Purchase and Sale of Commercial Real Property (TX)

A Practical Guidance® Practice Note by Aaron M. Barton, Branscomb Law

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This practice note explores the key considerations that attorneys and parties to a commercial real estate purchase and sale in Texas should address, from the contract preparation stage through post-closing. This practice note provides guidance for both the seller's attorney and the buyer's attorney. Given that each commercial real estate transaction is unique, be sure to account for those factors that are particular to your transaction, including market trends, the intended use of the property, and the type of financing involved, and discuss them with your client and its other professional advisors.

For additional information on the purchase and sale of commercial real property in Texas, see Purchasing and Selling Commercial Real Estate Resource Kit (TX).

Assessing Your Client's Goals

From a purely practical standpoint, regardless of which party to the transaction you represent, you should have an in-depth interview with your client prior to contract drafting to discuss your client's goals. Price is but one element to consider, and often, too much emphasis is placed solely on negotiating the price. There are other equally important considerations that you need to address with your client. By having the discussion with your client prior to drafting and negotiating the contract, you can ensure that the contract addresses those items explicitly to avoid problems post-execution, when it might be too late to address them.

When representing a seller, you should discuss not just how much the property will sell for and what amount of the proceeds the client wishes to net, but also (among other things):

- Whether the seller will pay certain closing costs
- Whether the seller will retain any interests in the property in the form of a reservation
- When the seller wants the contract to close
- Whether the seller will agree to finance the purchase price if the buyer cannot obtain a conventional loan

The main takeaway for the seller's counsel is to explore all of the potential gains your client can obtain in the transaction, advise your client about the probability of obtaining exactly what it wants, and caution your client on what it risks losing. This will streamline the contract negotiation and drafting process and ensure that you do not overlook a client goal.

When representing a buyer, you should similarly have an in-depth discussion about your client's goals in the transaction. In the buyer context, you and your client should discuss (among other things):

- How your client will pay for the property
- How much of the property your client wants to obtain (fee title or less than fee (e.g., the surface only))
- The potential use of the property
- When your client wants to close the transaction

The main takeaway for the buyer's counsel is to assess the benefits and risks associated with purchasing the property and closing the transaction, and explore the issues that your client might confront once it possesses the property.

Stating Your Client's Goals in Writing – The Letter of Intent (LOI)

Once you and your client have had a discussion about your client's goals, consider preparing an LOI to memorialize the understanding of the parties on the key terms of the deal. When drafting the contract, you will be able to use the LOI as a guide to ensure that you are not leaving out an important deal point that your client identified in the initial interview. Typically, the parties do not intend for the LOI to capture every term of the deal. Instead, the LOI is a short, nonbinding recitation of key deal points, including:

- The purchase price
- The legal description or other identifier of the property
- The length of the due diligence period (if any)
- The closing date
- Allocation of closing costs and fees

The LOI often states that the offer must remain confidential and will expire if the parties fail to sign the LOI and/or the contract by a certain date.

You should ensure that the LOI explicitly states that it is nonbinding to avoid a claim by the other party that the LOI is a binding agreement. When drafting the contract, or when reviewing the contract and drafting counter-terms, use the LOI to help you verify that the contract includes all key deal points. The LOI will not preclude you from including terms in the contract that better protect your client, create additional obligations for the other side, or disclaim certain liabilities.

While not all parties use LOIs in their deals, LOIs can be helpful in structuring transactions and working through basic deal points before the contract stage. Any party to the transaction can prepare the LOI; indeed, the LOI is often prepared not by the lawyers, but by the brokers representing the parties.

For further guidance on LOIs, see Letters of Intent. For a form of LOI to use in your commercial purchase and sale transaction, see Letter of Intent (Commercial Purchase and Sale).

Meeting Your Client's Goals When the Contract Is Already Drafted

In a perfect world, parties to a commercial real estate transaction would not execute a contract without first consulting with their lawyers and, ideally, involving their lawyers in the drafting process. The reality, however, is that a client might approach you with a completed, executed contract. Many times, the contract is a template from the Texas Real Estate Commission or Texas Association of Realtors, with pre-printed terms and conditions that are rather neutral. Other times, though, the parties draft the contract themselves and sign a document riddled with risks, liabilities, representations, and warranties that never would have been included had you reviewed it in advance. When your client presents an executed contract, you can no longer have an in-depth, precontract interview. Instead, your task is to review the contract and provide an honest assessment of the actions your client needs to take to ensure compliance with the contract.

