

Improved Real Estate Due Diligence, Including Lease and Financing Issues

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Caveat emptor qui ignorare non debuit quod jus alienum emit ¹

I. Introduction

The acquisition and development of commercial real estate by its nature requires the Buyer to balance risks, not all of which are within the control of the Buyer. Whether a particular project succeeds or fails depends on a multitude of factors including the aptitude of the person undertaking the development. Luck is also a key ingredient. The process is becoming more risky given the advent of new laws and regulations, the high cost of land and construction and the uncertainty of the Tenants financial health.

The risks include not only loss of significant money, but also time and effort and lost opportunities. The Buyer (and the Buyer's lawyer), therefore, should exert every effort to minimize the risks. One primary means by which this risk can be mitigated is through a methodical, comprehensive and adequate investigation of the property prior to acquisition.

These materials discuss, analyze and comment on the following:

- i. Buyer's Due Diligence issues with respect to improved real estate and the contract provisions, which should be included in the acquisition agreement to facilitate same;

1. Let a Buyer beware; for he ought not to be ignorant of what they are when he buys the rights of another

- ii. Buyer's lease issues and the contractual provisions which should be included in the acquisition documents to facilitate that review;
- iii. Buyer's financing issues and the contract provisions in an offer to purchase to address the financing contingency of the Buyer; and
- iv. Some creative concepts, which may solve deal specific problems.

The following addenda are attached:

- A. Form Purchase Agreement for acquisition of improved real property (Pro Buyer);
- B. Sample Closing Checklist for improved real property;
- C. Sample Tenant Estoppel letter;
- D. Sample SNDA; and
- E. Blank Lease Abstract form.

II. Due Diligence of Improved Real Property

- A. The Inspection Contingency. The primary goal of any inspection contingency, whether for vacant land or improved real estate, is facilitate efficiently the Buyers assembly of sufficient information to make an intelligent decision as to whether one should proceed with a proposed acquisition.
 - 1. The required information is obtained in three different ways:
 - a. from the Seller via its representations and warranties in the agreement;
 - b. a review of Seller's records and deliverables; and
 - c. third party inquiries and investigations.
 - 2. The goal is for the Agreement to provide a mechanism for the Buyer to perform all desired Due Diligence so that Buyer may confirm that the acquisition of the property will achieve the Buyer's goal.
 - 3. For the attorney charged with drafting an agreement, the attorney must know not only the client's desired result, but also the client risk tolerance.
 - 4. See Paragraph 5.1 of the sample agreement attached as Addendum A for sample inspection/contingency clause.
- B. Drafting Concepts. The inspection contingency should allow the Buyer sufficient access to the property, the Seller's records, the Seller's knowledge (in the form of representations and warranties) and third-parties to fully understand all aspects of the Property. Critical elements for Buyer's contingency in the acquisition agreement should include the following:
 - 1. Seller's obligations to deliver to the Buyer true and complete Due Diligence information in Seller's possession including surveys, title policies, environmental reports, appraisals, leases, permits, licenses, etc.

2. An express and irrevocable license to the Buyer and Buyer's agents for inspection activities commencing effective as of the date of contract and running through the date of closing.
 3. An on-going obligation of the Seller to advise the Buyer in writing, during the period of the contract, of any material adverse changes in the condition of the property, its permissible uses, the status of leases and the financial conditions of the Tenants.
 4. A comprehensive list of representations and warranties from the Seller as to the Seller's knowledge with respect to the condition of the property; its permissible uses; third party contracts; leases; permits and Seller's authority among others.
 5. An expressed consent by the Seller to Buyer's contacting third-parties for inspection purposes including tenants and/or municipal bodies.
 6. Specific license to enter upon the property for invasive environmental and mechanical evaluations and testing.
 7. Address Buyer's obligations for restoration following its investigation and Buyer's liability if any, for events occurring while on the Property.
 8. State clearly the commencement as well as termination date of the contingency period. Buyer's Due Diligence period should only commence following receipt of all of the Due Diligence materials.
 9. An express mechanism for Buyer's right to raise objection and to elect not to proceed. Alternatives include (i) deemed to proceed, absent notice of termination, (ii) deemed to terminate, absent notice of election to proceed, (iii) require affirmative act by Seller before Buyer is deemed to have terminated or proceeded, if Buyer has not notified Seller of its election. Goal is for Buyer retain control over the termination of the Agreement.
 10. Cross reference the termination notice mechanism with the notice provisions of the agreement. Make sure that fax deliveries are acceptable.
 11. Clarify that upon Buyer's election to terminate during the contingency period, the escrow agent is authorized and directed to disburse immediately to the Buyer the deposit.
 12. Cross-reference the default clause to determine Seller's remedies in the event Buyer defaults. Remedies should be limited to forfeiture of the deposit.
- C. Material Adverse Change Clause. A material adverse change clause will protect the Buyer from being obligated to close if a material adverse change occurs prior to closing. Properly drafted, the clause allows the Buyer to terminate the agreement and receive the return of its deposit before or after expiration of any contingency period if a material adverse change occurs in the condition of the property, the financial condition of the tenant, or the ability of the lender to close. (See Page 13 of sample agreement).
- D. Seller's Representations.

1. To the greatest extent possible, the Buyer should obtain representations from the Seller as to the Seller's knowledge of all attributes of the property including, but not limited to, Seller's ownership and Seller's due authority.
 2. Paragraph 8 of the sample agreement contains an exhaustive list of Seller representations.
 3. The Seller's representations should be made at the time of execution of the agreement as an inducement thereto, remade at the time of closing as an inducement to close, and survive the acquisition of title for an unlimited period of time.
 4. Sophisticated Sellers will address the Seller's responsibilities for notifying the Buyer of changes in the Seller's representations following the date of execution and articulate or attempt to limit the Buyer's remedies as a result thereof.
 5. Be cognizant of the limitations of the benefits of Seller's representations resulting from the anticipated liquidation of the Seller. Do not rely on the Seller's representations with respect to factual statements. All information should be independently confirmed through third-parties.
- E. Duration/Seller's Reps. The clause should address the duration of any Seller representations and warranties and specify the remedies which may be available to Buyer following a breach (termination, setoff, return of deposit). NOTE: Most single asset Sellers will quickly disperse all closing proceeds in a liquidating distribution following the consummation of the sale. In this scenario, the Buyer may not have recourse to a financially viable Seller for indemnity.
- F. As Is Clauses. "As is" clauses, which are typically mandated by sophisticated Sellers effectively eliminate or severely limit the scope of any Seller's representations. The "As Is" clause should be narrowly drafted so as to not eliminate (i) the title reps inherent in a warranty deed and other closing documents or (ii) negate Seller's express representations.
- G. On Site File Review. No substitute for a detailed review of the Seller's records at its place of business.
- H. Seller's Deliverables. Buyer's due diligence should include a review of information in Seller's possession, custody and control relative to the property. The Seller should be contractually obligated to deliver to Buyer all such items and represent that it has delivered to Buyer true, correct and accurate copies of all items in its possession relative to the Property and that the Seller has no knowledge of any contravening facts or circumstances. Sample of deliverables relating to improved real property are as follows:
1. a copy of Seller's existing title policy together with a commitment for an owner's policy of title insurance on the Project together with legible copies of all documents referenced in the Title Commitment;
 2. a currently updated and certified ALTA as-built survey of the project meeting the requirements of Buyer and Buyer's lender;

3. an update to a date from and after the Effective Date of the “Phase I” environmental assessment of the Project prepared by an environmental consultant acceptable to Buyer, together with a reliance letter from such firm addressed to Buyer and Buyer’s lender (if any);
4. written evidence from the appropriate governmental authority that Seller exists and, if applicable, is in good standing in its jurisdiction of organization;
5. current certified search results for all Uniform Commercial Code financing statements filed and/or recorded against Seller and the Property;
6. a complete copy of the Lease, together with all amendments thereto;
7. a copy of the plans and specifications for the Improvements;
8. copies of all contracts to which Seller is a party and relating to the operation of the Property;
9. copies of all written warranties from third parties running in favor of Seller and relating to the improvements;
10. an appraisal of the Project prepared in conformity with generally accepted appraisal standards by a licensed, MAI-certified appraiser, which is (i) dated (or updated as applicable) after the Effective Date, (ii) addressed to Buyer, and (iii) reflects an “as-built” market value for the property which is not less than the Purchase Price;
11. copies of all engineering and other reports in Seller’s possession relating to the condition of the property;
12. a complete copy of any lease Guaranty, together with all amendments thereto;
13. the most recent (for the prior twenty-four (24) months) real estate and personal property tax bills, notices of assessed valuation and utility bills relating to the Property;
14. all surveys, certificates of occupancy, certificates or other evidence of compliance (or notices of violation) with applicable laws, engineering data, floor plans, “as built” or working drawings, site plans, specifications, appraisals and title policies relating to the Property;
15. current operating statements, general ledgers, and trial balances maintained or prepared for the Property;
16. all material audits, reports, test results, notifications and correspondence relating to the environmental condition or operation of the Property; and
17. all material data, correspondence, documents, agreements with, notices to or from, or applications to, any taxing authorities, governmental agencies, utilities, vendors, tenants, and mortgagees with respect to the Property that are in Seller’s possession or control, all other documents material to the condition, maintenance or operating of the Property, and all other information and documents relating to the Property as Buyer shall reasonably request.

- I. Zoning. Buyer's investigations relative to the zoning of Property should include:
1. A confirmation letter from the applicable municipal authority stating the zoning classification of the property and the stated permissible uses within said classification is preferred.
 2. Confirm parking ratios compliance.
 3. Obtain a 3.1 zoning endorsement, which confirms that the project, as constructed, is in compliance with parking requirements of the municipality.
 4. A detailed review of the zoning ordinance as to existing and future permissible uses. To the extent a variance was granted for zoning purposes, the Buyer should review closely the provisions of the zoning ordinance relative to non-conforming uses, which may restrict the ability to rebuild the improvement following casualty.
- J. Environmental Analysis. Buyer's investigation relative to an environmental investigation of the Property should include:
1. Obtaining, at their own cost or through the Seller, a Phase I Environmental Site Assessment prepared in accordance with the most current ASTI standards and Bank standards.
 2. The report should be certified to the Buyer as well as Buyer's lender, so as to avoid duplication of costs.
 3. Prior to engaging an environmental consultant, care should be taken in confirming the scope and extent of the environmental company's liability following an omission of material fact. A detailed review of their insurance policy should be undertaken and the standard contract provisions limiting their liability for errors of fact should be eliminated or substantially amended.
 4. In addition to the investigations which would be intended upon a vacant land investigation, which would include a 50 year title search.
 5. An environmental audit with respect to improved real property should include:
 - a. asbestos testing, to the extent required,
 - b. air quality testing, including mold testing. To the extent the improvements have previously suffered water damage or leakage, the probability of mold contamination increases substantially.
- K. Structural Investigations. The inspection contingency clause should be drafted as follows:
- i. so as to allow a third party structural engineer to do a full inspection of the building and component parts including, but not limited to, the roof, HVAC and other mechanical systems;
 - ii. contain Seller's representations that, to its knowledge, all structural components are in good operating condition and will be as of the date of closing;

- iii. obligate Seller to assign to the Buyer at closing all warranties issued to it in conjunction with the original acquisition and construction of the improvements; and
- iv. the warranties in turn should be confirmed with the parties issuing the warranty.

