

Closing Commercial Real Estate Financing

Prepared and Presented by:

Douglas E. Cornelius, Esq.
Goodwin Procter LLP

John P. O'Neill, Esq.
Holland & Knight, LLP

V.	CLOSING COMMERCIAL REAL ESTATE FINANCING	1
A.	CONDUIT FINANCING.....	1
(1)	General.....	1
(2)	Single Purpose Bankruptcy Remote Borrower	2
(3)	Independent Director	4
(4)	Separateness Covenants	6
(5)	Nonconsolidation Opinions	8
(6)	Transfers of Ownership.....	9
(7)	Transfers of Portions of Mortgaged Property	10
(8)	Prepayment	11
(9)	References.....	12
B.	MEZZANINE FINANCING	13
(1)	Background on Mezzanine Financing	13
(2)	Subordination /Intercreditor Agreement	14
(3)	Closing a Mezzanine Loan from the Mezzanine Lender’s Perspective	15
(4)	UCC Insurance.....	17
(5)	Mezzanine Financing Title Endorsement.	18
Addendum A	Conduit Loan Delivery Checklist	20
Addendum B	Mezzanine Loan Checklist.....	23
Addendum C	Form of Intercreditor Agreement.....	26
Addendum D	Mezzanine Title Endorsement	27
Addendum E	UCC Financing Statement	29

V. CLOSING COMMERCIAL REAL ESTATE FINANCING

A. CONDUIT FINANCING

(1) General. Over the last decade, a substantial and growing amount of real estate has been financed through conduit loans that have been securitized and sold as commercial mortgage backed securities (“CMBS”). CMBS has become an increasingly significant component of the total commercial real estate debt market. In 2004 over \$93 billion of CMBS loans were originated. In the first 9 months of 2005 over \$100 billion of CMBS loans were originated. The development of the CMBS industry has generally benefited borrowers through increased loan proceeds and competitive rates. But these loans have particular characteristics that make the closing process more complicated.

In closing a securitized loan product, you may be required to meet a series of complex and sometimes expensive requirements regarding the need for a new single purpose entity, adoption of separateness covenants, employment of independent directors, and delivery of a nonconsolidation opinion. Depending upon the size of the loan, some or all of these criteria may be imposed. Generally, the larger the loan, the more of these requirements will be applicable. Single purpose entities are always required. Separateness covenants can have a real impact on operating efficiently. These are binding legal agreements for the borrower to operate in a manner separate and distinct from any affiliates. Including independent directors in the structure is modestly expensive and, like

the requirement for separateness covenants, will impose limited operating restraints on the borrower. Non-consolidation opinions can be expensive to give and not all lawyers are equipped to give them, potentially necessitating retention of separate special counsel.

(2) Single Purpose Bankruptcy Remote Borrower. The terms “single purpose,” “special purpose,” and “bankruptcy remote” are used in a variety of contexts throughout the conduit lending market. Although the terms have generally recognized meanings, those meanings may vary greatly depending on the role of the entity and the type of transaction. A single purpose entity (“SPE”) is an entity, formed concurrently with or immediately prior to the transaction, that is unlikely to become insolvent as a result of its own activities and that is adequately insulated from the consequences of any related party’s insolvency. The conduit loan documents generally require that the entity have the following restrictions in its organizational documents:

- (a) Restrictions intended to limit or eliminate the ability of an SPE from incurring liabilities other than the debt to be included as part of the transaction, including (i) restrictions and/or limitations on indebtedness, and (ii) limitations on purpose of the SPE and the activities in which it may engage.
- (b) Restrictions intended to insulate the SPE from liabilities of affiliates and third parties, including (i) the requirement that the

organizational documentation of the SPE and the transaction documents contain separateness covenants described in this section and (ii) the requirement that a nonconsolidation opinion be delivered with respect to the SPE.

- (c) Restrictions intended to protect the SPE from dissolution risk, including (i) absolute prohibitions on liquidation and consolidation for so long as the loan is outstanding, (ii) restrictions on merger of the SPE, and sale of all or substantially all of the assets of the SPE, in each case, without the prior written consent of the lender, and (iii) the requirement that, except for a properly structured single member limited liability company, the SPE have appropriate single-purpose, bankruptcy-remote equity owners (e.g., SPE general partners with respect to an SPE limited partnership, or an SPE member holding a meaningful economic interest with respect to an SPE limited liability company that is not a single member LLC).
- (d) Restrictions intended to limit a solvent SPE from filing a bankruptcy petition (or taking any other insolvency action), including the requirement that the SPE (and/or any SPE constituent entity) have an independent director or independent manager

whose vote is required prior to the filing of any bankruptcy (or taking any other insolvency actions).

