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Tips For Handling The Complex Real Property Transaction (With Forms And Checklist)



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James W. Martin and Leslie Horton Gladfelter

The sooner you know about the complexities, the sooner you can deal with them.

SO, IT TURNS OUT that the deal you thought was so simple, so cut-and-dried that any first-year lawyer could do it, is not so simple after all. You've been on the phone every day for a month, sent and received hundreds of emails a day, and still can't see how this deal's going to close. What you've got is a complex real property transaction.

It might be the sale of some vacant land that turns out to have environmental issues. It might be the sale of an industrial site that has a bunch of Philadelphia lawyers breathing down your neck. It might be the lease of multiple floors of an office building with an opposing lawyer who never learned the meaning of the word "fair." But whatever it is, it's eating up all your time, and your client's getting concerned about all the bills.

So, what do you do? If not this time, then next time one of these deals comes up? We don't know what you're going to do, but this article discusses some of the things that we've done.

1. Communicate, Communicate, Communicate

All deals need some communication. Complex deals need lots. You need to know your client's objectives, in detail. Your client needs to explain those details and how the real estate fits into the big picture. You need to explain to your client how the laws affect those details. You need to communicate this to opposing counsel, without disclosing attorney-client communications. This means you can't forward your client's emails to opposing counsel. Cut and paste instead.

2. Start With A Document Checklist, And Build On It

Every lawyer should start every deal with a checklist. Even a simple one. Read the contract and make sure the checklist includes every document called for by the deal. Include deadline dates. Give a copy to opposing counsel. Get everyone on the same page. Attached is a sample documents checklist.

3. Draw Diagrams To Depict The Structure Of The Deal

A picture says a thousand words, and a diagram pictures the deal. Do a diagram with rectangles for parties and arrows for deeds, leases, mortgage, easements, etc, pointing from one party to another. If you can't draw, use Shapes or MindNode apps on your Mac or Visio on your PC. Attached is a sample deal diagram.

4. Diligently Do Due Diligence

Complex real estate transactions include complex due diligence with architects, engineers, consultants, surveyors, contractors, and experts you've never heard of. Find out from your client who's in charge: you or them? Even if it's them, stay in the loop to help your client follow the contract provisions for due diligence and its deadlines. Attached is a sample due diligence checklist.

5. Ever Done A 363 Free And Clear Sale?

If the seller is in bankruptcy court and has liens on its land, consider a free and clear sale. It's complicated, but it might be the only way to get the deal done. Attached is a 363 sale checklist. Be sure to bring in a bankruptcy lawyer.

6. Use A Checklist To Manage Legalities Of Vacant Land Development

Vacant land is not necessarily bare, naked land. It's got a past, present, and future. Enter the developers, the government, and the wheeler dealers. This is prime territory for a detailed legal checklist. Attached is a sample checklist.

7. Releasing And Assuming, It Must Be The Environment

We found oil in them thar hills. Now what? Well, if the buyer still wants the property, maybe it's time for an environmental release and assumption agreement. Attached is a sample. Then everyone got worked up. Be sure to have an environmental law practitioner review this.

8. Defease The Mortgage, Please

The contract's been signed, the due diligence done, the financing in order, the closing is set. You request an estoppel letter from the mortgage holder and get a reply that the mortgage has a no prepayment clause. Not a no prepayment penalty clause, but a no prepayment allowed clause. The mortgage has been sold as a security on the stock market. Your only choice: defease the mortgage. It's time to call in the experts at www.defeasewithease.com or www.astdefeasance.com or Wells Fargo. Yikes, it's expensive. But, they'll substitute other collateral for the land as security so you can close your deal.

9. You're Selling Securities When You Sell the Entity That Owns the Land

So, your client owns the land in the name of a corporation, and the CPA says there'll be big tax to

pay if your client's corporation sells the land, but much less tax if the client sells the corporation's stock. That is, the CPA recommends a stock deal instead of an asset deal. The buyer gets the corporation and the land in it. So, what's complex about that? The state and federal securities laws, that's what. Whenever you sell stock, or even offer to sell it, you trigger those laws. That means it's time to call in the securities lawyer to advise on registration exemptions and anti-fraud compliance. Attached is a sample form, but every deal's different so don't cut and paste.

