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Peer to Peer Session #10

**Not So Complicated – Even if Other People Try to Make it So:  
Advanced Issues in Purchase and Sale Agreements**

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by:

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**ASSEMBLAGES**

Consider the normal real estate transaction (if there is such a thing). The parties enter into a purchase and sale agreement and the Buyer will conduct some due diligence to verify the condition of the property. Assuming the Buyer is satisfied with the results of the due diligence studies, the buyer will close on the property. What happens if the buyer needs to acquire multiple parcels to develop its project, the parcels are occupied by operating businesses, one of the sellers does not want to sell and there are environmental concerns with one the parcels?

To approach such a transaction it helps to separate the complications and develop a solution to each complication and then move on to the next complication.

Acquiring multiple parcels is the same as acquiring a single parcel. The complication arises because the Buyer has to acquire all of the parcels to make the project work. The solution to this complication is to make the purchase agreement for each parcel contingent on the Buyer acquiring all of the parcels. This “assemblage” allows the Buyer to proceed with the project.

To tie the contracts together, include the following due diligence condition:

CONDITION. Acquisition of Adjacent Parcels. Within sixty (60) days following the Effective Date, Buyer shall enter into purchase agreements satisfactory in form and substance to Buyer to acquire the following two parcels of real estate located adjacent to the Property as shown on Exhibit A and required by Buyer in connection with the Project (the “Adjacent Parcels”): (i) the approximately \_\_\_\_\_ acre parcel owned by \_\_\_\_\_ located adjacent to and east of the Property; and (ii) the approximately \_\_\_\_\_ acre parcel owned by \_\_\_\_\_ located adjacent to and west of the Property. Buyer’s obligation to close the transaction contemplated hereunder shall be subject to and conditioned upon Buyer’s closing and acquisition of fee simple title to the Adjacent Parcels.

Another version of language tying the parcels together:

Buyer is or expects to be the contract purchaser of the parcels of land that are shown as A, B, C, D & E on the plan that is attached to Exhibit A of this Agreement (such parcels of land to be referred to in this Agreement as “Other Adjacent Property”). Provided that the Buyer is able to become the contract purchaser of all of the Other Adjacent Property not later than the Effective Date it will be an additional condition of Buyer's performance of the Buyer's obligations under this Agreement *that the* Closing of the Property and

the closing of the purchase by Buyer of the Other Adjacent Property occur concurrently. If at no fault of Buyer such closings do not occur concurrently, the Buyer will not be obligated to close under this Agreement.

If you are handling an assemblage it is imperative to have an easy means of describing each parcel, tracking the status of getting the parcel under contract and tracking the status of due diligence. A simple Excel Spreadsheet with color coded cells will address this concern.

To keep the various owners from trying to hold the Buyer hostage and “outdo” one another consider using a couple of cooperative brokers to get the various parcels under contract. Depending on the sensitivity of the project it might be worthwhile requiring the brokers to sign non-disclosure agreements so that they do not disclose the overall plan. Once the property is under contract have the brokers assign the various contracts to the Buyer.

It is critically important to include the right for the Buyer to sue for specific performance in case one of the sellers in the assemblage reneges. Besides having the right to pursue specific performance, the Buyer should be ready to deal with a seller who gets wind of the project and decides to hold the Buyer hostage. Certainly knowing that specific performance is ultimately available, should give the Buyer some comfort. Another response to a reneging buyer might be, “Ho-hum.” The Buyer can respond that while the Buyer would certainly want to include the seller’s parcel in the new development, certainly the plans can be revised to work around the seller’s parcel and the Buyer will be happy to have the Seller as a neighbor. If all of the purchase agreement are tied together, a reneging buyer ought to be unwilling to suffer the obloquy of the remaining sellers.

Once the various properties have been put under contract, when the buyer acquires possession should be considered. Oftentimes a lease can enter into an assemblage transaction in three different ways: (1) there is a landowner who only wants to lease and does not want to sell; (2) a landowner wants to stay in possession for a time after the closing; or (3) a landowner has leased the owner’s parcel to a tenant.

If a landowner will only lease, the Buyer will want to structure the transaction as a long term ground lease with options to extend, liberal subleasing rights and rights to engage in leasehold financing. At the very least the ground lease should include a right of first refusal and if the ground lessor will agree, an option to purchase the property at a pre-negotiated price.

Consider the effects of the landowner’s and the tenant’s financing on the project. You will want the landowner’s financing to be subordinate to the ground lease and you will want the tenant to have the free right to obtain financing. Suggested language is provided below:

Landlord’s Financing: Landlord shall have the right, from time to time, and without restriction, to mortgage or otherwise encumber its estate or interest in the Premises, subject in each instance to this Lease. Any such mortgage or other encumbrance shall be, and shall expressly provide, that it is subordinate to this Lease and all rights hereunder as this Lease may be amended, modified or supplemented from time to time.

Tenant’s Financing: Tenant shall have the unrestricted right, from time to time, to mortgage or otherwise encumber Tenant’s Leasehold Estate to a Leasehold Mortgagee without the prior consent of Landlord.

Another version of language allowing the ground lessee the right to finance the ground lessee’s property and leasehold estate follows:

Tenant may grant a mortgage or other security interest or lien in all or part of the Tenant’s property (“Tenant Property”) located within the Premises (including Tenant’s trade fixtures) and in all or part of Tenant’s leasehold interest. Landlord hereby waives any lien that it may have against Tenant’s Property (whether by statute or under the terms of the Lease or otherwise). Landlord shall execute and deliver to Tenant any subordination documents, release documents and other documents reasonably requested by Tenant’s lender(s) within ten (10) days after Landlord received the requested documents.

