Wednesday, October 26, 2022
3:30 PM – 4:45 PM

Workshop #6

A COMPREHENSIVE LOOK AT RETAIL PROPERTY PURCHASE AND SALE AGREEMENTS: ARE YOU BUYING WHAT WE ARE SELLING?

Presented to
2022 ICSC + U.S. LAW
JW Marriott Grande Lakes, Orlando, Florida
October 26-28, 2022

By:

Katy Sermas
Wilson, Cribbs & Goren, P.C.
2500 Fannin Street, Houston, TX 77002
Email: ksermas@wcglaw.com

Michael E. Di Geronimo
Miller Starr Regalia
1331 N. California Blvd., 6th Fl.
Walnut Creek, CA 94596
michael.digeronimo@msrlegal.com

I. Introductions

A. Katy Sermas
B. Michael Di Geronimo
C. This Workshop Will Be Interactive

II. Workshop Covers: Purchasing and Selling Properties with Retail and Commercial Tenants as well as Buying and Selling Outparcels in Retail Centers for retail and other purposes

III. LOI or Term Sheet Provisions Besides the Purchase Price

A. Earnest Money – Deposit(s)

Almost all purchase and sale agreements for real properties require that the buyer provide a deposit or earnest money, which at some point in the transaction becomes nonrefundable absent the failure of certain closing conditions (e.g., the buyer's inability to obtain a title policy) or the occurrence of certain unexpected events, such as a casualty or condemnation. Letters of intent or term sheets customarily include the amount of the deposits or deposits in question and when they have to be made. They usually do not get into significant detail as to when such deposits become nonrefundable, although in the authors' view this practice is generally a mistake. Term sheets or letters of intent ("LOI(s)") should specify in some detail when the deposit or deposits become nonrefundable to avoid delay and having to resolve this issue when the subject purchase and sale agreement ("PSA") is being drafted and negotiated. How much is customary for such deposits? In our experience, deposits are usually in the range of between 3% to 5% of the purchase price, but there are often significant variations to such customary amounts. Some buyers will agree to make a very large deposit or additional deposit to differentiate their offers from others, and some sellers will insist on such large deposits to demonstrate a buyer's commitment to deal. On the other hand, certain retailers and/or other buyers whose deal is contingent on obtaining a rezoning or other entitlements will insist on a relatively small deposit due to the costs involved in getting the deal to the point of closing. See further discussion on this topic below.

B. Due Diligence / Inspection Contingency

Almost all PSAs and letters of intent / term sheets for the same provide the buyer with an inspection or due diligence period during which the buyer can cancel the transaction for any reason or no reason. Generally, from a seller's point of view, it is a good idea for liability protection purposes to grant the buyer a reasonable inspection period. Generally speaking, inspection or due diligence periods range from thirty (30) to ninety (90) days in length. The only sales transactions that customarily would not provide for a due diligence period are those where the buyer is already extremely familiar with the subject property. For example, it would be reasonable for a fee owner selling a parcel to a buyer who is ground leasing the property to insist on the PSA not containing a due diligence period or a very truncated version of one.

C. Governmental Entitlements and Permits / Third Party Approvals

1. If the buyer intends to redevelop or use the property for a use that requires a rezoning or other discretionary governmental entitlements, the buyer should negotiate a reasonable permit or governmental approvals contingency period ("Permit Period") as part of the LOI. In some instances, the question is whether the seller will agree to a permitting contingency that is significantly longer than the feasibility or due diligence period. Unpredictability on how long it takes to obtain discretionary governmental approvals or permits should be a concern to both the buyer and seller where the PSA will contain a Permit Period, particularly in a post-Covid world where permitting seems to take longer than before, and governing authorities are understaffed.

2. Best practices for a seller would be to have a hard deadline by which time the buyer either waives the contingency or terminates the PSA. If such does not occur, the contingency is deemed waived. Alternatively, a buyer or seller could negotiate for an extension payment as part of a buyer's right to extend the Permit Period, which in some cases may be fully applicable, partially applicable or not applicable to the purchase price depending on the bargaining position of its party.

3. End users will typically not close until the subject property is zoned / governmentally approved for its use, and in many instances until it has all governmental approvals and permits necessary to construct and operate its planned business. By way of example, a fast-food restaurant company may be unwilling to close on a property until and unless it has received approval for the construction and operation of a drive thru lane.

4. Discretionary vs. Ministerial Approvals / Permits. A zoning variance is a discretionary entitlement / governmental approval wherein the governmental authority has the right to deny or grant the entitlement or approval in its discretion (whether fully or in part). A grading or building permit is a ministerial approval or permit wherein the applicant has a right to receive the permit in question as long as it checks the box in terms of what is required to be submitted and paid for the permit to be issued. In many deals, closing will be conditioned on the buyer's receipt of only discretionary entitlements, but not ministerial permits. However, as noted above, some buyers, particularly end users will insist on not closing until they have all required entitlements and permits in hand. As a compromise, some buyers will agree to waive their permit contingency when they have received all discretionary entitlements and at least one round of acceptable plan check comments. See also discussion below on this topic. A smart buyer will insist on all approvals or agreements required from utility providers (whether governmentally owned or not) being part of its permit contingency.

5. Non-Governmental Approvals. It is also not unusual in LOIs and resulting PSAs to have the deal conditioned on the receipt of approvals or agreements from non-governmental entities, particularly anchor tenants or a tenant located on the subject property that the buyer is insisting agree to a buy-out or other earlier termination of its lease for the buyer to close on the property. Such issues should be addressed in the LOI.

D. Financing Contingency

Most institutional deals usually do not have a financing contingency. In some transactions, however, a defeasance needs to be arranged before the deal can close. If a financing contingency is included in the LOI, a buyer should make sure that the financing period is sufficiently long to allow the property to be appraised or at least that its due diligence period is long enough to allow for such to occur. Most financing contingencies agreed to as part of the LOI provide little detail as to whether, and how, the financing contingency will be satisfied beyond a deadline for the contingency to be resolved. In some instances, an acceptable interest rate or other loan terms are specified as being acceptable to the buyer. If a financing contingency has to be part of the deal, a seller's best protection is to keep the contingency period as short as possible and to insist on a portion of the deposit or extension payment being made nonrefundable if a relatively long financing contingency is needed.

E. Closing Date

Closing dates typically run between thirty (30) to sixty (60) days after the last buyer contingency has been waived or obtained. A closing date is a fundamental term that is almost always included in the LOI.

F. Closing Costs

Surprisingly, the parties' responsibilities for closing costs are often omitted from LOIs. In many jurisdictions, an easy way to address closing costs in the LOI and ultimately in the PSA is to provide that closings costs will be allocated per County custom.

G. Title / Escrow Company

A bad escrow agent or title company can make a transaction difficult for the respective parties, particularly the buyer. Accordingly, individuals and companies that buy and/or sell real property on a regular basis often try to designate the escrow agent or title company / insurer for the PSA transaction in the LOI. Often deals involving the sale or purchase of a shopping center or other retail project require the buyer and its counsel to review and analyze hundreds of recorded instruments, as well as encroachments, encumbrances, variations, and other matters shown by a survey. In such instances, it is not a trivial matter which title company or insurer is used. Dealing with a known and experienced title underwriter can also help a buyer obtain desired or needed endorsements without undue delay or unreasonable push back.

H. Required Estoppels

Most buyers and sometimes their lenders will condition their willingness to close on a purchase of a retail property on the receipt of certain specified, acceptable tenant estoppels. Usually, estoppels will be required from anchor and certain other designated tenants as well as a percentage of estoppels (e.g., 60%) from the rest of the tenants as a closing condition. The basic terms of the estoppel condition are usually covered in the LOI.

I. Commissions

Real estate commissions paid for commercial, or retail, purchase and sale transactions tend to be heavily negotiated. In general, in our experience, purchase prices in the $2 million or less range will generate commissions equal to 5% to 6% of the purchase price. For transactions where the property is being sold for over $2 million, but less than $10 million, we have seen commissions in the 4% to 5% range. Most commissions for a purchase price of $10 million or more will not exceed 3% to 4%. For very expensive real estate, such as a property worth $100 million, a commission equal to 1% thereof would not be unusual. The amount of the commission will also usually vary based on how much work the broker has to do or anticipates having to do to sell the property in question (i.e., the harder the work, the higher the commission). It is helpful in the drafting of the PSA to have the LOI reference whether each party is represented by a real estate broker and the party responsible for paying the commission, which is almost always the seller.

