

**PHASE TWO: DRAFTING THE PURCHASE AGREEMENT
AND THE CONSTRUCTION CONTRACTS**

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 - 3. Easements

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- I. Option Agreements are another good vehicle for acquiring an interest in the property

II. AGREEMENT OF PURCHASE AND SALE

THIS AGREEMENT is made and entered into this ____ day of _____, 2000 by and between _____, a Michigan co-partnership, whose address is _____ (the "Seller") and _____ or assigns, whose address is _____ (the "Purchaser").

WITNESSETH:

This Agreement of Purchase and Sale (the "Agreement") is based upon the following recitals:

A. Seller is the owner of certain real estate located in the Township of _____, _____ County, Michigan, a legal description of which is attached to this Agreement as Exhibit "A" and made a part hereof, together with all tenements, easements, hereditaments, privileges and appurtenances appertaining thereto (collectively the "Property", as said term is more specifically defined in Article I hereof)."

B. Seller has agreed to sell and Purchaser has agreed to purchase the Property upon the terms and conditions herein set forth.

NOW THEREFORE, the parties in consideration of the mutual covenants herein, and other good and valuable consideration to them in hand paid, receipt and adequacy of which are hereby acknowledged, hereby agree as follows:

ARTICLE I

PROPERTY

As used herein, the term "Property" shall be deemed to include:

1.1. The real estate described on Exhibit "A" and which Seller has petitioned to rezone to allow for the construction and operation of a commercial office building, together with all easements, air, mineral and riparian rights and all tenements, hereditaments, privileges and appurtenances thereto belonging or in any way appertaining thereto;

1.2. Any land lying in the bed of any street, road or avenue, open or proposed, at the foot of or adjoining the Property to the centerline thereof, which is owned by Seller;

1.3. The interest of Seller, if any, in the water and sewer lines, telephone, gas and electric lines and cable television lines to and in the Property, and the storm drainage system, presently utilized therein and/or adjacent thereto and the right to tap into and continue to use all of such utilities, and the paved streets to and in the Property and the right to use the same.

1.4. Any pending or future award made in condemnation of the Property or to be made in lieu thereof, and any unpaid award for damage to the Property by reason of change of grade of streets;

1.5. The use of appurtenant easements to the Property, whether or not of record, strips and rights-of-way abutting, adjacent, contiguous, or adjoining the Property;

ARTICLE II

PURCHASE PRICE

2.1. Seller agrees to sell and Purchaser agrees to purchase the Property pursuant to the terms and conditions contained in this Agreement. The total purchase price for the Property shall be (\$_____) Dollars (the "Purchase Price"). The Purchase Price shall be paid as follows:

In addition to the Earnest Money provided for in Article IV in the amount of _____ (\$_____) Dollars, Purchaser shall pay to Seller, at the Closing, the unpaid balance of the Purchase Price in the amount of _____ (\$_____) Dollars, in cash, by wire transfer or by certified or cashiers check, plus or minus the interest on the Earnest Money and closing adjustments and prorations provided for herein.

ARTICLE III

REAL ESTATE COMMISSION

3.1. Seller and Purchaser acknowledge that the subject transaction has come about through the efforts of _____, real estate broker. Upon the consummation of this transaction in accordance with the terms of this Agreement, Seller shall be responsible for the payment in full to _____ of the brokerage commission in the amount of (\$_____) Dollars, which shall be paid at Closing. But for such real estate broker, Seller and Purchaser represent one to the other that no other real estate brokers or finders have been involved in connection with this transaction.

3.2. Each party agrees to indemnify and hold the other harmless from all loss, damage, costs and expenses (including attorneys' fees) that the other party may suffer as a result of any claim brought by any broker or finder with whom such party may have dealt in connection with this transaction, subject to Seller's obligation set forth in Article 3.1.

ARTICLE IV

EARNEST MONEY

4.1. Concurrently with the Purchaser's execution of this Agreement, Purchaser shall deliver to _____ (the "Escrow Agent") an earnest money deposit in the sum of _____ (\$ _____) Dollars (the "Earnest Money"). The Earnest Money is to be held in escrow by the Escrow Agent until completion of the transaction described herein or as otherwise set forth herein.

4.2. In the event that the transaction contemplated hereby is consummated in accordance with the terms and conditions hereof, the Escrow Agent shall deliver the Earnest Money to the Seller for application against the cash portion of the Purchase Price due on Closing. In the event that the transaction contemplated hereby is not so consummated, the Escrow Agent shall apply the Earnest Money as set forth herein.

4.3. The Escrow Agent shall deposit such cash in an escrow account in an interest-bearing form. In the event the transaction contemplated hereby is consummated in accordance with the terms of this Agreement, all interest earned on the Earnest Money shall be paid to Seller and Purchaser shall receive a credit in the amount of such interest against the proceeds due Seller by Purchaser at Closing. In the event the transaction contemplated hereby is not consummated, all interest earned on the Earnest Money shall be treated in the same manner as the Earnest Money is treated under this Agreement.