A more elaborate provision for leasehold financing is attached to the end of this article.

A necessary element to leasehold financing is the right to record a memorandum of lease and the ground lease should give the ground lessee that right.

If an owner will only ground lease its parcel, consider if it might make the transaction easier if the Buyer induces the ground lessor to acquire the adjacent parcels and ground lease the whole assemblage to the Buyer.

The Buyer will want to negotiate for liberal rights to sublease all or part of the premises. It is imperative to have the landowner agree to provide a non-disturbance agreement for the subtenant agreeing that even if the lease is terminated, the subtenant may continue to occupy its premises. Non-disturbance agreement to consider is:

Every sublease shall be subject to the express condition that if this Lease should be terminated prior to the Expiration Date or if Landlord should succeed to Tenant's estate in the Premises, then (i) the subtenant shall attorn to and recognize Landlord as the subtenant's landlord under the sublease, upon and subject to the then-executory terms and conditions of the sublease and (ii) provided the subtenant is not in default beyond any applicable notice and cure periods of any of its obligations under its sublease, Landlord shall agree not to disturb the subtenant.

Another version of language for the landowner to agree not to disturb the subtenant follows:

Upon the written request of Tenant, Landlord agrees to enter into a non-disturbance and attornment agreement, in form and content reasonably acceptable to Landlord, with (i) any Subtenant who sublets all, or substantially all, of the Leased Premises, and (ii) any Space Tenant who sublets more than 10,000 square feet of rentable area in the Improvements, which agreement shall provide so long as such Subtenant or Space Tenant complies with all the terms, covenants and conditions of its Sublease or Space Lease, Landlord, in the exercise of any of its rights or remedies under this Lease, shall not deprive the Subtenant or the Space Tenant of possession, or the right of possession, of its subleased portion of the Leased Premises during the term of such Sublease or Space Lease, or join the Subtenant or the Space Tenant as an adverse or defendant party in any action or proceeding to enforce or terminate this Lease or to obtain possession of the premises demised in such Sublease or Space Lease for any reason other than a breach by the Subtenant or the Space Tenant of the covenants contained in its Sublease or Space Lease (including the covenants to pay rent and other monetary amounts) which would entitle Tenant (as sublessor therein and thereunder) to dispossess the Subtenant or the Space Tenant therein and thereunder, provided that:

- (i) No Event of Default shall have occurred and be continuing;
- (ii) The Subtenant or the Space Tenant meets reasonable requirements of financial responsibility;
- (iii) The term (including renewal or extension options) of the Sublease or the Space Lease does not extend beyond the Fixed Expiration Date;
- (iv) In the case of a Sublease, the minimum annual rent payable by the Subtenant during any Lease Year shall not be less than the Minimum Annual Rent for such Lease Year;
- (v) In the case of a Sublease, the Sublease shall obligate the Subtenant to perform and comply with all of the terms and provisions of this Lease (other than the payment of Minimum Annual Rent);
- (vi) In the case of a Space Lease, Landlord shall receive evidence, reasonably satisfactory to it, that the rent and other amounts payable by the Space Tenant throughout the term of the Space Lease constitute not less than a fair rental for the space demised thereunder as of the date of such Space Lease; and
- (vii) The attornment portion of the agreement contains, among other things, the agreement of the Subtenant or the Space Tenant to attorn to Landlord and recognize Landlord as the sublessor under the Sublease or the Space Lease and a provision to the effect that

neither Landlord, nor any Person claiming by, through or under Landlord, shall be (A) liable for any act or omission of any prior landlord (including the then-defaulting landlord), (B) subject to any setoffs or defenses which the Subtenant or the Space Tenant might have against any prior landlord (including the then-defaulting landlord), or (C) bound by any rent or additional rent which the Subtenant or the Space Tenant may have paid for more than one (1) month in advance to any prior landlord (including the then-defaulting landlord), (D) bound by any covenant to undertake or complete any construction of the premises, or any part thereof, demised by such Sublease or Space Lease.

The leasehold financing language attached to this article contains non-disturbance language that can be adapted to a sublease transaction.

If the Buyer has to grant easements as part of the development, the ground lease should include language giving the Buyer the right to grant easements. The landowner should agree to cooperate in granting the necessary easements. The Buyer might have to agree that the easements will not take effect until the Buyer closes on its acquisitions of the adjacent parcels. The landowner might also request the right to relocate the easements if the landowner repossesses the property.

If one of the sellers wants to remain in possession following closing, prepare an occupancy agreement, which is actually a lease with a short term. The occupancy agreement should include indemnities for premises liability. The occupancy agreement should require the seller to maintain liability insurance and property insurance. Consider the condition in which the seller is required to deliver the property at the end of the occupancy period. Sometimes, a buyer will not object if the seller removes portions of the improvements or the equipment attached to the improvements if the buyer is planning to demolish the improvements anyway. Be careful about letting the seller take out too much - be sure the seller has to deliver the improvements in a manner that they can be secured against vandals and vagrants.

If one of the parcels is encumbered by a lease whose term extends beyond the closing date, review the lease to determine if the lease provides the landlord the right to terminate the lease if the property is being sold. If the existing lease does not contain such a termination right, does it allow the landlord to pay the tenant a termination fee? Sometimes a Buyer will want to approach an existing lease with the idea that the tenant is in material default of the lease and the landlord can easily terminate the lease. If the existing tenant gets wind of the proposed development, the existing tenant might try to delay the project by unreasonably contesting the landlord's right to terminate the lease. It might be most expedient for the Buyer to negotiate a termination of the lease for a termination payment. It might be galling to the Buyer to pay the tenant such an amount, but in the long run it will facilitate getting the project under way. Even with a negotiated termination, the termination agreement should contain the strongest remedies available to the Buyer and include the Seller as a party to the agreement. The termination agreement should condition payment on the tenant delivering possession of the premises to the Buyer.

