An important due diligence criteria Lender must consider when deciding whether to agree to make the Loan is making the decision that the creditworthiness, reputation, and experience of Borrower is adequate since Lender will be looking to Borrower to deal successfully with all of the numerous adverse events that may occur during the term of the Loan and could impact the value of the Mortgaged Property and the net cash derived from its operation. It is logical that Lender will have much more confidence in Borrower’s ability to achieve success in dealing with these events if Borrower has prior history demonstrating its financial capacity and/or experience to take the appropriate actions effectively and quickly to “fix” each of these events so that the value of the Mortgaged Property can be maintained (and in turn will better ensure that there will be adequate cash flow to pay all Loan, operating, and capital costs related to the Mortgaged Property and the Loan through Maturity). Consequently, it is important to Lender that during the term of the Loan, Borrower and, ultimately, the key people (which in this Mortgage is defined as the “Key Principal”) who control Borrower and its subentities and related parties that are continuously involved with the operations of the Mortgaged Property remain the same and that any change in this manpower is at all times subject to Lender’s consent. Following are typical provisions included in a Mortgage. They deal with a transfer of the Mortgaged Property or a transfer of interests in Borrower, which, if they are allowed to occur, could completely change who the Borrower is and/or the underlying key people who control Borrower or to whom Borrower looks to operate the Mortgaged Property.
22.1 Transfer Event of Defaults

The occurrence of any of the following events shall constitute an Event of Default under this Mortgage:

(a) a Transfer of all or any part of the Mortgaged Property or any interest in the Mortgaged Property;
(b) a Transfer of a Controlling Interest in Borrower;
(c) a Transfer of a Controlling Interest in any entity which owns, directly or indirectly through one or more intermediate entities, a Controlling Interest in Borrower;
(d) a Transfer of all or any part of Key Principal’s ownership interests (other than limited partnership interests) in Borrower, or in any other entity which owns, directly or indirectly through one or more intermediate entities, an ownership interest in Borrower;
(e) if Key Principal is an entity, (A) a Transfer of a Controlling Interest in Key Principal, or (B) a Transfer of a Controlling Interest in any entity which owns, directly or indirectly through one or more intermediate entities, a Controlling Interest in Key Principal;
(f) if Borrower or Key Principal is a trust, the termination or revocation of such trust; and
(g) a conversion of Borrower from one type of legal entity into another type of legal entity, whether or not there is a Transfer.

Lender shall not be required to demonstrate any actual impairment of its security or any increased risk of default in order to exercise any of its remedies with respect to an Event of Default under this Section.

22.2 Permitted Transfers

The occurrence of any of the following events shall not constitute an Event of Default under this Mortgage, notwithstanding any provision of this Section to the contrary:

(a) a Transfer to which Lender has consented in writing;
(b) a Transfer that occurs by devise, by descent, or by operation of law upon the death of a natural person, so long as the transferee is reasonably satisfactory to Lender;
(c) a Transfer of obsolete or worn out Personalty or Fixtures that are contemporaneously replaced by items of equal or better function and quality, which are free of liens, encumbrances and security interests other than those created by the Loan Documents or consented to by Lender;
(d) the grant of an easement, if before the grant Lender determines in writing that the easement will not materially affect the operation or value of the Mortgaged Property or Lender’s interest in the Mortgaged Property, and Borrower pays to Lender, upon demand, all costs and expenses incurred by Lender in connection with reviewing Borrower’s request; and
(e) the creation of a tax lien or a mechanic’s, materialman’s or judgment lien against the Mortgaged Property which is bonded off, released of record or otherwise remedied to Lender’s satisfaction within 30 days of the date of creation.
22.3 Definitions

For purposes of this Section, the following terms shall have the meanings set forth below:

(a) “Initial Owners” means, with respect to Borrower or any other entity, the persons or entities who on the date of the Note own in the aggregate 100% of the ownership interests in Borrower or that entity.

(b) A Transfer of a “Controlling Interest” shall mean, with respect to any entity, the following:
   (i) if such entity is a general partnership or a joint venture, a Transfer of any general partnership interest or joint venture interest which would cause the Initial Owners to own less than 51% of all general partnership or joint venture interests in such entity;
   (ii) if such entity is a limited partnership, a Transfer of any general partnership interest;
   (iii) if such entity is a limited liability company or a limited liability partnership, a Transfer of any membership or other ownership interest which would cause the Initial Owners to own less than 51% of all membership or other ownership interests in such entity;
   (iv) if such entity is a corporation (other than a Publicly-Held Corporation) with only one class of voting stock, a Transfer of any voting stock which would cause the Initial Owners to own less than 51% of voting stock in such corporation;
   (v) if such entity is a corporation (other than a Publicly-Held Corporation) with more than one class of voting stock, a Transfer of any voting stock which would cause the Initial Owners to own less than a sufficient number of shares of voting stock necessary to have the power to elect the majority of directors of such corporation; and
   (vi) if such entity is a trust, the removal, appointment or substitution of a trustee of such trust other than (A) in the case of a land trust, or (B) if the trustee of such trust after such removal, appointment or substitution is a trustee identified in the trust agreement as approved by Lender.