(3) Independent Director. Often the lender will require that the borrower have an independent director to isolate the borrower's bankruptcy risk. The vote of the independent director is required to undertake certain actions, most importantly, to file a bankruptcy petition or take other insolvency action with respect to the SPE. The provisions regarding the independent director are intended to protect against a voluntary bankruptcy petition being filed by the applicable shareholders, members, partners, directors, or managers.

If there were no independent director on the board of the SPE, and the parent of the SPE were to become insolvent, and, as a consequence, deem it advantageous for the SPE to file a bankruptcy petition, the directors of the SPE corporation could simply vote to file a bankruptcy petition with respect to the SPE, regardless of its solvency. The independent director is intended to help insulate against the risk that the shareholders, members, partners, directors, or managers of the parent of the SPE will be able to control the SPE and vote to file a bankruptcy petition with respect to an otherwise solvent SPE.

The following is a generally accepted definition of "independent director":

A duly appointed member of the board of directors of the relevant entity who shall not have been, at the time of such appointment or

at any time while serving as a director or manager of the relevant entity and may not have been at any time in the preceding five years, any of the following:

- A direct or indirect legal or beneficial owner in such entity or any of its affiliates;
- A creditor, supplier, employee, officer, director, family member, manager, or contractor of such entity or any of its affiliates; or
- A person who controls (whether directly, indirectly, or otherwise) such entity or any of its affiliates, or any creditor, supplier, employee, officer, director, manager, or contractor of such entity or its affiliates.

There are several third party providers of the services of an independent director. Two of the most popular are and Entity Services Group (<http://www.entityservices.com/independent/indserv-independent.asp>) and CT Staffing Services (<http://ctadmin.ctadvantage.com/CTWebAdminApps/CTWebAdmin/pubcontent/CTStaffingServices.aspx>). Both require a payment of a fee, an indemnification of the independent director and D&O insurance or other financial backing to the indemnification.

The independent director will need to execute the organizational documents, so the documents must be finalized prior to the closing so they can be sent to the director for execution prior to the closing.

(4) Separateness Covenants. In order to increase the likelihood that an SPE will be insulated from the liabilities and obligations of its affiliates and third parties, the lender will require that the borrower agree to abide and, as applicable, its shareholders, members, partners, and affiliates should agree to cause the SPE to abide by the following separateness covenants with respect to the SPE whereby the SPE covenants, among other things:

- To maintain books and records separate from any other person or entity;
- To maintain its accounts separate from any other person or entity;
- Not to commingle assets with those of any other entity;
- To conduct its own business in its own name;
- To maintain separate financial statements;
- To pay its own liabilities out of its own funds;
- To observe all partnership formalities;

- To maintain an arm's-length relationship with its affiliates;
- To pay the salaries of its own employees and maintain a sufficient number of employees in light of its contemplated business operations;
- Not to guarantee or become obligated for the debts of any other entity or hold out its credit as being available to satisfy the obligations of others;
- Not to acquire obligations or securities of its partners, members, or shareholders;
- To allocate fairly and reasonably any overhead for shared office space;
- To use separate stationery, invoices, and checks;
- Not to pledge its assets for the benefit of any other entity or make any loans or advances to any entity;
- To hold itself out as a separate entity;
- To correct any known misunderstanding regarding its separate identity; and

- To maintain adequate capital in light of its contemplated business operations.

The separateness covenants will need to be contained in the organizational documents of the borrower.

(5) Nonconsolidation Opinions. In order for an entity to be considered an SPE, the insolvency of an affiliate of that SPE should not impact the SPE. Under the provisions of Section 105 of the Bankruptcy Code, a bankruptcy court has the power to “substantively consolidate” separate but related entities. Substantive consolidation treats the assets and liabilities of the entities as if they belonged to one, enabling the creditors of each formerly separate estate to reach the assets of the consolidated estate.

In a commercial mortgage transaction, if an affiliate of the SPE were to become insolvent, it is possible that the affiliate or the affiliate’s creditors would attempt to substantively consolidate the insolvent affiliate with the SPE, effectively placing the SPE under bankruptcy court protection and subjecting its assets to the claims of the affiliate’s creditors.