If the concern with possession is merely an existing tenant who wants to occupy its premises briefly to liquidate its business or merely wants to stay in the property for a short time to wind up business or to allow for an orderly relocation to a new location, the situation becomes easier. You only need to make sure the Buyer is protected against liability and against the tenant not vacating when required.

Whether it is a seller remaining in possession after closing, or a tenant who has agreed to move out earlier than the end of its lease, the Buyer's purchase agreement with the seller should require a significant portion of the purchase price to be placed in escrow to be released when possession of the property is delivered to the Buyer. Either in the occupancy agreement or a separate escrow agreement, the Buyer should require significant damages if actual possession is not delivered when required. Whether it is the Seller or an existing tenant staying in possession after closing the Buyer should negotiate for the right to receive an amount equal to the Buyer's carrying costs for the property. If actual possession is not delivered to the Buyer when required, the agreement should provide for a significant penalty to be paid to the Buyer and for the daily payment to increase by three or four times to create an enhanced incentive for the party remaining in possession to vacate. If the party remaining in possession is a tenant, the existing lease should be assigned to the Buyer so that the Buyer may collect rent and allow the Buyer to sue for possession if necessary.

If the transaction includes such a delayed possession, does the Seller or tenant need to occupy all of the property or might the Buyer have the opportunity to start working on a part of the property before the occupant

delivers possession? If there is a possibility to begin working early, the agreement should delineate the property on which the Buyer can start working.

While in-depth discussing of environmental issues is beyond the scope of this paper, the Buyer should use the due diligence period to determine the scope of any environmental concerns and negotiate with the Seller for appropriate indemnities and responsibilities to sign manifests for any hazardous materials removed from the property.

## **I. OUTPARCEL CREATION**

When real property subject to a purchase and sale is not legally subdivided from a parent parcel, such as a shopping center, this can present major challenges with respect to the typical timing of a real estate transaction. To the extent possible, both Seller and Buyer should consider a number of issues in advance of an outparcel purchase and sale.

### AS A SELLER:

#### 1. Timing & Expense

- (a) Need 12-18 months in advance planning to evaluate the following and build into a purchase and sale agreement, as necessary:
  - (i) Characteristics of outparcel to be sold:
    - Is it a “true” outparcel, in-line space, satellite center?
    - Is it a triple net lease or are there deviations?
    - Credit strength of outparcel tenant & length of lease
    - ROFR/ROFO rights of outparcel tenant
  - (ii) Economic deal terms of outparcel sale with potential buyer
    - More difficult when the lease is NOT triple net?
    - If there is leakage under the existing lease related to triple net status, who absorbs such leakage (i.e., Buyer or Seller)?
  - (iii) Impact on balance of shopping center (i.e., zoning requirements, co-tenancy requirements, GLA denominators for CAM and taxes, etc.)
  - (iv) Lender consent and loan release requirements
  - (v) ROFR/ROFO rights of other tenants in the shopping center
- (b) Subdivision
  - (i) Is the outparcel legally subdivided such that it can be transferred without governmental approval?
  - (ii) If not, subdivision challenges may include:
    - Length of process (exacerbated by COVID)
    - Varying/confusing jurisdictional requirements
    - Easements and other legal documents to be drafted in advance of subdivision approval
    - Variances
    - Meeting attendance

- Local counsel support
- (c) If the outparcel is NOT legally subdivided and/or NOT triple net, it could require significant time to restructure, so plan accordingly!

#### AS A BUYER:

1. Engage excellent service providers (i.e., title company, surveyor, local counsel, etc.)
  - (a) Lots of challenges with service providers in this environment, which results in:
    - (i) Delays in surveys, additional requirements from title companies to provide required title coverage, etc.
  - (b) Choose your service providers wisely!
2. Obtain due diligence materials from Seller as early in advance as possible
  - (a) Shopping center leases, existing title report and existing survey
    - (i) If Seller won't provide shopping center leases for review, require robust representations and warranties in purchase contract
3. Build flexibility into the purchase contract for changes/unforeseen issues
  - (a) Require a long due diligence period that does not commence until outparcel is legally subdivided, including significant flexibility to terminate the contract
4. Identify a lender (if applicable)

#### FOR BOTH SELLERS AND BUYERS

1. Remember you will be working on this transaction together for a while and unlike the purchase/sale of an entire shopping center, will likely be involved with each other in the future.
2. Keep this in mind when selecting an outparcel / awarding a purchase contract and try to maintain a good relationship throughout the transaction.

## **II. LEGAL DESCRIPTION ISSUES AND OTHER TITLE MATTERS**

It is important for the parties to understand and agree upon the description of the real property being sold, which is especially important for a newly-created parcel. Just because real property has its own tax identification number does NOT mean that it is a legally subdivided parcel.

1. Description of "Leased Premises" under Lease v. Tax Parcel v. Subdivided Parcel.
  - (a) Ideally these descriptions should match but oftentimes there are discrepancies, which can lead to leakage.
    - (i) Some leases are drafted poorly, which sometimes contributes to confusion.
  - (b) Build flexibility into the contract to refer to the legal description of the real property once legally subdivided.
  - (c) Some tenants have unusual requirements in connection with creation/conveyance of outparcels/subdivision of shopping center, so be aware of these requirements in advance and build into the contract (as necessary).
2. Title Matters
  - (a) While title and survey due diligence for an outparcel is similar to title and survey due diligence for other assets, it is important for the parties to understand how an outparcel 'fits in' with balance of the shopping

center, which is important to negotiate terms of a supplemental reciprocal easement agreement (as necessary).