ARTICLE V

INSPECTION OF PROPERTY AND COVENANTS

5.1. Purchaser shall have from the date hereof through and including the close of business on _____ (the "Inspection Period") to: (i) inspect or cause to be inspected the physical condition of the Property and all of Seller's documents evidencing rights or interests and other documents relevant to the Property, and to (ii) obtain a rezoning of the Property so that it may be developed as a commercial office building.

In the event that, after conducting the aforescribed inspections and after filing an application for a rezoning of the Property, Purchaser desires to proceed with the purchase of the Property, Purchaser shall so notify Seller, in writing, which notice (the "Notice to Proceed") must be given on or before the expiration of such Inspection Period. In the event that such notice is given, the parties shall proceed to Closing in accordance with the terms hereof.

In the event that Purchaser fails (in its sole discretion) to give such Notice to Proceed on or before the expiration of the Inspection Period, this Agreement shall terminate and become null and void, and Purchaser shall thereupon receive a refund of the Earnest Money deposited with Escrow Agent, together with all interest earned thereon, and be relieved of any and all liability hereunder.

5.2. Seller agrees that from the date of this Agreement to the Closing Date, Seller shall assist Buyer with its request to rezone the Property and shall appear with Buyer at any municipal hearings required to process the request to rezone. Seller also agrees that until the expiration of the Inspection Period, Seller will:

a. Refrain from transferring any of the Property or creating on the Property any easements, liens, mortgages, encumbrances or other interests which would affect the Property or Seller's ability to comply with the terms of this Agreement;

b. Keep in effect Seller's existing policies of public liability insuring the Property; and

c. Refrain from storing, treating, or disposing on the Property any Hazardous or Toxic Substance, as defined hereafter, or permitting the same to be done by any other person. The term "Hazardous or Toxic Substances," as used in this Agreement, means any substance the generation, storage, treatment disposal, or transportation of which is prohibited or regulated by any law or governmental regulation having as its object the protection of public health, natural resources, or the environment, including, by way of illustration only, the following: the Resource Conservation and Recovery Act; the Toxic Substances Control Act; the Clean Air Act; the Federal Water Pollution Control Act; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980; the Michigan Hazardous Waste Management Act; and the Michigan Solid Waste Management Act.

d. Promptly (within _____ (___) business days from the date of execution hereof) furnish Purchaser with a copy of all notices of violation of laws, municipal ordinances, governmental regulations, or orders of any governmental agencies or units, departments of housing, building, fire, labor, health, or other state, township or municipal departments or other governmental authorities having jurisdiction over or affecting the Property.

ARTICLE VI

TITLE AND SURVEY

6.1. Seller agrees, at Seller's sole cost and expense, to furnish Purchaser with:

a. A current commitment from _____ acceptable to Purchaser (the "Title Company") to issue to Purchaser, at or as soon as possible after Closing, its Owner's title insurance policy, without standard exceptions, in the amount of the Purchase Price, insuring title to the Property to be in good and marketable condition, free and clear of any liens and encumbrances except those liens, encumbrances, easements and other matters set forth in attached Exhibit "B" (the "Permitted Exceptions"). The Seller shall furnish Purchaser with the aforesaid title commitment as soon as possible, but in no event later than _____ (___) days following the Date of execution of this Agreement. Notwithstanding the foregoing, Purchaser shall pay for the title policy and Seller shall remit the sum of _____

_____ (\$ _____) Dollars to Purchaser at Closing in full satisfaction of Seller's obligation to pay for such policy.

If the title is not in the condition required hereunder, Purchaser shall notify Seller in writing of such defect(s) within _____ (__) days after receipt of the title insurance commitment and copies of all items shown therein. In the event Seller is unable or unwilling to cure such defects within _____ (__) days after receipt of such notice, Purchaser shall have the option of either (i) waiving such defect(s) and proceeding with the Closing; (ii) receiving the return of its Earnest Money and all interest accrued thereon, whereupon all liability hereunder shall terminate; or (iii) if the defect can be cured by the payment of dollars, deducting the amount required to cure such defect from the Purchase Price and the proceeds due Seller at Closing.

