

Closing the Deal

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Commercial Real Estate Transactions

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INTRODUCTION

This presentation will review the closing documents typically required pursuant to and agreement of purchase and sale (the **PSA**), along with closing procedures including: (i) preparing, obtaining and reviewing tenant estoppel certificates; (ii) deciphering the statement of adjustments; (iii) trust conditions; and (iv) understanding title insurance.

CLOSING DOCUMENTS

Generally, the PSA will outline the closing documents required by each of the vendor and the purchaser. To stay organized and prevent missed documents, create a closing agenda well in advance of the closing date.

In a typical commercial real estate transaction you would expect to see the following closing documents.

1. Vendor's Closing Documents

(a) Transfer of Land

The form of transfer of land is mandated by the *Land Titles Act (Alberta)*. Fully examine the transfer of land to ensure the parties and the legal description of the lands being transferred are correctly described. The vendor must sign the transfer of land under corporate seal, otherwise an affidavit of corporate signing authority will be required.

An issue that may arise is whether or not the *Foreign Ownership of Land Regulations (Alberta)* (the **Regulations**) apply to the transfer. The Regulations restrict the foreign acquisition of interests in non-urban land in Alberta by the establishment of a scheme of controlled and uncontrolled land. As a result, a statutory declaration in one of the prescribed forms must accompany a transfer of land when submitted for registration. Generally, if the subject lands are not within a city, town or village, a statutory declaration will be required. Check the Regulations to determine whether or not the subject lands are controlled land and if so, whether your transaction may be excluded from the operation of the Regulations. If the Regulations do apply to your transaction, keep in mind that this can increase the amount of time it takes for registration of the transfer of land.

(b) Assignment of Leases

Unless the PSA specifies otherwise, as a rule all existing leases should be assumed by the purchaser. The assignment agreement should be drafted for execution by both the vendor and purchaser, wherein the vendor confirms the assignment of the leases and the purchaser confirms the assumption of the leases. Check to make sure the proper indemnities are being given.

The leases would have been reviewed during the due diligence stage. Always ensure that the leases are assignable and whether they require a specific assignment and/or assumption agreement.

(c) Notice and Direction to Tenants

The purchaser may require that a notice be given to tenants under each of the leases that are assumed by the purchaser advising tenants that the purchaser is now the landlord under the lease. The notice will also provide for a direction regarding the payment of rent and other payments under the lease.

Note that federal and provincial government leases have specific requirements pursuant to the applicable *Financial Administration Act*.

(d) Assignment of Contracts

Unless the PSA specifies otherwise, as a rule all existing contracts should be assumed by the purchaser. The assignment agreement should be drafted for execution by both the vendor and purchaser, wherein the vendor confirms the assignment of the contracts and the purchaser confirms the assumption of the contracts. Check to make sure the proper indemnities are being given.

The contracts would have been reviewed during the due diligence stage. Always ensure that the contract(s) is/are assignable and whether they require a specific assignment and/or assumption agreement. If the purchaser has decided not to assume one or more of the contracts, the vendor should provide the purchaser with evidence of termination of such contracts. You may want to consider a separate assignment agreement for any guarantees or warranties.

(e) Notice and Direction to Contracting Parties

The purchaser may require that a notice be given to contracting parties under each of the contracts that are assumed by the purchaser advising such contracting parties of the assumption of the contract by the purchaser. The notice will also provide for a direction regarding the payments under the contract.

(f) Certificate as to Representations and Warranties

This is a certificate by the vendor that all of the representations and warranties in the PSA are true and accurate as of the closing date.

(g) Residency (Section 116 of the Income Tax Act) Certificate

This is a short declaration by the vendor that it is a resident of Canada. This certificate is required to satisfy the purchaser that there is no obligation to withhold sale proceeds (25%) pending a clearance certificate