In determining whether to substantively consolidate two entities, courts generally focus on the degree to which the affairs of the entities are intertwined. The separateness covenants and the other SPE criteria are intended to separate the business of the affiliate with those of the SPE and to mitigate consolidation risk.

The law pertaining to substantive consolidation is a complex subject and the separateness covenants alone will not adequately protect against the risk. For this reason, counsel to the SPE must properly structure the transaction and the relationship between the SPE and its affiliates (including affiliated property managers) to avoid the risk of substantive consolidation. In order to confirm whether a given SPE structure is appropriately insulated from consolidation risk, the lender generally requests on a nonconsolidation opinion of counsel for the SPE to that effect.

The lender will require an opinion of independent legal counsel that, if any equity owner or group of affiliated equity owners (or group of family members) who own more than 49% of the equity in the SPE were to become insolvent, the assets and liabilities of the SPE would probably not be substantively consolidated with that of the equity owner or group of affiliated equity owners (or group of family members).

These opinions are lengthy, detailed reasoned opinions. As such, the legal costs of issuing the opinion are high.

(6) Transfers of Ownership. As with most loans, a conduit loan restricts the principals of the borrower from transferring their interests. Typically, a borrower may not sell, pledge, encumber, mortgage, assign, or otherwise dispose of its interest in the mortgaged property, and a direct or indirect equity owner may not transfer its direct or indirect equity interests in a borrower, including any equity

interests in any of a borrower's constituent owners that should be single-purpose bankruptcy remote entities.

If the loan documents do not permit a transfer of ownership, the servicer of the conduit loan does not have the authority to approve a transfer. At the closing is important that the loan documents provide a mechanism for approval of any likely changes in the ownership structure of the borrower. If the principals of the borrower are individuals, borrower's counsel should make sure that the loan documents allow transfers for estate planning purposes and for transfers between the principals.

If any transfers are permitted by the loan documents, there will typically be a requirement that borrower give the lender a new nonconsolidation opinion if more than 49% of the interests are transferred. The loan documents will typically require payment of a fee, execution of loan assumption agreement and other approvals.

(7) Transfers of Portions of Mortgaged Property. Because of the tax structure of the conduit lending arrangement, there cannot be material changes to the mortgage loan or to the collateral for the mortgage loan. Transfers of mortgaged property in the nature of granting or conveyance of utility easements, rights-of-way, and similar encumbrances generally are permitted where such easements, rights-or-way, and similar encumbrances will not have a material adverse impact on the value, use, or operation of the mortgaged property or the borrower's ability

to pay the mortgage loan. However, releasing collateral is problematic once the loan is in the securitized structure. CMBS master and special servicers are limited in their ability to release (or encumber) property, which is security for the loan. If the conduit lender permits a change to loan that is found to be material, a hefty penalty tax can be imposed by the Internal Revenue Service.

It may be possible to obtain the release of unimproved land with a value less than 10% of the value of the entire parcel, but, even in that case, it will take time and cost money. The 10% is an industry rule of thumb and is no safeguard for the lender. A REMIC opinion is likely to be required. For larger parcels, it is effectively impossible, short of paying off the whole loan (which itself is problematic in many instances). A better alternative is to address this issue before the loan closes. If the loan documents specifically contemplate the release of an out parcel and define the circumstance under which that release will occur, out parcels of any size can be released and the process will be much more efficient and expeditious.

(8) Prepayment. As a general rule, conduit loan document restrict a borrower's right to prepay a mortgage loan. Conduit loans generally cannot be prepaid, except during the last few months prior to maturity.

Instead of prepayment, the loan documents generally permit a collateral defeasance. A defeasance is a transaction in which real estate collateral securing a mortgage loan is released from the lien of the mortgage and replaced by U.S.

government securities pledged to the lender. The income from the securities needs to be adequate to pay the debt service on the conduit loan and have maturities not before the maturity date of the conduit loan.

(9) References.

