

# Commercial Agreements of Purchase and Sale

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# Bullet Proofing Your Commercial Real Estate Agreements

Critical guidelines to reduce your litigation risk



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## Section A

- Key clauses to consider when drafting Purchase and Sale and Development Agreements



## Section B

- Checklist of representations and warranties to address in a commercial transaction



## Section C

- Analyzing the Issues Considered by the Municipalities with regards to Development Agreements



## Section D

- Examining the Courts' treatment of disputes on unclear agreements



# Section A – Key Clauses to Consider

## Key Clauses to consider when drafting Purchase and Sale and Development Agreements

- **Top Five Self-Evident Truths**

...You need to keep in the back of your mind (and which you may need to bring to the front of the toboggan) in entering into a Purchase & Sale Agreement (“PSA”) – and if you remember these five (5) truths everything else follows:





# Top Five Self-Evident Truths

1. It's a Contract – albeit oriented to a specific kind of asset – but it's a contract



# Top Five Self-Evident Truths (cont'd.)

2. Know who you are dealing with. Gather intelligence on the other party – reputable; assets to support the covenants; reputation – the best PSA in the world will not insulate you from disputes – and the costs – time, money and emotional toll – that flows therefrom



# Top Five Self-Evident Truths (cont'd.)

## 3. The Five P's

- Precision
- Parties
- Property
- Price
- Practical



# Top Five Self-Evident Truths (cont'd.)

## 4. Tax

- Consult with your tax advisor as to the best way to acquire/sell the property
- Build into your PSA the capacity to assign the PSA should circumstances dictate



# Top Five Self-Evident Truths (cont'd.)

## 5. It's All About the Money and the Property

- Listen to your client
- Invest in the transaction



# The Five P's - Precision

- The extensive use of defined terms
- Definitions help with precision
- Assist in future interpretation and reduce the need for repetitive text
- Makes for a tighter boat



# The Five P's - Parties

- Legal or juridicial persons / only individuals and Corporations can execute Agreements
  - Partnerships must sign by all of the partners
  - Trust must sign by all of the trustees
  - Limited partnerships sign by the general partner



# The Five P's - Parties (cont'd.)

- Assignability to a nominee corporation
  - Purchaser – transfer obligations to the nominee and insulate the mothership
  - Vendor – wants as many persons as possible responsible for the covenants under the PSA – resist or require original purchaser to remain obliged under the covenants (pending closing)
- Third Party Consents / Guarantors





# The Five P's - Property

- Define / Specify / Particularize – and do it again
  - Schedule to the PSA
  - Civic address
  - Parcel ID (PID) Number
  - Building / Plant / Equipment
  - Right-of-way / Access Easement / Service Easements required
  
- Specify what you do not want
  - The pile of environmentally contaminated soil
  - The swamp
  - The dilapidated structures / removal



# The Five P's - Property (cont'd.)

- Restrictive Covenants / Parking Agreements
- Co-ownership Agreements



# The Five P's - Price / Payment

- Amount
- Currency / Canadian / US Dollars / Other
- Deposit – Certified Funds
  - Increase on satisfaction of due diligence conditions



# The Five P's - Price / Payment (cont'd)

- How / when do you get the deposit back?
  - Termination / no default / return of due diligence materials
  - Repair of damage if any caused by the due diligence investigations
  - Vendor entitled to reports commissioned by the purchaser e.g. Environmental Site Assessment
  - Vendor / retention – genuine pre-estimate of damages – not penalty



# The Five P's - Price / Payment (cont'd)

- Refundable / Non-refundable
- Secure Funds / Solicitor Trust Cheques / Certified Cheque / Wire Transfers [Canadian Payments Association mandates electronic funds transfer (EFTs) where the transaction exceeds \$25 million]



# The Five P's - Price / Payment (cont'd.)

- Allocation of the Purchase Price
  - Land
  - Buildings and improvements
  - Equipment
  - Parties agree and shall assert the same allocation



# The Five P's - Price / Payment (cont'd)

- Tax – get advice as to the best vehicle to purchase and as a vendor – the best manner of sale – asset/share
- Residency – *Income Tax Act* / Harmonized Sales Tax
- HST – mixed use / commercial / residential allocation



# The Five P's - Practical / Deliverables

- Purchaser: Title and Possession
  - Documents that will vest in the purchaser the title to the Property – clear of all liens and encumbrances
  - Possession – keys / leases / warranties / service contracts and agreements
  - Registration – until you register and establish your priorities you are not safe: GAP insurance (title insurance)
  - Build into your PSA the capacity to register as a condition of release of funds
  - Deliverables





# The Five P's - Practical / Deliverables (cont'd)

- Vendor – secure transmission and delivery of closing monies and deliverables



## Section B - Checklist

- **Checklist of representations and warranties to address in a commercial transaction**
- Checklists are a tool or guide but need to be used and adjusted to reflect the requirements of the instant transaction. With that caveat there follows a checklist of issues (organized by category) that a party would wish to turn their mind to when entering into a commercial real estate transaction.



