

Contract of Sale for Office,
Commercial and Multi-Family
Residential Premises – A Commentary

Use of Printed Forms

Printed forms are commonly used in real estate transactions. When properly handled, they can significantly speed up drafting and negotiation by providing a familiar framework and standardized language. We should not have to “reinvent the wheel” for every transaction. The Committee on Real Property Law has prepared the form Contract of Sale for Office, Commercial and Multi-Family Residential Premises in the hopes of providing a standardized framework for sales of commercial buildings and multi-family residential properties.

General Description

The 2007 form of Contract of Sale is an updated version of the form contract previously drafted by the Committee on Real Property Law and published by Blumberg & Co. as Form 154. The updated form attempts to provide comprehensive coverage of the bulk of the provisions common to most sales of commercial real estate, including office, commercial, and multi-family residential buildings. The form should help prevent omissions and allow concentration on the unique aspects of the transaction. However, it will have to be modified to fit the individual transaction. The parties may, of course, add a rider modifying the printed form.

It is customary in New York for the seller's attorney to prepare the contract of sale. The committee strove for a balance between the interests of the seller and the purchaser which would require the seller to be reasonably forthcoming but not go so far as to discourage use of the form by sellers' attorneys.

The basic elements of the transaction are covered in the form. The seller is required to make various representations concerning the status of tenancies and other matters, and the seller's obligations between contract signing and closing are spelled out. The representations are not exhaustive, but in a seller's market the seller may want to curtail its representations. In a buyer's market, the buyer may negotiate for an expanded list of representations. A detailed list of closing obligations is included, which should serve as a checklist for both attorneys.

The comprehensiveness of the coverage should be a help to purchasers' attorneys who lack extensive experience in these transactions. The organization of the material allows for easy modification and cross-referencing.

Special Features

To simplify use of the contract as a printed form, most of the substantive information is set out in the contract schedules. For example, the purchase price is detailed in Schedule C, and variable information is, for the most part, inserted in Schedule D (such as the name of the purchaser's title company, the date and place of the closing, the name of the broker, the maximum amount which the seller must spend to cure violations, and the seller's maximum expense to cure title defects).

Major Changes in Form

The 2007 form effected a number of changes in the contract including the following:

1. Addition of language clearly providing for the assignment of the seller's mortgage to the purchaser's bank. Section 2.04.
2. Modification of description of any purchase money mortgage to include non-recourse carveouts. Section 2.05(c).
3. Modification of escrow provision to (a) identify the location of the bank in which the escrow deposit will be held, and (b) exculpate the escrow agent from liability for loss of the contract deposit caused by the insolvency of the bank in which the escrow deposit is held. Section 2.06.
4. Expansion of the representations concerning leases to cover occupancies. Section 4.03.
5. Addition of language requiring compliance with the New York City Displaced Service Workers Act, and expansion of representations concerning union affiliation. Section 4.07.
6. Addition of purchaser's due diligence period. Section 17.
7. Modified provisions relating to survival of Seller's representations, including provision for a minimum threshold of liability and a cap on liability. Section 4.25.
8. Modified purchase money mortgage provisions.

9. Addition of definition of “institutional lender.” Section 18.10.
10. Modification of the casualty clause. Section 8.
11. Modification of some of the existing representations, and addition of new representations. Section 4.
12. Addition of Patriot Act certifications. Section 4.21 and 5.02.

A more detailed description of the specific contract provisions is set out below.

Section 1. Sale of Premises and Acceptable Title

Section 1 contains the basic sentence that “Seller shall sell and Purchaser shall purchase.” The premises are described in some detail, all in one place. The description of the premises has been expanded in the new form. Title is to be fee simple, subject only to listed permitted exceptions and matters insured against by the purchaser’s title insurance company.

Sections 2.01 and 2.02. Purchase Price and Acceptable Funds

Section 2.01 refers to Schedule C for the total purchase price. Schedule C breaks down the purchase price into its component parts, consisting of the downpayment, the closing checks (or wire transfer), the portion of the purchase price attributable to any Existing Mortgages and the portion of the purchase price paid through execution and delivery of a purchase money note and mortgage. Section 2.02 describes the criteria for acceptable checks. Certified or official bank checks are required, except that seller may, at its election, require the closing funds

to be paid by wire transfer. The form contract does not permit the balance of the purchase price to be paid with an attorney escrow check that is not a certified check or an official bank check. Seller's counsel should be aware that (a) many banks today refuse to issue certified checks, although they will issue official bank checks, and (b) certified checks are not entirely secure in that a bank that has issued a certified check will honor a stop payment order issued by the purchaser. Personal checks are permitted up to the amount of \$2,500, in order to facilitate payment of apportionments calculated at or just prior to the closing.