10. Links, Links, I Love Free Links

Our clients use Google to draft their docs and only call us when they can't find the right form. Is that true? Well, it is true that there is much good information for free online. Here are some sample links to title company websites:

- **The Fund (www.thefund.com).** This is primarily for Florida lawyers. For non-members the Fund website allows access to an overview of products available and does not provide forms of title documents. On the website you can access an order form for brochures and publications available, which link denotes items available to members and non-members and costs for same. As a member of The Fund you can be set up to access FundNet, which is the online access site within the Fund's website that gives members access to online products, i.e. generating CPL, policy jackets, title searches, etc. You can also access Fund Title Notes and Fund Concepts via this website, after login as a member. As a member you will also be set up to receive alerts and bulletins that affect title agents, such as bank failures.
- **Fidelity National Title Group (FNTG) (www.fntg.com).** For non-members the main FNTG website allows access to an overview of products available but does not provide forms of title documents. This website links you to the current title insurance underwriters that are part of the Fidelity National Financial family of companies, such as Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Lawyers Title, and Fidelity National Title Insurance Company and also advises of former title insurance underwriters. Contact information can be obtained for the underwriters and their office locations in the main menu under "Title Insurance". As an underwriter under FNTG, Chicago Title Insurance Company (CTIC) has its own website www.ctic.com, which can also be accessed via the FNTG website. For non-members the CTIC website allows access to only an overview of products available; however, it does offer limited services such as Rate Calculator for title premiums and GFE Calculator for good faith estimates for loans. You must be a member of FNTG to have access to online products and title services with the various underwriters. As a member of FNTG you can be set up to access the CTIC agent site known as AgentTrax, which gives members access to online products and services such as generating CPL, policy jackets, title searches, policy remittance and reporting, etc. The website for log in by members is www.agenttrax.com. At www.fntgflorida.com you will find an extensive selection of forms that are useful to address title insurance commitment requirements. Examples: Notice of Termination (of NOC), Contractor's Final Payment Affidavit, General Partnership Affidavit, Borrower's Affidavit-Commercial Property, Construction Indemnity Agreement, etc. As a member you will also be set up to receive alerts and bulletins that affect title agents, such as bank failures.
- **Old Republic National Title Insurance Company (ORNT) (www.oldrepublic-title.com).** For non-members it allows for an overview of products available only, and does

not provide title document forms. It does allow non-members some services such as Premium Rate Calculator, Patriot Act Searches, Real Estate Dictionary, etc. You must be a member to have access to online products and title services. As a member of ORNT you must be set up in order to access OASIS, which gives members access to online products, i.e. generating CPL, policy jackets, title searches, policy remittance and reporting, etc., The OASIS site also includes full access to title insurance forms, endorsements, supplies, etc., and helpful links

to other websites affecting the title insurance industry. The website for log in by members is www.ortoasis.com. As a member you will also be set up to receive alerts and bulletins that affect title agents.

CONCLUSION • So, here's one final tip for handling the complex real property transaction: be alert. The sooner you realize you're in the middle of a complex deal, the more time you'll have to deal with the complexities.

APPENDIX 1

Sample Real Estate Closing Documents Checklist

Date: _____, 20____

Seller: _____

Buyer: _____

Closing Date: _____, 20____

Closing Place: _____

Persons Present at Closing: _____

Contract Documents

1. Contract
2. Amendments
3. Listing agreement or brokerage commission agreement

Approvals

4. Mortgage loan approval
5. Mortgage assumption approval
6. Mortgage release approval
7. Condo or homeowner association approval
8. Lease review and approval
9. Franchise approval

Inspections, Insurance, Utilities, Taxes

10. Title insurance search ordered
11. Survey (meeting or exceeding Minimum Technical Standards)

12. Termite inspection
13. Termite treatment contract
14. Professional building inspection
15. Phase I environmental site assessment inspection with Radon and asbestos
16. City or county inspection, zoning, setbacks, pending citations, & local city rental requirements search and research
17. City and county special assessment search
18. Financial books and records inspection by CPA Sales tax payment verification
20. Sales tax dealer registration
21. Ad valorem real and tangible personal property tax payment verification (County Tax Collector)
22. Property, casualty, liability, workers comp, and flood insurance with loss payee and additional insured
23. Utility accounts paid, disconnected and changed (gas, electricity, water, trash, phone, cable tv, sewer)
24. Tenant estoppel letters
25. Licenses and permits to be obtained or transferred
26. Employees to be retained or hired
27. Secretary of State certificates of existence
28. Corporate resolutions and minutes authorizing sale, conveyance and encumbrance
29. Affidavits of incumbency
30. Regulatory requirements

Closing Administration

31. Closing statement or HUD-1 settlement statement
32. Prorations statement
33. Closing statement agreement regarding errors
34. Brokers commission receipts
35. FIRPTA (Foreign Investment in Real Property Tax Act) Affidavit of Seller
36. 1099 designation agreement
37. 1099 affidavit
38. IRS Form 1099 or substitute
39. Cashier's checks from escrow agents and buyers
40. Cashier's check to Seller
41. Checks to pay closing costs

