

DUE DILIGENCE OVERVIEW FOR RAW LAND ACQUISITIONS

Table of Contents

I. INTRODUCTION.....	1
II. LAND USE DUE DILIGENCE	1
III. TITLE DUE DILIGENCE	2
IV. SURVEY DUE DILIGENCE.....	2
V. ENVIRONMENTAL DUE DILIGENCE.....	2
VI. WATER AND UTILITIES DUE DILIGENCE	3
VII. FINANCIAL DUE DILIGENCE	3
VIII. DEVELOPMENT DUE DILIGENCE.....	4
IX. ATTORNEY COMPETENCE (ETHICS) ISSUES IN RESTRUCTURING TRANSACTIONS.....	4
A. What is the Standard for “Competence”?	5
B. What Factors Must Be Considered When Determining Competence?.....	5
C. What Should an Attorney Lacking the Required Standard of Competence Do? 	6
Appendix A	7

DUE DILIGENCE OVERVIEW FOR RAW LAND ACQUISITIONS

I. INTRODUCTION

Completing a due diligence review for a raw land acquisition can be much more extensive than similar reviews for acquisitions of improved commercial real estate projects. Many additional issues must be addressed in raw land acquisitions to ensure that the Buyer will be able to construct the development that he envisions for the property. Although most raw land purchasers will contract with a development engineer to advise them during the due diligence review, by understanding all of the legal issues that will drive engineering, budgeting, and development decisions, the real estate attorney can offer enormous assistance to his or her client.

This paper addresses many different issues involved in completing a due diligence review of a raw land tract. Included as an appendix to this paper is a checklist for Raw Land Acquisitions, including a section addressing the due diligence phase of the transaction that closely tracks the discussion in this paper. This paper divides the raw land due diligence review into seven categories—Land Use Due Diligence, Title Due Diligence, Survey Due Diligence, Environmental Due Diligence, Water and Utilities Due Diligence, Financial Due Diligence, and Development Due Diligence. This paper devotes a section to each of these due diligence categories.

Section IX of this paper addresses the ethical issue of attorney competence that might arise when real estate attorneys advise clients on due diligence matters involved in raw land acquisitions.

II. LAND USE DUE DILIGENCE

Attorneys must complete the customary land use due diligence review that would be completed in almost any commercial real estate acquisition. Such matters include reviewing legal access to the property (which the title company will except to on the title commitment if it is not convinced that legal access is available) and analyzing jurisdictional issues affecting the property.

Because much of the development process will depend on which governing authorities' ordinances and rules affect the property, if any, the

attorney must determine the jurisdiction or jurisdictions in which the raw land is located. If the land is located inside of a city limits or subject to the extraterritorial jurisdiction of a city, the attorney should request a zoning verification letter from the municipal authorities. The letter will identify the zoning classification of the property and may, in some jurisdictions, identify any known violations of the applicable zoning ordinance or other municipal ordinances or regulations (i.e., parking ordinances, historical preservation regulations, etc.). The attorney's due diligence should not end with the zoning verification letter; the attorney should review the applicable municipal codes and county regulations to research all of the ordinances, laws, rules, and regulations that might affect the client's proposed development on the property.

If the property is not inside of a city limits or subject to any city's ETJ, it is still possible that county rules and regulations may restrict the development of the land. Applicable county rules and regulations should be reviewed as part of the land use due diligence.

The Buyer's attorney should also carefully review all of the items submitted by the Seller in accordance with the due diligence provisions of the purchase contract. Any notices concerning possible litigation involving the property, notices regarding legal violations on the property, summaries of hazardous materials used on the property, and other Seller submission materials may significantly impact the Buyer's decision to purchase the property. These items should be reviewed and additional, more detailed materials should be requested from the Seller or additional research should be completed when necessary to thoroughly understand the issues being disclosed.

Finally, the attorney should examine any current leases on the property. If the client intends to commence development of the land immediately after closing, the most important aspect of current leases would be the lease term. The attorney will want to make sure that the lease terms expire before the closing, are month-to-month, or are terminable by the landlord at will.