b. A boundary survey of the Property indicating all structures, easements and improvements thereon, prepared by a registered land surveyor or engineer licensed in the State of Michigan. The survey shall be delivered to Purchaser within _____ (__) days after the signing of this Agreement. The survey shall contain a certification acceptable to Purchaser and to the Title Company (in order to permit it to remove the survey exception in the Title Insurance Policy) dated not earlier than this Agreement or such later date as required by the Title Company to remove the survey exception in the title policy and shall be certified to the Purchaser, the Title Company, and any other applicable parties. The certification shall certify that (i) the Property does not lie within any flood hazard areas in accordance with the document entitled "Department of Housing and Urban Development, Federal Insurance Administration - Special Flood Hazard Area Maps"; (ii) all structures are located within the property lines; and (iii) there are no encroachments of any kind whatsoever. The survey shall contain a legal description of the Property which shall be identical to that set forth in Exhibit "A." If the survey is not in the condition required hereunder, Purchaser shall notify Seller in writing of such defect(s) within _____ (__) days after receipt of the survey. In the event Seller is unable or unwilling to cure such defect(s) within _____ (__) days after receipt of such notice, Purchaser shall have the option of either (i) waiving such defect(s) and proceeding with the Closing; (ii) receiving the return of its Earnest Money and all interest accrued thereon, whereupon all liability hereunder shall terminate; or (iii) if the defect(s) can be cured by the payment of dollars, deducting the amount required to cure such defect from the Purchase Price and the proceeds due Seller at Closing or otherwise; provided, however, in the event Seller bonds over or places into escrow the amount necessary to cure any such defect, Purchaser shall not deduct such amount from the Purchase Price and the proceeds due Seller at Closing.

ARTICLE VII

CLOSING

The transaction contemplated under this Agreement shall be consummated at a meeting of the parties (the "Closing") which shall take place at the offices of _____ or on any other date mutually acceptable to Purchaser

and Seller (the "Closing Date"), the determination of whether the Closing shall take place prior to the Closing Date to be at the option of the Purchaser.

At the time and place of Closing, all of the closing items described in Article X, including all closing proceeds, shall be tendered to the Title Company. The Title Company shall be authorized to consummate the Closing of the transaction contemplated hereunder at such time as the applicable documents have been recorded and it is prepared to issue an owner's policy of title insurance in accordance with the provisions of Article 6.1(a).

ARTICLE VIII

SELLER'S WARRANTIES

Seller represents, warrants and covenants with Purchaser the following:

8.1. There are no existing violations of any laws, zoning ordinances, regulations, orders or other governmental authorities having jurisdiction against or affecting the Property nor has Seller received any notice of any existing or threatened legal action of any kind involving the Property.

8.2. There is no pending or, to the knowledge of Seller, threatened litigation, administrative action or examination, claim, or demand whatsoever relating to the Property.

8.3. No Hazardous or Toxic Substances have been released into or deposited upon or below the surface of the Property or into any water systems on or below the surface of the Property or stored or used on or in the Property. There are no underground tanks, no fill and no wetlands located on or below the surface of the Property. Seller hereby agrees to indemnify Purchaser from and against any and all liability, loss, costs, penalty, damage and expense, including reasonable consultants' and attorneys' fees, resulting from or due to the presence or release or threatened release of Hazardous or Toxic Substances occurring or alleged to have occurred on or from the Property, or any underground tanks, fill or wetlands being located thereon.

8.4. As of the date hereof, Seller is the owner of title to the Property in the condition required for performance hereunder and will not cause any modification thereof through to and including the date of Closing. Seller shall utilize the proceeds received by Seller at the time of Closing to discharge the mortgage indebtedness due and owing to on the Property. Other than any lien which may have been given to such lender, there are no liens or encumbrances upon the Property or upon any of the above described personal property, equipment, tools, supplies, furnishings or furniture, or fixtures of any kind or description.

8.5. Neither the execution and delivery of this Agreement nor the Seller's performance hereof are restricted by or violate any contractual or other obligations of the Seller.

8.6. All roads necessary for the full utilization of the Property for its intended purposes have either been completed or the necessary rights of way therefore have either been acquired by the appropriate local authority, have been dedicated to the public use and

accepted by said local authority or have been made available through adjoining private land, doing so in accordance with valid and enforceable public or private easements which will inure to Purchaser's benefit on the Date of Closing and all necessary steps have been taken by Seller and all local authorities to assure the complete construction and installation thereof.

8.7. The Property is correctly described in the legal description in Exhibit "A" and all of the improvements are located thereon.

8.8. The Permitted Exceptions do not adversely affect the use of the Property for the purposes intended hereby.

8.9. The Property is insured under a currently effective policy of comprehensive liability insurance which will be kept in full force and effect until the Date of Closing.

8.10. The Seller has duly and validly authorized and executed this Agreement with full power to enter into and perform this Agreement.

8.11. Neither the Seller, nor any principals or partners of Seller, are a "Foreign Person" within the meaning of the Internal Revenue Code Section 1445(f)(3).

8.12. Gas and electricity are supplied or made available to the Property by either private or public authorities and are currently available to the Property in sufficient quantities to fully operate the Property as a commercial office building.

8.13. Seller has no knowledge of any pending, threatened, or contemplated condemnation proceedings affecting the Property or any part thereof, or any request by any utility company or governmental agency or any other person or entity for any improvements, repairs, construction, easements, rights of way or other activities or undertakings in connection with the Property or any part thereof, which are not of record.

8.14. The Property does not lie in any area which has been governmentally designated as a flood plain or special flood hazard area or as wetlands.

