Advanced Topics in Commercial Real Estate Law

Reference Manual
Volume No. 16-048

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OHIO STATE BAR ASSOCIATION
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To advance the professional interests of members of the Ohio State Bar Association.

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Advanced Topics in Commercial Real Estate Law

Vol. # 16-048

6.0 CLE Credit Hours; 6.0 Business, Commercial and Industrial Real Property Law Specialization Hours; 6.0 Title Insurance CE Hours

Thursday, August 04, 2016

Columbus
(Live in-person and via Webcast)

Friday, August 19, 2016

Cleveland
(Live in-person)

The Supreme Court Commission on CLE *has requested that we advise you that during this seminar, phones should be muted or turned off. If you must take a call during the presentations, please take the call outside of the room.*

Out of respect for your colleagues and speakers, the Commission asks that you not read the paper or engage in other activities that may be distracting to your fellow colleagues.

Please note scheduled breaks will be offered during the seminar.

The amount of CLE credit you are eligible to receive may be reduced if you are absent during the seminar. If you need to leave during the seminar, please make the appropriate deduction from your request for CLE credit.

CLE regulations require that we submit requests for credit within 30 days of the date of the seminar or be assessed a late fee. If you leave without completing the appropriate paperwork, your credit will not be reported.

8:00am Registration

8:30 Challenging Necessity in an Eminent Domain Action: A Highway Project Case Study

Columbus: Jeremy S. Young; Roetzel & Andress LPA; Columbus
Cleveland: Charles T. Riehl; Walter | Haverfield LLP; Cleveland

9: 30 Acquisition Documents

Columbus: Jack S. Levey; Plunkett Cooney, P.C.; Columbus
Cleveland: Karla M. Rogers; Calfee, Halter & Griswold LLP; Cleveland
Gary L. Ellsworth; Calfee, Halter & Griswold LLP; Cleveland

10:30 Break

10:45 Title Insurance for Commercial Real Estate Transactions

Columbus: Steven E. Elder; Fidelity National Title Insurance Company; Columbus
Nathan Heinz; Fidelity National Title Insurance Company; Columbus
Cleveland: Linda M. Green; Fidelity National Title Group; Cleveland

11:45 Lunch (on your own)

12:45 Assignments and Subleases

Columbus: Jack S. Levey; Plunkett Cooney, P.C.; Columbus
Cleveland: Lori A. Pittman Haas; Ulmer & Berne LLP; Cleveland

1:45 Break

2:00 Environmental Site Assessments

Columbus: Nathan C. Hunt; Thompson Hine LLP; Dayton
Cleveland: Heather Aley Austin; Thompson Hine LLP; Cleveland

3:15 <u>Columbus</u>: Real Estate Law in the Sharing Economy—from Airbnb to Crowdfunding for Real Estate Transactions

John D. (Jack) Gillespie; Shumaker, Loop & Kendrick, LLP; Columbus

<u>Cleveland</u>: Impact of Land Use Law on Commercial Development

Charles T. Riehl; Walter | Haverfield LLP; Cleveland

4:00pm Program Concludes

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Ohio State Bar Association
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Race and ethnicity (optional): *This information is used for statistical purposes only.*

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Ohio registration status: ☐ Active ☐ Inactive ☐ Corporate ☐ Retired ☐ Registered out-of-state only

Date first admitted to any state bar: _____ Which bar: _____ If admitted in Ohio, when: _____

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Type of practice currently involved in (full-time):

Law firm:
- ☐ Sole practitioner
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- ☐ Federal
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- ☐ Other: _____

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- ☐ Securities
- ☐ Social Security
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- ☐ Taxation
- ☐ Workers' Compensation
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Are you a certified specialist in any of these areas? ☐ yes ☐ no

If yes, which area(s)? _____

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_____

_____

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- ☐ Insurance Law
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- ☐ Traffic Law
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Featured Speakers

Heather Aley Austin

Thompson Hine LLP
Cleveland, Ohio

Ms. Austin received her BA from Allegheny College and her JD from the University of Pittsburgh School of Law. Her professional memberships include the Cleveland Metropolitan Bar Association (Environmental Law Section), Ohio State Bar Association (Environmental Law Committee), and Environmental Manager's Compliance (Board of Experts). Ms. Austin is of counsel in her firm's Environmental Practice Group. She focuses her practice on environmental counseling in business, regulatory, and legislative matters; environmental enforcement actions; and compliance with environmental regulations. Ms. Austin is proficient in handling complex environmental issues in mergers and acquisitions, as well as real estate and brownfield redevelopment projects. She is a frequent lecturer and author on environmental issues impacting commercial real estate transactions, environmental insurance, and environmental issues affecting corporate governance. For additional information, please visit www.thompsonhine.com.

Steven E. Elder

Fidelity National Title Insurance Company
Westerville, Ohio

Mr. Elder received his BS from Bowling Green State University and his JD from Cleveland State University Cleveland-Marshall College of Law. He is the Senior Commercial Underwriting Counsel and AVP for Fidelity National Title Insurance Company in its Westerville, Ohio National Commercial Services office. Mr. Elder functions as the Lead Underwriter for the Great Lakes Commercial Operations on complex commercial transactions for key customers. While maintaining his own National accounts, he assists others in the Great Lakes territory and around the country with various Ohio underwriting matters as a key resource for all commercial staff. Mr. Elder is a liaison between customers, their attorneys, lenders, developers, Fidelity's various National Commercial Services offices, and management. He also assists in areas of training, sales and marketing, business development, workflow, compliance, etc. Mr. Elder reviews and addresses objection letters, surveys, and title clearance matters. Some of his duties are to draft and negotiate policy exceptions, endorsements and escrow agreements, and to evaluate risk and approve high risk coverages in accord with state regulations and company guidelines. Prior to rejoining Fidelity in 2014, Mr. Elder was an Ohio attorney who managed, negotiated, and litigated statewide real estate title insurance claims in Ohio's state and federal courts. He is a former Regional Manager, Vice President, and Corporate Counsel for Title First Agency, Inc., which was then Ohio's largest title agency. Mr. Elder is also the former Great Lakes Area Claims and Litigation Counsel for Chicago Title Insurance Company, Ticor Title Insurance Company, and Security Union Title Insurance Company, where he administered claims for the States of Ohio, Western Pennsylvania, Kentucky, and West Virginia. He was simultaneously the Great Lakes Regional Recoupment Coordinator for these three companies. As past State Counsel for Ticor in Ohio and past Associate General Counsel for Midland Title, Mr. Elder has been intimately involved with title underwriting matters for many years. He has appeared in trial and appellate courts throughout Ohio (including the Supreme Court of Ohio) and has an extensive litigation and appellate background. Mr. Elder has been handling underwriting matters and all aspects of title insurance claims for the past 28 years for various national underwriters. He is the author of Service by Publications—Published Legal Notices—Newspapers of "General Circulation—Title Insurance, Title Topics, July 1990. Mr. Elder was on the Education Committee of the OLTA from (2008-2011) and was a speaker at the May 1991, 1994, 1996, 2008, 2010, and 2011 OLTA Title Insurance Seminars, as well as at various claims conferences in Ohio, Pennsylvania, Florida, Nebraska, and New York. He has opined as an Expert Witness on title matters. Mr. Elder was also a Realtor associate and/or broker for over 26 years. He has run his own title agency and maintains his Title Agent's License while at Fidelity. Mr. Elder is a member of the OLTA and various Bar Associations, as well as a past member of Chicago Title's Claims Advisory Council.

Gary L. Ellsworth

Calfee, Halter & Griswold LLP
Cleveland, Ohio

Mr. Ellsworth counsels clients on real estate matters, assisting them with the acquisition, sale, leasing, and conservation of both developed and undeveloped land. He has assisted private land owners, municipalities, and townships in a variety of matters, including the transfer of property, leasing, zoning, land development,

and mineral interest issues. Mr. Ellsworth also has experience in preparing and negotiating commercial agreements for electronic companies regarding computer hardware/software. He was formerly a member of the Board of Zoning Appeals for the City of Wickliffe, and he is currently a member of the Cleveland Metropolitan Bar Association and the Ohio Bar Association. Mr. Ellsworth has been awarded the American Bar Association Book Award for excellence in local government law. He is also coauthor of "At Risk Landlords: How to Protect Your New Lease," for the *Cleveland Metropolitan Bar Journal*. Previously, Mr. Ellsworth worked for Pioneer-Standard Electronics, Inc. and the Cleveland Metroparks as a Geographic Information Systems Manager and Regional Park Planner. His duties included assisting land owners, municipalities, and townships in issues concerning land conservation. Mr. Ellsworth joined Calfee in 2007.

John D. "Jack" Gillespie

Shumaker, Loop & Kendrick, LLP
Columbus, Ohio

Mr. Gillespie received his BA, cum laude, from Ohio Wesleyan University and his JD from The Ohio State University Michael E. Moritz College of Law. He has extensive experience representing developers and investors on all aspects of commercial real estate development and joint venture formation. Mr. Gillespie regularly represents developers and investors in connection with financings and small businesses in connection with their corporate needs. He also has substantial experience representing buyers and sellers of real estate on large portfolio transactions, including complex ground and air rights lease transactions. Mr. Gillespie focuses in health care real estate, including senior housing facilities (skilled nursing, assisted living, and memory care), medical office buildings, and physician practices. Investors in health care real estate (whether medical office building developers, health care REITs or physician groups) often require his counsel in negotiating transactions with hospital systems. On a day-to-day basis, in connection with his health care real estate practice, Mr. Gillespie covers a number of issues, including acquisition, disposition, and development of medical office buildings; the needs of REITs in acquisitions; new development projects; dispositions, loan assumptions, and consents; leasing transactions, campus developments, and hospital master leases; ground leases and air rights leases in connection with campus developments; and development, asset management, and property management agreements. He serves as part of a team designated as national leasing counsel for a publicly traded health care REIT with a portfolio comprising over 15 million square feet.

Linda M. Green

Fidelity National Title Group
Cleveland, Ohio

Ms. Green received her BA from Valparaiso University and her JD from Cleveland State University Cleveland-Marshall College of Law. She has extensive experience in commercial examining and title underwriting. Ms. Green is the past Chair for the Real Estate Section of the Cleveland Metropolitan Bar Association; the past president of CREW (Commercial Real Estate Women) and the Cleveland Title Association; and a member of Greater Cleveland Mortgage Bankers Association, International Council of Shopping Centers, and the Ohio Land Title Association. She is a frequent speaker on topics of title insurance and title examining.

Lori A. Pittman Haas

Ulmer & Berne LLP
Cleveland, Ohio

Ms. Pittman Haas received her BSBA from Youngstown State University and her JD from The University of Akron School of Law. Her professional memberships include the Commercial Real Estate Women—Cleveland Chapter, American Bar Association (Real Property, Probate, and Trust Law Section; Co-Chair, Planning Committee for Real Estate Law Institute), Ohio State Bar Association, Cleveland Metropolitan Bar Association (Real Estate Section), and International Council of Shopping Centers. Ms. Pittman Haas is an associate of her firm and focuses her practice on real estate and business law. She represents buyers and sellers in the acquisition, disposition, and development of commercial property, including convenience stores with fuel facilities and shopping centers. In addition, she represents shopping center developers, commercial property owners, and lenders with respect to borrowing and refinancing transactions. Ms. Pittman Haas has conducted due diligence analysis on hundreds of properties and has significant experience in recognizing and resolving title problems. She is experienced in representing landlords and tenants on retail and office leasing matters and has significant experience in liquor licensing. In addition, Ms. Pittman Haas has provided real estate assistance to creditors' rights counsel with respect to work outs, landlord-tenant issues in bankruptcy, cognovit judgments, foreclosures, and receivership cases. For additional information, please visit www.ulmer.com.

Nathan E. Heinz

Fidelity National Title Insurance Company
Westerville, Ohio

Mr. Heinz received his JD from Marquette University and his undergraduate degree from Ball State University. He has also spoken at several CLE seminars relating to title insurance in Minnesota, Illinois, and Ohio. Mr. Heinz is the National Counsel and AVP for Fidelity National Title Insurance Company in its Westerville, Ohio National Commercial Services office. He started in the industry as a title searcher for rural agricultural properties in Indiana in 2002. Mr. Heinz has since worked in offices with the Fidelity family of title insurance underwriters in Milwaukee, Wisconsin; Minneapolis, Minnesota; Chicago, Illinois; and Columbus, Ohio. Most recently, he worked for five years in the Chicago Title National Commercial Services unit in Chicago. Mr. Heinz underwrites national transactions encompassing various types of commercial, multifamily, industrial, and health care properties.

Nathan C. Hunt

Thompson Hine, LLP
Dayton, Ohio

Mr. Hunt received his BA from Wright State University and his JD from The University of Toledo College of Law. His professional memberships include the Dayton Bar Association, Culture Works (Associate Board Member), and Tawasi Business Association. Mr. Hunt is a member of his firm's Environmental Practice Group. He focuses his practice on environmental counseling in business, regulatory and legislative matters, environmental enforcement actions, and compliance with environmental regulations. Mr. Hunt's specific areas of concentration include Superfund matters; air and water pollution control issues; compliance counseling for hazardous waste; toxic torts; land use matters; and federal, state, and local permits and licenses. He is a frequent speaker on topics related to his areas of practice. For additional information, please visit www.thompsonhine.com.

Jack S. Levey

Plunkett Cooney
Columbus, Ohio

Mr. Levey received his BA from the University of Wisconsin—Madison and his JD from the University of Minnesota Law School. His professional memberships include the Columbus Bar Association (Real Property Law Committee) and Ohio State Bar Association (Real Property Law Committee). Mr. Levey is a senior attorney at his firm, where his practice focuses on real estate and business law, including commercial leasing, purchases and sales, financing, and multiparty agreements in connection with governmental incentives and public/private partnerships. He also serves as special counsel to the owner/operator of a major regional convention facility. Mr. Levey is coauthor with Kenton L. Kuehnle of the reference book *Baldwin's Ohio Practice, Ohio Real Estate Law* (3d ed. West, 2003). His articles on real estate and business law have appeared in *The Practical Real Estate Lawyer, Probate and Property*, and many other American Bar Association publications. For additional information, please visit www.plunkettcooney.com.

Charles T. Riehl

Walter | Haverfield LLP
Cleveland, Ohio

Mr. Riehl received his BA from Colgate University and his LLB from Case Western Reserve University School of Law. His professional memberships include the Cuyahoga County Board of Health (Board Member), Cuyahoga County Law Directors Association, Ohio Municipal Attorneys Association, International Municipal Lawyers Association, and various bar associations. Mr. Riehl divides his practice between private client representation for the firm's litigation group and municipal representation for its public law group. In his municipal practice, he has previously served as the law director of the municipalities of Hudson, Shaker Heights, Cuyahoga Heights, Richfield, Gates Mills, and Solon. As part of his public law practice, Mr. Riehl has dealt with a wide variety of zoning, telecommunications, employment, civil service, environmental, and construction issues and has established a regional council of governments for housing purposes and helped establish nonprofit corporations for public self-insurance pools. He has successfully represented cities, companies, and individuals in a wide range of civil proceedings. Mr. Riehl is a frequent lecturer on numerous zoning and governmental issues. For additional information, please visit www.walterhav.com.

Karla M. Rogers

Calfee, Halter & Griswold LLP
Cleveland, Ohio

Ms. Rogers' primary focus is real estate law and commercial business finance law. She is experienced in property development, acquisitions, dispositions, and leases involving corporate mergers, acquisitions, and divestures for public and privately held companies. Ms. Rogers negotiates and drafts commercial, industrial and retail leases on behalf of landlords and tenants. She provides counsel to a diverse group of clients on issues involving property acquisition and assembly, land use, zoning compliance, and appeals. Ms. Rogers advises clients on title and survey matters in connection with individual and multisite real estate acquisitions. She structures, negotiates, and drafts real estate financing agreements and facilitates secured financing transactions for Fortune 500 companies, institutional lenders, and privately held companies in the commercial and industrial sectors. Ms. Rogers is a member of the Ohio State and Cleveland Metropolitan Bar Associations. Additionally, she serves on the advisory board of Chicago Title Insurance Company and the board of directors of Shoes and Clothes for Kids, and she has been named as one of America's Leading Lawyers in Chambers USA. Previously the director of governmental affairs for the Building Industry Association of Cleveland and Suburban Counties, Ms. Rogers was also an associate with Taft, Stettinius & Hollister before joining Calfee in 1998.

Jeremy S. Young

Roetzel & Andress LPA
Columbus, Ohio

Mr. Young received his BA from The Ohio State University and his JD from The Ohio State University Michael E. Moritz College of Law. His professional memberships include the Ohio Association of Civil Trial Attorneys, Columbus Bar Association (Common Pleas Court Committee), and the Ohio State Bar Association (Appellate Practice Committee; Litigation Section). Mr. Young is an associate of his firm and focuses his practice on business and commercial litigation, with an emphasis on eminent domain litigation and appellate law. He has experience litigating contract, commercial, corporate, securities, and premises liability issues and disputes. Mr. Young also has considerable experience in matters of insurance coverage, medical malpractice defense, and personal injury/tort liability defense. He is the co-editor of Business Advocate and a frequent presenter of topics related to his areas of practice. For additional information, please visit www.ralaw.com.

Chapter 1: Challenging Necessity in an Eminent Domain Action: A Highway Project Case Study

Prepared and Presented By:
Jeremy S. Young
Roetzel & Andress LPA
Columbus, Ohio

Presented By:
Chalres T. Riehl
Walter|Haverfield LLP
Columbus, Ohio

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CHALLENGING NECESSITY IN AN EMINENT DOMAIN ACTION:

A highway project case study

ROETZEL

Presented by Jeremy S. Young, Esq.

ROETZEL
FOCUSED ON WHAT MATTERS TO YOU

LEGAL PRINCIPLES

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FOCUSED ON WHAT MATTERS TO YOU

Necessity

"…[W]here there is no necessity for taking private property for public use, the right of eminent domain cannot be successfully invoked."

***Federal Gas & Fuel Co. v. Townsend*, 1903 WL 710, 4 (Ohio Com.Pl. 1903).**

"When private property is appropriated for a public or quasi-public use, unless express authority is given by statute, no greater estate or interest may be taken than is necessary for such public use. In such case, where an easement is sufficient, only an easement may be taken."

***Henry v. Columbus Depot Co.*, 135 Ohio St. 311, 20 N.E.2d 921, par. 1 Syllabus (1939).**

"Necessity means that which is indispensable or requisite especially toward the attainment of some end…In statutory eminent domain cases it cannot be limited to an absolute physical necessity. It means reasonably convenient or useful to the public…"

***City of Dayton v. Keys, 21 Ohio Misc.*, 105, 112, 252 N.E.2d 655, 659 (Ohio Com.Pl. 1969).**

ROETZEL
FOCUSED ON WHAT MATTERS TO YOU

Petition for Appropriation – R.C. 163.05

An agency that has met the requirements of sections 163.04 and 163.041 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action. All petitions shall contain:

****

(B)(1) A statement that the appropriation is necessary, for a public use, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate…

ROETZEL
FOCUSED ON WHAT MATTERS TO YOU

Answer - R.C. 163.08

Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted.

The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation…

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Necessity Hearing - R.C. 163.09

(B)(1) When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in that section, the court shall set a day, not less than five or more than fifteen days from the date the answer was filed, to hear those matters. Upon those matters, the burden of proof is upon the agency by a preponderance of the evidence except as follows:

(a) A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation if the agency is not appropriating the property because it is a blighted parcel or part of a blighted area or slum.

