

Multifamily Seller/Servicer Guide

Chapter 30

Ground Lease Mortgages

30.1 General requirements (09/26/19)

In general, Freddie Mac will consider purchasing a multifamily Mortgage secured by a lien on a leasehold estate ("ground lease Mortgage") only if the lease ("ground lease") demising the leasehold estate ("leasehold interest") to the Borrower (including its successors and assigns, unless otherwise noted, the "Ground Lessee") meets the terms and conditions set forth in this chapter.

In addition to the specific terms and conditions set forth in this chapter, Freddie Mac's purchase of a ground lease Mortgage (other than an SBL Mortgage or a TEL secured by a ground lease) is conditioned upon approval by Freddie Mac after review by counsel for Freddie Mac of the Seller's Ground Lease Analysis. Freddie Mac's purchase of an SBL Mortgage or a TEL secured by a ground lease is conditioned upon Single Counsel's approval based on its analysis of the ground lease and determination that the ground lease complies with the requirements of this chapter.

30.2 Underwriting requirements for ground lease Mortgages (09/26/19)

a. Copy of ground lease

At full underwriting (or at preliminary underwriting for an early rate-lock delivery), the Seller must deliver a copy of the executed ground lease and all existing amendments as follows:

- For a non-SBL ground lease Mortgage, to the applicable *Freddie Mac Multifamily Regional Office* (with a copy to the applicable *Multifamily Attorney*).
- For an SBL ground lease Mortgage, to the *Small Balance Loan Team*.

b. Term of ground lease

The remaining term of the ground lease, together with any renewal options, must meet the following requirements:

- for a fully amortizing ground lease Mortgage, the remaining ground lease term must extend beyond the maturity date of the ground lease Mortgage by at least 10 years.
- for a partially amortizing ground lease Mortgage or for one with no amortization, the remaining ground lease term must be the longer of (a) the amortization period of the ground lease Mortgage plus any interest-only period, and (b) 20 years beyond the maturity date of the ground lease Mortgage.
- renewal options that are at the sole discretion of the Ground Lessor (even if the Ground Lessor is controlled by the Borrower) may not be considered part of the ground lease

term for purposes of satisfying the ground lease term requirements set forth in this chapter.

c. Base Rent

1. The base rent payable under the ground lease must be a fixed ascertainable sum and the ground lease must not contain any provisions that permit increases, escalations or re-sets in the base rent, other than a sum certain increase at a specified date or time interval.
2. Increases, escalations or re-sets in the base rent based on a reappraisal of the Property are not acceptable.

d. Analysis

1. For a non-SBL ground lease Mortgage: Seller's legal counsel must confirm using the Ground Lease Analysis whether or not the ground lease satisfies all applicable requirements therein and in this chapter or will be amended prior to the Origination Date of the Mortgage to comply with all of the requirements.

If the ground lease fails to satisfy any of the applicable requirements and the ground lease will not be amended, then Seller's legal counsel must provide a legal analysis as part of the Ground Lease Analysis detailing which requirement(s) will not be satisfied and the counsel's recommendation as to why Freddie Mac should accept the ground lease without it being compliant with the applicable provisions of this chapter.

As part of such recommendation, Seller's legal counsel must determine that any deviation from the requirements of this chapter satisfies each of the following conditions:

- It does not adversely affect the marketability of the ground lease estate.
- It will not have a foreseeable adverse effect on the Borrower's intended use or operation of the Property.
- It could not adversely affect Freddie Mac's ability to enforce its rights or remedies under the ground lease Mortgage.
- It does not deprive Freddie Mac of industry standard leasehold mortgagee protections or, to the extent one or more industry standard leasehold mortgagee protections are not included in the ground lease, the Ground Lease Analysis must describe such deficiency and why such deficiency should be acceptable to a prudent commercial lender, including Freddie Mac, together with any recommendations for potential mitigating provisions to be added to the loan documents, including any additional representations, covenants or recourse provisions.

Submission of the ground lease document alone is not sufficient and does not relieve the Seller of its responsibility to submit the required Ground Lease Analysis (together with any recommendations for any non-compliant matters) prepared by its counsel.

2. For an SBL ground lease Mortgage: Single Counsel must confirm whether the ground lease satisfies all applicable requirements in this chapter. If the ground lease fails to satisfy any of the applicable requirements and the ground lease will not be amended prior to the Origination Date of the Mortgage to comply with all of the requirements, then Single Counsel must determine that any deviation from the requirements of this chapter satisfies each of the following conditions:
 - It does not adversely affect the marketability of the ground lease estate.
 - It will not have a foreseeable adverse effect on the Borrower's intended use or operation of the Property.
 - It could not adversely affect Freddie Mac's ability to enforce its rights or remedies under the ground lease Mortgage.
 - It does not deprive Freddie Mac of industry standard leasehold mortgagee protections.