- See Standard & Poors CMBS Legal and Structured Finance

Criteria:

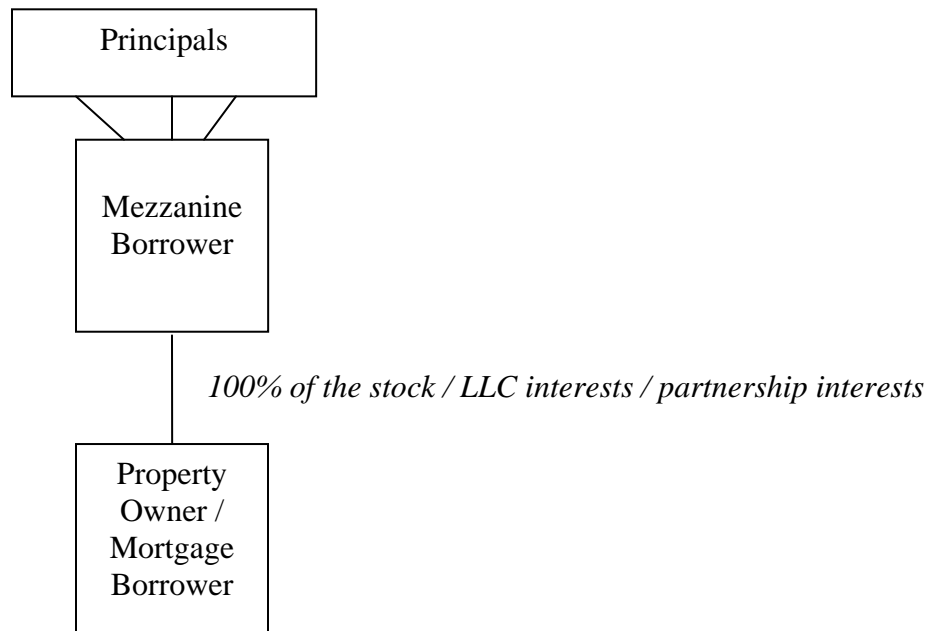
http://www2.standardandpoors.com/spf/pdf/fixedincome/040103_cmbslegalcriteria14.pdf

- See Addendum A for a conduit loan document delivery checklist.

B. MEZZANINE FINANCING

(1) Background on Mezzanine Financing. Mezzanine financing is debt that is subordinate to (i.e. gets paid after) the mortgage debt. Usually, it is a loan to a company that holds all of the ownership in the company that owns the property.

Structure Diagram:



The loan is usually secured by the mezzanine borrower's pledge of its ownership interest in the property owner. If the loan defaults, the lender has the right to foreclose on the ownership interest in the property owner, but not to foreclose on the property itself.

Mezzanine lending used to be fairly exotic and only found in extremely large transactions. In the past few years mezzanine lending has become more common and used in smaller transactions.

Typically, the mezzanine lender does not have a mortgage on property to secure repayment of the mezzanine loan. Although a mezzanine lender may want the extra security of a second mortgage, the mortgage lender may not allow a second mortgage to encumber the property. The mortgage lender wants to ensure that the mezzanine loan remains subordinate to the mortgage loan.

(2) Subordination /Intercreditor Agreement

The subordination/intercreditor agreement is the key document governing the relationship between the senior lender and the mezzanine lender. A mezzanine lender typically seeks to obtain certain rights with respect to the mortgage loan to protect its investment, and the mortgage lender generally tries to limit restrictions on its ability to deal with the mortgage borrower and the mortgaged property.

The negotiation of an intercreditor agreement is one of the most difficult aspects of mezzanine loan financing. Some key issues to consider in an intercreditor agreement:

- permitted transferees of the mezzanine loan

- conditions to taking title to the pledged equity interests

- limitations on modification to the first mortgage loan
- limitations on modification to the mezzanine loan
- rights of the mezzanine lender to cure defaults on the first mortgage loan
- rights of the mezzanine lender to purchase the first mortgage loan
- certain control rights of the mezzanine loan
- voting rights in bankruptcy

Since the mortgage loan documents would typically prohibit the mezzanine loan, it is important to the mezzanine lender (and therefore to the borrower) that there be an intercreditor agreement allowing the mezzanine debt.

Dechert LLP has produced a form of intercreditor agreement that has been widely adopted by mortgage lenders, and especially by conduit mortgage lenders. *See* Mezzanine Debt: Suggested Standard Form of Intercreditor Agreement by David W. Forti, Timothy A. Stafford: http://www.dechert.com/practiceareas/practiceareas.jsp?pg=lawyer_publications_detail&pa_id=32&id=1535. A form of intercreditor agreement is attached as Addendum C.

(3) Closing a Mezzanine Loan from the Mezzanine Lender's Perspective

The key steps in closing a mezzanine loan are the execution of the loan documents and perfection of the lender's lien on the ownership interests. Other

aspects of closing the mezzanine loan are the same as one would encounter in closing the acquisition of the property and closing a mortgage loan.