III. Lease Evaluation

- A. General. Commercial leases are the economic engine which drives the transaction and generates the necessary income to support the financing debt and provides a return to the owner. The importance of the commercial lease review cannot be underestimated.
- B. Seller's Deliverables. As with physical inspection, Buyer should obtain from the Seller the necessary information in Seller's possession, custody and/or control to fully analyze the leases in place and their impact on the Project. The contract should obligate the Seller to deliver to Buyer, in a timely manner, all information relative to the Landlord/Tenant relationship for Buyer's investigation (See 8.4 of Addendum A). This necessarily includes the following:
 - 1. Certified true and complete copies of all Leases and guaranties;
 - 2. Certified rent roll detailing the commencement date, ending date, renewal terms, rental rates, security deposit and a statement as to whether the leases are current. Seller should be obligated to update, at closing, the certified rent roll which should show no changes;
 - 3. All information relating to the tenant in Seller's possession including Gross Sales reports, financial statements and payment histories;
 - 4. Detailed review of the files of the Seller relative to the on-going relationship of the tenant;
 - 5. Previously executed Tenant estoppels and subordination, non-disturbance and attornment agreements.
- C. Estoppels/SNDAs. Estoppels are one of the most important aspects of a Buyer's lease investigation as it confirms from the party contractually obligated to pay the rent the terms of the Landlord/Tenant relationship being acquired.
 - 1. The purchase agreement should specifically allocate responsibility for obtaining the estoppel letter as well as a SNDA from a tenant. (See Paragraph 5.1 of Addendum A).
 - 2. Buyer's receipt, review and acceptance of the estoppel and SNDA must be a condition precedent to the Buyer's obligation to proceed.
 - 3. The purchase agreement should set forth the form of the estoppel, which should confirm all key lease provision and require the Tenant to attach a copy of the lease. A sample estoppel certificate is attached hereto as Addendum C.

4. Similarly, Buyer's acquisition financing will require that the lease be subordinated.
 5. While the subordination issue should be specifically articulated in the lease form itself, as a checklist item, an expressed subordination through a newly executed SNDA will be required for most transactions.
 6. The Buyer is advised to attach to the agreement a form of SNDA, which the Lender will accept.
 7. The timing of the return of the tenant estoppel as well as an SNDA should be analyzed in the context of the timeline of the transaction. It should be dated within thirty (30) days of closing. It is not uncommon for a Buyer to delay the costly aspects of Due Diligence until the Lease review has been completed.
- D. Detail Review of Lease/Abstract of the Lease. An abstract of the lease should be prepared and provided to Buyer so that the Buyer understands completely the nature of the economic relationship created between Landlord and Tenant, including the allocations of costs. A form of lease abstract is attached as Addendum E.
- E. Key Lease Provisions. The following lease provisions may bear significantly on the availability of financing as well as the Buyer's net return and should be separately analyzed:
1. any termination rights;
 2. option terms with rental rates set forth;
 3. options to purchase;
 4. formulation of rent calculations;
 5. Tenant's obligations for CAM, Real Estate taxes and insurance costs and/or contributions;
 6. obligations of the Tenant and Landlord regarding structural components of Property;
 7. Tenant's rights of set off;
 8. Landlord's obligations to rebuild following casualty and/or condemnation;
 9. Tenant's responsibility to provide financial statements;
 10. Tenant's responsibility to provide estoppel SNDA agreements;
 11. Expansion rights of the tenant and its impact on Landlord's ability to accommodate same;
 12. Landlord's right to relocate Tenant.
- F. Lender's Approval. Buyer's Lender should confirm its acceptance of the leases prior to waiver of the purchaser's Contingency Period.
- G. The Rent and CAM Proration Clause. The acquisition agreement should provide clear instructions as to how Buyer and Seller will prorate pass-through amounts

(CAM, taxes and insurance) paid by Tenants. (See Paragraph 10.12 of Addendum A for sample language).

IV. Financing Contingencies

- A. General. Except in rare circumstances, an acquisition of improved real estate will not proceed absent the availability of acquisition financing. The scope, extent and duration of Buyer's financing contingency is of great concern to both the Buyer and Seller.
- B. Buyer's Goal. The Buyer's financing contingency should not commence until such time as it has completed its review of the project Due Diligence and determined that, in fact, the Buyer wishes to proceed to closing and should not be waived until closing.
- C. Buyer's Risk. The financing contingency should not be waived until closing to protect the Buyer from the risk the Lender will not close. Sellers will not agree to leave open the financing contingency until closing. Thus, the Buyer is faced with waiving the contingency prior to closing and taking the risk its Lender will actually fund the acquisition. The risk is actually two-fold.
1. The first relates to its contractual obligations to the Seller, and the attendant damages and/or penalties which the Seller may pursue as a result of Buyer's failure to close after the waiver of the contingency.
 2. The second relates to the cost and expense of the due diligence activity, including prepaid loan fees.
- To waive the financing contingency, a Buyer should have received not only a firm commitment for financing on terms it determines acceptable in its sole discretion, but also written commitment from the lender as to the lender's satisfaction with all physical attributes of the property including, but not limited to, title, survey, environmental condition, and leases.
- D. Drafting Tips; Critical Provisions. A blanket financing contingency without parameters best serves the Buyer's interests. (See Paragraph 5.1 of Addendum A) Where a Seller mandates a more tailored financing contingency, the financing contingency should address the parameters of the contingency including, but not limited to:
1. amount of debt,
 2. amount of Buyer's equity,
 3. interest rate,
 4. amortization period,
 5. recourse vs. non-recourse,
 6. reserve and/or escrow requirements of lender;
- E. The MAC Clause. The inclusion of a material adverse change clause will go a long way towards protecting the Buyer from the risks resulting from Buyer's inability to close as a result of a lender's election not to proceed to fund.

- F. Waiver of Contingency. Prior to waiving any financing contingency, the Buyer should confirm that the obligations imposed upon the Buyer pursuant to the leases following closing relative to casualty and condemnation and the obligation to rebuild, if at all, dovetails with the obligations of the borrower and the rights of the lender relative to the application of those proceeds.
- G. Drafting Tips. Each of the considerations set forth in Section II B 9, 10, 11 and 12 above relative to duration, commencement and waiver of the Due Diligence contingency are applicable to the waiver of the financing contingency.

V. General Drafting Tips

In drafting the clauses relative to Buyer investigations, the parties are exposed to the principal tension between Buyer and Seller, to wit: Seller's desire to commit the Buyer to closing as quickly as possible versus the Buyer's desire to maintain till closing its right to terminate the agreement and receive the return of the Deposit. The issues go well beyond mere investigation and have been broadly described in those materials as a contingency period. The following are some drafting tips for Buyer's counsel:

- A. Use broad phrases and avoid overly narrow clauses in describing the scope of the contingencies. The sample purchase agreement attached broadly defines the contingencies to Buyer's obligation to close, which period is measured from a date following the Buyer's receipt and acceptance of the Due Diligence Materials. During this period, the Buyer may essentially terminate the agreement for any reason. If possible, the agreement should specifically absolve the Buyer of any obligation to state the reason for its election to terminate. This effectively forces the negotiations to focus in on the duration of the Contingency Period.
- B. When required, use staggered Contingency Periods. Frequently, Sellers require that certain contingencies be waived early on. There is some rationale for this position as title, survey and physical inspection items can typically be completed within a relatively reasonable period of time. Financing, lease negotiations, and/or municipal approvals, to the extent same are a contingency to the Buyer's obligation to close, will be much more time consuming and therefore may be addressed in an extended contingency or separate periods with respect to those items.
- C. Clearly articulate the conditions precedent to Buyer's obligation to close, which remain open till closing. This is a "disguised material adverse change" clause. It will be objected to strenuously by sophisticated Sellers as it provides a major avenue for the Buyer to terminate its obligation to close. At a minimum the closing contingency should include the following:
 - 1. Seller's full performance and all of the Seller's representations and warranties being true and correct as of closing;
 - 2. No material adverse change in the physical condition of the property (including casualty and/or condemnation);
 - 3. No material adverse change in the economic viability of the tenant and/or the tenant's business at the location;

4. No material adverse change in the environmental condition of the property;
 5. The title company issuing the owner's policy to Buyer with all endorsements in the form approved by Buyer.
 6. Specifically state the obligations of Buyer and rights and obligations of Buyer and Seller if the clause becomes operative;
 7. Buyer's rights to terminate the agreement and receive the return of its deposit should be unequivocal;
 8. The Seller should have some obligation to exercise commercially reasonable efforts to cure and any failed condition precedent should allow the Buyer to deduce such curing amounts from the purchase price payable at closing.
- D. The logistics of how the Buyer advises the Seller of the election to proceed must be clearly drafted.

VI. Creative Acquisition Concepts

One of the key roles of the attorney in the purchase and sale of real property is to develop solutions to deal specific issues which may be fatal to the transaction. The following concepts can be instrumental in assisting in a transaction to proceed.

A. The Groundlease as Alternative to the Purchase.

1. Frequently, the Seller of real property does not wish to proceed with an outright sale of their fee interest in the property due to several issues unique to the Seller, including adverse tax consequences. These include the realization of gain by the Seller on the disposition, which can be very large if the Seller's basis is low relative to the sale price. Alternatively, Buyers will not proceed with the acquisition of property if the capital needs necessary to complete the initial acquisition are excessive in relation to the anticipated profitability of the asset.
2. A groundlease will mitigate against both of these issues:
 - i. As a lease, the Seller does not realize a gain on the disposition of its interest in the property as no transfer of ownership occurs. Accordingly, the Seller can realize a significant long term pay out under a groundlease, which is an extremely effective tool for estate planning purposes as well as providing assurances to the Seller that it retains control of a critical and very valuable piece of property.
 - ii. Similarly, the groundlessee Buyer minimizes the capitalization costs necessary for acquisition and is able to take those monies and apply them to other costs associated with the transaction. Moreover, the obligations of the Buyer is as a tenant and, as such, the rents paid are typically fully deductible.
3. Key provisions of the groundlease include the following:
 - a. Basic rent and rent increases;
 - b. Allocation of responsibilities for taxes;

- c. Assignment and subletting rights of the groundlessee;
- d. Leasehold financing and the subordination of the fee owner's interest;
- e. Defaults by the groundlessee and cure rights are afforded to the groundlessee as well as the groundlessee's lender;
- f. Allocation of condemnation proceeds to the respective interests between the fee owner/groundlessor and the Buyer/groundlessee.