IV. Negotiating the Purchase and Sale Agreement

A. Deposits / Earnest Money

Earnest money is considered a good faith deposit and can demonstrate to a seller the seriousness of a buyer's interest in purchasing the property. Earnest money is applicable to the purchase price. In many instances, earnest money is deposited within a few short days of the effective date of the PSA and remains non-refundable until the expiration of the feasibility or inspection period. However, earnest money is not always straightforward. Sometimes, in competitive markets, earnest money becomes non-fundable sooner, even immediately upon deposit, to show a buyer's willingness to purchase the property. Despite earnest money being considered non-refundable, whether it is instantaneously upon deposit of the earnest money or later following the expiration of the feasibility period, there are some specific instances when, as buyer's counsel, it should be negotiated that the earnest money would be refunded to the buyer. For example, a seller's breach of the contract should not allow the seller to retain the earnest money, even if the earnest money is considered non-refundable. Also, a casualty event resulting in a termination of the contract, a condemnation event resulting in a termination of the contract, or even the failure of a closing condition that is not caused by a buyer's default are all instances where buyer's counsel could argue earnest money should be refunded to the buyer. If a buyer does not obtain a permit or governmental approval contingency, it should be clear in the PSA whether the earnest money will be refundable in whole or in part. As seller's counsel, the objective is to have the earnest money become nonrefundable, except in limited circumstances, and take the position that there must be some outside deadline at which point the buyer waives any contingencies, be it governmental or permit related or financing related, and allows the earnest money to become non-refundable, except in limited circumstances such as a seller default, casualty or condemnation.

As buyer's counsel, it is important to confirm with your client whether it is able or willing to walk away from a nonrefundable deposit if unanticipated issues arise that do not allow the client to terminate the purchase and sale agreement and receive the deposit(s) back, such as a failure of a loan contingency or lender requirement if the purchase and sale agreement does not have a financing contingency or the contingency has expired. This is also important in PSAs where the parties have agreed to have the earnest money become nonrefundable upon deposit and thus there is virtually no inspection or feasibility period.

Parties can also negotiate multiple deposits that are made throughout the course of the purchase and sale transaction. These can be used for longer term contracts, or when the parties have negotiated a buyer's right to exercise extensions of the feasibility period (or other contingency period) or closing date upfront. These time frames can be used if more time is required to meet lender requirements (such as SNDA or tenant estoppel requirements) or if a buyer is waiting on a permit approval prior to closing. Often extension payments are non-refundable, except in limited circumstances such as a seller default, but are applicable to the purchase price. Some sellers may want to assert that these extension payments are not considered part of the earnest money, but are a separate extension payment that, while applicable to the purchase price, should go directly to the seller or be released immediately upon receipt by the escrow agent for the granting of additional time. In all events, exactly how extension payments or additional deposits will be treated should be clearly spelled out in the PSA.

B. Investing the Deposit

It is generally a good idea to specify in the PSA that the PSA is not only an agreement between the parties, but escrow instructions to the escrow agent with respect to those provisions that pertain to it. A well drafted commercial PSA should also include an acknowledgment to this effect to be signed by the escrow agent. With respect to deposits, one should include a provision in the PSA that the deposit will be deposited in a federally insured, interest bearing account acceptable to the parties, which will not be a general account of the escrow agent. Otherwise, a bankruptcy of the escrow agent could result in the deposit funds being tied up or even potentially lost. The PSA should specify that any interest earned on the deposit or earnest money will be deemed part of the same.

Many commercial PSAs also include a provision similar to the following: "Notwithstanding anything in this Agreement to the contrary, One Hundred and No/100ths Dollars ($100.00) of the Initial Deposit is delivered to the Escrow Holder for delivery to Seller as non-refundable "Independent Contract Consideration", and the Initial Deposit (and, if applicable, the Total Deposit) is hereby reduced by and shall no longer include the amount of the Independent Contract Consideration so delivered to Seller, which amount has been bargained for and agreed to as consideration for Seller's execution and delivery of this Agreement and for the rights and privileges granted to Buyer herein, including any and all rights granted to Buyer to terminate this Agreement during certain periods hereunder." The reason for such provisions is some case law that holds without such a clause a PSA granting a buyer a right to terminate for any reason as part of its feasibility contingency constitutes an unenforceable option agreement.

C. Due Diligence Provisions

1. Indemnity and Insurance Requirements.

Most well represented sellers will require in the PSA that the buyer indemnify and agree to defend the seller from any claims arising from any personal injury or property damage as well as any mechanic's liens resulting from the entry of buyer or its agents onto the property. Most PSAs for retail and commercial properties also require the buyer to have and maintain commercial general liability insurance covering its activities on the property during the due diligence period endorsed to name the Seller and related parties as additional insureds. Typical minimum coverage amounts range from $1m to $3m. Worker's compensation insurance is also required to be carried in many PSAs as well as in some instances employer liability and auto liability insurance coverage. Often, such PSAs also require the buyer's contractors or consultants who are assisting the buyer in investigating the property to also have such coverage. When representing the buyer, counsel should take care to allow such coverage to be provided by a blanket insurance policy and to allow the buyer to self-insure risks typically covered by a CGL policy if the purchaser has a large net worth, such as a bank or other financial institution. Seller's counsel should include language in the PSA. A sample access indemnity and insurance provision is included in the appendix to this outline.

a. Carve-outs for pre-existing conditions. In representing the buyer, counsel should insist that the access indemnity include carve-outs to the extent that any claims arise out of the acts or omissions of the seller or any agent, employee or contractor thereof. Additionally, it is commercially reasonable to make clear in the PSA that the buyer will not be liable for the mere discovery of any pre-existing conditions, such as hazardous materials or problematic soil. Any liability for any pre-existing conditions should be limited (if included at all) to the extent that the buyer or any party under its control exacerbates the pre-existing condition.

b. Covid-19. It is not uncommon these days to have PSAs that have additional provisions in the due diligence sections granting automatic extensions of the due diligence period for delays resulting from Covid-19 and/or absolving the seller for any liability resulting therefrom. A sample Covid-19 release clause is included in the appendix.

c. Extensions for Tenant Caused Delays. In some instances, particularly when the Property being purchased is a single tenant parcel that is under lease, a well-advised buyer should insist that the PSA include a covenant by the seller to obtain all necessary approvals from the existing tenant to allow access to the Property including any building located on thereon or a representation or warranty from the seller that no such approval is required. In such circumstances, the buyer may also want to insist on a right to extend the due diligence deadline due to access delays caused by the existing tenant or seller's inability to obtain required approvals to allow buyer access. In our view, such provisions are commercially reasonable, although a seller should insist that any such extension right is capped.

2. Invasive Testing. Sellers generally take two types of approaches in dealing with invasive testing for environmental and other purposes. Many sellers require the seller's approval before any invasive testing is permitted, which may be granted in its sole and absolute discretion. Other sellers allow invasive testing for environmental purposes to the extent such is recommended by the buyer's environmental consultant in the buyer's Phase I Report or otherwise. In our view, for liability protection purposes, it is a bad idea to try to force a buyer to purchase real property where Phase II / invasive testing is recommended by the buyer's environmental team, although the seller should insist in all instances on having the right to approve of the scope and the location of such testing. Any permitted environmental testing also brings up additional issues, such as does the buyer or seller have any contractual obligation to report the subject test results to environmental regulators and which party is required to sign the manifest for any waste products generated by such testing. As to the obligation to report, most negotiations end up with an agreement to report only to the extent required by applicable laws. If possible, a seller should insist that such a determination be made by its counsel or consultant. The obligation to sign the manifest is surprisingly one that buyers and sellers do not always agree on. The party signing the manifest is legally responsible for ensuring the safe disposal of the waste in question. From the buyer's point of view, it makes little sense for the buyer to sign a manifest for hazardous waste from property it does not yet own (and may never own) and which the buyer has otherwise no responsibility for causing. Nonetheless, some sellers take the view that since the buyer's activities caused the waste to be taken from the property, the buyer should be responsible for signing the manifest. In many instances, sellers will allow the buyer to perform geotech tests for soil stability purposes without further seller approval as long as such testing does not involve any tests for hazardous materials. It is also customary to have the PSA provide that the buyer repairs any improvements damaged by the buyer's invasive testing. Some sellers require the right to be present for any invasive testing, although the provision should be drafted in a manner that only requires reasonable advance notice of such testing to allow for such a right to occur, as trying to schedule a mutually convenient time that works for both seller's and buyer's representatives can result in undue delays in the testing.

3. Disclaimers / return of Seller materials and required delivery of Buyer due diligence reports and other materials if the Buyer terminates the PSA. A seller-oriented PSA should contain language similar to the following regarding the due diligence documents being provided by the seller: "Seller makes no representation or warranty as to the accuracy or completeness of any of the Documents and Materials. If this Agreement is terminated pursuant to this Section, Buyer shall return to Seller the Documents and Materials (and any copies made thereof) delivered to Buyer by Seller." It is reasonable, however, for a buyer to insist on a seller representation in the PSA that the documents and materials being delivered to the buyer are true and complete copies of such documents and materials in seller's possession or words to that effect. A buyer may also want to agree to destroy any documents and materials received from the seller if the deal does not close rather than having to return the same to seller. Lastly, if a buyer is required to provide the seller with copies of any due diligence reports and/or surveys obtained by the buyer if closing does not occur, buyer's counsel should similarly provide that such reports and surveys are being provided without any warranty as to the accuracy or completeness of the information contained therein, and may further want to make clear in the PSA that the buyer does not need to provide any privileged or proprietary reports obtained by the buyer for the property, such as market study.