8.15. Neither Seller nor any present or prior tenant or occupant of the Property has ever received any notice from, nor filed any notice or application with, any governmental authority concerning any Hazardous or Toxic Substance, or any underground tank, fill or wetlands.

8.16. Seller will not permit or cause any action to be taken which would have the effect of making any of the foregoing representations or warranties to be untrue as of the Closing Date.

8.17. The Property is a "parent parcel" as that term is defined in the Land Division Act and the Property may be divided into ___ different parcels without platting.

ARTICLE IX

DEFAULTS

9.1. In the event of a default by Purchaser hereunder, Seller shall be entitled to terminate this Agreement and retain as liquidated damages Purchaser's Earnest Money deposit together with all interest earned thereon. The foregoing shall be Seller's sole remedy.

9.2. in the event of a default by Seller hereunder prior to or on the Closing Date, then in either event, Purchaser may, at its option: (a) receive a refund of all monies deposited by Purchaser hereunder, together with all interest earned thereon, and collect all damages to which Purchaser may be entitled, (b) specifically enforce the terms and conditions of this Agreement, or (c) exercise any other right or remedy, all of which rights and remedies shall be cumulative.

ARTICLE X

CLOSING: CLOSING DOCUMENTS

At the Closing, Seller shall execute and deliver to Purchaser (as required) and Purchaser shall execute and deliver to Seller (as required) the following:

10.1. Seller shall execute and deliver to Purchaser a good and sufficient Warranty Deed, conveying all divisions available to the Property as a parent parcel, subject only to the Permitted Exceptions conveying a marketable title to the Property to Purchaser.

10.2. Seller shall deliver to Purchaser the utility plans soil tests and other documents used by Seller in connection with the maintenance of the Property.

10.3. Seller shall deliver to Purchaser licenses and certificates of occupancy, or such other comparable certificates or documents issued by the appropriate governmental authority, with respect to the Property or any part thereof, which Seller has in its possession.

10.4. Seller shall furnish Purchaser with an affidavit stating that neither Seller nor any of its principals or partners are a "Foreign Person" within the meaning of IRC Section 1445(f)(3), in which event the adjustment referred to in subparagraph (h) of Article 10.12 below shall not be required. Seller shall also furnish Purchaser with any documents or forms which shall be required under any applicable IRS regulations in effect at the Closing Date.

10.5. Seller and Purchaser shall execute and deliver to each other a closing statement showing the amounts by which the cash portion of the Purchase Price shall be adjusted as of the Closing Date. The following items shall be apportioned between the Seller and the Purchaser on the basis that Purchaser owns the Property on the Closing Date:

a. Purchaser shall receive credit for the premium payable to the Title Company for the issuance of the title insurance policy required hereunder in the

event Seller shall not have provided written assurance from the Title Company to Purchaser that the title policy will be issued without cost to Purchaser.

b. All real estate and personal property taxes and assessments which are due or are a lien against the Property as of the Closing Date shall be paid in full by Seller. With respect to the real estate taxes for the current year, the parties shall adjust and apportion such taxes based upon the due date of all such taxes.

c. The Earnest Money and all interest accrued thereon held by the Escrow Agent shall be credited against the cash portion of the Purchase Price due on the Closing Date.

d. If Seller is a not a "Foreign Person" within the meaning of IRC Section 1445(f)(3), Seller shall execute and deliver to Purchaser at Closing an affidavit so stating.

e. Seller shall pay any state, county or other transfer tax to become payable upon delivery or recording of the Warranty Deed referred to in Article 10.1 above.

10.6. Seller shall furnish Purchaser with copies of appropriate documents demonstrating that the Seller is a co-partnership, in good standing in the State of Michigan and such other documents as shall reasonably satisfy the Purchaser that the Seller and the parties executing the documents have the authority to enter into this Agreement, consummate the sale contemplated hereby and execute and perform all documents contemplated hereby.

10.7. A revised title insurance commitment (including a current tax lien search) "marked up" by the Title Company at the Closing which has the effect of updating through to and including the Closing Date the title insurance commitment identified in Paragraph 6.1 hereof, and of insuring Purchaser as to the title obtained at the Closing being in accordance with the provisions hereof.

10.8. A written opinion of Seller's attorney addressed to the Purchaser, indicating that it is the opinion of such attorney that:

a. Seller is a co-partnership duly organized, validly existing and in good standing under the laws of the State of Michigan with full power and authority to execute this Agreement and carry out the transactions and execute the documents described herein;

b. The execution of this Agreement and the sale contemplated hereby have been duly and properly authorized and/or ratified and confirmed by appropriate action of partners of the Seller and to the best of the attorney's knowledge no legal impediments to the sale exist;

c. The Seller has taken all requisite action to consummate this Agreement and the sale contemplated hereby; and

d. All closing instruments have been properly executed by the Seller and are binding upon the Seller.

