

Litigation Considerations

Mark S. Frankel
Couzens, Lansky, Fealk, Roeder & Lazar, PC
Farmington Hills

A. Use of Form Documents	4-1
B. Specificity of Language as a Means to Avoid Litigation.	4-1
C. Purchase Agreement Provisions That Need Attention.	4-1

A. Use of Form Documents

1. Forms as a useful tool.
2. Understanding Provisions in Form Documents. Form over function - Understanding why certain contract language is necessary and deciding when it is not.
3. Black-lining and the importance of retaining drafts.

B. Specificity of Language as a Means to Avoid Litigation

1. Understanding the nature, terms and complexity of the transaction.
2. Understanding the client's intended use of the property or proceeds.
3. Specificity versus generality.

C. Purchase Agreement Provisions That Need Attention

1. Identity of the parties.
2. Property description.
3. Price.
4. Payment of price, adjustments, contingencies.
5. Documents of conveyance.
 - a. Warranty versus Quit Claim Deed.
 - b. Fiduciary Deeds and Limited Warranties.
6. Title Commitment and Objections.
7. Survey.
8. Conditions Precedent - Right to Terminate.
 - a. INSPECTION. Seller shall permit Purchaser and/or Purchaser's agents to enter upon the Property to conduct whatever inspections, tests and surveys Purchaser shall deem appropriate. Upon completion of such activities, Pur-

chaser and/or Purchaser's agents shall leave the Property in as close to the condition in which they found it as reasonably possible. The results of all inspections, tests and surveys must be satisfactory to Purchaser in Purchaser's sole discretion.

- b. SURVEY. Within _____ (____) days after the Agreement Date, Seller shall furnish Purchaser, at Seller's expense, an A.L.T.A. survey, prepared by a registered land surveyor or engineer selected by Purchaser and licensed in the State of Michigan, indicating all easements and improvements, and boundary lines thereon sufficient for the Title Company to issue a Title Policy without standard exceptions ("Survey"). The Survey shall contain a certification acceptable to Purchaser, and which permits the Title Company to remove the survey exceptions in the Title Policy, and shall be certified to Purchaser, Title Company, Purchaser's lender and any other parties Purchaser specifies. If Purchaser is not completely satisfied with the results of the survey, any problems shall be treated in the same manner as title objections per Section __ above.
- c. APPROVALS. Purchaser shall be able to obtain all governmental zoning variances, land divisions, inspections, licenses, permits, consents and approvals which Purchaser deems necessary or appropriate.
- d. MORTGAGE. Purchaser shall have the right to obtain a mortgage loan to finance the purchase of the Property, with such lender and upon such terms and conditions as are acceptable to Purchaser in its sole discretion.
- e. APPRAISAL. Purchaser shall have the right to obtain an independent appraisal of the Property, which appraisal must determine that the fair market value of the Property is not less than the Purchase Price.
- f. MORATORIUM. Purchaser shall have the right to confirm that the Property is not subject to any governmental moratorium or similar restriction or limitation (collectively "Moratorium") regarding the construction of improvements or the availability, accessibility or use of water, sewer or other utilities necessary for the timely construction, use and occupancy of improvements on the Property in Purchaser's normal course of development. In the event all or any portion of the Property becomes subject to a Moratorium before expiration of Purchaser's _____ (____) day due diligence period provided herein, then the _____ (____) day period will be tolled (stop running) commencing upon the date Purchaser receives written notice of the Moratorium. Such _____ (____) day period will begin running again on the date Purchaser receives written notice that the Moratorium has ended.
- g. ENVIRONMENTAL ASSESSMENT. Purchaser may retain an environmental consultant to perform a Phase I Environmental Site Assessment ("Phase I Report") which must be satisfactory to Purchaser, in its sole discretion. If the Phase I Report is not satisfactory, Purchaser may either terminate this Agreement and receive a full refund of the Deposit without further liability or cause a consultant to conduct a Phase II Environmental Site Assessment ("Phase II Report"). If Purchaser is not satisfied with the Phase II Report, Purchaser, at its sole discretion, may terminate this Agreement

and receive a full refund of the Deposit without further liability. Purchaser may also prepare a Baseline Environmental Assessment (“BEA”) satisfactory to Purchaser respecting the environmental condition of the Property, and the estimated cost, description and extent of all remediation activities necessary for compliance with all applicable federal, state and local laws, and satisfaction of Purchaser’s “due care” obligations; submit the BEA to the Michigan Department of Environmental Quality (“MDEQ”) for its approval; and receive from the MDEQ a written determination of exemption from liability in favor of Purchaser which is acceptable to Purchaser and which also ratifies Purchaser’s proposed plan to satisfy its statutory due care obligations. The costs and expenses incurred in obtaining the Phase I Report shall be paid by Purchaser, and Seller shall pay for the cost of any Phase II Report, BEA or remedial activities.

