



How ground leases can help not-for-profits redevelop their properties - by Patrick O'Sullivan

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For not-for-profits and developers who are undertaking a development transaction through a ground lease structure, the parties need to address two significant items as part of the complex negotiations in contemplation of construction completion. First, the parties must negotiate the timing of delivery of the not-for-profit's new facility and the remedies for failure to timely complete construction. Second, the parties must decide whether the ground lease will continue to govern their relationship upon construction completion. Often, the parties will form a condominium so that the condominium documents and board provide the structure for the parties ongoing relationship. In each instance, the parties will benefit from agreeing upon terms in advance of shovels going into the ground. This agreed-upon understanding is important to ensure that the not-for-profit receives a new facility on time and with an ability to operate in a manner that better enables it to further its mission.

Delivery of a New Facility

Given the importance of the delivery of a new facility, the ground lease should provide the not-for-profit with sufficient rights and remedies to ensure that the developer diligently pursues and timely completes construction. To this end, the parties should agree on a set of construction milestones with the developer required to devise a recovery plan in the event a milestone is missed. Since the not-for-profit may face additional costs associated with having to use temporary space for a longer period and because it is not receiving the value of its bargain, the ground lease can also provide for liquidated damages in the event of a default. Additionally, the not-for-profit can require an outside date by which if completion is not achieved, it can enforce a lease termination right.

Long-term Coexistence

Although the ground lease suggests a long-term landlord-tenant relationship, the parties can agree to create a condominium upon construction completion so that each party has title to its portion of the development. The condominium enables the parties to own and operate their units with a degree of independence and to have their relationship governed through the condominium declaration and bylaws. Although this structure offers a level of autonomy, the parties should agree on the terms of the condominium and its management well in advance of actual formation. The parties should address matters such as board management, use and maintenance issues, allocation of expenses and conflict resolution. Since the not-for-profit may have a minority of board members, the

not-for-profit should ensure that the approval of those members are required to take any action that may have an adverse effect on the not-for-profit's unit. By addressing these matters upfront, including by drafting an agreed-upon form of declaration and bylaws, the not-for-profit can ensure that over the long term it will have an ability to operate its facility in the manner most conducive to carrying out its mission.

Conclusion

The COVID-19 Pandemic has led many not-for-profits, including many religious institutions, to consider how to ensure their long-term viability given the financial challenges they now face. As part of any strategic planning effort a not-for-profit may undertake, it should assess whether long-term opportunities exist to monetize its real estate both to improve its facilities and solidify its financial condition. While market conditions may not provide immediate opportunities to realize value, planning and executing development transactions take time so a not-for-profit should have a long-term mindset when undertaking the assessment.

As this three-part series has highlighted, through a ground lease structure, a not-for-profit that owns property but that does not have the financial resources to redevelop its facilities can partner with a developer to undertake such a project. The ground lease provides an enforceable mechanism to structure the relationship with the developer partner. Through the partnership, the not-for-profit can undertake a project that provides it with a new facility and an opportunity to ensure its future.

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