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Key Points in Commercial Real Estate Purchase and Sale Contracts: Negotiating Title and Survey Provisions

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In this multipart series, we are examining important points to consider when negotiating commercial real estate purchase and sale contracts from the perspectives of buyers and sellers. Our prior posts addressed negotiating contract terms regarding payment of purchase price and deposit and the due diligence period. In this post, we focus on negotiating title and survey provisions, another important aspect of a typical commercial real estate purchase and sale contract (the contract).

Negotiating Title and Survey Provisions

Addressing title and survey matters (along with other key contract provisions) in the term sheet or letter of intent (the LOI) makes expectations clear, streamlines the contract drafting process, and avoids protracted negotiations to get the contract finalized.

Items to consider include:

- which party will obtain and pay for the title commitment, title company settlement fees, and survey;
- how "permitted exceptions" will be defined;
- deadlines with respect to delivery of the title commitment and survey, the buyer's objection notice, and the seller's time to respond to objections; and
- the seller's obligation to cure defects and the buyer's termination rights.

Allocating Costs for Title and Survey

The parties should clearly define who is responsible for obtaining and paying for the title commitment, including title searches, premiums, title company settlement fees, and the property survey. While customary practices regarding title-related costs vary by jurisdiction, these terms are negotiable, and each party should aim to minimize their own financial responsibility. Although title commitment costs differ by state, buyers typically bear the expense of additional endorsements and loan policies. Survey costs are also generally the buyer's responsibility; however, a buyer may negotiate for the seller to provide a current survey along with a survey affidavit of no change, provided it is acceptable to the title company.

Permitted Exceptions

Buyers will want to limit the scope of exceptions to the title that will be deemed acceptable and not removed at closing to those exceptions that will not materially interfere with the buyer's intended use of the property, the marketability of the property, or the buyer's ability to obtain financing. These exceptions usually include taxes not yet due and payable and utility easements. Sellers will want to define permitted exceptions broadly to include the title company's standard jacket exceptions, zoning and building laws, taxes not yet due and payable, all restrictions of record, items that would be shown on a survey, and any other matters not objected to by the buyer in a timely manner.

Timing

Deadlines for obtaining the survey, title commitment, buyer's objection notice, and seller's response should specify an actual time period – often running from the effective date of the contract – rather than relying on

general requirements such as "promptly" or "within a reasonable time" following the effective date of the contract. Once the title commitment and survey are delivered, the buyer should have a set period of time within which to object to items not deemed permitted exceptions, and the seller should have a set period of time to respond as to whether the seller will agree to cure buyer objections. Buyers will also want to specifically reserve the right to object to any exceptions that become of record after issuance of the commitment and prior to closing. Sellers will want to include a waiver of the buyer's right to object if the objection notice is not provided within the required time period.

Cure and Termination

The seller will want to clarify that they are not required to spend any money to cure non-monetary exceptions and will only be required to cure monetary exceptions of a sum certain prior to or at closing. A buyer should negotiate the right to terminate the contract and obtain the return of deposit monies if the seller is unable or unwilling to remove any unacceptable exceptions to title, which should include exceptions that arise after the effective date of the contract but before closing. The buyer's remedies for the seller's failure to cure non-monetary exceptions should be limited to termination of the contract and the return of the deposit and should not be considered a default by the seller under the contract.

What's Next: Negotiating Representations and Warranties

In our next post, we will examine the importance of negotiating contract terms regarding representations and warranties and will offer recommendations for buyers and sellers to consider.

If you have any questions about drafting and negotiating commercial real estate purchase and sale contracts or handling any aspects of transactional real estate matters, such as commercial leasing, acquisitions and dispositions, title matters, diligence, and financing, contact [Allison S. Mercantini](#) and [Zlata Fayer](#).