III. TITLE DUE DILIGENCE

The title commitment issued in the transaction must be reviewed during the due diligence inspection period. Much of the title review will cover the same matters as in any other commercial real estate transaction, such as: (1) Schedule A of the title commitment should list the seller as the owner of the property, identify the Buyer as the proposed insured, and contain an accurate legal description of the land; (2) all of the exception documents referenced on Schedule B should be reviewed to determine if they actually encumber the property and if they materially hinder the Buyer's proposed development of the property; and (3) the liens and encumbrances listed on Schedule C must be releasable at the closing.

The separation of the oil, gas, and mineral rights from the fee simple estate may pose a significant risk for purchasers of raw land; therefore, particular attention should be paid to oil, gas, and mineral rights referenced on Schedule B. Producing leases located on the property pose an obvious hindrance to development, but the potential for the exercise of future subsurface rights may also be significant. In order to gain comfort with third-party subsurface rights that will not be purchase from the Seller, the Buyer should review applicable laws and ordinances that may prevent future drilling on the property. If future drilling is a legal possibility, the Buyer should consider whether it wants to require the Seller to obtain Waivers of Surface Rights from holders of subsurface interests. If the Seller is unable or unwilling to obtain the waivers, then the Buyer may have to decide if the risks associated with the subsurface rights necessitate the termination of the contract during the due diligence period—the attorney must play a significant role in advising the client of all of the possible risks.

IV. SURVEY DUE DILIGENCE

The Buyer should obtain a detailed survey of the raw land, and the attorney should complete a thorough review of the survey. The survey should be an "as-built" survey that locates any improvements constructed on the land. The survey must meet the lender's requirements and must be approved by the title company as adequate for the removal of the boundary line exception from Schedule B of the title commitment.

As an initial matter, the attorney should review the survey in conjunction with the title commitment to ensure that every title exception referenced on Schedule B of the title commitment is drawn and located on the survey or listed on the survey as "not affecting" the property. Recorded documents identified by the survey as not affecting the property should be removed as exceptions from the title commitment. The legal description in the title commitment should be conformed to the legal description provided by the surveyor.

The Buyer and the attorney must review the location of easements or other third-party rights on the property and determine if they will interfere with the Buyer's proposed development. If such interests might possibly interfere with the Buyer's plans, then the Buyer should object to the interests during the due diligence period and require the Seller to either have the interests vacated, terminated, released, or amended and relocated so that they will not interfere with the Buyer's development. The Buyer's engineer may also play a significant role in reviewing the possible impact of third-party rights on the property.

The survey should also indicate whether the property constitutes one or more legal lots. If the property is not comprised of one or more legal lots, then the attorney should investigate whether applicable rules or ordinances require developed property to be legally platted lots. It is not unusual for tracts of raw land to not constitute legal lots; correcting this defect is usually an expense borne by the Buyer as part of its development plan. The Buyer may have to adjust its development budget to account for these costs.

The Buyer's attorney should make sure that the survey contains adequate certifications. The survey should be specifically certified to the Buyer, the title company, and the Buyer's lender. The survey should also specifically reference the title commitment for the transaction by file number or GF number. The survey should also contain adequate certifications concerning the completeness and accuracy of the survey. The checklist in Appendix A of this paper contains a list of recommended survey certifications.

V. ENVIRONMENTAL DUE DILIGENCE

Environmental due diligence will be particularly important in a raw land acquisition.

Environmental due diligence has two general goals: (1) to evaluate any potential, currently existing environmental liabilities associated with owning the property and (2) to evaluate whether the Buyer's proposed development will create new environmental liabilities or violate any federal state, or local environmental laws. In most cases, the Buyer's lender will determine the breadth and expansiveness of the environmental reports and studies to be completed on the property during the due diligence phase of the transaction. These reports and studies are also extremely important to the Buyer and should also be reviewed by the Buyer's attorney.

The purchase contract should require the Seller to submit copies of all environmental reports and studies in its possession—this is a good starting point for the Buyer's due diligence review. The Buyer's attorney should also pay special attention to, and take additional steps to research, any exceptions to the Seller's representations and warranties concerning known environmental defects on the property, environmental-related notices received from governing authorities, and the use of hazardous materials on the property.