10.9. Copies of all current real estate tax bills.

10.10. Seller shall furnish Purchaser with a certification of the Seller dated on the Closing Date that all representations and warranties of the Seller contained herein are true and correct as of the Closing Date, and shall survive thereafter.

10.11. Any and all other documentation reasonably required by Purchaser, the Seller, their attorneys and/or the Title Company, to consummate the transaction described herein and to cause the title insurance policy described in Article VI hereof to be issued and delivered to the Purchaser.

10.12. Purchaser shall complete the payment of the Purchase Price as provided in Article 2.1.

ARTICLE XI

DAMAGE

In the event that the Property shall be damaged or significantly altered by storm, tornado or other disaster on or before the Closing Date and the cost to restore such damage or alteration shall exceed _____ (\$ _____) Dollars, Purchaser shall have the right to terminate its obligations under this Agreement within _____ (___) business days after receiving notice of such loss and to receive a return of all sums deposited with Escrow Agent pursuant to Article IV hereof. In the event Purchaser shall not elect to terminate its obligations under this Agreement or in the event that the cost to repair such loss is _____ (\$ _____) Dollars or less, if Purchaser purchases the Property, Purchaser shall be entitled to receive an absolute assignment from Seller of any interest Seller may have otherwise had in the proceeds of any insurance on the Property and Seller shall pay to Purchaser at Closing the amount of any deductible).

ARTICLE XII

CONDEMNATION

In the event that notice of any action, suit or proceeding shall be given prior to the Closing Date for the purpose of condemning any part of the Property, then Purchaser shall have the right to terminate its obligations hereunder within _____ (___) days after receiving notice of such condemnation proceeding, and upon such termination, the proceeds resulting from such condemnation shall be paid to Seller. In the event Purchaser shall not elect to terminate its obligations hereunder, if Purchaser purchases the Property, the proceeds of such condemnation shall be assigned and belong to Purchaser.

ARTICLE XIII

CONDITIONS PRECEDENT TO CLOSING

Anything contained in this Agreement to the contrary notwithstanding, Purchaser shall have no obligation to consummate the within contemplated transaction unless and until the conditions set forth in this Article XIII shall have either been satisfied or waived by Purchaser in writing. Seller shall use its best efforts to satisfy each and all of such conditions. If not so waived, all such conditions must be satisfied by no later than the Closing Date. In the event Seller fails to satisfy any of the conditions set forth herein by the Closing Date, this Agreement shall be null and void, all liabilities of the parties shall terminate and Purchaser shall receive the return of its Earnest Money deposit. Such conditions are as follows:

- a. All representations, warranties and covenants of Seller hereunder shall be true and correct on the Closing Date;
- b. Between the date of this Agreement and the Closing Date, there shall have been no intervening destruction or damage to or condemnation of the Property;
- c. Seller shall have performed all of its other obligations under this Agreement.
- d. Buyer shall have been satisfied with the results of its inspection of the Property and obtained the rezoning necessary to utilize the Property as a commercial office building.

ARTICLE XIV

NO ASSUMPTION OF LIABILITIES

Seller shall be fully responsible for and shall indemnify and hold Purchaser harmless with respect to all operations of Seller's business from the Property prior to the Closing Date including, but not limited to all suits, actions, damages and claims which may be asserted or threatened against the Purchaser from and after the Closing Date, but which shall have arisen out of any aspect of the business or its operations prior to the Closing Date.

Purchaser shall be fully responsible for and shall indemnify and hold Seller harmless with respect to all operations of Purchaser's business from the Property after the Closing Date.

ARTICLE XV

MISCELLANEOUS

15.1. This Agreement and the exhibits attached hereto embody the entire agreement between the parties in connection with this transaction and there are no oral agreements existing between the parties relating to this transaction which are not expressly set forth herein and covered hereby. This Agreement may not be modified except in writing signed by all parties.

15.2. Failure of either party to complain of any act or omission on the part of the other party, no matter how long the same may continue, shall not be deemed to be a waiver by such party to any of its rights hereunder. No waiver by any party at any time, expressed or implied, of any breach of any provision of this Agreement shall be deemed a waiver or a breach of any other provision of this Agreement or a consent to any subsequent breach of the same or any other provision.

15.3. Purchaser has executed this Agreement subject to the right of Purchaser to assign all of its right, title and interest in this Agreement to an existing entity or an entity to be formed. Seller agrees to consummate this transaction with Purchaser's assignee.

15.4. No party other than Seller and Purchaser and their successors and assigns, shall have any rights to enforce or rely upon this Agreement, which is binding upon and made solely for the benefit of Seller or Purchaser, their heirs, personal representatives, successors or assigns, and not for the benefit of any other party.

15.5. Notice shall be deemed as given hereunder upon personal delivery to the addresses set forth below or, if properly addressed, one (1) day after depositing such notice in the custody of a nationally recognized overnight delivery service. Notice shall be deemed properly addressed if sent to the parties at their above specified addresses.

15.6. This Agreement shall be governed by the laws of the State of Michigan.

15.7. The provisions of this Agreement, including but not limited to those set forth in Article VIII, shall survive the Closing of the transaction contemplated hereby.

15.8. At all reasonable times from and after the date hereof to the Closing Date, Seller shall:

a. Make available to Purchaser, its counsel, all instruments, documents and other writings with respect to the Property that Purchaser shall reasonably request; and

b. Afford Purchaser and its representatives full and free access to the Property, including, but not limited to, the right to conduct tests and to inspect the Property, together with all other aspects of the Property; provided, that Purchaser shall indemnify and hold Seller harmless from and against any damage or loss which Seller may suffer as a result thereof.

Whenever this Agreement requires that something be done within a period of days, such period shall (i) not include the day from which such period commences, (ii) include the day upon which such period expire, (iii) expires at 5:00 p.m. Eastern Daylight Time on the date by which such thing is to be done, and (iv) be construed to mean calendar days; provided that if the final day of such period falls on a Saturday, Sunday or legal holiday where such thing is to be done, such period shall extend to the first business day thereafter.

15.9. Both parties to this Agreement have participated fully and equally in the negotiation and preparation hereof. Therefore, this Agreement shall not be more strictly construed or any ambiguities within this Agreement resolved against either party hereto.

15.10. Time is of the essence of all undertakings and agreements of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year set forth below.

WITNESSES:

"SELLER"

By: _____

Its: _____

"PURCHASER"

By: _____

Its: _____

III. RECEIPT OF ESCROW AGENT

_____ hereby acknowledges receipt of the sum of _____ (\$_____) Dollars which it agrees to hold in escrow as the Earnest Money in accordance with the terms of the foregoing agreement.

By: _____

Its: _____

Dated: _____

EXHIBIT A

LEGAL DESCRIPTION

EXHIBIT B

PERMITTED EXCEPTIONS

II. CHECKLIST FOR CONSTRUCTION CONTRACTS

- A. Name of Party
 - 1. Address for Notice
 - 2. Phone Number
 - 3. FAX Number
 - 4. IRS I.D. or Social Security Number
 - 5. Date

- B. Identification of Project
 - 1. Address
 - 2. Legal Description Including City and State
 - 3. Identification of Plan by Number
 - 4. Identification of Plan by Architect
 - 5. Identification of Plan by Engineer
 - 6. Identification of Instruments

- C. Clauses to Consider
 - 1. Contract Amount, if Lump Sum; If Not-Describe Nature of Payment
 - 2. Additions
 - 3. Deductions
 - 4. Scope of Work
 - 5. Time for Completion
 - 6. Insurance Amounts
 - 7. Definitions
 - 8. Captions
 - 9. Number and Gender
 - 10. Compliance with Law
 - 11. Governing Law
 - 12. Venue
 - 13. Assignment
 - 14. Indemnity Limitation
 - 15. Entire Agreement
 - 16. All Changes in Writing
 - 17. Severability
 - 18. Time Is of the Essence
 - 19. Nonwaiver
 - 20. Waiver of Jury Trial
 - 21. Interpretation of Plans and Schedules
 - 22. Dispute and Settlement Procedure
 - 23. Priority of Agreements

24. Cooperation
25. Termination or Cancellation
26. Project Manager
27. Approvals
28. Payments Do Not Constitute Acceptance
29. Notice
30. Damages – Special and Not So Special
31. Attorneys’ Fees
32. Joint Checks
33. Insurance Amounts
34. Commencement, Pursuit, and Completion
35. Delays and Extensions
36. Verify Dimensions and Layout
37. Accept Work or Notify
38. Shop Drawings
39. As-Built Plans
40. Protect Work
41. Quality
42. Provide for Inspection
43. Replace Defective Work
44. Clean-Up
45. Indemnification
46. Guarantee and Warranty
47. Insurance
48. Taxes
49. Construction Liens
50. Temporary Service
51. Bonds
52. Patching
53. Delivery
54. Communications
55. Tools (Lien)
56. Disclaimers
57. Fixtures
58. Acts of Default
59. Notice of Default

II. Background on Construction Contracts

A. Types of Contracts

Many different types of forms used in the construction industry. The most commonly used forms in the private sector are those developed by the American Institute of Architects (AIA) and those developed by the Association of General Contractors (AGC). The AIA documents were developed by architects are therefore drafted in favor of the architect who traditionally acts as the owner’s agent. As with any standard form contract, the AIA forms must be reviewed and

revised to comply with the actual intent of the parties. The most common AIA forms are the: (1) A-101, Standard Form of Agreement between Owner and Contractor; (2) A-401, Standard Form of Agreement between Contractor and Subcontractor; and (3) A-201, General Conditions of the Contract for Construction. The general conditions of the contract are a key element of any agreement using AIA contracts and must be carefully reviewed.