The mere fact that the parties already executed the contract does not mean that you cannot obtain better terms for your client. Consider approaching the other side with proposed amendments to the contract that address your client's goals and clarify the obligations and responsibilities of the parties. The other party might require additional consideration from your client for the amendment (in the form of independent consideration for the seller or a reduced purchase price for the buyer), but the cost might be worthwhile if your client ultimately obtains more favorable deal terms. The contract amendment should be in writing and should affect only those portions of the contract that you intend to modify. The contract amendment should also specifically refer to the original contract so that it is incorporated into the entire agreement as if it was part of the original contract. Even if the parties to the contract did not engage lawyers to draft the contract, you can still serve your client's interests by navigating the closing process with your client and obtaining better terms when possible through contract amendments.

Drafting and Negotiating the Purchase and Sale Agreement (PSA)

In Texas, a contract for the sale of real estate must satisfy the statute of frauds, or it is unenforceable. The contract must be (1) in writing and (2) subscribed by the party to be charged or by the party's agent. Tex. Bus. & Com. Code § 26.01(a), (b)(4)–(5). Any written contract for the sale of real property must state the essential elements of the contract or refer to another writing that states them. See Long Trs. v. Griffin, 144 S.W.3d 99, 105 (Tex. App. 2004). In short, this means that the contract must, at a minimum, sufficiently identify the property to be sold and the price for the sale. Id.

From a practical standpoint, you should draft the contract in a way that clearly describes the subject property, ideally by including a legal description of the property (with metes and bounds) if one is available. If a good legal description is unavailable, at the contract stage you may use the address of the property, or even the county appraisal district's description of the property. The potential pitfall with using an address or an appraisal district's description is that these sources might not be accurate and can create an ambiguity in the contract. That is why it is important to include language in the PSA that the parties will update the property description after obtaining a survey. Further, to ensure that you include the other basic requirement necessary to satisfy the statute of frauds, include the purchase price in dollars and cents, and make the purchase price a defined term.

For further guidance on commercial PSAs generally, see Commercial Purchase and Sale Agreements. For forms of PSA to use in Texas, see Purchase and Sale Agreement (Short Form) (Pro-Seller) (TX), Purchase and Sale Agreement (Short Form) (Pro-Buyer) (TX), and Commercial Purchase and Sale Agreement (Long Form) (TX).

The PSA – Considerations for Seller's Counsel

It is usually standard that the seller's counsel drafts the PSA (though either party's counsel can prepare the draft). When representing a seller during the contract drafting and negotiation stage, consider the items below, especially if you are drafting the PSA.

Title Holder

You will need to identify the proper party (or parties) to name as the seller in the PSA. Review the deed to the seller so that you can assess how your client took title and ensure that the party signing the PSA as the seller actually has the authority to enter into the PSA and sell the land. If the PSA does not properly name the seller (based on a title search), it is prudent practice to prepare and execute a contract amendment to modify the seller name and mirror the true name of the property owner as it appears in a title search or title commitment. Of course, if the title search shows that the party named in the PSA is not the owner of the property, no contract amendment will provide authority for that person or entity to sell the property. In this situation, you need a contract amendment that names the true owner as the seller and is executed by the true owner. By knowing who holds title and in what capacity, you can ensure that the PSA is properly drafted and enforceable.

Reservations

The seller might want to reserve an interest in the sale property. In the commercial real estate context, it is not unusual for a seller to sell only a portion of a larger tract. The seller might want to sell or retain tracts of land adjacent to the subject property for further development and sale in the future. It might therefore be necessary for the seller to reserve access to the retained tracts and other development rights in the form of an easement across the sale property.

Reservations of interests in land usually impact the purchase price, since the seller intends to sell less than the entirety of the tract. The buyer should insist on a reduced purchase price in exchange for allowing the seller to retain an interest in the land, especially if the seller will continue to use a portion of the sale property post-closing. When representing the seller, consider what your client's intended use for neighboring tracts might be. Your client might need a reciprocal access easement, utility easements across the sale property, or other rights. Spell out in the PSA which interests the seller wishes to reserve so that when it comes time to draft the deed, there is no argument about what reservations to include.

The Purchase Price

Usually, the parties have come to an agreement on a fixed purchase price for the PSA. Sometimes, however, if the parties do not know the size of the property or if they plan to calculate the price on a per acre basis, the purchase price might be subject to adjustment once a survey of the property is completed. If the parties have agreed in the PSA to adjust the purchase price based on a survey, use a contract amendment to change the purchase price once the survey is available.

Other times, the seller might not know what a fair price for the property is. To ensure that your client does not severely

undervalue the property, consider ordering an appraisal of the property. While this is an up-front expense for the seller, an appraisal can help your client set the price and limit the opportunity for the buyer to counter at a lower price.

