

Buying and Selling Commercial Real Estate: The Nuts and Bolts of Contract Negotiation, with COVID Considerations

CLE SEMINAR FOR IN-HOUSE COUNSEL
2021

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



Letter of Intent

- “Written handshake”
- Establishes primary business terms
- Guideline for documenting transaction
- Enforceable?
- Double-edged sword

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?

Purchase and Sale Agreement (cont'd)

- 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

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?

Purchase and Sale Agreement (cont'd)

- 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

Purchase and Sale Agreement (cont'd)

- 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

Purchase and Sale Agreement (cont'd)

- Access
 - Buyer wants ability to do full-range of tests and investigations on-site 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?

Purchase and Sale Agreement (cont'd)

- 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

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

Purchase and Sale Agreement (cont'd)

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

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

Thank you

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