- (b) Title companies are requiring more from parties to issue title insurance (such as gap indemnities, indemnity agreements, etc.), so you should work these requirements into the contract.
- (c) Some issues with respect to the title work a Buyer should consider are the following:
  - (i) Are there existing easements benefiting the outparcel?
  - (ii) Are there existing exclusive and prohibited uses?
  - (iii) REA charges?
  - (iv) Where does outparcel obtain utilities?

### 3. Negotiation of Supplemental Reciprocal Easement Agreement (“Supplemental REA”).

- (a) This is a critical document for both parties which establishes easements, restricted/exclusive uses, maintenance and payment obligations and other agreements of the parties.
- (b) Recorded in the real estate records for the benefit of future owners of each of the shopping center and outparcel.
- (c) Requires significant negotiations so plan accordingly!

### 4. List of Prohibited and Exclusive Uses (part of Supplemental REA).

- (a) What to include/exclude?
  - (i) Requires careful analysis
    - Example: Can’t include prohibition against restaurant use when outparcel is a restaurant user.
  - (ii) As a seller, be as broad as possible with respect to exclusive and prohibited uses to avoid a default under existing shopping center leases.
  - (iii) As a buyer, require that the existing exclusive and prohibited uses continue only so long as the lease that imposes them is in effect.

## III. CLOSING CONDITIONS

### 1. Seller/Buyer Representations

- (a) No material changes to Seller/Buyer representations at closing
- (b) Does the contract allow either party to update the representations at closing?
  - (i) What is the result if there is a change in a representation that is due to changed circumstances and not a result of a breach of the contract?
  - (ii) Include an anti-sand bagging clause in the contract?

### 2. Receipt of Title Policy

### 3. Required Estoppels & SNDAs

### 4. Occurrence of “Rent Commencement Date” under Lease

- (a) If a single-tenant asset is under construction and/or not yet open and operating, a buyer may want to consider drafting a closing contingency in the contract to mirror the “rent commencement date” under a lease
  - (i) For example, receipt of all governmental permits by the tenant, tenant is open and operating, etc.

#### 5. Jurisdictional Requirements

- (a) Understand jurisdictional requirements, such as transfer taxes, lien searches, etc. to incorporate into the contract as a closing condition or covenant, as applicable.

**PRACTICE TIP:** Try to obtain flexibility in purchase contract for closing due in case of unforeseen issues, especially as it relates to single-tenant assets that are under construction or newly-constructed.

### IV. ESTOPPELS AND SUBORDINATION, NON-DISTURBANCE AND ATTORNMENMENT AGREEMENTS

#### 1. Estoppels

- (a) Estoppels are written statements from tenants certifying the accuracy of certain facts contained in a lease that can be relied upon by potential purchasers and lenders of real property.
- (b) The contract should specify the following with respect to tenant estoppels:
  - (i) Which tenant estoppels are required to close?
    - Typically, buyers require certain named tenants and a percentage of the balance of the GLA of the shopping center to deliver signed estoppels at closing, and sellers will typically exclude leases with a term of less than 12 months
  - (ii) What constitutes a ‘clean’ estoppel and the basis for rejecting a ‘dirty’ estoppel?
    - Does any tenant estoppel that identifies a breach a ‘dirty’ estoppel or only material breaches?
  - (iii) Who are the certification parties required by Buyer and any lender?
  - (iv) What is the required form of tenant estoppel?
    - Typically the parties will attach a form to the contract but will permit the delivery of other forms required under leases or pursuant to the policies of national tenants
  - (v) Are Seller estoppels permitted?
    - Buyer oftentimes permit Seller Estoppels for a small percentage of shopping center tenants, excluding ‘major tenants’
  - (vi) What happens if any “required” estoppels are not obtained at closing?
    - Failure of a closing condition v. a default by Seller
    - Does Buyer and/or Seller have a right to extend the closing date?

#### 2. Subordination, Non-Disturbance and Attornment Agreements

- (a) Subordination, non-disturbance and attornment agreements (“SNDA”) are rarely a condition to closing under a contract, but are often a condition to closing on a loan.
  - (i) Buyers should identify a lender early and work with them during contract negotiations to agree upon those tenants from whom SNDAs are required to issue loan



- (b) The key elements to a SNDA are the following:
- (i) Subordination of the lease to a mortgage or deed of trust (as applicable), including amendments and renewals of such lease;
  - (ii) Tenant's agreement to attorn to the lender or purchaser at a foreclosure sale;
  - (iii) An agreement by the lender or new owner not to disturb the tenant so long as there is no default under such tenant's lease;
  - (iv) An agreement by the tenant to provide copies of default notices and to permit the lender to cure defaults:
    - A failure by a tenant to provide such notice to a lender should NOT be considered a default under the SNDA but rather, should prohibit the tenant from terminating the lease until lender receives a copy of such notice and has been given an opportunity to cure the default (if it elects to do so).
  - (v) A limitation of the lender's liability and obligations under the lease to the extent that such party
  - (vi) A prohibition on material amendments to a lease without the lender's consent.
    - If a material amendment is entered into without the lender's consent, oftentimes a SNDA will provide that it is not binding upon the lender

## **CONCLUSION**

In conclusion, there are a variety of ways we have seen the above issues resolved, but the above captures much of our experience. At the end of the day, it's all negotiable.

