



Ground Lease Issues

American Association of Port Authorities
Port Administration and Legal Issues Seminar

Peter Friedenber

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Agenda

Selected Ground Lease Provisions

- Transfer/Change of Control
- Financing
- Design and Construction Controls

Transfer/Change of Control: Assignment

- Restrictions
- Permitted transfers
- Criteria for approval
- “Bad actor”/Patriot Act
- Assumption Agreement

Transfer/Change of Control: Assignment (cont'd)

- No deemed consent
- Release of transferor/guarantor
- Transaction or participation rent

Transfer/Change of Control: Sublease

- Other similar relationships
- Restrictions
- Criteria for approval
- “Bad actor”/Patriot Act
- Deemed consent
- Sublet profit
- SNDA

Financing: Structuring Issues

- No subordination of fee or rental income
- Institutional lenders only
- Review and approval of loan documents
- Cap on aggregate LTV
- No cross-collateralization
- No cross-default

Financing: Structuring Issues (cont'd)

- Junior debt
- Release of proceeds
- “Recognized” vs. other lenders
- “Senior” vs. other “Recognized Lenders”
- Reimbursement of expenses

Financing: Recognized Lender vs. Landlord

- Recognized Lender's rights
 - Notice and (extended) cure period under Ground Lease
 - Flexibility/time to assess situation and options at time of default by borrower
 - Control over Ground Lease amendments (Senior)
 - Waiver of "Incurable Defaults" by Ground Lessor (Senior)
 - "New lease" provision (Senior)

Financing: Landlord vs. Recognized Lenders

- Landlord's rights
 - Notice and extended cure period under financing documents
 - Control over financing document amendments
 - Estoppel certificates

Control over design process

- Written design review process w/deliverables and time-frames
- Outside consultant reviews
- Reimbursement for consultant fees
- Changes

Control over construction process

- Starts with control over design changes
- Approval of contracts and parties
- Construction completion security
- Approved construction management plan
- Importance of ongoing schedule updates

But always remember, no matter how well-drafted the Ground Lease may be, there will always be room for disagreement and re-interpretation, so....

*In-house counsel should have two
plans for litigation:*

*Plan A: **Avoid it.***

*Plan B: **Win.***

Roger Coe