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Considerations for Auctioning Real Estate

It is the middle of 2011 and sellers of commercial real estate are still facing significant obstacles in selling their properties. Many owners are having trouble attracting potential buyers, and even when they do, such potential sellers are not getting the price or selling their properties within the time frames desired. As a result, owners have begun to look for alternative ways to sell a property. One alternative gaining favor is the auction process.

Auctions offer sellers a way to dispose of their properties within a specific time frame and with a certainty of closing. They also might attract potential buyers who may not otherwise have been interested in the property or known about it being for sale. An auction is, however, very different than a typical sale transaction, and anyone considering auctioning a property should be aware of the various nuances of an auction sale process, including the following:

- **Auction Agreement:** A seller who desires to sell property at an auction should employ the services of a reputable auction company and attorney to aid in the process. In addition to the standard terms (e.g. fees for services, identification of property, general terms), the auction contract should contain any unusual terms of the sale (e.g. minimum bid price, deed restrictions and rights to review and approve advertising materials).
- **Bidder's Information Package:** Auction sellers typically provide potential buyers with a package of information regarding the property prior to the auction. The bidder's information package generally contains any information the seller has with respect to the property, including vesting deeds, title work, surveys and environmental reports. The seller may even want to provide the buyer with an updated title commitment and phase I environmental report to make the transaction easier for the buyer to consummate. The package might also include any form documents which the buyer will be required to sign at the auction or at closing, including the purchase contract, conveyance deed, bill of sale and assignments.
- **Confidentiality Agreement:** In conjunction with the distribution of the bidder's information package, the auction seller may want to require potential buyers to

sign a confidentiality agreement limiting the ability of the buyer to disclose any information in the bidder's information package to third parties.

- Inspections: Some sellers do not allow any access to the property prior to the auction or prior to closing, and the property is simply sold "as-is". If an auction seller is considering buyer access to the property prior to the auction or closing to perform inspections, the seller should require a site access agreement, which contains obligations to repair any damage, insurance requirements and indemnities for personal injury or damage caused to the property as a result of the inspections.
- Price: Auction sellers have a few options when it comes to price. The seller can agree to an absolute sale, which means that the property will go to the highest bidder regardless of price. The seller can also set a minimum bid price which is published to potential buyers. In the alternative, the seller can auction the property with reserve, which means that the seller has a minimum set price it is willing to accept, but that price is unpublished. Sellers should be aware that if they sell property without a minimum price, there is a risk they will be bound to sell the property for a less than satisfactory price.
- Bidders: If an auction seller is concerned about who may bid on the property, it may want to consider reserving the right to preclude a buyer from bidding at the auction.
- Contract: Although a seller can put any terms it wants into the form purchase contract, it is typically expected that a buyer will have done any due diligence it wants to do prior to the date of the auction. As such, to expedite the closing, the seller typically will not want to place any contingencies in the contract. Auction sellers may also want to consider requiring that winning buyers put up a nonrefundable deposit in conjunction with the signed purchase contract, particularly since the auction seller would have to go through the process all over again if the deal falls through.

These are just some of the items that an auction seller needs to pay attention to if it decides to auction a property. If we can assist you in achieving any goals with respect to an auction, please contact one of the attorneys listed below:

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