Section 2.03. Existing Mortgages

Section 2.03 provides that if the purchase price is to be paid in part by taking title subject to Existing Mortgages, and if required principal payments are made between the contract signing and the closing, the amounts allocated to the Existing Mortgage and the cash portion of the purchase price shall be appropriately adjusted at closing to reflect payments of principal. The wording is intended to ensure that the full purchase price is paid, notwithstanding any reduction in the principal amount of the Existing Mortgage during the contract period.

The term "Existing Mortgage" is intended to encompass only those mortgages specifically designated as Existing Mortgages on Schedule C.

The seller and the purchaser must furnish information and cooperate to obtain any required consent to purchaser's acquisition of the property subject to an existing mortgage, but neither is required to make any payment to obtain such

consent. The purchaser is not required to accept changes in the terms of the Existing Mortgages.

Section 2.04. Assignment of Seller's Mortgage

Even if the purchaser is not paying a portion of the purchase price by taking the property subject to an Existing Mortgage, the purchaser will usually want the seller to arrange to have its mortgage assigned to the purchaser's lender, in order to save mortgage tax to the extent of the principal amount of the seller's mortgage. Since the purchaser benefits from the assignment, the purchaser must pay all costs. The seller's attorney may want to consider negotiating a split of the mortgage tax savings, in which event the form must be modified.

Section 2.05 Purchase Money Mortgage

Section 2.05(a) refers the parties to Schedule K for the form of purchase money mortgage and note. The contract form thus requires the parties to fully negotiate the forms of the purchase money loan documents prior to execution of the contract.

Section 2.05(b) provides that the purchase money mortgage shall be subordinate to the Existing Mortgage (as it may be extended, modified, consolidated or replaced), provided that (i) the interest rate of the Existing Mortgage is not increased over an agreed amount and (ii) if the principal amount of the Existing Mortgage is increased, the increase will be used to reduce the principal due on the purchase money mortgage. If the purchaser is not taking title subject to an Existing Mortgage, but is both borrowing money from a lender and giving the seller

a purchase money mortgage (an unlikely event), Section 2.05(b) will have to be modified to provide for the subordination of the Purchase Money Mortgage to the purchaser's new mortgage.

Section 2.05(c) sets out certain provisions to be included in the Purchase Money Mortgage. Since the form of the Purchase Money Mortgage is to be attached to the contract (Section 2.05(a)), Section 2.05(c) is not an essential provision. It was included in the form contract largely to serve as a partial checklist of issues that should be dealt with in the Purchase Money Mortgage. The drafter should be sure that the provisions included in Section 2.05(c) conform to the provisions of the form mortgage attached to the contract, or should delete Section 2.05(c) entirely. The provisions highlighted in Section 2.05(c) include the following:

- a. The mortgagor has the right to prepay without penalty at any time after the end of the fiscal year of the mortgagee in which the closing occurs (or a specified prepayment date), thus preserving to the seller the benefits of an installment sale over at least two years. If prepayment is to be prohibited for a longer period or is not to be prohibited at all, the appropriate insert should be made in Schedule D.
- b. The mortgagor is not personally liable on the purchase money note, and recourse for nonpayment is limited to the mortgaged property; except for certain customarily accepted carveouts. If the purchase money mortgage is intended to be recourse, subsection (c)(ii) should be deleted.

- c. Subsection (c)(iii) is intended to effect compliance with Real Property Law § 274-a, which requires non-institutional lenders to provide estoppel certificates upon the borrower's request.

Additional provisions should be set forth in a rider or in the attached mortgage form. Possible additions might include: (i) a provision that a default or commencement of a foreclosure proceeding under a prior mortgage would be a default under the purchase money mortgage; (ii) a right of the mortgagee to cure defaults under prior mortgages and add the cost to the amount secured by the purchase money mortgage (subject to review of mortgage tax consequences with the title company); (iii) a prohibition of additional mortgages without consent of the purchase money mortgagee; (iv) a requirement of monthly escrow deposits for real property taxes and insurance premiums to the extent such payments are not required by any first mortgage; (v) imposition of an agreed charge for late payments, and (vi) a due on sale/transfer clause.

Section 2.06. Escrow of Downpayment

The escrow agent (called the "Escrowee" in the contract) is usually the seller's attorney. The duties of the escrow agent are set forth in some detail. The downpayment is required to be deposited in an interest-bearing account, and the interest follows the downpayment. If title closes, the interest is paid to the seller and is not credited against the purchase price. If the closing does not occur, the escrowee is authorized to disburse the escrowed funds upon demand of one party if the other party does not object within ten (10) business days after notice. The

liability of the escrowee is limited to bad faith, willful disregard of the contract or gross negligence, and a provision has been added expressly exculpating the escrow agent from liability for lost interest if the Downpayment is withdrawn prior to the date interest is posted or for loss caused by the bankruptcy of the depository bank. The escrowee is indemnified by the parties. The escrowee acknowledges its agreement to Section 2.06 by signing the contract on the signature page.

Section 3. The Closing

The scheduled date, time and place of the closing are to be inserted in Schedule D.