Title Documents

42. Title insurance commitment
43. Endorsements to title insurance commitment
44. Title insurance commitment marked up at closing
45. Title insurance exception documents
46. Deed (warranty, special warranty, PR, trustee, fee simple, or quit claim)
47. Exhibits to deed
48. Affidavit of no liens
49. Special affidavits re title
50. Leases

Loan Documents

- 51. Note
- 52. Mortgage
- 53. Assumption documents
- 54. Estoppel letter on mortgage being satisfied
- 55. Other lender-required documents
- 56. Amortization schedule
- 57. Separate check for points
- 58. Satisfaction of mortgage to be paid off

Miscellaneous

- 59. Bill of sale to contents and personalty
- 60. Assignment of warranties
- 61. Occupancy agreement
- 62. Land trust agreement
- 63. Deed in trust
- 64. Keys to buyer
- 65. Cover letters to clerk to record deed, mortgage and other documents
- 66. Other:

After Closing

- 67. Received recorded deed (original to buyer; copy to seller)
- 68. Received recorded mortgage (original to seller; copy to buyer)
- 69. Received satisfactions of mortgage (original to seller)
- 70. Received original satisfied note marked "paid" (original to seller)
- 71. Received title insurance policy meeting requirements of marked-up commitment

APPENDIX 2

Sample Designation Agreement For Title Insurance Agency To File 1099

SELLER(S) NAME: _____

ADDRESS: _____

NAME OF ATTORNEY (if any): _____

BUYER(S) NAME: _____

ADDRESS: _____

NAME OF ATTORNEY (if any): _____

REAL ESTATE TRANSFERRED

ADDRESS: _____

LEGAL DESCRIPTION: _____

TITLE INSURANCE AGENCY

NAME: _____

ADDRESS: _____

FILE NO.: _____

DATE OF CLOSING: _____, 20____

The undersigned hereby acknowledge and agree that the Title Insurance Agency named above is the “person responsible for closing” this transaction, as that phrase is used in the federal regulations for reporting real estate transactions to the Internal Revenue Service (26 C.F.R. §1.6045-3T); and that the Title Insurance Agency is the “real estate broker” for this transaction for the purpose of such reporting, even though the Title Insurance Agency is not a real estate broker licensed under _____ law and is not the procuring cause of this transaction.

The Title Insurance Agency hereby agrees that it will timely comply with Internal Revenue Code §6045 and the Regulations thereunder with respect to this transaction, including but not limited to the preparation and filing of form 1099 with the U.S. Internal Revenue Service. This agreement is intended to not only confirm that the Title Insurance Agency is the person responsible for closing, but also to be a designation agreement under the provisions of Temporary Regulation section 1.6045-3T(e)(5). This agreement must be signed either before or at the closing and must be retained for four years after the last day of this calendar year.

Signatures Date Signed

SELLER(S): _____, _____,
20____

SELLER(S): _____, _____,
20____

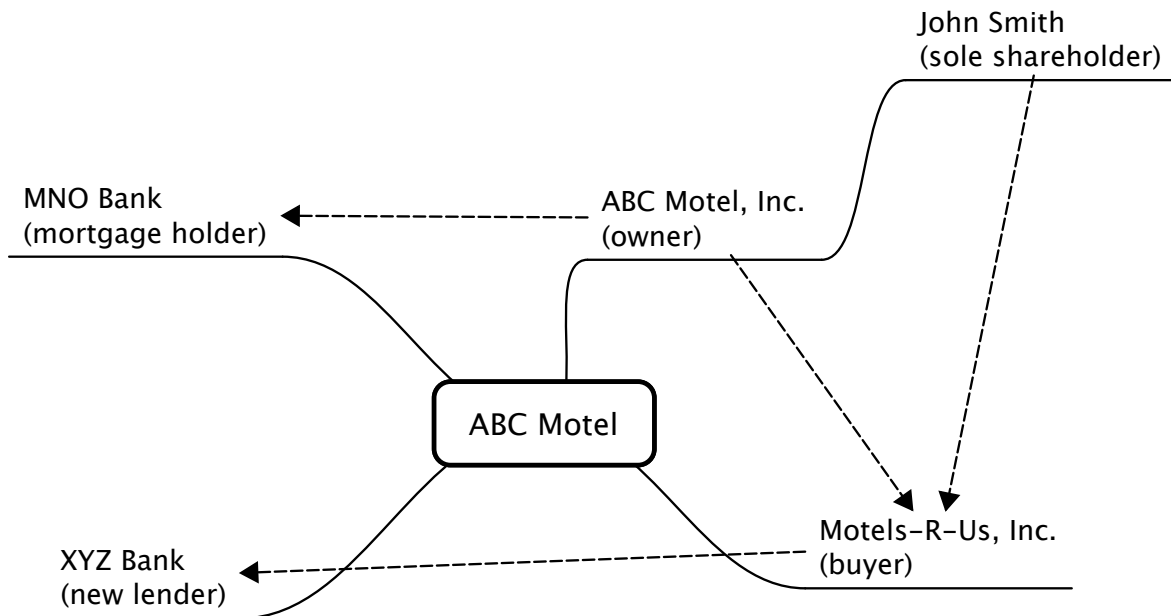
BUYER(S): _____, _____,
20____

BUYER(S): _____, _____,
20____

TITLE AGENCY: _____,
_____, 20____

APPENDIX 3

Sample Diagram for Motel Deal



APPENDIX 4

Sample Due Diligence Checklist

(Existing Commercial/Retail Building)