LEASEHOLD FINANCING LANGUAGE:

TENANT FINANCING

5.1. Leasehold Mortgages Authorized.

5.1.1. On one or more occasions Tenant may mortgage or otherwise encumber Tenant's Leasehold Estate to an Institutional Investor (as hereinafter defined) under one or more Leasehold Mortgages and assign this Lease as security for such Mortgage or Mortgages.

5.1.2. Tenant shall not place or create any mortgage, deed of trust, or other lien or encumbrance affecting Landlord's fee interest in the Property or Landlord's interest in this Lease, and all financing of the Premises by Tenant shall, to the extent the same is secured by the Premises, be secured by one or more Leasehold Mortgages pursuant to the terms of this Section 5.

5.2. Notice to Landlord.

5.2.1. Each time Tenant shall mortgage Tenant's Leasehold Estate to an Institutional Investor, the holder of such Leasehold Mortgage shall provide Landlord with notice of such Leasehold Mortgage together with a true copy of such Leasehold Mortgage and the name and address of the Mortgagee. Following receipt of such notice by Landlord, the provisions of this Section 5.2 shall apply in respect to such Leasehold Mortgage. In the event of any assignment of a Leasehold Mortgage or in the event of a change of address of a Leasehold Mortgagee or of an assignee of such Mortgage, notice of the new name and address shall be provided to Landlord.

5.2.2. If requested by the terms of such notice, Landlord shall promptly upon receipt of a communication purporting to constitute the notice provided for by Section 5.2.1 above acknowledge in writing receipt of such communication as constituting the notice provided for by Section 5.2.1 above, or in the alternative, notify Tenant and the Leasehold Mortgagee of the rejection of such communication as not conforming with the provisions of Section 5.2.1 and specify the basis of such rejection.

5.2.3. After Landlord has received the notice provided for by Section 5.2.1 above, Tenant, upon being requested to do so by Landlord, shall with reasonable promptness provide Landlord with copies of the note or other obligation secured by such Leasehold Mortgage and or any other document pertinent to the Leasehold Mortgage. Tenant shall thereafter also provide Landlord from time to time with a copy of each amendment or other modification or supplement to such instruments. All documents shall be accompanied by a certification by Tenant that such documents are true and correct copies of the originals. Copies of all recorded documents shall show the recording data.

5.3. Definitions.

5.3.1. "Leasehold Estate" shall mean the estate of Tenant created by this Lease upon and subject to all the terms and conditions of this Lease.

5.3.2. The term "Institutional Investor" as used in this Lease shall refer to a savings bank, savings and loan association, commercial bank, trust company, credit union, insurance company, college, university, state or local governmental authority, real estate investment trust, pension fund, and any other financial institution that is actively engaged in commercial real estate financing, and that have assets in excess of one hundred million dollars (\$100,000,000) at the time the Leasehold Mortgage loan is made, and subsidiaries of any of the foregoing that are regularly engaged in the business of making real estate mortgage loans. In addition to the foregoing, an Institutional Investor may also be any partnership, corporation, trust or other legally recognized entity (a "Special Purpose Lender") formed for the purpose of issuing debt, securities or other obligations, the proceeds of the sale of which shall be used to make a loan to be secured by, inter alia, a Leasehold Mortgagee.

5.3.3. The term "Leasehold Mortgage" as used in this Lease shall include a mortgage, a deed of trust, and any other security instrument or instruments by which Tenant's Leasehold Estate is mortgaged, conveyed, assigned, or otherwise transferred, to secure a debt or other obligation, including, without limitation, a Purchase Money Leasehold Mortgage.

5.3.4. The term "Purchase Money Leasehold Mortgage" shall mean a Leasehold Mortgage taken back, retained by, or granted to Tenant upon a sale and assignment of the Leasehold Estate to secure payment of

any portion of the purchase price or any other obligations of the purchaser and assignee in connection with such sale and assignment.

5.3.5. The term "Foreclosure" as used in this Lease with respect to a Leasehold Mortgage shall include a judicial sale, nonjudicial sale, trustee's sale and other similar realization proceedings.

5.3.6. The terms "Leasehold Mortgagee" and "Mortgagee" as used in this Lease shall refer to a holder of a Leasehold Mortgage who has given notice to Landlord and whose notice has been received by Landlord as provided in Section 5.2. A "designee" of a Mortgagee shall mean a subsidiary or other entity designated by a Mortgagee to acquire any interest in the Leasehold Estate as contemplated by this Section 5.

5.4. Protection of Leasehold Mortgagees. If Tenant, or Tenant's successors or assigns, shall mortgage the Leasehold Estate in compliance with the provisions of this Section 5, then so long as any such Leasehold Mortgage shall remain unsatisfied of record, the following provisions shall apply:

5.4.1. Consent. No cancellation, surrender or modification of this Lease shall be effective as to any Leasehold Mortgagee unless consented to in writing by such Leasehold Mortgagee, except that such consent shall not be required with respect to a termination in accordance with this Section 5 or with Section 8 below upon condemnation.

5.4.2. Notice of Default. Landlord, upon providing Tenant any notice of: (a) default under this Lease, or (b) a termination of this Lease, or (c) a matter on which Landlord may predicate or claim a default, shall at the same time provide a copy of such notice to every Leasehold Mortgagee of which Landlord has been provided notice in accordance with Section 5.2 above. Landlord shall have no liability for the failure to give any such notice, except that no such notice by Landlord to Tenant shall be deemed to have been duly given unless and until a copy thereof has been so provided to every Leasehold Mortgagee of which Landlord has been provided notice in accordance with Section 5.2 above. From and after such notice has been given to a Leasehold Mortgagee, such Leasehold Mortgagee shall have the same period, after the giving of such notice upon it, for remedying any default or acts or omissions which are the subject matter of such notice, or causing the same to be remedied, as is given Tenant after the giving of such notice to Tenant, plus in each instance, the additional periods of time specified in Sections 5.4.3 and 5.4.4 hereof to remedy, commence remedying or cause to be remedied the defaults or acts or omissions which are specified in such notice. Landlord shall accept such performance by or at the instigation of such Leasehold Mortgagee as if the same had been done by Tenant. Tenant authorizes each Leasehold Mortgagee to take any such action at such Leasehold Mortgagee's option and does hereby authorize entry upon the Leasehold Estate by the Leasehold Mortgagee for such purpose.