The Buyer's lender will almost certainly require a licensed environmental consultant to conduct Phase I environmental study of the property. The Phase I study generally consists of a site inspection and an investigation of available public and private records to determine the historic use of the property and evaluate the likelihood of an environmental issue on the property. The Phase I does not usually require soil sampling.

If any of the environmental due diligence raises a concern for the lender or Buyer, a Phase II study may be ordered. The Phase II study usually consists of taking soil samples and evaluating them for contaminants.

Depending on the nature of the property, the Buyer should also consider having its environmental consultant perform studies concerning protected wetlands, protected species, and protected vegetation. The presence of any of these may materially impair the Buyer's ability to develop the land. Seismic reports and geotechnical analyses may also be useful for this purpose.

After all of the environmental studies and assessments are complete, and assuming that the

lender has not withdrawn its commitment to provide funding, the attorney should review the studies to evaluate whether the Buyer is "purchasing a problem" or if the Buyer's development plans will create an environmental problem or liability.

VI. WATER AND UTILITIES DUE DILIGENCE

The Buyer must have a plan for providing water and wastewater services, other utilities, and drainage control for the new development. The Buyer may need to construct new facilities, extend existing facilities, or tie into existing facilities at the property. The Buyer's engineers will probably take the lead on analyzing utilities access for the new development. The Buyer's engineers may also play a significant role in obtaining the necessary permits, licenses, and approvals for utilities, although a regulatory attorney may need to be involved in the process.

The attorney conducting the due diligence review on the property may not have a significant role in reviewing utility-related issues. But, legal issues in this area may need additional research and review by the due diligence attorney. For example, planning for utilities may implicate water rights issues, issues concerning existing easements on the property, or other legal issues.

VII. FINANCIAL DUE DILIGENCE

Certain financial matters concerning the property should be reviewed during the due diligence phase. The Buyer's lender will require an appraisal of the property to evaluate its decision to lend funds, but the appraisal should also be reviewed by the Buyer's attorney to assist the Buyer in evaluating the transaction before its ability to terminate the contract lapses.

The attorney should also obtain UCC lien searches, tax lien searches, and judgment searches for the property. The attorney should conduct searches in the name of the Seller, any development companies associated with the Seller, any entities affiliated with the Seller, any persons or companies that have possessed the property under a lease or other right, and the Seller's lenders. UCC searches should be conducted in the records of the Texas Secretary of State and the county clerk's office of the county where the property is located. These searches should reveal

all of the liens that the Buyer needs to be released simultaneously with the closing.

The attorney should also review the tax certificate received from the title company and the portions of the title commitment dealing with real property taxes. The tax certificate should reveal the amount of taxes that will be owed on the property, the amount of any past-due taxes, and any real property exemptions currently benefiting the property. The attorney should analyze the exemptions claimed against the property in order to evaluate the possibility that the Buyer will owe real property ad valorem rollback taxes when it begins to develop the property. The potential for rollback taxes may prompt the Buyer to ask for a reduction in the purchase price to compensate it for the cost of the rollback taxes.

VIII. DEVELOPMENT DUE DILIGENCE

The Buyer, the Buyer's engineers, and the attorney should review all of the matters that will affect the Buyer's proposed development. If the Seller has begun the development process on the property or has begun the process of obtaining necessary permits or licenses, the Buyer will most likely assume all of the applicable contracts and receive the benefit of all of the licenses and permits. For this reason, the attorney and engineers should review all of the work previously completed to determine if there are any costly errors or items that need to be amended or revised to conform to the Buyer's proposed development.

If the property must be platted, the Buyer should review any plat applications that have been submitted by the Seller to ensure that they meet the needs of the Buyer's proposed development. If the Buyer will control the plat process, the Buyer's engineers and attorney should analyze all of the issues that will affect the plat, including mandatory dedications of land, fiscal deposits that must be made, and the timing of the process. The Buyer should budget the necessary expense and time required to complete the plat process when planning its proposed development.

The Buyer, its engineers, and attorney must also determine the effect of the property's zoning, a proposed annexation, and/or other jurisdictional-related issues on the proposed development.

As part of its development due diligence, the Buyer and its engineers should also determine the need for regrading or reshaping the land and the

need to construct roadways—as well as the need to obtain permits to perform such activities. The attorney's role in this process may not extend beyond raising the issue for the Buyer to make sure that the Buyer's engineers have researched and prepared for the appropriate processes.