Taxes

It is good practice for you to introduce your client to a tax attorney or other tax advisor (if your client has not already engaged one) when your client is selling commercial real estate. There may be adverse tax consequences that proper tax planning could avoid or mitigate. You might save your client quite a bit of money, and, in turn, build trust with your client. Above all, you want to avoid a situation in which your client is unaware of the potential consequences of the sale. Recommending a tax professional to your client will, if nothing else, give you some protection against claims that you did not fully inform your client about the consequences of the transaction.

Financing

Not all deals are cash deals where a buyer comes to the table with sufficient funds to purchase the property. Indeed, this is rarely the case. Lenders are heavily involved in the purchase and sale of commercial real estate and have their own requirements for a buyer looking to obtain financing. Lenders often conduct their own appraisals of the property and look to the seller to provide due diligence materials for their review. Sometimes, the buyer will seek to include a financing contingency in the PSA, giving the buyer the right to terminate the deal if it cannot obtain financing from an institutional lender.

To ensure that insufficient financing does not bring the deal to a halt, your client might be willing to finance a portion of the price while the buyer obtains the remainder from its lender. Note that seller financing does create its own issues. The parties will need to capture the terms of the financing—including the interest rate, maturity date, amount financed, and repayment—in an addendum to the PSA. Many sellers simply want to sell their property and move on. That said, losing a sale due to lack of financing can often be avoided if the seller is willing to offer partial financing.

For further guidance on commercial real estate acquisition financing transactions in Texas, see Commercial Real Estate Acquisition Loan Resource Kit (TX).

Liens

At closing, the seller will have to satisfy existing liens against the property (evidenced by a recorded deed of trust or other security instrument) that the seller created; otherwise, these liens will survive the closing and remain on the property. No buyer willingly purchases property with a lien against it unless the buyer intends to assume the lien. Sometimes, a buyer will agree to proceed with a purchase and assume a lien—even if the sale proceeds will not be sufficient to satisfy the lien—because the buyer sees great value in the property. As the seller's counsel, once you know how much money your client wants to net from the deal, you will need to work with your client to obtain information about all liens against the property. This will help you evaluate (1) the amount necessary to satisfy the liens, (2) the amount that your client will net after paying the liens, and (3) whether your client should consider a potential assumption arrangement with the buyer to meet your client's financial goals. If the parties are considering an assumption, you should review your client's loan documents and the lien instrument to ensure that they permit an assumption, and alert your client to the lending institution's requirements (and fees) for assumption.

Leases

When preparing the PSA, keep in mind the existing third-party leases on the property. Leases often survive a transfer of real property, requiring a buyer to step into the shoes of the seller as a landlord. Sometimes, the leases (and rents they generate) are the reason a buyer is interested in purchasing commercial real estate. An undisclosed lease or a long-term lease, however, might interfere with a sale, especially if the lease requires notice of termination. This means that you need your client to identify all leases before you draft the PSA so you can adequately consider the effect of the leases and how to address them in the PSA.

Representations and Warranties

- **Scope.** When drafting seller representations and warranties in a PSA, you will need to consider the parties' competing interests. The scope of the seller's representations and warranties should be sufficiently broad to make the buyer comfortable in proceeding with the deal, but limited enough to protect your client from post-closing claims.
- **As-is.** You will do your client a service if you ensure that the PSA provides the property will transfer "as-is, with all faults." Typically, this language addresses the physical characteristics of the property and improvements, rather than warranties of title (see "Warranties of Title" below). By inserting this statement in clear and conspicuous language in the PSA, you will limit your client's potential exposure post-closing, because the buyer will not be able to look to the seller for recourse if there is a defect in the property or improvements.

- **Diligence.** The seller's ability to further disclaim liability is enhanced when the seller provides a due diligence period to the buyer to inspect the property prior to closing. Your client might not like the idea of granting a due diligence period to the buyer, but it is in your client's long-term interest to allow the buyer that right.
- **Knowledge qualifier.** In the PSA, the seller also often represents that the materials that it provided to a buyer in due diligence are true and accurate. As the seller's counsel, you should limit those representations "to the best of the seller's actual knowledge." With this qualifying language, the representations are no longer stated as fact, but are limited to those specific facts known to the seller at the time that it made the representations. Adding a knowledge qualifier can make a significant difference; it might be enough to limit your client's potential liability if the buyer claims post-closing that the seller's representations were false.
- **Survival.** Limit the amount of time that representations and warranties survive post-closing. Usually anywhere from six months to one year after closing and transfer of title is sufficient for both a buyer and seller. The goal of limiting the duration of the representations and warranties is to provide your client with finality once the property is sold and protect your client from post-closing claims.