(c) “Publicly-Held Corporation” shall mean a corporation, the outstanding voting stock of which is registered under Section 12(b) or 12(g) of the Securities and Exchange Act of 1934, as amended.

Explanation

As indicated above, Lender has underwritten the Loan on the basis of the creditworthiness and experience of Borrower, the Key Principal, the Borrower parent, and other related entities and key people who are related to Borrower, in each case to the extent they relate to the operation of the Mortgaged Property and/or the ability of Borrower to perform its obligations under the Loan Documents and maintain the value of the Mortgaged Property. One way for Lender to assure itself that Borrower...
and such related entities and key people will continue their involvement with the Mortgaged Property throughout the term of the Loan is for the Loan Documents to prohibit any transfers of the Mortgaged Property or of any controlling interests in Borrower and subentities of Borrower, as set forth in Section 22.1 above.

Note that Section 22.2 provides a list of permitted transferees to which Borrower is permitted to transfer the Mortgaged Property. These permitted transferees are the ones that borrowers commonly request and that lenders typically can accept, as they do not impinge upon the basic protections that Lender seeks to achieve using a “due-on-sale” provision. It is also not uncommon for Borrower’s counsel to ask for greater flexibility in expanding who might be a permitted transferee. Frequently another category of permitted transferees would include entities in which Borrower, the Borrower parent, the Key Principal, or other key individuals maintain Control as well as a minimum percentage of equity interest in such entities. (In this regard, Lender will frequently require that such transferee be a bankruptcy remote, special purpose entity.) In this way, Borrower can bring in new partners and/or permit minor equity owners to transfer their interests without needing Lender’s consent.

When entering into the Loan Documents, frequently, an important consideration of Borrower is that it have an ability to transfer the Mortgaged Property, subject to the Loan. This kind of provision often affords Borrower much flexibility in the future, particularly if the interest rate environment has risen materially from the time of the closing of the Loan. If this rise in interest rates should happen, the ability to transfer the Mortgaged Property subject to the Loan, which is at that time at a relatively lower interest rate, will allow Borrower to transfer the Mortgaged Property for a considerably higher purchase price than would otherwise be the case if it had to sell the Mortgaged Property free and clear of the Loan. Therefore, a particular advantage for Borrower’s counsel is to get his/her client to think about trying to negotiate a provision that will allow for a future sale of the Mortgaged Property, subject to the Loan. Section 22.4 relates to this type of a permitted transfer, which would enable Borrower to transfer the Mortgaged Property, subject to the Loan.

### 22.4 One Time Transfer Right

Lender shall consent, without any adjustment to the rate at which the Loan secured by the Note bears interest or to any other economic terms of the Loan, to a one time Transfer during the term of the Loan that would otherwise violate this Section, if, prior to the Transfer, Borrower has satisfied each of the following requirements:

(a) the submission to Lender of all information required by Lender to make the determination required by this Section;

(b) the absence of any Event of Default;

(c) the transferee meets all of the eligibility, credit, management and other standards (including any standards with respect to previous relationships between Lender and the transferee and the organization of the transferee) customarily
applied by Lender at the time of the proposed Transfer to the approval of borrowers in connection with the origination or purchase of loans secured by similar mortgages, deeds of trust or deeds to secure debt on commercial real estate properties which are being used for similar purposes as Mortgaged Property;

(d) in the case of a Transfer of all or any part of the Mortgaged Property, or direct or indirect ownership interests in Borrower or Key Principal (if an entity), if transferor or any other person has obligations under any Loan Document, the execution by the transferee or one or more individuals or entities acceptable to Lender of a written assumption agreement that is acceptable to Lender and that, among other things, requires the transferee to perform all obligations of transferor or such person set forth in such Loan Document, and may require that the transferee comply with any provisions of this Mortgage or any other Loan Document which previously may have been waived by Lender;

(e) if a guaranty has been executed and delivered in connection with the Note, this Mortgage or any of the other Loan Documents, Borrower causes one or more individuals or entities acceptable to Lender to execute and deliver to Lender a similar guaranty in a form acceptable to Lender;