****

(2) Subject to the irrebuttable presumption in division (B)(1)(c) of this section, only the judge may determine the necessity of the appropriation…

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ODOT v. Speedway, Erie County, Ohio

STATE OF OHIO DEPARTMENT OF TRANSPORTATION

Represented by

SEAL OF THE ATTORNEY GENERAL OF OHIO

Speedway

Represented by

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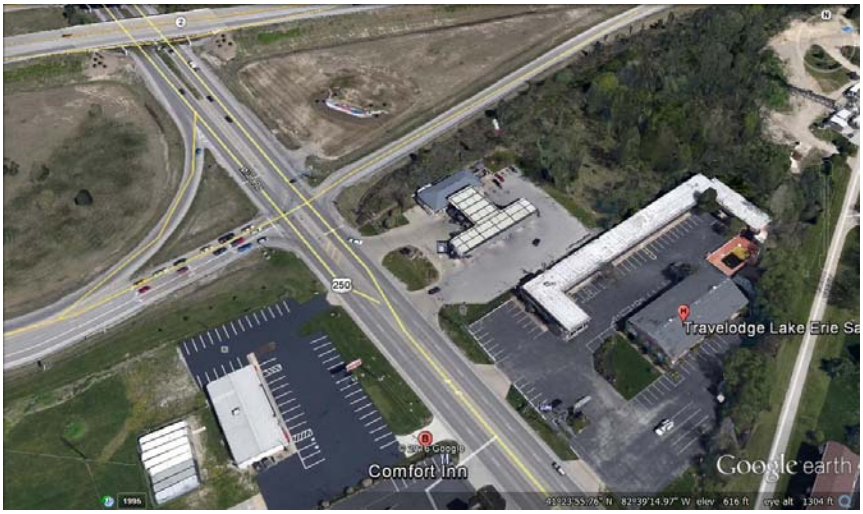
Aerial of Store and Intersection of US 250 and SR 2



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Street View of Speedway and Intersection of US 250 and SR 2

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Street View of Speedway Site

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ODOT's Petition

- **"Plaintiff intends to obtain and take possession of and enter upon the property being appropriated for the purposes of making, constructing, repairing or improving a state, U.S. or Interstate highway which shall be open to the public, without charge."**
- **Resolution – "WL" taking**
- **Resolution – "…to make construct, repair or improve U.S. Route 250…**
- **Resolution – "In accordance with R.C. 163.06(B), it is necessary and it is my intention to forthwith obtain and take possession of and enter upon and occupy the property appropriated."**

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Speedway's Answer

- **No necessity challenge**
- **Nothing in Petition or Resolution suggested that a necessity challenge could succeed.**
- **Speedway simply requested that it be awarded compensation for the property taken and damages to the residue.**

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New Information

- **During a site visit to the property with the Judge, it is revealed that the appropriation is part of an access management project**
- **Purpose of appropriation is to control access to US 250/Milan Rd.**

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Speedway's Motion to Amend Answer

- **Civil Rule 15(A): "The Court shall freely give leave [to amend pleadings] when justice so requires."**
- **Speedway argued that appropriation not for the making or repairing of public roads because it was merely an access management taking.**
- **Speedway argued that the closure of the north drive was not necessary based upon the opinion of its engineering expert—alternate design available that did not require closure of drive.**

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ODOT's Opposition to Motion to Amend Answer

- **R.C. 163.08 governs, not Civil Rule 15, and it does not provide for amendments of answers.**
- **Speedway waived ability to challenge necessity by failing to avail itself of administrative objection process addressed in Notice of Intent to Acquire (10-day window to object).**
- **Closure of north drive necessary due to reconstruction of eastbound on-ramp to SR 2—therefore appropriation is for the making or repairing of public roads.**
- **Speedway's proposal that alternate design is available is beyond Speedway's or Court's purview—ODOT discretion on design absolute. *Risner v. ODOT*, 2015-Ohio-4443.**

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Speedway's Reply Brief

- **Civil Rule 15 governs.**
- **R.C. 163.08 no bar because access management taking not for the making or repairing of public roads.**
- ***Weir v. Wiseman*, 2 Ohio St.3d 92 (1982) – requires necessity hearing in case involving appropriation that is ostensibly filed for the purpose of making or repairing a road where the answer specifically denies that the project actually involves the making or repairing of a road.**
- **No legal support for ODOT's waiver argument.**
  - Case law supports ability to challenge necessity without exhausting administrative remedy. *Thormyer v. Irvin*, 170 Ohio St. 276 (1960) (permitting necessity challenge in separate injunction action).
  - Exhaustion of administrative remedies doctrine subject to exception on constitutional issues and when administrative remedy is onerous.
- **ODOT attempting to shift public burden onto Speedway by adopting cheaper design that closes north drive.**
- **ODOT's highway design decisions not absolute. *Risner* distinguishable--deals only with ODOT liability in accident cases.**

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Court Grants Motion for Leave to Amend Answer

- **"…while R.C. 163.08 precludes a party from challenging the necessity of the appropriation when the seizure is for the purpose of making or repairing roads, Defendant seeks to amend its answer challenging necessity and alleging that the seizure of the property is not for the making or repairing of roads but instead the purpose is in connection with an access management project in order to control access to US 250/Milan Rd."**

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Speedway's Amended Answer – Specific Denial

- **Because this eminent domain action is being prosecuted in connection with an access management project, Defendant denies that Plaintiff intends to obtain and take possession of and enter upon the property at issue for the purpose of making, constructing, repairing or improving a state, U.S. or Interstate highway which shall be open to the public without charge. Further, consistent with R.C. 163.08, Defendant specifically denies the allegations set forth in paragraph 2 of Plaintiff's Petition, as follows:**
  - As alleged in Plaintiff's Petition, this action involves both temporary and permanent takings of the subject property ("Property"). According to the Resolution attached as Exhibit 1 to the Petition, the Project requires the permanent taking of a fee-simple interest in a .1937-acre piece of land, including limitation of highway access, as well as a temporary taking of .0685 acres for construction purposes. The permanent taking involves the closure of one of the Property's two existing access points/drives onto U.S. Route 250/Milan Rd. As the access point/drive at issue is the northernmost of the two, it is referred to herein as the "North Drive."
  - Plaintiff has indicated an intention to begin construction on the Property soon, on or before April 1, 2016.
  - The closure of the North Drive is not necessary for the Project, and Plaintiff is able to effectively complete the Project without closing the North Drive.
  - The use of the North Drive by Speedway and the motoring public does not pose a safety concern, because no significant number of motor vehicle accidents has occurred at that location. Thus, the closure of the North Drive is not necessary for safety reasons.
  - The use of the North Drive by Speedway and the motoring public does not cause any undue disruption in the flow of traffic. Thus, the closure of the North Drive is not necessary for reasons relating to traffic flow.
  - The closure of the North Drive is not necessary in order to improve the safety or convenience of the nearby highway entrance ramp onto State Route 2. Although Speedway understands that Plaintiff plans to move the entrance to that ramp closer to the Property in order to assist tractor trailers in turning onto State Route 2, the same objective can be accomplished without requiring the closure of the North Drive. From an engineering standpoint, other alternatives are available, which would be equally effective to assist tractor trailers in turning onto State Route 2, without needlessly violating Speedway's rights as a property owner.
  - By determining that the North Drive should be closed in connection with the Project when equally effective alternatives exist, Plaintiff is wrongfully seeking to take Speedway's property without due process of law and to violate/trespass upon Speedway's property rights, which are protected by Article 1, Section 19 of the Ohio Constitution and the Fifth Amendment to the U.S. Constitution. In this way, Plaintiff has acted arbitrarily and unreasonably and has abused its discretion.

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Speedway's Motion to Set Necessity Hearing

- **R.C. 163.09(B)(1) provides, in pertinent part, as follows:**
  - When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in that section, the court shall set a day, not less than five or more than fifteen days from the date the answer was filed, to hear those matters. Upon those matters, the burden of proof is upon the agency by a preponderance of the evidence… (Emphasis added).
- **Based upon the foregoing, the Court is required to set a necessity hearing, at which the parties may present evidence relating to whether the closure of the North Drive is necessary.**
- **ODOT has represented to the Court that it intends to begin construction on the subject property on or after May 1, 2016. Therefore, and consistent with the directive of R.C. 163.09(B)(1), a prompt necessity hearing is essential.**

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ODOT's Opposition to Motion to Set Necessity Hearing

- **Under *Weir v. Wiseman* and R.C. 163.08, Speedway is only entitled to a hearing regarding whether the appropriation is for the purpose of making or repairing public roads.**
- **A necessity hearing can only occur if Speedway proves the appropriation is not for the making or repairing public roads.**

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Speedway's Reply Brief

- ***Weir v. Wiseman* and R.C. 163.08 do not support ODOT's position, and there is no legal authority that does.**
- **R.C. 163.09 is the only relevant authority, and it requires necessity hearing in this circumstance.**
- **Judicial economy weighs in favor of holding a single hearing on both the issue of whether the appropriation is for the making or repairing of roads and on necessity.**

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Court Grants Speedway's Motion—Necessity Hearing to Proceed April 14, 2016

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Speedway's Motion to Prevent ODOT from Exercising Quick Take Rights

- **Same standard of making or repairing public roads is used in both R.C. 163.08 and R.C. 163.06.**
  - Under R.C. 163.08, a property owner cannot challenge necessity if the appropriation is for the making or repairing of public roads.
  - Under R.C. 163.06, an appropriating authority may exercise quick take rights if the taking is for the making or repairing of public roads.
- **Because appropriation is not for the making or repairing of public roads, ODOT has no quick take rights.**

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ODOT's Contractor Attempts to Close Drive

- **ODOT had represented to the Court that the north drive would not be closed before May 1, 2016.**
- **However, in early April, ODOT's contractor came into the store to advise that the north drive would be closed that day.**
- **A flurry of email traffic between counsel and the Court followed.**
- **To resolve the issue until the outcome of the necessity hearing, the Court granted Speedway's Motion to Prevent ODOT from Exercising Quick Take Rights.**

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Necessity Hearing – Speedway's Hearing Brief - Making or Repairing Roads

- **Court must consider appropriation at issue, not project as a whole. R.C. 163.08 & 163.09.**
- **Access management taking does not constitute making or repairing of public roads—simply converting ODOT's easement to fee ownership and limiting Speedway's access through the installation of a curb in front of the north drive.**
- **"Making" and "repairing" not statutorily defined, so Court should look to dictionary definitions.**
- **Eminent domain statutes must be strictly construed in favor of property owners. *Norwood v. Horney*, 110 Ohio St.3d 353, 374-75, 2006-Ohio-3799, 853 N.E.2d 1115, 1138, ¶ 70 (2006); *Blackman v. City of Cincinnati*, 140 Ohio St. 25, 42 N.E.2d 158, Syllabus ¶2 (1942).**

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Necessity Hearing – Speedway's Hearing Brief, Cont. (Making or Repairing)

- ***City of Perrysburg v. Carter*, Wood County Probate No. 2015 9004A, Nov. 2, 2015 Judgment Entry**
- **City of Perrysburg could not take advantage of the quick take procedure in connection with a taking for the purposes of highway improvement, pedestrian walkways and sidewalks, public utilities, and "other municipal purposes" because those purposes did not constitute the making or repairing of roads. In so holding, the Court reasoned as follows:**
  - …a plain reading of R.C. 163.06 and the case law interpreting statutory construction surrounding eminent domain proceedings makes it clear that *the "quick take" option provided in R.C. 163.06 applies to appropriations "for the purpose of making or repairing roads which shall be open to the public."* In the case at bar…plaintiff, the City of Perrysburg…[has] enacted a resolution declaring an intent to appropriate property belonging to the defendants/property owners and to utilize the "quick take" provisions of R.C. 163.06. This resolution and accompanying documents provide in pertinent part that the proposed appropriations are for the stated purpose of "required improvements" to certain roadways and for "other municipal purposes" as well as references to "installing pedestrian walkways and sidewalks" as well as "providing for public utilities." *This Court finds that if the legislature intended to allow the "quick take" procedures set forth in R.C. 163.06 to extend to other areas…such as the construction of sidewalks…, those other areas…would have been referenced accordingly somewhere as falling within the "quick take" statute. They are not. The Court further finds that expanding the "quick take" immediate possession of private property provided for in R.C. 163.06 beyond the clearly stated purpose of "making or repairing roads" is not appropriate as a matter of law in appropriation/eminent domain cases*…
  - …the Court finds the plaintiff can prove no set of facts to support its request to utilize the "quick take" provisions contained in R.C. 163.06 for purposes of "other municipal purposes", "pedestrian walkways and sidewalks", and "public utilities." *To determine otherwise would simply be to add language which does not exist in R.C. 163.06.*

***Id*. at pp. 7-8 (emphasis added).**

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Necessity Hearing – Speedway's Hearing Brief, Cont. - Necessity

- **CESO alternative design, which does not require closure of north drive or taking of any other private property, equally safe and effective to accomplish desired improved turning radius.**
- **Closure of North Drive not necessary for US 250.**
  - Mere cost savings over alternative design insufficient to establish necessity.
- **Closure of North Drive not necessary for SR 2.**
  - Beyond scope of petition and resolution.

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Necessity Hearing – ODOT's Hearing Brief

- **Resolution raises statutory presumption in favor of finding that taking is for purpose of making or repairing roads.**
- **Abuse of discretion standard applies to ODOT's necessity determination.**
- **Doctrine of latches bars Speedway's necessity challenge—15 month delay.**

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Necessity Hearing

- **Speedway called 4 witnesses:**
  1. Julie Cichello, ODOT's District 3 Traffic Engineer, as on cross-examination
  2. Robert Matko, CESO Traffic Engineer
  3. Tim Lowe, CESO Highway Design Engineer
  4. Steve Rice, Speedway Division Project Manager
- **ODOT called only Julie Cichello.**

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Necessity Hearing – Making or Repairing Roads

- **Julie Cichello testified that a WL taking involves just the purchase of limited access right of way.**
- **Exhibit A to the Resolution: "Grantor/Owner, his heirs, executors, administrators, successors and assigns forever, are hereby divested of any and all abutter's rights, including access rights in, over and to the within described real estate, including such rights with respect to any highway facility constructed thereon…"**
- **Ms. Cichello conceded that ODOT is not relocating or widening U.S. 250 or constructing a new road on the Speedway property.**

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Necessity Hearing – Making or Repairing Roads

- **Julie Cichello testified that a WL taking involves just the purchase of limited access right of way.**
- **Robert Matko testified that WL designation in the field of professional surveying is an abbreviation for the survey term, "Fee Simple with Limitation of Access."**
- **Exhibit A to the Resolution: "Grantor/Owner, his heirs, executors, administrators, successors and assigns forever, are hereby divested of any and all abutter's rights, including access rights in, over and to the within described real estate, including such rights with respect to any highway facility constructed thereon…"**
- **Ms. Cichello conceded that ODOT is not relocating or widening U.S. 250 or constructing a new road on the Speedway property.**
- **Title Sheet for construction plans indicates that the project "includes improving US 250 by upgrading the existing traffic signals and signing, incorporating access management…" Cichello conceded that the Title Sheet includes no mention that the project involves the making or repairing of any toll-free public road.**

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Necessity Hearing – Making or Repairing Roads, Cont.

- **The boundary of Speedway's property line extends to the center of U.S. 250, and Speedway's Property is subject to an existing Easement for Highway Purposes.**
- **Cichello acknowledged that the Easement permitted ODOT to undertake all planned improvements, which were in the nature of making or repairing roads.**
- **Only thing ODOT proposed to do that was not permitted by Easement was limiting access through the installation of the curb.**

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Necessity Hearing – Necessity

- **No evidence that north drive caused any traffic accidents.**
- **Cichello testified that ODOT considered only accidents on US 250 as a whole.**
- **Robert Matko testified that the design process of a special use property, such as a fuel center, includes ensuring that the internal site circulation works in a safe and efficient manner, not only for the passenger cars, but also for the fuel transport trucks that may be entering and exiting the site.**
- **Matko: Speedway site was designed with two driveways in order to provide the proper internal circulation, as well as limiting driver frustration when exiting the site by providing two egress points.**

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Necessity Hearing – Necessity, Cont.

- **CESO did traffic counts for both drives during peak traffic conditions.**
- **Traffic from north drive then reassigned to south drive and a then conducted a capacity analysis to determine levels of service, as measured by delay per vehicle (Letter grades A through F).**
- **CESO also performed stacking (queuing) analysis.**
- **Significant congestion and traffic circuity issues within footprint of property, particularly with respect to fuel transport trucks, causes safety concerns on property and on US 250.**
- **Traffic count videos illustrated stacking issues encountered when fuel transport truck attempting to exit site.**
- **ODOT performed no traffic study to contradict CESO's, and Cichello had no legitimate criticisms of CESO study.**

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Necessity Hearing – Necessity, Cont.

- **ODOT wanted to comply with provision of its Location and Design Manual providing that there "should" be no drives within 600 feet of a signalized intersection.**
  - South drive within 600 feet
- **ODOT wanted to close north drive to improve turning radius for semi traffic going from northbound US 250 to eastbound SR 2.**
  - CESO's alternative ramp design alleviated issue without closure of north drive.

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Necessity Hearing – Necessity, Cont.

- **CESO's alternative ramp design**
- **CESO engineer Tim Lowe prepared a design alternative that did not require closure of north drive.**
- **Alternative design involved "skewing" the entrance ramp onto SR 2, such that the desired turning radius was achieved in a way that satisfied all pertinent engineering requirements.**
- **Cichello's sole criticism of alternative design was that it did not accommodate through traffic from eastbound off-ramp from SR 2 onto US 250. However, Lowe offered unrebutted testimony that the alternative design could be easily modified to do so.**

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Court's Findings of Fact and Conclusions of Law

- **Court rejected ODOT's laches argument.**
- **Court properly exercised its discretion to hold a single hearing on the "making or repairing" issue and on necessity.**
- **Speedway bears the burden to demonstrate that the taking is not a necessity by a preponderance of the evidence.**
  - ODOT's legal authorities to the effect that an abuse of discretion standard applies were superseded by a 2007 amendment to R.C. 163.09.
- **The taking is not for the purpose of making or repairing public roads.**
  - Court looked to dictionary definitions.
  - Court followed presumption of interpreting eminent domain statutes in favor of property owners.
  - The Easement already permits ODOT to make or repair U.S. 250.
  - Limitation of access through the closure of North Drive is the only action that requires the exercise of eminent domain.
  - ODOT conceded the point by filing this eminent domain action to effectuate only a WL taking.
- **ODOT cannot exercise quick take rights and Speedway can lawfully challenge the necessity of the taking.**
- **The closure of the north drive is not necessary.**
  - Increased cost alone is legally insufficient to demonstrate that the closure of the North Drive is necessary.
- **ODOT lacks the legal right to exercise eminent domain to close the north drive.**
- **Speedway entitled to recover its attorneys fees and expert witness fees under R.C. 163.21(B)(1).**

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Epilogue

- **ODOT's Motion for Relief from Judgment**
  - Trial Court should not have prohibited ODOT from taking "any other action" to limit access to Speedway property.
  - Language interferes with ODOT's new plan to limit access through installation of median on US 250.
  - Purported new evidence of an old traffic accident at the south drive and allegedly unsafe traffic exiting north drive supports limitation of access.
  - Speedway opposing motion, which is currently pending.
- **ODOT has also appealed to the 6th District Court of Appeals.**

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Presented by
Jeremy S. Young

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IN THE COMMON PLEAS COURT
ERIE COUNTY, OHIO

JERRY WRAY, DIRECTOR OHIO DEPARTMENT OF TRANSPORTATION,	**CASE NO. 2014-CV-0659**
Plaintiff,	**JUDGE TYGH M. TONE**
vs.	**OPINION AND JUDGMENT ENTRY**
SPEEDWAY LLC, SUCCESSOR-IN-INTEREST TO SPEEDWAY SUPERAMERICA LLC AND EMRO MARKETING COMPANY, ET AL ,	
Defendants.	