Section 4. Representations and Warranties of Seller

Section 4 contains the representations and warranties of the seller. Section 4.01 confirms the purchaser's normal expectation that the seller is the sole owner of the premises and therefore the proper party with whom to contract. If this is not the case, the seller must say so. Section 4.01 has been expanded to include representations that the *seller* has not granted any purchase option, right of first refusal or right of first offer. The purchaser might seek to negotiate a broader representation that the seller has no knowledge of any such right, but the committee felt that the seller's representation on this front should be limited to the seller's acts.

Section 4.02 states that no notice of default has been received concerning the Existing Mortgages and that the seller has delivered a true copy of the Existing Mortgages to the purchaser. It does not contain a representation that

the Existing Mortgages will not be due on sale, since the documents should speak for themselves.

If the purchaser is buying a tenanted property in reliance on the cash flow to be generated by the existing tenants or on projected cash flow to be generated by new tenants upon the reletting of space subject to expiring leases, Section 4.03 is the heart of the contract. Section 4.03 includes disclosure as to leases, licenses, and written occupancy agreements affecting the premises, which are collectively defined as the “Leases.” The seller represents that the rent schedule information (see discussion under “Schedules”) is accurate and there are no Leases other than those listed on the rent schedule. The seller additionally represents that, except as shown in the rent schedule: the leases are in effect and have not been amended; there are no renewal rights, extension options, or expansion options; no tenant has an option to buy; the rents are current and there are no arrearages in excess of one month; no tenant is entitled to a rent concession or abatement for any period following the closing; the seller has sent no notices of default (which default remains uncured); no action against the seller by any tenant is presently pending (except with respect to claims covered by insurance); and there are no security deposits other than those set forth in the rent schedule. The 2007 form adds the following new representations: that (a) true copies of the leases have been delivered to purchaser (if seller has concern about the completeness of seller’s files or has lost signed copies, seller may want to modify this representation to a “substantial” compliance standard); (b) the tenants are in actual possession (this representation

is not normally requested or given for multi-family residential premises); to seller's actual knowledge, seller has performed its obligations under the leases and there is no notice of default outstanding; to seller's actual knowledge there is no bankruptcy proceeding pending against any tenant; and no leasing commissions are due or owing with respect to any of the leases. As to the last representation, because commissions may be paid in installments that may extend to the post-closing period and because commissions may become due with respect to future lease renewals, buyer may want to expand this representation to cover commissions that will become payable in the future. On the other hand, since the purchaser generally has no liability under the common law of New York State for future commissions (as of 2007), the seller may object to including such a representation. Both parties, however, should consider the possibility that commissions will become payable after the closing date.

If there are a great many tenants or if there is a seller's market, the seller may be unwilling to make such precise representations, particularly with respect to commercial leases. For example, the seller may refuse to make any representations at all concerning the leases, requiring the buyer to rely on its own review of the lease files and on estoppel certificates obtained from tenants; or it may insist on qualifying its representations.

For commercial buildings, purchasers should consider negotiating for representations by seller that it has performed all "landlord's work" required to be performed under the Leases and has paid all construction allowances owed tenants.

If the seller will not make such representations, such issues can be covered through the estoppel certificates. Possible purchaser additions to the list of seller lease representations are numerous, especially in a purchaser's market.

Because the parties initial the leases, the seller is relieved of the consequences of a misrepresentation if the initialed lease provides information contrary to the seller's contract representation.

Sections 4.04 and 4.05 concern rent stabilization and rent control and are applicable only to New York City properties.

Sections 4.06, 4.07 and 4.08 provide for attachment of schedules listing insurance policies, employees and service contracts, if any. Section 4.07 has been updated to cover 3 basic situations: (a) buildings whose employees are unionized, (b) buildings whose employees are not unionized and that are in New York City (and therefore potentially covered by the Displaced Building Service Workers Act, N.Y.C. Admin. Code Sec. 22-505 *et seq*) ("DBSWA"), and (c) buildings whose employees are not unionized and that are not covered by the DBSWA. DBSWA covers non-union buildings in New York City, other than (a) *residential* New York City buildings of less than 50 units, (b) commercial New York City office, institutional, or retail buildings of less than 100,000 square feet, and (c) New York City buildings in which the City of New York and/or any governmental entity (the head or majority of members of which are appointed by one or more officers of the City of New York) occupies 50% or more of the rentable square footage). If the DBSWA applies, the purchaser is required to continue to employ the building's

employees for a period of ninety (90) days. With respect to unionized buildings, sellers and purchasers should note that although the seller may have made all contributions required through the date of closing, retroactive assessments may be assessed under the Taft-Hartley Act against the seller if it is subsequently determined that a union's pension plan is underfunded. The seller can avoid such liability by having such potential obligations bonded.