There are no special mechanisms for execution of the mezzanine loan documents. Since they typically do not attach to an interest in real estate, they do not need to be notarized under Massachusetts law. If the mezzanine lender is also getting a second mortgage on the property, the second mortgage would have to be notarized.

As the mezzanine loan is not a true real estate loan, the mezzanine loan documents are typically not governed by the law where the property is located. Instead they are usually governed by the law where the lender is located. The opinion of counsel from the mezzanine borrower will need to contain an opinion that the choice of law will be recognized and that the mezzanine loan documents are enforceable under state law.

Under the Uniform Commercial Code the interests in the property owner held by the mezzanine borrower will be governed by either Article 8 or Article 9. If the ownership interests are “certificated,” like stock certificates, perfection of the security interest is governed by Article 8. Otherwise perfection is governed by Article 9.

If the interests are not certificated, perfection is by filing a financing statement with the state in which the mezzanine borrower is formed. If it is a

Massachusetts limited liability company, corporation or partnership, the financing statement should be filed with the Massachusetts Secretary of State. The financing statement should name the mezzanine borrower as the debtor, the mezzanine lender as the secured party and describe the ownership interests in the property owner as the collateral. See Addendum E for an example of the financing statement.

For “certificated” interests, the best method to perfect is by possession. At the closing, the mezzanine borrower will need to deliver the original certificates. It is good practice to also file a UCC Financing Statement as well.

At closing, the mezzanine lender will need comfort that their lien on the ownership interest is not subordinate to other liens. At closing, the mezzanine lender will require UCC searches on the mezzanine borrower showing that they have not previously pledged the interests.

(4) UCC Insurance.

Give the growth in mezzanine loans, there is a growing market for title insurance products to give lenders comfort as the enforceability and priority of the lien. Title insurance companies have begun issuing UCC insurance policies. Once of the first companies to do so was First American Title Insurance Company with their Eagle 9 UCC insurance policy, which started issuing its product in 2000. Several companies now have a UCC insurance policy available. A UCC

title insurance policy insures the attachment, perfection and priority of a lender's security interest in the personal property collateral of the debtor. By insuring lien priority, the lender's policy also insures against mis-indexed filings and similar matters, and effectively covers the authority of the debtor to grant the security interest to the lenders.

(5) Mezzanine Financing Title Endorsement.

Because the mezzanine lender does not possess a present ownership in the real property of the borrowing entity, it does not itself have an insurable interest in the land. Also, its interest cannot be insured under an ALTA Loan Policy, because it does not have a mortgage lien against the real property.

There is an ALTA endorsement for mezzanine lending that was adopted in 2004. See Addendum D. The endorsement combines the coverage of a fairways endorsement, a non-imputation endorsement and an additional insured endorsement. The Form 16 Mezzanine Financing Endorsement protects the mezzanine lender with respect to (1) matters created, suffered, assumed or agreed to by the insured (Exclusion 3(a)), (2) matters known to the insured but not found in the public records and not known or disclosed to the title insurer (Exclusion 3(b)), and (3) loss the insured suffers because it has not paid value for the interest in the land covered by the policy (Exclusion 3(e)). The endorsement assigns to the mezzanine lender the right to receive payments otherwise payable to the insured

under the policy. The endorsement also assures the mezzanine lender that no amendment of the policy can be made without its written consent.

The endorsement can be issued when the mezzanine loan is closed or it can be issued to amend the borrower's existing owner's policy of title insurance.

For a sample mezzanine loan closing checklist, see Addendum B.

Addendum A
Conduit Loan Delivery Checklist

Client Name and Client Loan #:
MERS ID (it applicable)
Closing Date:
Note Amount:
Consolidated: Yes _____ No _____
Borrower Name(s):
Number of Properties:
Property Name(s) and Address(es):
Property Type(s):
Express Mail Tracking Number:
Closing Contact:
Phone/Fax Number:
Email Address:
Closing Agent:
Phone/Fax Numbers:
Email Address:
Client Contact:
Phone/Fax Number:
Email Address:

DOCUMENT DELIVERY CHECKLIST:

Loan Number _____
Date _____

CRITICAL DOCUMENTS:

- A. Promissory Note 123B.
Allonge(s)/Endorsement(s)
Endorsed to _____
- C. Letter(s) of Credit (list separately)
Beneficiary _____
- D. Letter of Credit Rider to the Closing Checklist List all terms including
Beneficiary, Amount, Expiration Date, Transferable, Issuing Bank and Address
- E. Assignment of Letters of Credit
Assignee _____
- F. Ground Lease Include Amendments, Modifications and Extensions
- G. Memorandum of Lease (Ground Lease)