This matter is before the Court on Defendant's, Speedway LLC, motion to challenge Plaintiff's, ODOT, appropriation for making or repairing roads and to challenge the necessity of the appropriation. After a thorough review of the pleadings, case law, and evidence presented at a hearing held April 14, 2016, Defendant's motion is found well taken and GRANTED.

FINDINGS OF FACT

1. This is a partial taking eminent domain action initiated by Plaintiff, Jerry Wray, Director of Department of Transportation ("ODOT" or "Plaintiff") against Speedway with respect to a piece of real property ("Property") located on U.S. 250/Milan Rd., near the intersection with State Route ("S.R.") 2, in Sandusky, Ohio.

2. ODOT's Petition to Appropriate Property and to Fix Compensation ("Petition") was filed in this matter on October 1, 2014. As alleged in the Petition, the appropriation in this case is a WL taking, meaning Fee Simple with Limitation of Access. ODOT is proposing to take fee ownership of the property at issue in order to limit Speedway's access to U.S. 250 through

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the installation of a curb across the Property's northernmost of the Property's two drives ("North Drive") onto U.S. 250.

3. Speedway's Answer was filed on November 3, 2014. On March 8, 2016, this Court granted Speedway leave to file its First Amended Answer to challenge the necessity for ODOT's planned closure of the North Drive. Speedway argues that it is entitled to raise a necessity defense because the appropriation at issue is not "for the purpose of making or repairing roads, which shall be open to the public, without charge" within the meaning of R.C. 163.06 and 163.08.

4. A bench hearing was held in this matter on April 14, 2016, the date that was agreed upon by the Parties, with respect to the following two issues: (1) whether the appropriation in this case is "for the purpose of making or repairing roads, which shall be open to the public, without charge"; and (2) whether the closure of the North Drive is necessary.

5. At the hearing, Speedway presented its case in chief first with the testimony of Julie Cichello, ODOT's District Three Traffic Engineer, as upon cross-examination; Robert Matko, P.E., P.S., PTOE, Senior Engineering Manager at Civil Engineers of Southwest Ohio, Inc. ("CESO"); Timothy Lowe, P.E., Transportation Engineering Manager at CESO; and Steven Rice, Division Project Manager for Speedway. ODOT presented the testimony of only witness, Julie Cichello. The Court also admitted into evidence Plaintiff's Exhibits A-F over Defendant's objections, based on relevance, and Defendant's Exhibits 1-8, 10-11, and 13-16.

6. As the trier of fact in this bench hearing, the Court had the benefit of hearing the testimony and observing the witnesses and evidence presented by the parties. The Court was also able to weigh the credibility of the witnesses.

7. After weighing all the testimony and evidence presented at the hearing, the Court finds that Speedway has satisfied its burden of proof on both issues and was successfully able to persuade the Court that (1) the appropriation at issue is not "for the purpose of making or repairing roads, which shall be open to the public, without charge"; and (2) the closure of the North Drive is not necessary. I discuss the evidence in support of each finding more fully below.

A. <u>A Preponderance Of The Evidence Supports The Court's Finding That The Appropriation Is Not For The Purpose Of Making or Repairing Roads.</u>

8. Based upon a weighing of the evidence presented at the hearing and the credibility of the witnesses, the Court finds that Speedway has satisfied its burden to prove by a preponderance of the evidence that the appropriation at issue is not for the purpose of making or repairing roads, which shall be open to the public, without charge.

9. The Court's factual finding is supported by the plain language of the Resolution of Necessity attached as Exhibit A to ODOT's Petition (the "Resolution"). In particular, the Resolution provides that the permanent appropriation in this case is a "WL" taking. As ODOT's witness, Ms. Cichello, testified at the hearing, this WL designation means that ODOT is only purchasing "access rights." (Tr. 37-38). In fact, during ODOT's case in chief, Ms. Cichello testified as follows: "Q. ...what do the WL takes involve? A. ...we're just, you know, purchasing the limited access right of way in the area closest to the interchange on all four quadrants. Q. And is that what you're doing at Speedway's property? A. Yes." (Tr. 202).

10. The Court's factual finding is also supported by Exhibit A to the Resolution, which provides : "Grantor/Owner, his heirs, executors, administrators, successors and assigns forever, are hereby divested of any and all abutter's rights, including access rights in, over and to the within described real estate, including such rights with respect to any highway facility

constructed thereon..." Thus, the plain language of the Resolution itself supports the Court's finding that the purpose of the proposed taking is the acquisition of access rights.

11. Ms. Cichello further testified at the hearing that she could not say whether the closure of the North Drive falls into the category of access management, although she was impeached on that issue with her prior deposition testimony to the effect that it does in fact fall within the category of access management. (Tr. 44). Moreover, upon further cross-examination, Ms. Cichello conceded that ODOT is not relocating or widening U.S. 250 or constructing a new road on the Speedway property. (Tr. 44-45).

12. As to the nature of the proposed ODOT taking as alleged in the Petition, CESO engineer Robert Matko, in his capacity as a licensed registered surveyor in Ohio, provided expert testimony that the WL designation in the field of professional surveying is an abbreviation for the survey term, "Fee Simple with Limitation of Access." (Tr. 66). In particular, Mr. Matko testified about Defendant's Exhibit 4, which is a drawing prepared by Mr. Matko that depicts the area of the WL taking at issue in this case. (Tr. 67-68).

13. Mr. Matko was the only licensed surveyor who testified at the hearing, and he offered unrebutted and credible testimony that the taking at issue involves two things and only two things: (1) the conversion of ODOT's interest in the property at issue from that of an easement holder to that of a fee simple owner; and (2) the limitation of Speedway's access to U.S. 250 through the closure of the North Drive. (Tr. 67-68).

14. The Court's factual finding is further supported by the Title Sheet for ODOT's construction plans (Defendant's Exhibit 1), which indicates that the project "includes improving US 250 (Milan Road) by upgrading the existing traffic signals and signing, incorporating access management..." (*See* Defendant's Exhibit 1). During her testimony, ODOT's witness, Ms.

Cichello, testified that the Title Sheet includes no mention that the project involves the making or repairing of any toll-free public road. (Tr. 36).

15. The Court's factual finding is further supported by the evidence that the boundary of Speedway's property line currently extends to the center of U.S. 250, and that Speedway's Property is subject to an existing Easement for Highway Purposes ("Easement"), which was admitted into evidence as Defendant's Exhibit 3. (Tr. 45).

16. Ms. Cichello acknowledged that the Easement permits ODOT to improve the drainage of U.S. 250 at the Speedway property, which ODOT proposes to do, without the need to file an eminent domain action. (Tr. 46).

17. The Court finds that the Easement would permit ODOT to resurface U.S. 250 and improve drainage on U.S. 250 without the need to initiate condemnation proceedings. The Easement, however, would not permit ODOT to limit access to the Speedway property.

18. After weighing all the testimony and evidence, the Court finds that Speedway has satisfied its burden of persuasion and its burden to prove by a preponderance of the evidence that the WL taking at issue is not "for the purpose of making or repairing roads, which shall be open to the public, without charge."

B. A Preponderance Of The Evidence Supports The Court's Factual Finding That The Closure Of North Drive Is Not Necessary.

19. Based upon a weighing of the testimony and the evidence presented at the hearing, the Court also finds that Speedway satisfied its burden of persuasion and its burden to prove by a preponderance of the evidence that the closure of the North Drive is not necessary.

There Is No Evidence That North Drive Has Caused Any Traffic Accidents

20. At the hearing, Ms. Cichello testified that she has no evidence of any traffic accidents that have occurred at the North Drive or were caused by traffic entering or exiting the Speedway property through the North Drive. (Tr. 40-41; 253-54).

Expert Testimony of Robert Matko and the CSEO Operations Impact Report

21. During her testimony, Ms. Cichello testified that ODOT did not examine whether North Drive caused any accidents, but considered only accidents on U.S. 250 as a whole. (Tr. 41).

22. Alternatively, Speedway's expert, Robert Matko, testified that the property at issue has an approximately 3,000 square foot convenience store, 10 fueling positions, 13 parking spaces, and 2 full motion access drives. (Tr. 72). Mr. Matko testified that the design process of a special use property, such as a fuel center, includes ensuring that the internal site circulation works in a safe and efficient manner, not only for the passenger cars, but also for the fuel transport trucks that may be entering and exiting the site. (Tr. 71-72).

23. Mr. Matko further testified that this Speedway site was designed with two driveways in order to provide the proper internal circulation, as well as limiting driver frustration when exiting the site by providing two egress points. (Tr. 79).

24. As part of his work as an expert witness, Mr. Matko prepared the "CESO Operations Impact Report" that was admitted as Defendant's Exhibit 6 at the hearing. Defendant's Exhibit 6 sets forth the results of the operations impact study regarding the closure of the North Drive and, alternatively, the conversion of the North Drive into a right-out-only. (Tr. 79).

25. With respect to this operations impact report, Mr. Matko testified that CESO collected traffic counts using proprietary video camera technology owned by Miovision, Inc. (Tr.

79). He further explained that Miovision is recognized in the field of traffic engineering as a reliable and accurate method of performing traffic counts. (Tr. 80).

26. Traffic counts were conducted from 6:00 a.m. to 6:00 p.m. on Thursday, May 21, 2015; and from 7:00 a.m. to 7:00 p.m. on Saturday, June 27, 2015. These dates and times were selected to create a fair balance between a typical weekday peak and a Saturday peak due to Cedar Point traffic. (Tr. 80).

27. After the traffic counts were collected, existing volumes were reassigned to the Speedway property's southernmost drive ("South Drive") onto U.S. 250 based upon the closure of the North Drive as proposed by ODOT. (Tr. 81-84).

28. Mr. Matko testified that CESO performed a capacity analysis based upon the concepts and procedures of ODOT's Highway Capacity Manual. The primary result of capacity analysis is assignment of levels of service measured by delay per vehicle. Levels of service are assigned letter grades from A to F, similar to grades in school. (Tr. 84).

29. Mr. Matko testified that CESO performed a capacity analysis to determine the level of service measured in delay per vehicle due to the closure of the North Drive. (Tr. 84).

30. Mr. Matko testified that the delay per vehicle significantly increases with the closure of the North Drive, referring to tables 2, 3, and 4 in Defendant's Exhibit 6. (Tr. 86).

31. Mr. Matko testified that, in his expert opinion, vehicular delay has the potential to impact safety at the site, as well as on Milan Road (US 250). Mr. Matko testified that drivers become more likely to accept smaller gaps in the north/south traffic volume on Milan Rd. to turn left or right out of the site. (Tr. 84).

32. Mr. Matko testified that CESO also performed a stacking (queuing) analysis in connection with the closure of the North Drive. (Tr. 86).

33. The stacking analysis was done by utilizing Synchro software, highway capacity software, and ODOT methodology. These are tools that are recognized in the field of traffic engineering as reliable and accurate and are used by ODOT. (Tr. 87).

34. Based upon the data set forth in the report and his own expert analysis and study, Mr. Matko provided an opinion that, by closing the North Drive, the queue at the South Drive will extend back into the Speedway site beyond the western most fueling pump. This queuing is depicted in figures 11-16 in Defendant's Exhibit 6. (Tr. 90).

35. It is also Mr. Matko's opinion that the more vehicles that queue into the site, the more safety becomes a factor with internal circulation, causing driver frustration and vehicles to drive between fueling pumps for circulation. (Tr. 90).

36. Mr. Matko also considered the fuel transport truck route with the closure of the North Drive. (Tr. 90). In the current situation, a fuel transport truck enters the North Drive and exits the South Drive. An engineering drawing reflecting this route is depicted on Speedway drawing CS-1 attached to Exhibit 6. (Tr. 90)

37. Mr. Matko testified that with the closure of the North Drive, the fuel transport truck would then enter the South Drive, circulate in a counterclockwise manner inside the site to the west side of the canopy, then exit through the South Drive. (Tr. 73).

38. In Mr. Matko's opinion, this truck movement would cause safety issues at the site, because the fuel transport truck would cross in front of the main doors to the Speedway store where vehicular and pedestrian traffic occurs. Also, the fuel transport truck would be angled in such a way that it would block any circulation around the west end of the canopy, causing queuing and capacity issues. (Tr. 73).

39. It is Mr. Matko's opinion that the delays, changes in capacity, and queuing caused by the closure of the North Drive will cause safety issues due to internal circuity of travel for Speedway customers at the site. (Tr. 90).

40. It is also Mr. Matko's opinion that the closure of the North Drive will have a potential impact on safety on U.S. 250 for drivers exiting the site and experiencing driver frustration. (Tr. 90).

41. Based on Mr. Matko's testimony, this Court finds that the closure of the North Drive would result in substantial change to internal circuity of travel within the boundaries of the Speedway property and impact the safety of Speedway customers, both vehicular and pedestrian.

42. The Court further finds that Mr. Matko's conclusions and expert opinions regarding the potential safety problems both internally at the Speedway site and on U.S. 250 are credible and well-documented, and that ODOT has improperly failed to consider and take into account Speedway's valid safety concerns for the motoring public raised by CESO's Traffic Operations Impact Report (Defendant's Exhibit 6), in its plan to close the North Drive.

43. Conversely, ODOT failed to produce any competent, credible evidence, such as its own traffic study, to contradict the expert opinions of Mr. Matko. Unlike CESO, ODOT did not perform any traffic engineering studies to assess the impact of the closure of the North Drive, including, but not limited to the impact the closure would have on fuel transport trucks visiting the Speedway property. (Tr. 49-51).

44. Nevertheless, Ms. Cichello testified that she does not believe the closure of the North Drive will result in internal circuity of traffic at the Speedway property. (Tr. 50-51). Ms. Cichello's testimony regarding her opinion that the closure of a drive has no impact on internal traffic circuity and safety not only lacks credibility, it defies common sense.

45. Although ODOT agrees that "safety is the key in this case" (Tr. 30), Ms. Cichello testified that she believes that Speedway customers are safer as they travel on the Speedway property after the closure of the North Drive. (Tr. 247).

46. Ms. Cichello testified that, with one exception, she agreed with all the conclusions contained in the CESO report. (Tr. 52). Specifically, Ms. Cichello agreed that delays, stacking, and queuing of traffic, as well as the reduction in capacity at the Speedway property can cause safety issues. (Tr. 247). Further, Ms. Cichello agreed that excessive delay in motorists' ability to get out onto U.S. 250 from the Speedway property can lead to dangerous conditions, with motorists accepting smaller gaps to exit. (Tr. 248).

47. Ms. Cichello was critical that the CESO report does not account for the fact that the intersection of U.S. 250 and S.R. 2 is signalized. (Tr. 51-52). Although Ms. Cichello refused to concede that the failure of the CESO Report to account for signalization at the intersection actually results in a more conservative statement of the issues that will be caused by the closure of the North Drive, CESO traffic engineer Robert Matko offered unrebutted testimony to that effect. (Tr. 52-53, 81).

Testimony of Steven Rice

48. The Court's also heard the testimony of Steven Rice, a Division Project Manager for Speedway. The store at issue is located within Mr. Rice's 450-store territory. (Tr. 142-43).

49. Mr. Rice has been to the property numerous times and is very familiar with it. (Tr. 146-47).

50. Mr. Rice testified that Speedway generally requires at least two drives for each of its stores. (Tr. 144-45). Speedway would not construct a new store with only one drive. (Tr. 145). Mr. Rice testified that at least two drives are necessary in order to promote traffic

circulation and safety at Speedway locations. (Tr. 144-45). Mr. Rice testified that safety is of the utmost importance. (Tr. 145-46, 158).

51. Part of Mr. Rice's job duties include evaluating the effect that the closure of a drive at a Speedway store might have from an operational standpoint. (Tr. 163). Mr. Rice performed such an evaluation with respect to the store at issue and concluded that the closure of the North Drive would cause significant safety, traffic congestion, and traffic circuity issues, both within the Speedway property and on U.S. 250. (Tr. 163-64).

52. Mr. Rice confirmed that fuel transport trucks access the property through the North Drive, deposit fuel into the underground storage tanks on the west side of the property, and then exit through the South Drive. (Tr. 154). The location of the underground storage tanks was selected to maximize safety and efficiency when fuel transport trucks access the property. (Tr. 156). Fuel transport trucks bring fuel to the store when fuel is low and do not come on a predictable schedule. (Tr. 154-55).

53. Although Ms. Cichello testified during ODOT's case in chief regarding her belief that fuel transport trucks could potentially enter the property through the South Drive and deposit their fuel from the driver side, Mr. Rice offered unrebutted testimony that fuel transport trucks are required to be oriented with their passenger side facing the underground storage tanks in order to deposit fuel. (Tr. 155).

54. In this regard, the Court finds that Ms. Cichello's testimony is particularly suspect with respect to the issue that fuel transport trucks could circumnavigate the Speedway property, passing around the canopy and in front of the convenience store. Ms. Cichello supported her testimony on that issue only with a discussion of whether the height of the canopy would

accommodate such circumnavigation. She failed to address, however, the safety issues posed by vehicular and pedestrian traffic on the property. (Tr. 240).

55. From an operational standpoint, Mr. Rice agreed with Mr. Matko's testimony that the closure of the North Drive would cause internal circuity of traffic at the Speedway store since fuel transport trucks would be required to enter through the South Drive, circle around the canopy, go between the canopy and the convenience store, deposit their fuel from the driver side into the underground storage tanks, and then exit through the South Drive. (Tr. 154). Mr. Rice also agreed with Mr. Matko's testimony that significant traffic congestion and safety concerns would result from this internal circuity of traffic. (Tr. 157-58).

56. Additionally, Mr. Rice testified that large diesel tour buses access the property. These buses fill up at the property's only diesel fuel dispenser, which is the westernmost dispenser at the property, closest to U.S. 250. (Tr. 158). The location of the diesel fuel dispenser was selected to maximize safety and efficiency when large diesel vehicles fuel up at the property. (Tr. 159). Tour buses enter the property through either the North or South Drive, proceed directly to the diesel fuel dispenser, and then exit through the opposite drive. (Tr. 159).

57. Tour buses visit the Speedway property at unpredictable times, and they bring large numbers of pedestrians onto the property in the form of bus passengers. (Tr. 161). The presence of these pedestrians raises additional safety and traffic circuity concerns if the North Drive is closed, particularly when a fuel transport truck is depositing fuel into the underground storage tanks. (Tr. 161-62).

58. Additionally, Mr. Rice testified that the store experiences dramatically increased traffic and business during the summer months. (Tr. 162-63).

59. The Court finds Mr. Rice's testimony to be credible, and further finds that Mr. Rice's testimony provides further support for the Court's finding that the closing of North Drive is not necessary.

ODOT's Reasons For Closing The North Drive

60. At the hearing, ODOT failed to present credible and persuasive reasons for why it is necessary to close the North Drive to Speedway's Property. In this regard, Ms. Cichello testified that ODOT is basing its decision to close the North Drive on its own Location and Design Manual, which was admitted into evidence as Defendant's Exhibit 10. (Tr. 42). Although Section 802.2.9 of ODOT's Location and Design Manual recommends that there "should" be 600 feet between a drive and a signalized intersection, Ms. Cichello conceded at the hearing that this recommendation is not a requirement, and that ODOT has discretion to permit a drive within 600 feet of a signalized intersection. (Tr. 42-43).