The legal issues raised in the development due diligence on the property may affect the Buyer's proposed development budget. The Buyer and the Buyer's lender need to make sure this budget accurately predicts the funding needs for the development, so the work of the real estate attorney in this area may be vital to the transaction.

IX. ATTORNEY COMPETENCE ISSUES IN RAW LAND ACQUISITION DUE DILIGENCE

Conducting due diligence in a raw land acquisition may not be commonplace for many Texas real estate attorneys. Many real estate attorneys may not have experience advising clients on development issues. Also, many aspects of raw land acquisitions involve specialized licensing and permitting rules, regulations, and processes that may not be familiar to all real estate attorneys. These concerns raise the ethical issue of attorney competence.

The *Texas Disciplinary Rules of Professional Conduct* (“TDRPC”) require that an attorney be “competent” to handle the matters raised in the course of his or her representation of a client. TDRPC 1.01(a) provides: “A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless: (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.” The rule raises three questions: (1) What is the standard of “competence”?; (2) What factors must an attorney consider when judging his or her competence to handle a matter?; and (3) If an attorney is not competent to handle the matter, what should he or she do?

A. What is the Standard for “Competence”?

The Terminology section in the Preamble to the TDRPC defines “Competent.” The definition states that “Competent or Competence denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.” Therefore, the attorney must either currently possess the knowledge to handle the matter or be able to acquire the necessary knowledge in a timely manner. Comment 1 to TDRPC 1.01 goes on to describe “competence” as “appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.”

“Competence” is not the same as experience. Comment 3 to TDRPC 1.01 states that newly admitted attorneys are just as competent as experienced attorneys to handle matters that require only fundamental legal skills and no specialized knowledge. All the experience in the world, however, may not make an attorney competent to handle all types of unique legal matters.

The definition of “competence” also allows an attorney to gain the requisite knowledge through study and training. If an attorney will be able to gain the knowledge in a timely manner, he or she should be judged competent to handle the matter. The TDRPC embraces the notion that attorneys inherently have the ability to gain specialized knowledge to enhance their practice areas through additional study and investigation. Attorneys must be wary of the “timeliness” issue imposed by TDRPC 1.01 with regard to additional study, however. Comment 4 to TDRPC 1.01 states that the additional study should not result in unusual delay or expense to the client unless the client consents to the delay and expense. TDRPC 1.01 does not make it unethical for an attorney to charge the client for the time required to gain the specialized knowledge, but attorneys should obtain the client’s consent if the extra expense will be “unusual.”

With regard to raw land acquisitions, a real estate attorney who is not familiar with all of the issues involved in conducting due diligence, analyzing development issues, or navigating regulatory issues related to licensing and

permitting in such transactions should pause to judge his or her competence before undertaking the representation of a client in such a matter. It may be advisable for the attorney, though not required by TDRPC 1.01, to tell the client that he or she has not performed due diligence for this type of transaction before. Some factors the attorney should consider in making this judgment are discussed in Section VI.B. below.

B. What Factors Must Be Considered When Determining Competence?

Comment 2 to TDRPC 1.01 gives the attorney some guidance as to how to determine his or her competence. Comment 2 states: “In determining whether a matter is beyond a lawyer’s competence, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.”

This comment raises four important factors to consider: (1) the nature of the matter; (2) the attorney’s prior experience in similar matters; (3) the attorney’s ability to devote time to additional study; and (4) the feasibility of other options. These four considerations track the definition of “competence” discussed in Section VI.A.

An attorney analyzing his or her competence to represent a client in a raw land acquisition should recognize that some amount of specialized knowledge of development matters and legal issues involved with the ownership of raw land is required. Many real estate attorneys may not already possess this specialized knowledge. But, many attorneys will judge that, assuming they have the time and resources to do so and/or by associating with other specialized counsel, they will be able to timely gain the specialized knowledge needed to undertake the representation.

C. What Should an Attorney Lacking the Required Standard of Competence Do?

If an attorney judges that he or she lacks the competence to undertake a representation, absent an emergency situation governed by TDRPC 1.01(a)(2), two options are left open by TDRPC 1.01. First, the attorney may decline or withdraw from the representation. Second, after obtaining the consent of the client, the attorney may associate another attorney with the requisite specialized knowledge to assist with the legal matter.