Warranties of Title

The seller should convey the property under a special warranty deed, with broad exceptions to conveyance and warranty, and not under a general warranty deed. The special warranty of title is a warranty against title defects and encumbrances arising only "by, through, or under" the seller. In other words, the seller warrants only that it did not create any title defects or encumbrances other than those that it will address at closing. The seller is not warranting against title defects and encumbrances further up the chain of title or otherwise outside of the seller's control (which would be covered by a general warranty of title).

Using broad exceptions to conveyance and warranty (e.g., all interests and encumbrances of record other than liens created at closing) will protect your client from claims of breach of the warranty of title; if the claim arises from any interest of record, your client has disclaimed liability for it. This is the classic "buyer beware" situation, where it is incumbent on the buyer to examine title, or purchase title insurance, to protect itself. Most buyers' attorneys will push back and ask for permitted exceptions only as exceptions to warranty. Permitted exceptions are those items noted in Schedule B of the final title commitment that the title company issues at closing. Sellers customarily agree to limit exceptions to the Schedule B permitted exceptions, but when drafting the PSA on behalf of the seller, you should simply state that the deed will be a special warranty deed with the standard exceptions to conveyance and warranty. The onus should be on the buyer's attorney to limit the exceptions to the permitted exceptions. The more your seller can disclaim from the warranty of title, the better protected it will be.

For forms of deed to use in Texas, see Purchasing and Selling Commercial Real Estate Resource Kit (TX).

While the items listed above are not exhaustive, they all impact the seller and you should consider and address them when drafting and negotiating the PSA for your client. Otherwise, your client might face unintended, adverse consequences when selling its commercial real property. Give your client the peace of mind of knowing that you are protecting it not just during the contract phase of the deal, but well into the future.

The PSA – Considerations for Buyer's Counsel

While the seller's counsel typically drafts the PSA, there are times when the buyer's counsel prepares the initial draft. The buyer's counsel should consider the items discussed below when reviewing the seller's draft or preparing the PSA.

How Title Will Vest in the Buyer

Even though the PSA might list the buyer in their individual capacity, it might not be best for your client to be individually liable for and bound by the terms of the PSA. Further, taking title as an individual might not be the best choice for your client. If your client has already signed the PSA in their individual capacity but it would be preferable for them to complete the closing in some other capacity (e.g., as trustee of a trust or a member of a limited liability company), consider assigning the PSA to another entity that your client has control over. This would also likely assist your client in avoiding potential adverse tax consequences if they were to take title in their individual capacity and then subsequently transfer title to an entity soon after the closing.

A word of caution: Many times, PSAs include language expressly permitting or prohibiting assignment. If you are still in the negotiation process, you should certainly include language allowing your client to assign the PSA. If, however, the PSA has already been signed and prohibits assignment, then under the terms of the agreement your client will have to close the deal and take title in their individual capacity. On a purely practical level—and regardless of the

language in the PSA—a zealous advocate would simply ask for the seller to allow an assignment; the seller might say no, but if the seller agrees, you will have helped your client immensely.

Zoning and Restrictions on Use

It is essential for you to ask your client about its intended use of the commercial property. Often, there are zoning codes and use restrictions that preclude certain uses, especially on properties near residential developments. Once you have an understanding of your client's proposed use of the property, you should review the local municipality's zoning and use ordinances to assess whether the use is allowed. If the property is not subject to a zoning ordinance or if the current zoning classification does not preclude your client's intended use, you must then determine whether there are certain use restrictions (in the form of restrictive covenants) burdening the property that might limit potential uses. Certain properties might have restrictive covenants permitting only residential uses. Your client's plan to open a commercial enterprise on property restricted for residential use only would likely lead to a loss for your client.

Even if there are zoning and use restrictions on the property, you might be able to obtain variances, modifications, or releases to allow the buyer's intended use. Note, however, that obtaining these often involves lengthy and costly processes and your client is not guaranteed a favorable result, and it might be preferable for your client to locate a new piece of property. If your client insists on pursuing a specific property and is willing to undertake the variance/modification process, be sure to include language in the PSA that (1) extends the closing to give your client time to obtain the relief it seeks and/or (2) makes closing contingent on obtaining such relief. Note that a seller will not agree to hold the property under contract indefinitely, and might require independent, nonrefundable consideration in exchange for an extension or a contingency.