With respect to Section 4.08, the parties should be aware that because service contracts are often informally drawn or provide for "automatic" renewal, it is sometimes difficult to determine whether they are transferable or terminable. In New York, General Obligations Law § 5-903 makes most automatic renewal clauses unenforceable if the contractor fails to give appropriate advance notice of the renewal provision. The contract assumes that the service contracts will be assigned to the purchaser at the closing (see Section 10.01(f)).

Section 4.09 provides that the copy of the certificate of occupancy attached to the contract in Schedule J is a true copy and has not been amended or superceded. However, the seller makes no representation as to compliance therewith. This is an example of a situation where an issue is raised in the form contract, but protection for the purchaser has not been provided. The purchaser's attorney should carefully explain to his or her client the risks of failure to have valid certificates of occupancy for all of the premises as constructed and used as of the closing date and the risks of failure to comply with any existing certificate. Those consequences include the possible need to amend the certificate of occupancy,

which may impose on the building owner the burden of upgrading the building to comply with current code requirements and the risk that a tenant with a non-conforming use may have the right to withhold rent or abandon the space.

Requirements of lenders for such certificates should be anticipated. In a municipality, such as New York City, where certificates of occupancy are easily accessible on-line, the seller's attorney may elect to eliminate this representation from the contract. Outside New York City the provision for optional initialing of certificates of operation should be deleted if inapplicable.

The assessed valuation and real estate taxes are referred to in Section 4.10 and are to be inserted in Schedule D. Section 4.11 assumes that each residential apartment contains a range and refrigerator owned by the seller. Other personal property may be listed on a schedule, which is optional. All personal property is represented to be free of liens other than Existing Mortgages (Section 4.12).

Section 4.13 is a representation that the building's incinerators and boilers are being operated in accordance with law. The purchaser wants such a representation because if the applicable permits have not been obtained by the seller, sooner or later the purchaser will have to obtain such permits and possibly have to replace or alter such equipment to obtain the permits. The purchaser may want to expand the representation to include building air conditioning equipment, which in New York City often requires an equipment use permit. Note again, however, that the seller in a seller's market may be unwilling to give the buyer such

representations and require the buyer to rely on its own due diligence. This would be an especially appropriate position to take if the purchaser has been given a due diligence period.

The seller represents in Section 4.14 that there are no assessments payable in annual installments that are liens. If there are assessments which will survive the closing, Section 12 of the contract provides for apportionment of such assessments. Section 4.14 is another example of a representation that a seller, particularly in New York City, may want to delete, since the purchaser can obtain the information on-line from the City.

Section 4.15 provides that seller is not a foreign person. If the seller is a non-resident alien, Section 2.07 of the contract will control.

In Section 4.19, the seller represents that the premises constitute one tax lot. If all or part of the property is erroneously included in another taxpayer's tax lot, the purchaser will be unable to obtain financing and the property will be subject to foreclosure if the other taxpayer defaults in paying taxes. Accordingly, the purchaser would generally require the seller to correct the tax lot description as a condition to closing.

Section 4.21 contains the seller's Patriot Act representation and Section 5.01(f) contains the purchaser's Patriot Act representation. The parties should not rely solely on the representations contained in the contract to assure Patriot Act compliance, but should each, as a matter of course, check the Treasury

Department's list of Specifically Designated National and Blocked Persons to determine if the other party is a prohibited person.

A representation has been added that, to seller's knowledge, there are no underground fuel tanks at the property. The purchaser should not rely entirely on the seller's representation, which is only intended to flush out information within the seller's actual knowledge, but should independently evaluate the need for an environmental review of the property. It is not uncommon for a seller to refuse to make any environmental representations or, at a minimum, to limit such representations to the seller's actual knowledge. The seller will, of course, always have liability to government agencies having jurisdiction if the property was contaminated or if contaminants were released from the property during the period that the seller owned the property. But the seller will generally resist giving the purchaser surviving environmental representations that create an independent obligation to the purchaser, because the purchaser's instinct will be to find other parties to share the cost of any environmental remediation.

Section 4.25 provides for the survival of some of the seller's representations for a limited period of time, and survival is generally limited to those items that the purchaser cannot independently verify before the closing date. To the extent that the purchaser becomes aware, at the closing date, that seller's representations are incorrect, the purchaser is precluded from making a claim for such misrepresentations. The survival of the seller's representations is often one of the most hotly negotiated contract issues. In a seller's market, the seller may be

unwilling to permit survival of any of the representations or may only agree to a shortened survival period of six (6) months or less. Where the seller does agree to survival of representations, there is typically a floor and a cap. The floor is to prevent litigation over minor matters. The cap is to limit the seller's exposure. The floor and the cap are highly negotiable.

The penultimate paragraph of Section 4.25 limits the phrase "to seller's knowledge" to the actual knowledge of an identified person. If the seller is a "mom and pop" entity, the limitation may not be appropriate. But if the seller is a larger enterprise with many employees, it is prudent for the seller to identify a single person whose knowledge is attributable to seller. The buyer should ask the questions necessary to assure it that the identified person has the requisite knowledge.

