

The Difference Between Waivers And Consents In A Ground Lease



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Real Estate

I write about commercial real estate negotiations, deals and legal issues.



If a ground lease restricts a developer's financing, it's a good idea to say the landlord can consent to noncompliant financing, rather than simply ban it. [-] GETTY IMAGES

When a property owner enters into a long-term ground lease with a developer tenant, that ground lease typically gives the tenant a great deal of flexibility but also restricts that flexibility in meaningful ways.

For example, the ground lease might say that the tenant can obtain a leasehold mortgage – i.e., a mortgage secured only by the tenant's interest in the property – but

only if the lender is an “institution,” as defined in a list of categories. If the proposed lender doesn’t fall under one of those categories, the tenant will need to find its financing somewhere else.

Separately, as an additional restriction, the lease might also say the tenant’s loan cannot exceed 75% of the value of the tenant’s leasehold estate.

Now consider the following series of facts based on actual transactions. First, the tenant wants to obtain its financing from a high quality, strong, and credible lender that doesn’t fall under one of the “institution” categories. Second, to obtain the best terms on its financing, the tenant wants to sign a mortgage that encumbers not only this (leasehold) estate but also a handful of other properties under common ownership. The loan and mortgage amounts will therefore far exceed 75% of the value of this particular property.

The lease wouldn’t allow any of that. The property owner would, however, be happy to let the tenant proceed. The property owner doesn’t intend to use strict enforcement of the lease as an opportunity to hold up the tenant. That’s not part of this owner’s business model. This particular owner would be perfectly happy for the developer to obtain the financing it wants from the lender it wants. The property owner would gladly waive the restrictions in the ground lease that tie the tenant’s hands.

But there’s a problem: the property owner has signed a mortgage. The mortgage says the owner can’t waive anything in the ground lease without consent from the owner’s lender. And the ground lease itself says the same thing. It even says any waiver by the owner without consent by the owner’s lender is absolutely ineffective.

What can the owner and tenant do to accommodate the tenant’s requests?

The owner could go and ask its lender to consent to the waivers the owner wants to grant. To do that, the owner would first need to figure out who to call at the lender. That isn’t always easy. Second, after identifying and connecting with that person, the owner might eventually learn that the request actually needs to go to someone else, and then

someone else after that. And if a securitization trust holds the loan, the property owner will need to deal with a servicer, a separate organization that is brain-dead. Third, if the owner is lucky enough to find someone with whom to have an intelligent conversation, that person will ask for more information, some documentation, a processing fee, and a written request so the approvals committee can consider the matter at its next meeting. Fourth, after that meeting, the committee will have only a couple of questions, requiring another full iteration of submissions.

As a practical matter, the property owner will probably not want to endure that process. The tenant will need to figure out a different way to obtain and structure its financing.

A small change in the wording of the ground lease would have made a large difference. Instead of banning any lender not defined as an institution, the lease could have said the tenant needs the owner's consent to borrow from any lender that is not an institution. Similarly, instead of saying the tenant can't borrow more than 75% of the value of the leasehold, the lease could have said the tenant needs the owner's consent to obtain a larger loan or one that otherwise does not comply with the criteria in the ground lease.

If the ground lease by its terms contemplated that the owner could consent to these matters otherwise prohibited, then the owner wouldn't need a "waiver" from the lender to accommodate the tenant. Instead, the owner would simply administer the ground lease in accordance with its terms, including the term allowing the owner to consent to particular matters. The tenant could simply seek consent for its lender and loan structure, and the property owner would grant that consent. The property owner would not need its lender to waive anything. The tenant could proceed happily with its financial life.

Of course, the property owner’s mortgage might prohibit the owner from granting any “consent” under the ground lease without the lender’s consent. That’s less likely, though, than having the mortgage prohibit any “waiver” of the ground lease. And if the mortgage does restrict the owner from granting “consents,” that restriction would probably apply only to important consents, a concept that could be worded in any number of ways. Usually, if the lease provided for landlord consents of the type under discussion here, the owner could provide that consent without involving the owner’s lender.

In short, any ground lease can either (i) absolutely prohibit the tenant from doing something or (ii) prohibit the tenant from doing that something unless the property owner consents. The second option creates much more flexibility, even though it doesn’t sound all that different.



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I help buyers, sellers, borrowers, lenders, tenants, property owners, and other commercial real estate market participants identify and achieve their business goals. To do that, I need to understand risk, security, numbers, value, financeability, flexibility, and exit strategy. Some legal issues matter a lot and many don’t. It’s important to know the difference. I write extensively on commercial real estate law and practice – over 300 articles and five books on leasing, lending, and other areas, with some emphasis on ground leases. I occasionally serve as an arbitrator or expert witness in complex real estate disputes. That lets me see how transactions go wrong. Often, the problems could have been avoided by keeping it simple and following the money, but everyone got sidetracked. As a Forbes contributor, I try to tell stories that teach worthwhile lessons for real estate deals. **Read Less**

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