APPENDIX A

RAW LAND ACQUISITION CHECKLIST

Raw Land Acquisition Checklist

I. CONTRACT PHASE

- A. Define the “Property” to include the real estate and any rights Seller owns in intangible property (including permits, licenses, reports and studies, surveys, maps, transferable utility contracts, engineering plans and studies, development contracts, and other contract rights)
- B. Negotiate amount of Earnest Money to deposit
- C. Negotiate payment of independent contract consideration to ensure enforceability of option contract
- D. Coordinate Inspection Periods, Option Periods and Closing Dates
- E. Require Seller to submit copies of most recent surveys, environmental reports, and other studies/reports concerning the real estate
- F. Require the Seller to submit information concerning the Property
 - i. Most recent real property and personal property ad valorem tax statements
 - ii. Notices from governing authorities concerning the Property’s noncompliance with applicable laws
 - iii. Any appraisals and surveys in Seller’s possession
 - iv. Copies of all development contracts, engineering contracts, and filings with applicable authorities regarding platting, zoning, or other permitting and licensing issues
- G. Require Seller to update all of its submission materials within 10 days of a material change in any of the materials
- H. Obtain Seller representations and warranties
 - i. Seller owns indefeasible title to the Property
 - ii. Seller is duly organized, validly exists, and is authorized to sign Contract
 - iii. Seller is not a “foreign person”
 - iv. Property complies with governmental regulations

- v. No knowledge of violations of environmental laws and has not received any notices regarding violations
 - vi. Seller has not placed hazardous materials on the Property
 - vii. There are no parties in possession of all or any portion of the Property other than those claiming under valid leases or documents filed in the Official Public Records of Real Property of _____ County, Texas
 - viii. There are no actions, suits, claims, assessments, condemnation proceedings, or other proceedings pending or, to the knowledge of the Seller, threatened that could materially adversely affect the ownership, operation, or maintenance of the Property or Seller's ability to perform under the Contract
- I. Limit the Seller's remedies for breach of contract to retention of the Earnest Money (no suit for damages)
 - J. Make sure Contract is assignable (if necessary)
 - K. Include provisions requiring Seller's cooperation with a 1031 exchange (if necessary)
- II. RAW LAND DUE DILIGENCE
- A. Land Use Due Diligence
 - i. Confirm adequacy of legal access to Property
 - ii. Confirm applicable governmental jurisdiction over the Property
 - (1) If inside a city limits or subject to a municipality's extraterritorial jurisdiction, obtain Zoning Verification Letter from applicable governing authorities
 - a. Check zoning compliance
 - b. Check compliance with applicable local ordinances (i.e., parking ordinance)
 - c. Review copies of any notices from governing authorities regarding noncompliant conditions at the Property provided by Seller

- (2) If outside of a city limits, determine which governmental authorities have jurisdiction; also review the possibility of future annexation
 - iii. Review materials submitted by the Seller as required by the Contract
 - iv. Review any current leases for the property or any other rights to possession or use of the property to make sure that such rights terminate prior to the closing or can be terminated by the Seller prior to closing
- B. Title Due Diligence
 - i. Make sure Seller is listed as the current owner on Schedule A of the Title Commitment
 - ii. Make sure Schedule A of the Title Commitment correctly lists the Buyer as the Proposed Insured
 - iii. Make sure schedule A contains an accurate legal description of the Property (the description should match the description on the Survey)
 - iv. Review any recorded documents listed on the title commitment (i.e., restrictive covenants, deed restrictions, and easements) to make sure that (1) they actually affect the Property and (2) they are still enforceable
 - v. Review any outstanding oil, gas, and mineral rights
 - (1) Determine if outstanding oil, gas, and mineral rights will affect the proposed development of the Property
 - (2) Review possibility of obtaining Waivers of Surface Rights from holders of outstanding oil, gas, and mineral rights
 - (3) Review whether local laws would prevent drilling on the Property
 - vi. Review all liens and encumbrances listed on Schedule C of the Title Commitment to determine if they are releasable at the closing