Note that this Appendix as well as Appendix 6 were prepared for a presentation to Florida lawyers. Acronyms used in this Appendix and in Appendix 6 are typical in Florida, but likely have equivalents in all states. Those acronyms include the following: DRI = Development of Regional Impact; FSP = Final site plan; CLOS = Certificate of Level of Service (Traffic); DOR = Florida Department of Revenue; WMD = Water Management District (several in Florida); DEP = Florida Department of Environmental Protection; CDD = Community Development District (a special taxing district); O&M = Ownership & Maintenance (fees in a CDD).

** This is not meant to be a complete list of all items that must be reviewed with respect to a particular project. This list is not intended to address all title and title insurance-related items. Other due diligence items must be addressed based on the type of project, particular property and location, applicable state and local jurisdiction(s), whether project is in a DRI or master-planned development, status/identity of Seller, type of tenants, etc. Further, this list is primarily for a fully-developed project, not a vacant parcel that needs to be permitted and developed with infrastructure and vertical improvements.

| Item | Responsibility | Deadline/Status | Comments |
|---|-----------------------|------------------------|---------------------------------------|
| <p>1. Obtain existing documentation from Seller before Due Diligence Period begins, e.g.:</p> <p>a) all written Tenant Leases; b) all equipment leases, if any; c) all insurance policies; d) Service Contracts and other contracts concerning the Property; e) all licenses concerning the Property; f) all operating statements including, but not limited to, income and expense statements, year-end financial and monthly operating statements, and any and all books and records for the operations of the Property; g) all documents and agreements pertaining to the Tangible and Intangible Personal Property relating to the Property; h) all reports, studies, environmental audits and tests relating to the Property in Seller's possession; i) an updated rent roll; and j) all engineering and architectural plans and specifications, drawings and surveys relating to the Property in Seller's possession.</p> | | | |
| <p>2. Title Commitment & copies of exceptions</p> | | | <p>Seller to provide prior policy</p> |

| Item | Responsibility | Deadline/Status | Comments |
|---|------------------------------------|------------------------|--|
| 3. Survey showing improvements & title exceptions (easements, etc.) | Buyer | | Seller to provide prior survey(s); Buyer's surveyor needs prior survey and copies of all title exceptions (easements, Declarations, plats, etc.) |
| 4. Written loan commitment from lender (with comprehensive list of conditions attached or included) | | | Commitment fee due at time of Buyer signing |
| 5. Phase 1 Environmental | Buyer/lender (approved consultant) | | Seller to provide prior environmental studies |
| 6. Phase 2 (or limited Ph.2) environmental | | | |
| 7. General building & site inspection, including but not limited to, exterior, roof, parking areas, drainage, retention, tenant spaces, loading docks, garbage receptacles; Building, fire and other Code compliance issues | | | Seller to provide plans, specs, prior inspection reports & maintenance/repair & replacement logs & back-up |
| 8. Structural building inspection | | | Seller to provide copies of prior inspection reports |
| 9. Mechanical/ electrical/ HVAC inspection | | | Seller to provide copies of prior inspection reports |
| 10. Review, abstract & analyze tenant leases & Landlord's tenant files | | | Seller to provide leases & all amendments, side letters, rent rolls, lease summaries, payment history, etc. |

| Item | Responsibility | Deadline/Status | Comments |
|--|----------------|-----------------|---|
| 11. Obtain and review tenant estoppel letters. At a minimum, should disclose: <ul style="list-style-type: none"> + base & % rent & status of payment, any prepaids + security deposit + rent concessions + TI due from LL (past or future) + no option to purchase + verify correct & complete copy of lease attached + identify any available extensions + confirm no claims by or against Landlord | | | |
| 12. Get Seller to sign consent for Buyer to obtain tax clearance letter from DOR, and apply for same | | | |
| 13. Obtain and review all service, maintenance, management contracts | | | Seller to provide. Determine timeframe to terminate or accept same, as applicable |
| 14. Obtain permits, licenses, etc., for building & operation, e.g.: <ul style="list-style-type: none"> + Building permit + Local & state licenses as applicable + WMD & DEP permits | | | |

