

## What Now?

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### Hey, Ground Lessor, I've Got a Mortgage: The Significance of Proper Notice

The primary concern for the holder of any mortgage is ensuring the priority and perfection of its lien. When the collateral is a ground leasehold mortgage, this concern is significantly heightened. A ground lease is a lease of the land, generally for an extended term (we often see terms extending up to 99 years). The tenant under a ground lease can usually mortgage its leasehold interest in the land pursuant to an express right contained in the ground lease. The ground lease will, however, almost always require notice to the landlord and, in some cases, specific provisions which are required to be included in the mortgage. For a ground lease to be financeable, it must contain detailed protections in favor of the mortgagee or lender such as notice and cure rights which require the landlord under the ground lease to notify the lender of any default and give the lender a period of time to cure such default. There are numerous other protections required for the lease to be financeable, but of paramount importance is that the financing be permitted. In many cases, a pre-condition to such financing being permitted is that a notice be given to the landlord. In addition, a landlord obviously cannot give notices to a mortgagee it is unaware of, and a mortgagee's cure rights in the event of a tenant default are only meaningful if such mortgagee receives notice of same. As mentioned, ground leases often provide that a mortgage on the tenant's leasehold interest will not be recognized at all by the landlord unless and until the landlord receives notice of such mortgagee or lender. Other protections contingent on notice include preventing the landlord from terminating or materially amending a ground lease without first notifying the recognized mortgagee.

In general, the law is pretty strict with respect to notices. If a document specifies the manner, language, timing and/or method of delivery, then to be effective, such notice must strictly comply. There is case law which holds, in certain cases, that if a party received a notice but it did not strictly comply with notice provisions, such notice is still effective. These cases are not in the majority and many times are very fact-dependent. Consequently, in practice, no one would intentionally take the chance of disregarding specific notice requirements. The general rule of thumb is that a notice will not be effective unless and until provided in strict accordance with the notice provisions of the ground lease. If the ground lease requires that a duplicate original of the mortgage be delivered to the landlord, an executed original must be sent to the landlord, in addition to the original being recorded. If such mortgage must be received by the landlord within ten days after its execution, the mortgage should be sent immediately after the closing of the loan to ensure that it is received within the stated timeframe. Ground leases often require notice by personal delivery or delivery by a reputable, national overnight delivery service. While today's most common and efficient way to send a notice may be via FedEx, if FedEx delivery was not contemplated pursuant to the terms of a ground lease executed decades ago, notice is not effective if sent that way. It is also prudent to review all related lease documents, including estoppels, to ensure that notices are being sent to the correct address. If a party's address has changed over time, but such change in address has not been reflected in either an amendment to the ground lease or changed in strict compliance with the notice provisions of the ground lease (*e.g.*, a notice provision may simply require that a notice be given in the manner required by the notice provision to change one's address for purposes of future notices), notice should be sent to all addresses, even if the sender knows that the original notice address is no longer valid. If its notice provision provides that a notice is not effective until delivery, and notice is sent to the wrong address, the notice will not be effective.

It's imperative as part of the closing of the loan to send notice of the mortgage to the landlord as may be required pursuant to the terms of the ground lease. While most people generally don't give much thought to notices, ensuring notice is delivered timely, in the correct fashion, and to the correct address is necessary in order for the lender to receive any mortgagee protections it may be entitled to pursuant to the ground lease. Further, effective notice is especially important with respect to time periods that start running based on receipt. Consider, for example, if the documents provide that the lender cannot foreclose on the leasehold estate without first giving the landlord the opportunity to cure the tenant's default, and that the landlord has thirty days after receipt of notice of such default to exercise its right to cure. If notice is not properly given to the landlord, this thirty-day time period cannot begin to run,

and the lender ultimately cannot foreclose. The law with respect to notice provisions can be draconian, and complying with notice provisions is a simple, vital, and requisite way to protect a lender's interest in a leasehold estate.