

Real Estate Purchase Agreements – Unprecedented Times Require a Careful Approach

The COVID-19 outbreak is having an immediate impact on pending and contemplated real estate purchase and sales transactions. These unprecedented times require a careful approach to real estate purchase agreements. As with all commercial contracts, the starting place is to fully understand the applicable terms and conditions of the contract. Each contract and transaction needs to be vetted and analyzed separately. Buyers and sellers may be looking to obtain additional time for normal transaction deadlines, such as the delivery of title commitments, conducting due diligence and closing dates. On the other hand, one or both of the parties might look for opportunities to exit from a deal that no longer makes good business sense. Certainly a force majeure clause in the purchase agreement will come into play. In addition, purchase and sale agreements often include provisions that “time is of the essence.”

• **Title Insurance.** Title insurance is the lifeblood of any real estate sales transaction. Most purchase agreements require the seller or buyer to obtain a title commitment within a set period of time. The ability to do so will be impacted. Title companies are already sending out alerts about delays in the delivery of title commitments. Various title company offices are closed and numerous register of deeds offices are closing or limiting service. Bodman is keeping in close contact with title companies for the latest information.

Tips for Drafting: Avoid setting a fixed date or time period for delivery of the title commitment. Consider using a “soon as possible” standard. In the alternative, expressly allow for COVID-19 force majeure extensions for the delivery period.

Tips for Existing Agreements. If the commitment has not yet been delivered, immediately contact the title company for an estimated delivery date. If necessary, promptly notify the other party of a potential delay. Consider the ability to obtain force majeure extensions under the terms of the agreement. If necessary, make a formal request for the other party to provide an extension.

• **Due Diligence.** The ability to conduct typical due diligence will undoubtedly be affected, including obtaining Phase I environmental reports and conducting physical inspections. The current standards for phase I environmental site assessments require the consultant to review public records and to conduct on-site examinations. Both aspects of Phase I are being impacted. Access to governmental records are delayed and some consultants have indicated that they will only be conducting exterior examinations and might be prohibited from conducting any inspection depending upon the circumstances. The same goes for property condition assessments.

Tips for Drafting Allow for extensions of the due diligence time periods for delays outside of the control of the buyer. A seller may want to limit the extension rights specifically to COVID-19 delays and require reasonable evidence of the delay. To the extent multiple extensions are needed, the seller may want to include a termination right or a kick-out clause (i.e. the right to locate a back-up buyer and then require the initial buyer to complete the purchase

or let the seller terminate and enter into a new agreement with the back-up buyer).

Tips for Existing Agreements. Buyers will need to closely track the inspection expiration dates and consider the need to terminate agreements if due diligence cannot be completed. The typical ability for a buyer to terminate the agreement will provide the buyer with an opportunity to seek extensions, but such should be done well in advance of the inspection deadline. The seller's ability to quickly respond to a request may be hampered. Further, sellers will need to consider the pros and cons of allowing additional inspection time. Certainly there may be a benefit to keeping the current deal alive. On the other hand, continuing to keep the property off the market without certainty of a closing poses added risk for a seller. At some point, it may be reasonable for the buyer to "share in the pain" and pay a reasonable non-refundable extension fee to the seller as compensation for additional carry costs.

• **Closings.** Closing the purchase and sale may be impacted for numerous reasons. As noted above, title company offices are closing. The deed may not be able to be recorded in the register deeds office. Lenders providing financing to the buyer may not be in a position to fund the loan. Parties may not have a means to distribute and collect executed closing documents, especially documents which need to be signed in front of a notary.

Tips for Drafting Allow for extensions of the closing date for COVID-19 delays. Either party may want to require reasonable evidence of the delay before an automatic extension kicks-in. Keep in mind that closing is often not triggered until the inspection period has expired. If the parties have already allowed for multiple extensions of the inspection period, there may be less appetite for additional extensions. A well negotiated purchase agreement needs to factor in the overall timeline created by multiple sections of the agreement. To the extent extensions of the closing date are needed, the parties may want to include a termination right or a kick-out clause.

Tips for Existing Agreements. Closely monitor required closing dates and act quickly on sending notices if time periods are missed. The failure to timely act could be deemed a waiver of rights depending upon the circumstances and wording of the purchase agreement. Consider the ability to obtain force majeure extensions under the terms of the agreement.

Bodman is deeply committed to the communities in which we live and work. Bodman practitioners are actively advising clients on these and other urgent real estate and legal issues. This alert is not intended to be comprehensive, nor does it constitute legal advice.

If you have any questions, please contact Bodman attorney Andy Spilkin at **(248) 743-6029** or **aspilkin@bodmanlaw.com**