H. Ground Lease Estoppel

BASIC AND TRANSFER DOCUMENTS:

1. Mortgage(s)/Deed(s) of Trust and Security Agreement
2. Interim Assignment of Mortgage/Deed of Trust Assignee (if any)
3. Assignment of Mortgage/Deed of Trust Assignee Blank or Trust
4. Consolidation Agreement List all underlying notes
5. Assignment(s) of Leases and Rents
6. Interim Assignment of Assignment of Leases and Rents Assignee (if any)
7. Assignment of Assignment of Leases and Rents Assignee Blank or Trust
8. Title Policy
9. Preliminary Evidence of Title Type
10. UCC-1 Financing Statement State
11. Interim UCC-3 Assignment
State =
Assignee = _____
12. Interim UCC-3 Assignment
State =
Assignee =
13. UCC-1 Financing Statement Fixture Filing
Jurisdiction =
14. UCC-3 Assignment Fixture Filing
Jurisdiction =
Assignee =
15. UCC-3 Assignment
Jurisdiction =
Assignee = Blank or Trust
16. UCC-1 Financing Statement Other Filing
Jurisdiction =
17. UCC-3 Assignment Other Filing
Jurisdiction =
Assignee =
18. UCC-3 Financing Statement Other Filing
Jurisdiction =
Assignee = Blank or Trust
19. Loan Agreement
20. Reserve or Escrow Agreement List if multiple Agreements
21. Cash Management Arrangements
 - a. Cash Management Agreement
 - b. Lockbox Agreement
 - c. Property Account/Clearing Account Agreement
 - d. Investment Property/Deposit Account Control Agreement
22. Security Agreement (if separate from Mortgage)

- 23. Guaranty/Indemnity Agreement (applies to all non- recourse events)
- 24. Environmental Indemnity

SPECIALIZED PROPERTY DOCUMENT:

List all other collateral being delivered such as:

- 25. For Franchise Loans Franchise Agreement
- 26. For Hotels Comfort Letters/Tri-Pa Letters (list all parties)

CUSTODIAL ACKNOWLEDGEMENT

DATE:

TO:

On behalf of _____ in its capacity as document custodian, the undersigned acknowledges receipt of the documents described above unless noted _____ makes no representations as to the condition, validity, legality, enforceability, recordability, genuineness or due authorization of any of the described documents.

_____ has not conducted and will not conduct an independent review of the documents other than as specifically outlined in the applicable custodial agreement, pooling and servicing agreement, bailee agreement, or other agreement by which _____ has agreed to act as document custodian.

Addendum B
Mezzanine Loan Checklist

1. Structuring Issues

- 1.1 Debt versus Preferred Equity
- 1.2 UBTI Concerns – Debt Guidelines
- 1.3 ERISA Considerations
- 1.4 Securitization/SPE Issues
- 1.5 Structural Subordination
- 1.6 Security: Pledge/Mortgage or both
- 1.7 Transfer Taxes/Consents/Other Structuring Considerations

2. Commitment Letter/Term Sheet/Loan Application

- 2.1 Determine what client needs and who will prepare; does it adequately describe the basic deal; is there catch-all language giving Mezzanine Lender’s counsel final control; non-binding on Mezzanine Lender except to agreement to pay Mezzanine Lender counsel fees and remain exclusive, if applicable
- 2.2 Commitment or other fees to be paid
- 2.3 Foreign lender “Doing Business” Requirements – Qualifications or Filing Requirements; Statutory lending requirements; usury concerns

3. General Diligence

- 3.1 Client diligence list to be circulated, including borrower/guarantor background check; financials; budgets, proformas, evidence of insurance, etc.
- 3.2 Obtain detailed organizational chart identifying all interest holders in Borrower.

