

DRAFTING TIPS FOR REAL ESTATE PURCHASE AND SALES AGREEMENTS

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Contents

Business Days vs. Calendar Days	1
Transfer Taxes.....	1
Cost Allocations	2
Standard Title Exceptions	2

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When negotiating a
real estate purchase
and sale agreement,

parties generally — and understandably —
concentrate their efforts on the major deal points of their transaction. Consequently,
once the agreement is signed those points are rarely the source of any confusion
or frustration as the transaction proceeds. However, that is not to say that the
transaction will necessarily proceed smoothly.

DRAFTING TIPS FOR REAL ESTATE PURCHASE AND SALES AGREEMENTS

After signing a real estate purchase and sales agreement, parties are often unpleasantly surprised or disappointed by what seemed to be minor points — that is, “details” — when they negotiated the agreement. While these “details” do not cover new legal ground and no one would suggest that the parties should spend the bulk of their efforts fine-tuning these points in the purchase and sale agreement, parties would be well-served to give these points the time they deserve and, thereby, ensure that the resulting operation of the agreement delivers the result that each party anticipated.

Business Days vs. Calendar Days

Most purchase and sale agreements provide for several time periods typically measured in a number of days from the date the agreement is fully executed, whatever it may be. Obviously, parties negotiating an agreement cannot be certain when it ultimately will be signed, and thus do not know what specific calendar dates would result in the agreed upon time periods.

But if a period is measured in calendar days instead of business days, it may be that once the agreement is signed and the actual end date of the period is finally determined, that date may fall on a weekend or a holiday. When this happens, the time period, generally speaking, will not automatically be advanced to the next business day as a matter of law. As a practical matter, this means the time period is shortened so that the parties must address whatever is called for in that time period by the last business day before the end date.

Imagine the frustration of a buyer who had agreed upon a relatively short 30 day inspection period only to find that the period ends on the Monday of a holiday weekend, effectively leaving the buyer with a 27 day inspection period. While this may not be an insurmountable obstacle, this result could easily be avoided if the buyer had ensured the purchase and sale agreement included a provision that automatically moved any date falling on a weekend or a holiday to the following business day. This could be as simple as the following:

If any date for the occurrence of an event or act under this agreement falls on a Saturday, Sunday or legal holiday, then the time for occurrence of such event or act shall be extended to the next succeeding business day.

Transfer Taxes

Not all jurisdictions charge taxes on the transfer of interests in real estate, and those that do, differ in the amount of taxes charged, the types of transactions for which they are charged and the party that customarily pays such taxes.

Often, when such transfer taxes are charged, they are significant. As an additional cost, if these taxes are not adequately addressed at the outset, one or both parties might be unpleasantly surprised. In a jurisdiction where sellers customarily pay such taxes, the sale may yield fewer proceeds than the seller deems economically worthwhile, while in a jurisdiction where buyers customarily pay such taxes, the buyer may have difficulty coming up with the necessary funds for closing.

Therefore, when dealing with property in an unfamiliar jurisdiction, the parties should be sure to confirm whether any transfer taxes will be incurred for the transaction and address which party will pay for them in the purchase and sale agreement.

Cost Allocations

Whereas the presence of transfer taxes in a particular jurisdiction may be an entirely unanticipated cost element, similar problems can arise when anticipated costs are customarily allocated in an unexpected manner. The customary manner for allocating costs — such as the premium for buyer's owner's title policy, the cost of the survey, the cost of recording documents and the escrow agent's closing fees — between the parties varies from jurisdiction to jurisdiction.

This, again, might lead to an unpleasant surprise for a buyer. Consider a sophisticated real estate buyer whose experience has been limited to transactions in jurisdictions where the custom is for a seller to pay for the cost of the buyer's title policy premium as part of the seller's obligation to deliver good title. If that same buyer were to purchase property in a jurisdiction where the custom is for buyers to pay for their own title and survey items, the buyer will incur thousands of dollars in additional cost that may not have been previously budgeted. (On a related note, whichever party will be paying for the title insurance costs should confirm in advance the premium that will be charged for the title policy and endorsements, which vary from state to state, in some instances significantly.)

At a minimum, a buyer should confirm what the local custom is and plan accordingly, whether that is budgeting appropriately or negotiating with the seller to alter the custom by contract. If not using local counsel, a buyer's best source of local custom is the buyer's broker or the local title company.

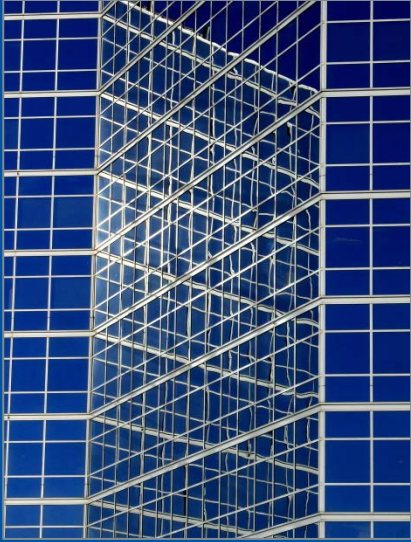
Standard Title Exceptions

Many purchase and sale agreements provide for a title inspection period (though, as discussed above, jurisdictions differ on which party will be responsible for obtaining and paying for the necessary title commitment and survey), whereby buyers can review a title commitment and survey and object to any unacceptable items. If the parties cannot agree on the resolution of these objections, then buyers will typically have an opportunity to terminate the purchase and sale agreement.