4. Avoiding Interference with Existing Tenants / Tenant Interviews. The PSA should contain a covenant by the buyer that its due diligence activities will not materially interfere with the business or occupancy of existing tenants renting space in the property. It is not commercially reasonable to insist that no interference occur. Rather, a materiality standard in this regard is usually an acceptable middle ground. Tenant interviews are also deemed essential due diligence work for most purchasers of shopping centers and other retail projects; accordingly, a buyer's right to conduct such interviews in coordination with or with advance notice to seller (with

seller's right to be present during such interviews) should be included in the PSA. A sample tenant interview clause is included in the sample material.

5. Title Review:

a. Separate review period from the Due Diligence or Inspection Period. Most, well-drafted PSAs for commercial and retail properties contain separate provisions governing the buyer's review of title to the property. In almost all instances, a buyer and its counsel cannot effectively review title without both a title report / commitment with links to each of the recorded exceptions listed thereon and a current ALTA survey. It usually takes at least 30 days for a survey to be obtained for a property. As a result, before agreeing to a title review period, the buyer and its counsel should discuss with the surveyor a realistic time frame for the delivery of the survey and for buyer's team to be able to review the same, and insist that the PSA's title review period reflect the results of such a discussion. In our view, it is crucial that a buyer negotiate a realistic time to obtain and review such a survey.

b. Pre-approved and Permitted Exceptions / Monetary Liens. Buyer oriented PSA forms often provide that the seller is obligated to remove any title exceptions or matters objected to by the buyer. Such provisions are not commercially reasonable or practicable. Seller oriented PSA forms usually contain a host of pre-approved title exceptions, such as recorded CC&Rs or other project documents; non-delinquent real property taxes and special assessments, which are a lien not yet due or payable; pre-printed provisions of the commitment for the title policy; zoning and other regulatory laws; and matters caused by the buyer or any agent, contractor or employee thereof. Buyer's counsel should attempt to pare down the list of any pre-approved exceptions to a bare minimum. In almost all instances, existing leases will be deemed to be permitted exceptions as well as any exceptions that the buyer has approved or is deemed to have approved. Typically, a negotiated commercial PSA will provide that the buyer has a right to object to any title exception or matter, but the seller has the option as to whether to agree to cure the same or not before closing. If the seller agrees to cure any such default, a buyer will usually insist on a self-help right or a remedy beyond termination and a right to receive its deposit back if the seller fails to cure the exception as agreed. Customarily, monetary liens (e.g., deeds of trust, mortgagees, mechanic's liens, etc.) are deemed objected to by the buyer and must be removed from title by closing. Some sellers will try to limit their obligation to remove monetary liens to only those liens that have been voluntarily entered into by the seller, but such a limitation is problematic for a buyer as the effect of any monetary lien is the same whether the lien is characterized as a voluntary or involuntary lien. If such a limitation is insisted on by the seller and the seller declines to remove a nonvoluntary lien, such as that imposed by judgment, then the buyer should have the right to terminate the transaction and have all of its costs and expenses incurred in connection with the transaction reimbursed and its deposit refunded.

c. Gap Exceptions. A well drafted PSA will include a provision allowing the buyer to object prior to Closing to exceptions to title (a) raised by the title company between the expiration of the title review period and the closing and (b) not disclosed by the title company or otherwise actually disclosed in writing to buyer before the expiration of the title review period. The negotiated issue with gap exceptions is whether buyer's right to object is qualified by a materiality standard. Sellers want to make sure that a buyer does not use the gap exception as a basis for terminating the PSA if the seller is unwilling or unable to cure the same when the exception in question will not have a material and adverse impact on the intended use or value of the property. Buyers, however, do not want to get into arguments over whether a new exception is material if they deem it worth objecting to under the subject gap clause. A compromise position is to at least specify that any gap objections will be made in good faith, which should in most cases be deemed an implied obligation in any event under applicable law.

D. <u>Closing Conditions</u>

Different closing conditions are required for buyers and sellers in real estate sale agreements. Buyers, and particularly retail buyers, may have specific closing conditions that should be addressed in the PSA.

Certain estoppel requirements are usually insisted on by well represented buyers and/or their lenders. Estoppel requirements include both estoppels from declarants and other owners in restrictive documents, such as declarations, CC&Rs, cross access agreements or reciprocal easement agreements, and estoppels from tenants in operating developments. It is important to establish in the purchase and sale agreement what and how many tenant estoppels will be required. If the tenant estoppel requirement is a percentage of the tenants on the property, is the percentage based on the rentable square feet of the property or just a percentage of the tenants on the property? Are there any specific anchor tenants that a buyer or its lender will require an estoppel from? Frequently, it is a combination of both a percentage and required anchor tenant estoppels.

What constitutes an acceptable estoppel also needs to be spelled out in the PSA as well as the time period for the buyer to object to the same and any resulting right to terminate the PSA if an acceptable estoppel cannot be obtained for the subject tenant. In most PSAs, the buyer can only terminate the PSA if a sufficient number of acceptable estoppels is not obtained. However, a prudent buyer may want to negotiate a right to terminate the PSA based on an estoppel. In short, estoppels that contain information that a reasonable buyer would find problematic (such as a material default by the seller or tenant, claims of free rent beyond what is provided for in the lease, an alleged or actual right to offset sums owed to the tenant against rent that is being exercised by the tenant, and/or fraud claims against the seller) are stated as not being acceptable and capable of being objected to by the buyer. Usually what constitutes an acceptable estoppel is spelled out in some detail in the PSA. The PSA should include the required form of the estoppel, but also include language that the seller will not be required to use the attached form for any tenant whose lease specifies a different form. Most well drafted estoppel provisions in PSAs for retail properties include a buyer and/or seller right to extend the closing date for a specified period if necessary for the estoppel closing condition to be satisfied; an obligation of the seller to seek estoppels from all tenants even if such is not a closing condition; and a provision that the buyer has no right to object to estoppels that contain adverse information, but which was already disclosed to the buyer as part of the due diligence materials. A prudent buyer should also insist that a seller's ability to provide seller estoppels be limited in a manner similar to the following: "Seller may deliver its own certificate to Buyer in the form attached hereto as Exhibit X ("Seller's Lease Certificate") for Tenants that did not deliver an Estoppel Certificate, so as to provide Estoppel Certificates and Seller's Lease Certificates that, taken together, satisfy the Estoppel Delivery Requirement; provided that Buyer shall have no obligation to accept Seller's Lease Certificates that (x) collectively cover in excess of 20% of the Tenants; (y) is for any Anchor Tenant, or (z) would, if issued by a Tenant, constitute a Non-Complying Estoppel Certificate."

Customarily PSAs for retail properties also allow for seller estoppels or certificates to take the place of tenant estoppels that the seller is unable to obtain, and which are needed to satisfy the closing condition. Often, the buyer's right to rely on such seller estoppels is limited to a specified period after closing and the PSA further provides that if and when an acceptable tenant estoppel is obtained from the applicable tenant, it will take the place of the prior seller estoppel, which will essentially become null and void.

In addition to estoppels, if a buyer is obtaining financing, its lender may have specific requirements concerning subordination, non-disturbance and attornment agreements or SNDAs. Many institutional and other sellers will not condition a closing on the receipt of any SNDAs. Usually, however, a buyer can negotiate a reasonable time to obtain such SNDAs and the Seller's cooperation with respect thereto. If SNDAs are a required closing condition, similarly to the estoppel requirements, it is important to establish how many SNDAs will be required. Will the lender only make certain anchor tenants providing an SNDA a condition to closing or will they require a percentage of tenants to provide SNDAs, or perhaps a combination of both? As buyer's counsel it is important to know if SNDAs will be a condition to the lender closing or if some, or all, SNDAs can be obtained post-closing.

A condition to closing that a buyer may also include is confirmation that there has been no adverse change in the physical or environmental condition of the property. What is considered "adverse" can be further defined if the parties are concerned with the vacancy rate in the development. Further, a buyer may require that there is no preclusion on the intended use as a condition to closing. If a seller agrees to this condition, the intended use should be well defined.

Another closing condition that a buyer would want to list in the contract is that there is no seller default. Conceptually, this should also be covered in the default provisions of the PSA.