61. Indeed, Ms. Cichello testified that Speedway's South Drive, which ODOT is not proposing to close, is also located less than 600 feet from the intersection. (Tr. 43). Further, Ms. Cichello conceded that ODOT would not close the North Drive if it was Speedway's only access onto U.S. 250 and testified that if the North Drive was Speedway's only access, ODOT would move it. (Tr. 43). The Court finds, however, that moving the North Drive would not change the fact that any entrance to the Speedway property would still be located within 600 feet of the signalized intersection.

62. Additionally, ODOT is basing its decision to close the North Drive on a desire to improve the turning radius for semi traffic from U.S. 250 onto S.R. 2. (Tr. 204). As set forth below, however, this reason is insufficient to show the necessity of closing the North Drive and

was unconvincing, unpersuasive and unreasonable when weighed against the more convincing and persuasive testimony and evidence presented by Speedway.

Expert Testimony of Timothy Lowe and CESO's Alternative Ramp Design

63. The Court's findings are also supported by the testimony of Timothy Lowe, an expert highway construction engineer who was retained by Speedway for the purpose of reviewing ODOT's proposed improvements as part of this eminent domain case, in order to determine whether there is a viable engineering alternative that would avoid closing the North Drive. (Tr. 114).

64. As part of his work, Mr. Lowe reviewed ODOT's plan sheets as well as AASHTO ("American Association of State Highway and Transportation Officials") design requirements, and ODOT's Location and Design Manual. (Tr. 115).

65. Having reviewed the ODOT plan and applicable engineering standards and guidelines, Mr. Lowe formed an opinion that an equally acceptable alternative to ODOT's plan can be designed for the eastbound on-ramp to S.R. 2. (Tr. 116).

66. Mr. Lowe's alternative plan for the on-ramp appears at Defendant's Exhibit 7. It is a three page engineering design. (Tr. 116).

67. Mr. Lowe testified that the CESO proposal would involve reconstructing the location of the eastbound on-ramp, whereas the ODOT proposal does not include reconstruction of the ramp. (Tr. 125).

68. In preparing the alternative design, Mr. Lowe looked at a microscopic picture of the interchange at U.S. 250 and S.R. 2, and reviewed how vehicles access the freeway. (Tr. 117).

69. He then utilized software called AutoTURN, which simulates movements of vehicles. AutoTURN is the industry standard software. (Tr. 118).

70. He then incorporated a 53 foot semi-tractor trailer approved by ODOT guidelines. (Tr. 118).

71. It is Mr. Lowe's expert opinion that CESO's alternative design provides adequate turn radius to permit a semi-tractor trailer to enter onto the eastbound on-ramp to S.R. 2. (Tr. 119).

72. Mr. Lowe also measured the acceleration distance for the alternative design. The design speed was 50 mph, well within acceptable engineering guidelines. (Tr. 120-121).

73. The ODOT plan depicts a taper that blocks the Speedway North Drive. The CESO alternative depicted in Exhibit 7 instead depicts a 70° skew at the intersection at U.S. 250 and the eastbound on-ramp to S.R. 2 that does not block access to the Speedway North Drive or require the taking of any private property. (Tr. 121).

74. Both the AASHTO green book and the ODOT's Location and Design Manual recognize 70° as an allowed skew angle at an intersection. (Tr. 123). In fact, a skew of up to 60° is allowed at a signalized intersection such as the one at issue, making the proposed 70° skew well within acceptable limits. (Tr. 136).

75. It is Mr. Lowe's opinion that the CESO alternative ramp design lays out geometry to meet all engineering guidelines required by AASHTO and ODOT. (Tr. 135).

76. It is Mr. Lowe's opinion to a reasonable degree of professional certainty that the CESO alternative ramp design reflected in Exhibit 7 is equally acceptable as ODOT's proposal from an engineering standpoint. (Tr. 124).

77. Addressing ODOT Engineer Julie Cichello's sole criticism of the CESO alternative ramp design that it did not provide for through traffic for eastbound vehicles that mistakenly exited onto U.S. 250, Mr. Lowe created Defendant's Exhibit 8. (Tr. 124).

78. In Mr. Lowe's opinion, Exhibit 8 depicts an acceptable radius such that if a vehicle was traveling across the ramp at 30-40 mph, it would accommodate that speed. (Tr. 125).

79. It is Mr. Lowe's opinion that the CESO alternative ramp design plan not only resolves the concerns ODOT has expressed regarding the current turn radius onto the eastbound on-ramp to S.R. 2, but it also addresses Speedway's operational and safety concerns, by eliminating significant impact on the Speedway site. (Tr. 130-131).

80. Mr. Lowe testified that it is his opinion that although a full design study was not performed as part of the scope of his engagement, any issues and concerns could be easily accommodated. (Tr. 136).

81. The Court finds Mr. Lowe's testimony to be credible and persuasive. Mr. Lowe holds a professional engineer's license in three states, including Ohio. (Tr. 112). Mr. Lowe's CV appears at Exhibit 13. Mr. Lowe has significant experience in the design of highway ramps, both in the state of Ohio and the in the state of Washington. Additionally, Mr. Lowe manages the Roadway Design Group for CESO. (Tr. 113).

82. More specifically, as with Mr. Matko, the Court finds that Mr. Lowe's alternative ramp design is credible and well documented, and there is no competent, credible evidence presented by ODOT that would persuade me that Mr. Lowe's alternative design is not a safer and more effective alternative to closing the North Drive.

83. In this regard, ODOT did not call a highway construction engineer at the hearing to criticize Mr. Lowe's expert opinions, or to provide testimony that CESO's alternate ramp design fails to comply with all applicable ramp engineering design standards and requirements.

84. Although Ms. Cichello was questioned regarding her criticisms of CESO's work during Speedway's case in chief, she raised new, yet relatively minor and unpersuasive concerns, for the first time during ODOT's case in chief, after hearing the testimony of Speedway's witnesses as ODOT's corporate representative.

85. Although Ms. Cichello conceded that CESO's alternative design is fully compliant with all applicable ODOT and AASHTO standards, she was critical that CESO's alternative design did not account for through movement of traffic from the westbound exit ramp of S.R. 2, across U.S. 250, and onto the eastbound on-ramp to S.R. 2. (Tr. 59-60). However, she conceded on cross-examination that Exhibit 8 could be modified to show through movement of traffic. (Tr. 254). Indeed, Mr. Lowe offered unrebutted testimony that the alternative design could be modified to accommodate through traffic by widening the on-ramp on the north side of the ramp, as depicted in red on Defendant's Exhibit 8. (Tr. 124-25).

86. Further, Ms. Cichello expressed doubt as to whether the modification to the CESO design depicted in Exhibit 8 satisfies the standard of designing for through traffic to travel at or above 40 miles per hour (Tr. 206-07). However, Mr. Lowe offered unrebutted testimony that the modification could accommodate through traffic traveling 40 miles per hour. (Tr. 125). The Court finds Mr. Lowe's testimony on this issue to be more convincing and more persuasive than Ms. Cichello's testimony.

87. The Court also finds that ODOT did not consider the CESO alternative design in determining what rights to appropriate in this case. Although Ms. Cichello offered some

testimony during ODOT's case in chief to the effect that ODOT did consider design alternatives, those design alternatives related to U.S. 250 as a whole, and did not relate specifically to the Speedway property. (Tr. 222-23). Significantly, there is no evidence in the record that any of the alternatives considered by ODOT involved keeping the North Drive open. Further, ODOT did not consider reconstructing the eastbound on-ramp to S.R. 2. (Tr. 209).

88. Mr. Lowe has significant experience in cost estimating in highway construction projects. (Tr. 125).

89. In his opinion, the CESO relocation alternative for the ramp would be more costly than ODOT's proposal. He roughly estimates that the additional costs would be in the neighborhood of $750,000 to $1,000,000. (Tr. 126).

90. Ms. Cichello similarly testified that expanding the project to include the work on the S.R. 2 ramp proposed by CESO would increase costs for ODOT, although she was not specific as to the amount of those increased costs. (Tr. 209). However, she also testified that "improving US 250 by upgrading the existing traffic signals and signing, incorporating access management, and adding turn lanes where needed...additional lanes on the SR 2 interchange ramps will be added." (ODOT Ex. A) (Emphasis added.) Clearly ODOT anticipated new ramps as part of their access management project.

91. The Court finds, based on Mr. Lowe's testimony, that by avoiding closure of the North Drive, the legitimate safety concerns of both ODOT and Speedway are properly taken into account, notwithstanding the additional costs to the public associated with CESO's plan to reconstruct the ramp.

92. Based upon a weighing of the totality of the evidence in the record, therefore, the Court finds that ODOT's reasons for closing the North Drive is not for the making or repairing

of roads open to the public. It is not necessary. And, further, the Court finds that the appropriation is arbitrary, unreasonable, and an abuse of discretion.

93. In making this finding, this Court understands that it lacks the authority to order that ODOT be required to construct the alternative design provided by CESO. The probative value of the CESO alternative ramp relocation design is simply that it provides convincing and persuasive evidence that the closing of the North Drive is not for the making or repairing of roads, nor is it necessary, and that there are other equal or better engineering alternatives that would not result in the closure of the North Drive, which could ultimately save the taxpayers millions. On the whole, after weighing all the testimony and evidence, and in particular the testimony and evidence addressed above, the Court finds that Speedway demonstrated by a preponderance of the evidence that the closure by ODOT of Speedway's North Drive is not necessary, and that there is a better and safer alternative to address ODOT's undocumented safety concerns at the location of the on-ramp at U.S. 250 and S.R. 2.

CONCLUSIONS OF LAW

A. Speedway's Necessity Challenge Is Not Barred By The Equitable Doctrine of Laches.

1. In its Bench Brief, ODOT has argued, without supporting legal authority, that Speedway's challenge to the necessity of the taking is barred by the equitable doctrine of laches because the defense was not raised in Speedway's original answer.

2. Laches is an equitable defense that arises if there is "(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." *Portage Cnty. Bd. of Commissioners v. City of Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 81; *Keech v. Ohio Dept. of Job & Family Servs.*, 6th Dist. Erie No. E-11-007, 2011-Ohio-6314, ¶ 29.

3. Here, based upon a weighing of the equities and the evidence presented at the hearing, the Court finds that Speedway timely raised the necessity defense in this proceeding and that ODOT failed to satisfy its burden of proof and burden of persuasion to establish the elements of the laches doctrine.

4. This Court previously exercised its discretion under Civ. R. 15(A) to grant leave for Speedway to file its First Amended Answer to challenge the necessity for ODOT's planned closure of the North Drive. The Court finds that the allegations of Speedway's First Amended Answer satisfy the standard set forth in R.C. 163.08 to place necessity at issue. ODOT has raised no challenge to the sufficiency of Speedway's allegations in that regard, and the time to do so has passed. *See* R.C. 163.09(B)(1) (providing that the Court shall hear a properly raised necessity challenge not less than 5 or more than 15 days from the date the answer challenging necessity was filed); Civ.R. 12(F) (providing that any motion to strike Speedway's allegations relating to necessity must have been filed within 28 days of the service of Speedway's First Amended Answer).

5. Further, this Court finds that ODOT failed to satisfy its burden of proof and burden of persuasion to establish the elements of the laches doctrine. In support of its laches argument, ODOT presented Plaintiff's Exhibit D at the hearing, which is an October 3, 2013 letter to "EMRO Marketing Company" at an address in Findlay, Ohio, that purports to provide notice of a public meeting regarding the ODOT project at issue. (Tr. 230). Although Ms. Cichello testified that this letter constitutes notice to Speedway of the alleged taking, It was revealed, on cross-examination, that Ms. Cichello was unaware that Speedway is actually located in Enon, Ohio, not Findlay. (Tr. 252). Although Ms. Cichello also testified that a similar letter would have been delivered to the Speedway store in Erie County, no such letter was offered into

evidence. (Tr. 252). Thus, based upon a weighing of the equities and the evidence submitted at the hearing, the Court concludes that ODOT failed to satisfy its burden of proof or its burden of persuasion with respect to the equitable laches defense.

B. <u>This Court Properly Exercised Its Discretion To Hold A Single Hearing On Whether The Appropriation Is For The "Making Or Repairing" Of Roads And Whether The Taking Is Necessary.</u>

6. ODOT's Bench Brief also challenges the Court's decision to conduct a single hearing to take evidence on whether the taking at issue is for the making or repairing of toll-free public roads and whether the closure of the North Drive is necessary.

7. The Court previously decided to hold a single hearing because it determined, in the exercise of its discretion, that it would be more efficient to hear evidence at one time on both issues. This decision is consistent with Civ. R. 1, which provides that the civil rules "should be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice."

8. Indeed, in this case, it is clear that a single hearing furthers the interests of judicial economy and efficiency. At the hearing, both Speedway and ODOT relied upon the same witnesses, chiefly engineers, and much of the same documentary evidence with respect to both contested issues. It would have been wasteful and inefficient, therefore, to have required those witnesses to travel to Court on two separate occasions, when they could easily provide all the relevant testimony during a single day.

9. Moreover, the Court finds that holding separate hearings would have unnecessarily delayed these proceedings and could have deprived the Court of sufficient time to

rule on Speedway's necessity challenge before May 1, 2016, which is the date ODOT has indicated construction on Speedway's property will begin. Clearly, Speedway will be irreparably prejudiced if ODOT begins construction and cuts off Speedway's access to U.S. 250 before the Court has the opportunity to address necessity; the damage then will have already been done.

10. Consequently, on March 25, 2016, after briefing by the parties, the Court exercised its discretion over procedural matters such as the method and matter of hearing evidence to rule that it would hold a single hearing on April 14, 2016 to entertain evidence relevant to both issues in dispute. *See State ex rel. Nat. City Bank v. Maloney*, 7th Dist. Mahoning No. 03 MA 139, 2003-Ohio-7010, ¶ 5, *aff'd sub nom. State ex rel. Natl. City Bank v. Maloney*, 103 Ohio St.3d 93, 2004-Ohio-4437, 814 N.E.2d 58, ¶ 5 (2004) (citations omitted) ("A trial court has the inherent authority to manage its own proceedings and control its own docket."); *Love Properties, Inc. v. Kyles*, 5th Dist. Stark No. 2006 CA 00101, 2007-Ohio-1966, ¶ 37 (same); Civ.R. 16 (granting trial courts with discretion over pretrial procedures); Civ.R. 42 (granting trial courts with discretion in consolidating hearings and trials).

11. The cases cited by ODOT on this issue are not controlling and not persuasive. First, *Weir v. Wiseman*, 2 Ohio St.3d 92, 443 N.E.2d 152 (1982), cited by ODOT, does not support ODOT's position. In fact, *Wiseman* is consistent with Speedway's position. *Wiseman* was an eminent domain action in which, as in this case, ODOT alleged that the taking was for the purpose of making or repairing roads. The property owners challenged necessity in their answer, alleging that there was no funding for the project and no reasonable likelihood that the property at issue would actually be used for highway purposes. The trial court dismissed the case based on the lack of funding. The court of appeals reversed, holding that R.C. 163.08 precluded the

necessity challenge. In reversing in part and affirming in part, the Supreme Court of Ohio held as follows:

> 1. R.C. 163.08 and 163.09 mandate a hearing on the right or necessity of an appropriation action when an answer is filed in the action specifically denying either the right to make the appropriation, or the necessity for the appropriation, with facts relied upon in support of such denial, and the appropriation is not sought in time of war or other public exigency imperatively requiring immediate seizure, and not for the purpose of making or repairing roads, which shall be open to the public without charge.
>
> 2. Prior to ***resolving*** questions of right or necessity, the trial court must determine whether the requested appropriation is "taken in time of war or other public exigency" or "for the purpose of making or repairing roads," as those phrases are used in R.C. 163.08.

Id. at Syllabus (emphasis added).

12. Further, the *Wiseman* Court reasoned that "R.C. 163.08 and 163.09...require a hearing on the issues of right or necessity for the appropriation in situations when the answer properly raises the issue of whether the requested appropriation is for the purpose of making or repairing toll-free public roads." *Id.* at 95, 155. Accordingly, the Court "affirm[ed] the determination of the court of appeals that the trial court erred...by failing to hold a hearing as mandated by R.C. 163.09(B) on the issues of the right or necessity to make the appropriation...[and remanded the case] for determination of the questions of the right or necessity to make the appropriation ***and*** whether the appropriation...[is] for the purpose of making or repairing roads,' as that language is used in R.C. 163.08." *Id.* at 95-96, 155-56 (emphasis added).

13. Thus, consistent with R.C. 163.09(B)(1), *Wiseman* requires a necessity hearing in a case involving an appropriation that is ostensibly filed for the purpose of making or repairing a road where the answer specifically denies that the project actually involves the making or

repairing of a road. *See also, Sugarcreek Twp. Bd. of Trustees v. Farra*, 2nd Dist. No. 97-CA-90, 1998 WL 177564, *3 (Apr. 17, 1998). While *Wiseman* acknowledges that the Court must also determine whether the taking is for the making or repairing of roads, it held only that the determination of that issue must precede the "resolution" of the necessity issue. *Wiseman*, at syllabus ¶ 2. The *Wiseman* Court, therefore, did not hold that no evidence relevant to necessity can be heard until after the determination of whether the taking is for the making or repairing of roads.

14. Additionally, the other case cited by ODOT, *Wray v. Bartley*, 4th Dist. No. 94CA533, 1995 WL 353964 (June 7, 1995), does not support ODOT's position. *Bartley* was an appeal from an entry of summary judgment. No hearing was held in that case. Obviously, therefore, *Bartley* is inapposite to the issue of what evidence should have been presented at the hearing in this case.

15. Accordingly, based upon the foregoing, the Court re-affirms its prior decision that it has the discretion to conduct a single hearing to take evidence relevant to both issues.

C. <u>Speedway Bears The Burden To Demonstrate That The Taking Is Not A Necessity By A Preponderance Of The Evidence.</u>

16. Before the hearing in this case, the Court held a conference with counsel for the parties in chambers. During that conference, a discussion was held regarding the burden of proof and order of proof for the hearing. Based upon this discussion and the arguments of counsel, therefore, the Court concluded that Speedway would present its evidence first because it bore the burden to prove by a preponderance of the evidence that the closure of the North Drive did not involve the "making or repairing of roads" and bore the burden to prove the lack of necessity for the taking by a preponderance of the evidence.

17. This conclusion of law is based upon the plain language of R.C. 163.09, which generally provides that "[t]he burden of proof upon the agency to demonstrate the necessity of the taking "by a preponderance of the evidence." In this regard, however, R.C. 163.09(B)(1) further provides that "[a] resolution of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of necessity for the appropriation." Here, ODOT attached a resolution to its Petition (Exhibit A) that declared the necessity of the appropriation at issue. Accordingly, pursuant to R.C. 163.09(B)(1), the Court concluded that the burden of proof rests with Speedway at the necessity hearing.

18. Although R.C. 163.09(B)(1) is silent with respect to a property owner's burden of proof at a necessity hearing, this Court and all counsel agreed that the burden of proof would be by a preponderance of the evidence, since this is the evidentiary standard set forth in R.C. 163.09(B), and there is no other evidentiary standard is set forth in the statute. The Court is not aware of any controlling legal authority that holds that one party bears a different burden of proof than the other party in the same proceeding that involves the identical issues and evidence presented. Thus, prior to the hearing, the Court advised both parties that Speedway would bear the burden of proof by a preponderance of the evidence.