C. Survey Due Diligence

- i. Make sure the Survey includes a complete metes and bounds legal description of the Property
- ii. Make sure the Property constitutes a legal platted lot—if it does not, investigate local requirements for legal lots
- iii. Compare the Survey with the Title Commitment to make sure every recorded document listed in the Title Commitment is referenced and located on the Survey or listed as not affecting the Property by the surveyor
- iv. Review the location of third party property rights to determine if they interfere with the proposed development
- v. Make sure the Survey is certified to the Title Company, the Buyer, and the Buyer's lender
- vi. Make sure the Survey's certification references the GF number of the Title Commitment
- vii. Obtain adequate Survey certifications:

(a) This survey was made on the ground as per the field notes shown on this survey and correctly shows (i) the boundaries and areas of the subject property and the size, location and type of buildings and improvements thereon; (ii) the location of all rights-of-way, easements and any other matters of record (or of which I have knowledge or have been advised, whether or not of record) affecting the subject property; (iii) the flood zone designation (with proper annotation based on Federal Flood Insurance Rate Maps or the state or local equivalent, by sealed map location and graphic plotting only); (iv) all roads and roadways located on or providing access to the subject property; and (v) all other significant items on the subject property;

(b) except as shown on the survey, there are no (i) encroachments upon the subject property by improvements on adjacent property, (ii) encroachments on adjacent property, streets or alleys by any improvements on the subject property, (iii) party walls, or (iv) conflicts or protrusions;

(c) all required building set back lines on the subject property are located as shown hereon;

(d) except as shown on the survey, no part of the subject property lies within a flood plain or flood prone area or flood way of any body of water; and

(e) the survey complies with the current Society of Professional Surveyors Standards and Specifications for a Category____, Condition____survey and the same is accurate, true, and correct to the best of my knowledge and belief.

D. Environmental Due Diligence—environmental due diligence is extremely important for purchases of raw land

- i. Review most recent environmental studies (Phase I, etc.) obtained from Seller
- ii. Check with lender for requirements regarding new environmental studies
- iii. Order any new required environmental studies very early to ensure that results are obtained before the end of the Inspection Period
- iv. At a minimum, the Buyer should obtain a Phase I study of the property
- v. If the Phase I study indicates potential environmental defects, the Buyer should obtain a Phase II expanded study of the Property (including soil reports and geotechnical reports)
- vi. Buyer should also obtain reports about protected wildlife and vegetation
- vii. Buyer should consider the purchase of environmental insurance

E. Water and Utilities Due Diligence

- i. Analyze the need for wastewater facilities
- ii. Analyze the need for stormwater drainage facilities
- iii. Review access to water supplies and the need to construct new facilities for water supplies
- iv. Review need to relocate utilities and/or construct utility tie-ins

F. Financial Due Diligence

- i. Obtain and review appraisal
- ii. Obtain and review results of UCC lien searches, tax lien searches, and judgment searches—the Buyer should conduct searches in the name of the Seller, any development companies associated with the

Seller, any entities affiliated with the Seller, any persons or companies that have possessed the property under a lease or other right, and the Seller's lenders in the records of the Texas Secretary of State and the county clerk's office of the county where the Property is located

- iii. Obtain tax certificate from Title Company
 - (1) Check for payment of past due taxes
 - (2) Check current valuation and amounts of taxes
 - (3) Check for claimed exemptions to analyze rollback taxes issue

G. Development Due Diligence

- i. If Seller has begun the development process, review all contracts, permits, licenses, approvals, and related correspondence concerning all development matters—also make sure that the rights to all such items will be assigned to the Buyer at closing
- ii. Review any completed plat or plat preparation begun by Seller, or if no plat work has commenced, assess issues involved with developing a plat for the Property, such as
 - (1) Required dedications
 - (2) Mandatory deposits and/or fees
 - (3) Timing of the plat process
- iii. If zoning must be changed or if the Property will be annexed, review any completed zoning applications or preparation of zoning materials begun by Seller, or if no zoning work has commenced, assess issues involved with applying for zoning for the Property (if necessary)
- iv. Review the need for regrading/reshaping the land and research the associated costs
- v. Review the need for roadways and the ability to construct roadways and research the associated costs
- vi. Prepare development budget