Section 5. Acknowledgments of Purchaser

In Section 5.01 the purchaser acknowledges that it has inspected the premises or has had opportunity to inspect the premises, and will accept them "as is," subject to Section 7 (violations), Section 8.01 (destruction, damage or condemnation), and Section 9.04 (replacement of personal property), and subject to reasonable use, wear, tear and natural deterioration between the contract signing and the closing. In Section 5.02 the purchaser acknowledges that it is not relying on any representations not expressly set forth in the contract. If the purchaser is relying on the seller for any information that is not included in the form contract

representations, the purchaser should consider expanding the list of seller representations.

Section 6. Seller's Obligations as to Leases

Section 6 sets out the seller's obligations as to leases between the contract signing and the closing. This is one of the most important sections of the contract, because it deals with an essential part of the business transaction. The form assumes that the purchaser is relying on the current rent roll and, accordingly, provides in Section 6.01 that the seller may not, without the purchaser's prior written consent, amend, renew or extend any existing lease, grant a lease to an occupant who does not have a lease, consent to an assignment or subletting, or terminate a lease or tenancy (except for the tenant's default). The purchaser is required to be reasonable in granting or withholding its consent, a provision that a purchaser may want to delete or modify in appropriate circumstances.

Section 6.02 deals with new leases. Before entering into a new lease, the seller is required to notify the purchaser of the identity of the proposed tenant, together with (a) either a copy of the proposed lease or a summary of its terms and (b) a description of any brokerage commission payable. This information should contain all the business terms of the proposed deal. If the purchaser objects, the seller may not enter into the lease, but the purchaser must pay the seller at the closing the benefit of his or her bargain: the proposed rent less the seller's reletting expenses, prorated over the term of the lease and apportioned as of the closing date. The time for the purchaser to act is limited to seven (7) business days after receipt

of purchaser's notice. If the purchaser does not object, the seller may enter into the proposed lease and the prorated reletting expenses are to be apportioned at the closing. Where the contract period is short or the purchaser wants a vacant building, the purchaser may insist on the right to disapprove new leases without paying the seller for its lost income.

Under Section 6.03 the purchaser agrees to accept vacancies not wrongfully caused by the seller. The seller is prohibited from granting rent concessions for periods following the closing. Purchasers sometimes seek to include a provision in this section that would prohibit the seller from applying the security deposit against unpaid obligations of a tenant unless the tenant has vacated the premises, thus protecting the purchaser from inheriting a situation in which a delinquent tenant is in possession with no security or a depleted security deposit.

Section 7. Building Code Violations

Section 7.01 requires the seller to remove violations of law, including violations of building codes and fire codes, which were issued prior to the contract date and municipal liens which attached prior to the closing. The purchaser may want to expand this to violations issued prior to the closing, but New York sellers customarily refuse to accept this change for fear that the purchaser's inquiries may lead to new violations being placed on the premises between the contract signing and the closing. Outside New York City the appropriate code references should be substituted. If the seller fails to comply, it must pay the purchaser at the closing the reasonably estimated unpaid cost of removal or compliance, but the purchaser is

required to accept title subject to such violations and liens unless its institutional lender reasonably objects or, in the case of a multiple dwelling, if the violation would cause rent to be unrecoverable or to be grounds for allowing tenants to withhold rent. Outside New York City the latter clauses should be deleted or the appropriate statutory references should be substituted. Both parties should note that there is no mechanism provided to resolve a dispute as to the “reasonably estimated” cost.

Section 7.02 allows the seller to cancel the contract if the reasonably estimated cost of compliance with Section 7.01 would exceed the amount specified in Schedule D.

Section 7.03 expressly permits the seller not to comply with violations for which a tenant is responsible. However, the purchaser is not required to accept tenant violations if its institutional lender objects.

Outside New York City this entire section should be carefully examined in the light of local custom.

Section 8. Destruction, Damage, Condemnation

The New York version of the Uniform Vendor and Purchaser Risk Act provides that the risk of loss between the date of the contract and the closing will be on the seller unless purchaser has taken possession of the property. The Committee believes that incorporating the statute by reference is not adequate for either party. Accordingly, Section 8 contains the following formula: if the damage does not (a) exceed an amount negotiated by the parties, as determined by an engineer selected

by seller and reasonably satisfactory to purchaser, (b) adversely affect the lobby, building-wide systems or common areas and the continued operation of the undamaged portion of the building, and (c) give rise to rent abatement or termination rights of tenants under leases covering more than a specified portion (to be negotiated by the parties) of the rentable square feet, purchaser may not terminate the contract because of the damages, but seller will assign to purchaser seller's interest in the insurance proceeds (less any amounts spent by seller to comply with law, to safeguard the premises or for emergency repairs). Before agreeing to this provision, the purchaser needs to determine the size of the insurance policy's deductible.

