Landlord owed to Tenant, except to the extent such monies are actually received by Fee Mortgagee.

(c) Any modification or amendment of the Ground Lease, or any waiver of any terms of the Ground Lease, made without Fee Mortgagee's written consent, to the extent that such consent is required by the Fee Mortgagee.

(d) Any obligation of Landlord under the Ground Lease to make, pay for, or reimburse Tenant for any alterations, demolition, or other improvements or work at the Premises.

(e) Any covenants or obligations of or applicable to Landlord to the extent they apply to or affect any property other than the Premises.

In addition, notwithstanding such subordination, so long as an Event of Default on Tenant's part (beyond any applicable notice, grace or cure period) does not exist under the Ground Lease, Fee Mortgagee will not join Tenant as a party defendant, unless required by law, in any foreclosure action or other proceeding for the purpose of terminating Tenant's interest and estate under the Ground Lease or for any other purpose.

Additionally, notwithstanding anything contained in Section 3(a) above, if Fee Mortgagee succeeds to Landlord's interest under the Ground Lease and acquires title to the Premises, then Fee Mortgagee shall be subject to any offset rights then currently existing and specifically set forth in the Ground Lease (other than Landlord's obligation to perform the work referenced in Section 3(d) above), provided that (i) Fee Mortgagee had written notice of the default giving rise to the offset right in accordance with Section 6 below, (ii) Fee Mortgagee had an opportunity to cure such default in accordance with Section 6 below, and (iii) in no event shall Tenant offset against more than fifty percent (50%) of any monthly installment of Fixed Rent (as defined in the Lease).

**4. Recognition.** If the interests of Landlord in the Premises shall be transferred to and owned by Fee Mortgagee by reason of foreclosure or other proceedings brought by it, or by deed in lieu of foreclosure, or if Fee Mortgagee takes possession of the Premises pursuant to any provisions of the Fee Mortgage, then: (i) Fee Mortgagee and Tenant shall be directly bound to each other under all the terms, covenants and conditions of the Ground Lease for the balance of the term thereof and for any extensions or renewals thereof which may be exercised by Tenant, with the same force and effect as if Fee Mortgagee were Landlord under the Ground Lease; and (ii) Tenant does hereby attorn to Fee Mortgagee as its landlord, said attornment to be effective and self-operative (without the execution of any further instruments), immediately upon Fee Mortgagee succeeding to the interests of Landlord under the Ground Lease; provided, however, regarding items (i) and (ii) above, that Tenant shall have received written notice from Fee Mortgagee that it has succeeded to the interests of Landlord under the Ground Lease. The respective rights and obligations of Tenant and Fee Mortgagee upon such attornment, to the extent of the then-remaining balance of the term of the Ground Lease and any such extensions and renewals, shall be and are the same as now set forth in the Ground Lease from and after Fee Mortgagee's succession to the interests of Landlord under the Ground Lease, and Tenant shall have the same remedies against Fee Mortgagee for the breach of any agreement contained in the Ground Lease that Tenant might have under the Ground Lease against Landlord if Fee Mortgagee had not succeeded to the interest of Landlord.

**5. Payments to Fee Mortgagee.** In the event Tenant receives written notice (the "**Rent Payment Notice**") from Fee Mortgagee or from a receiver for the Premises that there has been a default under the Fee Mortgage and that rentals due under the Ground Lease are to be paid to Fee Mortgagee or to the receiver (whether pursuant to the terms of the Fee Mortgage or of that certain Assignment of Rents and Leases executed by Landlord as additional security for the Loan), Tenant shall pay to Fee Mortgagee or to the receiver, or shall pay in accordance with the directions of Fee Mortgagee or of the receiver, all Rent and other monies due or to become due to Landlord under the Ground Lease, notwithstanding any contrary instruction, direction or assertion of Landlord. Landlord hereby expressly and irrevocably directs and authorizes Tenant to comply with any Rent Payment Notice, notwithstanding any contrary instruction, direction or assertion of Landlord, and Landlord hereby releases and discharges Tenant of and from any liability to Landlord on account of any such payments. The delivery by Fee Mortgagee or the receiver to Tenant of a Rent Payment Notice, or Tenant's compliance therewith, shall not be deemed to: (i) cause Fee Mortgagee to succeed to or to assume any obligations or responsibilities as landlord under the Ground Lease, all of which shall continue to be performed and discharged solely by the Landlord unless and until any attornment has occurred pursuant to this Agreement; or (ii) relieve the Landlord of any obligations under the Ground Lease. Tenant shall be entitled to rely on any Rent Payment Notice. Tenant shall be under no duty to controvert or challenge any Rent Payment Notice. Tenant's compliance with a Rent Payment Notice shall not be deemed to violate the Ground Lease. Tenant shall be entitled to full credit under the Ground Lease for any Rent paid to Fee Mortgagee pursuant to a Rent Payment Notice to the same extent as if such Rent were paid directly to Landlord.