B. 1031 Exchanges.

1. The tax deferred exchange as defined in Section 1031 of the Internal Revenue Code of 1986, as amended, offers real estate investors one of the last great investment opportunities to build wealth and save taxes.
2. By completing an exchange, the investor (the "Exchanger") can dispose of their investment property, use all of the equity to acquire replacement investment property, defer the capital gain that would ordinarily be paid and leverage all of their equity into the replacement property.
3. Two basic requirements must be met to defer the capital gain tax:
 - a. The Exchanger must acquire "like-kind" replacement property; and
 - b. The Exchanger cannot receive cash or other benefits (unless the Exchanger pays capital gains taxes on this money).

In exchange, the Exchanger must enter into an exchange transaction prior to the close of the relinquished property. The Exchanger and the qualified intermediary enter into an exchange agreement, which essentially requires that:

- c. The qualified intermediary requires the relinquished property from the Exchanger and transfers it to the Buyer by a direct deed from the Exchanger; and
 - d. The qualified intermediary acquires the replacement property from the Seller and transfers it to the Exchanger by direct deed from the Seller. The cash or other proceeds from the relinquished property are assigned to the qualified intermediary and are held by the qualified intermediary in a separate, secure account. The exchanged funds are used by the qualified intermediary to purchase the replacement property for the Exchanger.
4. Important considerations for an exchange include:
 - a. Exchanges must be completed within strict time limits with absolutely no extensions. The Exchanger has 45 days from the date the relinquished property closes to "identify" potential replacement properties. This involves a written notification to the qualified intermediary, listing those addresses or legal descriptions of the potential replacement properties. The purchase of the replacement property must be completed within 180 days after the close of the relinquished property. After the 45 days has passed, the Exchanger may not change their property iden-

tification list and must purchase one of the replacement properties or the exchange fails.

- b. To avoid the payment of capital gains taxes, the Exchanger should follow three general rules:
 - i. Purchase a replacement property that is of the same or greater value as the relinquished property;
 - ii. Reinvest all of the exchange equity into the replacement property; and
 - iii. Obtain the same or greater debt on the replacement property as on the relinquished property. The Exchanger can offset the amount of the debt obtained on the replacement property by putting the equivalent amount of additional cash into the exchange.
- c. In the case of real property exchanges, the Exchanger must sell property that is held for income or investment purposes and acquire replacement property that will be held for income or investment purposes.
- d. IRC Section 1031 does not apply to exchanges of stock and trade, inventory, property held for sale, stocks, bonds, notes, securities, evidences of indebtedness, certificates of trust or beneficial interest or interests in a partnership.

This is an important tool, which should be used by counsel to facilitate transactions. Paragraph 15.16 of the form purchase agreement contains a sample 1031 clause.

C. Techniques to Avoid Transfer Tax and Increase Real Property Taxes Following Sale.

Pursuant to statute, upon transfer of real property a transfer tax is payable to the county as well as to the State, which aggregates \$8.6 of every \$1,000 worth of consideration. In a \$10,000,000.00 transaction, the transfer tax charged, due and payable will be \$86,000.00. Per statute, the Seller is obligated to pay this amount unless contrary instructions are articulated in the contract. Sophisticated tenants have now begun negotiating provisions in their leases which preclude them from being responsible for any increase in real estate taxes resulting from a disposition of an interest in the real property by its landlord.

Thus, both the Seller and the Buyer are motivated to attempt to structure the transaction in a means by which the Seller need not pay transfer tax and the Buyer not suffer a substantial increase in real property taxes which may not otherwise be reimbursable by tenants.

Of late, sophisticated Buyers and Sellers have structured transactions to avoid the obligation to pay these taxes. Essentially, the structure involves:

- i. the Seller's forming, just before closing, a new entity (typically a limited liability company);

- ii. the Seller then conveys title to the property to its newly formed entity (which at the time of formation is wholly owned and therefore exempt from transfer tax);
- iii. the Buyer then acquires the membership interest in the newly formed entity for the stated consideration; and
- iv. as no deed is recorded, no transfer tax is paid at closing.

To my knowledge, there has been no definitive ruling by a court of competent jurisdiction as to the viability of these transactions for purposes of avoiding the transfer tax due upon disposition of real property. Other states have had similar loopholes, which were closed by legislation. I anticipate that as substantial transactions are restructured in this fashion, the State will note the loss of revenue and attempt to legislatively respond. Pending such a determination, the transactional structure seems viable, although counsels for both Buyers and Sellers are advised to proceed at their own risk.

Buyers who are cooperating with Sellers in conjunction with these alternative structure transactions should consider the following:

5. Sharing in some of the savings to the Seller by obtaining a reduction in the sale price;
6. Requiring the Seller to indemnify the Buyer from any retroactive tax increases resulting from a determination that such transactions are somehow void or challengeable;
7. Confirm the title company's willingness to issue an owner's policy to the new entity as part of the transaction;
8. All Due Diligence must be certified in a way so as to extend the benefits of such reports to the newly formed entity and the membership interests acquired.
9. Get a deed for your files.

Exhibit A
Purchase Agreement
(Long Form - Purchaser Oriented)

AGREEMENT OF PURCHASE AND SALE

THIS AGREEMENT OF PURCHASE AND SALE is made as of the ____ day of _____, 200__, between _____ whose address is _____ (“Seller”), and ABC ACQUISITION CO., L.L.C., a Michigan limited liability company, whose address is _____, on behalf of an existing entity or an entity to be formed (“Purchaser”). Seller and Purchaser are sometimes collectively referred to herein as the “Parties”.

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 City of _____, _____ County, Michigan, the 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, which real estate, together with all buildings and improvements situated thereon and all fixtures, equipment and personal property located on or about said real estate, buildings and improvements (collectively, the “Property,” as said term is hereinafter more specifically defined), commonly known as “_____” [name of project], _____ [street address].

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

C. The execution and delivery of this Agreement by the Purchaser shall constitute Purchaser’s offer to Seller to acquire the Property upon the terms and conditions herein set forth. Upon the Seller’s execution hereof, it shall attach to each copy hereof which has been executed by the Purchaser, the Exhibits designated “A” through “I.” The date on which the Purchaser and Seller execute this Agreement is referred to herein as the “Effective Date”.

NOW THEREFORE, in consideration of the mutual covenants contained herein, and for other valuable consideration, the receipt and adequacy of which is hereby mutually acknowledged, the Parties agree as follows:

1. Property. As used herein, the term “Property” shall be deemed to include:

1.1 The real estate described on Exhibit A and all buildings and improvements located thereon, consisting of, among other things, a _____ building consisting of approximately _____ net rentable square feet, situated on approximately _____ acres (and including approximately ____ parking spaces), plus a contiguous _____ acre parcel and _____ acre right-of-way parcel fronting on _____ Road, zoned “_____” (the real estate and the improvements and buildings thereon are sometimes collectively referred to as the “Real Estate”), together with all easements, air, mineral and riparian rights and all tenements, hereditaments, privileges, parking areas, if any, and appurtenances belonging or in any way appertaining thereto;

1.2 All fixtures, equipment, inventory, supplies and personalty located on or about the Real Estate or used in conjunction therewith, including, but not limited to, landscaping equipment, furniture and furnishings and all heating, lighting, plumbing, electrical and air-

conditioning fixtures and equipment, hot water heaters, incinerating, disposal, cleaning, snow removal and fire sprinkling system equipment, office equipment and furniture, fuel supplies, disposables, car wash equipment and supplies, satellite television system, elevator systems, security systems, computer hardware and software, any and all vehicles, and all building and/or construction materials stored on the land and intended for use in the construction of the additional improvements, if any, excluding therefrom only items of personal property which are owned by tenants of the Property. Attached hereto as Exhibit B is a list of all such fixtures, equipment, inventory, vehicles, supplies and personalty located on or about the Real Estate;

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

1.4 Any tangible and intangible personal property owned by Seller located on or about or arising out of the ownership of the Property;

1.5 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 Real Estate by reason of change of grade of streets;

1.6 The use of appurtenant easements to the Real Estate, whether or not of record, strips and rights-of-way abutting, adjacent, contiguous, or adjoining the Real Estate;

1.7 The trade name “_____”;

1.8 The lessor’s interest under all leases and occupancy agreements (collectively the “Leases”) between Seller, as landlord, and certain tenants and/or other occupants (the “Tenants”) identified in the Rent Roll, which Rent Roll, together with true, correct and complete copies of the Leases, are attached hereto as Exhibit C and incorporated herein, as well as any assignments, amendments, guaranties, renewals, extensions or assignments thereof (the “Leases”), together with all rentals, security deposits and other monetary items payable by tenants or occupants of the Property;

1.9 All licenses, permits, franchises and certificates of occupancy issued by any state, federal or local municipal authorities, relating to the use, maintenance or operation of the Property or any portion thereof;

1.10 All plans and specifications relating to the construction of any existing or proposed improvements on the Real Estate and all unexpired claims, warranties, guaranties and sureties received by Seller in connection with the construction, improvement or equipment of or on the Property; and

1.11 Seller’s interest in and to the agreements and leases (other than the Leases) relating to the operation of the Property and described in Exhibit D attached hereto and made a part hereof.

2. 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 _____ and 00/100 Dollars (\$_____.00) (the “Purchase Price”). *[if vacant land, add the following: except that if the acreage of the Property certified in the Survey described in Section 6.1 below, is less than ____ Net Acres (as defined below), then the Purchase Price shall be _____ and 00/100 Dollars (\$_____.00) per Net Acre. “Net Acre” shall mean the acreage of the Property as determined by the Survey described in Section 6.1 below, but excluding all road right of way].* The Purchase Price shall be paid as follows:

- (a) At "Closing" (as hereinafter defined), Purchaser shall pay Seller an amount equal to the Purchase Price (which shall include application of the Earnest Money, as defined in Section 3.1 hereof) which sum shall be paid in cash, certified check or wire transfer, plus or minus the closing adjustments and prorations as set forth hereinafter.

3. Earnest Money.

3.1 Within three (3) business days of the Effective Date of this Agreement, Purchaser shall deliver to _____ title company, as escrow agent (the "Escrow Agent" or "Title Company"), an earnest money deposit in the sum of _____ Dollars (\$____.00) (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.

3.2 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.

3.3 The Escrow Agent shall deposit the Earnest Money in an escrow account in an interest-bearing form. All interest earned on the Earnest Money shall be the sole property of the Purchaser.

3.4 The Parties acknowledge and agree that Escrow Agent is acting solely for their accommodation. and hereby release and hold Escrow Agent harmless from liability for any acts performed in good faith in connection with the escrow established hereunder. In the event of any dispute as to disposition of the escrow established hereunder, Escrow Agent is authorized to refuse to disburse until the Parties agree in writing as to such disposition and jointly advise Escrow Agent of the same or until a court of competent jurisdiction arrives at a final adjudication regarding disposition of such escrow.