One of the more fundamental closing conditions is that the buyer be able to obtain a title policy or at least the title company be committed to issue the policy at closing subject to the payment of the premiums. The form of the policy required for the closing condition to be satisfied is often the basis of some negotiation between the parties. In general, provided that the buyer obtains an ALTA survey, most buyers will insist that the title policy needs to be a current ALTA Owner's policy, although some buyers prefer a 2006 ALTA Owner's policy of title insurance with extended coverage in the jurisdiction where such is available. Usually, the specified amount of the title policy is the purchase price although some buyers will insist that the amount include the anticipated costs of buyer improvements. It is also commercially reasonable for the buyer to insist that the policy insure important easement access rights, such as those set forth in the CC&Rs or an REA for the center in question if the buyer is purchasing only a portion of the overall development. Other typical requirements include that the policy be issued by the title company pursuant to the title commitment, and that buyer's fee title is insured, subject only to the permitted exceptions agreed to as part of the PSA. Most of the negotiations over the requirements for the title policy center on what, if any endorsements, the buyer will be entitled to insist on receiving from the title company as a condition of closing. Sellers may object to a provision requiring the policy to include any endorsements requested by buyer.

A good compromise position is to require the buyer to obtain a proforma of the policy during the due diligence period, and only have a right to insist on endorsements as a closing condition which are set forth in the proforma.

A buyer may request as a condition to closing confirmation that the Seller's representations and warranties remain in true in all material respects.

The best practice if you represent the buyer is to clearly detail any closing conditions in the purchase and sale agreement, particularly if the requirements are imposed by a third party, such as a lender. If buyer will obtain financing, buyer's counsel should have detailed discussions with its client's lender to understand what lender requirements exist for the loan to close, such as, but not limited to, whether a survey is required (usually required for bigger transactions), a clean Phase I (almost always), an acceptable appraisal (i.e. the property appraises for the purchase price or least to allow a debt ratio acceptable to the lender or its regulatory requirements) in addition to the requirements described above. In some cases where properties have vacancies, a lender may require a master lease for a buyer to meet certain debt to ratio requirements. This lease would require the seller to provide rent for a specific, limited, period of time, that eventually burns off or is earlier terminated if the vacant space is leased.

A condition to closing for the benefit of both parties is that the property being acquired and sold must be a legal lot. In a host of jurisdictions, there are legal or practical reasons why such needs be a condition to closing. Who is responsible for a replat or subdivision map, if required to divide property? In some jurisdictions, like Texas, a replat may be required to subdivide and sell property, and failure to do so would be an illegal subdivision of the property. This onus is on the seller, but such replat will impact title so the buyer may take on the responsibility to replat, so they have control over the process, and it meets the buyer's development requirements. Similarly, in California, it is unlawful to sell property that is not a legal lot. This closing condition is not waivable under California law. Developers may prefer to replat the property before going under contract to sell the property in order to reduce the number of contingencies a buyer may negotiate and so that the seller can maintain control.

Sellers usually have fewer closing conditions for their benefit. First, a seller closing condition is that there has been no event of default by the buyer. Secondly, a seller may require a buyer confirm that its representations and warranties remain true in all material respects. Finally, a closing condition for the seller may be that the property is a legal lot.

There are also various other closing conditions that may be included such as requirements that an Escrow Agent has performed its obligations and that neither party is insolvent or is the subject of a bankruptcy or similar proceedings. There may be environmental conditions to closing depending on the environmental status of the property. These requirements could be waiting on a closure/ no further action letter from the governing authority or a remedial action plan that has been approved by the applicable governmental regulator. If the property is part of a larger development and a supplement or new declaration, cross access agreement or reciprocal easement agreement is required that benefits the property being conveyed and/or property being retained by the seller, the parties may make the recordation of such document a condition to closing. Finally, if the seller is performing any work, the parties may agree that it should be a condition to closing. Seller work provisions in a PSA can be quite complex, and are usually set forth in a whole or in part in a separate work exhibit detailing the scope of the work in question. Typically, if the buyer is counting on seller's work to be done in order for buyer to redevelop the property being purchased with its own building or other improvements, the PSA may include per diem penalties for late delivery. If any seller's work will be performed after closing, a well-represented buyer will usually insist on a holdback agreement where a portion of the purchase price will be held in escrow until the post-closing work is finished or made available to the buyer under a self-help right to perform the work in question if seller fails to do so. Such self-help rights may also include a recorded license agreement if the buyer has to access other property of seller beyond the land it is buying to perform the work in question. A letter of credit may also be used in lieu of a holdback agreement.

E. <u>Escrow Provisions; Closing Costs; Prorations including Reconciliations</u>

As noted above, the responsibility for or allocation of closing costs are usually negotiated as part of the PSA. In many commercial real estate transactions, the agreed upon allocation is to use the customary county or jurisdiction allocation of closing costs, and to spell out the same in the PSA. In almost all instances, each party will agree to pay its own attorneys' fees and costs, and the buyer will agree to pay for the survey. Even in jurisdictions where the seller typically pays for the costs of the title policy, most costs will be limited in the PSA to the costs of a base title policy (in CA, for example, a standard CLTA owner's policy) with the buyer paying for the overage for an extended coverage ALTA owner's policy and any endorsements it wants (except for any endorsements being issued to cure a title object per seller's agreement, which are typically paid for by the seller).

Because of the complexities of the operation of retail shopping centers and other retail projects, the prorations provisions for such properties also need to be drafted to address the same. Specifically, the prorations provisions should address, among other items, the proration of base or minimum rent, reimbursable tenant expenses or reconciliations (e.g., CAM charges, real property taxes and assessments, and insurance, often referred to collectively as operating expenses or reconciliations in such PSAs), any percentage rent obligations, and the parties' duties towards each other with respect to the above after closing.

The proration of base or minimum rent is usually straight forward, i.e., prorated based on either a thirty-day month or the actual number of days in the month in question. As a general rule, delinquent rent of any type is not prorated. Most attorneys who work on the sale and purchase of retail projects will agree that the seller's right to receive delinquent rent should be subordinate to the buyer's right to apply rent received after closing from the applicable tenant to rent that is then currently owed. Most commercial PSAs ultimately provide that the seller will retain the right to collect delinquent rent from tenants after closing, but that the seller is not entitled to evict the tenant or otherwise interfere with its right to possession after closing. Such clauses also require the buyer to cooperate at no material cost with seller's efforts to collect delinquent rent, but usually such cooperate clauses are subject to a sunset provision (e.g.it goes away after 12 months). What rent is delinquent at closing is often specified in a schedule added to the PSA via an amendment prior to Closing. A sample rent allocation / delinquent rent provision is set forth in the sample materials.

With respect to reconciliation expenses, there are two schools of thought. Some PSAs for retail projects provide that if at closing the amount collected by seller for reconciliation / operating expenses is more than what is owed for the expenses in question for the partial year in question, then the seller will provide the buyer with a credit for said amount and if the amount collected is less than the actual expenses buyer shall pay such difference to seller at closing (minus any delinquent rent attributable to the shortage) in addition to the purchase price. A buyer or buyer's attorney will often object to such language as it assumes that the buyer will be able to recover the difference from the tenants at the property as part of the year reconciliation process. Perhaps a better approach is to provide that the buyer is obligated to bill the existing tenants for such sums (to the extent allowed under the applicable leases), and to pay seller its share of said sums if and when received.

Percentage Rent is usually prorated after closing (if any is actually received by the buyer) based on the percentage created by the number of days which elapsed between the commencement date of the percentage rent year for the applicable tenant and the closing date over the total number of days in such percentage lease year.

Leasing Costs and Security Deposits. Sellers usually agree to pay and have reflected in the PSA that they are responsible either through a credit or other direct payment for any tenant allowances or commissions owed under the leases entered into prior to the PSA being signed. Usually, the buyer will be responsible for such leasing costs for any lease entered into or signed after the PSA. Any and all security deposits are either delivered or credited to buyer at closing.

With respect to the proration of rent and the handling of reconciliations under the tenant leases, The PSA should also provide that the seller will assist the escrow agent in preparing the closing statement with buyer having the right to reasonably approve the same. It is usually customary for such purchase and sale transactions for the PSA to have re-prorations similar to the following: "In the event that any prorations, apportionments or computations made under this Section require final adjustment after the Close of Escrow because of the unavailability of information on the Closing Date, then the parties hereto shall make the appropriate adjustments promptly when accurate information becomes available and either party hereto shall be entitled to an adjustment to correct the same. Additionally, in the event any prorations or apportionments made under this Section shall prove to be incorrect for any reason, then any Party shall be entitled to an adjustment to correct the same. Any corrected adjustment or proration will be paid in cash to the party entitled thereto." It is good idea, however, to have the obligation to re-prorate to expire after a set number of days after closing usually in the range of one year to 18 months.