| Item | Responsibility | Deadline/Status | Comments |
|--|----------------|-----------------|--|
| 15. Request approval information from applicable local government, e.g.: <ul style="list-style-type: none"> + zoning compliance letter + parking requirements + signage requirements + alcoholic beverage status vis-à-vis tenants + review zoning ordinance, PSP, FSP ~ site plans and approval stipulations & limitations + DRI DO (if in a DRI) | Buyer | | |
| 16. UCC search | | | |
| 17. Seller identity search | | | |
| 18. Property Owners Association (if applicable) ~ review books & records | | | If a POA, obtain estoppel letter |
| 19. Condominium association or other master association (if applicable) ~ review books & records | | | If a condo or master association, obtain estoppel letter |
| 20. Any wetlands or ponds on site? Mitigation, monitoring, maintenance requirements? | | | |
| 21. Any reserved parking or shared parking arrangements? Code parking issues if a space leased in future to a more intensive use (e.g., restaurant vs. specialty retail)? Cross access requirements (in local government Code or approvals) or cross access easements? | | | |

| Item | Responsibility | Deadline/Status | Comments |
|--|--------------------------------------|-----------------|----------|
| 22. Appraisal | Buyer/lender (approved appraiser) | | |
| 23. Management of property ~ company or Seller employee(s)? Does Buyer want to consider hiring? | | | |
| 24. Service marks ~ state, federal ~ name of building/ shopping center/ project | | | |
| 25. Insurance ~ existing coverage, pending & prior claims | | | |
| 26. Income & expense statements for property | Buyer/Buyer's accountant | | |
| 27. Review amount & payment history of ad valorem taxes ~ any CDD debt, O&M or other special assessments? | | | |
| 28. Warranties, e.g.: + roof + HVAC + equipment + fixtures; personal property + paving | | | |
| 29. Any pending building moratorium, condemnation, roadway expansion or other proceeding that would impact future development or redevelopment or cause a nonconforming use situation? | | | |

| Item | Responsibility | Deadline/Status | Comments |
|--|----------------|-----------------|----------|
| 30. Confirm no pending litigation, foreclosure, bankruptcy of Seller | | | |
| 31. If a commercial/retail property and includes as-yet-undeveloped out parcels, other considerations including: + DRI , zoning and FSP conditions + CLOS? + Declaration, plat, condominium, master association, easement, parking, signage, etc. considerations + available sf? + retention? | | | |
| 32. Additional matters ** based on particular property: + _____ + _____ + _____ + _____ | | | |

APPENDIX 5

Sample Chapter 363 Sale Checklist

(Note that this Checklist is drafted from the Perspective of a Real Estate Practitioner/Title Insurance Agent representing a Buyer in Middle District of Florida, Tampa Division)

“363 Sale”: A sale of assets (real or personal) in a bankruptcy case, generally a Ch. 11 reorganization, pursuant to Section 363 of the Bankruptcy Code. The Court must authorize the sale of an asset (or in limited cases all or substantially all of the debtor’s assets) that will be conveyed to a purchaser free and clear of liens and encumbrances. 363 sales permit the disposition of assets of the debtor outside of the ordinary course of business. For the real estate practitioner representing a purchaser pursuant to a 363 sale (especially in a complex commercial or large-scale property situation), there are numerous considerations that distinguish these transactions from the usual, with particular attention to the title insurance underwriting requirements as well as documentation issues.

This checklist deals primarily with the situation where you represent a client who has a contract to purchase a parcel of real estate.

| Item | Issues/Comments |
|---|---|
| <p>1. 363 process – a few highlights:</p> <ul style="list-style-type: none"> a. Debtor (DIP, or Trustee in Ch. 7) files Motion to Sell Property b. Motion must contain all essential terms & conditions of the sale (often attach contract – purchaser in this situation sometimes the “stalking horse”) c. Notice to all creditors required, with opportunity to object d. Usually there will be a hearing on the Motion, though not always necessary if no objections. e. Requirements of Court approval of a Sale Motion include: <ul style="list-style-type: none"> + highest and best offer (not just \$\$ - other considerations) + whether negotiations were arms-length + whether the sale is in the best interests of the estate and its creditors. + whether the purchaser acted in good faith f. Typically cannot approve a sale free and clear of secured creditors, so important to get those creditors on board if possible g. Note that “free and clear of encumbrances” does not include easements and certain other title exceptions (see below) h. Sale Order will allocate proceeds of the sale among the secured creditors with liens against the assets sold. If there are any excess proceeds, allocated to unsecured creditors and other claimants per Bankruptcy Code. i. Your client/purchaser should also engage a bankruptcy lawyer | <ul style="list-style-type: none"> b. If there are competing bidders, Motion will contain details and timing for submission of competing bids, and Motion might simply seek approval of an auction or other procedure to determine who successful purchaser will be. e. See separate item below under “Sale Order” for items required in sale order to satisfy title insurance underwriting (in RE sale) requirements. g. Even though Sale Order will often say “free and clear of all liens and encumbrances against the Land whatsoever.” |