4. Real Estate Commissions.

4.1 Seller shall pay any and all real estate commission(s) payable in connection with the sale of the Property. including, without limitation, all commissions payable to _____. Seller agrees to indemnify and hold Purchaser harmless from all loss, damage, costs and expenses (including reasonable attorneys' fees) that Purchaser may suffer as a result of any claim brought by any broker or finder in connection with this transaction. Purchaser represents and warrants to Seller that it has not dealt with any broker in connection with this transaction.

5. Contingencies and Covenants.

5.1 Purchaser shall have ninety (90) calendar days following the last to occur of: (i) the Effective Date; (ii) Purchaser's receipt of the Title Commitment (including legible copies of all documents and instruments described on Schedule B thereof) and Survey described in Section 6.1 hereof; and (iii) Purchaser's receipt of all items described on the Due Diligence List attached hereto and incorporated herein by this reference as Exhibit E (such period is hereinafter referred to as the "Inspection Period") to (A) inspect or cause to be inspected the physical condition of the Property and any other documents, matters or conditions relevant to the Property, access to which shall be granted to Purchaser and/or Purchaser's consultants, counsel, bookkeepers and accountants at all reasonable times during the Inspection Period, (B) obtain agreements ad/or easements from Adjacent Property Owners for such matters as may be required, (C) satisfy itself as to such

other items as Purchaser shall require, including but not limited to, availability and adequacy of utilities, financing, and municipal approvals for its operations. Such inspection may include such testing as is reasonably required to determine the environmental condition of the Property by an environmental engineer or other similar expert, including environmental and geotechnical testing and soil borings. Such inspection may also include interviewing Seller's employees and management company, after reasonable prior notice to Seller, and may also include interviewing Tenants of the Property. Seller agrees to make available its employees and managers for interviews during normal business hours and further agrees to provide all records reasonably requested by or on behalf of Purchaser. While at the Property, Purchaser shall not unreasonably interfere with Tenants' business operations. Purchaser agrees to indemnify Seller from any and all loss, damage, costs and expenses (including reasonable attorney's fees) caused by Purchaser's entry on the Property and conducting of inspections thereon. In addition, within days of the Effective Date, Seller shall deliver to Purchaser originally executed forms of the Estoppel Certificate attached hereto and incorporated herein by this reference as Exhibit I, or such other form as Purchaser's lender may require (the "Estoppel Certificates"). Seller shall obtain Estoppel Certificates from each tenant of the Property, and the Estoppel Certificates shall be dated no earlier than _____. In the event all of such Estoppel Certificates are not received within ____ days from the Effective Date, Purchaser's Inspection Period shall be extended for one day for each day after such date that Purchaser has not received all of the Estoppel Certificates.

5.2 In the event that, after conducting the inspections referred to in Section 5.1, Purchaser is satisfied with the results of such inspections, Purchaser shall so notify Seller in writing, which notice (the "Notice to Proceed") must be given on or before expiration of the Inspection Period. In the event the Purchaser fails to timely give such Notice to Proceed for any reason or no reason, this Agreement shall terminate and become null and void, and Purchaser shall thereupon receive a refund of the Earnest Money and any other amounts deposited with Escrow Agent, together with all interest earned thereon, and be relieved of any and all liability hereunder. In the event that such Notice to Proceed is given, the Parties shall proceed to Closing in accordance with the terms hereof, subject to the contingencies described herein. *[Alternative for additional Inspection Period: in the event the Purchaser fails to timely give such Notice to Proceed for any reason or no reason and does not elect to extend the Inspection Period pursuant to Section 5. 2(b) and (c) below, this Agreement shall terminate and become null and void, and Purchaser shall thereupon receive a refund of the Earnest Money and any other amounts deposited with Escrow Agent, together with all interest earned thereon, and be relieved of any and all liability hereunder.]* In the event that such Notice to Proceed is given, the Parties shall proceed to Closing in accordance with the terms hereof, subject to the contingencies described herein.

[additional provisions for extending Inspection Period:

(b) In addition to the ninety (90) day Inspection Period described above, Purchaser shall have the right to extend the term of the Inspection Period for an additional period of sixty (60) days (the "Extension Period") in order to continue its investigations hereunder.

(c) In the event that Purchaser desires to extend the Inspection Period in its sole and absolute discretion, Purchaser shall notify Seller in writing prior to expiration of the original Inspection Period, at which time \$_____ of the Earnest Money Deposit shall then become non-refundable and Title Company shall remit such amount to Seller. If, at the end of the Extension Period, Purchaser is not satisfied with the Property in its

sole discretion, Purchaser may either (i) terminate this Agreement, in which case all remaining funds constituting the Earnest Money Deposit (including any interest thereon) shall be returned to Purchaser and neither party shall have any further obligations hereunder, or (ii) deliver to Seller a Notice to Proceed, in which case the Parties shall proceed to a Closing in accordance with the terms hereof, subject to the contingencies described herein. All funds from the Earnest Money Deposit which are delivered to Seller pursuant to this Agreement shall be applied to the Purchase Price at Closing, should Purchaser elect to close in its sole discretion.

(d) If Purchaser does not provide Seller with a Notice to Proceed in its sole and absolute discretion, or, if applicable, Purchaser does not provide the written notice extending the Inspection Period, on or before the expiration of the Inspection Period, this Agreement shall automatically terminate and Purchaser shall be entitled to receive a prompt refund of the Earnest Money Deposit (including any interest thereon) and both parties shall be released from further liability or obligation under this Agreement.]

5.3 Seller agrees that from the date of this Agreement to the Closing, Seller shall conduct its business involving the Property in the ordinary course and consistent with the prior operations of the Property, and during said period 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) Refrain from entering into any contracts or other commitments regarding the Property, other than in the ordinary and usual course of business, without the prior written consent of Purchaser;
- (c) Refrain from entering into any new leases or renewals or modifications of existing leases without Purchaser's prior written consent, which consent shall not be unreasonably withheld or delayed;
- (d) Keep in effect Seller's existing policies of public liability and hazard and extended coverage insurance insuring the Property;
- (e) 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, statute, ordinance, 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; the Michigan Natural Resources and Environmental Protection Act; as any of the foregoing may be amended from time to time, and any analogous federal, state or local laws or regulations now or hereafter affecting the Property; and
- (f) Promptly (within seven (7) business days from the Effective Date) furnish Purchaser with a copy of all notices of violation of laws or municipal ordinances, regulations, orders or requirements of departments of housing, building, fire, labor, health, or other state, city or municipal departments or other governmental authorities having jurisdiction against or affecting the Property or the use or operation

thereof and a copy of all notices of claims or potential claims from any such governmental authority.

6. Title and Survey.

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

- (a) A commitment from the Title Company, as agent for a nationally recognized title insurance company reasonably acceptable to Purchaser dated after the date of this Agreement, to issue to Purchaser at or as soon as possible after Closing, its ALTA fee owner's title insurance policy with 3.1 zoning endorsement (with parking) and such other endorsements as Purchaser or its lender may require, 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 (i) those liens, encumbrances, easements and other matters set forth in attached Exhibit G (the "Permitted Exceptions") and (ii) the rights of tenants in possession of portions of the Property pursuant to written leases as tenants only. Seller shall furnish Purchaser with the aforesaid title commitment and legible copies of all items described on Schedule B thereof (the "Title Commitment") as soon as possible, but in no event later than fifteen (15) days after the Effective Date.

If the title is not in the condition required hereunder, Purchaser shall notify Seller in writing of such defect(s) within fifteen (15) days after receipt of the Title Commitment and copies of all items shown therein. In the event Seller is unable or unwilling to cure such defects within twenty (20) 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, whereupon all liability hereunder shall terminate; or (iii) if the defect can be cured by the payment of money, deducting the amount required to cure such defect from the Purchase Price and the proceeds due Seller at Closing or otherwise.

- (b) An ALTA/ACSM land title survey of the Property (the "Survey"), indicating all structures, easements and improvements thereon, prepared by a registered land surveyor or engineer licensed in the State of Michigan and reasonably acceptable to Purchaser. The Survey shall be delivered to Purchaser as soon as possible, but in no event later than fifteen (15) days after the Effective Date. The Survey shall contain a certification 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, Purchaser's lender and any other applicable parties. At Purchaser's request, Seller shall cause the surveyor to make such modifications to the Survey as may be required by Purchaser's lender. 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 fifteen (15) days after receipt thereof. In the event Seller is unable or unwilling to cure such defect(s) within twenty (20) 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 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.

7. Closing.

The transaction contemplated under this Agreement shall be consummated at a meeting of the Parties (the "Closing") which shall take place at _____, within ____ (____) days after Seller's receipt of Purchaser's Notice to Proceed (the "Closing Date") or on any other date or at any other place jointly directed by the Parties.

At the time and place of Closing, all of the closing items described in Section 10 hereof, 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 Section 6.1 (a) hereof.

8. Seller's Representations and Warranties.

Seller represents, warrants and covenants to Purchaser as follows:

8.1 There are no existing violations of any laws, zoning ordinances, regulations, orders or requirement, of departments of housing, building, fire, labor, health, or other municipal departments or other governmental authorities having jurisdiction against or affecting the Property (including, without limitation, the Americans with Disabilities Act and any analogous state laws), nor has Seller received any notice of any existing or threatened condemnation or other legal action of any kind involving the Property.

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

8.3 Seller has not contracted for any services or employment and has made no commitments or obligations which will bind Purchaser as a successor in interest with respect to the Property except for those contracts identified in Exhibit D. With respect to those contracts which Purchaser agrees to assume, Seller shall pay all amounts due under those contracts through the Closing; provided, however, that with respect to the contracts identified in Exhibit "D", amounts paid or payable shall be prorated between the parties at the Closing and appropriate credits shall be given.

8.4 The attached Rent Schedule (Exhibit C) contains the following information concerning each of the Leases: (a) the name of the Tenant; (b) the lease execution and expiration date; (c) the rental rate, including any additional charges and percentage rentals, if any; (d) the date through which rent has been paid; (e) the identity of the site or space leased; (f) any renewal or purchase or space expansion, reduction or relocation options; (g) the amount of the security deposit held for each Tenant; and (h) the amounts of all other deposits and fees paid by the Tenant. All of such information is true, complete and accurate. Furthermore, the documents which are a part of Exhibit C are true, accurate and complete copies of the Leases. Seller is the landlord under each of the Leases and has full right and authority to assign all of the Leases to the Purchaser. There are presently no other leases or occupancy agreements in effect with respect to the Property except the Leases. With respect to each of the Leases:

- (i) the Leases set forth the true and complete understanding and agreement of the parties thereto;
- (ii) each of the Leases is in full force and effect;
- (iii) none of the

Leases has been canceled, terminated, modified, amended, altered or extended; (iv) all rents under the Leases are current and there are no prepayments of rent except as set forth in the Rent Schedule; (v) there are no defaults by either party under any Lease; (vi) except as otherwise set forth in the Rent Schedule, no Tenant has an option to renew its Lease or to purchase all or any portion of the Property; (vii) no Tenant has instituted or threatened legal or administrative action against the Seller; (viii) no Tenant is entitled to any rent concession or abatement. except as set forth in the Rent Schedule; (ix) there are no Tenant deposits except as set forth in the Rent Schedule; (x) except as set forth in the Rent Schedule, all leasing commissions in connection with the Leases have been paid in full; and (xi) no event has occurred and Seller knows of no impending event which would cause the guaranty of any guarantor with respect to any Lease to become null and void.