**6. Fee Mortgagee Notice and Cure Rights.** Tenant hereby agrees to give to Fee Mortgagee copies of all notices of Landlord default(s) under the Ground Lease in the same manner as, and whenever, Tenant shall give any such notice of default to Landlord, and no such notice of default

shall be deemed given to Landlord unless and until a copy of such notice shall have been so delivered to Fee Mortgagee. Fee Mortgagee shall have the right to remedy any Landlord default under the Ground Lease, or to cause any default of Landlord under the Ground Lease to be remedied, and Tenant hereby grants to Fee Mortgagee an additional thirty (30) days in which to cure a Landlord default beyond the later of: (i) the period of time granted to the Landlord to cure such Landlord default in the Lease, or (ii) the date that Tenant gave Fee Mortgagee a notice of such Landlord default. Tenant shall accept performance by Fee Mortgagee of any term, covenant, condition or agreement to be performed by Landlord under the Ground Lease with the same force and effect as though performed by Landlord. Tenant agrees that it will not terminate or cancel the Lease on account of any such Landlord default until a notice of such Landlord default has been given to Fee Mortgagee and the time for Fee Mortgagee to cure such Landlord default has expired, without Landlord or Fee Mortgagee having cured such Landlord default. It is expressly understood and agreed that the provisions of this Section shall not be deemed to create any obligation of Fee Mortgagee to cure any Landlord default. Fee Mortgagee shall have the right, without Tenant's consent, to foreclose the Fee Mortgage or to accept a deed in lieu of foreclosure of the Fee Mortgage or to exercise any other remedies under the loan documents, subject to the non-disturbance and recognition provisions contained in this Agreement.

Any notice, election, communication, request or other document or demand required or permitted under this Agreement shall be in writing and shall be deemed delivered on the earlier to occur of (a) receipt or (b) the date of delivery, refusal or nondelivery indicated on the return receipt, if deposited in a United States Postal Service Depository, postage prepaid, sent certified or registered mail, return receipt requested, or if sent via a recognized commercial courier service providing for a receipt, addressed to Tenant or Fee Mortgagee, as the case may be, at the addresses shown on the first page of this Agreement or at such other address as such party gives in accordance with the notice provisions of this Section 6.

**7. Casualty and Condemnation Proceeds.** Notwithstanding anything to the contrary contained herein, to the extent that the provisions of the Ground Lease are inconsistent with the provisions of the Fee Mortgage with respect to Tenant's entitlement to any condemnation award for a taking of all or part of the Premises, or Tenant's entitlement to any casualty proceeds with respect to a casualty to the Premises (or any building constructed thereon), the provisions of the Ground Lease shall have priority and shall control, and Fee Mortgagee waives any rights it may have under the Fee Mortgage to receive any condemnation award or casualty insurance proceeds allocated to Tenant under the Ground Lease.

**8. Warranties and Representations.** Fee Mortgagee hereby warrants and represents as follows:

(a) Fee Mortgagee (unless a natural person), is a duly organized, validly existing entity organized and in good standing under the laws of the United States, has all requisite power and authority to conduct its business and to own its property as now conducted or owned and is qualified to do business in all jurisdictions where the nature and extent of its business is such that such qualification is required by law.

(b) This Agreement has been authorized by all requisite entity action and constitutes Fee Mortgagee's legal, valid and binding obligations in accordance with the terms thereof, subject to bankruptcy and insolvency and similar laws of general application affecting the rights and remedies of creditors and with respect to the availability of the remedies of specific enforcement, subject to the discretion of the court before which proceedings therefor may be brought.

(c) The performance by Fee Mortgagee of the obligations of Fee Mortgagee hereunder does not and shall not constitute a violation of any law, order, regulation, contract, organizational document or agreement to which Fee Mortgagee is subject or by which Fee Mortgagee or the property thereof is or may be bound.

**9. No Oral Change.** No provision of this Agreement may be changed, waived, discharged or terminated or relieved by telephone or by any other means except by an instrument in writing signed by the party against whom enforcement of the change, waiver or discharge or termination is sought.