5.4.3. Notice to Mortgagee. Anything contained in this Lease to the contrary notwithstanding, if any default shall occur which entitles Landlord to terminate this Lease, Landlord shall have no right to terminate this Lease unless, following the expiration of the period of time given Tenant to cure such default or the act or omission which gave rise to such default, Landlord shall notify every Leasehold Mortgagee of Landlord's intent to so terminate at least ten (10) days in advance of the proposed effective date of such termination if such default is capable of being cured by the payment of money, and at least forty-five (45) days in advance of the proposed effective date of such termination if such default is not capable of being cured by the payment of money. The provisions of Section 5.4.4 below shall apply only if, during such 10 or 45 day termination notice period, any Leasehold Mortgagee shall:

(a) Notify Landlord of such Leasehold Mortgagee's desire to nullify such notice; and

(b) Pay or cause to be paid all Rent and other payments (i) then due and in arrears as specified in the termination notice to such Leasehold Mortgagee, (ii) any of the same which become due during such 10 or 45-day period as and when they become due, and (iii) discharge all liens of a definite or ascertainable amount encumbering Landlord's fee interest, other than liens consented to or granted by Landlord; and

(c) Comply or in good faith, with reasonable diligence and continuity, commence to comply with all non-monetary requirements of this Lease then in default and reasonably susceptible of being complied with by such Leasehold Mortgagee; provided, however, that such Leasehold Mortgagee shall not be required during such 45 day period to cure or commence to cure any default consisting of Tenant's failure to satisfy and discharge any lien, charge or encumbrance against the Tenant's interest in this Lease or the Premises junior in priority to the lien of the mortgage held by such Leasehold Mortgagee.

Any notice to be given by Landlord to a Leasehold Mortgagee pursuant to any provision of this Section 5.4 shall be deemed properly addressed if sent to the Leasehold Mortgagee who served the notice referred to in Section 5.2 unless notice of a change of Leasehold Mortgage ownership has been given to Landlord in writing.

#### 5.4.4. Procedure on Default.

(a) If Landlord shall elect to terminate this Lease by reason of any default of Tenant, and a Leasehold Mortgagee shall have proceeded in the manner provided for by Section 5.4.3, this Lease shall not be deemed terminated so long as such Leasehold Mortgagee shall:

(i) Pay or cause to be paid the Rent and other monetary obligations of Tenant under this Lease as the same become due, and continue its good faith efforts to perform all of Tenant's other obligations under this Lease excepting (A) obligations of Tenant to satisfy or otherwise discharge any lien, charge or encumbrance against Tenant's interest in this Lease or the Leasehold Estate junior in priority to the lien of the Mortgage held by such Leasehold Mortgagee, and (B) past non-monetary obligations then in default and not reasonably susceptible of being cured by such Leasehold Mortgagee; and

(ii) If not enjoined or stayed, take steps to acquire or sell Tenant's interest in this Lease by foreclosure of the Leasehold Mortgage or other appropriate means and prosecute the same with due diligence.

Nothing in this Subsection (a) of this Section 5.4.4, however, shall be construed to extend this Lease beyond the Initial Term hereof, nor to require a Leasehold Mortgagee to continue such foreclosure proceedings after the default has been cured. If the default shall be cured and the Leasehold Mortgagee shall discontinue such foreclosure proceedings, this Lease shall continue in full force and effect as if Tenant had not defaulted under this Lease.

(b) If a Leasehold Mortgagee is complying with Subsection (a) of this Section 5.4.4, upon the acquisition of the Leasehold Estate herein by such Leasehold Mortgagee or its designee or any other purchaser at a foreclosure sale or otherwise and the discharge of any lien, charge or encumbrance against the Tenant's interest in this Lease or the Premises which is junior in priority to the lien of the Leasehold Mortgage held by such Leasehold Mortgagee and which the Tenant is obligated to satisfy and discharge by reason of the terms of this Lease, this Lease shall continue in full force and effect as if Tenant had not defaulted under this Lease.

(c) The making of a Leasehold Mortgage shall not be deemed to constitute an assignment or transfer of this Lease or the Leasehold Estate hereby created, nor shall any Leasehold Mortgagee, as such, be deemed to be an assignee or transferee of this Lease or of the Leasehold Estate hereby created so as to require such Leasehold Mortgagee, as such, to assume the performance of any of the terms, covenants or conditions on the part of the Tenant to be performed hereunder, but the purchaser at any sale of this Lease and of the Leasehold Estate hereby created in any proceedings for the foreclosure of any Leasehold Mortgage, or the assignee or transferee of this Lease and of the Leasehold Estate hereby created under any instrument of assignment or transfer in lieu of the foreclosure of any Leasehold Mortgage, shall be deemed to be an assignee or transferee within the meaning of this Section 5.4.4 and shall be deemed to have agreed to perform all of the terms, covenants and conditions on the part of the Tenant to be performed hereunder from and after the date of such purchase and assignment only for as long as such purchaser or assignee is the holder of this Leasehold Estate. If the Leasehold Mortgagee or its designee shall become holder of the Leasehold Estate and if the Premises shall have been or become materially damaged on, before or after the date of such purchase and assignment, the Leasehold Mortgagee or such designee shall be obligated to repair, replace or reconstruct the Improvements only to the extent Tenant is required to do so by the terms of Section 6 of this Lease and then only to the extent of the insurance proceeds received by the Leasehold Mortgagee or such designee by reason of such damage. Should such net insurance proceeds be insufficient to repair, replace or reconstruct the Improvements and should the Leasehold Mortgagee or such designee choose not to fully reconstruct the Improvements, such failure shall entitle the Landlord to terminate this Lease pursuant to Section 14 hereof, and the net insurance proceeds shall be distributed to the parties as provided in Section 7.6.1 hereof; provided that the Leasehold Mortgagee shall not be entitled to receive insurance proceeds in excess of the then outstanding balance of the debt secured by the Leasehold Mortgage.