It should be noted that verbal agreements for construction are enforceable since construction contracts are capable of being performed within a year. Often, a proposal or bid that is submitted and accepted is used as the basis of a construction contract. In other instances, letters, writings, drawings and documents are also used to evidence an agreement between an owner and builder, between a developer and a contractor, and between a contractor and subcontractor. This area of the law is filled with pitfalls for litigation since projects move quickly and proper documentation is not always obtained.

B. Key Contract Clauses

Even if none of the above-mentioned standard forms are utilized in the construction project, there are certain important contract clauses that are normally found.

1. Incorporation by reference. Usually, a construction contract or subcontract will incorporate by reference the drawings, specifications, plans, general conditions, construction and bid documents. Likewise, a subcontract will “incorporate by reference” the terms and conditions of the contract between the owner and the contractor.

This incorporation by reference clause is extremely important when determining an event of default and the remedies available to the non-defaulting party. It is important for the practitioner to review all documents to make sure that they are consistent and to make sure that items such as notice and opportunity to cure are consistent.

Often, the volume of documents, the difficulty of obtaining the prime contract to review its provisions, and the schedule for the project, often create tremendous possibilities for conflict between the documents. A subcontractor is presumed to know the contents of the documents incorporated by reference. It is immaterial if the documents have not been provided to the subcontractor or reviewed by the subcontractor. See, Avery v. Supervisors, 71 Mich. 538 (1888), Ginsberg v. Meyer, 215 Mich. 148 (141). See also, People to Use of Hirth v. Powers, 108 Mich. 399 (341) (1896).

Incorporation by reference must be unambiguous. Omega Construction Company v. Altman, 147 Mich. App. 649 (1985). A reference to an extraneous writing for a particular purpose makes the extraneous writing part of the agreement only for the purposes specified. Arrow Sheet Metal Works, Inc. v.

Bryant and Detwiller Co., 338 Mich. 68 (1953; see also, In re Atlas Concrete Pipe, Inc., 668 F.2d 905 (6th Cir. Mich.1982).

2. No Damage for Delay. Delay on a project is expensive since it prevents contractors from working, causes demobilization and remobilization of workers, and idles valuable equipment. A typical no damage for delay clause provides in part: “contractor hereby waives any claims for damages by reason of delay, the extension of time for completion being contractor’s sole remedy”. Such a clause in a prime contract might also apply to various subcontracts by virtue of incorporation by reference provisions. Courts have strictly construed no damage clauses and recognize certain exceptions to their enforceability.

(i.) Active Interference. Active Interference is an affirmative wrongful act in bad faith, which unreasonably interferes with plaintiff’s compliance with the contract. Phoenix Contractors, Inc. v. General Motors Corp., 135 Mich. App. 787 (1984). Bad faith however, may be implied based upon what the owner or other contracting party knows, or should know, with respect to the working relationships on the project. John E. Green Plumbing and Heating Co. v. Turner Construction Co., 500 F. Supp. 910 (E.D. Mich., 1980). See also, Toebe v. Dept. of State Highway, 144 Mich. App. 21 (1985).

(ii.) Delays not Contemplated by the Parties. As a general rule, a contractor is not entitled to damages resulting from delay by other contractors. Cooke v. Highway Dept. #2, 55 Mich. App. 479 (1974). Adverse weather conditions and a delay caused by bad weather are not sufficient to excuse performance, as adverse weather conditions are foreseeable. R&R-Curtiss Co. v. U.S., 244 F.2d 565, 567 (1962).

(iii.) Negligence. Negligence itself is not sufficient to avoid a no damage for delay clause, since there is no bad faith or willful interference by the delaying party. See, John E. Green Plumbing, supra.

3. Scope of Work. Scope of work provisions must be reviewed and made consistent with all documents that are incorporated by reference. Practitioners should be careful when reviewing the contract documents so that the exact scope of work to be performed by the contractor or subcontractor is drafted consistent with the intent of the parties. Special requirements of the contract and supplemental conditions will prevail over conflicting terms and the standard specifications and general conditions. Cooke v. Highway Dept. #2, 55 Mich. App. 479 (1974). Gratuitous work performed by a contractor does not revise the compensation. Michaels v. Penter, 208 Mich. 455 (1919).

If the plans and specifications are defective, a contractor may obtain payment for extras even though the plans and specification provide that no representations or warranties concerning the information in the plans are made by the owner. Hershey Gravel Co. v. State Highway, 305 Mich. 333

(1943); see also, Brighton Painting v. Southeastern Oakland Co. Water Authority, 2001 W.L. 1006358 (6th Cir. Mich). In Hershey, the contractor was entitled to extras because the soil conditions were different from those shown on the plans and specifications. The construction contract provided that the soil borings and soil information were for informational purposes only and that the contractor was required to satisfy itself with the accuracy of the representations. Despite this contractual language, the court ruled that the contractor was entitled to extras because the representations in the plans as to the subsurface soil conditions created a warranty that the contractor could rely upon, so long as the contractor did in fact examine the site without any notice of irregularity. See also, Loyer v. City of Novi, 179 Mich. App. 781 (1989); Obra v. Eason Eng., 1999 W.L. 33438136, *2 (Mich. App. July 30, 1999).