19. ODOT cites a number of cases for the proposition that an abuse of discretion standard applies to judicial review of ODOT's highway design decisions in a necessity hearing. The Court does not find these cases to be applicable. First, ODOT cites *Hurst v. Santon*, 7th Dist. No. 90 C.A. 59, 1992 WL 37809 (Feb. 26, 1992). However, *Hurst* is distinguishable in that it involved the question of whether an appropriation created a public nuisance. *Hurst* did not involve any question as to whether the appropriation at issue was for the making or repairing of a public road, or whether the appropriation was necessary.

20. ODOT also cites *Branford Village Condominium Unit Owners' Ass'n v. City of Upper Arlington*, 12 Ohio App.3d 120, 467 N.E.2d 542 (10th Dist.1983). However *Branford Village* involved a claim for injunctive relief to enjoin a separate eminent domain action. As such, R.C. 163.09, which sets forth the applicable burden of proof for a necessity hearing in an eminent domain action, did not apply.

21. Finally, ODOT cites *Risner v. Ohio Dept. of Transp.*, 2015-Ohio-4443. Like *Santon* and *Branford*, however, *Risner* is distinguishable. Far from being an eminent domain case, *Risner* was a wrongful death and survival action filed against ODOT, which rested upon an allegation of negligent design of the intersection where the fatal auto accident at issue occurred. The holding of the case provides, in pertinent part, as follows: "[i]n determining whether to improve an existing highway, the Ohio Department of Transportation is immune ***from liability for damages*** arising from its decisions regarding which portions of a highway it will improve and what type of improvement it will make." *Id.* at ¶ 1 (emphasis added).

22. Thus, there is no legal authority supporting ODOT's position that an abuse of discretion standard applies to the agency's decision to close the North Drive. In this regard, the Court notes that the cases cited by ODOT were all decided under a previous version of R.C. 163.09, which was amended in 2007. Before its amendment, the statute provided, in pertinent part, as follows:

> When an answer is filed pursuant to section 163.08 of the Revised Code and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in that section, the court shall set a day, not less than five or more than fifteen days from the date the answer was filed, to hear those matters. ***Upon those matters, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of***

that necessity in the absence of proof showing an abuse of discretion by the agency in determining that necessity.

(Emphasis added).

23. In 2007, however, the General Assembly amended the eminent domain statutes to eliminate the abuse of discretion language in R.C. 163.09. Thus, as set forth above, R.C. 163.09 now provides for a preponderance of the evidence burden of proof. Thus, the cases cited by ODOT are neither controlling nor persuasive authority in support of ODOT's position that an abuse of discretion standard applies. Accordingly, the Court re-affirms its previous conclusion that a preponderance of the evidence standard applies.

24. The Court would also note that, as a practical matter, the applicable burden of proof is irrelevant, because, this Court's ruling would be the same under either a preponderance of the evidence standard or an abuse of discretion standard.

D. ODOT Cannot Exercise Quick Take Rights And Speedway Can Lawfully Challenge The Necessity Of The Taking Because This Court Has Found That The Appropriation At Issue Is Not For The Purpose of Making or Repairing Roads.

25. Article I, Section 19 of the Ohio Constitution and Ohio Revised Code 163.06 grants public agencies, such as ODOT, with the right to utilize "quick take" procedures where an appropriation is for the purpose of "making or repairing" public roads. Where available, the quick take procedures enable the appropriating authority to take immediate possession of a property, and begin construction, upon the deposit with the Court of an amount equal to the appropriating authority's determination of the compensation and damages due the property owner. Where the quick take procedure is unavailable, however, an appropriating authority must await the jury's award of compensation and damages before taking possession and beginning construction, unless there is a successful necessity challenge, in which case the appropriating authority may not take possession or begin construction at all.

26. The issue of whether the appropriation is for the purpose of "making or repairing" public road is also relevant to this proceeding because R.C. 163.08 grants a property owner the statutory right to challenge the necessity of an appropriation, except where, *inter alia*, the appropriation is "for the purpose of making or repairing roads, which shall be open to the public, without charge." Thus, if the closure of the North Drive is not "for the purpose of making or repairing roads, which shall be open to the public, without charge," then Speedway would have the right to challenge necessity in this action under R.C. 163.08 and R.C. 163.09.

27. In determining whether an appropriation is for the purpose of making or repairing toll-free public roads, the Court must examine the specific appropriation at issue, rather than the overall project. Specifically, R.C. 163.08 provides that a property owner's answer may deny "***the necessity for the appropriation***" except where, *inter alia*, the taking is "...for the purpose of making or repairing roads, which shall be open to the public, without charge," in which case "an answer may not deny...***the necessity for the appropriation***." *Id.* (Emphasis added). Thus, the key issue is whether the "appropriation" that is the subject of the Petition is for the "making or repairing" of roads.

28. The doctrine of standing supports this Court's conclusion that it must examine the taking at issue, rather than the overall project, since Speedway lacks standing to challenge in this eminent domain proceeding any part of ODOT's project that does not involve the taking of Speedway's property. *See generally State ex rel. Walgate v. Kasich*, 10th Dist. No. 12AP-548, 2013-Ohio-946, 989 N.E.2d 140, 145, ¶ 11 (2013); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469–70, 715 N.E.2d 1062, 1999–Ohio–123. The question presented, therefore, is whether the appropriation at issue (i.e., the closure of North Drive) is for the purpose of "making or repairing" a toll-free public road.

29. The terms "making" and "repairing" are not defined in R.C. 163.06, 163.08, or Article I, Section 19 of the Ohio Constitution. "In the absence of clear legislative intent to the contrary," however, it is well-established that "words and phrases in a statute shall be read in context and construed according to their plain, ordinary meaning." *Fickle v. Conversion Techs. Intern., Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960, ¶ 29. In this regard, "the plain, ordinary, or generally accepted meaning of an undefined statutory term is invariably ascertained by resort to common dictionary definitions." *Id.* (citations omitted).

30. Here, Merriam-Webster Dictionary defines "making" as, *inter alia*, "the act or process of forming, causing, doing, or coming into being," and defines "make" as, *inter alia*, "to lay out and construct <make a road>." Similarly, Dictionary.com defines "making" and "make" as, *inter alia*, "to bring into existence by shaping or changing material, combining parts, etc."

31. Merriam-Webster Dictionary also defines "repair" as, *inter alia*, "to restore by replacing a part or putting together what is torn or broken." Similarly, Dictionary.com defines "repair" as, *inter alia*, "to restore to a good or sound condition after decay or damage; mend."

32. Based upon these plain, ordinary, and generally accepted definitions of the terms "making" and "repairing," therefore, the Court concludes, based upon a weighing of the evidence presented at the hearing, that the appropriation at issue is not for the purpose of "making" or "repairing" a toll-free public road.

33. To the extent that there is any doubt or ambiguity over whether the closure of North Drive qualifies as the "making" or "repairing" of a toll-free public road, such doubt must be construed in favor of the property owner because it is well-established, as the Ohio Supreme Court has ruled, that eminent domain statutes must be strictly construed in favor of property owners. *See Norwood v. Horney*, 110 Ohio St.3d 353, 374-75, 2006-Ohio-3799, 853 N.E.2d

1115, 1138, ¶ 70 (2006); *Blackman v. City of Cincinnati*, 140 Ohio St. 25, 42 N.E.2d 158, Syllabus ¶2 (1942); *Pontiac Imp. Co. v. Bd. of Commrs. of Cleveland Metropolitan Park Dist.*, 104 Ohio St. 447, 135 N.E. 635 (1922) *Parkside Cemetery Ass'n v. Cleveland, Bedford & Geauga Lake Traction Co.*, 93 Ohio St. 161, 112 N.E. 596, Syllabus (1915); *see also Johnson v. Preston*, 1 Ohio App.2d 62, 203 N.E.2d 505 (1963) (holding that R.C. 5529.02, which gives ODOT the power to appropriate property for road-side parks, does not authorize the appropriation of property for a rest area). Thus, the Court will construe the phrase, "making or repairing roads" in accordance with its plain and ordinary meaning and will not expand the scope of the statutory language.

34. The definition of "making or repairing roads" roads also should not be read more broadly because it is undisputed that the quick take proceedings in R.C. 163.06 do not apply to every exercise of eminent domain by ODOT. R.C. 5519.01 generally authorizes ODOT to exercise the power of eminent domain for "any purpose related to highways, roads, or bridges." Additionally, R.C. 163.02(B) broadly permits ODOT to appropriate real property.

35. By contrast, R.C. 163.06 is limited in that it only authorizes quick take authority for the purpose of "making or repairing" roads. Similarly, R.C. 163.08 prohibits necessity challenges only if the appropriation is for the purpose of "making or repairing" roads. Thus, ODOT's right to exercise quick take authority and to preclude necessity challenges is narrower than its statutory authority to appropriate property.

36. Stated otherwise, the mere fact that ODOT may have the right to appropriate property does not mean that it can exercise quick take authority in connection with that appropriation, or that it can preclude a property owner from raising a necessity challenge. If the Legislature had intended R.C. 163.06 and 163.08 to be as broad as R.C. 5519.01 and 163.02(B),

then it could have used similar language. The fact that it did not do so further supports the conclusion that that R.C. 163.06 and 163.08 are intended to apply more narrowly than R.C. 5519.01 and 163.02(B).

37. Here, the Court has made a factual finding, based upon a weighing of the evidence presented at the hearing, that Speedway has satisfied its burden to prove by a preponderance of the evidence that the purpose of the appropriation is not for the making or repairing of roads. In this regard, the Court finds that ODOT will not be widening, adding turn lanes to, or relocating U.S. 250 at Speedway's property. Rather, as set forth in the Court's Findings of Fact, the evidence demonstrates that ODOT filed this eminent domain action for the sole purpose of limiting Speedway's access through the closure of the North Drive.

38. Indeed, based upon the evidence presented at the hearing, it is clear that limitation of access is the sole reason why ODOT filed this eminent domain action against Speedway because the Easement already permits ODOT to make or repair U.S. 250. *See generally, Sears v. Hopley*, 103 Ohio St. 46, 48, 132 N.E. 25, 26 (1921) (holding that the erection of a stone marker on property dedicated for highway purposes did not constitute an additional burden requiring initiation of condemnation proceedings because the new use was consistent with the dedication); *City of W. Carrollton v. Bruns*, 2nd Dist. No. CA 17054, 1998 WL 879118, *9 (Dec. 18, 1998) ("…widening a street within a pre-existing easement does not constitute a use that is inconsistent with the original use. Nor does it substantially interfere with the original use; instead, it promotes the efficiency of the original use."); *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 138 Ohio App.3d 57, 66, 740 N.E.2d 328, 334 (4th Dist.2000) ("The grant of an easement includes the grant of all things necessary for the dominant estate to use and enjoy the easement." (citations omitted)).

39. Thus, limitation of access through the closure of North Drive is the only action that requires the exercise of eminent domain because that right is not inherent in the rights granted by the Easement. Indeed, ODOT has conceded this point by filing this eminent domain action to effectuate only a WL taking.

40. In this regard, the fact that ODOT also proposes to construct a sidewalk on the property does not transform the taking at issue into an appropriation for the purpose of making or repairing roads. As previously discussed, the scope of the WL taking does not include the construction of a sidewalk, only the closure of the North Drive. ODOT would only have authority to construct the sidewalk if it is successful in acquiring the easement area in fee. Even if, however, the Court were to conclude that this taking included the construction of a sidewalk, the construction of a "sidewalk" would not constitute the making or repairing of a "road" under Ohio law.

41. In *City of Perrysburg v. Carter*, Wood County Probate No. 2015 9004A, Nov. 2, 2015 Judgment Entry, the Court held that the City of Perrysburg could not take advantage of the quick take procedure in connection with a taking for the purposes of highway improvement, pedestrian walkways and sidewalks, public utilities, and "other municipal purposes" because those purposes did not constitute the making or repairing of roads. In so holding, the Court reasoned as follows:

> ...a plain reading of R.C. 163.06 and the case law interpreting statutory construction surrounding eminent domain proceedings makes it clear that ***the "quick take" option provided in R.C. 163.06 applies to appropriations "for the purpose of making or repairing roads which shall be open to the public."*** In the case at bar...plaintiff, the City of Perrysburg...[has] enacted a resolution declaring an intent to appropriate property belonging to the defendants/property owners and to utilize the "quick take" provisions of R.C. 163.06. This resolution and accompanying documents provide in pertinent part that the proposed

> appropriations are for the stated purpose of "required improvements" to certain roadways and for "other municipal purposes" as well as references to "installing pedestrian walkways and sidewalks" as well as "providing for public utilities." ***This Court finds that if the legislature intended to allow the "quick take" procedures set forth in R.C. 163.06 to extend to other areas...such as the construction of sidewalks..., those other areas...would have been referenced accordingly somewhere as falling within the "quick take" statute. They are not. The Court further finds that expanding the "quick take" immediate possession of private property provided for in R.C. 163.06 beyond the clearly stated purpose of "making or repairing roads" is not appropriate as a matter of law in appropriation/eminent domain cases***...
>
> ...the Court finds the plaintiff can prove no set of facts to support its request to utilize the "quick take" provisions contained in R.C. 163.06 for purposes of "other municipal purposes", "pedestrian walkways and sidewalks", and "public utilities." ***To determine otherwise would simply be to add language which does not exist in R.C. 163.06.***

Id. at pp. 7-8 (emphasis added).

42. The Court finds the *Carter* decision persuasive and adopts its holding. Consequently, the Court finds that the fact that ODOT proposes to construct a sidewalk on the property does not transform the appropriation at issue into a taking for the purpose of making or repairing toll-free public roads. *See also*, *Snider v. Akron*, 9th Dist. Summit No. 23994, 2008-Ohio-2156 (holding that a sidewalk is not a "public road," as that term is defined in R.C. 2744.01, which relates to political subdivision tort immunity); *Gordon v. Dziak*, 8th Dist. Cuyahoga No. 88882, 2008-Ohio-570, ¶36 ("sidewalks are not considered public roads.").

43. For all of these reasons, therefore, and based upon the Court's Findings of Fact, the Court concludes that ODOT's appropriation does not qualify as an appropriation for the purpose of "making or repairing" public roads under Article I, Section 19 of the Ohio Constitution, R.C. 163.06 and R.C. 163.08. Accordingly, the Court concludes that ODOT may

not utilize quick take rights under R.C. 163.06, and that Speedway is entitled to challenge the necessity of the appropriation under R.C. 163.08 and R.C. 163.09.

E. Based Upon The Court's Factual Finding That The Closure of North Drive Is Not Necessary, the Court Concludes That ODOT Does Not Have The Legal Right To Exercise Eminent Domain To Effectuate The Closure Of The North Drive To Speedway's Property.

44. Based upon the Court's Factual Finding that the appropriation at issue is not for the making and repairing of roads, and not a necessity, the Court concludes that ODOT does not have the legal right to exercise eminent domain powers to effectuate the closure of the North Drive. Although CESO's alternative design would be more costly than ODOT's design, increased cost alone is legally insufficient to demonstrate that the closure of the North Drive is necessary.

45. In *Lake Erie, All. & W.R. Co. v. Atlantic & G.W.R. Co.*, Warren County Probate Court, 7 Ohio Dec.Reprint 364, 2 W.L.B. 187, 1877 1877 WL 5907 (1877), the Court addressed an eminent domain action initiated by one railroad company against another. The plaintiff sought to appropriate the property rights necessary to cross the defendant's track with its own track at a particular location described in the petition. The defendant challenged the necessity for the crossing to occur at the location selected by the plaintiff and presented expert engineering testimony demonstrating that crossing at the proposed location would unreasonably interfere with and injure the defendant's property and unjustifiably increase the danger to the traveling public, including those members of the traveling public on defendant's property. The expert engineering testimony also demonstrated that these problems could be avoided by selecting a different crossing location. However, as in this case, there was evidence that crossing at a

different location would increase the costs to the appropriating authority. On these facts, the Court held that the mere fact that an alternative crossing location would result in increased costs for the plaintiff was insufficient to demonstrate necessity for the crossing at the location proposed. Accordingly, the Court held that there was no necessity for the appropriation alleged in the petition.

46. Additionally, in *The City of Willoughby Hills v. Andolsek*, 11th Dist. Lake No. 2001-L-173, 2003-Ohio-323, the Court addressed a necessity challenge raised by a property owner in an eminent domain action relating to a drainage project being completed by the city of Willoughby Hills. The city sought to take an easement across the subject property for ingress to and egress from the project. The city in *Andolsek* conceded that it was possible to complete the project without the taking at issue, but the city defended the taking on the basis that the alternative proposed by the property owner was more expensive than the city's plan. However, other than determining that the alternative proposed by the property owner would increase project costs, the city had not evaluated alternatives to taking the defendant's property. On these facts, the *Andolsek* Court ruled in favor of the property owner on his necessity challenge, holding that the city abused its discretion in determining that it was necessary to take an easement across the property at issue. *See also, State ex rel. Horvath v. State Teachers Retirement Bd.*, 83 Ohio St.3d 67, 70, 697 N.E.2d 644, 649 (1998) (noting that "the United States and Ohio Takings Clauses...are...designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

47. The Court finds these cases to be persuasive and applicable to the instant case. In this case, as in *Andolsek*, there is no necessity for the closure of the North Drive, and ODOT has abused its discretion by determining otherwise. Like the city in *Andolsek*, ODOT has not

considered alternatives to its proposed closure of the North Drive, including, without limitation, the alternative designed proposed by Speedway, which is as effective and safe as the ODOT design and does not require the closure of the North Drive. Also as in *Andolsek*, the alternative design proposed in this case does not require the taking of any privately owned property.

48. Consequently, as in the foregoing cases, the Court determines that increased cost alone is legally insufficient to demonstrate that the closure of the North Drive is necessary. Accordingly, the Court finds that there is no necessity for the closure of the North Drive.

49. For all of these reasons, therefore, the Court concludes that ODOT is not legally entitled to appropriate the property in the manner set forth in the Petition in order to effectuate the closure of the North Drive.

50. Under R.C. 163.21(B)(1), "if the court determines that the agency is not entitled to appropriate property, the court shall enter both of the following:

> (a) A judgment against the agency for costs, including jury fees, and
>
> (b) A judgment in favor of each affected owner, in amounts that the court considers to be just, for the owner's reasonable disbursements and expenses, to include witness fees, expert witness fees, attorney's fees, appraisal and engineering fees, and for other actual expenses that the owner incurred in connection with the proceedings.

Accordingly, pursuant to R.C. 163.21, Speedway is entitled to a judgment in its favor dismissing the Petition with prejudice and awarding the costs, including witness fees, expert fees, attorney fees, appraisal and engineering fees, and for other actual expenses, that were incurred by Speedway in connection with the proceedings.

Judge Tygh Tone

4-28-16

JUDGMENT ENTRY

Pursuant to the Court's Opinion as set forth above, it is hereby ORDERED, ADJUDGED and DECREED that the Court enters the following Judgment in favor of Defendant Speedway, LLC ("Speedway" or "Defendant"), and against Plaintiff Jerry Wray, Director of the Ohio Department of Transportation ("ODOT" or "Plaintiff") in the above-referenced eminent domain action:

IT IS HEREBY ORDERED that Plaintiff may not utilize any quick take rights under Article I, Section 19 of the Ohio Constitution and R.C. 163.06, in order to effectuate the appropriation set forth in the Petition.