**10. Successors and Assigns.** This Agreement shall be binding upon each party hereto and its, his or their respective successors, assigns, heirs and personal representatives; provided, however, that upon satisfaction of Fee Mortgage by payment in full of all sums due to Fee Mortgagee under the loan secured by the Fee Mortgage, this Agreement shall become null and void and be of no further effect.

**11. Partial Invalidity.** Each of the provisions hereof shall be enforceable against the parties hereto to the fullest extent now or hereafter not prohibited by applicable law. The invalidity or unenforceability of any provision hereof shall not limit the validity or enforceability of each other provision hereof.

**12. Joint and Several.** The obligations of the parties and of its, his, her or their respective successors, assigns, heirs and personal representatives shall be and remain joint and several.

**13. Counterparts.** This Subordination and Non-Disturbance Agreement may be executed in several counterparts, each of which when executed and delivered is an original, but all of which together shall constitute one instrument. In making proof of this agreement, it shall not be necessary to produce or account for more than one such counterpart which is executed by the party against whom enforcement of such agreement is sought.

[Signatures and acknowledgments on following pages]

Witness the execution hereof as of the date first set forth above.

TENANT:

Attested, signed, sealed and delivered in the presence of: \_\_\_\_\_,  
a \_\_\_\_\_ limited liability company

\_\_\_\_\_  
Unofficial Witness

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

[AFFIX NOTARIAL SEAL]

Tenant Signature Page  
to SNDA for \_\_\_\_\_

Witness the execution hereof as of the date first set forth above.

FEE MORTGAGEE:

Attested, signed, sealed and delivered in the \_\_\_\_\_  
presence of:

\_\_\_\_\_  
Unofficial Witness

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

[AFFIX NOTARIAL SEAL]

Fee Mortgagee Signature Page  
to SNDA for \_\_\_\_\_

Witness the execution hereof as of the date first set forth above.

LANDLORD:

Attested, signed, sealed and delivered in the presence of: \_\_\_\_\_,  
a \_\_\_\_\_ limited liability company

\_\_\_\_\_  
Unofficial Witness

By: \_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

[AFFIX NOTARIAL SEAL]

Landlord Signature Page  
to SNDA for \_\_\_\_\_

## **EXHIBIT A**

**(to Subordination and Non-Disturbance Agreement)**

### **REAL ESTATE DESCRIPTION**

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<sup>i/</sup> Many of these leases have combined terms of up to 99 years (although we typically see terms of approximately 50-65 years).

<sup>ii/</sup> Each of the rating agencies has its own criteria for the required length of the term beyond the maturity date of the leasehold mortgage. These requirements are summarized in these materials and vary from 10-30 additional years.

<sup>iii/</sup> In New York, if a tenant pays the transfer tax, the amount of transfer tax is added to the consideration for the purpose of computing the transfer tax and in some cities (e.g. NYC) there is also a local transfer tax, which can be significant.

**Webinar: Financeable Ground Leases and Leasehold Mortgages**

Supplement:

Title Issues and Considerations; Leasehold Title Insurance

**Thursday, July 7, 2016  
1:00 PM-2:30 PM**

Strafford Webinars

by:

**Mitchell Cohen**

Partner

Chernett Wasserman LLC

ErieView Tower

1301 East Ninth Street,

Suite 330

Cleveland, Ohio 44114

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I. Introduction to Title Insurance for Leasehold Interests

- When you should consider getting coverage
- Lender's Requirements

II. Reviewing the Title Exam and Issue Spotting

- Is the Owner of the Land the same entity as the landlord named in the lease?
- Are there Covenants or Restrictions of record that prohibit or limit the tenant's intended use ?
- Who are necessary parties to nondisturbance agreements?

III. Leasehold Policy Endorsements

- ALTA 13 Endorsement Forms (Adopted 2001). Appendix I –(Owner' s Form 13-06) and Appendix II (Lenders Form 13.1-06)
- New Definitions: Leasehold Estate, Lease, Eviction, Personal Property, Lease Term, Remaining Lease Term, and Tenant Leasehold Improvements
- Valuation of Estate
- Covered Losses

IV. Determining the Amount of Insurance

ALTA Endorsement — Form 13-06 (Appendix I) and 13.1-06 (Appendix II) were created to be attached to the ALTA Owner's Policy and ALTA Loan Policy, respectively. They are intended to be used either with policies covering only leasehold estates or for those that insure both leasehold estates and the ownership of improvements located on them.