30.3 Requirements for all ground lease Mortgages (06/25/20)

Except for a ground lease or other lease structure in place to obtain/maintain a tax benefit (discussed in Section 30.9 of this chapter), if the Ground Lessor will join in the Mortgage and mortgage its fee interest in the Property, then the ground lease will be considered a subordinated ground lease. If the Ground Lessor will not join in the Mortgage, then the ground lease will be considered an unsubordinated ground lease (see Section 30.4 of this chapter). Unsubordinated ground leases are not permitted for SBL Mortgages.

For any ground lease Mortgage to be eligible for purchase, the ground lease (whether subordinated or unsubordinated) must meet the following requirements:

a. Casualty

1. The ground lease must not contain a provision for termination in the event of damage or destruction, unless the ground lease Mortgage is paid in full.
2. The ground lease mortgagee must have the right to participate in adjustment of losses as to hazard insurance proceeds.
3. Hazard insurance proceeds must be paid to the ground lease mortgagee or an independent trustee acceptable to the ground lease mortgagee.
4. The Ground Lessor must not receive any hazard insurance proceeds until (i) the Property is fully restored or (ii) the ground lease Mortgage is paid in full.
5. If the Ground Lessee is obligated to rebuild after a casualty, then the Ground Lessee's obligation to rebuild must be limited to the amount of available insurance proceeds.
6. The ground lease must provide that no parties, other than the Ground Lessee and the ground lease mortgagee, will have any rights to (i) consent to or supervise the

restoration of the Property (for example, the Ground Lessor may not have any right to participate in the adjustment of losses, approve budgets or approve plans and specifications) and/or (ii) control and/or supervise the administration and disbursement of the hazard insurance proceeds.

7. Either (i) the ground lease must provide that insurance proceeds may be applied to the ground lease Mortgage in accordance with the loan documents or (ii) the failure of the ground lease to provide as set forth in clause (i) must be disclosed to Freddie Mac in the Ground Lease Analysis and approved by Freddie Mac.

b. Condemnation

1. The ground lease must provide that a ground lease mortgagee receives notice of, and has a right to participate in, any condemnation proceedings and settlement discussions.
2. The ground lease must set forth the formula for allocating the condemnation award between the Ground Lessor, the Ground Lessee and the ground lease mortgagee (for both partial and total condemnation). The ground lease must provide that any payment to the ground lease mortgagee or an independent trustee acceptable to ground lease mortgagee, as applicable, must not be less than the total award minus the value of the land that was taken pursuant to the condemnation (considered as unimproved, but encumbered by the ground lease).
3. The ground lease must provide for payment to the ground lease mortgagee (or independent trustee acceptable to ground lease mortgagee for restoration in the case of partial taking) of any condemnation award to which the Ground Lessee is entitled under applicable law.
4. In the case of a partial taking, the ground lease must permit the Ground Lessee to rebuild and restore the improvements on the Property, unless the ground lease mortgagee requires or consents to distribution of the proceeds. In that event, the ground lease must permit proceeds to be applied first toward reduction of the ground lease Mortgage.
5. The ground lease must provide that no parties, other than the Ground Lessee and the ground lease mortgagee, will have any rights to (i) consent to or supervise the restoration of the Property (for example, the Ground Lessor will not have any right to approve budgets or plans and specifications) and/or (ii) control and/or supervise the administration and disbursement of the portion of the condemnation award to which Ground Lessee is entitled.
6. Either (i) the ground lease must provide that condemnation awards may be applied to the ground lease Mortgage in accordance with the loan documents or (ii) the failure of the ground lease to provide as set forth in clause (i) must be disclosed to Freddie Mac in the Ground Lease Analysis and approved by Freddie Mac.

c. Shared Appreciation Rights/Equity Participation

The ground lease may not grant the Ground Lessor (or any other party) shared appreciation rights or an equity participation in the Property (e.g., any right to share in the proceeds from a future financing/sale of the Property or the operating cash flow of the Property).

30.4 Additional requirements when Ground Lessor will not join in Mortgage (Unsubordinated Ground Lease) (09/26/19)

For any ground lease Mortgage to be eligible for purchase, an unsubordinated ground lease must meet the following requirements, in addition to those set forth elsewhere in this chapter.

a. General

1. Original lessee

If the Borrower is not the original lessee under the ground lease, then there must be evidence that the fee owner of the Property (“Ground Lessor”) has specifically recognized the Borrower as lessee under the ground lease.

2. Recordation

The ground lease (including all amendments) or a memorandum of the ground lease and any assignments by the Ground Lessor or Ground Lessee of its interest in the ground lease must be recorded in the official land records of the jurisdiction where the Property is located.