IT IS FURTHER ORDERED that Plaintiff shall not proceed with the appropriation set forth in the Petition nor take any other action to limit access to Defendant's Property to and from S.R. 250.

IT IS FURTHER ORDERED that the Petition for Appropriation is hereby dismissed with prejudice, and that Speedway is entitled to a judgment against the Plaintiff under R.C. 163.21 for an award of the costs incurred by Speedway in connection with these eminent domain proceedings, including but not limited any witness fees, expert witness fees, attorney's fees, appraisal and engineering fees, and other actual costs and expenses that were incurred in connection with the proceedings.

IT IS FURTHER ORDERED that Speedway shall submit a written statement of the attorney fees, witness fees, expert witness fees, appraisal and engineering fees, and any other costs and expenses incurred in connection with this proceeding to the Court for review and approval on or before Friday, May 27, 2016.

IT IS FURTHER ORDERED that the Erie County Clerk of Courts is to serve upon all parties notice of this OPINION AND JUDGMENT ENTRY, and its date of entry, upon the journal within three (3) days of entering the OPINION AND JUDGMENT ENTRY on the journal. The Clerk shall serve all parties, all in accordance with Civil Rule 58(B) and 5(B).

IT IS FURTHER ORDERED that there is no just reason for delay pursuant to Civil Rule 54(B).

Costs to Plaintiff.

IT IS SO ORDERED.

4/28/16
DATE

JUDGE TYGH M. TONE

Cc: Stephen D. Jones, Esq.
Jeremy S. Young, Esq.
Marc A. Sigal, Esq.
Eric M. Hopkins, Esq.
Jason R. Hinners, Esq.

Favorable Ruling for Businesses Impacted by Highway Improvement Projects

Roetzel & Andress

USA | May 13 2016

Roetzel eminent domain attorneys **Stephen D. Jones** and **Jeremy S. Young** recently obtained the dismissal of an eminent domain action filed against Speedway LLC by the Ohio Department of Transportation (ODOT). This case of first impression promises to have far-reaching implications for businesses affected by highway improvement projects.

The case involved a profitable Speedway store in Sandusky, Erie County, Ohio. As part of an access management project, ODOT proposed to close one of the store's two drives by installing a curb, a step that had the potential to shutter the store. ODOT also proposed to exercise "quick take" authority, which is the extraordinary option to proceed with construction before the eminent domain case is concluded. Roetzel challenged the exercise of "quick take" authority, as well as the necessity for the appropriation itself.

Significantly, Ohio law generally prohibits a property owner from challenging the exercise of "quick take" authority or necessity in a highway improvement project. Article I, Section 19 of the Ohio Constitution and Ohio Revised Code 163.06 permit an appropriating authority to exercise "quick take" authority when an appropriation is for the "making" or "repairing" of roads, terms that are not statutorily defined. Additionally, Ohio Revised Code 163.08 prevents a property owner from challenging the necessity of an appropriation that is for the making or repairing of roads.

A necessity hearing was held, at which Roetzel presented expert engineering testimony regarding the impact the closure of the drive would have on operations at the store, as well as the availability of alternative design options that would not require the closure of the drive. Roetzel also argued that the general prohibition against challenges to the exercise of "quick take" authority and necessity did not apply because the appropriation involved only limitation of access, and not the making or repairing of a road.

The trial court ultimately entered judgment in favor of Speedway, ruling that the closure of Speedway's drive did not constitute the making or repairing of roads, such that ODOT could not exercise "quick take" authority and Speedway could challenge necessity. The court further held that there was no necessity for the appropriation, such that ODOT could not proceed with the taking at all. Accordingly, the Court dismissed the eminent domain action and ordered ODOT to pay Speedway's substantial legal and expert expenses pursuant to R.C. 163.21.

The case is one of first impression that has far-reaching implications for businesses impacted by highway improvement projects, as well as for ODOT, which has numerous similar access management projects pending across the state. It is therefore anticipated that ODOT will appeal to the Sixth District Court of Appeals and ultimately to the Ohio Supreme Court, if necessary, which means the case will likely take on even greater significance for businesses throughout the state of Ohio that are adversely impacted by similar access management takings.

Chapter 2: Acquisition Documents for Commercial Real Estate

Jack S. Levey
Plunkett Cooney, P.C.
Columbus, Ohio

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Chapter 2: Acquisition Documents for Commercial Real Estate

Jack S. Levey
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Columbus, Ohio

Note: These written materials were originally prepared for this presentation by Donald J. Shuller of Vorys, Sater, Seymour and Pease LLP, Cincinnati, Ohio. Due to a last-minute schedule change, Mr. Shuller was unable to attend. The author's additions to Mr. Shuller's materials appear in italics. Additional forms, commentary, and judicial opinions follow Mr. Shullers materials.

This portion of the program covers documents for the purchase and sale of commercial real estate from the perspective of both the buyer's attorney and the seller's attorney.

Negotiating and Drafting Purchase and Sale Agreements for Commercial Real Estate

I. General

A. Purchase and sale contracts perform two significant functions in transactions for purchases and sales of real estate. First, a contract is a "road map" for the transaction from contract to closing. Second, the contract establishes respective rights and liabilities of parties in transactions that do not close. In negotiating and drafting contracts, be mindful of both of these functions.

B. Consider your client.

1. What role does your client want you to play in the transaction? Are you to negotiate the contract, consult with client to assist in negotiating the contract, or draft the contract as negotiated by the client?

2. What is your client's experience level in similar transactions? This will affect degree to which you might recommend your involvement in negotiation. If client is inexperienced, you might perform a service by referring your client to competent professionals to assist in the transaction (e.g., an environmental engineer or a surveyor).

3. Understand your client's general intentions, which should guide you in negotiating and drafting contract.

C. Consider the property.

1. What type of property is involved? The various types of commercial property—office, apartment, hotel, retail, industrial, undeveloped land—present different issues to be covered by the contract.

2. What is the intended use of the property? Does the buyer intend to occupy as an owner, to lease, or to develop?

3. Where is the property located? Are there any special concerns raised by the location that should be addressed in contract?

D. Understand the transaction. What are the general terms that have been agreed upon? What terms are open to negotiation? What is the client's bargaining power? In light of client's bargaining power, what terms can reasonably be negotiated?

E. Although there are certain provisions that are commonly included in purchase and sale contracts, contract is subject of negotiation. There are no set rules as to the provisions of purchase and sale contracts. Some typical provisions are discussed in Contract Provisions, below.

II. Preliminary Documents

A. Confidentiality agreement.

At outset of negotiation (prior to execution of contract), the buyer often wants to obtain property information from the seller to begin due diligence while negotiation of the contract proceeds. The seller is generally willing to provide property information at this point, because that might permit a shorter due diligence period in the contract. This often leads to a confidentiality agreement whereby the buyer agrees to maintain the confidentiality of the property information provided. The seller should consider requiring the buyer's broker to sign.

B. Letter of intent.

Because of the time involved in negotiating and drafting a contract, parties often enter into a letter of intent as an intermediate step in order to set forth their common understanding of the general terms of a contract to be entered. Be very careful in using letters of intent, because if a letter of intent includes the material terms of a contract, it might be enforceable. If you are consulted, be certain that the letter of intent specifically provides that the parties do not intend it to be enforceable as a contract.

1. Be equally careful to specify that certain provisions of the letter of intent are enforceable, and survive termination of the letter of intent. These may include:

a. Confidentiality requirements, if not contained in a separate agreement.

b. Warranties, representations and indemnities as to what brokers each party has dealt with.

c. Any right to enter and inspect the property pending execution of the purchase agreement, including provisions concerning liens, indemnities, and insurance.

d. Any commitment by Seller to keep the property off the market for a specified time.

2. Instead of letter of intent, consider using an unsigned term sheet, or a term sheet signed by the brokers. In that case, any binding provisions, such as confidentiality or pre-contract inspections, will need to be set forth in a separate agreement signed by the parties. The supplementary materials include a sample right of entry agreement, with confidentiality provisions.

III. Contract Provisions

A. The parties.

1. Use exact names.
2. Identify each party as an individual, corporation, partnership, or limited liability company, *and the jurisdiction in which the party is organized.* Identity of parties might affect various other contract provisions.
   a. If seller is an individual, the seller's spouse should sign contract to obligate spouse to release dower at closing.
   b. If the buyer intends to assign to an entity to be formed, the buyer should negotiate sufficient flexibility in assignment provision. *Buyer should consider a provision that automatically releases buyer from all obligations under the contract conditioned only upon seller receiving satisfactory evidence that the new entity has been formed, has accepted an assignment of the contract, and has duly assumed the performance of all of buyer's obligations. Seller will want to consider whether the new entity has sufficient assets to perform its obligations, and whether the original buyer's credit is still necessary for any reason.*
   c. If the seller is an entity, contract might include representations and warranties by the seller regarding entity status and authority. *Similar representations from the buyer may be appropriate from the buyer, if the buyer is an entity. In either case, consider adding a representation and warranty by the individual signing on behalf of the entity that the individual has all necessary authority to do so*.

B. Effective date of contract.

Certain periods provided for in contract (e.g., due diligence period, time for closing) are likely to be tied to date of contract. Contracts frequently are signed by parties on different dates. The contract should specify its effective date or the manner for determining the effective date (e.g., date of last execution) in order to avoid inconsistent dates and resulting confusion.

C. Description of property being sold.

1. Real estate.
    a. Include the best available description of the land. Use legal description from the most recent title document if it is available and you are certain that it describes the property intended to be sold.
    b. Include a brief description of improvements.
    c. Many contracts also include the street address and tax parcel numbers. This information can be helpful, but should be a supplement to an accurate legal description, not a substitute.
2. Any personal property being sold with the real estate should also be described.
    a. Tangible personal property—equipment, furniture, and the like. Attach inventory if available.
    b. Intangible personal property.
        i. Leases, contracts, warranties, licenses, trade names, etc.
        ii. Plans, specifications, engineering information, and other technical information regarding property.

D. Purchase price and payment.

1. Amount of purchase price.

a. Price is generally fixed, but is sometimes subject to adjustment on the basis of acreage disclosed by survey completed after contract. If price is subject to adjustment on the basis of acreage, the buyer might try to limit it to usable acres (e.g., exclude portions of property subject to highway right-of-way or otherwise unusable).

b. Allocation of purchase price between real and personal property and between land and improvements might be important to the parties for tax reasons. Parties might be able to agree on these allocations. However, parties' tax motivations might not coincide, and it is often impractical for parties to agree on allocation.

2. Manner of payment.

a. Cash (immediately available funds) upon closing.

b. Seller financing.

i. Specify portion of purchase price that the seller will finance.

ii. Specify all material terms of the seller's financing, including interest rate, term, repayment provisions, prepayment rights, security, partial release provisions, etc. It is generally best to do this by attaching copies of the

seller's financing documents as exhibits to the contract. Although this practice will likely extend negotiation of contract, it will avoid later disagreement as to loan terms and the need to negotiate loan documents after contract is entered.

c. Assumption of existing mortgage.

i. Buyer should review loan documents prior to entering contract to confirm that they are acceptable.

ii. Confirm that assumption is permitted under terms of mortgage. If assumption not permitted, contract should be contingent upon obtaining consent of existing mortgagee to assumption.

iii. Is the seller to be released from assumed mortgage loan? If so, make that a condition of contract.

iv. The buyer should require various representations and warranties by the seller regarding assumed loan.

(a) Balance of loan being assumed. This is important, as it will affect the amount of cash required at closing (purchase price less assumed loan balance equals cash required).

(b) Seller has furnished to the buyer true copies of all loan documents and all amendments.

(c) No defaults.

v. Buyer should require an estoppel certificate of the lender confirming the seller's representations and warranties regarding assumed loan.

(a) Obtain at the outset of contract period in order to avoid spending time and money on transaction if there are problems with loan.

(b) Obtain again at the time of closing to confirm status of loan.

vi. Specify who pays assumption fee, attorneys' fees, and any other charges of lender whose loan is to be assumed.

vii. Is the assumed loan to be modified as a condition of the contract? If so, specify the modifications and make the contract contingent on obtaining the lender's agreement to those modifications.

E. Earnest money deposit.

1. Amount.

2. Form—cash, letter of credit, or other form?

3. Who is to hold?

   The buyer generally does not want to pay directly to the seller. Deposit generally held by third party such as broker or title company. *Parties often prefer to use a title agency in order to avoid the impractical requirements of Ohio Rev. Code § 4735.24, which governs earnest money deposited with a broker.*

4. Is deposit to be deposited in an interest-bearing account? If so, who is entitled to interest?

5. Application of deposit.

   a. Upon closing, deposit to be applied against purchase price.

   b. If the closing does not occur because of default by the buyer, the deposit is to be paid to the seller. The contract should specify whether payment of the deposit to the seller under these circumstances is liquidated damages for the buyer's default.

   c. If the closing does not occur because of default by the seller or any other reason other than default by the buyer (e.g., termination by Buyer during within due diligence period or failure of contingency), the deposit should be returned to the buyer. If the seller defaults, return of deposit to the buyer should not be liquidated damages and should be without prejudice to the buyer's rights for breach of contract.

   d. The contract should specify when the deposit becomes nonrefundable.

   e. Some contracts call for additional deposits upon the occurrence of certain events, such as an extension of the due diligence period, or the buyer's acceptance of the condition of the property. Make certain to specify the consequences of the buyer's failure to make the additional deposit. If seller's sole remedy is retaining the deposit as liquidated damages, then seller may be unable to collect unpaid installments of the deposit, unless the contract expressly includes the unpaid installments as part of the liquidated damages. See the sample clause below, and Stonehenge Land Co. v. Beaser Homes Invests, LLC, 177 Ohio App. 3d 7, 2008-Ohio-148, both of which appear in the supplementary materials.

F. Due diligence/contingencies.

1. Contracts typically specify a due diligence period, during which buyer may perform its due diligence and, at Buyer's option, terminate for any reason by giving notice of termination prior to expiration of due diligence period. Under a contract like this, buyer's reasons for termination are irrelevant and buyer does don't have to justify termination. Seller's negotiating focus in this type of contract is to keep the due diligence period as short as possible.

2. As an alternative to, and sometimes in addition to, a "no fault" due diligence period, contract might provide for specific contingencies to parties' obligations and period(s) for satisfying contingencies.

    a. Contingencies are most commonly for benefit of the buyer. However, under certain circumstances, it is appropriate for the contract to include a contingency for the benefit of the seller (e.g., release of the seller from liability under assumed loan, ability to obtain waiver of prepayment fee, and review of the buyer's credit if the seller providing financing).

    b. The purpose of contingencies is to allow the benefited party a period of time after date of contract to make determinations regarding specified matters that are critical to the party's ability or willingness to conclude the transaction and that cannot reasonably be made as of the date of contract. It is important to discuss in detail with your client any specific contingencies to be included.

    c. Some common buyer contingencies.

        i. Financing.

        ii. Buyer determining that the condition of the property is satisfactory.

        iii. Buyer confirming that satisfactory utility services are available.

        iv. Buyer determining that intended use of property is permitted under zoning and land use laws.

        v. Buyer determining that all permits and licenses necessary for intended use of property are in place or can be obtained.

        vi. Financial feasibility—review of books and records.

        vii. Review of leases and contracts.

    d. Considerations.

        i. The buyer wants its contingencies to be as broad and subjective as possible, with long periods of time to satisfy. The seller wants the buyer's contingencies to be specific and objective, and to require the buyer to proceed in good faith to attempt to satisfy within a short period of time. Contingencies often highly negotiated.

        ii. Time period(s) for satisfaction of contingencies should be based on time reasonably necessary to satisfy. Might be appropriate to negotiate different periods for various contingencies.

        iii. Provide for what happens if the buyer fails to give notice of satisfaction or failure of contingency by the end of

contingency period. Does the buyer's silence equal failure of contingency or satisfaction of contingency?

iv. Extensions: Seller will usually want to be paid for any extension of the due diligence period, unless the extension is necessary because of a delay caused by Seller. The payment may take the form of an addition to the earnest money, or a direct payment to Seller. Depending on the circumstances and the number of any prior extensions, Seller may agree to credit the payment against the purchase price, or may want the extension fee to be in addition to the purchase price.

G. Title matters: title evidence and survey.

1. Title evidence.

a. Specify type of title evidence to be furnished or obtained.

b. Specify which party is responsible for furnishing and paying for title evidence. Custom varies in different parts of state, but is subject to negotiation.

c. Specify which title insurance company will issue title insurance, or which party is to select title insurance company.

d. When is title evidence to be furnished? Within the specified number of days after the date of the contract.

e. Establish standard for determining whether the quality of the title is acceptable. Possibilities:

i. Objective standard: marketable title, determined in accordance with OSBA Standards of Title Examination; and

ii. Subjective standard: the buyer may object to any title exception within specified period after the buyer receives both the title insurance commitment and the survey. *Seller may be more willing to agree to this standard if the contract gives Buyer the right to reject the property for any reason or no reason, the time for issuing title objections is no longer than the due diligence period, and the contract does not obligate Seller to cure non-liquidated title defects.*

iii. Hybrid standard: buyer must accept all easements, covenants, and conditions of record that do not unreasonably interfere with the existing use (or buyer's specified intended use, if different) of the property.

f. If the quality of title does not meet the established standard, the seller should have the obligation (if objective title standard used) or the option (if subjective title standard used) to attempt to cure title objections within the specified period. *Seller should insist on a clause permitting seller to provide title insurance against the*

defect as an acceptable cure. In the absence of such a clause, the seller may not be able to force buyer to accept title insurance in lieu of removing the defect as of record. See Desantis v. Lenoci, 2005-Ohio-4661 (9th Dist. App. Lorain Cty.), and cases cited at § 39.8, fn. 6, K. Kuehnle & J. Levey, Baldwin's Ohio Practice, Ohio Real Estate Law (Thomson Reuters 2015). If the seller is unable or unwilling to remove title objections within that period, the buyer has option to either terminate the contract or waive the objection. Should the seller's inability to cure title objections give rise to a claim for damages? *Seller usually will resist liability for non-liquidated encumbrances, but may be willing to agree to reimburse buyer for attorney's fees and specified due diligence expenses, up to a given aggregate limit.*

g. Removal of standard exceptions (e.g., survey and mechanic's lien exceptions). *Removal of the mechanic's lien will result in a surcharge to the title insurance premium. Seller may resist this surcharge.*

h. Require the seller to sign affidavit as to off-record title matters as required by the title company. *If the contract permits seller to deliver a limited warranty deed, then seller will want to limit the affidavit accordingly. Seller's changes to the affidavit should be negotiated with the title company well in advance of the closing, and preferably before the contract is signed so that the agreed form of affidavit can be attached as an exhibit to the contract.*

2. Survey.

a. Survey is desirable for a number of reasons: to identify the described real estate as the real estate intended to be purchased; to determine the exact description of the land, to show the dimensions of an area within the subject land, to show location of easements and setback lines, to show the location of improvements and the relation of improvements to property lines, setback lines, and easements, and to show access between property and dedicated street.

b. Which party is responsible for furnishing and paying for survey? Negotiable.

c. When is the survey to be furnished? Within a specified number of days after the date of contract.

d. Specify the surveyor or which party is to select the surveyor.

e. Specify standards to which the survey must conform. If the buyer is obtaining at the buyer's cost, not so important; can simply provide for the buyer to obtain a survey meeting the buyer's requirements. If the seller is obtaining or paying for the survey, it is more important to specify survey standards in detail. Consider incorporating ALTA/ACSM survey standards.

f. Establish the standard for determining whether survey and matters disclosed by survey are acceptable and the seller's right to cure defects. Combine with provisions regarding title insurance discussed in Contract Provisions §§ G.1.e. and f.