If the damage (i) exceeds the amount negotiated by the parties or (ii) affects the lobby, building-wide systems or common areas or the continued operation of the building, or (iii) gives rise to rent abatement or termination rights of tenants under leases covering more than the portion of rentable square feet negotiated by the parties, purchaser may elect to terminate the contract.

Section 8 also covers condemnation by providing that purchaser may terminate the contract or elect to close title and receive an assignment of seller's right to the condemnation award, if a condemnation proceeding is instituted that affects all or any part of the property. The Committee does not propose a formula for determining when a taking is substantial or insubstantial because in New York City, partial takings are rare although not unheard of (especially with respect to subway construction). Outside New York City and perhaps even in boroughs other

than Manhattan, the parties may want to define what constitutes a substantial taking, bearing in mind that a taking of all or any part of a building is usually (unless the purchaser intends to demolish) deemed substantial, and that a taking of a portion of the land may be substantial or insubstantial depending on whether parking is critical to the use of the premises, how much land is taken (and possibly its location), and the purchaser's plans for future development of the property.

Section 9. Seller's Covenants

Section 9 contains the usual affirmative and negative covenants of the seller covering the period between the contract signing and the closing (in addition to those relating to leases set out in Section 6). Section 9.01 provides that if purchaser is acquiring subject to an Existing Mortgage, the seller may not amend or prepay the mortgage and must make the required payments. Section 9.02 prohibits the seller from modifying existing service contracts or entering into new ones, unless they are terminable without penalty on no more than thirty (30) days' notice. In appropriate cases the purchaser may want to delete the last clause to make the prohibition absolute or may even allow the seller more freedom. Section 9.03 requires the seller to maintain the insurance referred to in Schedule G until the closing. This is particularly critical if the purchaser is investing significant sums in its due diligence and pre-closing activities, because the purchaser will want assurance that if there is a casualty, there will be available sufficient insurance proceeds for restoration (this assumes, of course, that the purchaser has reviewed and approved the property's insurance program).

Section 9.04 prohibits removal of personal property unless replaced by similar items of at least equal quality. If there are unique items involved, the purchaser may want to modify the clause. Section 9.05 prohibits settlement of real estate tax protests for periods which may affect the purchaser without the reasonable consent of the purchaser. Section 9.06 requires the seller to give the purchaser reasonable access to the premises, the leases and other documents before the closing. Section 9.07 obligates the seller to operate the premises in substantially the same manner as on the date of the contract. The purchaser should consider whether other covenants would be appropriate.

Section 10. Seller's Closing Obligations

Section 10 lists the usual documents to be delivered by the seller at the closing, including deed, leases, a check or credit for the security deposits or an assignment of security deposits, etc. Outside New York City: the description of the deed in Section 10.01(a) must be modified to provide for the customary form.

In addition, seller is obligated to deliver estoppel letters from the building's tenants in the form of Schedule F. The seller's attorney will prepare the form of estoppel certificate attached to the contract. Estoppel certificates are generally only required with respect to commercial tenants, and not with respect to tenants of multi-family residences. Whether estoppel letters will be required from 100% of the commercial tenants is negotiable, but the purchaser should ensure that estoppels are obtained from the key commercial tenants (whose names will be listed in subparagraph (r)).

Section 10.01(k) should be modified to conform to local custom as to payment of transfer taxes and, if the city or county imposes a transfer tax on the purchaser as the primary obligor, to provide for purchaser payment of any transfer taxes imposed by statute on the purchaser as the primary obligor.

One of the closing documents to be delivered by seller is an assignment of all Leases, which must include an indemnification by seller of claims by tenants with respect to any failure by seller to perform its obligations under the Leases prior to the Closing Date. Not all sellers will be willing to give such an indemnity.

Section 10 essentially provides a list of the documents to be provided by the seller at the closing. The list will vary with the circumstances, and the purchaser may want to add to the list. Common additions might include a requirement that seller deliver a bill of sale for personal property, and mortgagee approvals of any new leases if purchaser is acquiring the property subject to Existing Mortgages.

Section 10.02 requires Seller to notify unions with contracts affecting the premises of the sale and the name and address of the purchaser. Seller's failure to do so will result in continuation of liability under the union contracts after the Closing Date through the date the union receives notice.

Section 11. Purchaser's Closing Obligations

Section 11 requires the purchaser to, among other things, deliver at the Closing the required checks in payment of the purchase price; the purchase money note and mortgage, if any; an indemnification agreement as to the transferred security deposits; an indemnification agreement with respect to obligations under union contracts; an agreement assuming the seller's obligations under the tenant leases and related subordination, non-disturbance, and attornment agreements, an agreement assuming seller's obligations for brokerage commissions with respect to leases made prior to closing if such brokerage obligations are disclosed in Schedule E; and a certificate confirming the continued accuracy of seller's representations (subject to the survival limitations set out in Section 5 of the contract). The purchaser is also required to sign transfer tax returns.