(d) Any Leasehold Mortgagee or other acquirer of the Leasehold Estate pursuant to foreclosure, assignment in lieu of foreclosure or other proceedings, and any tenant under a New Lease (as defined in Section 5.5 below), may, upon acquiring the Leasehold Estate, without further consent of Landlord sell and assign the Leasehold Estate on such terms and to such persons and organizations ("Subsequent Assignee") as are acceptable to such Leasehold Mortgagee or acquirer and thereafter be relieved of all obligations under this Lease; provided such Subsequent Assignee has delivered to Landlord its written agreement to be bound by all of the provisions of this Lease.

(e) Notwithstanding any other provision of this Lease, any sale of this Lease and of the Leasehold Estate hereby created in any proceedings for the Foreclosure of any Leasehold Mortgage, or the assignment or transfer of this Lease and of the Leasehold Estate hereby created in lieu of the Foreclosure of any Leasehold Mortgage, shall be deemed to be a permitted sale, transfer or assignment of this Lease and of the Leasehold Estate hereby created.

5.5. New Lease. In the event of the termination of this Lease as a result of Tenant's default, Landlord shall promptly, within a reasonable time, provide each Leasehold Mortgagee with written notice that the Lease has been terminated ("New Lease Notice"), together with a statement of all sums which would at that time be due under this Lease but for such termination, and of all other defaults, if any, then known to Landlord. Landlord agrees to enter into a new lease ("New Lease") of the Premises with such Leasehold Mortgagee or its designee for the remainder of the Initial Term of this Lease, effective as of the date of termination, at the same Rent and upon the terms, covenants and conditions of this Lease; provided:

5.5.1. Request. Such Leasehold Mortgagee shall make written request upon Landlord for such New Lease within sixty (60) days after the date such Leasehold Mortgagee receives Landlord's New Lease Notice given pursuant to this Section 5.5. Landlord and Leasehold Mortgagee shall use good faith and commercially reasonable efforts to execute said New Lease within sixty (60) days after the New Lease Notice.

5.5.2. Procedure. Such Leasehold Mortgagee or its designee shall pay or cause to be paid to Landlord at the time of the execution and delivery of such New Lease, any and all sums which would at the time of execution and delivery thereof be due pursuant to this Lease, including interest as required under the terms of this Lease, but for such termination and, in addition thereto, all reasonable expenses, including reasonable attorneys' fees, which Landlord shall have incurred by reason of such termination and the execution and delivery of the New Lease and which have not otherwise been received by Landlord from Tenant or other party in interest under Tenant. Upon the execution of such New Lease, Landlord shall allow to the Tenant named therein as an offset against the sums otherwise due under this Section 5.5.2 or under the New Lease, an amount equal to the net income received by Landlord from the Project during the period from the date of termination of this Lease to the date of the beginning of the term of such New Lease. In the event of a controversy as to the amount to be paid to Landlord pursuant to this Section 5.5.2, the payment obligation shall be satisfied if Landlord shall be paid the amount the full amount, including any amount in controversy (which may be paid under protest), and the Leasehold Mortgagee or such designee shall agree to pay any additional sum ultimately determined to be due plus interest at the rate specified in Section 17.14 hereof and such obligation shall be adequately secured. The parties shall cooperate to determine any disputed amount promptly in accordance with the terms of this Lease.

5.5.3. Cure. Such Leasehold Mortgagee or such designee shall immediately remedy any of Tenant's monetary defaults and within a reasonable time remedy any of Tenant's non-monetary defaults of which such Leasehold Mortgagee was notified by Landlord's New Lease Notice and which are reasonably capable of being so cured by Leasehold Mortgagee or such designee.

5.5.4. Priority. Any New Lease made pursuant to this Section 5.5 shall have the same priority with respect to any mortgage or other lien, charge or encumbrance on the Land and the Project as this Lease, and the Tenant under such New Lease shall have the same right, title and interest in and to the Land and the Improvements thereon as Tenant had under this Lease as of the date of the New Lease.

5.6. New Lease Priorities. If more than one Leasehold Mortgagee shall request a New Lease pursuant to Section 5.5, Landlord shall enter into such New Lease with the Leasehold Mortgagee whose Leasehold Mortgage is prior in lien, or with the designee of such Leasehold Mortgagee. Landlord, without liability to Tenant or any Leasehold Mortgagee with an adverse claim, may rely upon a mortgagee title insurance policy issued by a responsible title insurance company doing business in the state where the Premises is located as the basis for determining the appropriate Leasehold Mortgagee who is entitled to such New Lease and the Leasehold Mortgagee which executes the New Lease shall indemnify and hold Landlord harmless against any claims by Tenant or other Leasehold Mortgagee with respect to such determination.