H. Other provisions facilitating buyer's due diligence.

1. In or to perform due diligence, it is important for the buyer to be furnished with various items of property information in the seller's possession. Require the seller to furnish such property information to the buyer within specified period, including, as applicable:

   a. Current rent roll;

   b. Copies of leases;

   c. Copies of contracts relating to ownership and operation of property;

   d. Written inventory of personal property being sold;

   e. Copies of building plans and specifications;

   f. Any geotechnical, environmental, or other engineering reports;

   g. Any environmental permits and documentation relating to such permits;

   h. Correspondence from governmental agencies regarding any alleged violation of any law applicable to property;

   i. Certificate of occupancy; and

   j. Operating statements for property.

2. Authorize the buyer to review the seller's books and records relating to the property and to contact governmental authorities to obtain information about the property.

3. Authorize the buyer, at reasonable times and upon reasonable notice to the seller, to inspect and test the property. The buyer should be obligated to inspect and test in a manner that will not damage property*, keep the property free of mechanic's lien claims resulting from its activities,* and to indemnify the seller against liabilities and claims arising out of inspections or tests.

   a. Note that all indemnities in the contract should include specific waivers of the indemnifying party's immunity as an employer under the workers' compensation act, so that the indemnity is enforceable in the event of injury or death of buyer's employee. It may also be helpful to specify the procedure to follow for enforcing the indemnities. See supplemental materials for sample clauses.

b. Seller may also want to receive evidence of liability insurance, with seller, its property manager, and its mortgagee, shown as additional insureds, before Buyer enters to conduct its tests. Seller may also want to restrict when buyer can communicate with tenants.

c. If the contract contains more than one indemnity, then it is goo practice to use consistent language to describe the indemnity obligation.

4. As protection to the seller, the seller might require the buyer to return all information furnished or obtained if the contract fails to close for reasons other than the seller's default.

I. Provisions regarding leases.

1. Rent roll and copies of leases should be furnished at outset of contract (*see* Contract Provisions §§ H.1.a. and b.).
2. Updated rent roll to be furnished at time of closing.
3. Seller should pay to the buyer or credit against purchase price (i) prepaid rents, prorated through date of closing; and (ii) security deposits.
4. Address treatment of past due rents as of time of closing. Who is entitled to collect past due rents after closing? If the seller not entitled to collect, what efforts must the buyer exert to collect? If the buyer receives rent payment from a delinquent tenant after closing, must that payment be applied to past due rent or may the buyer apply first to current rent?
5. Seller indemnifies the buyer against liabilities and claims arising under leases and relating to periods of time prior to closing. The buyer indemnifies the seller against liabilities and claims arising under leases and relating to periods of time after closing.
6. Representations and warranties regarding leases.
    a. Copies of leases furnished by the seller to the buyer are true and complete copies of all leases, including amendments.
    b. Leases in full force and effect.
    c. Rent roll true and complete and fairly and accurately summarizes status of leases.
    d. No security deposits paid by tenants except as set forth in rent roll.
    e. Seller not in default under any leases.
7. If any lease is of particular importance to the buyer, the buyer should require estoppel certificate of tenant. *Seller will typically agree to use reasonable efforts to obtain the estoppels, but will want the delivery of estoppels to be a condition to closing, and not a covenant, so that seller will not be liable for inability to provide one or more of the estoppels.*

J. Provisions regarding other contracts.

There might be contracts, other than leases, relating to the ownership or operation of the property (such as management contracts, maintenance contracts, etc.) that run with the land or are assumable by the buyer. These contracts should be addressed. *In practice, this issue often assumes more importance than it may be worth. Very few contracts will bind a successor owner of the property unless buyer expressly assumes the contract, or the contract touches and concerns the land. Ask whether it will be simpler to terminate the existing contracts and have buyer enter into new contracts with the same or different vendors.*

1. Copies of contracts relating to ownership or operation of property should be furnished at outset of the contract (*see* Contract Provisions § H.1.c.).
2. Within specified time after the seller furnishes contracts, the buyer should notify the seller as to which of the contracts the buyer desires to assume. The buyer should not be obligated to assume any other contracts.
3. At closing, the seller is to assign, and the buyer to assume, the assumable contracts previously specified by the buyer, the buyer is to pay to the seller any prepaid obligations under assumed contracts, and the seller is to pay to the buyer or credit against the purchase price accrued obligations under assumed contracts.
4. The seller indemnifies the buyer against liabilities and claims (i) arising under assumed contracts and relating to periods of time prior to closing; and (ii) arising under contracts that are not assumed. The buyer indemnifies the seller against liabilities and claims arising under assumed contracts and relating to periods of time after closing.
5. Representations and warranties regarding contracts:
    a. Except as disclosed by the seller, there are no contracts affecting the property that will bind the property after closing.
    b. All contracts assumed by the buyer are in good standing and will be in good standing upon closing.
6. If there is a contract to be assumed by the buyer that is of particular importance to the buyer, the buyer should require an estoppel certificate of the other party to contract.

K. Prorations.

1. Taxes and assessments.
    a. Taxes.
        i. Delinquent taxes to be paid by the seller or credited against the purchase price.
        ii. Current taxes to be prorated as of closing date and paid by the seller or credited against purchase price.

iii. Actual amount of taxes to be prorated not generally known at time of closing. Contract should provide whether proration intended to be final or to be adjusted when actual taxes determined.

iv. Ohio Rev. Code § 5715.19 permits any taxing district to petition the Board of Revision to increase the assessed valuation of the property at any time up to March 31 following the year of closing. If commercial property within the taxing area of the Columbus Board of Education is sold for a price greater than the assessed fair market value, then it is not unusual for the Board of Education to file a petition seeking a retroactive increase for the year of closing, on the theory that the purchase price represents the market value as of January 1 (the tax lien date) of the year of closing.

v. Receivers and lenders selling REO will often require that all pro-rations be final.

b. Assessments.

If assessment is payable in installments, contract should provide whether (i) entire assessment is to be credited against purchase price; or (ii) only the installments prorated through closing are to be credited against purchase price. The buyer prefers credit for entire assessment. The seller prefers credit for prorated installments.

2. Rents. *See* Contract Provisions §§ I.3. and 4.

3. Assumed contracts. *See* Contract Provisions § J.3.

4. Utility charges through closing to be paid by the seller.

5. Interest on assumed mortgage.

6. Escrows held by lender under assumed mortgage.

L. Casualty; eminent domain.

Contracts typically contain lengthy provisions governing the parties' rights if, prior to closing, (i) the property is damaged by casualty; or (ii) all or a portion of the property is taken or threatened to be taken by government authority. These provisions cover eventualities that are very unlikely to occur, and it probably does not make sense to spend too much time negotiating them. The following suggested provisions seem to be reasonable and fair.

1. Casualty.

a. Require the seller to keep property insured in commercially reasonable amounts prior to closing.

b. If the damage can reasonably be restored prior to closing, the seller is to restore prior to closing.

c. If the damage cannot reasonably be restored prior to closing:

i. If the cost to restore is below a specified amount, insurance proceeds to be paid to the buyer at closing, the purchase price is reduced by amount of the insurance deductible, and the closing is to proceed.

ii. If the cost to restore is above the specified amount, the buyer has option to either (a) terminate the contract; or (b) proceed with closing, in which event insurance proceeds are to be paid to the buyer at closing and the purchase price is to be reduced by amount of insurance deductible.

2. Eminent domain.

The seller is to give the buyer notice of commencement of negotiations or legal action for taking of any part of the property. Buyer then has the option (a) to terminate contract; or (b) to proceed with closing. If the buyer proceeds with closing, the purchase price will be reduced by any awards paid to the seller prior to closing, and the seller assigns to the buyer the right to any awards not yet paid as of closing.

M. Transfer documents.

Provide for the documents by which the subject property will be transferred by the seller to the buyer.

1. Deed for real estate.

a. General warranty, limited warranty, or quit-claim deed. *If the contract is silent, then buyer is entitled to a general warranty deed, unless seller is a trustee, receiver, executor, or similar fiduciary.*

b. If deed is general or limited warranty deed, specify permitted exceptions to which conveyance may be subject.

c. Deed is to be transferable and recordable. If legal description not approved by county engineer, or if conveyance involves a lot split that has not been approved, then the deed would not be transferable.

d. Specify who pays the conveyance fee. Custom is for the seller to pay, but might be negotiable.

2. Bill of sale for tangible personal property.

Specify any warranties to be given by the seller in bill of sale. The seller will want to disclaim any implied warranties. Consider attaching form of bill of sale.

3. Assignment of leases.

a. Include representations and warranties regarding leases (*see* Contract Provisions § I.6.).

b. Include indemnifications by the seller and the buyer described in Contract Provisions § I.5.

c. Buyer should sign to indicate agreement to assume leases.

4. Assignment of assumed contracts.

a. Include appropriate representations and warranties regarding assumed contracts (*see* Contract Provisions § J.5.).

b. Include indemnifications by the seller and the buyer described in Contract Provisions § J.4.

c. Buyer should sign to indicate agreement to assume contracts.

d. If the assignment of contract requires the consent of the other party to contract, require that party's consent.

5. Assignments of any other items of intangible personal property (e.g., warranties, licenses, trade names, etc.).

N. Closing.

1. Time.

2. Place.

3. Method—escrow or sit-down closing. If escrow closing, who pays the fees of escrow agent?

O. Brokerage commissions.

1. Specify any brokerage commissions to be paid, and to whom.

2. The seller and the buyer should each represent and warrant that it has not taken any actions that would give rise to a claim for any commission, except as specified.

P. Representations and warranties.

1. Often an area of substantial negotiation. The buyer generally wants the seller to make numerous representations and warranties, and the seller wants to keep them to a minimum. However, for a buyer, representations and warranties are not a substitute for thorough due diligence. Therefore, greatest value of representations and warranties to the buyer is in eliciting facts about property.

2. Some typical representations and warranties:

a. Property free and clear of all liens and encumbrances, other than "permitted exceptions";

b. No actions or claims affecting the property are pending or have been threatened;

c. Seller has not granted to any person, other than tenants under permitted leases, any right to occupy property;

d. No violations of zoning, building, fire, safety, or health codes;

e. No knowledge of any public improvements to be made that would result in assessment against real estate;

f. No knowledge of any threatened condemnation or eminent domain proceeding;

g. Operating statements furnished by the seller to the buyer are not misleading;

h. No knowledge of latent defects in improvements;

i. Property not in violation of any environmental laws;

j. Property not contaminated by any hazardous substances;

k. No asbestos in improvements;

l. Representations and warranties regarding leases—*see* Contract Provisions § I.6.;

m. Representations and warranties regarding contracts—*see* Contract Provisions § J.5.; and

n. Representations and warranties regarding assumed loan—*see* Contract Provisions § D.2.c.iv.

o. Parties are not on the Blocked Persons list and are in compliance with all anti-terrorism and anti-money laundering laws. (See supplemental materials.)

3. Seller generally wants to couch representations and warranties as being to the best of the seller's knowledge. That might be appropriate for some representations and warranties, but not others. The buyer should negotiate this issue for each individual representation and warranty, rather than concede to a blanket qualification of all representations and warranties as being to the best of the seller's knowledge. *If seller is an entity, then seller will want the contract to specify whose knowledge is imputed to seller, particularly in the case of a large organization. In that case, buyer will want a representation that the named officers or employees are the persons with direct responsibility for the property.*

4. Representations and warranties should be effective as of date of contract and as of date of closing.

5. Specify whether representations and warranties survive closing. As a compromise, the survival of representations and warranties is sometimes limited as to time.

Q. Management pending closing.

Specify responsibilities of the seller in managing the property prior to closing. Seller's obligations might include:

1. To maintain property in substantially the same condition as of date of contract;

2. To manage property in responsible manner and in a manner consistent with management prior to contract;

3. To insure property in commercially reasonable amounts and with commercially reasonable deductible;

4. Not to cancel or amend any lease, or enter into any renewal or new lease without the buyer's consent, except within parameters specified in contract;

5. Not to enter into any agreement that would encumber the property after closing without the buyer's consent;

6. To advise the buyer of any action or claim concerning the property; and

7. To continue to make the debt service payments on any loan to be assumed and to keep such loan in good standing.

R. Assignment rights.

Seller generally wants to prohibit assignment of contract by the buyer. However, the buyer might intend to form new entity prior to closing to take title, in which case the buyer needs flexibility to make that assignment*, and will want to be automatically released upon the assignment. In either case, consider including a statement in the contract that any purported assignment in violation of the restrictions will be void and confer no rights on the assignee.*

S. Duration of offer.

Contract often written as offer from one party to the other. If so, the offer should specify a date and time at which it will expire and the method by which it can be accepted.

T. Like-kind exchange provision.

Either the seller or the buyer might want to structure transaction as part of a like-kind exchange under I.R.C. § 1031. It is a good idea to include a provision obligating each party to cooperate with the other in accomplishing a like-kind exchange. *See* § 23 for sample purchase and sale agreement.

Purchase and Sale Agreement

THIS PURCHASE AND SALE AGREEMENT (this "Agreement") is made as of the ____ day of _____, 2015 (the "Effective Date"), by ABC COMPANY, LLC, an Ohio limited liability company ("Seller"), and XYZ COMPANY, LLC, an Ohio limited liability company ("Buyer").

Seller and Buyer hereby agree as follows:

1. Sale and Purchase. Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, on and subject to the terms and conditions herein set forth, the following (collectively, the "Property"):

(a) the land situated in the City of Anywhere, _____ County, Ohio, being more particularly described in Exhibit A hereto, together with the building and all other improvements and fixtures thereon and appurtenances thereto (the "Real Property"), commonly known as 123 Main Street, Anywhere, Ohio;

(b) Seller's right, title and interest in and to all leases of portions of the Real Property (the "Leases"), which Leases are identified in Exhibit B hereto;

(c) Seller's right, title and interest in and to all tangible personal property of any kind located at and used in connection with the management or operation of the Real Property, but specifically excluding personal property of tenants of the Real Property (the "Tangible Personal Property");

(d) to the extent transferable without consent and without violating the terms thereof, Seller's right, title and interest in and to all (i) contracts relating to the management or operation of the Real Property that are assumed by Buyer pursuant to Section 7, (ii) trade names associated with the Real Property, (iii) plans and specifications and other architectural and engineering drawings related to any improvements to the Real Property, (iv) warranties relate to the Real Property, and (v) governmental permits, licenses and approvals related to the Real Property (collectively, the "Intangible Personal Property").

2. Purchase Price and Payment. The purchase price (the "Purchase Price") shall be $_____, and shall be paid by Buyer to Seller in immediately available funds upon the closing (the "Closing") of the transaction contemplated by this Agreement (the "Transaction").

3. Deposit.

(a) Amount. Within one business day after the Effective Date, Buyer shall deposit $_____ (the "Initial Deposit") in immediately available funds with _____ _____ ("Title Company"). In addition, within one business day after the Effective Date, Buyer shall pay $100 to Seller as independent consideration for this Agreement, which shall be non-refundable. Within one business day after the last day of the Due Diligence Period (as defined in Section 4(c)), Buyer shall deposit an additional $_____ (the "Additional Deposit" and, together with the Initial Deposit, the "Deposit") in immediately available funds with Title Company.

(b) Application. If Buyer terminates this Agreement prior to expiration of the Due Diligence Period in accordance with Section 4(c), then the Initial Deposit shall be returned by Title Company to Buyer. If Buyer does not so terminate this Agreement, then the Deposit shall become non-refundable, except as otherwise expressly provided in this Agreement. Upon

Closing, the Deposit shall be paid by Title Company to Seller and applied to the Purchase Price. If Buyer fails to close the Transaction for any reason other than a default by Seller or the exercise of Buyer of an express right of termination provided for herein, then the Deposit shall be paid by Title Company to Seller as liquidated damages for Buyer's default, the parties acknowledging that Seller's actual damages would be difficult to ascertain, and that such liquidated damages is the parties' best estimate of such damages.

(c) Escrow Provisions. Title Company shall serve as escrow agent for the Transaction. Title Company shall hold the Deposit in an account reasonably acceptable to Seller and Buyer (which shall be an interest bearing account if requested by Buyer) and shall disburse the Deposit in accordance with this Agreement. Any interest earned on the Deposit shall be added to and become a part of the Deposit, and shall follow the Deposit. The obligations of Title Company hereunder are purely ministerial in nature and are limited to the safekeeping and disposition of the Deposit in accordance with this Agreement. Title Company shall incur no liability in connection with the safekeeping or disposition of the Deposit for any reason other than Title Company's willful misconduct or gross negligence. If Title Company is in doubt as to its obligations with respect to the Deposit, or if Title Company receives conflicting instructions from Buyer and Seller with respect to the Deposit, Title Company shall not be required to disburse the Deposit and may, at its option, continue to hold the Deposit until both Buyer and Seller agree as to its disposition, or until a final judgment is entered by a court of competent jurisdiction directing its disposition, or Title Company may interplead the Deposit in accordance with the laws of the state in which the Property is located. Title Company shall not be responsible for any interest on the Deposit except as is actually earned, or for the loss of any interest resulting from the withdrawal of the Deposit prior to the date interest is posted thereon. Title Company shall execute this Agreement solely for the purpose of being bound by the provisions of this Section 3(c).

4. Due Diligence.

(a) Property Information. Within two business days after the Effective Date, Seller shall deliver to Buyer, to the extent Seller has not already done so, true and complete copies of the following (collectively, the "Due Diligence Documents"):

(i) all Leases;

(ii) all contracts relating to the management or operation of the Property (the "Contracts");

(iii) any title insurance policies or other evidence of title for the Real Property in the possession or control of Seller;

(iv) any surveys of the Real Property in the possession or control of Seller;

(v) any building plans and specifications and other drawings or plans relating to the Property in the possession or control of Seller;

(vi) any notices or correspondence received by Seller from governmental authorities or other third parties within the past three years regarding any violation or alleged violation of any law applicable to the Property;

(vii) any permits or licenses relating to the ownership or operation of the Property in the possession or control of Seller; and

(viii) income and expense statements regarding the results of operation of the Property for 2013, 2014 and 2015 to date.

Seller will furnish such additional documents and information regarding the Property as are reasonably requested by Buyer from time to time prior to Closing and in the possession or control of Seller, and any such additional documents furnished by Seller to Buyer shall be considered Due Diligence Documents. Buyer acknowledges that the Due Diligence Documents and all other information of any kind provided by Seller to Buyer are provided for informational purposes only, and Seller makes no representations or warranties whatsoever regarding the contents of the Due Diligence Documents or other information.

(b) Access. Buyer and Buyer's agents shall, during the Due Diligence Period, have reasonable access to the Property during normal business hours in a manner as not to unreasonably disturb the tenants under the Leases for the purpose of inspecting and testing the Property, provided that Buyer shall not conduct invasive testing (such as an environmental Phase II investigation) without Seller's prior written consent. Buyer and Buyer's agents will only be permitted such access when accompanied by Seller or a representative of Seller, who will be available during normal business hours to accompany Buyer and Buyer's agents. Buyer will indemnify, defend and hold Seller harmless from all liens, claims, losses, damages and liabilities suffered by or asserted against Seller (including without limitation any damage to property or injury to persons) as a result of any entry by Buyer or Buyer's agents under this Section 4(b). Prior to any entry by Buyer or Buyer's agents under this Section 4(b), Buyer shall furnish to Seller evidence of liability insurance maintained by Buyer or Buyer's agents with coverages and limits reasonably satisfactory to Seller. If any inspection or test disturbs or damages the Property, Buyer shall promptly repair and restore the Property to substantially the same condition as existed prior to any such inspection or test. This Section 4(b) shall survive the termination of this Agreement or the Closing.

