

LAND OWNERS ARE USING GROUND LEASES MORE AND MORE

LANDOWNERS IN MARKETS WITH UNDERUTILIZED LAND ARE TURNING TO GROUND LEASE STRUCTURES RATHER THAN SELL.

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Landowners are turning to ground leases more often. Ground lease structures have increasingly grown in popularity over the past two decades. Private landowners have turned to ground leases as an alternative to selling land sites, particularly in areas with a underutilized land, and as a way to promote public policy agendas, according to **Ira J. Waldman**, a partner at real estate law firm **Cox, Castle & Nicholson**. Through ground leases, landowners are able to

maintain ownership while also benefiting from development. While ground leases have become more complicated, they can present challenges in the sale or purchase of a property.

Ground leases can be used by both private landowners as well as publicly owned land, but the lease structures vary between the two. “Public entities are more likely to be interested in pursuing public policy goals and exercising development controls over and above what is possible pursuant to their governmental functions, as well as avoiding the political slings and arrows about why the land was sold,” Waldman tells GlobeSt.com. “These include affordable housing, local and veteran hiring, prevailing wage and design and use requirements, such as public parking, day care requirements, bicycle shops, etc. Private landowners are less constrained by public policy goals and more consumed with profitability. So public ground leases by their very nature are more complex than private ground leases as the public policy goals are built into the document structure.”

Landowners in particular benefit from ground lease structures because they are able to maximize the value of the land without foregoing ownership. “For public entity landowners, they can retain ownership of the land, pursue public policy goals and profit from the development, while exercising as much control as they desire over the project with the protection of all manner of indemnifications from the ground tenant/developer,” adds Waldman. “Ultimately at the end of the lease they own the improvements, which, if they have required continual maintenance, repair and upgrades, can be enormously valuable.”

For landowners, there are ample benefits to ground leases, but Waldman says that the disadvantages are limited—which is likely the reason why this has become so popular. For the ground tenant, however, there are some disadvantages, typically in the complexities of the lease and site restrictions. “Ground tenants and developers are compelled to navigate what can be a complex structure, imposing on them somewhat inflexible long-term complex requirements and use restrictions, difficulties in negotiating financing arrangements and, in one way or another, paying for the landowner’s legal and other costs incurred in the transaction,” he explains.

There are also challenges for sublessees or operators on the land site, who can often see additional legal issues as a result of a ground lease. “For sublessee operators, there are several additional legal issues that it must navigate in order to protect itself and its investment from the possibility of default by the ground tenant/developer under the ground lease and any actions that may be taken by the lender to the ground tenant/developer,” explains Waldman.

Ground tenants can navigate these issues with patience during the negotiating process and an understanding of ground lease structure. “The best practice for a landowner and a ground tenant/developer is to consider in advance the position of the other and anticipate what may be required to reach a consensus deal, which includes the concerns of the lender to each,” adds Waldman. “For example, anyone regularly involved in a ground lease transaction understands or should understand that there are certain necessary rights that a leasehold lender will require to protect its position. It serves little purpose for a landowner to argue about leasehold lender protections that are not contrary to the long-term interests of the landowner.”