8.5 Seller will not enter into any amendment to or modification of any of the Leases prior to the Closing without Purchaser's prior written consent (which consent shall not be unreasonably withheld or delayed prior to Purchaser's delivery of the Notice to Proceed; after delivery of such Notice to Proceed, Purchaser may withhold its consent in its sole and absolute discretion); no rents or other deposits are or will on the Closing be held by Seller, except security deposits and prepaid rents for the current month.

8.6 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. Seller hereby agrees to indemnify Purchaser from and against any and all liability, loss, costs, penalty, damage and expense, including actual 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 prior to Closing.

8.7 As of the date hereof, Seller is the owner of fee simple 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.

8.8 There is no assessment presently outstanding or unpaid for local improvements or otherwise which has or may become a lien against the Property. Further, Seller knows of no public improvements which have been ordered to be made and/or which have not heretofore been completed, assessed and paid for.

8.9 In the event any claim is made by any party for the payment of any amount due for the furnishing of labor and/or materials to the Property or the Seller prior to Closing, or in the event any lien is filed against the Property subsequent to Closing as a result of the furnishing of such materials and/or labor prior to Closing, Seller shall immediately pay said claim and discharge said lien; provided, however, in the event Seller desires to challenge or contest any such claim, Seller must first bond over or place into escrow the amount necessary to pay such claim.

8.10 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.

8.11 All roads necessary for the full utilization of the Property for its intended purposes have either been completed or the necessary rights of way therefor 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.

8.12 To the best of Seller's knowledge, the Property is correctly described in the legal description in Exhibit A and all of the improvements are located thereon.

8.13 To the best of Seller's knowledge, the Permitted Exceptions do not adversely affect the use of the Property for the purposes intended as an office building.

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

8.15 The Seller has duly and validly authorized and executed this Agreement with full power to enter into and perform this Agreement, and the person executing and delivering this Agreement on behalf of Seller has all necessary authority to do so.

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

8.17 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 except for those notices and/or applications which are listed in Exhibit H attached hereto.

8.18 To the best of Seller's knowledge, there are no latent defects existing in, on, or upon the Property.

8.19 Between the Effective Date as defined herein and the Closing, Seller shall not commit any action that constitutes waste of the Property.

8.20 All electrical, mechanical, water, storm water, sewer, elevator and other utility systems servicing the Property are in serviceable condition and adequately service the Property.

The representations, warranties and covenants in this Section 8 shall be reaffirmed by Seller as of the Closing and shall survive the Closing and delivery of possession of the Property to Purchaser.

Seller shall, and does hereby, indemnify and hold Purchaser harmless from any and all losses, damages, costs, liabilities and expenses, including reasonable attorneys' fees, incurred by Purchaser as a result of the breach by Seller of any of the representations or warranties contained herein or the failure by Seller to comply with the covenants contained herein or any other default by Seller under this Agreement.

Purchaser acknowledges that pursuant to this Agreement it will have an opportunity to inspect the financial and physical condition of the Property and the legal status of the Property. Purchaser further acknowledges that Purchaser, in purchasing the Property, is relying upon its own expertise and the representations and warranties of Seller pursuant to this Agreement. Purchaser acknowledges that it is acquiring the Property in its "AS IS" condition, without any warranties or representations, express or implied, concerning the Property from the Seller, except as expressly set forth in this Agreement; provided, however, that the investigation by Purchaser and its employees, agents and representatives of the financial and physical conditions of the Property shall not negate or diminish the representations or warranties of the Seller contained herein.

9. Default.

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, if any. The foregoing shall be Seller's sole and exclusive remedy.

9.2 In the event of a default by Seller hereunder prior to or on the Closing, 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, if any, 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.

10. Closing Documents.

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

10.1 Seller shall execute and deliver to Purchaser a good and sufficient warranty Deed, subject only to the Permitted Exceptions, conveying marketable title to the Property to Purchaser, along with a real estate transfer valuation affidavit.

10.2 Seller shall execute and deliver to Purchaser an assignment of the Leases and other occupancy agreements and all rents due and to become due thereunder and Seller will deliver to Purchaser the originally executed Leases; provided, however, that such assignment shall not impose any liability on Purchaser for any default of Seller under the Leases. Purchaser shall assume all of landlord's obligations under the Leases relating to periods subsequent to the Closing including the obligation to refund security deposits of tenants of the Property but only as to those security deposits which are paid over and delivered to Purchaser at the Closing (or for which Purchaser receives credit at the Closing against the Purchase Price); and Purchaser shall indemnify and hold Seller harmless from all claims of Tenants under the Leases arising from and after the date of Closing or relating to any security deposits which are paid over and delivered to Purchaser at the Closing. Seller shall indemnify and hold Purchaser harmless from all claims of Tenants under the Leases arising prior to the Closing, including claims relating to security deposits which are not paid over and delivered to Purchaser at the Closing, and from all liability with respect to any breach by Seller of Seller's statutory obligations regarding security deposits.

10.3 Seller shall execute and deliver to Purchaser an assignment and delivery of all claims, guaranties, warranties, indemnities and all other rights, if any, which Seller may have against suppliers, laborers, materialmen, contractors or subcontractors arising out of or in connection with the installation, construction and maintenance of the improvements, fixtures and personal property on or about the Property, together with the originals of all such guaranties, warranties and such similar instruments.

10.4 Seller shall deliver to Purchaser all plans and specifications relating to the Property and all 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, as well as any other documentation as may be required by any statute, law, ordinance or regulation to allow the consummation of this sale.

10.5 Seller shall deliver to Purchaser a revised Rent Schedule in the form attached hereto as Exhibit C, which shall be updated to and certified by the Seller as true and correct as of the Closing.

10.6 Seller shall execute and deliver to Purchaser a warranty bill of sale, covering all fixtures, equipment, vehicles and other personal property owned by Seller and used or useable in connection with the operation of the Property, along with any other documents or filings necessary to lawfully transfer title to the same. Such bill of sale shall contain an itemized list of all of such items and shall warrant unencumbered, marketable title thereto.

10.7 Seller shall provide and assign to Purchaser an assignment of those contracts listed in Exhibit D and Seller will deliver to Purchaser the originally executed contracts. Seller shall indemnify and hold Purchaser harmless against any liability under said contracts accruing prior to the Closing, and Purchaser shall indemnify and hold Seller harmless against any liability under said contracts arising from and after the Closing. Seller shall deliver to Purchaser evidence of its termination of any management agreement or other agreements not specifically assumed by Purchaser at closing.

10.8 Seller shall provide and assign to Purchaser all other agreements, if any, which Purchaser deems reasonably necessary for access and utilities to service the Property.

10.9 Purchaser shall deliver to Seller a form of letter addressed to the Tenants, indicating that the Property has been sold to Purchaser and directing that all future rental payments be sent to the Purchaser, which Seller shall execute and deliver to all Tenants.

10.10 Seller shall execute and deliver to Purchaser a discontinuation of any assumed named certificate now on file whereby Seller has reserved the right to conduct business under the name “_____” and an assignment of Seller’s right to the use of such name.

10.11 Seller shall furnish Purchaser with an affidavit stating that neither Seller nor any of its principals or partners is a “Foreign Person” within the meaning of IRC Section 1445(f)(3), in which event the adjustment referred to in subparagraph (i) of Section 10.12 below shall not be required.

10.12 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. The following items shall be apportioned between the Seller and the Purchaser on the basis that Purchaser owns the Property on the date of Closing:

- (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) Notwithstanding the provisions of Michigan Public Acts 80 and 279 of 1994, all real estate and personal property taxes and assessments which are due or are a lien against the Property as of the Closing shall be paid in full by Seller and all current real estate taxes and personal property taxes, to the extent not reimbursed by Tenants prior to Closing, shall be prorated based upon the due date of each such tax. Such proration shall be made as if such taxes are paid in advance.
- (c) If not delivered by Seller to Purchaser at Closing, Purchaser shall receive credit for all security deposits previously collected from Tenants and in which the Tenants of the Property have a continuing interest to the extent not previously applied in reduction of Tenants’ liabilities. Seller shall not apply nor forfeit any such security deposits unless the applicable tenant vacates the Property or is evicted therefrom prior to the Closing.
- (d) All rents, common area maintenance charges, percentage rents, and other amounts (other than security deposits) received by Seller as landlord under the Leases (collectively “Rents”) shall be apportioned between Purchaser and Seller as of the Closing, with Seller being credited with rents to the Closing and Purchaser being credited with rents from and after the Closing. Purchaser shall remit to Seller on a monthly basis all rents received by Purchaser after the Closing which are

attributable to periods prior to the Closing; provided, however, that rents received by Purchaser after the Closing shall be first applied to rents accruing subsequent thereto; provided, further, that any such rents which are more than ninety (90) days delinquent shall be deemed the sole property of Purchaser. Seller shall have no right from and after the Closing to take any action to collect any rents due from Tenants to Seller for periods prior to the Closing and Purchaser shall have no obligation to take any action to collect the same.

- (e) To the extent any of the Leases require Tenant escrows, such escrows shall be credited to Purchaser at Closing.
- (f) All water, sewer and utility charges and maintenance charges shall be paid by Seller through the Closing or prorated between the parties and appropriate credits given.
- (g) Any amounts payable by or to the owner of the Property under any contracts which Purchaser wishes to continue and/or assume shall be prorated between the parties and appropriate credits given.
- (h) The Earnest Money held by the Escrow Agent shall be credited against the cash portion of the Purchase Price due at the Closing.
- (i) If Seller is a "Foreign Person" within the meaning of IRC Section 1445(f)(3). Purchaser shall withhold the appropriate taxes required under IRC Section 1445.
- (j) Seller shall receive a credit for any insurance premiums paid prior to the Closing for insurance coverage beyond the Closing in the event that the Purchaser desires to take an assignment of all or any portion of the Seller's insurance.
- (k) Seller shall pay any and all state and county transfer taxes or documentary stamp taxes payable upon delivery or recording of the Warranty Deed referred to in Section 10.1 above.

10.13 Seller shall furnish Purchaser with copies of appropriate documents demonstrating that the Seller is a _____ in good standing under the laws of the State of Michigan and such other documents as shall reasonably satisfy Purchaser that Seller and the persons executing the documents have the authority to enter into this Agreement, consummate the sale contemplated hereby and execute and perform the obligations under all documents contemplated hereby.