Of course, buyers generally are interested in closing the transaction, so it would behoove them to obtain a seller's agreement to cure as many title objections as possible in advance. To avoid any potential confusion and minimize the risk arising from missing the title objection deadline, buyers should strive to include in the purchase and sale agreement an obligation on the seller to remove the standard title exceptions, as well as existing monetary liens and security interests encumbering the property, such as:

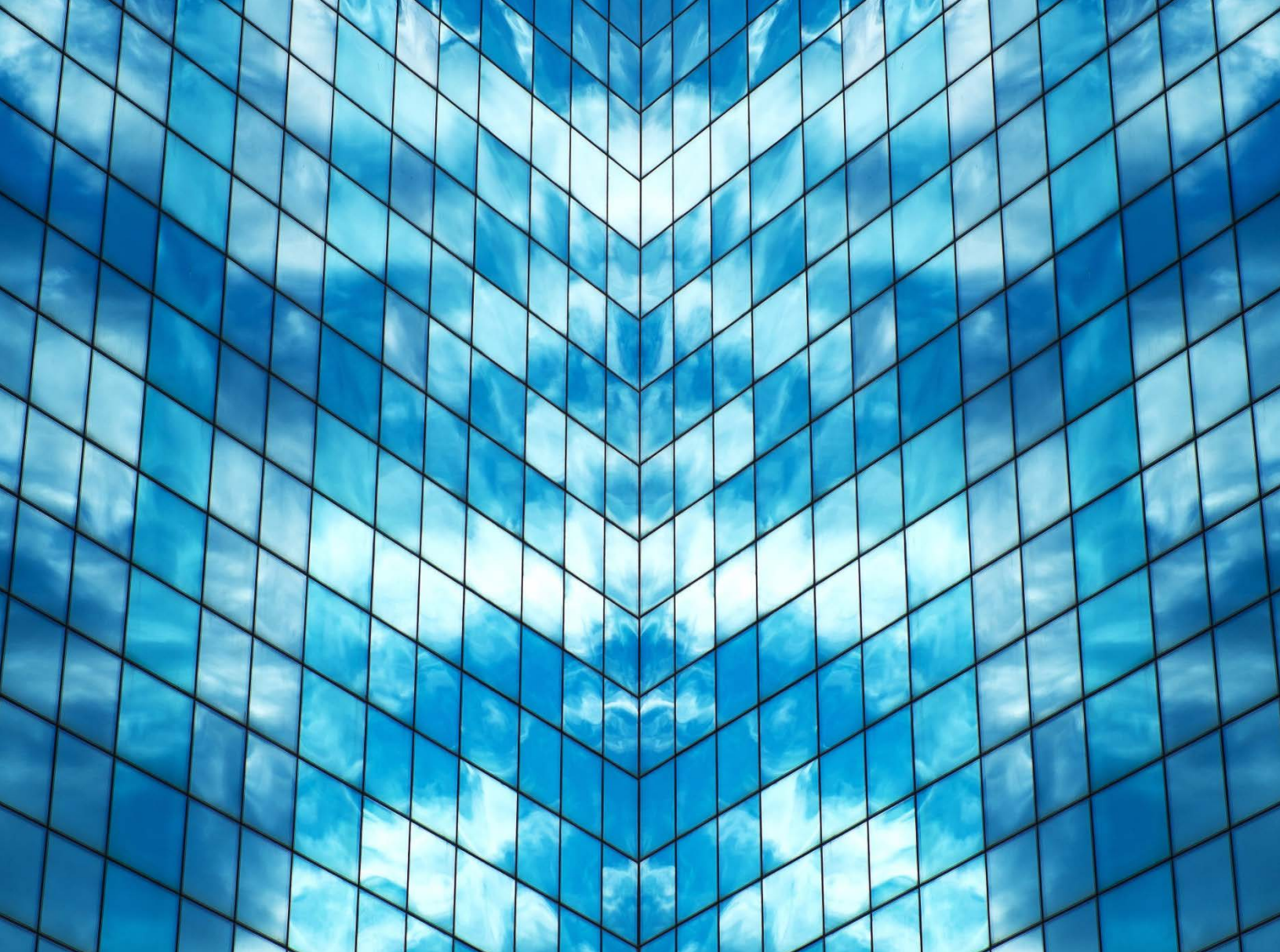
The Permitted Exceptions shall not, in any event, include (i) rights or claims of parties in possession not shown by the public records; (ii) easements, or claims of easements, not shown by the public records; (iii) any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records; and (iv) mortgages, deed of trusts, or other security interests or liens encumbering the Property, which Seller hereby agrees to cure.

If the seller is providing the survey, the buyer may also want to include the survey-related standard title exceptions among the aforementioned items.



Admittedly, few transactions will turn

on any of the items discussed above, but that does not mean that they are unimportant. Parties to real estate transactions would do well to keep these items in mind during their negotiations. Proper attention to these and other details will ensure that the transaction yields the desired result with as little frustration and disappointment as possible.



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