The previous leasehold owner's and leasehold loan policies were designed to provide insurance for space tenants that have no significant investment in tenant improvements. As a result, those policies did not provide compensation for the value of improvements if lost, or for impairment of legitimate uses, as the result of a matter covered by the policies.

The endorsement forms now provide all of the existing coverages of the leasehold policy and additions and include the value of improvements in the calculation of losses resulting from eviction based on a matter insured by the policies. Similarly, improvement value is included if the Insured tenant is unable to use the property for its intended purpose as a result of a matter covered by the policy, assuming the lease permits such a use.

Reimbursement to Insured lessees for specified out-of-pocket construction costs for improvements on the Land that were substantially incomplete at the time of eviction is also provided. Similar coverage is provided to Insured leasehold lenders for improvements they construct after they acquire the property by foreclosure or conveyance in lieu thereof.

APPENDIX I

**ALTA FORM 13-06 LEASEHOLD ENDORSEMENT - OWNER'S (04-02-12)**

Attached to and made part of Policy Number \_\_\_\_\_ issued by \_\_\_\_\_

1. As used in this endorsement, the following terms shall mean:
  - a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case as a result of a matter covered by this policy.
  - b. "Lease": the lease described in Schedule A.
  - c. "Leasehold Estate": the right of possession granted in the Lease for the Lease Term.
  - d. "Lease Term": the duration of the Leasehold Estate, as set forth in the Lease, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.
  - e. "Personal Property": property, in which and to the extent the Insured has rights, located on or affixed to the Land on or after Date of Policy that by law does not constitute real property because (i) of its character and manner of attachment to the Land and (ii) the property can be severed from the Land without causing material damage to the property or to the Land.
  - f. "Remaining Lease Term": the portion of the Lease Term remaining after the Insured has been Evicted.
  - g. "Tenant Leasehold Improvements": Those improvements, in which and to the extent the Insured has rights, including landscaping, required or permitted to be built on the Land by the Lease that have been built at the Insured's expense or in which the Insured has an interest greater than the right to possession during the Lease Term.
  
2. Valuation of Estate or Interest Insured:

If in computing loss or damage it becomes necessary to value the Title, or any portion of it, as the result of an Eviction of the Insured, then, as to that portion of the Land from which the Insured is Evicted, that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The Insured Claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements affected by a defect insured against by the policy valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.
  
3. Additional items of loss covered by this endorsement:

If the Insured is Evicted, the following items of loss, if applicable to that portion of the Land from which the Insured is Evicted shall be included, without duplication, in computing loss or damage incurred by the Insured, but not to the extent that the same are included in the valuation of the Title determined pursuant to Section 2 of this endorsement, any other endorsement to the policy, or Section 8(a)(ii) of the Conditions:

  - a. The reasonable cost of (i) removing and relocating any Personal Property that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction, (ii) transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, (iii) repairing the Personal Property damaged by reason of the removal and relocation, and (iv) restoring the Land to the extent damaged as a result of the removal and relocation of the Personal Property and required of the Insured solely because of the Eviction.
  - b. Rent or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.

- c. The amount of rent that, by the terms of the Lease, the Insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the Insured has been Evicted.
  - d. The fair market value, at the time of the Eviction, of the estate or interest of the Insured in any lease or sublease permitted by the Lease and made by the Insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.
  - e. Damages caused by the Eviction that the Insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease permitted by the Lease and made by the Insured as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.
  - f. The reasonable cost to obtain land use, zoning, building and occupancy permits, architectural and engineering services and environmental testing and reviews for a replacement leasehold reasonably equivalent to the Leasehold Estate.
  - g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the Insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering services, construction management services, environmental testing and reviews, and landscaping.
4. This endorsement does not insure against loss, damage or costs of remediation (and the Company will not pay costs, attorneys' fees or expenses) resulting from environmental damage or contamination.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Signed under seal for the Company, but this endorsement is to be valid only when it bears an authorized countersignature.

