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NEGOTIATING PURCHASE AND SALE AGREEMENTS AS TO IMPROVED AND UNIMPROVED REAL PROPERTY

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I. Introduction.

This presentation will address selected issues that arise in connection with the negotiation of purchase and sale agreements of real estate in a commercial context. There are as many different types of purchase and sale agreements as there are different types of real estate: improved vs. unimproved property; retail vs. office; residential vs. industrial.

My presentation will concentrate on selected provisions of a typical non-income producing improved real property purchase and sale agreement and address negotiation points with respect to each such provision. If we have time, we will also address some special issues related to the sale and purchase of undeveloped land and income producing improved property. I have attached as Appendix A a form of real estate purchase and sale agreement that includes many of the provisions that are addressed in this paper.

II. Letters of Intent.

It is becoming more and more common to commence the negotiation of a purchase and sale agreement with a non binding letter of intent in place. Attached as Appendix B is a form of a non-binding letter of intent.

The purpose of the letter of intent is to make certain that the parties are in general agreement with the significant terms and provisions of the sale and purchase prior to incurring the time and expense of negotiating the entirety of a purchase and sale agreement. More often than not, a letter of intent is entered into without the input of counsel. It is important that if you are working with brokers or associates that want to put a letter of intent in place, make certain that the letter of intent expressly states that it is non-binding on the parties until a definitive purchase and sale agreement has been entered into between the seller and purchaser.

Even though a letter of intent may be non-binding as to the actual sale and purchase of the real property, such instrument can include provisions that will be binding on the parties, such as an agreement to negotiate in good faith or an agreement by the seller not to entertain any other offers while such negotiations are taking place.

III. What is being conveyed.

A. Land.

An agreement for the sale and purchase of real property necessarily includes land as part of the property being transferred or conveyed. Section 1.01 of the

Purchase and Sale Agreement attached as Appendix A is a typical description of the land being conveyed. A proper legal description of the land is usually a reference to a lot or reserve described in a recorded plat or a metes and bounds description of the land prepared by a licensed surveyor.

One of the major shortfalls I encounter with respect to real estate purchase and sale agreements is that the description of the land is legally insufficient and may make the purchase and sale agreement unenforceable. The legal description should be sufficient to enable a party familiar with the locality to identify the premises to the exclusion of other premises. *Morrow v. Hotwell*, 477 S.W.2nd 538, 539(Tex. 1972); *Siegert v. Seneca Resources Corp.*, 28 S.W. 3rd 680, 682-683 (Tex. Civ. App.—Corpus Christi 2000, no pet. h).

Occasionally, there may be a situation where the land is being divided and there is no existing metes and bounds description. Section 1.02 of the Purchase and Sale Agreement attached as Appendix A is a provision that I have seen used in an attempt to deal with those situations where at the time the agreement is signed a metes and bounds description is not available. If the land does not abut a publicly dedicated street, access may be by means of an easement. If this is the case, the description of the land should also include a description of such easement rights.

B. Improvements.

Conveyance of real property necessarily includes any improvements that are permanently affixed to the land, such as buildings, parking lots and other permanently affixed improvements. In the rare situation where a building is to be removed or destroyed prior to conveyance, language should be added to the purchase and sale contract to address such a situation.

C. Fixtures, Equipment and Furnishings.

Equipment or trade fixtures are commonly affixed temporarily to the Improvements located on the land to be conveyed but may not be intended to be part of the conveyance of real property. If this is the situation, again, specific provisions should be added to the agreement to allow for removal of these trade fixtures, including a provision to deal with the damage to the remaining improvements relating to such removal. Personal property such as equipment and furnishings are not normally included as part of a non-income producing agreement of purchase and sale for improved real property. If it is intended that equipment and/or furnishings are to remain with the land and improvements, the contract should specifically add this personal property to the description of what is being conveyed.

D. Contracts.

Many improved real estate properties are subject to contracts affecting the management, operation and/or use of such properties. The most common of such contracts, especially in the context of income producing properties, are leases of the property. A prudent purchaser should require that all contracts to be transferred and

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