

COMMERCIAL PURCHASE AGREEMENT FORMS – COMPARISON OF DIFFERENT TYPES OF KEY PROVISIONS

I. INTRODUCTION

For many real estate attorneys and brokers, the longer that we are in the business, the more accustomed we become to doing things a certain way. Often we assume – wrongly – that everyone else does things pretty much the same way we do; and that, for example, all standard purchase agreement forms say pretty much the same thing.

As any of us who have participated on a committee to develop a “standard” form of purchase agreement can tell you, this simply is not true. The purpose of this article is to point out some of the different ways particular terms in a purchase agreement are handled. The goal is not to reach an agreement as to the correct or preferable way of handling a particular term, rather, the goal is to alert you as to possible differences.

II. DISCUSSION

A. Contingencies

1. Many forms contain contingency language whereby the buyer has total discretion on contingency items. Other clauses attempt to define what is and what is not an acceptable deal breaker. Compare:

- This Agreement is contingent upon **Purchaser's satisfaction** with a survey of the Property to be performed at Purchaser's sole expense.
- Upon receipt of said commitment and the survey, Purchaser shall notify Seller of **any objections to the condition of the title, including any conditions reflected in the commitment or survey which render title unmarketable**, and thereafter, Seller shall have thirty (30) days to cure same.
- If the survey reveals a matter that **materially and adversely affects the value of the Premises or Buyer's intended use of the Premises**, Buyer shall have the right to terminate this Agreement by giving Seller written notice within _____ (_____) calendar days after copies of both the survey and title commitment are delivered to Buyer, otherwise Buyer's right to terminate this Agreement shall be deemed to have been waived.
- Buyer shall have the right to terminate this Agreement if the inspection reports **are not acceptable to Buyer** by giving Seller written notice within ____ calendar days of the effective date of this Agreement.
- If the inspection reports show **any condition which in Buyer's reasonable judgment renders the Property defective**, Buyer shall give Seller written notice of the defects, and if Seller declines to repair them to the satisfaction of Buyer's inspector, Buyer may, as Buyer's sole remedy, terminate this Agreement without further liability and be returned its Deposit.
- This Agreement is contingent upon the availability of **satisfactory financing** to Buyer.

Buyer shall have 30 days to determine whether satisfactory financing can reasonably be expected to be available at the time of the closing.

- This Agreement is contingent upon the Buyer's ability to obtain a _____ type _____ year **mortgage loan in the amount of \$_____ bearing interest at a rate no greater than _____% per annum.**

2. In the case of a buyer's purchase of vacant land for development, some forms simply provide that the purchase is contingent upon the purchaser's ability to obtain necessary rezonings/permits/variances:

- This Agreement is contingent upon Purchaser's ability to obtain site plan approval and all other necessary governmental approvals for Purchaser's proposed use of the Property. Purchaser shall have _____ days to obtain all appropriate government approvals.

Some forms require that the rezoning decision be "final."

- Buyer's obligation to consummate this Agreement is contingent upon a determination by Buyer's counsel within _____ days of the date of this Agreement that (a) the _____ of _____ has adopted, published and finally approved, in accordance with applicable law, an ordinance unconditionally rezoning the Property to accommodate the intended development plans of Buyer, (b) a period of 31 days has expired following the final adoption of the zoning ordinance accomplishing this purpose during which period no petition requesting the submission of such zoning ordinance to the electors has been filed, and (c) no litigation challenging such zoning action has been commenced. If Buyer fails to notify Seller of the fulfillment of this contingency, this Agreement

shall be null and void, and Buyer's deposit shall be returned.

Other forms require the buyer to define just what permits/variances will be required.

- This Agreement is expressly conditioned on zoning of the Property for business retail usage. Seller agrees that if the Property is not presently zoned for such usage, Seller shall, at its expense and within thirty (30) days of the date hereof, file an application to have the Property zoned for business retail usage. Seller shall pursue the zoning application and processing to completion and shall execute all necessary and appropriate instruments.

Some forms attempt to impose an obligation on the purchaser (or seller) to actively pursue the necessary permits/variances.

- Should the applicant be entitled to "give up" at any time during the process?
 - Should the applicant be required to appeal an unfavorable decision to the zoning board of appeals?
 - Should either or both parties be entitled to terminate the contract if permits are not obtained by a particular time?
3. In the case of the purchase of a business, a purchase agreement is typically contingent upon buyer's review of seller's records – *e.g.*, tax returns, income statements, leases, services contacts. Sometimes the buyer's review is unlimited; other times the buyer's review is limited to confirming that the financial representations that have been made by the seller are true.
 5. Often times, a purchase agreement provides that it is subject to "advice of counsel."

Sometimes, attorney review means the review and approval of the purchase agreement itself.

Other times, attorney review is only as to the “marketability of title.”

- Any evidence of title and supporting documents are to be examined by the attorney named herein: _____.

Still other times, attorney review is for purposes of “ascertaining that the terms of the sale are adhered to before the transaction is closed”:

- This Agreement is contingent upon Buyer’s attorney’s review to pass upon the marketability of title and to ascertain that the terms of the sale are adhered to before the transaction is closed.

B. Third Party Reports

1. If seller pays for third party report for buyer (*e.g.*, survey, environmental report, etc.), what happens if buyer does not purchase property?
Should the result be the same if buyer is in default or simply exercising a right to terminate under the contract?

One method is to have buyer pay for report in first instance, and to provide that seller will reimburse buyer if and when the closing takes place.

Another method is to provide that seller pays for a report only in the event a report reveals a problem that cannot be remedied.

2. If seller is to pay for report, who selects the provider?
3. Is seller entitled to copies of reports?

C. Property Taxes and Assessments

1. There are numerous property tax proration methods. Examples:

- Real property taxes shall be deemed to cover the **calendar year** in which the tax bills are issued. Tax bills issued in years prior to year of closing shall be paid by Seller without proration. Tax bills issued, or to be issued, in the year of closing shall be prorated so that Seller shall be charged with taxes from the first of the year to closing date, and Buyer shall be charged with taxes for the balance of the year, including the date of closing. If any bill for taxes proratable hereunder is not issued as of the closing date, the corresponding tax bill for the last previous year shall be substituted therefor and used in proration hereunder.
- The winter tax bill shall be prorated assuming the tax period is January 1 through December 31 **for the year in which the tax statement was billed.** The summer tax bill, if any, shall be prorated assuming that taxes are paid in advance during the period of July 1 through June 30.
- Seller agrees to pay all taxes that **are a lien** against the property as of the time of closing. Further, the immediately previous December and July, if any, tax bills will be prorated **as paid in advance based upon the current year of January 1 through December 31** and July 1 through June 30 respectively, unless otherwise agreed to herein.
- Real estate taxes on the Premises shall be prorated to the date of closing according to **due dates**, under the assumptions that taxes are paid **in advance** and that winter and summer taxes are due January 1, and July 1, respectively.

- All real estate taxes paid by or on behalf of Seller in the twelve (12) months preceding closing shall be prorated to, but not including, the date of closing on a due-date basis in accordance with the provisions of MCLA 211.2. As therein provided, for purposes of this proration, such taxes shall be assumed to have been paid in advance for the twelve (12) months succeeding their **levy date**. Seller shall be responsible for that portion of such taxes from the levy date or dates to, but not including, the date of closing. Buyer shall be responsible (and shall reimburse Seller) for the remainder. **“Levy date” shall mean, for purposes hereof, the date on which such taxes first became due and payable.** There shall be no other proration of taxes.
- Real property taxes shall be prorated on a **fiscal year basis** as though paid in arrears. The **fiscal year will be assumed to cover the 12-month period prior to the date billed**, and taxes will be prorated through the date of closing.
- Real estate taxes shall be prorated as of the date of closing using the fiscal-year method. Under the fiscal-year method, any real estate tax bill, or any part of any real estate tax bill, which is designated for a particular governmental entity for which it is collected is deemed to be related to that entire fiscal year. Some tax bills will be deemed paid in advance and others paid in arrears under this method. **The fiscal year for each governmental agency for which a tax is collected shall be deemed to be as stated on the tax bill.**
- All real property taxes and assessments on the Premises **which are due and payable, or a lien or both** on or before the date of this Agreement,

shall be paid by Seller at or prior to closing,
without proration.

2. As to special assessments, purchase agreements should spell out what happens if there is a special assessment that permits annual installment payments. In this event, is seller required to pay the entire assessment?

- Seller shall pay all special assessments which have become a lien on the Premises prior to the date of closing, whether due in installments or otherwise.
- Seller shall pay all special assessments which have become a lien on the Premises prior to the date of closing, provided, however, that in the event a special assessment is payable in installments, Seller shall only be responsible for those installments covering the years prior to the year of closing, and Buyer shall be responsible for all installments covering all years after the year of closing. Installments of special assessments covering the year of closing shall be prorated using the same method used for the proration of real estate taxes.

D. Seller's Warranties

1. Some forms contain unlimited warranties; others provide that the seller's warranties are qualified "to the best of the seller's knowledge."