5.7. Certain Defaults. Nothing herein contained shall require any Leasehold Mortgagee or its designee as a condition to its exercise of rights hereunder to cure any default of Tenant which by its terms is not reasonably susceptible of being cured by such Leasehold Mortgagee or such designee in order to comply with the provisions of Sections 5.4.3 or 5.4.4 or as a condition of entering into the New Lease provided for by Section 5.5. The financial condition of any Leasehold Mortgagee or successor to Tenant's interest under this Lease or a New Lease shall not be a consideration in the determination of the reasonable susceptibility of cure of such a default. No default or Event of Default, the cure of which, and no obligation of Tenant, the performance of which, requires possession of the Premises shall be deemed reasonably susceptible of cure or performance by any Leasehold Mortgagee or

successor to Tenant's interest under this Lease or a New Lease not in possession of the Premises, provided such holder is complying with the requirements described in Section 5.4.4(a)(ii) above, and upon obtaining possession promptly proceeds to cure any such default then reasonably susceptible of cure by such Leasehold Mortgagee or successor; nor shall any Leasehold Mortgagee be required to cure the bankruptcy, insolvency or any related or similar condition of Tenant.

5.8. Eminent Domain. Tenant's share, as provided by Section 8 of this Lease, of the proceeds arising from an exercise of the power of eminent domain shall, subject to the provisions of such Section 8, be disposed of as provided for by any Leasehold Mortgage.

5.9. Insurance. A Standard Mortgagee Clause naming each Leasehold Mortgagee may be added to any and all insurance policies required to be carried by Tenant hereunder on condition that the insurance proceeds are to be applied in the manner specified in this Lease and the Leasehold Mortgage shall so provide; except that the Leasehold Mortgage may provide a manner for the disposition of such proceeds, if any, otherwise payable directly to the Tenant pursuant to the provisions of this Lease.

5.10. No Merger. So long as any Leasehold Mortgage is in existence, unless all Leasehold Mortgagees shall otherwise expressly consent in writing, the fee title to the Premises and the Leasehold Estate of Tenant therein created by this Lease shall not merge but shall remain separate and distinct, notwithstanding the acquisition of said fee title and said Leasehold Estate by Landlord or by Tenant or by a third party, by purchase or otherwise.

5.11. Notices. Notices from Landlord to the Leasehold Mortgagee shall be mailed to the address furnished Landlord pursuant to Section 5.2.1 and those from the Leasehold Mortgagee to Landlord shall be mailed to the address designated pursuant to the provisions of Section 17.12 hereof. Such notices, demands and requests shall be given in the manner described in Section 17.12 and shall in all respects be governed by the provisions of that section.

5.12. Erroneous Payments. No payment made to Landlord by a Leasehold Mortgagee shall constitute agreement that such payment was, in fact, due under the terms of this Lease; and any Leasehold Mortgagee having made any payment to Landlord pursuant to Landlord's wrongful, improper or mistaken notice or demand shall be entitled to the return of any such payment or portion thereof provided he shall have made demand therefor not later than twelve (12) months after the date of its payment.

5.13. Bankruptcy. In the event of any proceeding by either Landlord or Tenant under the United States Bankruptcy Code (Title 11 U.S.C.) as now or hereafter in effect:

5.13.1. If this Lease is rejected in connection with a bankruptcy proceeding by Tenant or a trustee in bankruptcy for Tenant, such rejection shall be deemed an assignment by Tenant to the Leasehold Mortgagee (or if there is more than one Leasehold Mortgagee, to the one highest in priority) of the Leasehold Estate and all of Tenant's interest under this Lease, and this Lease shall not terminate and the Leasehold Mortgagee shall have all the rights of the Leasehold Mortgagee under this Section 5 as if such bankruptcy proceeding had not occurred, unless such Leasehold Mortgagee shall reject such deemed assignment by notice in writing to Landlord within thirty (30) days following rejection of the Lease by Tenant or Tenant's trustee in bankruptcy. If any court of competent jurisdiction shall determine that this Lease shall have been terminated notwithstanding the terms of the preceding sentence as a result of rejection by Tenant or the trustee in connection with any such proceeding, the rights of any Leasehold Mortgagee to a New Lease from Landlord pursuant to Section 5.5 hereof shall not be affected thereby.

5.13.2. If the Lease is rejected by Landlord or by Landlord's trustee in bankruptcy:

(a) Tenant shall not have the right to treat this Lease as terminated except with the prior written consent of all Leasehold Mortgagees' and the right to treat this Lease as terminated in such event shall be deemed assigned to each and every Leasehold Mortgagee, whether or not specifically set forth in any such Leasehold Mortgage, so that the concurrence in writing of Tenant and each Leasehold Mortgagee shall be required as a condition to treating this Lease as terminated in connection with such proceeding.

(b) Unless this Lease is treated as terminated in accordance with Section 5.13.2(a) above, then this Lease shall continue in effect upon all the terms and conditions set forth herein, including Rent, but excluding requirements that are not then applicable or pertinent to the remainder of the Term. Thereafter, Tenant or its successors shall be entitled to any offsets against Rent payable hereunder for any damages arising from such rejection and any such offset properly made shall not be deemed a default under this Lease. The lien of any Leasehold Mortgage then in effect shall extend to the continuing possessory rights of Tenant following such rejection with the same priority as it would have enjoyed had such rejection not taken place.

5. 14. Mortgagee as Trustee. A Leasehold Mortgagee (other than the Tenant under a Purchase Money Leasehold Mortgage) may hold and disburse any funds received as the proceeds of hazard insurance or condemnation.