3. Full Force and Effect

All conditions precedent to effectiveness of the ground lease term commencement must have been fully satisfied by the Origination Date of the ground lease Mortgage and the ground lease must be in full force and effect.

4. Use

If the ground lease does not permit “any lawful use”, then at a minimum it must permit the Property to be used as it is currently being used on the Origination Date of the ground lease Mortgage and must not contain any unreasonable restriction on the use of the real property.

5. Ground lease mortgagee

The ground lease must not contain any conditions, restrictions or limitations on what type of lender (including such lender’s successors and assigns) is qualified to be a “ground lease mortgagee”.

b. Extension, Purchase, and Cancellation

1. Rights to extend or purchase

The ground lease must provide that the ground lease mortgagee may exercise any rights to extend the term of the ground lease or purchase the Property (if applicable) without the consent or joinder of the Ground Lessee.

2. Cancellation

The ground lease must provide that any termination, surrender or cancellation of the ground lease will not be effective without the prior written consent of the ground lease mortgagee.

c. Subletting and mortgaging the ground lease

1. Right to mortgage

The ground lease must expressly permit the Ground Lessee to mortgage the ground lease without any limitation or restriction.

2. Right to Sublet

The ground lease must provide that the Ground Lessee must have the right to sublet, subject only to objective criteria that would be acceptable to a prudent commercial lender. A provision in the ground lease that “Ground Lessor’s consent will not be unreasonably withheld” (or similar provision) is not sufficient.

3. Commercial space

If the Property contains commercial space, then the ground lease must contain reasonable, objective standards requiring the Ground Lessor to grant nondisturbance and attornment agreements to commercial tenants.

d. Ground lease mortgagee protections

The ground lease must contain the following provisions:

1. Notice

The ground lease must require the Ground Lessor to give written notice to the ground lease mortgagee of all Ground Lessee defaults as a condition precedent to the Ground Lessor's exercise of any remedies for such default. The Ground Lessor must forward to the ground lease mortgagee copies of any notices it sends to the Ground Lessee, other than rent and other periodic billing notices.

2. Estoppel Certificates

The Ground Lessor must be obligated to deliver estoppel certificates to the ground lease mortgagee on request.

3. Modifications

The Ground Lessee must be prohibited from modifying the ground lease in any material manner or restating the ground lease without the prior written consent of the ground lease mortgagee.

4. Defaults and cure period

- Right to cure. The ground lease mortgagee must have the right to cure a monetary default or a non-monetary default that is capable of being cured by a ground lease mortgagee within the time permitted to the Ground Lessee, plus a reasonable additional time period (i.e., at least 10 days beyond any grace period granted to Ground Lessee for monetary defaults and at least 60 days beyond any grace period granted to Ground Lessee for non-monetary defaults).
- Defaults not capable of being cured. The ground lease mortgagee must have protection against a default that is not capable of being cured by a ground lease mortgagee, including the following provisions:
 - The ground lease must prohibit termination of the ground lease as a result of any defaults of the Ground Lessee that by their nature are not capable of being cured by a ground lease mortgagee, so long as monthly base rents are being paid. Alternatively, the ground lease may provide that the Ground Lessor must waive a non-monetary default that is incapable of being cured if the ground lease mortgagee has commenced and is diligently pursuing the exercise of its rights and remedies and has cured any curable defaults within the applicable cure period afforded a ground lease mortgagee.
 - The ground lease must allow the ground lease mortgagee additional time to obtain relief from any bankruptcy stay in the Ground Lessee's bankruptcy sufficient to enable the ground lease mortgagee to either foreclose the lien of the ground lease Mortgage or obtain the appointment of a receiver or secure other remedies necessary to enable the ground lease mortgagee to take control of the Property.

5. Foreclosure

The ground lease must allow a foreclosure or acceptance of a deed-in-lieu of foreclosure by the ground lease mortgagee, its nominee or its designee without the consent of the Ground Lessor and without any conditions, restrictions, approvals or limitations. The ground lease mortgagee must have the unrestricted and unconditional right to further assign the ground lease and leasehold interest, subject only to delivery of notice to the Ground Lessor and other routine documentation requirements.

6. New lease

If the ground lease terminates for any reason (including the rejection of the ground lease in a bankruptcy proceeding) other than expiration of the term, then the Ground Lessor must be obligated, without any conditions, restrictions, approvals or limitations, to enter into a new lease with the ground lease mortgagee, its nominee or its designee

on the same terms and conditions as the original ground lease and with the same title priority.

7. Personal liability

The ground lease (or an estoppel certificate executed by the Ground Lessor) must provide that any liability of the ground lease mortgagee and its assigns must be limited to the value of its interest in the ground lease.