Notwithstanding the foregoing, the parties agree that, if Purchaser fails to receive the aforementioned BEA and written determination of non-liability from the State of Michigan within _____ (___) days after the Agreement Date, then the foregoing _____ (___) day period shall be extended by a period of time necessary for Purchaser to receive, and review and determine whether to approve the BEA and determination of non-liability.

9. **SELLER’S REPRESENTATIONS AND WARRANTIES.** Seller agrees, represents, warrants, covenants and agrees to the following, all of which, it is acknowledged, are material to Purchaser and are being relied upon by Purchaser:
- a. **FURNISHING INFORMATION.** Seller agrees to supply to Purchaser, within five (5) days of Purchaser’s receipt of an accepted copy of this Agreement, true, accurate and complete copies of any and all environmental studies, surveys, title policies, lot split or land division approvals, other governmental notices, permits, licenses, consents and approvals, and any additional information pertaining to the Property which may be relevant to any of Purchaser’s investigations respecting the Property.
 - b. **TITLE.** Seller has good, marketable and insurable fee simple title to the Property and, at closing title to the Property shall be free and clear of all mortgages, liens, encumbrances, claims, leases, tenancies, security interests, covenants, conditions, restrictions, easements, judgments, and other matters affecting title except matters of record which appear in the Title Commitment, all of which must be acceptable to Purchaser in its sole discretion. There are no unrecorded water, mineral, oil or gas rights, boundary disputes, easements, liens or assessments against or affecting the Property.
 - c. **AUTHORITY.** Seller has the power and authority to sell the Property to Purchaser and has taken all actions necessary or appropriate to sell the Property free and clear of all liens and encumbrances to Purchaser.
 - d. **ADVERSE FACTS.** There is no significant adverse fact or condition relating to the Property and Seller knows of no fact or condition of any kind or character whatsoever which might adversely affect Purchaser’s intended use of

- the Property or might cause Purchaser's intended use of the Property to be more costly.
- e. ZONING. The Property is properly zoned for Purchaser's intended use of the Property and there are no non-conforming uses. Seller shall reimburse Purchaser and hold Purchaser harmless for any costs and/or damages (including reasonable attorneys fees) incurred by Purchaser with respect to any changes or modifications required by any zoning law, building code or the like as a result of the change of ownership of the Property.
 - f. SPECIAL ASSESSMENTS. No portion of the Property is affected by any special assessments, whether or not constituting a lien thereon, and no public improvements have been approved or are being considered which might result in an assessment against the Property.
 - g. COMMITMENTS. No commitments have been made to any government authority, utility company, school board, church or other religious body, or any homeowners or homeowners' association, or to any other organization, group or individual, relating to the Property which would impose an obligation upon Purchaser or its successors or assigns to make any contribution or dedications of money or land or anything else, or to construct, install, or maintain any improvements of a public or private nature on or off the Property; and no governmental authority has imposed any requirement that any owner or developer of the Property pay directly or indirectly any special fees or contributions or incur any expenses or obligations in connection with any development and/or ownership of the Property or any part thereof. The provisions of this Section shall not apply to any regular or nondiscriminatory local real estate or school taxes assessed against the Property.
 - h. COMPLIANCE WITH LAWS. The Property is currently in compliance with all Laws ("Laws" means any applicable laws, statutes, ordinances, building codes, rules, regulations, restrictions, or the like) except as otherwise provided herein. Furthermore, there are no violations of any Laws, whether or not such violations occurred during the period Seller owned the Property, except as otherwise provided herein, and performance of this Agreement by Seller will not violate any Laws.
 - i. CONTRACTUAL OBLIGATIONS. Performance of this Agreement will not result in any breach of, or constitute any default under, or result in the imposition of, any lien or encumbrance upon the Property under any agreement or other instrument to which Seller is a party or by which Seller or the Property is bound. The execution and delivery of this Agreement, and the performance by Seller of all transactions contemplated by this Agreement will not conflict with any applicable public or private restrictions, and does not require any consent to, or approval of, any public or private authority. Further, there is no default or breach by Seller under any covenants, conditions, restrictions, rights-of-way or easements which burden or benefit the Property.
 - j. LAWSUITS. There are no other actions, suits, or other legal or administrative proceedings, including condemnation cases, pending or threatened,

Litigation Considerations

against the Property or Seller and Seller is not aware of any facts which might result in any such action, suit or other proceedings.