For further guidance on zoning review, see Planning and Zoning.

Due Diligence / Feasibility Period

Every PSA should give the buyer the right to perform due diligence of the property and to terminate the PSA, without liability, for any reason or no reason at all before the due diligence period expires. In exchange, the seller will likely expect the buyer to pay independent consideration in the form of earnest money (which is sometimes nonrefundable). When negotiating a PSA on behalf of a buyer, be sure that the independent consideration will be applied to the purchase price at closing.

The scope of due diligence and the length of the due diligence period can vary based on a variety of factors, including the complexity of the transaction, the features of the property, and the amount of money that the buyer plans to invest in the property. Further, the buyer might be able to extend the due diligence period at an additional cost. Often, a seller will increase the amount of independent consideration that it requires for each diligence extension. Each day that the buyer pushes the closing, the seller faces the risk that the buyer will terminate the deal without liability. By requiring additional consideration for each extension, the seller shifts some of the risk to the buyer and makes each delay more costly for the buyer. To avoid paying additional up-front costs and potentially forfeiting a large sum of money to the seller, the buyer should consider early on how much time it will need to conduct its due diligence.

It is during the due diligence period that the buyer will:

- Review the seller's information pertaining to the operation of the property (including current leases and other financial information if it is an income-producing property)
- Conduct site assessments
- Review title issues and assess curative measures

During due diligence, you and your client should focus in particular on:

- Environmental issues that might create liability and require remediation prior to closing
- Zoning and use restrictions that would preclude the buyer's intended use
- Defects in the property or improvements that could create future liabilities and potentially impact marketability

For further information on environmental review during due diligence, see Environmental Due Diligence in Real Estate Transactions.

Discuss with your client whether there are any particular inspections that might be necessary to inform your client of the risks, or lack of risks, in proceeding to closing. The due diligence period is also often the time when the buyer will attempt to finalize financing issues with its lender and obtain permits or approvals from governmental authorities (if required) to lawfully operate its business at the property.

The main takeaway for the buyer's counsel is to negotiate or draft the PSA in a way that allows the buyer to terminate the PSA for any reason with minimal liability and obtain a refund of all earnest money, minus the independent consideration paid. Once the due diligence period lapses, your client's ability to terminate the PSA

will become very limited and, most often, your client will be forced to close the transaction. For this reason, while buyers often conduct due diligence themselves, you should closely monitor the diligence timelines and assist your client in reviewing and requesting diligence material as needed.

Parties in Possession

Commercial properties often are income-producing properties where third-party tenants pay the owner rent to use and occupy the property. These leasing arrangements might be:

- Ground leases to use the property for a certain commercial operation or to conduct sales from the property
- Grazing or agricultural leases to use the property for farming and ranching operations
- Retail leases with shopping center tenants
- Office leases with tenants leasing space in office buildings

Be aware of all parties in possession at the property and assist the buyer in requesting and reviewing all lease agreements between the seller and the tenants. Leases typically continue through a sale, with the buyer becoming the new landlord. Lease agreements are often a motivating factor for a buyer in purchasing commercial real estate due to the income stream they produce. It is important that you review the leases and advise the buyer about potential obligations, representations, and liabilities that the buyer will assume once it acquires the property. Further, you should advise your client about what the leases permit and prohibit at the property, and what rights the tenants have (such as audit rights and use of common areas). Be sure to alert your client if the leases impose limits on the landlord's control over or use of the property, particularly if the lease terms are long.

In addition to reviewing all leases at the property, the buyer should require all tenants to deliver estoppel certificates that:

- Identify the leases
- Confirm that the leases are current
- Confirm that there are no defaults (on the part of the tenant or the landlord)
- Ratify the terms of the leases

This will help avoid post-closing disputes over the content or validity of the leases. For more on tenant estoppel certificates, see Tenant Estoppel Certificates in Commercial Purchase and Sale Transactions. For a form of tenant estoppel certificate, see Tenant Estoppel Certificate (Commercial Purchase and Sale).

The goal of lease review is to make the buyer comfortable that it is purchasing valuable, performing leases and not potential liabilities. It is important that you understand the third-party rights that exist at the property, and the extent and duration of those rights, in order to give the buyer a complete picture of the asset it is purchasing.

Reservations by the Seller

As discussed above, a seller might want to retain interests in the sale property for future development of neighboring tracts. You should closely review and negotiate all reservations that allow the seller to retain some form of possession over the property post-closing. Take care to clearly define and limit all reservations in favor of the seller. If the seller seeks to retain an easement to access neighboring tracts, make sure to define the easement (length, width, location, and scope) in the PSA to avoid post-closing arguments. The seller will likely want a broad easement that it can use freely to support its neighboring tracts. When representing a buyer, you should push back against a broad easement and instead define it narrowly to ensure that the seller's use of the easement will not interfere with your client's use of the sale property.