III. OBJECTION PHASE—Prepare Objection Letter to the Seller

- A. Buyer should object to any defect in the due diligence materials supplied by Seller
- B. Buyer should object to any title defect shown in the Title Commitment
 - i. Documents referenced in the Title Commitment that do not affect the Property or that are no longer enforceable
 - ii. Documents that the Survey indicates do not affect the Property
- C. Buyer should object to any defect shown on the Survey (i.e., encroachments over easements and setback lines)
- D. Buyer should object to any defect in the development contracts, permits, licenses, approvals, or other documents being assigned to Buyer at closing
- E. Depending on the language of the Contract, the Buyer may be forced to choose to either (1) waive its objections at the end of the Inspection Period and proceed to closing or (2) terminate the Contract and receive a refund of the earnest money

IV. FINANCING PHASE

- A. Negotiate Loan Commitment with Lender and finalize the Loan Commitment before the end of the Inspection Period
- B. Obtain drafts of forms of all loan documents (typically, a Note, Deed of Trust, Guaranty Agreement, and construction-related documents)
- C. Provide Lender with closing date

V. PRE-CLOSING PHASE

- A. Request an Insured Closing Letter from the Title Company
- B. Prepare drafts and/or review drafts of all of the closing documents and agree on final forms with Seller—be sure to include Seller’s specific representations and warranties in the appropriate closing documents; the documents should include
 - i. Deed
 - ii. Assignment and Assumption Agreement for any development contracts Buyer will assume

- iii. General Indenture and Conveyance for other intangible property (licenses, permits, etc.)
- C. Finalize forms of loan documents with Lender
- D. Request and review forms of closing documents that will be prepared and required by the Title Company (i.e., an Affidavit of Debts and Liens)
- E. Request initial draft of Settlement Statement
- F. Coordinate preparation of closing documents by §1031 exchange intermediary, if applicable
- G. Make sure Seller is obtaining releases of liens

VI. CLOSING

- A. Finalize Settlement Statement with the Title Company, Lender, and Seller
 - i. Ensure Settlement Statement correctly prorates real property taxes
 - ii. Coordinate finalizing Settlement Statement with §1031 exchange intermediary, if applicable
- B. Prepare Closing Instruction Letter to Title Company (letter should contain a statement regarding requested changes in the form of Owner's Title Insurance Policy to be issued after the closing)
- C. If a representative of Buyer is not attending the closing, submit fully executed closing documents with closing letter

VII. POST-CLOSING

- A. Review form of Owner's Title Insurance Policy issued after the closing to ensure conformance with contract requirements, the Title Commitment, and the closing instruction letter
- B. Review recorded Deed

Borrower's Checklist for Loan Documents

The following provisions are usually not included in initial drafts of Lender-prepared loan documents. The Borrower's ability to add the following provisions is increased if the request for the provisions is made before agreeing to the Lender's Loan Commitment document.

1. Notice and Cure. Notice and cure periods for both monetary (10 days) and nonmonetary (30 days) defaults. Some lenders strongly resist giving notice for monetary defaults; you can compromise by limiting the number of required notices for monetary defaults to two per year and/or five over the life of the note. Similar compromises may be made on the number of permitted nonmonetary defaults.
2. Not Payable on Demand. The loan documents should not contain a payable on demand feature.
3. No Prepayment Penalties. Allow the Borrower to prepay the entire loan with 30 or fewer days notice and no prepayment penalties.
4. Ad Valorem Property Taxes. Retain the right to contest ad valorem property taxes.
5. Subordination to Personal Property Purchase Money Lenders. The lien contained in the loan documents should be automatically subordinate to any purchase money lien for equipment or other personal property purchased by the Borrower after the date of the loan.
6. No Lender's Approval Necessary for Certain Transfers or Assignments of Ownership Interests in Borrower. The owners of the Borrower may want the flexibility to be able to transfer ownership interests in the Borrower for estate planning purposes without obtaining the prior consent of the Lender.
7. Approval of Leasing Parameters that Do Not Require Lender Consent. The Borrower may want the ability to enter into certain leases affecting the Property without the need for obtaining the Lender's prior consent (e.g., leases less than a ___-year term, less than ___square feet, and at a rate per square foot of \$ ___or more).