Countersigned:

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Authorized Countersignature

## APPENDIX II

### **ALTA FORM 13.1-06 LEASEHOLD ENDORSEMENT - LOAN (04-02-12)**

Attached to and made part of Policy Number \_\_\_\_\_ issued by \_\_\_\_\_

1. As used in this endorsement, the following terms shall mean:
  - a. "Evicted" or "Eviction": (a) the lawful deprivation, in whole or in part, of the right of possession insured by this policy, contrary to the terms of the Lease or (b) the lawful prevention of the use of the Land or the Tenant Leasehold Improvements for the purposes permitted by the Lease, in either case as a result of a matter covered by this policy.
  - b. "Lease": the lease described in Schedule A.
  - c. "Leasehold Estate": the right of possession granted in the Lease for the Lease Term.
  - d. "Lease Term": the duration of the Leasehold Estate, as set forth in the Lease, including any renewal or extended term if a valid option to renew or extend is contained in the Lease.
  - e. "Personal Property": property, in which and to the extent the Insured has rights, located on or affixed to the Land on or after Date of Policy that by law does not constitute real property because (i) of its character and manner of attachment to the Land and (ii) the property can be severed from the Land without causing material damage to the property or to the Land.
  - f. "Remaining Lease Term": the portion of the Lease Term remaining after the Tenant has been Evicted.
  - g. "Tenant": the tenant under the Lease and, after acquisition of all or any part of the Title in accordance with the provisions of Section 2 of the Conditions of the policy, the Insured Claimant.
  - h. "Tenant Leasehold Improvements": Those improvements, in which and to the extent the Insured has rights, including landscaping, required or permitted to be built on the Land by the Lease that have been built at the Tenant's expense or in which the Tenant has an interest greater than the right to possession during the Lease Term.
  
2. Valuation of Estate or Interest Insured:

If in computing loss or damage it becomes necessary to value the Title, or any portion of it, as the result of an Eviction of the Tenant, then, as to that portion of the Land from which the Tenant is Evicted, that value shall consist of the value for the Remaining Lease Term of the Leasehold Estate and any Tenant Leasehold Improvements existing on the date of the Eviction. The Insured Claimant shall have the right to have the Leasehold Estate and the Tenant Leasehold Improvements affected by a defect insured against by the policy valued either as a whole or separately. In either event, this determination of value shall take into account rent no longer required to be paid for the Remaining Lease Term.
  
3. Additional items of loss covered by this endorsement:

If the Insured acquires all or any part of the Title in accordance with the provisions of Section 2 of the Conditions of this policy and thereafter is Evicted, the following items of loss, if applicable to that portion of the Land from which the Insured is Evicted shall be included, without duplication, in computing loss or damage incurred by the Insured, but not to the extent that the same are included in the valuation of the Title determined pursuant to Section 2 of this endorsement, any other endorsement to the policy, or Section 8(a)(iii) of the Conditions:

  - a. The reasonable cost of (i) removing and relocating any Personal Property that the Insured has the right to remove and relocate, situated on the Land at the time of Eviction, (ii) transportation of that Personal Property for the initial one hundred miles incurred in connection with the relocation, (iii) repairing the Personal Property damaged by reason of the removal and relocation, and (iv) restoring the Land to the extent damaged as a result of the removal and relocation of the Personal Property and required of the Insured solely because of the Eviction.

- b. Rent or damages for use and occupancy of the Land prior to the Eviction that the Insured as owner of the Leasehold Estate may be obligated to pay to any person having paramount title to that of the lessor in the Lease.
  - c. The amount of rent that, by the terms of the Lease, the Insured must continue to pay to the lessor after Eviction with respect to the portion of the Leasehold Estate and Tenant Leasehold Improvements from which the Insured has been Evicted.
  - d. The fair market value, at the time of the Eviction, of the estate or interest of the Insured in any lease or sublease permitted by the Lease and made by the Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.
  - e. Damages caused by the Eviction that the Insured is obligated to pay to lessees or sublessees on account of the breach of any lease or sublease permitted by the Lease and made by the Tenant as lessor of all or part of the Leasehold Estate or the Tenant Leasehold Improvements.
  - f. The reasonable cost to obtain land use, zoning, building and occupancy permits, architectural and engineering services and environmental testing and reviews for a replacement leasehold reasonably equivalent to the Leasehold Estate.
  - g. If Tenant Leasehold Improvements are not substantially completed at the time of Eviction, the actual cost incurred by the Insured, less the salvage value, for the Tenant Leasehold Improvements up to the time of Eviction. Those costs include costs incurred to obtain land use, zoning, building and occupancy permits, architectural and engineering services, construction management services, environmental testing and reviews, and landscaping.
4. This endorsement does not insure against loss, damage or costs of remediation (and the Company will not pay costs, attorneys' fees or expenses) resulting from environmental damage or contamination.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Signed under seal for the Company, but this endorsement is to be valid only when it bears an authorized countersignature.

Countersigned:

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Authorized Countersignature