If the seller is assigning Service Contracts to the purchaser, the seller should add to the list of purchaser documents an assumption of the seller's obligations under the Service Contracts.

Section 12. Apportionments

Section 12.01 provides for apportionment as of the close of business of the day prior to the closing (in other words, the purchaser is treated as owner of the property on the day of closing) of prepaid rents and additional rents, other revenues, interest on Existing Mortgages if purchaser is acquiring the premises subject to such mortgage(s), real estate taxes, water charges, sewer rents, wages and benefits of continuing employees, fuel (at the current price), charges under transferred

service contracts, administrative charges on tenant security deposits, dues to rent stabilization associations if the property is residential and subject to rent regulation, reletting expenses, and senior citizen exemptions. The reference in subsection (g) to administrative charges on security deposits should be deleted if inapplicable. Outside New York City: (i) the description of taxes and other charges in subsection 12.01(c) should be modified as appropriate; and (ii) the reference in subsection (h) to dues to rent stabilization associations should be deleted.

The seller should consider whether leasing commissions, construction allowances, or other prepaid expenses should be added to the list of apportioned expenses.

Section 12 provides for temporary apportionment of taxes if the tax rate has not been fixed before the closing, with recomputation after it has been fixed. Installments of special assessments allocable to the period after the closing are the purchaser's expense. If an assessment is listed on Schedule D, Section 12.01(k) calls for apportionment.

The obligation to correct errors in computation survives the closing.

Section 12.02 requires rent arrears received after the closing to be applied in the following order of priority: (i) to the month preceding the closing month; (ii) to the closing month; (iii) to the months following the closing month; and (iv) to the other months preceding the closing month. This provision is subject to negotiation. Purchasers sometimes omit the fourth category on the grounds that the seller had its opportunity to collect and should not benefit from the purchaser's

success in collection after the closing and that the purchaser's obligation should be discharged after collection of one month's arrears. Reasonable expenses of collection are deductible. Obviously, this obligation survives the closing.

Section 12.03, which is not applicable to residential property, covers percentage rent, escalation charges and other charges, some of which will usually become due after the closing for periods prior to the closing. Again, reasonable expenses of collection are deductible and the obligation survives the closing.

Section 13: Objections to Title and Seller's Obligations

Section 13.01 requires the purchaser to promptly order an examination of title and furnish a copy of the title report to the seller's attorney upon receipt. It does not require the purchaser to specify its objections or otherwise waive them. Some sellers will require a waiver if the purchaser fails to raise objections within a specified period. The Committee elected not to follow that route because it was felt to unfairly penalize purchasers whose attorneys fail to give notice of objections. However, if there is a long contract period, the seller may insist on such a provision. The seller is entitled to reasonable adjournments of up to sixty (60) days to cure defects, except that the time period is shortened if purchaser's loan commitment expires earlier.

Section 13.02 provides that if the seller is unable to convey title in accordance with the contract, the purchaser may accept title nevertheless, without credit against the monies payable at the closing. If the purchaser does not elect to

close, it may terminate the contract, in which event the sole liability of the seller is to refund the downpayment, without interest, and pay purchaser's costs of title examination and survey. The seller is not permitted to refuse to pay off mortgages or other liens, of which seller has actual knowledge, which can be satisfied or discharged by payment of a sum certain (other than Existing Mortgages, which are permitted exceptions).

Section 13.03 allows the seller to use the purchase price to pay taxes, liens and encumbrances if the seller provides official bills showing the amount due, and requires the purchaser to provide separate checks for such payment upon reasonable request made in advance. If the charges, liens or encumbrances impair title, the seller may deposit funds or other assurances with the purchaser's title insurance company to pay such charges, liens and encumbrances. The purchaser must accept such insurance, in lieu of discharge of such charges, liens and encumbrances at closing, unless its institutional lender reasonably objects.

Section 13.04 provides that the seller's sole remedy for the purchaser's default is to retain the downpayment as liquidated damages. Section 13.05 gives purchaser the right to specific performance or damages if seller *willfully* defaults. In a seller's market, the seller is likely to limit the purchaser's remedy on a seller default to recovery of its downpayment. Sellers take this position in order to prevent a defaulting buyer from initiating frivolous litigation to tie up the property by claiming a seller default. Such a position, of course, effectively prevents a legitimate buyer from obtaining a remedy for a seller default. The form attempts to

bridge the gap by allowing the purchaser to obtain either specific performance or damages if the seller *willfully* defaults. Section 13.05 should be read in conjunction with Section 13.07, which provides that if the purchaser has grounds for refusing to close (for example, by reason of seller's default), the seller's sole liability is to refund the downpayment and to reimburse the purchaser for the cost of updating the existing survey (or the cost of a new survey) and departmental searches. The seller's liability is similarly limited if either seller or purchaser terminate the contract for reasons permitted by the contract pursuant to a provision that specifically refers to Section 13.07.