- k. FLOOD PLANE. The Property is not within any area determined by the Department of Housing and Urban Development or any other applicable governmental agency to be flood prone under the Federal Flood Protection Act of 1973, as amended, and is not subject to flooding.
- l. ACCESS AND UTILITIES. No fact or condition exists which could result in the termination or impairment of access to the Property from public or private streets adjoining the Property or which could result in discontinuation of presently available or otherwise necessary sewer, water, electric, gas, telephone or other utilities or services.
- m. ENVIRONMENTAL ASSESSMENT.
 - i. Seller represents and warrants that: (A) Seller has not, and no other person or entity has: (i) used the Property for any activities which, directly or indirectly, involve the use, generation, treatment, storage, transportation or disposal of any petroleum product or any toxic, hazardous or regulated chemical material, substance or other Hazardous Materials (as such term is defined below), other than in quantities and in a manner prescribed by law; (ii) released or discharged any Hazardous Materials into the Property, or into the environment from, at, on or under the Property; (iii) used the Property at any time as a landfill or a disposal site for garbage, waste or refuse of any kind; or (iv) installed or removed underground storage tanks on or from the Property; (B) Both Seller and the Property are in full compliance in all respects with all applicable environmental laws; (C) Seller has not received any communication (written or oral), whether from a governmental entity, citizens group, employee or otherwise, alleging that Seller or the Property is not in such compliance; (D) there is no past to present actions, activities, circumstances, conditions, events or incidents that may prevent or interfere with such compliance in the future; (E) there are no permits or other governmental authorizations currently held by Seller or otherwise relating to the Property which are required pursuant to applicable environmental laws; (F) there are no past or present actions, activities, circumstances, conditions, events or incidents, including, without limitation, the release or presence of any Hazardous Material (as hereinafter defined), which could form the basis of any environmental claim against Seller or the Property.
 - ii. As used herein, the term “Hazardous Materials” shall mean any substances, chemicals, waste, toxin, pollutant or contaminant, including but not limited to, radiation and electromagnetic forces and any material, listed or classified by the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, the National Institute of Safety and Health, the MDEQ or any other federal, state or local agency having jurisdiction over a work place, safety or environmental protection, or any of their successor agencies or authorities, as a haz-

ardous activity, hazardous substance, hazardous waste, toxic substance, toxic waste, pollutant or contaminant.

- n. CONDITION OF PROPERTY. Seller is not aware of any hidden, latent or structural defects regarding the condition of the Property. Seller shall maintain the Property in the same condition as it was on the date Purchaser executed this Offer to Purchase through the date of Closing. At Closing, Purchaser shall surrender possession of the Property in neat and clean condition.
 - o. VALIDITY OF STATEMENTS. All statements made by Seller herein are true and correct in all material respects, and the information provided and to be provided by Seller to Purchaser relating to this Agreement does not and will not contain any statement which, at the time and in the light of circumstances under which it is made, is false or misleading with respect to any material fact, or omits to state any material fact (which is known, or in the exercise of reasonable diligence by Seller, should have been known) necessary in order to make any statement contained herein not false or misleading in any material respect.
 - p. SURVIVAL OF REPRESENTATIONS AND WARRANTIES. The representations and any warranties set forth in this Agreement shall be continuing and shall be true and correct on and as of the Closing Date with the same force and effect as if made at that time, and all of such representations and warranties shall survive the Closing and shall not be affected by any investigation, verification, or approval by any party hereto or by anyone on behalf of any party hereto. If, prior to Closing, Purchaser shall discover any of Seller's representations or warranties to be incorrect, then Purchaser, at its sole option, shall have the right to terminate this Agreement and receive a full refund of the Deposit without further liability on its part.
10. SELLERS INDEMNITY. Seller agrees to indemnify Purchaser and hold it harmless from and against, and agrees to promptly defend Purchaser from, and reimburse Purchaser for, all losses, damages, costs, expenses, liabilities and obligations of any kind (including, without limitation, environmental investigation, remediation and response costs and reasonable attorneys' fees and other legal costs and expenses) which Purchaser may suffer or incur, or become subject to, as a result of or in connection with: (a) any breach or inaccuracy of any of the representations or warranties made by Seller in or pursuant to this Agreement; (b) any failure by Seller to carry out, perform, satisfy and discharge any of its covenants, agreements, undertakings, liabilities or obligations under this Agreement or under any of the documents and materials delivered by Seller pursuant to this Agreement; and (c) any claims, lawsuits, demands, suits, inquiries, hearings, investigations, notices of violation, litigation, proceedings, arbitrations and other disputes, whether civil, criminal, administrative or otherwise (collectively "Claims") of any nature whatsoever, actual or contingent, that involve any use, operation or condition of the Property which occurred or existed before the Closing - which Claims shall include, without limitation, Claims seeking recovery or other relief for any violations of federal, state or local Laws or regulations relating to, without limitation, the protection of the environment; (d) any claims aris-

ing out of any brokers', finders' or any similar fee incurred by Seller in connection with the transactions contemplated by this Agreement; and (e) any suit, action or other proceeding brought by any person arising out of, or in any way related to, any of the matters referred to in the foregoing subparagraphs (a), (b), (c) or (d).