If the seller's reservation will burden the sale property, negotiate a lower purchase price for your client. If the seller needs the reservation to support neighboring tracts, and particularly if the easement will increase the value of the neighboring tracts, the seller will likely be inclined to compromise with the buyer on price and other deal points.

Seller Representations and Warranties

Given that the seller is the party with knowledge about the condition of the property, the buyer will expect the seller to make property-level representations and warranties in the PSA. The value of representations and warranties, while difficult to quantify, is significant to a buyer. You should ensure that the seller's representations and warranties are clear and not limited by the seller's actual knowledge. The statements should be as definite as possible, without room for ambiguity or qualification.

The seller will likely attempt to limit survival of its representations and warranties. Some sellers will argue that their representations and warranties should not survive closing, while others might offer a 90-day post-closing survival period. It is not reasonable to expect a seller to give lifelong representations and warranties, but it is reasonable for a seller to stand by its representations and warranties for a sufficient amount of time post-closing to

protect the buyer from issues that the seller should have disclosed before closing. When representing a buyer, try to negotiate for a one-year survival period. This will give your client peace of mind knowing that once the deal closes, the seller will not be allowed to walk away with the purchase price and without liability for wrongs that the seller should have addressed. A seller refusing to stand by its representations and warranties might signal an underlying issue at the property.

Warranties of Title

When representing a buyer, you should insist on a general warranty deed, with only limited exceptions (sometimes called permitted exceptions) to the warranty of title. A general warranty of title is a broad warranty that the seller holds title and that title is good and as represented. It warranties against title defects and encumbrances, whenever created. The permitted exceptions are those contained in the title commitment that the title company issues at closing. By limiting the exceptions to warranty to the permitted exceptions, title insurance will likely cover your client if claims to title (other than those listed as exceptions to warranty) arise after closing. Be sure that the PSA specifies the type of deed that the seller will deliver at closing, as these warranties are material to the transaction.

Take care to consider and address all of these issues when representing a buyer to avoid unintended adverse consequences. The points discussed above will help you best advocate on behalf of your client during the contract phase and protect your client once it is in possession of the property and attempting to realize its investment.

Closing the Deal

Often, the PSA becomes effective—and the due diligence period commences—once the title company receives the signed PSA and the earnest money. At that point, counsel to both parties can begin working toward closing the PSA and completing the deal.

Closing Process – Considerations for Seller's Counsel

When representing the seller, you should ensure that the closing proceeds efficiently; that way, your client can receive payment and divest the property without delay. Delay can often work to the benefit of the buyer. With that in mind, consider the points below in order to streamline the closing process and protect your client's interests.

Delivery of Due Diligence Materials

Make sure that the seller understands its obligations during the due diligence period. You will likely have to help your client locate and deliver the due diligence materials that the parties agreed to during PSA negotiation. If the buyer's attorney makes additional due diligence requests, review them to confirm that they are consistent with the terms of the PSA. The due diligence period should not be an opportunity for the buyer to learn everything there is to know about the seller and its business. Instead, due diligence should be limited to the information necessary for the buyer to make an informed decision as to whether the property is suitable for the buyer's intended use. Push back against unreasonable or overly broad requests and make sure to assert the confidentiality of the materials provided.

Title Commitment Review

Prior to closing, the title company will issue a preliminary title commitment listing items that the seller will need to cure. In Texas, these seller encumbrances appear on Schedule C to the title commitment. When you receive the title commitment, you might see loans that the seller will need to pay off and judgments that the seller will need to satisfy and release. Schedule C might also list requirements concerning title defects or questions of ownership. The apparent owner of the property will be shown on Schedule A to the title commitment. If the owner named in title is not the seller named in the contract but is instead a related party (e.g., an affiliated entity, a trust, or a family member), consider amending the contract to reflect the record ownership; this will help avoid claims that your client lacked the authority to execute the contract. If the record owner and your client are neither the same nor related entities, the title company will likely require that you show how your client claims ownership of the property.

All of these seller-related title items are commonly referred to as seller cure items. The seller can attempt to cure them with, among other things, affidavits of fact, correction deeds, title transfers, and releases. When representing a seller, give special attention to these seller cure items and related title company requirements. Failing to address these items properly—and to the satisfaction of the title company—may give the buyer cause to terminate the contract. Remember, though, that you should dispute Schedule C items if there are grounds to do so. If you can show the title company's underwriters that a given Schedule C item either does not apply or has already been cured, the title company should delete that item from the title commitment. Communication with the title company on behalf of your client throughout the closing process is essential.