The PSA should also impose a duty on seller to cooperate with buyer to produce the year end reconciliation statement for the year of the closing and further provide that seller will cooperate with buyer for any CAM or other reconciliation audits relating to any period prior to closing, and ultimately be responsible for any sums determined to be owed to any tenants as a result of such audits for any period prior to closing.

F. Representations and Warranties

1. Such representations by seller and buyer are usually stated in the PSA that they are made as of the Effective Date and again at Closing, and the same remain true in all material respects is normally a condition of closing.

2. In general, a seller will attempt to limit the scope and number of representations it makes, and the buyer will attempt to increase the scope and number of such representations. Usually, seller will be willing to represent, among other things, that the leases and other documents provided to buyer are true and complete copies of what is contained in seller's files or records; there are no material defaults under the subject leases except as otherwise disclosed in the PSA by way of a schedule or otherwise; there is no undisclosed litigation involving the property; except as otherwise provided in the due diligence, seller has not received any notices that the property is violation of any applicable laws, including environmental laws; the list of leases and service contracts provided to the buyer are the exclusive list of such agreements, and that no such other leases or contracts will be in effect after closing; the PSA is being signed with due authority and without being in conflict with any other agreements that are binding on seller; except as may be disclosed in any environmental reports provided to buyer, seller has no actual knowledge of any hazardous materials being located on or under the property in violation of applicable laws; seller owns fee title to the property; the rent roll provided to buyer is accurate in all material respects; seller is not insolvent or subject to a chapter proceeding; and no brokerage or leasing commissions or tenant improvement allowances are due or payable by seller except as otherwise disclosed in the PSA or a schedule thereto. Outlot buyers also typically want the seller to represent that there are no restrictions contained in any leases or other agreements binding on the property, which would preclude buyer's ability to construct its planned improvements or to operate its planned business thereon. As one might imagine, seller usually attempt to delete (usually unsuccessfully with a strong buyer paying a market price) or limit (usually with more success) such representations, such as by having the representation made to seller's actual knowledge.

Typically, buyer representations are usually more generic in nature, such as representations of due authority, no conflicting agreements, no insolvency or chapter proceeding involving the buyer, and not in violation of anti-terrorism or anti-money laundering laws. Many sellers also want a buyer to represent that the buyer is an experienced purchaser of the type of property in question and/or has the financial ability perform its obligations under the PSA.

3. How long should these reps and warranties survive closing? A good drafting tip is to provide not only an express survival period for the rep or warranty in question, but also on any action filed based thereon. Typically, the parties will agree on a survival period ranging between one to two years for the representations and warranties in question, and will further state in the PSA that any action based thereon must be filed shortly after the survival period expires (e.g. 30 days), and no such action shall be timely if the alleging party did not notify the other party of the alleged or actual breach of the rep and warranty within the survival period.

4. Cap on recoverable damages. It has been a common practice for sellers to insert a damage cap on any post-closing claims made for any breach of a representation or warranty. We question whether any such cap would be legally enforceable in the event of any intentional fraud or deceit, but such could well be enforced with respect to negligent misrepresentation claims. Perhaps in recognition of the above, some negotiated PSAs provide that any such damage cap does not apply to intentional fraud or deceit. From a buyer's point of view, any cap that is less than the buyer's deposit would seem commercially unreasonable.

5. Provisions requiring buyer to waive any claim for a breach of an express representations or warranty if the buyer discovers the same before closing are relatively common and usually agreed to by the buyer, with the buyer's sole remedy being the right to terminate the PSA and receive its deposit back. Some buyers, however, push back on such language and want the PSA to provide that if a representation or warranty was inaccurate when made, then the limitation on the buyer's remedy does not apply or at a minimum the buyer can terminate receive back not only its deposit, but also a reimbursement of all of the fees and costs incurred by the buyer in connection with the subject transaction. In other words, in terms of equity, there is a material difference between a representation that becomes false because of a change of circumstances (e.g., a rep that no notices of any violation of applicable environmental laws has been received by seller, which was true when originally made, but not at closing due to the seller's receipt of such notice after the PSA was inked).

6. Representations to a Parties' actual knowledge. Most sellers will also want to limit a host of the representations and warranties the seller makes in the PSA to the actual knowledge of a single person associated with the seller, which significantly devalues the representation for the buyer. A seller in making such a representation should specify that such actual knowledge does not include the imputation of knowledge from any other person, it is being made with no duty of investigation or inquiry, and the individual to whose knowledge the

representation is being made will have no personal liability under the PSA by virtue of acting as representative of the seller for the purpose of the subject definition. One strategy a buyer may use when a seller is seeking to so limit all or some of representations to the actual knowledge of one individual is to ask that more individuals connected with seller be included for purposes of defining what actual knowledge means under the PSA.

G. Default Remedies

The default section is one of the more heavily negotiated provisions of commercial PSAs. If you represent the buyer, one of the most common remedies to require in the event of a seller default is specific performance. Most experienced buyer's counsel considers specific performance an extremely important remedy that needs to be included in the PSA for the buyer's benefit. However, some sellers will not agree to specific performance. Typical provisions that seller's attorneys push for include limitations on the time that the buyer has to file an action for specific performance, limitations on incidental damages, and other requirements showing with certainty that the buyer was ready and able to perform. Buyers should have the property stipulated as unique with an acknowledgment that money damages are not an adequate remedy.

In addition to specific performance, a buyer may negotiate a reimbursement of its costs and expenses in the event of a seller default since pursuing specific performance is not always in the buyer's interest depending on the materiality of the seller default. A seller will likely require a cap on such reimbursements, which can vary depending on size of the transaction and potential costs a buyer anticipates incurring in performing its inspections and due diligence on the property. It is also important for a buyer to anticipate any 1031 exchange damages that may be incurred from a seller default.

In the event a seller refuses to agree to a specific performance remedy, there are other alternative remedies, including, but not limited to obtaining a right of first offer or a right of first refusal that would be recorded against the property in the event of a seller default to at least ensure that the seller will not flip the property to another for a higher price without triggering a legal right of the buyer to purchase the property despite seller's prior default under another agreement.

Seller's attorneys usually want the purchase and sale agreement to provide that the remedies granted to the buyer in the event of a seller default are buyer's sole and exclusive remedies.

In the event of a default by the buyer, the most common remedy is a return of the earnest money deposit, which serves as liquidated damages. If the earnest money deposit is overly high, a buyer may seek to negotiate that only a portion of the deposit will serve as liquidated damages in the event of a buyer default. Parties should be aware that there may be specific language required to classify the earnest money deposit amount as liquidated damages. The enforceability of the liquidated damages may center on this.

Sometimes there are provisions in the PSA that call for specific performance in the event of a buyer default. However, the practicality of enforcing a specific performance provision against a buyer is much more difficult than in the event of a seller default. It would be highly unlikely, and difficult, for a court to require a buyer to purchase property, particularly if it does not have the financial capability to do so.

Both seller and buyer will typically agree to waive claims for consequential and punitive damages in purchase and sale agreements.

A sample PSA default provision is set forth in the appendix.

H. Pre-Closing Seller Covenants

1. No Further Encumbrances; Obligation to Convey the Property subject only to the agreed upon Permitted Exceptions; and Duty to Maintain the Property and Insurance. To protect the integrity of its title review, well advised buyers will insist that the seller agree not to further encumber the property with any new title exceptions, such as easements, without the buyer's consent. If the property under contract is part of shopping center or other project being commonly maintained or managed, most buyers will agree to a reasonableness standard regarding whether it must give its consent to any such further encumbrances. Ideally, an experienced buyer's counsel will want the seller to covenant that it will convey the property at closing subject only to the agreed upon permitted exceptions, as opposed to just making such a conveyance a closing condition. Sellers will also customarily agree in the PSA to continue to maintain or cause to be maintained the property in substantially the same condition as such exists, and to be insured, as of the effective date of the PSA. A compromise position is to have the seller covenant only to make commercially reasonable efforts with respect to such maintenance and insurance.

2. Limitations on New Leases and Lease Amendments. Customarily PSAs for a retail project restrict the ability of the seller to enter into new leases or any material lease modifications with any existing tenant after the PSA is signed without the buyer's consent. The general rule of thumb is that buyer needs to be reasonable with respect to its consent rights prior to waiving its feasibility contingency and its deposits becoming hard, but it can elect in its sole and absolute discretion to grant or withhold such consent thereafter.

3. Service Contracts. Similarly, sellers will customarily agree to not enter new service contracts or extend or modify any existing service contracts after the PSA is signed. The PSA usually requires the buyer to let the seller know what, if any, service contracts, the buyer would like to assume at closing, which election is customarily made during the due diligence period. For those service contracts that the buyer does not want to assume at closing and keep in effect, seller will ordinarily agree to terminate the same on or prior to closing as long as the seller has the legal ability to do so. If not, the PSA should provide that the buyer will need to assume the applicable service contract at closing.