| Item | Issues/Comments |
|---|--|
| <p>2. Timing of your purchaser client's contract – pre- or post-petition and other contract considerations</p> <ul style="list-style-type: none"> a. Ability to contemplate requirements of title insurer, e.g., Court approval of Sale Order, estoppels & releases from lien holders b. Free look and built-in extensions of due diligence and closing date c. Obtain title commitment pre-signing contract d. Amount of deposit e. Court approval required to execute contract post-petition (but requirement of sale order for pre-petition contracts essentially the same result) f. Purchaser concern about due diligence time frame and spending \$\$ before approval either way g. Seller representations and warranties – from a Debtor in bankruptcy?? | <p>b., f., g. Thorough due diligence even more important than usual because of liens & other title issues; likelihood of unhappy tenants and others; unpaid CDD O&M, POA/HOA fees, taxes and municipal liens; unrecorded agreements; pending litigation; etc.</p> |
| <p>3. Motion to Sell Real Property</p> <ul style="list-style-type: none"> a. Attach contract, if applicable, and summarize terms in Motion b. If legal description may change because of survey or otherwise, be sure to allow for that change in the contract (final recorded Sale Order will need to include exact legal of property being conveyed, however) c. Summarize deposit, due diligence periods, \$ and other obligations of debtor/seller – before and at closing, closing date, available extensions, etc. d. List all liens and claims of lien e. Cover everything you'll need in Sale Order | <p>As Purchaser's counsel, best if you (and your purchaser's bankruptcy counsel) have an opportunity to review Sale Motion before filed.</p> <p>c. Hopefully you have a title commitment before Motion is filed so exceptions and requirements can be confirmed and addressed</p> |
| <p>4. Title Insurance requirements and considerations</p> <ul style="list-style-type: none"> a. Contents of Sale Order (see separate item) b. Recordation of certified copy of Sale Order required; proof that notice of sale was given to the creditors whose liens are to be divested is required (put in sale order) c. Sometimes pending litigation and/or recorded documents reveal unrecorded agreements that affect or potentially affect the Land and these will show up as exceptions d. Title Commitment will specify certain requirements of deed (see separate item) e. Owner's affidavit language non-standard because of existing liens, pending litigation | <p>Title insurance companies are very conservative in the current economic climate, and are even more conservative when the Seller is a debtor in bankruptcy. Underwriting counsel involvement is invaluable.</p> <p>Obtain frequent title updates from title company. Even if new claims of lien, lawsuits, lis pendens are filed post-petition and should not affect title, the title companies are requiring their removal – either by a release or amended complaint/claim of lien/lis pendens by the Plaintiff/lienor or by order of the bankruptcy court. Title insurance companies are not taking the risk of a claim in the future.</p> |

| Item | Issues/Comments |
|---|-----------------|
| <p>5. Contents of Sale Order</p> <p>a. Usual language required by 363 (e.g., acted in good faith and arms-length transaction; fair value; supported by the secured creditors, if true; highest and best offer; etc.) – to be supplied/approved by your purchaser’s bankruptcy counsel.</p> <p>b. Language stating that non-material amendments to the contract that are not adverse to the Debtor’s estate can be entered into w/o Court order [provided consent is obtained from _____ (mortgagees), if applicable]</p> <p>c. Language requiring creditors to execute UCC-3’s and any other document required to evidence release of the Land from such creditor’s claim – in form appropriate for recording or filing</p> <p>d. Language allowing Debtor or your Purchaser to record a certified copy of the Sale Order in public records immediately before or coincident with Closing.</p> <p>e. “Free and clear of liens and encumbrances” language, including but not limited to list of creditors’ liens and claims that are released from the Land.</p> <p>f. Other language supporting the contract requirements, as applicable to your transaction (e.g., typically requiring and authorizing Debtor to comply with certain provisions of the contract that require expenditure of \$\$)</p> <p>g. A finding by the Court that proper notice was given to all creditors.</p> | |
| <p>6. Conveyance and other closing documents language for DIP</p> <p>a. Description/signature block for Debtor: _____[Debtor], a _____ [insert type of entity], as debtor in possession of the estate of [Debtor], a debtor in the case styled _____, Case No. _____, in the United States Bankruptcy Court for the [Middle District of Florida, Tampa Division]</p> <p>b. Additional language for deed [at a minimum]: The Property is transferred free and clear of any and all liens, mortgages, claims, claims of lien, pledges, security interests, interests, charges, unrecorded agreements and encumbrances of any kind or nature whatsoever and whenever arising pursuant to 11 U.S.C. §363 and in accordance with [Sale Order- insert title of order] entered on _____, by the United States Bankruptcy Court, [Middle District of Florida, Tampa Division], Case No. _____.</p> | |