Section 13.06 grants the purchaser a vendee's lien against the premises for the amount of the downpayment.

Section 14. Broker

Section 14 contains mutual representations and indemnities by the seller and the purchaser that either (i) the broker identified in the contract brought about the sale or (ii) no broker is entitled to commission. The party responsible to pay the commission is designated. These obligations survive the closing.

Seller's counsel should note that sellers are sometimes reluctant to give such a representation because of the number of cold calls received by the seller that can't be tracked. In such a situation the seller is truly relying on the purchaser to identify the brokers with whom the purchaser has dealt, and the seller will limit its obligation to an indemnification of the purchaser for claims made by brokers with whom the seller, but not the buyer, has dealt.

Section 15. Notices

Section 15 provides for notices to be delivered personally or sent by prepaid certified mail, nationally recognized overnight courier, or facsimile transmission, addressed as set forth in Schedule D.

Section 15.01 also authorizes the attorneys to give notices on behalf of their clients. Although the Committee elected to permit notices to be given by facsimile transmission, some attorneys eliminate fax transmissions as a mode of notice because of concerns that faxes will become lost in inter-office mail.

Section 16. Limitation on Survival of Representations, etc.

Section 16 provides that no representations, warranties, covenants or other obligations of the seller shall survive the closing, except as otherwise provided (see Sections 4 and 5).

Section 17: Due Diligence Period

The Committee elected to include a due diligence clause in the model contract, although in some markets at some times, inclusion of a due diligence period is not customary. The number of days in which the purchaser must complete its due diligence investigation must be inserted in Section 17.01. Section 17.02 provides that the purchaser must give notice of termination on or before the last day of the due diligence period. The scope of the due diligence will depend on the nature and location of the property. For example, multi-tenant residential property in New York City requires significant due diligence to determine if the tenants are paying legal rents. Local Law 11 compliance (façade inspection) is also a significant

issue in New York City. Suburban and rural properties tend to generate greater concerns about environmental contamination than New York City properties.

In giving notice of termination, purchaser's attorney must take into account the notice periods set out in Section 15. The length of the due diligence period will depend on the size and use of the property, the nature of the property, and the availability of environmental investigators and engineers. Purchasers should note that all institutional lenders require environmental and engineering reports from their approved list of consultants.

In the model form, the purchaser's right to terminate is limited to those instances in which the environmental and/or engineering inspections are unsatisfactory to the purchaser. It is not unusual to see a due diligence clause give the purchaser a right to terminate if the purchaser is dissatisfied with any matter relating to the property, but the Committee elected to limit the purchaser's due diligence right to engineering and environmental matters. The seller is required to cooperate with Purchaser's due diligence inspection, but the purchaser does not have the right to conduct a Phase II environmental investigation without the consent of seller. Phase II investigations generally involve invasive testing and are rarely obtained absent specific environmental concerns. The purchaser is required to deliver copies of all reports to the seller. Sellers should be aware that if an environmental investigation discloses any contamination, all parties with knowledge (including the consultant who performed the environmental testing) are required to report the contamination to the appropriate authorities.

Under Section 17.04 the Purchaser indemnifies the seller from all loss caused by the due diligence inspection. The indemnity only covers damage caused by the inspection itself, and not environmental liabilities arising from the disclosure of the existence of environmental contamination.

Section 17 makes time of the essence with respect to purchaser's actions. Accordingly, the purchaser must terminate within the prescribed time period.

Section 18. Miscellaneous

Section 18 contains the usual miscellaneous provisions. Assignment by the purchaser is prohibited. If either seller or purchaser is involved in a Section 1031 like-kind exchange, Section 18.01(b) will become applicable. If the purchaser intends to form a new entity to take title, the purchaser should request a modification to Section 18.01(a) to permit assignment of the contract to an entity controlled by purchaser.

Schedules

The description of the premises (Schedule A) is to be attached separately, preferably by photocopying the title insurance policy description and adding the tax map designation (to eliminate typographical errors and proofreading). The title insurance description rather than the deed description should be used because the title company has insured only the title policy description.

Schedule B lists the usual permitted exceptions. Paragraph 1 assumes a continuation of the present use by the purchaser. Paragraph 6 requires acceptance of out-of-date or irrelevant liens on personalty. The existing survey should be described at the end of Paragraph 10. Additional permitted exceptions from the seller's title insurance policy should be added, beginning with a new Paragraph 11.

Schedule C sets out the purchase price.

Schedule D is to be filled in as applicable. Any additional schedules or riders should be referred to in the body of the contract.

Schedule E, the Rent Schedule, is to be attached. A format was not prescribed because this schedule will often be prepared by the managing agent, perhaps from a computer print-out, or by the seller. Ideally, it should contain all the material terms of the leases and tenancies, such as the names of each tenant, annual base rentals, security deposits, renewal options (sometimes), termination options, and rights of first refusal to lease or buy.

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