I. Sale of Contaminated Properties

1. Due Diligence Issues / Environmental Investigation. The main trick in successfully acquiring contaminated property is to have a good environmental team made up of a knowledgeable and practical environmental engineer and an attorney experienced with helping clients acquire and manage environmentally impaired properties. If the subject site cannot be properly characterized due to restrictions on invasive testing, a decision to purchase contaminated real property is a real roll of the dice since the ultimate clean-up and regulatory related costs will be very difficult to estimate with any accuracy. In some instances, the property can be transferred with an assignment of a third-party environmental indemnity from a financially strong indemnitor such as, by way of example, a major oil company. In such an event, a buyer's risk assessments may change favorably based on the financial strength of the indemnitor. However, even when transferrable, such third-party indemnities are often limited in ways that need to be carefully understood and explained to the client. It also needs to be noted that performing a Phase I site assessment compliant with ATSM environmental site assessments standards before closing on property is a necessary step for the buyer to qualify for the bona fide prospective purchaser exemption (commonly known as bfpp protection) under CERCLA and other state or local laws.

2. Seller Environmental Indemnities. In some instances, a seller is willing to provide an indemnity to the buyer regarding claims relating to pre-existing contamination on the site. In our experience, such indemnities are only offered after the seller has been designated as the responsible party by a regulatory agency, has remediated the property to closure (and feels comfortable with its efforts in that regard) or is willing to stay on the hook to complete the remediation to closure letter after closing. Another alternative that parties negotiate is to condition the closing on the seller obtaining a closure or no further action letter.

3. Buyer Environmental Indemnities. One of the primary goals of a seller selling contaminated property is to shed itself of any liability for the property to the greatest extent possible. Not surprisingly, many sellers of contaminated property will insist on the buyer indemnifying the seller from any liability regarding the same including for past releases. The buyer's typical response is to attempt to delete any such post-closing environmental indemnities or to try to limit the same to cover only the acts and omissions of the buyer, and not pre-closing releases and other potential tort claims arising from events before the closing. The exact scope of such indemnities is usually a function of each side's bargaining power, although from seller's point of view it may make little sense to sell a property if there is any significant likelihood of the seller continuing to be involved in its remediation in the future or otherwise being required to respond to claims relating to the contamination.

4. Environmental Covenants. In connection with an approved closure, a governmental regulatory agency will condition the closure on an environmental covenant or declaration being recorded against the subject property restricting its use by so-called sensitive receptors. These use restrictions typically take the form of precluding residential housing, day care, schools and similar uses, while allowing the property to be used for most retail and commercial purposes. A seller may also require that an environmental covenant be recorded at closing as a means of reducing the perceived risk of selling the property.

5. Environmental Insurance.

Another means of reducing risks on the sale or purchase of contaminated property is for either the buyer or seller to obtain environmental insurance, and to name seller as an insured thereon. Some sellers of contaminated property in fact require the buyer to obtain such insurance as a condition of closing. In the current marketplace, there are two main types of environmental insurance that are potentially able to be obtained, which are described below.

a. PLL Policies. Pollution Legal Liability Policies will typically cover *inter alia* unknown environmental risks, the risk of offsite migration and related claims, and re-opening liability (i.e., the regulator decides to reopen the site and require further remediation even though a closure letter was previously issued by it). There are only a few carriers that will offer such insurance, and they normally require significant data about the site (i.e., it needs to be well characterized and understood from an environmental risk perspective) before the carrier will underwrite and commit to issue the policy in question.

b. Excess of Indemnity Policies. Another available type of policy is to have the carrier issue a policy to agree to perform either the seller's or buyer's environmental indemnity obligations if the indemnitor fails to do so. These types of policy are almost entirely underwritten on the financial strength of the indemnitor (or any parent or affiliate entity willing to pledge is assets in case that the insurer is forced to honor the indemnity).

As one might guess, environmental insurance is not cheap and thus it only usually makes sense for larger deals involving significant dollars. However, in our experience, the ability to obtain an environmental policy can make the difference between a deal closing or not.

6. Incremental Cost Agreements. Another potential vehicle to include in a PSA for contaminated property is an incremental cost agreement. Under such agreements, the seller will agree to cover such excess or additional costs that the buyer may incur above its ordinary development costs because of the contamination at issue. By way of example, a seller could agree to cover the costs of disposing of soil containing hazardous materials, but only the amount of such costs in excess of the costs of disposing of clean dirt.

7. Seller Right to Terminate Due to Discovery of Unknown Contamination. Particularly where a seller is selling property that is known to contain hazardous materials, but the extent of the contamination is not well known, a seller may want to include a provision in the PSA allowing the seller to terminate the PSA if the scope of the contamination is discovered by the buyer's due diligence and the seller is not confident that the buyer can effectively remediate the same without potential liability down the road to seller. Most buyers will agree to such a clause, but only if the seller agrees to reimburse the buyer for its out-of-pocket costs incurred in connection with the transaction at the time of any such termination.

8. Special Purpose Entities / Buyer Assignment Rights. Counsel for a buyer under contract to purchase contaminated property should advise its client that all things being equal for liability protection title to the property should be taken and held in a special purpose entity or SPE, whose only asset is its interest in the property. In some instances, for example deals involving a tax deferred exchange, there may be significant and overriding reason why the property cannot be conveyed to a SPE, but in our view such should rarely be the case. For this reason, as well as others, counsel for buyers should make sure that the buyer is free to assign its interest in the PSA to affiliate entities or other entities under the common control of the buyer without seller's consent.

J. <u>Outlot Development</u>

In the event of a sale or acquisition of unimproved property that will be used for outlot development, there are a number of unique issues that should be addressed in the purchase and sale agreement. One of the key questions that should be addressed up front in the PSA is how much control does the original developer, often the seller, retain?

If possible, a buyer's counsel may request the recorded documents that burden the property when negotiating the purchase and sale agreement to fully understand the development and how much needs to be negotiated between the parties as a condition to closing. Is the use or development of the property subject to a detailed Declaration / CC&Rs or are they only subject to a simple access agreement? It is also important to determine if there is an anchor lease within the development that may control outlot development.

One of the most important issues is determining who has approval rights and what guidelines there are for such development approvals. If the party that has approval rights is the seller, as a buyer, you may want to get approval of your development as a closing condition, if possible. Agreeing to broad approval rights can be risky without clear design guidelines or an agreement of what can and will be constructed. As discussed above, any declaration, reciprocal easement agreements or cross access agreements should be a condition to closing as an agreement to agree to future easements has some risk associated with it.

Another considerable issue for outlot development is what exclusive and prohibited uses are already on the development, and what exclusive and prohibited uses can be established for the buyer's benefit. If a seller has already sold off a majority of the project, is it worth seeking an exclusive from the seller or is it possible to get a supplemental declaration or amendment to an existing agreement for exclusive or prohibited uses? Can the buyer obtain any protected or control areas? Is there any seller work that should be a further condition to closing, or if performed post-closing, should the buyer obtain self-help rights and remedies?

K. Alternative Dispute Resolution Provisions

Given that many judges and most juries know little about commercial real estate transactions, many sophisticated buyers and sellers insist on including ADR provisions in their PSAs. In such an event, however, counsel for the buyer should make sure that the ADR provision does not preclude any necessary interim relief and/or allows the buyer to file an action for specific performance with a court of competent jurisdiction even if the buyer's right to specific performance or the lack thereof will be determined through the ADR process set forth in the PSA. Certain states have specific requirements for ADR provisions to be effective, including requirements that they be separately initialed or set forth in a certain font or type. Counsel should make sure that the ADR provisions in the PSAs they draft comply with local requirements.

L. Force Majeure

What does the force majeure clause extend and for how long is a good question for counsel reviewing a draft PSA for a buyer or seller to ask? In reviewing a force majeure clause, counsel for the seller should ensure that such does not result in the buyer having an unlimited time to perform. Most commercially reasonable force majeure clauses state that financial inability or lack of funds does not qualify as a force majeure event, and thus will not extent the time for any performance. Some practitioners have taken the approach of addressing Covid-19 and other public health caused delays separately from the force majeure clause through language along the following lines: "In the event that a Covid Delay exists on the Closing Date, the Closing Date shall be extended on a day-for-day basis until any such Covid Delay no longer exists, at which point the Closing Date shall occur on the following Business Day. As used herein, "Covid Delay" means any of the following events: (i) the governmental offices where any closing documents must be recorded (collectively, the "Recording Offices") are not open for business and any Recording Office's e-update and e-filing systems are not operational such that recordation cannot occur; (ii) the Title Company is not open for business such that its services as escrow agent, settlement agent and/or title insurer necessary to consummate the Closing cannot be performed; (iii) overnight couriers are not operating such that the closing documents cannot be delivered to the Title Company or to a Recording Office to the extent such closing documents are required to be originals; or (iv) financial institutions or wire transfer systems are not operating, such that, as part of consummation of the Closing, delivery to the Title Company and disbursement by the Title Company of the sums itemized on the settlement statement cannot occur."