# Section B – Checklist (cont'd.)

## Corporate Status

- Existence of corporations
- In good standing
- Authority to bind corporation / due authorization and execution
- Resident of Canada for Income Tax purposes
- G.S.T./H.S.T. status of parties
- Status – *Investment Canada Act*
- Not insolvent / no bankruptcy etc.



## Section B – Checklist (cont'd.)

### Status of the Land:

- Vendor has good and marketable title to the land
- “As Is” conveyance
- No defects of title
- Vendor has the authority to sell the land
- Vendor has no obligation to pay any person or Government anything in relation to the land
  - no taxes owing
  - no encumbrances
  - no liens



## Section B – Checklist (cont'd.)

- No pending litigation/expropriation in relation to the land
- No Improvement on adjoining land or encroachments on land
- No options to purchase or rights of first refusal in relation to the land
- Commitments made to any tenant or third person regarding the land
- Leases, contracts and permitted encumbrances are in good standing



## Section B – Checklist (cont'd.)

### **Environmental Condition of Land:**

- Explicit indication that there is no representation of environmental condition
- No environmental issues
- No previous storage, use or transportation of Hazardous materials



## Section B – Checklist (cont'd.)

- Land has not contained urea formaldehyde foam insulation, asbestos, PCB's, radioactive materials or substances determined to be injurious to human life or health
- No underground petroleum tanks
- Land not used as a waste disposal site
- Remediation requirements
  - Who pays?



# Section B – Checklist (cont'd.)

## Representations Related to the Contract

### Conflicts:

- Land and Zoning suitable to use
- Contract does not conflict with any law
- Contract will not place a party in breach of a court order
- Contract will not breach any other obligation of the party





## Section B – Checklist (cont'd.)

- Due Diligence
  - Length of due diligence period
  - Indemnity during due diligence period



# Section B – Checklist (cont'd.)

## General

- Survival of Representations
  - Carry on after completion of contract?
    - Time period?
- Accounting Principles to be used
- No further consent from Government Authority required



## Section B – Checklist (cont'd.)

- No further information missing
- No further disclosure
- No material or adverse change since previous documents (if stated)
- No entitlement to Broker's fees



## Section B – Checklist (cont'd.)

- Insurance aspects
- Assets required to carry on business present and in good working order
- Representations are complete and accurate
- No other representations except those listed
- Confidentiality



# Section B – Checklist (cont'd.)

## Other Contract Specific Concerns

- Discuss with a legal professional
  - eg. – status / representations with respect to a key asset
  - consents



# Section C - Analyzing Issues

- **Analyzing the issues considered by the municipalities with regards to Development Agreements**



# What Is A Development Agreement?

- “Development Agreement” is a term given to a type of agreement entered into between a municipality (or any approval authority) and a property owner that:
  1. Is required by the municipality as a condition (typically a pre-condition) of a given development approval (which often involves a rezoning of lands); and
  2. Regulates or ensures that the property owner fulfills the conditions that the municipality (or approval authority) has imposed in granting the approval.



# Capacity to Contract

- A municipality is a creature of the Province, created by a provincial enactment wherein the express powers of a municipality are set out.
- In Nova Scotia, the relevant legislation is the *Municipal Government Act*, S.N.S., 1998, c. 18
- Section 13 of the *Municipal Government Act* determines who may sign contracts on behalf of a municipality





# *Intra Vires / Ultra Vires*

- It is important to ensure that the contract entered into with a municipality is within an express or implied statutory authority. A contract entered into within the scope of authority of the municipality is an *intra vires* contract. Conversely, if the Municipality enters into a contract that is beyond the authority conferred upon it by law then the contract is an *ultra vires* contract.



## *Intra Vires / Ultra Vires (cont'd.)*

- From a developer's perspective, it is important (and incumbent) upon the property owner to determine the legal capacity of the municipality to enter into a particular contract. Contracting parties dealing with the municipality should ensure that the municipal contract is *intra vires* the municipality otherwise the agreement will be void and all rights that once flowed from the agreement will no longer exist.



## *Intra Vires / Ultra Vires (cont'd.)*

- In terms of the issues considered by the municipalities (and I will confine my comments to the *Municipal Government Act* – Nova Scotia) but, as a general proposition, these comments will extend across the jurisdictions the enabling legislation is the first stop.
- Part VIII – Planning and Development – is the relevant section of the *Municipal Government Act*.
- Section 225 of the *Municipal Government Act* outlines the scenarios where municipal council may consider development by Development Agreement



# Common Considerations

The most common considerations addressed by municipalities and imposed within Development Agreements are those designed to obtain:

1. Municipal Services;
2. Financial Payments and Guarantees;
3. The Maintenance of Specific Development Standards; and
4. Setting the Hook



# Municipal Services

- Land owners should ensure that the services they are being contractually obligated to provided or to pay for relate directly to the proposed development. The leading decision concerning the reasonableness of conditions imposed on subdivision approval (and by extension development agreements) is *Mills v. York (Regional Municipality) Land Division Committee* (1975), 9 O.R. (2d) 349, 60 D.L.R. (3d) 405 (Ontario Divisional Court) which stands for the principle that the conditions imposed by an approval authority must be relevant and fairly and reasonably related to the consequences of the proposed development.