11. Default Provisions and Remedies.

a. PURCHASER'S DEFAULT.

- i. In the event of default by Purchaser, after satisfaction or waiver of all conditions precedent to its obligation to consummate the purchase of the Property, Seller shall retain the Deposit as liquidated damages and terminate this Agreement as Seller's sole remedy.
- ii. In the event of default by Purchaser, Seller may declare a forfeiture hereunder and retain the Deposit, maintain an action against Purchaser for specific performance and/or maintain an action against Purchaser for any costs, expenses and damages suffered by Seller as a result of Purchaser's default.

b. SELLER'S DEFAULT.

- i. In the event of default by Seller, Purchaser may, at its option, elect to enforce specifically the terms hereof, maintain an action for all damages suffered, including actual out of pocket costs and expenses incurred and loss of bargain, and/or receive a full refund of the Deposit and terminate this Agreement.
- ii. In the event of default by the Seller, Purchaser shall be entitled to, at Purchaser's option, elect to enforce the terms hereof or demand, and be entitled to, an immediate refund of the Deposit in full termination of this Agreement, and these are Purchaser's sole remedies.

12. NO ASSUMPTION OF SELLER'S LIABILITY. The Purchaser shall not assume and does not agree to pay, perform or discharge, and Seller represents and warrants that Purchaser shall not be obligated to assume, pay, perform or discharge, any debts, lien, obligation, claim, expense, liability or any other commitment of any kind, nature or description of, or relating to the Property, the Seller or the Seller's business whether absolute or contingent, matured or unmatured, liquidated or unliquidated, known or unknown, disclosed or undisclosed. In furtherance of the foregoing and without limiting its generality, Purchaser specifically does not agree, and shall not be obligated, to pay, perform, assume or discharge: (i) any liability of Seller for any Federal, state or local tax liability whatsoever whether or not relating to ownership, use, occupation and operation of Seller, including without limitation, any investment tax recapture, depreciation recapture, employer taxes such as F.I.C.A. and F.U.T.A., any sales or use taxes, withholding taxes, single business taxes, personal and real property taxes (except for real property tax prorations set forth elsewhere in this Agreement), and any worker's compensation premiums or adjustments; (ii) any claim, obligation or liability under any contract, license, agreement or commitment; (iii) any costs or expenses, including, but not limited to, legal fees, court costs, accounting fees,

brokerage fees and consulting and financing costs incurred in negotiating this Agreement or in consummating the transactions contemplated hereby; (iv) any and all other obligations, whether now or hereafter existing in favor of the current and former employees utilized either directly or indirectly by Seller in its business, including without limitation, any contributions due pension, profit sharing or other employee benefit plans, group insurance premiums, payroll taxes, accrued vacation and sick pay, unemployment compensation or worker's disability, salary withholding obligations or other employee costs.

13. **NOTICES OF VIOLATIONS.** All notices of violations of any Law issued to Seller prior to the closing with respect to the Property or Seller's ability to perform any of Seller's obligations hereunder by any private party or federal, state or municipal departments or agencies having appropriate jurisdiction shall be disclosed to Purchaser in writing within five (5) days after the Agreement Date and shall be satisfied or complied with by Seller prior to the Closing.
14. **RISK OF LOSS.** All risk of loss, damage to, or destruction of the Property or any improvements thereon prior to the Closing shall be on Seller. In the event of any such casualty, or similar event, Purchaser, at its option, may proceed to Closing with an assignment of all insurance proceeds, etc. and an abatement of the Purchase Price equal to the amount of the loss or casualty, or terminate this Agreement and receive a full refund of the Deposit.
15. **SEVERABILITY.** The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof which shall remain and continue in full force and effect, and this Agreement shall be construed as if such invalid or unenforceable provision(s) were omitted.
16. **RECORDING.** Seller hereby grants Purchaser the right to record this Agreement or a Memorandum of this Agreement against the Property to give record notice of Purchaser's rights under this Agreement.
17. **NO THIRD PARTY RIGHTS.** No party other than Seller and Purchaser and their successors and assigns, shall have any right to enforce or rely upon this Agreement, which is made solely for the benefit of Seller and Purchaser, their heirs, personal representatives, successors or assigns, and not for the benefit of any other party.
18. **SURVIVAL.** The representations, warranties and covenants contained in this Agreement shall survive Closing and shall not merge upon the execution of or delivery of one or more deeds to all or any portion of the Property.
19. **AMENDMENTS.** This Agreement may not be modified or amended except in a writing signed by all of the parties hereto.
20. **Choice of Law.**
21. **Choices of Venue or Forum.**
22. **Arbitration vs Litigation.**
 - a. **Cost.**
 - b. **Discovery.**

Litigation Considerations

- c. Finality.
- d. Jury.