(f) the transferring Borrower ("Transferee") assumes and agrees to pay (subject to the non-recourse provisions of this Section 22 hereof) all the service payments payable under the Note and to perform all other obligations of Borrower arising under the Note, this Mortgage and the other Loan Documents and (provided that Borrower shall be relieved of such obligations from and after the date of such Transfer and Lender shall execute and deliver to such Borrower at the time of the Transfer a release to such effect) prior to or concurrently with the closing of such Transfer, the Transferee, as a condition to proceeding with such Transfer, shall execute, without any cost or expense to Lender, such documents and agreements as Lender shall reasonably require to evidence and effectuate said assumption and shall deliver such legal opinions (including a nonconsolidation opinion in substantially the same form as that delivered in connection with the closing of the Loan evidenced by the Note) as Lender may reasonably require;

(g) Transferee and Borrower authorize the filing of, without any cost or expense to Lender, new financing statements or financing statement amendments and any additional documents reasonably requested by Lender;

(h) Borrower shall cause to be delivered to Lender, without any cost or expense to Lender, such endorsements to Lender's title insurance policy, hazard insurance endorsements or certificates and other similar materials as Lender may deem necessary at the time of the Sale, all in form and substance reasonably satisfactory to Lender, including, without limitation, an endorsement or endorsements to Lender's title insurance policy insuring that the lien of this Mortgage constitutes a first lien on the Mortgaged Property subject only to the Permitted Exceptions, extending the effective date of such policy to the date of execution and delivery (or, if later, of recording) of the assumption agreement referenced above in sub-subsection (f) of this Section 22.4 and insuring that fee simple title
to the Mortgaged Property is vested in the Transferee, or, in lieu thereof, such other documents or evidence as Lender may reasonably require in order to confirm the priority of this Mortgage;

(i) Borrower shall execute and deliver to Lender, without any cost or expense to Lender, a release of Lender, its officers, directors, employees and agents, from all claims and liability relating to the transactions evidenced by the Note, this Mortgage, and any of the other Loan Documents through and including the date of the closing of the Transfer, which agreement shall be in form and substance satisfactory to Lender and shall be binding upon the Transferee; and

(j) Lender’s receipt of all of the following:
   (i) a non-refundable review fee in the amount of $_______ and a transfer fee equal to one percent (1%) of the outstanding Indebtedness immediately prior to the Transfer.
   (ii) In addition, Borrower shall be required to reimburse Lender for all of Lender’s out-of-pocket costs (including reasonable attorneys’ fees) incurred in reviewing the Transfer request.

22.5 No Indemnitor Relief

Any Transfer shall not be construed so as to relieve any current guarantor or indemnitor (collectively “Indemnitor”) of its obligations under any existing guaranty or indemnity agreement, in favor of Lender which is in effect immediately prior to any such Transfer, as being part of the Loan Documents; and each such Indemnitor at the time of any such Transfer, as a condition to Lender’s consenting to such Transfer, shall execute, without any cost or expense to Lender, such documents and agreements as Lender shall reasonably require to evidence and implement the ratification of each such guaranty or indemnity; provided that if any beneficial owner of, or related party to, the Transferee shall be approved by Lender in Lender’s sole but reasonable discretion, not to be unreasonably withheld or delayed, and any such entity (which approval shall be deemed granted so long as Lender receives (1) a certified financial statement of such beneficial owner of Transferee showing that such entity has a liquid net worth of not less than $___________, and (2) a certification of such beneficial owner of Transferee, in form and substance reasonably satisfactory to Lender, which certifies that at no time during the ten (10) year period immediately prior to the date of such Transfer (A) has such entity been convicted of a felony, or (B) has such entity been adjudicated bankrupt or insolvent or filed, consented to or acquiesced in any petition of bankruptcy, reorganization or arrangement pursuant to any Federal bankruptcy law, or any similar Federal or State law) executes, without any cost or expense to Lender, each indemnity and guaranty, in form substantially the same as executed in connection with the execution of the original Loan Documents, then Lender shall execute and deliver to the current Indemnitor or, concurrently with such transaction, a full release of the current Indemnitor from all obligations related to, or arising under, the Loan Documents in connection with occurrences which happen from and after the closing of such Transfer.
Explanations