Payoffs

If the seller has any outstanding loans, judgments, or other costs secured by a lien on the property, you should assist your client in obtaining payoff. The title company typically uses sale proceeds to satisfy payoff amounts at closing. You should therefore review all payoff statements carefully with your client before submitting them to the title company to ensure that they reflect the true amounts due; otherwise, the payees may not release their liens and your client may not be able to deliver clean title to the buyer at closing.

Deed Preparation

Typically, the seller's attorney prepares the deed for the closing. Even if the title company has preferred counsel for deed preparation, you should insist on preparing the draft to maintain control over the warranties and disclaimers that appear in the deed. It is best practice to have the PSA available when drafting the deed to ensure that you reflect the parties' intent and agreements. To best protect your client, keep the following in mind:

- If the PSA contains language that the property will be conveyed as-is, take care to include strong as-is language in the deed.
- Be sure to prepare the type of deed that the PSA requires (e.g., general warranty deed, special warranty deed, or other type).
- Unless the PSA requires otherwise, prepare the draft with broad title exceptions to warranty; the burden should be on the buyer and its counsel to limit the breadth of exceptions to conveyance and warranty.
- Include all reservations to the conveyance that the parties agreed to in the PSA.

Review of Closing Documents

The title company will prepare and deliver certain items to the seller for review, such as closing statements and affidavits concerning title and ownership issues. As the seller's lawyer, you should closely review the closing statement to confirm that the prorations are accurate and that the seller is paying only those items that the seller agreed to pay in the PSA or that sellers customarily pay (e.g., title insurance policy and one-half of the title company's fee). Of utmost importance, ensure that the closing statement reflects the correct purchase price and the correct amounts and payees of all loans, judgments, and outstanding interests that will be satisfied at closing.

For more information on closing documents, see Closing and Other Ancillary Documents Required for Commercial Real Estate Purchase and Sale Transactions.

Each closing will have its own particular issues, but the above are considerations that will be pertinent to all closings where you represent a seller.

Closing Process – Considerations for Buyer's Counsel

When representing the buyer during the closing process, your goal is to ensure that the buyer takes good title to the property with the fewest potential defects, encumbrances, and other issues that may be costly to remediate in the future. Accuracy and thoroughness are much more important than speed of closing. Indeed, rushing to close often leads to unintended consequences that can burden a buyer post-closing. Below are the main considerations to keep in mind when representing a buyer in the closing process.

Conducting Due Diligence

Remember that the due diligence period is a limited, often short, period of time. Your first task should be to note the due diligence deadline and help your client meet it. Be sure that your client is aware of the deadline and calendars it. You then should prepare a checklist of items to review during the diligence period to make sure that, when the seller delivers the due diligence materials, nothing is missing. For a sample due diligence checklist, see Commercial Purchase and Sale Due Diligence Checklist.

If the seller is slow in delivering due diligence materials, promptly reach out to the seller's counsel. The seller will likely want to close quickly; to incentivize the seller to cooperate, let the seller's counsel know that a delay in delivery may lead to a delay in closing.

As you review due diligence materials with your client and as your client conducts inspections at the property, highlight those legal issues that might create trouble or interfere with your client's intended use of the property. If diligence review raises concerns and your client decides against closing, be sure to provide yourself with ample time to prepare a PSA termination letter. In the letter, (1) state that the termination is pursuant to the due diligence rights afforded the buyer in the PSA and (2) instruct the seller (or request that the seller instruct the title company) to release the earnest money to your client (minus any independent consideration).

Title Commitment Review

Schedule B to the title commitment lists potential title issues. Schedule B, Section 10 of the title commitment generally contains the title issues specific to the subject property. The commitment identifies deed restrictions,

easements, leases, encroachments, and other issues to the extent they impact the property. You should request copies of all title exception documents identified on Schedule B and review them carefully to ensure that they do not contain anything that might preclude your client's ability to use the property as intended.

Note that not all items identified in Schedule B necessarily impact the property, especially when the subject property is a section of a larger tract. Once you review title, you should prepare a title objection letter identifying all items that the title company should delete from the commitment and the grounds for deletion. For example, Schedule B might identify an access easement on the western boundary of the property. If your client is purchasing the eastern half of the property, the easement would not affect the sale property and you should object to the exception in your letter. The title company's underwriters will review the objection and either delete the exception or provide a reason for keeping it in title. You should be sure to complete this exercise during the due diligence period; the title company's refusal to delete an exception might affect the permitted use of the property and give your client reason to terminate the PSA. Telegraphing a termination of the PSA might have the added benefit of prompting the seller to engage in curative efforts so it does not lose the sale.