M. Assignment and Assumption of Leases and Other Typical Closing Documents Besides the Deed

1. Assignment and Assumption of Leases. The seller should assign and the buyer should assume all leases on the property along with the security deposits associated with such leases. A seller customarily indemnifies the buyer for any claims arising under the leases prior to closing, and the buyer customarily indemnifies seller for any claims arising under the leases on and after closing. In representing the seller, however, care should be taken that the seller's indemnity is drafted in such a way as to not undercut other provisions of the PSA, such as any as-is sale clauses.

2. Other Assignments and Bills of Sale. Seller should assign to the buyer intangible property rights, name rights, signage pylon and monument signage, and any personal property included in the sale. Such assignments or transfers usually include language disclaiming any warranties and referencing that they are being sold on an as-is basis. It is also a good idea to specify in some or all of these closing documents that in the event of a conflict between them and the PSA, the PSA will control. Service contracts that the buyer will be assuming at closing should be assigned and assumed in a manner similar to the leases in the project.

N. Sales to Allow for Mixed Use Redevelopment

It is no secret that retail projects have come under increasing stress due to, among other factors, the rising share of e-commerce sales, retailer overexpansion, excess construction of retail space, and over leverage by chains. The pandemic has arguably caused many people who traditionally shopped for most of their needs in brick-and-mortar stores to become accustomed to having not only food, but retail goods of all types and nature delivered to their house. As a result, it has become increasing difficult to fill retail projects with just traditional retailers. At the same time, many (if not most) of the Country continues to be plagued by a house crisis in that there is simply not enough housing for those that want to own or rent their own place at a price or rent that is affordable for them. As a result, governmental planners and officials both on a voluntarily and involuntary (i.e., being required law) basis are rezoning shopping centers and other retail projects to permit housing and to a lesser extent non-traditional retail uses, such as offices and clinics for health care providers. The main problem with this trend for the owners of these project is that such properties are usually encumbered by CC&Rs or other project documents as well as anchor or major tenant leases that preclude all or large portions of the properties from being used for non-retail purposes. Many such instruments and leases flat out exclude residential uses in their entirety and often limit the overall square footage of office uses, or the permitted locations thereof. A buyer that is purchasing a retail center to redevelop it as a mixed used development thus needs to have its counsel carefully review title to the property and all of the subject leases to determine what, if any, such redevelopment is possible, without significant changes to the restrictions in question, and the term or end date of any leases prohibiting such changes. A buyer purchasing a property to redevelop it may thus require that the closing be contingent on the buyer reaching deals to terminate certain leases and/or entering into binding agreements with the key tenants and other property occupants to amend their leases or project documents, or grant required approvals thereunder to permit the buyer's development plans. The problem for both sellers and buyers who get involved in such deals and corresponding PSA is that reaching agreements with anchors and major tenants is at best a crap shoot, such usually involves granting concessions to such anchors and/or major tenants, and routinely takes many months at best to achieve the desired outcome if such is possible. Any anticipated timelines are rarely met even when a potential deal seems possible. Accordingly, a seller entering into such a PSA should insist on receiving some nonrefundable extension payments from the buyer in exchange for granting the buyer a realistic contingency period in which to obtain such approvals and/or agreements. Buyer's counsel should also be careful to cause the PSA to be drafted in a way that does not result in the closing condition or contingency being deemed satisfied by an anchor approval or agreement, which approval or agreement is subject to conditions unacceptable to the buyer.

Buyers acquiring property for residential use will also insist on closing conditions that are not typically found in PSAs for retail projects. By way of example, such a buyer may condition its closing on the approval of a tentative subdivision map allowing portions of the property to be subdivided into residential lots or include the PSA a provision that permits the buyer not to close and receive its deposit back unless on the closing date no litigation (not instituted by buyer), moratorium, or similar ordinance or regulation is in effect that would have an adverse and material impact on the buyer's ability to grade, construct, or permit occupancy of the property for the planned residential project, or upon buyer's ability to obtain water, sewer, or other utility services for the property, which litigation, moratorium, or similar ordinance or regulation was not in effect as of the expiration of the due diligence period.

O. <u>Seller Oriented Provisions</u>

1. As-Is Provisions.

Sellers should have As-Is language beyond the standard words "as-is where-is." Sellers should disclaim any warranties and representations. Buyers will want to carve out any representations or warranties that are expressly provided in the Contract. There should be a statement that the buyer will inspect the property and is relying on its own examination (other than with respect to the express seller representations and warranties set forth in the PSA), and that each party has legal counsel and an acknowledgment that both parties are sophisticated parties. Sellers will want the As-Is language to be incorporated into the deed at closing. At a minimum the PSA should provide that the As-Is and release provisions will survive the closing.

2. Release Provisions.

It has become relatively common for buyers to provide seller with an expansive release, releasing seller from all manner of things and claims relating to the property being sold, including, without limitation, its physical condition, environmental, development issues, patent and latent issues with the property, etc. In some jurisdictions, like California, specific statutory waivers need to be added to cause the release to cover unknown claims. Typically carve-outs, include seller's representations and warranties and obligations under the PSA, certain types of pre-closing personal injury claims, as well as any actual fraud. As noted above, it is unlikely in most, if not all, jurisdictions that anything in a PSA could be drafted, which would prevent actionable claims for any sort of intentional fraud or deceit.

V. <u>Closing Remarks / Questions</u>

Appendix
Sample Provisions

SAMPLE DUE DILIGENCE AND INDEMNITY PROVISIONS

Purchaser shall protect, indemnify, defend (with counsel reasonably acceptable to Seller or selected by Purchaser's insurance company) and hold harmless the Real Property, Seller and its officers, directors, shareholders, participants, partners, members, managers, affiliates, employees, representatives, invitees, agents and contractors free and from and against any and all claims, damages, liabilities, losses, costs and expenses, including without limitation reasonable attorneys' fees, reasonable expert fees and court costs (collectively "Claims"), resulting from access to or inspection of the Real Property by Purchaser or any of Purchaser's agents, contractors or representatives, which cause any property damage or personal injury, or any liens, except to the extent such Claims are caused due to the willful misconduct or negligence of Seller or any employee, agent or contractor thereof. Purchaser's indemnification obligations set forth herein shall survive the Closing and shall not be merged with the Deed, and shall survive the termination of this Agreement and Escrow. Nothing contained herein shall create any liability for Purchaser due to its mere discovery, without exacerbation, of pre-existing conditions on the Real Property, such as, but not limited to any Hazardous Materials, and in the event of any such discovery, Purchaser shall have no liability to Seller as a result thereof unless and only to the extent that Purchaser or any agent, employee or contractor exacerbates said pre-existing condition.

During the Due Diligence Period and before entering the Property for any purpose, Purchaser will procure and maintain, at its own expense, during the performance of the Inspections, policies of insurance provided by insurance companies admitted to do business in the State of [Insert State] with A.M. Best & Company ratings of at least A- / VII, which policies are primary as to any other existing, valid, and collectible insurance insuring Purchaser against loss or liability caused by or with the performance of this Agreement by Purchaser, or its agents, consultants, contractors, or subcontractors, in amounts not less than:

(1) Commercial General Liability Insurance with a minimum combined single limit of liability of at least US$1,000,000 and a general aggregate limit of at least $2,000,000.

(2) Comprehensive Automobile Liability Insurance or Business Auto Policy covering all owned, hired or otherwise operated non-owned vehicles, with a minimum combined single limit of at least $1,000,000 each occurrence for Bodily Injury and Property Damage.

(3) Workers' Compensation Insurance as required by law

The insurance coverage required may be provided by one or more policies of insurance issued to Purchaser or its agents, consultants, contractors, or subcontractors, provided, however, that in order for such insurance to be acceptable, Purchaser will contractually require such agents, consultants, contractors, or subcontractors to indemnify, defend, and hold harmless Seller from and against Claims and Losses to the extent of Purchaser's obligations provided for in this Agreement, with Seller and its members named as an additional insureds to such agreements, and such insurance policies will meet the requirements of this Section.

The policies of insurance will name Seller and its members and affiliates as additional insureds by way of an endorsement reasonably acceptable to Seller. Purchaser will deliver to Seller a certificate of insurance and additional insured endorsements evidencing the existence of the policies. Purchaser shall provide Seller with notice if any required coverage will be canceled or materially changed at least 30 days in advance of such occurring. Subrogation against Seller and all additional insureds will be waived as respects all of the insurance policies required above (including policies of any subcontractor). The insurance required in no way limits or restricts any indemnity by Purchaser or its agents, consultants, contractors, or subcontractors under this Agreement.