4. Property Diligence

- 4.1 Unique Property-Type Diligence
 - (a) Multi-family residential
 - (b) Office
 - (c) Industrial
 - (d) Condominium
 - (e) Assisted Living
 - (f) Lodging
 - (g) [Other]

4.2 General Property Diligence

- (a) Structural and Engineering Review
- (i) Update and Reliance Letter to Mezzanine Lender
- (b) Environmental Review
- (i) Update and Reliance Letter to Mezzanine Lender
- (c) Financial Statements Review
- (d) Pro-Forma Business Plan including Budget for remaining current year
- (e) Real estate/water & sewer/personal property tax bills
- (f) Zoning Review
- (g) Operational Permit Review
- (h) Review of Contracts and Leases
- (i) Evidence of Insurance
- (j) UCC/Judgment//Federal Tax Lien/Bankruptcy Lien and Litigation Searches of Pledgor(s), Borrower and any Guarantors
- 4.3 Development-Specific Diligence

5. Title/UCC Insurance; Survey

- 5.1 Existing Title Policy
- 5.2 Title Commitment
 - (a) Copies of all Exception Documents
 - (b) Required Endorsements
- 5.3 Survey
 - (a) Surveyor's Certification
- 5.4 Title/Survey Summary
- 5.5 UCC Insurance

6. Intercreditor Agreement

- 6.1 Suggest beginning with form of intercreditor prepared by Mezzanine Lender or in alternative see checklist of key issues for Mezzanine Lender in reviewing a form prepared by senior lender

7. Mezzanine Loan Documents

- 7.1 Loan Agreement
- 7.2 Promissory Note
- 7.3 Pledges
- 7.4 [Guaranty for Pledge]
- 7.5 Power of Attorney
- 7.6 [Mortgage]
- 7.7 [Assignment of Leases and Rents]
- 7.8 [Subordination, Non-disturbance and Attornment Agreement]

- 7.9 Assignment of Contracts, Licenses and Permits
- 7.10 Assignment of Management Agreement
- 7.11 Non-Recourse Guaranty
- 7.12 [Completion Guaranty]
- 7.13 Environmental Indemnity
- 7.14 UCC-Financing Statement
- 7.15 Lockbox Agreement

8. Review of Senior Loan Documents

- 8.1 Ensure senior loan documents incorporate any key concerns from mezzanine lender perspective, although may be dealt with in intercreditor (see above).

9. Organizational/Authority Document

- 9.1 Borrower's Entity Formation documents and evidence of authority
- 9.2 Guarantor Entity Formation documents and evidence of authority

10. Opinions

- 10.1 Due Authority/Enforceability (including perfection, usury, choice of law, and any other opinions that may be customarily required by a particular client)
- 10.2 Zoning Opinion
- 10.3 Environmental/Permitting Opinion

11. General/Miscellaneous Documents

- 11.1 REOC Letter
- 11.2 Usury Filing
- 11.3 Update Matter Page
- 11.4 Transfer Taxes/Documentary Taxes
- 11.5 Escrow Closing Letter
- 11.6 Title Company Letter

Addendum C
Form of Intercreditor Agreement

Attach form of agreement.

Addendum D
Mezzanine Title Endorsement

ALTA ENDORSEMENT FORM 16
(Mezzanine Financing)

Attached to Policy No.

Issued by
_____ TITLE INSURANCE COMPANY

1. The Mezzanine Lender is: *[INSERT NAME OF MEZZANINE LENDER]* and each successor in ownership of its loan (“Mezzanine Loan”) reserving, however, all rights and defenses as to any successor that the Company would have had against the Mezzanine Lender, unless the successor acquired the indebtedness as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy as affecting title to the estate or interest in the land.
2. The insured:
 - (a) assigns to the Mezzanine Lender the right to receive amounts otherwise payable to the insured under this policy, not to exceed the outstanding indebtedness under the Mezzanine Loan; and
 - (b) agrees that no amendment of or endorsement to this policy can be made without the written consent of the Mezzanine Lender except as provided in Section 12(a) of the Conditions and Stipulations.
3. The Company does not waive any defenses that it may have against the insured, except as expressly stated in this endorsement.
4. In the event of a loss under the policy, the Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b) or (e) to refuse payment to the Mezzanine Lender solely by reason of the action or inaction or knowledge, as of Date of Policy, of the insured, provided:
 - (a) the Mezzanine Lender had no knowledge of the defect, lien, encumbrance or other matter creating or causing loss on Date of Policy.
 - (b) this limitation on the application of Exclusions from Coverage 3(a), (b) and (e) shall:
 - (1) apply whether or not the Mezzanine Lender has acquired an interest (direct or indirect) in the insured either on or after Date of Policy, and
 - (2) benefit the Mezzanine Lender only without benefiting any other individual or entity that holds an interest (direct or indirect) in the insured or the land.
5. In the event of a loss under the Policy, the Company also agrees that it will not deny liability to the Mezzanine Lender on the ground that any or all of the ownership interests (direct or indirect) in the insured have been transferred to or acquired by the Mezzanine Lender, either on or after the Date of Policy.
6. The Mezzanine Lender acknowledges:
 - (a) that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which