By giving Borrower the right to elect to sell the Mortgaged Property subject to the Loan, as set forth in Section 22.4 above, arguably Lender is not giving up much economically since both before and after any such Transfer, the type and value of the collateral will remain the same or better than the original collateral securing the Loan and Lender’s risks regarding whether it will receive amortization payments for the remainder of the term of the Loan and whether it has adequate collateral also remains the same because in both cases, the Loan remains secured by the Mortgaged Property and the income generated from the Mortgaged Property. Pursuant to this provision, there are parameters regarding who would be an acceptable Transferee. So even though this type of provision does not necessarily come with significant economic risks, a Lender will frequently be disinclined to include such a provision in the Mortgage because to implement the Transfer, Lender must spend time and effort to assure itself of the satisfactory nature of (1) the Transferee, (2) any new guarantor, and (3) the documentation necessary to permit such Transfer. More importantly, if interest rates have moved up and circumstances require Borrower to pursue a Transfer when interests rates are higher, then Lender will be stuck with retaining the Loan at its relatively lower interest rate. Therefore, Lender will be forgoing the opportunity to use the prepayment proceeds to make a new mortgage loan at a higher interest rate. As a result, Lender may resist allowing Borrower to have this Transfer election.

If Lender does permit Borrower to have a Transfer election included in the Mortgage, similar to the provision presented in Section 22.4, it is understandable that Lender will only allow this election to be made by Borrower if (1) no Event of Default then exists and (2) the new borrower is structured as a single purpose, bankruptcy remote entity. It is also understandable that Lender would require the Transferee to assume the obligations under the Loan Documents and the old Borrower to release Lender from all prior acts.

As part of these Transfer provisions, Lender is legitimately requiring that Borrower provide Lender with a release from any potential “lender liability claims” that might have arisen prior to the Transfer. Lender’s requirement that its title policy be endorsed to reflect that the new owner is now the Transferee is a reasonable requirement since Lender legitimately wants assurance that following the Transfer, Lender will have evidence that the new Borrower actually owns Lender’s primary collateral, the Mortgaged Property.

Also note that the Transfer provision in Section 22.5 also provides that Lender is committed to enabling a substitution of the guarantor. Most often, Lender will not commit to this type of provision. By obtaining this type of substitution right, Borrower will be able to require Lender at the time of the Transfer to permit such a substitution, which will usually be a precondition for Borrower’s ability to proceed with the Transfer (although sometimes if such provision does not exist and if Lender refuses to permit such a substitution, Borrower will proceed with the Transfer and obtain an indemnification from a creditworthy related party of the Transferee).
A related type of provision is for the Borrower’s parent(s) to obtain a one-time right to transfer its equity interest in Borrower to a third party. This type of transaction could be beneficial to Borrower in States where such a transfer would not trigger a transfer tax or where there may be key ownership rights in the name of the original Borrower that might be voided upon a transfer of the Mortgaged Property. Such a provision typically includes most of the provisions set out in the foregoing Section 22.4 and 22.5, but does not necessarily include some of the property due diligence or financing statement filings because in this case, the Borrower remains the same following such a transfer.

Another type of Transfer election that is not included in this Mortgage is a transfer provision that enables only part of the Mortgaged Property to be released and sold, while enabling Lender to maintain the lien of its Mortgage on the balance of the Mortgaged Property. It is often useful to Borrower if the Mortgaged Property includes vacant land, multiple facilities, and/or condominium units, which ultimately Borrower hopes to sell off, to include a provision in the Mortgage that permits such a sale of part of the collateral (such as vacant land and/or surplus condominium units). This type of provision, if permitted by Lender, frequently mandates a number of additional due diligence provisions requiring Lender’s approval, including a new survey. It also usually requires that certain credit tests, such as minimum percentages for loan-to-value ratio and annual debt service to annual net revenue ratio (with respect to the portion of the Mortgaged Property that will still be encumbered by the lien of the Mortgage), be achieved as a precondition to enabling such transfers to be implemented. This type of provision then would usually mandate that all or a portion of the net proceeds of any sale arising from such a Transfer be utilized to partially prepay the Loan.

It is very important for Borrower’s counsel to discuss these various Transfer alternatives with its client, including various provisions in the Loan Documents that would permit Transfers and/or substitution of guarantors. Without them, Borrower is usually at the mercy of Lender with regard to making a nonpermitted transfer of all or part of the Mortgaged Property. Such a situation often leads to (1) extended delay in attempting to get Lender consent to the transfer and (2) considerable cost in negotiating with Lender at the time of a future transfer, and at times, Lenders will refuse to consent to such a transfer (particularly if the Loan has been sold into a securitization), leaving Borrower as its only recourse to prepay the entire amount of the Loan, which can come with crippling prepayment penalties.