Title exceptions benefit the title insurance companies and the seller, not the buyer. As the buyer's counsel, your goal should be to limit exceptions to coverage and warranty. The Schedule B items that you do not object to (or those that the title company refuses to omit) will become title coverage exceptions under the final title policy. The buyer will not be able to rely on title insurance to address a claim arising from one of the items excepted from coverage. Therefore, it is necessary that you carefully review the proposed title exceptions and object when appropriate to best protect your client and obtain broad coverage. Further, given that the seller's counsel will annex the final Schedule B exceptions to the deed, it is best to list as few exceptions as possible. With fewer exceptions, the buyer will have greater recourse against the seller under the warranties of title.

For further guidance on reviewing and objecting to a title commitment, see Title Insurance.

Survey Review

There are various types of surveys. Some show just the boundary lines of the property. Others show interests in the land, such as easements, both recorded and visible and apparent. Still others show constructed or proposed improvements and proposed easements that might be part of the transaction.

Once the seller delivers the survey, you should review it to:

- Ensure that neighboring land does not encroach onto the sale property and that the sale property does not encroach onto neighboring land
- Identify third-party possessory interests in the property (e.g., easements)
- Determine if setback lines will impair the buyer's ability to construct improvements
- Locate the access points to the property from public rights-of-way (or alert your client if there is a lack of access)
- Confirm that the metes and bounds legal description of the property is accurate

The survey will also provide an updated legal description of the property to use for the deed and other closing documents.

Note that once the title company receives the survey, it should revise the title commitment to delete survey exceptions from Schedule B. It is your duty as the buyer's counsel to ensure that the title company actually does delete the survey exceptions, either by way of a formal objection letter or by directly contacting the title company and requesting the deletion in writing.

For further guidance on survey review, see ALTA Survey Review and Title Insurance.

Deed Review

While it is typical for the seller's attorney to draft the deed, you should review and approve the deed prior to closing. Make sure that the deed is in the form that the parties agreed to in the PSA (e.g., general warranty deed, special warranty deed, or other type). Further, avoid general exceptions to conveyance and warranty and those that refer broadly to all items of record. Instead, make sure that the exceptions to warranty mirror only those exceptions contained on Schedule B, Item 10 of the final title commitment.

Loan Document Review

If your client is obtaining financing, you will receive loan documents from the lender's counsel as part of the closing. Review the loan documents to ensure that they correctly state the loan amount and all other terms of the financing. Advise your client as to the obligations and liabilities that it is incurring by executing the loan documents. You can often

negotiate the loan documents; indeed, you should attempt to minimize your client's exposure by limiting the borrower representations and warranties they contain. Further, you might be able to negotiate some of the events of default to make them less burdensome, or to extend notice and cure periods. Careful review of the loan documents is just as important as a careful review of the deed of conveyance to the property, because the loan documents create interests in the property that will affect your client well into the future.

For further information on commercial real estate financing transactions in Texas, see Commercial Real Estate Acquisition Loan Resource Kit (TX).

Review of Closing Documents

Finally, review the closing documents that the title company prepares. When reviewing the closing statement for the buyer, confirm that:

- The purchase price reflects the price agreed to in the PSA
- All earnest money deposits are applied against the purchase price, if the parties so agreed
- The loan amount is accurate
- Tax prorations are correct and allocated as agreed in the PSA
- All costs assessed against the buyer mirror the PSA requirements
- All loan and lien payoffs (with per diems, if applicable) are in the correct amounts

Each transaction involving the purchase and sale of commercial real estate is different and contains particular considerations, but all generally follow a blueprint, of sorts. Ensuring that you address the key considerations in this practice note will provide you with a solid foundation for guiding your client, seller, or buyer, through a typical commercial real estate transaction in the state of Texas.

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Aaron M. Barton is a member of the firm's Business and Real Estate Groups. Aaron has been practicing law for over a decade, representing businesses, title companies, developers, lenders, and individuals in a wide variety of business, financing, leasing, and real estate transactions. Prior to joining Branscomb Law, Aaron also represented title insurers and businesses in business and real estate litigation matters. This experience has assisted Aaron in delivering legal services to the firm's clients with an eye to avoiding litigation, and structuring transactions to better protect clients in the event a dispute arises in the future.