8. Release of liability

The ground lease must provide for an automatic release of the ground lease mortgagee and its assigns from any further liability to the Ground Lessor after the assignment of the ground lease.

9. No merger

The ground lease (or an estoppel certificate executed by the Ground Lessor) must contain a provision that there will not be a merger of the fee title with the leasehold interest if the Ground Lessee becomes the owner (through acquisition or otherwise) of the fee estate.

e. Encumbrances on the fee

- Existing mortgage on fee estate

Any existing mortgage on the fee estate of the Ground Lessor must be subordinated to the ground lease, any subleases and any new ground lease given to ground lease mortgagee after termination of the original ground lease.

- Future mortgage on fee estate

The ground lease must prohibit the Ground Lessor from mortgaging the fee estate unless there is an express subordination of the fee mortgage to the Ground Lessee's interest under the ground lease, the interest of any ground lease mortgagee, any subleases and any new ground lease given to a ground lease mortgagee after termination of the original lease.

f. Sublease

If the ground lease is a sublease, then Seller's legal counsel or Single Counsel, as applicable, must review each lease/sublease in accordance with this chapter, and Freddie Mac must be satisfied that it has received adequate additional security or other assurances to mitigate the legal risks inherent in a sublease structure.

30.5 Amendment to Ground Lease (09/26/19)

If the ground lease does not meet all the conditions in this chapter, as applicable, and any areas of non-compliance described in the Ground Lease Analysis are not acceptable to Freddie Mac, then Freddie Mac may require an amendment to the ground lease. Freddie Mac will not accept an amendment to the ground lease in an estoppel certificate (except for personal liability and merger, as provided in Section 30.4(d)(7) and (9)) unless the estoppel certificate is recorded and provides that it amends the ground lease for the benefit of the Ground Lessee and any future ground lease mortgagee.

30.6 Lessor's Estoppel Certificate (09/26/19)

An estoppel certificate is not required if the ground lease will be executed simultaneously with the ground lease Mortgage.

For non-SBL Mortgages, the Seller must deliver a draft Ground Lessor's estoppel certificate to the Applicable Freddie Mac Multifamily Regional Office, with a copy to the applicable Multifamily Attorney for approval, at least 10 days before the Origination Date. At a minimum, the estoppel certificate must contain the provisions set forth in the Multifamily Ground Lessor's Estoppel Certificate found on FreddieMac.com. Freddie Mac may require that the Seller add additional provisions to the estoppel certificate, based upon Freddie Mac's review of the Ground Lease Analysis. The estoppel certificate must be dated within 30 days prior to the Origination Date.

The Seller must submit the approved and executed estoppel certificate to Freddie Mac at final delivery of the Mortgage.

30.7 Reserve for rents (06/25/20)

A Reserve for ground rents is not required if the security for the Mortgage includes a lien on the fee estate.

For all other ground lease Mortgages, the Seller must establish an appropriate Reserve, as determined by Freddie Mac, for rents due under the ground lease. At the time of final delivery of the ground lease Mortgage to Freddie Mac, the Seller must complete one of the following two forms, as applicable:

- Form 1058, Letter Agreement for Servicer's Reserve Custodial Account, or
- Form 1060, Letter Agreement for Reserve Custodial Account

The form must be completed by the depository institution holding the Custodial Account and must acknowledge Freddie Mac's interest in the Custodial Account. The completed form must be delivered to Freddie Mac at the address provided on the form.

30.8 Title insurance for ground lease Mortgages (09/26/19)

In addition to meeting the requirements set forth in Chapter 29 or Chapter 29SBL, as applicable, the policy must include the following:

1. Reference to the status of fee simple title to the Property and insurance that the Ground Lessee's interest under the ground lease and the Ground Lessee's option, if any, to purchase the fee interest in the related land, and

2. Insurance that the ground lease is not subordinate to any lien or encumbrance (other than the ground lease Mortgage, if the fee owner is granting a mortgage on the fee estate).

Freddie Mac may require additional endorsements that it determines are appropriate.

30.9 Leases with Government Agencies (including Industrial Development Agencies) (09/26/19)

If the Borrower has entered into a ground lease with a government agency (including an Industrial Development Agency or Authority) for the purpose of obtaining a tax abatement, tax exemption or payment in lieu of taxes ("tax benefit"), then Seller's legal counsel or Single Counsel (as applicable) must analyze the ground lease as follows:

- If the tax benefit is used in the underwriting of the Mortgage, then the ground lease must be analyzed as an unsubordinated ground lease (even if the governmental agency granting the tax benefit will join in the Mortgage).
- If the tax benefit is not used in the underwriting of the Mortgage, then the ground lease must be analyzed as a subordinated ground lease.