Important Aspects of Commercial Real Estate Sale and Purchase

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Before Purchase Agreement is Executed

Pre-Purchase Agreement

- Letter of intent
- Gathering due diligence
- Early access agreement
- Confidentiality agreement
- Financing considerations (Buyer)
- Brokerage agreement
- Prepare property for sale

Letter of Intent

- Critical terms
  - Purchase price
  - Earnest money
  - Due diligence period
  - Seller contingencies
  - Buyer contingencies
  - Closing date
  - Title company / escrow agent
- See sample LOI (Exhibit A in handout)

Letter of Intent

- Additional terms
  - Allocation of closing costs
  - Allocation of purchase price (real vs. personal property)
  - Early access
  - Debt assumption
  - Confidentiality provision

Gathering Due Diligence

- Standard due diligence materials
  - Title evidence
  - Survey
  - Environmental reports, wells, tanks
  - Operational documents
  - Leases / rent roll
  - Contracts
  - Plans
  - Budgets / financial information
  - Licenses, permits, certificates warranties

Gathering Due Diligence

Practice Tips:

- Pay attention to timing of delivery of due diligence materials. If due diligence is extensive, it may make sense to tie the expiration of due diligence period to the delivery of all due diligence materials.
- Specify what obligations the seller has to update due diligence materials after original delivery

Early Access Agreements

- Seller side
  - Key items
    - Buyer carrying appropriate insurance
    - Buyer indemnifying seller against damage / liability
  - Advantages
    - Reduces due diligence period under contract
    - Helps determine buyer's likelihood of proceeding
  - Disadvantages
    - Potential delay of executing purchase agreement
    - Discovery of environmental issues / obligation to notify regulatory agency

Early Access Agreements

- Buyer side
  - Key items:
    - Define scope and length of access
    - Not inheriting pre-existing problems (e.g. environmental conditions)
  - Advantages
    - Ability to conduct testing and investigations without earnest money or negotiation of full purchase agreement
    - Jump start on due diligence to identify whether additional testing is required (e.g. Phase II)
    - Accelerates deal timeline and closing date
  - Disadvantages
    - Spending money without executed purchase agreement
    - Seller may continue to market property for sale / risk of losing the deal
    - Accelerates deal timeline and closing date
  - See sample Early Access Agreement (Exhibit B in handout)

Confidentiality Agreement

- Important where parties do not wish to disclose deal terms or names
- Protects parties' confidential information during negotiation of purchase agreement
  - Buyer's financial information
  - Seller's property information
  - Purchase price and critical terms
- Control press releases
- May be included in LOI
  - Practice tip: ensure that confidentiality provisions are binding even if the rest of the LOI is not binding
- See sample confidentiality agreement (Exhibit C in handout)

Financing Considerations

- Seller side
  - Understand prepayment and payoff terms, conditions and fees for existing loans
  - Consider whether partial release is necessary
- Buyer side
  - Retain a mortgage broker
  - Solicit term sheets from potential lenders
  - Gather financial due diligence for mortgage underwriting
- **<u>Practice tip</u>**
  - Early lender selection can help ensure lender requirements are covered in purchase agreement (e.g. SNDA forms, due diligence, title and survey requirements, insurance)

Brokerage Agreement

- Interview commercial real estate brokers
- Seek broker with experience in your specific sub-market
- Compare commission fees and schedules
- Explore level of service to be provided
- Consider whether brokerage firm can provide additional services for discounts (e.g. sales and loan brokerage)

Preparing Property for Sale

- Consider whether cross-access / parking / utility rights will be required after sale
- Consider retention of exclusive rights benefiting seller
- Address potential title defects / issues / boundary disputes
- Locate existing title information and survey
- Determine zoning compliance

Purchase Agreement

Effective Date

- Official kick off date for all time periods (e.g. earnest money deposit, delivery of property information, due diligence period, closing date)
- Best practice: sign off by escrow agent or other confirmation that effective date has occurred
- Specify consequences for failure of occurrence of effective date

Earnest Money

- Require funds to be held in state where property is located
- Specify whether interest-bearing; provide W-9 if parties wish to collect interest
- Specify under what circumstances earnest money is refundable

Delivery of Property Information/Due Diligence Period

- Seller's Side Preferences
  - Due diligence starts on effective date (irrespective of date of delivery of all property information)
  - Finite list of deliverables and no updates required
- Buyer's Side Preferences
  - Receipt of <u>all</u> property information triggers start of due diligence
  - Broad list of deliverables with seller obligation to update deliverables

Title & Survey

- Seller should review and provide existing title and survey information
- Purchase agreement to specify who is responsible for ordering new commitment and updated survey
- Buyer reviews as part of due diligence
- Buyer should specify Table A requirements for survey (and include lender requirements)

Zoning / Development

- Obtain confirmation of current zoning status
  - Zoning letter from municipality
  - Attorney/buyer investigation
  - PZR report
  - Flood certification
- Determine any land use needs
  - Conditional use permits, variances, zoning changes
  - Subdivision / lot split or shift

Lender's Title / Survey Concerns

- Obtain lender requirements for loan policy
- Obtain lender requirements for survey, including survey certification
- Order lender-required searches
- Seller should contact existing lenders for payoff information and UCC terminations

Practice Tips on Due Diligence Timing

- Order third-party reports promptly
- Ensure purchase agreement is clear on title review timelines
- Pay attention to interplay among title review period, due diligence period and closing date

SNDAs and Estoppel Certificates

- Subordination, Non-Disturbance and Attornment Agreements
  - Obtain lender requirements and form
  - Consider timing, lease requirements, penalties for tenant failure to deliver
- Estoppel Certificates
  - Both buyer and lender may require
  - Determine minimum buyer/lender requirements

Executory Period

- Define seller's rights to operate property during executory period
  - New leases / amendments
  - Improvements
  - Contracts
  - Insurance

Determination of Closing

- Purchase agreement should specify method, time and location of proposed closing
- Consider attaching key closing documents as exhibits to purchase agreement
- Pay attention to lender requirements and timing (both existing and new lender)

Buyer Financing

Due Diligence Considerations for Borrowers and Lenders

- Rate lock timeframe / closing date deadlines
- Lender's zoning and title review
- Lender lead-time items
  - Appraisal
  - Phase I / Phase II
  - Flood certificate
  - Property condition report
  - Assignments of existing loan documents
  - Assignments of property-related documents
- Opinion of Counsel

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Lender Closing Requirements

- Loan documents – request and review as early as possible
- SNDAs and estoppels
- Loan title insurance policy and required endorsements
- Timing and location
- Seller financing payoff requirements

Prepare for Closing

Closing Deliverables

- Form of deed
- Title company requirements
- Authority documents
- Bill of sale
- Lease documents
- Other assignments
- Original documents

Settlement Statement

- Purchase price
- Earnest money
- Recording fees
- Escrow / closing fees
- Brokerage fees
- Attorneys' fees
- Title insurance costs
- Prorations (taxes, leases, etc.)

Closing Administration

- Escrow instruction letter
- Tenant notice letters
- Delivery of original documents
- Final utility readings
- Keys and codes
- Transfer of files
- Closing book

Contact Info

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