10.14 In the event the Purchaser chooses to utilize the Seller's insurance applicable to the Property, Seller shall execute and deliver an assignment of any or all of the insurance policies which the Purchaser chooses to assume covering all or any part of the Property.

10.15 Seller shall furnish Purchaser with a revised title insurance commitment (including a current tax lien search) which has the effect of updating through to and including the date of Closing the Title Commitment identified in Section 6.1 hereof, and shall cause the Title Company to hand mark the Title Commitment as an effective title policy, together with such endorsements as Purchaser shall require.

10.16 Seller shall furnish Purchaser with copies of all current personal property and real estate tax bills.

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

10.18 Seller shall deliver to Purchaser copies of tax clearance certificates evidencing payment in full of all sales and use taxes, single business taxes or other similar taxes applicable to the Property and/or the business operations conducted therefrom.

10.19 The Parties shall execute and deliver 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 Section 6 hereof to be issued and delivered to the Purchaser; provided that such documentation does not have the effect of amending this Agreement or modifying the Parties' obligations hereunder.

11. Casualty Damage.

11.1 In the event that any improvements located upon the Property shall be, damaged or destroyed by fire, storm or other casualty on or before the Closing, and the cost to repair such casualty loss shall exceed _____ Dollars (\$_____), Purchaser shall have the right to terminate its obligations under this Agreement within thirty (30) business days after receiving notice of such casualty and to receive a return of all sums deposited with Escrow Agent pursuant to Section 3 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 casualty loss is One Hundred Thousand Dollars (\$100,000) 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 (including any rent loss insurance allocable to the period from and after the Closing) and Seller shall pay to Purchaser at (losing the amount of any deductible.

12. Condemnation.

In the event that notice of any action, suit or proceeding shall be given prior to the Closing for the purpose of condemning any part of the Property (including, without limitation, any parking areas, driveways, access or other common areas) Seller shall notify Purchaser in writing within three (3) days of receipt of such notice (whether Seller shall have received such notice orally or in writing) and shall provide Purchaser with copies of all documentation relating thereto. Purchaser shall have the right to terminate its obligations hereunder within thirty (30) days after receiving notice of such condemnation proceeding and copies of all documentation relating thereto, 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, all of such condemnation proceeds (or proceeds from any sale or transfer in lieu thereof) shall be assigned and belong to Purchaser.

13. Conditions Precedent to Closing.

Notwithstanding anything to the contrary contained in this Agreement, Purchaser shall have no obligation to consummate the within contemplated transaction unless and until the conditions set forth in this Section 13 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. In the event Seller fails to satisfy any of the conditions set forth herein by the Closing, 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 as of the date of Closing;
- (b) Between the date of this Agreement and the Closing, there shall have been no intervening destruction or damage to or condemnation of the Property or any portion thereof or any reduction in the occupancy rate below the level of occupancy at the Effective Date;
- (c) Seller shall have performed all of its other obligations under this Agreement; and
- (d) Purchaser shall have received Estoppel Certificates from each Tenant of the Property, certified to Purchaser and its lender(s).

14. No Assumption of Liabilities.

The Parties acknowledge that this transaction contemplates only the sale and purchase of the Property and that Seller is not selling a business nor do the Parties intend that Purchaser be deemed a successor of Seller with respect to any liabilities of Seller to any third party other than liabilities arising from and after the Closing (a) to utility companies for utility service furnished to the Property; or (b) to Tenants under the Leases. Except for the foregoing, Purchaser shall neither assume or be liable for any of the debts, liabilities, taxes or obligations of, or claims against, Seller, or of any other person or entity, of any kind or nature, whether existing now, on the Closing Date or at any time thereafter. All of such debts, liabilities, taxes, obligations and claims shall be solely those of Seller, and Seller hereby represents, warrants, covenants and agrees to defend, indemnify and hold harmless Purchaser from any liability (including attorneys' fees) with respect thereto. The debts, liabilities, taxes, obligations and claims for which Seller alone is liable shall include, without limitation (a) all payments and benefits to past and/or present employees of Seller in connection with the business being conducted on or from the Property as may have accrued through the Closing, (including, but not limited to, salaries, wages, commissions, bonuses, vacation pay, health and welfare contributions, pensions, profit sharing, severance or termination pay, or any other form of compensation or fringe benefit) and (b) obligations of Seller under any contracts.

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 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, but which shall have arisen out of any aspect of the business or its operations prior to the Closing:

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

15. Miscellaneous.

15.1 This Agreement and Exhibits "A" through "___" 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. *[Without limiting the generality of the foregoing, the Parties agree that a certain letter of intent dated _____, 200___, executed by Seller and Purchaser's affiliate, _____, is superseded by this Agreement and is hereby null, void and of no further force or effect.]* 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 of 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. If any action by any party shall require the consent or approval of another party, such consent or, approval of such action on any one occasion shall not be deemed a consent to or approval of said action on any subsequent occasion or a consent to or approval of any action on the same or any subsequent occasion.

15.3 _____ has executed this Agreement subject to its absolute and unconditional right to assign all of its right, title and interest in this Agreement to an existing entity, an entity to be formed or an individual. Seller agrees to consummate this transaction with any such assignee and upon Seller's receipt of notice of such assignment, _____ shall be released from all liability hereunder.

15.4 The captions and section numbers appearing in this Agreement are inserted only as a matter of convenience, and do not define, limit, construe or describe the scope or intent of such sections of this Agreement nor in any way affect this Agreement.

15.5 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.

15.6 Any notice, request, demand, instruction or other communication to be given or served hereunder or under any document or instrument executed pursuant hereto, shall be in writing and shall be delivered personally or sent by recognized overnight courier service or by United States certified mail return receipt requested, postage prepaid or by telecopier (with confirmation of receipt) and addressed to the parties at their respective addresses set forth, below, and the same shall be deemed effective upon receipt if delivered personally, or one (1) business day following delivery to such courier service or two (2) business days after deposit in the mail if mailed, or upon confirmed receipt if delivered by telecopier. The party may change its address for receipt of notices by service by of a notice of such change in accordance herewith. Notices shall be deemed properly addressed if sent to the following addresses:

If to Purchaser:

Telecopier: _____

With copy to:

Telecopier: _____

If to Seller:

Telecopier: _____

With copy to: _____

Telecopier: _____

If to Escrow Agent: _____

Telecopier: _____

15.7 This Agreement shall be governed by the procedural and substantive laws of the State of Michigan, without regard to conflicts of law principles. Any action to enforce the terms hereof or arising with respect to the Property shall be brought, if at all, in the Circuit Court for _____ County, Michigan, or in the United States District Court for the Eastern District of Michigan, Southern Division, and Seller hereby irrevocably consents to the jurisdiction of and venue in either of such courts.

15.8 The provisions of this Agreement shall survive the Closing of the transaction contemplated hereby.

15.9 At all times from and after the date hereof to the Closing, Seller shall:

- (a) Make available to Purchaser, its counsel and/or accountants, for examination, all financial data, operating data, contracts, leases, insurance policies, 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 electrical, plumbing and mechanical systems located at 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.

15.10 Wherever the words "includes" or "including" are used in this Agreement, such words shall not be construed to restrict or limit any of the language, terms or definitions used in association therewith.

15.11 Any reference in this Agreement to any entity shall include and shall be deemed to be a reference to any person or entity that is a successor to such entity.

15.12 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 expires, (iii) expire at 5:00 p.m. local (Detroit, Michigan) time on the date by which such thing is to be done, and (iv) be construed to mean calendar days (unless otherwise specified); 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.

15.13 Whenever in this Agreement provision is made for the doing of any act by any person it is understood and agreed that such act shall be done by such person at its own cost and expense unless a contrary intent is expressed.

15.14 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.

15.15 Except as may be required by applicable law, Purchaser agrees to keep confidential and not to disclose to any third party any information provided to Purchaser in connection with the inspections performed by Purchaser pursuant to this Agreement. Notwithstanding the foregoing, Purchaser may disclose any information received or prepared by Purchaser in connection with this transaction to any professional advisor, counsel, investor, lender, or any other party involved in Purchaser's acquisition of the Property and to any appropriate governmental entity, authority or agency; provided, however, that Purchaser shall advise each of the foregoing entities (other than governmental entities, authorities or agencies) to whom Purchaser discloses financial statements, environmental reports, manager's reports, engineering reports or maintenance records provided to Purchaser by Seller, that such items are subject to the confidentiality provisions of this Section 15.15.

15.16 Tax Deferred Exchange (§ 1031). In the event, prior to closing, either Purchaser or Seller shall desire to restructure this transaction as a part of a tax deferred exchange, pursuant to § 1031 of the Internal Revenue Code, the other party, as an accommodation, shall enter into and execute any such amendatory documentation as may be reasonably requested; provided however, that such party shall not incur any additional cost, expense, risk or potential liability whatsoever on account thereof. The cooperating party shall have no liability to the party seeking favorable tax treatment in the event the subject transaction is found, held or adjudicated not to qualify as or as a part of a tax deferred exchange pursuant to § 1031 of the Internal Revenue Code.

15.17 TIME IS OF THE ESSENCE OF ALL UNDERTAKINGS AND AGREEMENTS OF THE PARTIES HERETO.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed and effective as of the date first above written.

WITNESSES:

"SELLER"

By: _____

Its: _____

WITNESSES:

"PURCHASER"

By: _____

Its: _____

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.

[Title Company]

By: _____

Its: _____

Dated: _____

LIST OF EXHIBITS

- EXHIBIT A: Legal Description of the Real Estate
- EXHIBIT B: List of fixtures, equipment, inventory, supplies and personalty located on Real Estate
- EXHIBIT C: Rent Schedule and copies of Leases
- EXHIBIT D: Contracts related to the Property
- EXHIBIT E: Due Diligence List
- EXHIBIT F: Legal Description of the "Adjacent Property"
- EXHIBIT G: Permitted Exceptions
- EXHIBIT H: Notices of violations of law
- EXHIBIT I: Form of Tenant Estoppel Certificate

EXHIBIT E

Due Diligence List

1. Zoning, use and occupancy permits for all tenants in occupancy, licenses and agreements with governmental jurisdictions to the extent presently available.
2. Most recent “as built”, boundary, and topographic surveys of the Property and all other surveys of the Property in Seller’s possession and/or readily obtainable.
3. Site plans, lease plans, space plans and leasing brochures showing all tenant spaces.
4. Latest title reports in Seller’s possession and latest Seller’s title policy.
5. Annual operating statements with respect to the Property for the last three calendar years and the year-to-date period and monthly operating statements with respect to the Property for the last twenty-four (24) months and that portion of U.S. Federal Income Tax returns which sets forth the income and expense breakdown for the Property for the most recent two (2) years.
6. Current rent roll and current and/or pending lease proposals, offers and correspondence regarding the same.
7. All leases (including riders, addenda, amendments, exhibits and the like), and all other agreements with tenants, if any, and all previous estoppel letters delivered to Seller, any Lender or other party.
8. All contracts with the parties providing services or property to the Property.
9. Tax assessments and real estate tax bills for the last three calendar years and the year-to-date period.
10. Insurance policies or other reasonable evidence setting forth the limits of casualty coverage for the Property.
11. Zoning, building, health or environmental notices received from any governmental authority with jurisdiction over the Property, including, but not limited to, notices of violations of zoning, building, health or environmental laws, rules or regulations, if any.
12. Any existing appraisals in Seller’s possession or control.
13. A schedule of all tenants’ rent delinquencies and other delinquencies, if any, for the previous twenty-four (24) months.
14. Most recent “as-built” architectural and engineering plans and specifications in Seller’s possession or control.
15. Copies of all environmental, soils, wetlands, engineering, appraisal and marketing reports and all addenda thereto and correspondence in connection therewith.
16. Copies of all warranties and guaranties with respect to any of the improvements located upon the Property.