| Item | Issues/Comments |
|---|--|
| <p>7. Title commitment requirements specific to bankruptcy</p> <p>Sample requirement from Sched. B-I of title commitment:</p> <p>“[Debtor/owner] has filed bankruptcy in the [Middle District of Florida, Tampa Division], under Case No. _____. The following items are required relative thereto and to effectuate the proposed sale or mortgage:</p> <ol style="list-style-type: none"> 1. Record a certified copy of bankruptcy court order authorizing the transaction to be insured. Proof that the motion/petition for the court order was given to the debtor and all interested parties must be presented. 2. The bankruptcy docket must show that the time for appeal expired without the filing of an appeal. 3. If the sale is to be free of liens: (a) the order must so state; (b) proof is required that 21 days' notice of the sale was given to the creditor whose lien is to be divested; (c) the deed from the Debtor in possession to the purchaser must state that the conveyance is free of liens; and (d) approval from the Underwriting Department is required. Upon compliance, with this requirement, Items No. __ through __ inclusive, on Schedule B-Section 1 herein, will automatically be satisfied. The Company reserves the right to make additional requirements and /or exceptions upon review of the petition and order for sale free & clear. 4. Record deed from trustee or debtor in possession to the purchaser. The deed should recite the case number and court in which the bankruptcy is pending.” | <p>Notes:</p> <p>The red sentence language was added with underwriting counsel approval so we, as purchaser’s counsel & title agent, could be sure which requirements would be satisfied if these conditions were met.</p> <p>With underwriting counsel approval, the purple sentence was deleted immediately prior to closing, after bankruptcy docket and circuit court docket had been checked and current title search performed.</p> |
| <p>8. Best advice if your client is a purchaser from a debtor in a bankruptcy proceeding:</p> <ol style="list-style-type: none"> a. Don’t think you can act as bankruptcy counsel unless you are a bankruptcy lawyer. If you don’t have a bankruptcy lawyer in your firm, associate with one. (Vice versa advice to the bankruptcy lawyers who shouldn’t act as RE/title counsel.) b. If you are writing the title insurance, become best friends with underwriting counsel whom you trust. | <p>Helpful hint when you do go to bankruptcy court (Tampa) – with your bankruptcy lawyer: take driver’s license and bar card. No phones, iPads, laptops in court house, but if you have your bar card you can put them in a locker inside security.</p> |

APPENDIX 6
Sample Closing Checklist
Vacant Land – Development Parcel

BUYER: _____, a _____

BUYER'S
ATTORNEY: _____

SELLER: _____, a _____

SELLER'S
ATTORNEY: _____

TITLE AGENT: _____

ESCROW AGENT: _____

CLOSING DATE: _____

PROPERTY: _____

REVISED AS OF _____, 20__

| Item | Comments | Responsibility/Status |
|---|---|------------------------------|
| 1. Agreement for Purchase and Sale | | BUYER/SELLER/ ATTORNEYS |
| 1.a. Amendments to Agreement for Purchase and Sale (if necessary) | | BUYER/SELLER/ ATTORNEYS |
| 1.b. Assignment and Assumption of Agreement for Purchase and Sale (if applicable and permitted by contract) | Executed by Buyer and Assignee (and Seller, if Seller consent required) | |
| 2. Title Commitment | + Agreeing to insure Land being purchased fee simple, as well as any off-site easements serving land, if applicable; also agreeing to insure mortgage by Buyer, if applicable + Buyer's Attorney to review requirements of title commitment to determine whether acceptable (under contract or otherwise) and how to handle. | TITLE AGENT |
| 2.a. Replacement Title Commitment and/or pre-closing endorsements | As necessary | TITLE AGENT |
| 2.b. Marked-down Title commitment or closing endorsement for closing | Update title search pre-closing | TITLE AGENT |

| Item | Comments | Responsibility/Status |
|--|---|------------------------------|
| 3. W-9 form from Buyer for deposit to an interest-bearing escrow account (if interest-bearing account required by contract) | Note: Original W-9 from buyer often required by the bank to open escrow account | BUYER |
| 4. Survey | <ul style="list-style-type: none"> + Check that legal description matches title commitment + Check legal access + Should include reference to title commitment & show all exceptions that can be located + Survey to include off-site easements serving the land being purchased, if applicable + Check certification – less than 90 days before closing | BUYER/BUYER'S ATTORNEY |
| 5. Surveyor's sketches and legal descriptions of Land and easements (if applicable) to attach to deed and other conveyance documents for recording | | BUYER/BUYER'S ATTORNEY |
| 6. Closing Protection Letter | | TITLE AGENT |
| 7. UCC Search | | BUYER/BUYER'S ATTORNEY |
| 8. Property Lien Search Report | | BUYER'S ATTORNEY/TITLE AGENT |