# Financial Payments and Guarantees

- This is expressly provided for in Section 227(1)(h) of the *Municipal Government Act*. Again, the financial payments required in the Development Agreement must relate to the subject lands of the proposed development and not general municipal matters [Pine Tree Developments Co. v. Ontario (Minister of Housing) (1976), 1 M.P.L.R. 277, 14 O.R. (2d) 687]



# Financial Payments and Guarantees (cont'd.)

- The property owner will want to ensure that the Development Agreement precisely details the process that must be satisfied by the property owner in order to obtain a reduction or release of any posted security



# Development Standards

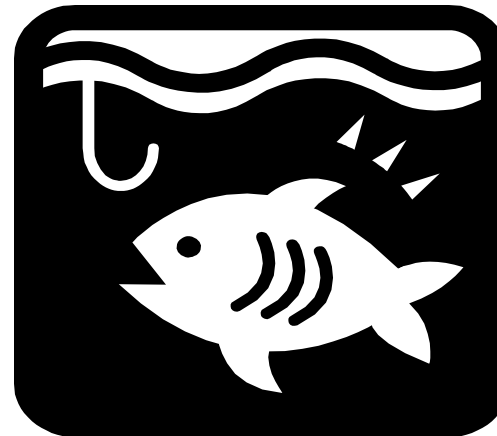
- Section 227(1)(a) of the *Municipal Government Act* incorporates by reference the provision that a Development Agreement may contain terms with respect to matters that a land use by-law may contain (see Section 220(4) of the *Municipal Government Act*)





# Setting the Hook

In a number of jurisdictions Development Agreements are characterized as binding only on the parties to the agreements. This issue is avoided, statutorily, under the *Municipal Government Act* wherein pursuant to Section 234 if the owner of a property that is subject to a Development Agreement conveys all or part of the property to a person not a party to the Development Agreement, the Development Agreement continues to apply to the property until discharged by council.



## Setting the Hook (cont'd.)

Municipalities may also insist on the inclusion of an assumption clause in Development Agreements requiring a subsequent owner to enter into a Development Assumption Agreement with a municipality. The effect of the Development Assumption Agreement is to bind the subsequent owner, in contract, to deliver or to perform any matters not completed by the former owner under the Development Agreement.



# Section D - Examination of the Courts' Treatment

- Examining the Courts' treatment of disputes on unclear agreements



## Section D - Examination of the Courts' Treatment (cont'd.)

- In Canada, the classical or traditional approach to the interpretation of written contracts was outlined by Saunders, J.A. of the British Columbia Court of Appeal in *Gilchrist v. Western Star Trucks Inc.* (2000), 73 B.C.L.R. (3d) (102) where he stated:

“The goal in interpreting an agreement is to discover, objectively, the parties’ intentions at the time the contract was made. The most significant tool is the language of the agreement itself. The language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations may the court consider other matters such as the post-contracting conduct of the parties.”



## Section D - Examination of the Courts' Treatment (cont'd.)

- In England and some commonwealth countries a “more relaxed approach” has been advocated (see *Investors' Compensation Scheme Limited v. West Bromwich Building Society*, (1997), [1998] 1 W.L.R. 896 (U.K.H.L.) but Canadian Courts continue to adhere to the classical approach noted in *Gilchrist v. Western Star*.



## Section D - Examination of the Courts' Treatment (cont'd.)

- In the interpretation of contracts, I wanted to bring to your attention some of the tools employed by the Courts in the interpretation of contracts. In no particular order, the following:

### 1. **The possibility of implication**

It's been a long standing proposition that it is not always possible to confine the terms of a contract (written, oral or both) to those terms to which have been expressly articulated by the parties. A term will be implied on the idea or basis that Courts in their interpretation of the contract are seeking to discover what the parties intended and not what a Court thinks is reasonable.



# Section D - Examination of the Courts' Treatment (cont'd.)

## 2. Business Efficacy

The doctrine of business efficacy while a variation on the theme of an implied term, the Courts will imply a term or terms to make the transaction effective; to give support to the contract in what has been called “business efficacy” so as to avoid a failure of the contract which could not have been the contemplated outcome.



## Section D - Examination of the Courts' Treatment (cont'd.)

### 3. Usage and custom

In certain circumstances, where a usage or custom was reasonably certain, notorious and generally agreed to by those in a particular trade or business then it may be presumed to form an ingredient of the contract but it needs to be recognized that the express terms of the contract can oust the application of the custom. In other words, any alleged custom must not be inconsistent with the specific terms of the contract.





## Section D - Examination of the Courts' Treatment (cont'd.)

### 4. Statutory Terms

This occurs whenever a statute implies a term into a contract within the scope of the statute. In the context of commercial real estate Agreements of Purchase and Sale the *Vendors and Purchasers Act* (Nova Scotia) is a relevant example. This Act imposes certain statutory conditions should these terms not be expressed in the contract and these terms are incorporated into the contract as a matter of law.



# Questions

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