17. Detailed information with respect to any fire or other casualty loss for which claims were made on any insurance policy since the improvements located upon the Property have been open for business to the general public.
18. Copies of recent bids on capital improvements, including, but not limited to, roof repairs and replacements and parking lot and driveway repairs and replacements and restriping.
19. Copies of plats and/or aerials with respect to the Property to the extent in Seller's possession.
20. Copies of all utilities bills for the last three calendar years and the year-to-date period.
21. Common area maintenance, tax and insurance reconciliation statements and billings for the last three calendar years and the year-to-date period, if any, and any correspondence received from any tenants of the Property disputing any such reconciliation.
22. Other items as reasonably requested by Purchaser after review of the aforementioned items.

EXHIBIT I

TENANT ESTOPPEL CERTIFICATE

To: _____, its successors and assigns ("**Purchaser**") and _____ [insert name of Purchaser's lender]

Re: Property Address: _____ ("**Property**")
Lease Date: _____; Between: _____ ("**Landlord**") and _____ ("**Tenant**")
Square Footage Leased: _____
Suite No./Floor: _____ ("**Premises**")

Tenant understands that Purchaser is contemplating purchasing the Property from Landlord. The undersigned, as the tenant under the above-referenced lease ("**Lease**") hereby certifies to Purchaser, the following:

1. The lease attached hereto as *Exhibit A* is a true, correct, and complete copy of the Lease, is in full force and effect and has not been modified, supplemented, or amended in any way and the Lease represents the entire agreement between the parties as to the Premises and/or the Property or any portion thereof.
2. The amount of fixed monthly rent is \$_____, plus utility, insurance and common area maintenance reimbursements in the respective monthly amounts of \$_____, \$_____ and \$_____ [also identify any other charges payable by Tenant under the Lease]; No such rent or other payments have been or will be paid more than one (1) month in advance of their due date, except: _____.
3. The undersigned's security deposit is \$_____.
4. The Lease will not be altered or amended or terminated, without Purchaser's prior written consent.
5. The commencement date of the Lease was _____ and the Lease terminates on _____. Tenant also has the right under the Lease to the following renewal, expansion or contraction options _____ [insert as applicable], which must be exercised, if at all, on or before _____. Tenant has no option to purchase all or any part of the Property.
6. All work to be performed for us under the Lease has been performed as required and has been accepted by us; and any payments, free rent, or other payments, credits, allowances or abatements required to be given by Landlord to us have already been received by us.
7. The Lease is free from default by Landlord; we have no offset, defense, deduction or claim against Landlord. We are aware of no event which, with the giving of notice or passage of time, or both, would constitute a default by Landlord. under the Lease.

8. The undersigned has received no notice of any prior sale, assignment, pledge or other transfer of the said Lease or of the rents received therein.
9. The undersigned has not assigned said Lease or sublet all or any portion of the Premises, the undersigned does not hold the Premises under assignment or sublease, nor does anyone except us and our employees occupy the Premises.
10. No actions, whether voluntary or otherwise, are pending against the undersigned under the bankruptcy laws of the United States or any state and there are no claims or actions pending against the undersigned which if decided against us would materially and adversely affect our financial condition or our ability to perform the tenant's obligations under the Lease; and
11. The undersigned recognizes that Purchaser would not purchase the Property but for Tenant's execution of this Tenant Estoppel Certificate. The statements contained herein may be relied upon by Purchaser, its successors and assigns and by Purchaser's lender(s). If requested by Purchaser's lender(s), Tenant will promptly execute an additional estoppel certificate in a form reasonably requested by Purchaser's lender(s).
12. In the event that Purchaser succeeds to the interest of Landlord under the Lease and assumes Landlord's obligations thereunder, then Tenant hereby agrees to attorn to and accept Purchaser and to recognize Purchaser as its landlord under the Lease for the then remaining balance of the term thereof, and upon request of Purchaser, Tenant shall promptly execute and deliver to Lender an agreement of attornment reasonably satisfactory to Tenant, Purchaser and Purchaser's lender(s), if any.

The undersigned is a duly appointed officer [partner] [manager/member] of the corporation [partnership] [limited liability company] signing this certificate and is the incumbent in the office indicated under his/her name. In any event, the undersigned is duly authorized to execute this certificate.

Dated this ____ day of _____, 200__.

TENANT:

By: _____

Its: _____

[insert if applicable: The undersigned, as guarantor of the Lease, hereby joins in and consents to the foregoing Tenant Estoppel Certificate and agrees to be bound by the provisions hereof].

[Guarantor]

**Exhibit B
Closing Checklist**

CLOSING CHECKLIST

PURCHASER:

SELLER:

PROPERTY ADDRESS:

PURCHASER'S COUNSEL:

SELLER'S COUNSEL:

TITLE INSURANCE COMPANY:

Commitment No. _____

CLOSING DATE:

CHECKLIST

| ITEMS FOR REVIEW | RESPONSIBLE PARTY | COMMENTS |
|--|-------------------|----------|
| 1. Agreement of Purchase and Sale | | |
| 2. Assignment of Purchase Agreement, if applicable | | |
| 3. Warranty Deed | | |
| 4. Assignment and Assumption of Lease | | |
| 5. Bill of Sale | | |
| 6. Assignment and Assumption of Prior Indebtedness, if applicable | | |
| 7. Assignment of Service Contracts | | |
| 8. Assignment of Warranties | | |
| 9. Real Estate Valuation Affidavit | | |
| 10. Property Transfer Affidavit | | |
| 11. Non-Foreign Person Affidavit | | |
| 12. Title Insurance Commitment - including endorsements as follows: | | |
| 13. Owner's Affidavit (for title policy) | | |
| 14. Closing Statement | | |
| 15. Authorization and Entity Documents - Seller | | |
| 16. Authorization and Entity Documents - Purchaser | | |
| 17. UCC Searches | | |
| 18. Survey (See separate Survey Checklist) | | |
| 19. Loan Documents for Prior Indebtedness, if applicable | | |
| 20. Letter from Lender approving assumption of Prior Indebtedness by Purchaser | | |
| 21. Property Insurance & Liability Policies/ Certificates | | |
| 22. Zoning and Parking Letter from City | | |
| 23. Certificate of Occupancy | | |
| 24. Licenses and Permits | | |
| 25. Engineering and Architectural plans | | |
| 26. Current financial and operating statements with respect to the Property | | |

Improved Real Estate Due Diligence, Including Lease and Financing Issues

| | | |
|---|--|--|
| 27. Letter from Tenant waiving right of first refusal, if applicable | | |
| 28. Estoppel Certificates | | |
| 29. Service contracts, maintenance agreements with the parties providing services or property to the Property. | | |
| 30. Tax assessments and real estate tax bills for the Property. | | |
| 31. Insurance policies or other reasonable evidence setting forth the limits of casualty coverage for the Property. | | |
| 32. Zoning, building, health or environmental notices received from any governmental authority with jurisdiction over the Property, including, but not limited to, notices of violations of zoning, building, health or environmental laws, rules or regulations, if any. | | |
| 33. Any existing appraisals in Seller's possession or control. | | |
| 34. Certified Rent Roll | | |
| 35. Copies of all environmental, soils, wetlands, and soil engineering reports and all addenda thereto and correspondence in connection therewith. | | |
| 36. Copies of all warranties and guaranties with respect to any of the improvements located upon the Property. | | |
| 37. Detailed information with respect to any fire or other casualty loss for which claims were made on any insurance policy since the improvements located upon the Property have been open for business to the general public. | | |
| 38. Copies of plats and/or aerials with respect to the Property to the extent in Seller's possession. | | |
| 39. Copies of all utility bills for the Property. | | |
| 40. Common area maintenance, tax and insurance reconciliation statements and billings for the Property. | | |
| 41. Tax Clearance Certificates | | |
| 42. Property Inspection | | |
| 43. Americans with Disabilities Act Compliance | | |
| 44. Original Leases from all Tenants | | |

| | | |
|---|--|--|
| 45. Lease Abstracts | | |
| 46. Letters to Tenants | | |
| 47. Notifications to Third Parties | | |
| 48. Opinion of Counsel for Purchaser | | |
| 49. Opinion of Counsel for Seller | | |
| 50. Management Termination Letter | | |
| 51. New Management Agreement | | |
| 52. Deposit Release Letter | | |
| 53. Wiring Instructions | | |
| 54. Compliance with Land Division Act and Statement Regarding Farmland, if applicable | | |

SURVEY REVIEW CHECKLIST

Survey By: _____, **Job No.** _____

1. Compare Legal Description to Documents/Title Commitment
2. Certified to: Purchaser, Lender, Title Company
3. ALTA/ACSM 1999 Minimum Standard Detail Requirements Certification
4. Additional Lender Certifications
5. Easements (on and off premises)
 - Sanitary Sewer
 - Water
 - Utility
 - Ingress and Egress
 - Storm drainage
6. Check for surveyor's signature and seal
7. Locate north arrow
8. Determine beginning and/or commencement point tied to some point on the ground that can be located.
9. Compare all easements and other matters listed on title commitment to survey and locate on the survey.
10. Review all "notes" on the survey. Are there indications of any unauthorized use of the property or unexpected conditions?
11. Review survey for encroachments onto the surveyed property or encroachments of improvements on surveyed property onto other property.
12. Check survey for any easements or matters not shown on title commitment.
13. Check for flood plain certification, if applicable.
14. Check for building set backs and other zoning requirements and for compliance therewith.
15. Check for building dimensions.
16. Check for number of parking spaces and parking lot striping.