| Item | Comments | Responsibility/Status |
|--|--|------------------------------|
| 9. Due diligence documentation | See separate due diligence checklist | BUYER |
| 10. Certificate of Good Standing – Seller | Note that title agent will need, in advance of closing, copies of Articles of Incorporation, Articles of Organization, Operating Agreements and Partnership Agreements (depending on the entity type) for title insurance purposes | SELLER |
| 11. Seller’s Corporate Resolution (or LLC Certificate or Partnership Resolution authorizing transaction and setting forth Members and authorized signatories for Seller) | Usually required to be recorded; | SELLER |
| 12. Certificate of Good Standing – Buyer | Note that title agent will need, in advance of closing, copies of Articles of Incorporation, Articles of Organization, Operating Agreements and Partnership Agreements (depending on the entity type) for title insurance purposes if issuing a mortgagee policy | BUYER |
| 13. Buyer’s Corporate Resolution (or LLC Certificate or Partnership Resolution authorizing transaction and setting forth Members and authorized signatories for Buyer) | Usually required to be recorded if mortgagee title insurance will be issued | BUYER |

| Item | Comments | Responsibility/Status |
|---------------------------------|--|---|
| 14. Closing Statement | Purchase Price: \$ _____ Deposit: \$ _____ Proration of ad valorem taxes, CDD fees, etc., at closing BUYER'S COSTS: a. Survey b. Recording fees for deed and easements granted at closing c. Property Lien Search report d. Buyer's attorneys' fees e. Loan costs f. Cost of issuance of Mortgagee Title insurance policy SELLER'S COSTS: a. Cost of recording title corrective documents (and otherwise to satisfy title insurance commitment requirements relative to Land or Seller) and releases (e.g., mortgage) b. Doc Stamps on Deed c. Title insurance premium and related costs for Owner's policy d. Seller's attorneys' fees e. Pay-off amounts to mortgagee, other lien holders, for satisfaction of outstanding loans or judgments f. UCC-3 filing fees g. Broker's commission | TITLE AGENT Note: Buyer and Seller costs are examples of allocation, but in commercial transactions, there is no "normal" as in residential transactions – all is negotiable |
| 15. Warranty Deed (usually SWD) | | SELLER'S ATTORNEY |

| Item | Comments | Responsibility/Status |
|--|--|------------------------------|
| 16. Easement Agreements, Cross Easement Agreements, Modifications to existing utility easement agreements, etc. if any | Is title insurance policy expected to include off-site easements serving the land being purchased? | |
| 17. Owner's Affidavit | | TITLE AGENT |
| 18. Buyer's No Lien Affidavit | Needed by title agent if issuing mortgagee title insurance | TITLE AGENT |
| 19. Non-foreign Affidavit | | TITLE AGENT |
| 20. Reaffirmation of Seller's Representations and Warranties (per contract) | Form attached to contract (if applicable) | |
| 21. Reaffirmation of Buyer's Representations and Warranties (per contract) | Form attached to contract (if applicable) | |
| 22. Current estoppel letters from existing mortgagees and other lien holders | Need to include enough information to support calculation of pay-off for closing statement as of closing date; Need original Satisfactions at closing from non-institutional mortgagees | SELLER/TITLE AGENT |
| 23. Estoppel letters from any easement holders or others that will retain post-closing interests in the Land | | SELLER/TITLE AGENT |
| 24. Affidavits required for title insurance (if applicable), e.g., Contiguity Affidavit, Same Name Affidavit, Surveyor's affidavit of identical legals | To be recorded | BUYER'S ATTORNEY |

| Item | Comments | Responsibility/Status |
|--|---|------------------------------|
| 25. Nonappealable Rezoning approvals or other local governmental approvals or local or statewide permits required by contract by closing | | BUYER |
| 26. Real Estate Commission Receipts from all brokers involved in the transaction | Need at closing unless broker has signed contract or otherwise confirming exact amount due. In any event, receive prior to or coincident with delivering check. | TITLE AGENT |
| 27. Notices to utilities, tenants, others, if applicable, re: change of ownership | Should be minimal in situation covered by this checklist (i.e., vacant land) | SELLER/BUYER |
| 28. UCC-3 terminations/releases | For recording and for filing with State | SELLER |
| 29. Title policy | Mark-down commitment or closing endorsement at closing; Policy issued post-closing | TITLE AGENT |