- the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy; and
- (b) that the Company shall have the right to insure mortgages or other conveyances of an interest in the land, without the consent of the Mezzanine Lender.
7. If the insured, the Mezzanine Lender or others have conflicting claims to all or part of the loss payable under the Policy, the Company may interplead the amount of the loss into Court. The insured and the Mezzanine Lender shall be jointly and severally liable for the Company's reasonable cost for the interpleader and subsequent proceedings, including attorneys' fees. The Company shall be entitled to payment of the sums for which the insured and Mezzanine Lender are liable under the preceding sentence from the funds deposited into Court, and it may apply to the Court for their payment.

Whenever the Company has settled a claim and paid the Mezzanine Lender pursuant to this endorsement, the Company shall be subrogated and entitled to all rights and remedies that the Mezzanine Lender may have against any person or property arising from the Mezzanine Loan. However, the Company agrees with the Mezzanine Lender that it shall only exercise these rights, or any right of the Company to indemnification, against the insured, the Mezzanine Loan borrower, or any guarantors of the Mezzanine Loan after the Mezzanine Lender has recovered its principal, interest, and costs of collection.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

AGREED AND CONSENTED TO:

[NAME OF INSURED]

[NAME OF MEZZANINE LENDER]

BY: _____

BY: _____

Addendum E UCC Financing Statement

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS (front and back) CAREFULLY

A. NAME & PHONE OF CONTACT AT FILER (optional)
B. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or capitalize letters.

2a. ORGANIZATION'S NAME				
MEZZANINE BORROWER				
OR				
2b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE
2d. TAX ID # - EIN OR EIN		2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	
2g. ORGANIZATION DEBTOR		2h. ORGANIZATIONAL ID #, if any		<input type="checkbox"/> NONE

2. ADDITIONAL DEBTOR'S EXACT FULL LEGAL NAME - insert only one debtor name (2a or 2b) - do not abbreviate or capitalize letters.

2a. ORGANIZATION'S NAME				
OR				
2b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE
2d. TAX ID # - EIN OR EIN		2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	
2g. ORGANIZATION DEBTOR		2h. ORGANIZATIONAL ID #, if any		<input type="checkbox"/> NONE

3. SECURED PARTY'S NAME (a) NAME of TOTAL ASSIGNOR (ASSIGNOR SPY) - insert only one secured party name (2a or 2b)

2a. ORGANIZATION'S NAME				
MEZZANINE LENDER				
OR				
2b. INDIVIDUAL'S LAST NAME		FIRST NAME	MIDDLE NAME	SUFFIX
2c. MAILING ADDRESS		CITY	STATE	POSTAL CODE
2d. TAX ID # - EIN OR EIN		2e. TYPE OF ORGANIZATION	2f. JURISDICTION OF ORGANIZATION	
2g. ORGANIZATION DEBTOR		2h. ORGANIZATIONAL ID #, if any		<input type="checkbox"/> NONE

4. THE FINANCING STATEMENT covers the following collateral: Any additional collateral description can be typed on the Addendum Form.

- (a) all of the Debtor's ownership interests in [PROPERTY OWNER],
 - (b) any and all right of the Debtor to receive income, earnings, profits, distributions, or other amounts from [PROPERTY OWNER] in any circumstances whatever, including without limitation, upon withdrawal, and
 - (c) all obligations owing by [PROPERTY OWNER] to the Debtor,
- in each case, whether now existing and owned by the Debtor or hereafter arising or acquired.

5. ALTERNATIVE DESIGNATION (if applicable) <input type="checkbox"/> LESSOR/LESSOR		<input type="checkbox"/> CONSIGNEE/CONSIGNEE	<input type="checkbox"/> BULK SELLER	<input type="checkbox"/> SELLER/BUYER	<input type="checkbox"/> JOI - LIEN	<input type="checkbox"/> NON-ACC FILING
6. <input type="checkbox"/> This FINANCING STATEMENT is to be filed for record by recording in the PUBLIC RECORDS.		7. Check to REQUEST SEARCH REPORT (Cost: Debtor's 1.00/entry)		<input type="checkbox"/> All Debtors	<input type="checkbox"/> Debtor's	<input type="checkbox"/> DEBITOR'S
8. OPTIONAL FILER REFERENCE DATA						