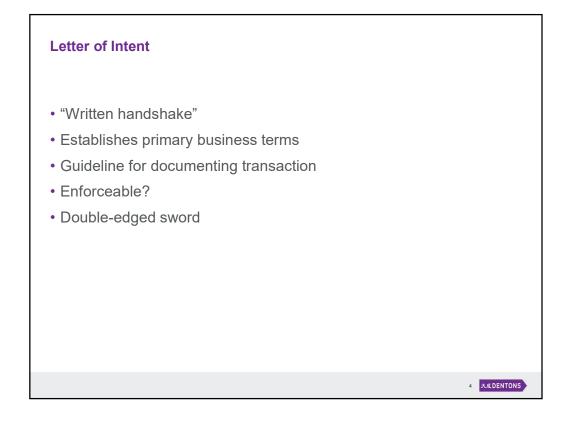


### **Various Real Estate Impacts**

- Purchase and sale
- Financing
- Lease, license, and other occupancy agreements
- Easement
- ROFR / ROFO
- New development, i.e. "dirt"
- Construction
- Tax credits

# Anatomy of a Commercial Purchase and Sale Transaction • Letter of Intent • Purchase and Sale Agreement (the "PSA") • Due Diligence / Financing / Corporate Matters • Closing / Post-Closing LOI PSA Due Diligence Closing



### **Purchase and Sale Agreement**

- Roadmap for the transaction
- Key provisions:
  - Price and payment terms
  - Earnest money
  - Due diligence deliverables
  - Contingencies
  - Access/Physical Due Diligence
  - Representations and warranties
  - Pre-closing covenants
  - Closing
  - Assignment
  - · Default and remedies
- What's "market"?



### **Purchase and Sale Agreement (cont'd)**

- Typical price and payment structure
- Earnest Money
  - How much, and when deposited?
  - Who's holding it?
  - Under what circumstances is it released to Buyer or Seller, and whose consent is required?
  - Additional earnest money required?



- Due Diligence deliverables
  - Competing goals:
    - Buyers want as much information as possible
    - Sellers want to deliver whatever they possess
  - Failure to deliver; certificate of delivery
  - Seller representations regarding accuracy of deliverables

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### **Purchase and Sale Agreement (cont'd)**

- Contingencies, generally
  - Buyer's closing obligation almost always conditioned upon satisfaction of contingencies
  - Allow objections within specified time period, with mechanism for cure (and failure to cure)
  - Inaction: termination or waiver?

- Title and Survey contingencies
  - Title and survey review
  - Mandatory cure items
  - Timing of resolution of title/survey issues
  - Failure to cure



### **Purchase and Sale Agreement (cont'd)**

- Contract Contingency
  - Typically, Buyer has a fixed period of time to review all contracts affecting the property and make assumption election
  - Vendor contracts sometimes structured as a lease or license, e.g., cable, internet, cell tower, laundry
  - Compulsory assumption



- General due diligence contingency
  - This can take the place of, or be in addition to, specific contingencies for title, survey, contracts, financing, etc.
  - Not necessarily coterminous with other contingencies
  - "Any reason or no reason" termination
  - End of this contingency is a big moment

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### **Purchase and Sale Agreement (cont'd)**

- Access
  - Buyer wants ability to do full-range of tests and investigations onsite whenever it wants
  - Sellers should consider various access-related issues and address them in the PSA:
    - Lease/tenant disturbance?
    - Tenant communications?
    - Insurance requirements?
    - Invasive tests?
    - Indemnities for damage?

- Representations and Warranties
  - AS-IS transaction
  - In practice, Sellers commonly provide at least a few reps and warranties
  - Knowledge qualifiers/persons
  - Survival of representations
  - Remedies and limitations of liability for breach of representations

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### **Purchase and Sale Agreement (cont'd)**

- Pre-closing covenants
  - Often property dependent, but Buyer's goal is to avoid encumbrances during deal process and purchase property as it existed on date of contract; also, limit Seller's ability to freely sign new contracts
  - Seller wants the ability to keep using property in its normal course
  - PSA should address pre-closing condemnation or casualty

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### Purchase and Sale Agreement (cont'd)

- Closing
  - Usually occurs within fixed period of time after due diligence ends
  - Subject to a series of conditions, e.g. issuance of title policy, PSA compliance
  - Closing prorations rent/deposits, utilities, taxes, maintenance
  - Specify deliverables:
    - Primary seller deliverables: deed (what form?), bill of sale, assignments/assumptions, bring down certificate, FIRPTA, settlement statement
    - Primary buyer deliverables: \$\$\$, settlement statement, assignments/assumptions



- Default
  - Notice and cure?
  - Failure to close, buyer: Earnest money to seller
  - Failure to close, seller: Depends

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# **Purchase and Sale Agreement (cont'd)**

- Assignment
  - Buyer under contract rarely takes title
  - Seller may want to place limits or requirements on assignment

# **COVID Impacts**

- Deadlines / Time of Essence / Force Majeure
- Financing Contingencies
- Increased importance of estoppels
- Expanded representations and warranties

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# Thank you

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