Examples:

- If statement(s) of income and expenses with respect to the operation of the Property are attached hereto, such statements are accurate for the period(s) designated **to the best of Seller's knowledge and belief.**

- Seller represents and warrants that it has not disposed, or caused to be disposed, any environmental contamination on the Property and **to the best of its knowledge**, after due inquiry, no environmental contamination has been placed, stored, or disposed of on the Property.
- All of the leases are in full force and effect and **to Seller's knowledge**, no party is in default thereunder, and no leases have been modified, amended or extended.
- **To the best of Seller's knowledge and belief**, Seller has complied with all applicable laws, ordinances, statutes, rules and regulations and restrictions pertaining to the Property.

E. Eminent Domain/Fire or Other Casualty Prior to Closing

1. In the event the property is condemned or damaged prior to closing, some forms provide that seller must repair the damage; other forms provide that in such event either party can elect to terminate the contract:
 - If between the Effective Date of this Agreement and the closing date, all or any part of the Premises is damaged by fire or natural elements or other causes beyond the Seller's control which cannot be repaired prior to the closing date, or any part of the Premises is taken pursuant to any power of eminent domain, Seller shall immediately notify Buyer of such occurrence, and either Seller or Buyer may terminate this Agreement by written notice to the other within fifteen (15) calendar days after the date of the damage or taking.
 - In the event of damage or destruction to the Property prior to closing, Seller shall promptly

repair same unless the amount of damage exceeds \$_____, in which case either party may elect to terminate this Agreement.

2. In the event of property damage prior to closing, if the transaction proceeds forward, some forms provide for credit to purchase price while other forms provide for an assignment of insurance proceeds:

- If neither Seller nor Buyer elects to terminate this Agreement, there shall be no reduction of the purchase price and at closing Seller shall assign to Buyer whatever rights Seller may have with respect to any insurance proceeds or eminent domain award.
- If between the Effective Date of this Agreement and the closing date, all or any part of the Premises is damaged by fire or natural element, or causes beyond the Seller's control, or in the event all or any part of the Premises _____, Seller shall notify Buyer of the damage and provide an estimate of the cost of repairing same from a reputable contractor. Thereafter, Purchaser may elect to terminate the Agreement or proceed to close, in which event the Purchase Price shall be adjusted by the amount of the repair estimate.

F. Rent Proration/Security Deposits for Existing Tenants

1. Some forms provide for adjustments at closing.

- The following items shall be adjusted as of the Closing Date and the resulting dollar figure shall increase or decrease the purchase price: (i) all rents collected for the month in which the Closing Date shall occur; and (ii) all rent due under the Lease for the month in which the Closing Date shall occur. . . .

2. Some forms provide that after closing, buyer is to collect past due rents on seller's behalf, in which case the clause should provide for appropriate allocation of money received:
 - If any tenant is late, delinquent or otherwise in default in the payment of rent on the closing date, Seller shall assign to Buyer the claim for and the right to collect the rent; Buyer shall forward any past due rent to Seller promptly upon receipt, but Buyer shall not be obligated to file suit to collect such rent and shall reassign the claim to Seller on demand.

G. Sales of Businesses that Include Inventory

1. Some forms require the buyer to pay seller for actual inventory on hand at closing. At a minimum, these provisions should address the following issues:
 - At current price or acquisition cost?
 - Will there be an adjustment for obsolete inventory?
2. Some forms provide that parties will take current and closing inventories and adjust the purchase price for any difference.

H. Remedies in the Event of Default

1. Some forms provide that nondefaulting party entitled to earnest money only as liquidated damages; no other remedy.
 - If the Buyer defaults, the Earnest Money shall be forfeited to Seller as liquidated damages.
 - If either party defaults, the Earnest Money shall be forfeited to the non-defaulting party as liquidated damages.

2. Other forms provide that nondefaulting party gets earnest money AND may pursue all other available remedies:
 - If the Buyer defaults, all deposits made may be forfeited as liquidated damages at Seller's election or, alternatively, Seller may retain the deposit as part payment of the purchase price and pursue Seller's legal or equitable remedies against Buyer.
 - In the event the Seller wrongfully refuses to conclude the sale on the terms herein set forth, the earnest money deposit shall be immediately refunded to Purchaser and the Purchaser may bring an action for specific performance or pursue such other remedy as Purchaser may elect.

III. CONCLUSION

In the commercial context particularly, REALTORS® should never assume that a particular provision is "standard" or that a particular matter is "always handled this way." As our tax proration methodology so aptly illustrates, there are often several fairly "standard" ways of handling a particular matter and often two or three more subtle variations as to each of those "standard" methods. REALTORS® should carefully review the particular terms of a form contract before attempting to address their client's questions or concerns. Hopefully, this article will assist REALTORS® in recognizing the various differences.