Many contracts will provide that the architect must approve extras in writing. Such a provision can be waived even where there is no written claim, as long as the architect and owner know of the changes. Teakle v. Moore, 131 Mich. 427 (1902); Pelc v. Petoskey, 2001 W.L. 710188, *2t (Mich. App. June 22, 2001).

4. Pay When Paid. There are many risks associated with any construction project. The owner of a project attempts to shift as much risk to the general contractor. The general contractor attempts to shift as much risk as possible to the subcontractor. One of the risks faced by the general contractor is non-payment because the owner has become insolvent. Usually, the risk of insolvency falls upon the general contractor, who is still liable to pay subcontractors. The general contractor normally attempts to shift this risk to the subcontractor by inserting a pay when paid clause in the subcontract documents. A Pay when paid/pay if paid clause provides that payment to the subcontractor shall not be made until the contractor receives payment from the owner. This clause is viewed as a condition precedent, which transfers the risk of nonpayment, by the contractor to both the financial integrity of the owner and the contractor's performance of its contract with the owner. Pay when paid provisions have historically been strictly construed, as conditions precedent are not favored. McDonald v. Peery, 342 Mich. 578 (1955).

Smith v. Ross, 51 Mich. 116 (1883) is the earliest reported decision that arguably involves a paid when paid clause. Later, in Dyer Co. v. Bishop Int'l Eng., 303 F.2d 655 (6th Cir. 1962), the court held that a pay when paid provision is to be construed as allowing a reasonable time for payment and not to be construed to provide that if the contractor is not paid, the subcontractor will be paid. The court held that the subcontractor was not relying on the financial ability of the owner, nor the contractor's performance on his contract with the owner. The general contractor was liable for payment to the subcontractor regardless of whether the owner was solvent. The "pay when paid" provision in Dyer provided that:

“The total price to be paid to Subcontractor shall be (\$115,000.00) lawful money of the United States, no part of which shall be due until thirty-five (35) days after the entire work to be performed and completed under said contract shall have been completed to the satisfaction of Owners, and provided further that Contractor may retain sufficient monies to fully pay and discharge any and all liens, stop-notices, attachments, garnishments and executions.”

The Dyer court strictly construed this clause against the general contractor and reasoned that in order for the contractual language to be considered a condition precedent, the subcontract must contain an express condition precedent to payment, clearly indicating the intention of the parties. Dyer is the most significant case for the proposition that , unless clearly expressed as a condition precedent to payment, contingent payment clauses simply address the time for payment and not a condition to payment.

Much later, in Kasler Electric Co v Insurance Company of North America 1990 US App Lexis 14702 (6th Cir 1990), the Sixth Circuit found that although a paid when paid provision was valid, if the trial court on remand found that the contractor breached its contract with the subcontractor, the pay-when- paid provision would be irrelevant to the determination of damages.

The United States District Court for the Eastern District of Michigan also analyzed a conditional payment provision in Fisher & Wright, Inc v Flakt, Inc. 1991 US Dist LEXIS 19589 (ED Mich 1991). The relevant contract language in Fisher & Wright’s subcontract with Flakt provided:

“It is specifically understood and agreed that the payment to the Subcontractor is dependent, as a condition precedent, upon Flakt, Inc. receiving contract payments including retainer from the owner.”

Fisher & Wright filed a motion for summary disposition on its claim for payment, arguing at most the contractual language required Flakt to pay it within a reasonable time from completion of the work and that a reasonable time had passed. The court distinguish Dyer and concluded that the contractual language here made payment to the owner Flakt a clear condition precedent to Flakt’s obligation to make payments to Fisher & Wright.

In order to distinguish a paid if paid clause from a pay when paid clause, the parties must clearly agree that the contractor’s receipt of payment from the owner is a condition precedent to the contractor’s obligation to pay its subcontractors. Unless the subcontract clearly expresses a condition precedent, Dyer provides that such conditional language will be construed to allow the contractor to delay making payment to a subcontractor only for a reasonable time after the work is completed.

5. Arbitration. Arbitration clauses are liberally construed. Omega Construction v Altman 147 Mich App 649 (1985). The standard AIA documents contain arbitration clauses. Counsel must review these clauses carefully to understand the time for filing for arbitration and the impact it will have on the progress of work. Michigan public policy favors arbitration. Campbell v Community Services, 75 Mich App 416 (1977).

LIST OF EXHIBITS

- Exhibit A: Agreement Between Developer and Contractor**
- Exhibit B: General Conditions of the Contracts for Design and Construction**
- Exhibit C: Subcontract**