Seller shall be entitled to suspend Purchaser's right to access the Property until and unless such insurance requirements are met.

SAMPLE COVID 19 RELEASE CLAUSE

Buyer hereby acknowledges and represents as follows: (i) Buyer is aware of the COVID-19 pandemic and associated Safer at Home/Shelter in Place Orders (and any other similar federal, state or local orders) that have been enacted in response to the pandemic; (ii) Buyer voluntarily assumes all risks associated with entering the Property and all risks associated with the transmission of COVID-19; (iii) there are no guarantees that Buyer will not be exposed to and/or contract COVID-19 as a result of Buyer's entry onto the Property; (iv) each time Buyer enters the Property, such entry shall be deemed to constitute a representation by Buyer that, to Buyer's actual knowledge at such time, Buyer does not have COVID-19 at such time or within the last ten (10) days, and is not then exhibiting. In consideration of Seller granting Buyer the right to enter upon the Property pursuant to the terms and provisions of this Agreement, Buyer hereby waives, covenants not to sue, releases and discharges forever Seller from all claims of any form whatsoever, whether known or unknown, foreseen or unforeseen, anticipated or unanticipated, manifest or latent, which Buyer now owns or holds, has at any time heretofore owned or held or may at any time own or hold by reason of any matter or thing arising out of or relating to any COVID-19 exposure as a result of Buyer's entry onto the Property.

SAMPLE TENANT INTERVIEW CLAUSE

If Buyer desires to interview any Tenants, Buyer shall notify Seller of such intent. Upon receipt of Buyer's notice, Seller shall attempt to schedule such interview with the Tenants within a reasonable time thereafter. Seller shall have the right to have one of its agents or representatives present at such interview, provided that Seller's failure to attend any interview will not preclude Buyer from conducting such interview.

ESTOPPEL/ SNDA REQUIREMENTS:

Seller shall use commercially reasonable efforts to deliver to Buyer, within fifteen (15) days after the expiration of the Feasibility Period, an estoppel certificate (each, a "Tenant Estoppel Certificate") in the form reasonably requested by Buyer or its lender executed by each tenant in the Building. Seller must deliver to Buyer Tenant Estoppel Certificates from each tenant (each a "Major Tenant") whose base rent under its Lease, as of the Closing Date, constitutes ____ percent (___%) or more of the total base rent due under all Leases in the Building. As soon as possible after the effective date of this Contract, Buyer shall deliver to Seller a description of its lender's requirements for estoppel certificates and the lender's form for the Tenant Estoppel Certificate (which form shall be reasonable with regard to the number and nature of representations the tenant is requested to make). If Buyer fails to deliver such form of Tenant Estoppel Certificate prior to the expiration of the Feasibility Period, Seller may use Seller's reasonable form of Tenant Estoppel Certificate. In the event that, at Closing, Seller has not delivered to Buyer Tenant Estoppel Certificates from the Major Tenants or from tenants demising at least _____ percent (____%) of the tenant space occupied as of the Closing Date, Buyer shall have the right to terminate this Contract and receive a refund of the Earnest Money by giving written notice hereof to Seller on or before the Closing Date. Notwithstanding anything contained herein to the contrary, if Seller has not met the minimum estoppel certificate delivery requirement described above by the Closing Date, Seller shall have the option to extend the Closing Date for up to thirty (30) days in order for Seller to meet such requirement by giving Buyer written notice of such extension on or before the original Closing Date. Buyer shall have the right to terminate this Contract by written notice to Seller and receive a refund of the Earnest Money (a) if any Tenant Estoppel Certificate reveals an uncured event of default by Seller under the applicable Lease or reveals material adverse information that is not consistent with the Rent Roll or the Leases, or (b) if Seller fails to timely satisfy the requirements of this Paragraph _____, or (c) if Buyer's lender's requirements for the number of required estoppel certificates are more stringent than this Paragraph _____, and Seller fails to deliver enough Tenant Estoppel Certificates to satisfy such lender's requirements and Buyer's lender refuses to fund the purchase of the Property due to Seller's inability to satisfy such lender's estoppel certificate requirements (which refusal shall be evidenced by a letter from such lender with a copy delivered to Seller concurrently with Buyer's notice of termination).

Provided that Seller receives the proposed form thereof from Buyer, Seller agrees to request subordination, non-disturbance and attornment agreements ("SNDAs") from each Major Tenant in a form reasonably acceptable to Buyer, any lender making a loan to Buyer in connection with the transaction contemplated hereunder and such Tenant. Buyer shall deliver to Seller the proposed form of such SNDAs as soon as such information becomes available from Buyer's lender but in no event later than the date the estoppel certificates described above have been delivered to the Tenants.

SAMPLE DELINQUENT RENT PROVISION

All Delinquent Rent shall not be prorated on the Closing Date. Rather, with respect to all Leases, Buyer shall cause any such Delinquent Rents for the period prior to Closing to be remitted to Seller if, as and when collected, subject to the following: At Closing, Seller shall deliver to Buyer a schedule of all such Delinquent Rents. (In no event shall Seller be entitled to any Delinquent Rents not set forth on said schedule.) To the extent Buyer receives payment of Rent no matter how identified on or after the Closing Date, unless otherwise required by any applicable Lease, such payments shall be applied first toward the Rent for the month in which the Closing occurs, then to the Rent owed to Buyer in connection with the applicable Lease for which such payments are received, and then to any Delinquent Rents owed to Seller, with Seller's share thereof being promptly delivered to Seller; provided, however, that any year-end or similar reconciliation payment shall be allocated as hereinafter provided. Buyer may not waive any Delinquent Rents or modify a Lease so as to reduce or otherwise affect amounts owed thereunder for any period in which Seller is entitled to receive a share of charges or amounts without first obtaining Seller's written consent. Seller hereby reserves the right to pursue any remedy for damages against any Tenant owing Delinquent Rents and any other amounts to Seller (but following the Closing shall not be entitled to terminate any Lease or any Tenant's right to possession). Buyer shall reasonably cooperate with Seller, at no material out-of-pocket cost to Buyer, in any collection efforts hereunder, but shall not be required to litigate or declare a default under any Lease. Notwithstanding the above, Buyer shall have no obligation to deliver any Delinquent Rent received by Buyer more than fourteen (14) months after the Closing and after said period shall have no further duty to cooperate with Seller with respect to the collection of any Delinquent Rents. With respect to Delinquent Rents respecting any tenants who are no longer tenants of the Property as of the Closing Date, Seller shall retain all of the rights relating thereto. In the event that subsequent to Closing Seller receives any Rent relating to the period from and after Closing, Seller shall promptly remit the same to Buyer. The provisions of this paragraph shall survive the Closing and the Survival Period.

SAMPLE DEFAULT CLAUSE

Buyer shall be in default hereunder if Buyer (i) fails to close timely or deposit any Earnest Money on or before the date the same shall be due and payable as provided hereunder or (ii) fails to comply with any of its other material obligations hereunder and such failure continues for a period of five (5) days after written notice thereof from Seller to Buyer. Upon such default, Seller shall, as its sole and exclusive remedy, be entitled to terminate this Contract upon which the Earnest Money shall be paid immediately to Seller without need of any further action or authorization of either party as full liquidated damages for such default of Buyer, whereupon the parties shall have no further rights or obligations hereunder, except for those which expressly survive any such termination. [NOTE: IN SOME STATES, INCLUDING CA, LIQUIDATED DAMAGE PROVISIONS IN REAL ESTATE CONTRACTS MUST BE SET FORTH A CERTAIN TYPE OF TYPE AND BE INITIALED BY THE PARTIES TO THE AGREEMENT]

Seller shall be in default hereunder if Seller (i) fails to close timely or (ii) fails to comply with any of its other material obligations hereunder and such failure continues for a period of five (5) days after written notice thereof from Buyer to Seller. Upon Seller's default, Buyer may, at its election, as its sole and exclusive remedy, (i) terminate this Contract upon which the Earnest Money shall be paid immediately to Buyer (less the Independent Contract Consideration which shall be paid to Seller) without need of any further action or authorization of either party and Buyer shall be reimbursed by Seller for up to $50,000.00 of its verifiable third party due diligence costs and expenses, whereupon the parties shall have no further rights or obligations hereunder, except for those which expressly survive any such termination, (ii) commence an action against Seller for specific performance of Seller's obligations under this Contract, and if title to the Property is awarded to Buyer, the conveyance will be pursuant to the requirements of this Contract, or (iii) waiver said failure or breach and proceed to Closing without any reduction in the Purchase Price.