Exhibit C
Tenant Estoppel Letter

TENANT ESTOPPEL LETTER

Re: Lease dated _____, 20____, (the "Lease"), between
_____ ("Landlord") and _____,
a _____ ("Tenant"), for premises at _____

Gentlemen:

The undersigned is Tenant under the Lease noted above and understand that you will rely on the information herein contained and hereby certify to _____ and to Landlord as follows:

1. A true and correct copy of the Lease (inclusive of all riders and exhibits thereto) is attached. There are no other oral or written agreements, understandings or the like between Landlord and Tenant relating to the premises demised by the Lease (the "Premises") or the Lease transaction.
2. The information set forth below is true and correct:
 - a. Square footage of Leased Premises: _____
 - b. Annual rent as of this date: _____
 - c. Lease term commenced: _____
 - d. Lease termination date: _____
 - e. Rent is paid to and including: _____
 - f. Security Deposit: _____
 - g. Prepaid rental in amount of: _____
3. Tenant has accepted possession of the Premises, is in occupancy thereof under the Lease. The execution of the Lease was duly authorized, the lease was properly executed and is in full force and effect and is valid, binding and enforceable against Tenant and there exists no default, nor state of facts which with notice, the passage of time, or both, could ripen into a default, on the part of either Tenant or Landlord.
4. Under the Lease, Tenant is presently obligated to pay rent without rights of defense or offset, at the rate set forth in Paragraph 2 above of \$_____ per month. Tenant acknowledges that its obligation for performance of the terms of the Lease, including payment of rent commenced on the date stated in Paragraph 2. Rent is paid through and including _____, 20__. No rent has been or will be paid

more than thirty (30) days in advance, and Tenant has no claim against the Landlord for any deposits or other sums.

5. The Lease has not been modified, altered or amended in any respect.
6. There has not been filed by or against nor, to the best of the knowledge and belief of Tenant, is there threatened against or contemplated by Tenant, a petition in bankruptcy, voluntary or otherwise, any assignment of the benefit of creditors, any partition seeking reorganization or arrangement under the bankruptcy laws of the United States or of any state thereof, or any other action brought under said bankruptcy laws.
7. To the best of Tenant's knowledge, there has not been any assignment, hypothecation or pledge by Landlord of the Lease or rents accruing under the Lease.
8. All of the improvements contemplated to be installed by either Landlord or Tenant under the Lease have been entirely completed as required therein.
9. The address for notices to be sent to Tenant is as set forth in the Lease.
10. Tenant has no right of first refusal, option or other right to purchase the Property or any part thereof, including, without limitation, the Premises.
11. Tenant acknowledges that no representations have been made to Tenant regarding the condition of the Premises or the compliance of the Premises with any applicable health, building, safety, zoning or environmental statutes, codes, laws, ordinances or regulations (collectively "Laws"). Tenant acknowledges that it has inspected the Premises and has accepted the Premises in as "AS-IS" condition. Tenant hereby waives and releases Landlord or _____ from, any obligation with respect to the condition of the Premises or compliance of the Premises with any Laws and Tenant agrees that compliance with all Laws is Tenant's responsibility under the Lease.
12. Tenant understands that Landlord may assign, or has assigned, the Lease to _____ and agrees that if _____ and Landlord so requests pursuant to such assignment, Tenant will pay all rents and other charges due and payable under said Lease directly to _____.

BY: _____

Its: _____

AND

BY: _____

Its: _____

TENANT

Exhibit D
Subordination, Non-Disturbance and Attornment Agreement

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

THIS SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT ("Agreement") is made and entered into as of the ____ day of _____, 2002, by and among _____ ("Landlord"); and _____, a _____ ("Lender").

WITNESSETH:

WHEREAS, Lender is or may become the holder of a certain mortgage/deed of trust ("Mortgage/Deed of Trust") encumbering that certain parcel of real property and the improvements thereon, commonly known as the _____ restaurant located at _____, in the County of _____, State of _____, and more particularly described in Exhibit A attached hereto and incorporated herein by this reference (the "Property");

WHEREAS, Lender and Landlord are parties to the Mortgage/Deed of Trust, pursuant to which Landlord financed the Property from Lender; and

WHEREAS, Landlord and Tenant are parties to that certain Lease Agreement dated August 17, 1999 (the "Lease") pursuant to which Tenant leased the Property from Landlord.

NOW, THEREFORE, in consideration for the mutual covenants and agreements contained herein, the sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

1. Subordination. The Lease, and the rights of Tenant in, to and under the Lease and the Property, are hereby made subject, junior and subordinate in all respects to the Mortgage/Deed of Trust and to all renewals, modifications, consolidations, replacements and extensions thereof and to the rights of Lender. This clause shall be self-operative, and no further instrument shall be required. However, Tenant covenants and agrees that if requested by Lender it will execute, acknowledge and deliver any instrument or document reasonably requested to confirm the foregoing subordination of the Lease within ten (10) days after receipt of written request therefor.

2. Non-Disturbance. So long as Tenant is not in default beyond any applicable grace or cure periods, under the Lease, then: (a) Tenant's possession and occupancy of the Property and the improvements and its leasehold estate shall not be disturbed or interfered with by Lender or any third party purchaser; (b) the Tenant's rights and obligations under Lease shall not be altered or affected by the foreclosure of the Mortgage/Deed of Trust, or a deed in lieu of foreclosure, or the Lender's exercise of any remedy provided for in the Mortgage/Deed of Trust; and (c) in the event that Lender forecloses upon the Property, Lender shall preserve the Lease as a lease between Lender and Tenant.

3. Attornment. In the event that Lender or any successors in interest to Lender forecloses upon the Property, then:

(a) Tenant shall be bound to Lender, and Lender shall be bound to Tenant, under all of the terms, covenants and conditions of the Lease for the balance of the term thereof remaining, and any extensions or renewals thereof which may be effected in accordance with any option therefor contained in the Lease, with the same force and effect as if

Lender were the original landlord under the Lease, except that Paragraph 3(b) below shall modify the Lease, and Tenant does hereby attorn to Lender as its landlord, said attornment to be effective and self-operative without the execution of any further instruments; provided, however, that within ten (10) days after receipt of written request therefor from Lender, Tenant will execute and deliver to Lender any instrument or other documents reasonably requested by Lender to confirm Tenant's attornment to Lender.

(b) Notwithstanding the foregoing, however, it is agreed that in no event shall Lender:

1. be liable for any act or omission of any prior landlord (including Landlord);
2. be obligated to cure any defaults of any prior landlord (including Landlord) which occurred prior to the date that Lender succeeded to the interest of such prior landlord under the Lease; provided that from and after the date Lender becomes owner of the Property, Lender shall be obligated to cure any continuing default of the landlord under the Lease to the extent such default is capable of being cured by Lender;
3. be subject to any offsets or defenses which Tenant may be entitled to assert against any prior landlord (including Landlord) with respect to events occurring prior to the date Lender succeeded to Landlord's interest;
4. be bound by any Minimum Annual Rent or other amounts paid by Tenant to any prior landlord (including Landlord) more than one (1) month in advance of the date that Lender succeeded to the interest of such prior landlord under the Lease;

4. Payment of Rent to Lender. Tenant agrees to pay the Minimum Annual Rent and any other payments due to Landlord under the Lease to Lender upon receipt of written notice from Lender that it has succeeded to the interest of Landlord under the Lease, and Landlord agrees that Tenant is entitled to rely conclusively upon such notice without any duty of inquiry.

5. Performance by Lender; Conflict. Nothing in this Agreement shall be or be deemed to be an agreement by Lender to perform any obligation of Landlord under the Lease unless and until the Lender acquires the Property, and then only if required to do so by the terms of the Lease, as modified and limited by this Agreement. In the event of any conflict between the terms of this Agreement and the terms of the Lease, the terms of this Agreement shall control.

6. Notices. Any notice required or permitted to be given hereunder shall be in writing and may be given by personal delivery, certified mail, return receipt requested or by nationally recognized overnight courier service and if given personally or by mail or by courier service, shall be deemed sufficiently given if addressed to the parties at the addresses set forth below. Any party may by notice specify a different address for notice purposes.

Addresses for Notices:

To Lender: _____

To Landlord: _____

To Tenant: _____

7. Successors and Assigns. This Agreement and each and every covenant and provision contained herein shall be binding upon and shall inure to the benefit of the parties hereto and their respective representatives, successors and assigns.

8. Modifications; Counterparts. This Agreement shall not be modified or amended in whole or in part except by a writing executed by all of the parties hereto or their respective representatives, successors or assigns. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be a fully executed original and all of which shall constitute one and the same instrument.

9. Governing Law; Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the jurisdiction in which the Property is located.

[Signature page to follow]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered as of the date hereinabove first written.

SIGNED AND ACKNOWLEDGED IN THE PRESENCE OF:

TENANT:

By: _____
(Print Name):
Its: _____

SIGNED AND ACKNOWLEDGED IN THE PRESENCE OF:

LANDLORD:

By: _____
(Print Name):
Its: _____

SIGNED AND ACKNOWLEDGED IN THE PRESENCE OF:

LENDER:

By: _____
(Print Name):
Its: _____

STATE OF _____)
) ss.
COUNTY OF _____)

On _____, 2002 before me, _____ as a Notary Public, personally appeared _____, as _____ of _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Given under my hand and seal of office this _____ day of _____, 2002.

Sign: _____

Print: _____

My Commission Expires: _____

(SEAL)

STATE OF _____)
) : ss.
COUNTY OF _____)

On _____, 2002 before me, _____ as a Notary Public, personally appeared _____, as _____ of _____, a _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Given under my hand and seal of office this _____ day of _____, 2002.

Sign: _____

Print: _____

My Commission Expires: _____

(SEAL)

STATE OF _____)
) : ss.
COUNTY OF _____)

On _____, 2002 before me, _____ as a Notary Public, personally appeared _____, as _____ of _____, a _____, person-

Improved Real Estate Due Diligence, Including Lease and Financing Issues

ally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Given under my hand and seal of office this _____ day of _____, 2002.

Sign: _____

Print: _____

My Commission Expires: _____

(SEAL)

EXHIBIT A

**SUBORDINATION, NON-DISTURBANCE
AND ATTORNMENMENT AGREEMENT**

AND

Dated: _____, 2002

Location: _____

Recording requested by and
when recorded return to:

Attention: _____

Exhibit E
Lease Abstract

The following Lease Abstract is a summary of the substantive terms of the Lease, but should not be construed as a substitute for review of the Lease for a determination of the exact rights of the parties.

Lease Abstract

Landlord: _____

Tenant: _____

Property: _____
Date of Lease: _____
Commencement Date: _____
Term: _____
Use: _____
Renewal Options: _____
Rent: _____

- Utilities and Taxes:
- Maintenance:
- Alterations, Additions, Installation & Removal:
- Trade Fixtures, Personal Property:
- Maintenance & Repair:
- Indemnity:
- Insurance:
- Compliance with Laws:
- Signs:
- Casualty Loss:
- Condemnation:
- Default:
- Landlord Right to enter Premises:
- Assignment, Subletting:
- Holding Over:
- Estoppel Certificate:

- Subordination:
- Hazardous Materials: