



10 Issues to Consider When Drafting and Negotiating an Acquisition of Real Property

Timing of transaction/coordination of due diligence

- When do time periods start? (Effective Date v. delivery of Due Diligence Materials)
- When do time periods end?
 - Never on a weekend or holiday
 - Closing Date on a Tuesday, Wednesday or Thursday

Deposit

- How much time to deposit?
- Never entirely “non-refundable” after expiration of Due Diligence Period - Deposit should remain refundable for a failure of a condition to Closing
 - Failure to obtain certain approvals
 - Material change in condition of property

Independent consideration

- Unclear how much money is enough
- Non-monetary consideration

Representations and Warranties

- What do we ask for?
- What do we really need?
- Allowing for Seller to update representations and warranties prior to Closing

As-Is sale/Release of claims

- Carve-outs
 - Breach of representations and warranties
 - Seller fraud
 - Environmental contamination caused by Seller during the period of its ownership
 - Third party claims for bodily injury, death, personal injury or property damage (e.g., slip and fall) during the period of Seller’s ownership



Acquisition Timeline and Summary

Property Address

Seller

Lead Broker

Lead Outside Counsel

Square Feet (Buildings)

Acres (Land)

Purchase Price

- Total Purchase Price
- Price per Square Foot

Due Diligence Costs

- Environmental
- ALTA Survey
- Legal
- Total Due Diligence Costs
- Total Due Diligence Costs per Square Foot

Existing Due Diligence Information

- ALTA Survey
- Phase I
- Phase II
- Other

**New Due Diligence Information
(Date Requested)**

- Preliminary Title Report
- ALTA Survey
- Phase I
- Phase II
- Other

Letter of Intent (Date Executed)

**Confidentiality Agreement
(Date Executed)**

Access Agreement (Date Executed)

**Purchase and Sale Agreement
(Date Executed)**

- By Buyer
- By Seller

Title Company/Title Officer

Deposit

- First Installment (Amount)
- First Installment (Date Due)
- Second Installation (Amount)
- Second Installment (Date Due)

Notices

- Type of Notice
- Date Due
- Date Submitted

Due Diligence (Expiration Date)

Closing Date

Comments



Indemnity

- Reciprocal?
- Carve-outs
- Indemnity from Buyer (if granted) should apply only to the period of Buyer's ownership

Remedies upon default by Buyer

- Liquidated damages in the amount of the Deposit (and attorneys' fees and enforcement costs)

Remedies upon default by Seller

- **Prior to Closing**
 - Termination of Agreement, return of Deposit, reimbursement of out-of-pocket costs (subject to a cap? – cap should be exclusive of attorneys' fees and enforcement costs)
 - Specific performance (with Seller representation)
- **Post-Closing**
 - Limitations period
 - Cap on damages (exclusive of attorneys' fees and enforcement costs)
 - Carve-outs

Confidentiality

- Carve-outs
- Sunset date

Security for Seller's Post-Closing Obligations (if any)

- Escrow holdback
- Personal guaranty