(c) Due Diligence Period. Buyer shall have the period of _____ days after the Effective Date (the "Due Diligence Period"), expiring at 5:00 p.m. Eastern Time on the last day of the Due Diligence Period, in which to inspect and investigate the Property and, in Buyer's sole discretion, to determine whether the Property and the prospects for ownership and operation of the Property are satisfactory to Buyer. Buyer may terminate this Agreement by giving notice of termination to Seller by 5:00 p.m. Eastern Time on the last day of the Due Diligence Period. If Buyer terminates this Agreement pursuant to this Section 4(c), the Initial Deposit shall be returned to Buyer by Title Company, and all further rights and obligations of the parties under this Agreement shall terminate, except those provisions which expressly survive termination. If Buyer does not terminate this Agreement pursuant to this Section 4(c) by the expiration of the Due Diligence Period, Buyer shall have no further right to terminate this Agreement pursuant to this Section 4(c), Buyer shall make the Additional Deposit as required by Section 3(a), and the Deposit shall become non-refundable, except as otherwise provided in this Agreement.

(d) Confidentiality. The Due Diligence Documents and all other documents and information obtained by Buyer or Buyer's agents regarding the Property, whether from Seller or independently (collectively, the "Confidential Information"), shall be held in confidence by Buyer and Buyer's agents and not disclosed to third parties except to the extent that (i) such disclosure is required by law and/or (ii) such disclosure is necessary or reasonably appropriate to enable Buyer to enforce its rights under this Agreement or to defend any claim brought against Buyer under this Agreement; provided that Buyer may disclose the Confidential Information to those of its agents with a need to know and to Buyer's prospective lenders and investors, as long as Buyer advises such agents, lenders and investors of the confidential nature

of the Confidential Information. Buyer shall be responsible for any violation of the above provisions of this Section 4(d) by Buyer's agents. The confidentiality and non-disclosure provisions of this Section 4(d) shall not survive the Closing but shall survive any termination of this Agreement. If this Agreement is terminated for any reason, Buyer shall promptly redeliver to Seller or destroy the Confidential Information and will not retain any copies of the Confidential Information, except to the extent required by law.

5. Title Matters. Buyer shall obtain, prior to expiration of the Due Diligence Period, (i) a title insurance commitment (the "Title Commitment") issued by Title Company, and (ii) a survey of the Real Property prepared by a surveyor selected by Buyer (the "Survey"), each satisfying Buyer's requirements. At Seller's request, Buyer will furnish to Seller a copy of the Title Commitment and the Survey obtained by Buyer. If any exception set forth in Schedule B of the Title Commitment or any matter disclosed by the Survey is unsatisfactory to Buyer, Buyer may object to such title exception or survey matter (any such title exception or survey matter to which Buyer objects being called a "Noted Exception") by giving written notice of objection to Seller by the expiration of the Due Diligence Period. Seller may, within five business days after Buyer gives Seller such notice of objection to a Noted Exception (such five business day period being called the "Response Period"), give Buyer written notice that Seller will cure or use commercially reasonable efforts to cure such Noted Exception at or prior to Closing, in which event Seller will cure or use commercially reasonable efforts to cure such Noted Exception at or prior to Closing. If Seller does not, within the Response Period, give Buyer written notice that Seller will cure or use commercially reasonable efforts to cure a Noted Exception, Buyer may, by giving written notice of termination to Seller within three business days after expiration of the Response Period, terminate this Agreement, in which case the Deposit shall be returned by Title Company to Buyer. If Buyer has the right to, but does not, so terminate this Agreement within three business days after expiration of the Response Period, Buyer will be deemed to have waived its objection to the Noted Exception and the Transaction shall proceed without reduction in the Purchase Price. If Seller notifies Buyer during the Response Period that Seller will use commercially reasonable efforts to cure any Noted Exception, but Seller fails to cure such Noted Exception by the Outside Closing Date (as defined in Section 12(a)), then Buyer may refuse to close the Transaction by reason of such Noted Exception, in which case the Deposit shall be returned by Title Company to Buyer, but if Buyer does not refuse to close the Transaction by reason of such Noted Exception, Buyer shall be deemed to have waived its objection to such Noted Exception. The title exceptions and survey matters to which Buyer does not object as provided above, together within any Noted Exceptions to which Buyer objects but subsequently waives the objection, are collectively called the "Permitted Exceptions;" provided that (a) in no event shall any lien that may be satisfied by the payment of money, other than real estate taxes not yet due, be a Permitted Exception, and Seller shall cause all such liens to be released at or prior to Closing, and (b) the Leases will be Permitted Exceptions, whether or not exceptions therefor are set forth in Schedule B of the Title Commitment. Upon Closing, the title to the Real Property conveyed by Seller to Buyer shall be such that Buyer shall be able to obtain an owner's policy of title insurance in accordance with the Title Commitment, insuring in Buyer in the amount of the Purchase Price fee simple title to the Real Property, subject only to the Permitted Exceptions and to any liens to which Buyer subjects the Real Property at Closing.

6. Leases.

(a) Tenant Documents. Seller shall use commercially reasonable efforts to cause each tenant under the Leases (each, a "Tenant") to execute and deliver to Buyer and Buyer's lender, if any, as soon as practical after the expiration of the Due Diligence Period and in any event at or prior to Closing, (i) an estoppel certificate (a "Tenant Estoppel") and (ii) if required by Buyer's lender, a Subordination, Non-Disturbance and Attornment Agreement (an "SNDA"). Each Tenant Estoppel shall be in the form of Exhibit C hereto or in such other commercially reasonable form as may be required by Buyer's lender, with only such changes as may be requested by a Tenant and approved by Buyer in its commercially reasonable discretion. Each SNDA (if required by Buyer's lender) shall be in commercially reasonable form as required by Buyer's lender, with only such changes as may be requested by Tenant and approved by Buyer's lender. If, as of the Outside Closing Date, Seller has not caused each Tenant to execute and deliver to Buyer and Buyer's lender such a Tenant Estoppel and SNDA, then Buyer may terminate this Agreement and the Deposit shall be returned by Title Company to Buyer; provided that Buyer may not terminate this Agreement by reason of the failure of a Tenant to execute and deliver an SNDA if Buyer's lender waives the requirement for an SNDA from such Tenant. Promptly upon obtaining any Tenant Estoppel or SNDA from a Tenant, Seller will furnish a copy of the same to Buyer. From time to time at the request of Buyer after the expiration of the Due Diligence Period, Seller shall advise Buyer of the status of Seller's efforts to obtain the Tenant Estoppels and SNDAs. Buyer may communicate with the Tenants to obtain and/or confirm information regarding the Leases, the Tenants and the Property.

(b) Assignment and Assumption; Closing Adjustments. At Closing, Seller shall assign the Leases to Buyer, Buyer shall assume the Leases, Seller shall deliver the original Leases to Buyer, and Seller shall cooperate with Buyer in notifying the Tenants to pay future rents to Buyer. Seller shall pay to Buyer or credit against the Purchase Price any outstanding security deposits and any prepaid rents under any of the Leases, prorated through the date immediately prior to the date of Closing. Seller shall retain title to all past due rents under the Leases existing as of Closing, and shall have the right to collect such past due rents at Seller's cost. Buyer shall promptly remit to Seller all such past due rents collected by Buyer after Closing; provided that rents collected by Buyer after Closing shall be applied first to the rents becoming due and payable on and after the date of Closing.

(c) Leasing Activities. During the pendency of this Agreement, Seller shall not enter into any new lease, amend any of the Leases, or terminate, waive or modify its rights under any of the Leases, without the prior written consent of Buyer. During the Due Diligence Period, Buyer will not unreasonably withhold or delay consent to any new lease, any amendment of any of the Leases or any termination, waiver or modification of Seller's rights under any of the Leases. After the Due Diligence Period, Buyer shall have no obligation to consent, or to be reasonable in withholding consent, to any new lease, any amendment of any of the Leases or any termination, waiver or modification of Seller's rights under any of the Leases.

7. Contracts. By expiration of the Due Diligence Period, Buyer shall give written notice to Seller identifying the Contracts, if any, that Buyer desires to assume (the Contracts that Buyer so elects to assume being called the "Assumed Contracts," and the other Contracts being called the "Refused Contracts"). If Buyer does not give such written notice to Seller by expiration of the Due Diligence Period, then Buyer shall be deemed to have elected to assume none of the Contracts, and none of the Contracts shall be Assumed Contracts. At Closing, Seller

shall assign the Assumed Contracts to Buyer, Buyer shall assume the Assumed Contracts, Seller shall deliver to Buyer the original Assumed Contracts, Buyer shall pay to Seller the amount of any prepaid obligations under the Assumed Contracts, and Buyer shall be entitled to a credit against the Purchase Price in the amount of any accrued obligations under the Assumed Contracts. In addition, at Closing, Seller shall give notice of termination of Refused Contracts to the other parties thereto in order that each of the Refused Contracts shall terminate at the earliest time after the notice of termination permitted thereunder. Buyer shall not be obligated to assume any of the Contracts other than the Assumed Contracts; provided that Buyer shall be responsible for the obligations accruing under the Refused Contracts during the period after Closing, not to exceed 30 days, until the termination of the Refused Contracts becomes effective.

8. Taxes and Assessments. Seller shall pay or credit on the Purchase Price any of the following that are a lien on the Property on the date of Closing: all delinquent real estate taxes, including penalty and interest, all unpaid real estate taxes and installments of assessments not yet due for years prior to Closing and a portion of such taxes and installments of assessments for the year of Closing, prorated through the date immediately prior to the date of Closing. Such proration shall be based on a 365-day year and on the most recently available tax rate and valuation; provided that when tax bills with respect to such prorated taxes are received after Closing, such taxes will then be re-prorated on the basis of the actual taxes and cash settlement made between Seller and Buyer.

9. Utilities. All utility charges and all charges for services of any type furnished to the Property by any governmental agencies, public utilities or private utilities through the date immediately prior to the date of Closing shall be paid by Seller.

10. Damage or Destruction. Prior to Closing, Seller shall insure the Property, in commercially reasonable amounts and with a commercially reasonable deductible, against fire and such other insurable casualties as are commonly insured against. Seller shall promptly notify Buyer of any material damage occurring to the Property prior to Closing. If, prior to Closing, any portion of the Property is damaged or destroyed and the Property can reasonably be restored by Closing, Seller shall promptly restore the Property prior to Closing, subject to force majeure, and the Closing shall occur in accordance with this Agreement. If, prior to Closing, any portion of the Property is damaged or destroyed, the Property cannot reasonably be restored by Closing and the estimated cost of restoration is not more than $_____, all insurance proceeds payable with respect to the loss (after deduction of any amounts paid to Seller's mortgagee(s)) shall be assigned to Buyer at Closing, to the extent not theretofore applied to restoration, the Purchase Price shall be reduced by the amount of the insurance deductible and amounts paid to Seller's mortgagee(s), and the Transaction shall be closed. If, prior to Closing, any portion of the Property is damaged or destroyed, the Property cannot reasonably be restored by Closing and the estimated cost of restoration is more than $_____, Buyer may, at its option exercisable by notice given to Seller within 15 days after Buyer receives notice of the damage or destruction (but not later than the Outside Closing Date), terminate this Agreement, in which event both parties shall be released from all further obligations hereunder and the Deposit shall be returned by Title Company to Buyer; and if Buyer does not so terminate this Agreement, all insurance proceeds payable with respect to the loss (after deduction of any amounts paid to Seller's mortgagee(s)) shall be assigned to Buyer at Closing, to the extent not theretofore applied to restoration, the Purchase Price shall be reduced by the amount of the insurance deductible and amounts paid to Seller's mortgagee(s), and the Transaction shall be closed.

11. Eminent Domain. If, prior to Closing, any authority having the right of eminent domain shall commence negotiations with Seller or shall commence legal action against Seller for the damaging, taking or acquiring of all or any part of the Property, either temporarily or permanently, in any condemnation proceeding or by exercise of the right of eminent domain, Seller shall immediately give notice of the same to Buyer. Upon the occurrence of any of the foregoing events, Buyer shall have the right, at its option, to terminate this Agreement within 15 days after Buyer receives such notice from Seller (but not later than the Outside Closing Date) by giving written notice thereof to Seller, in which event the parties shall be released from all further obligations hereunder and the Deposit shall be returned by Title Company to Buyer. If Buyer does not so terminate this Agreement, the Purchase Price shall be reduced by the total of any awards, settlement proceeds or other proceeds received by Seller at or prior to Closing with respect to any damaging, taking or acquiring. If, at the time of Closing, no proceeds have been received, Seller shall assign to Buyer all of Seller's rights in and to any awards, settlement proceeds or other proceeds payable by reason of any such damaging, taking or acquiring, but the Purchase Price shall remain the same.

12. Closing.

(a) General. The Closing shall occur on the date which is ____ days after the last day of the Due Diligence Period (such date being called the "Outside Closing Date") or on such earlier date as to which the parties may agree. The Closing shall occur in escrow through Title Company. Title Company's escrow fees, if any, shall be borne equally by Seller and Buyer.

(b) Conditions to Parties' Obligations to Close. In addition to all other conditions set forth elsewhere in this Agreement, the obligation of Seller, on the one hand, and Buyer, on the other hand, to close the Transaction shall be conditioned upon the following:

(i) The other party's representations and warranties contained herein shall be true and correct in all material respects as of the date of this Agreement and as of Closing; and

(ii) As of Closing, the other party shall have performed its obligations hereunder and all deliveries to be made at Closing by the other party shall have been tendered.

So long as a party is not in default hereunder, if any condition to such party's obligation to close the Transaction has not been satisfied as of the Outside Closing Date, such party may, in its sole discretion, terminate this Agreement by delivering written notice to the other party on or before the Outside Closing Date, or elect to close, notwithstanding the non-satisfaction of such condition, in which event such party shall be deemed to have waived such condition.

(c) Seller's Escrow Deliveries. Upon Closing, Seller shall deliver in escrow to Title Company the following:

(i) Deed. A transferable and recordable Limited Warranty Deed in the form of Exhibit D hereto, executed by Seller, conveying to Buyer or Buyer's nominee fee simple title to the Real Property, subject only to the Permitted Exceptions;

(ii) Assignment and Assumption of Leases. A counterpart of an Assignment and Assumption of Leases in the form of Exhibit E hereto, executed by Seller with respect to the Leases, matching the counterpart executed by Buyer pursuant to section 12(d)(ii);

(iii) Assignment and Assumption of Intangible Personal Property. A counterpart of an Assignment and Assumption of Intangible Personal Property in the form of Exhibit F hereto, executed by Seller with respect to the Assumed Contracts, if any, and any other Intangible Personal Property, matching the counterpart executed by Buyer pursuant to Section 12(d)(iii);

(iv) Bill of Sale. A Bill of Sale in the form of Exhibit G hereto, executed by Seller, with respect to the Tangible Personal Property;

(v) Certificate of Non-Foreign Status. A Certificate of Non-Foreign Status executed by Seller in customary form certifying that Seller is not a foreign person within the meaning of the Internal Revenue Code and its regulations;

(vi) Authority. Evidence of existence, organization and authority of Seller and the authority of the person(s) executing documents on behalf of Seller reasonably satisfactory to Buyer and Title Company;

(vii) Title Clearance Instruments. Such other instruments as are reasonably required by Title Company to issue an owner's title insurance policy insuring title to the Real Property, including such affidavits as may be customary for (i) deleting exceptions for mechanics' and materialmen's liens, unrecorded easements, rights of parties in possession and lien rights of brokers, (ii) limiting persons in possession to the tenants under the Leases, and (iii) providing so called "gap" insurance coverage, if applicable;

(viii) Closing Statement. A counterpart of a Closing Statement (the "Closing Statement"), executed by Seller, consistent with this Agreement and showing the credits, charges and adjustments to the Purchase Price provided for in this Agreement and the disbursements of funds to be made upon Closing, matching the counterpart executed by Buyer pursuant to Section 12(d)(v); and

(ix) Additional Documents. Any additional documents that Buyer or Title Company may reasonably require for the proper closing of the Transaction.

(d) Buyer's Escrow Deliveries. Upon Closing, Buyer shall deliver in escrow to Title Company the following:

(i) Purchase Price. The Purchase Price, subject to credits, charges and adjustments as provided for in the Closing Statement, in immediately available funds wired for credit into Title Company's escrow account;

(ii) Assignment and Assumption of Leases. A counterpart of an Assignment and Assumption of Leases in the form of Exhibit E hereto, executed by Buyer with respect to the Leases, matching the counterpart executed by Seller pursuant to Section 12(c)(ii);

(iii) Assignment and Assumption of Intangible Personal Property. A counterpart of an Assignment and Assumption of Intangible Personal Property in the form of Exhibit F hereto, executed by Buyer with respect to the Assumed Contracts, if any, and any other Intangible Personal Property, matching the counterpart executed by Seller pursuant to Section 12(c)(iii);

(iv) Authority. Evidence of existence, organization, and authority of Buyer and the authority of the person(s) executing documents on behalf of Buyer reasonably satisfactory to Seller and Title Company;

(v) Closing Statement. A counterpart of the Closing Statement, executed by Buyer, matching the counterpart executed by Seller pursuant to Section 12(c)(viii); and

(vi) Additional Documents. Any additional documents that Seller or Title Company may reasonably require for the proper closing of the Transaction.

(e) Close of Escrow. Upon delivery in escrow to Title Company of all of the documents and funds provided for in Section 12(c) and Section 12(d), and subject to the satisfaction of the conditions to the parties' obligations to close the Transaction, Seller and Buyer shall direct Title Company to close the Transaction by (i) recording or delivering to the appropriate parties the documents delivered in escrow to Title Company and (ii) disbursing funds in accordance with the Closing Statement.

(f) Additional Deliveries. Upon Closing, in addition to Seller's deliveries in escrow to Title Company pursuant to Section 12(c), Seller shall deliver to Buyer (i) possession of the Property, subject to the Leases and the other Permitted Exceptions, (ii) any Tenant Estoppel and SNDA obtained by Seller and not previously furnished to Buyer, (iii) the original Leases, (iv) the original Assumed Contracts, (v) copies of Seller's books and records with respect to the Property reasonably required by Buyer for the ongoing management and operation of the Property, and (vi) a notice to Tenants in the form of Exhibit H hereto, which Buyer may deliver to Tenants.

13. Brokers. Seller has engaged _____ ("Listing Broker") in connection with the sale of the Property. Buyer has engaged _____ ("Selling Broker") in connection with the purchase of the Property. Upon Closing, Broker shall have earned a commission as agreed separately between Seller and Listing Broker, which commission shall be paid by Seller and shared by Listing Broker and Selling Broker in accordance with a separate agreement between them. Seller and Buyer each represent to the other that it has not enlisted the services of a broker or other agent in connection with the purchase and sale of the Property, other than Listing Broker and Selling Broker, nor have they taken any actions that could give rise to a claim for a commission in connection with the Transaction, other than as provided above. Each party shall indemnify and hold the other party harmless from and against any and all liabilities, claims, costs and expenses arising from a breach by the indemnifying party of the foregoing representation. Such indemnifications shall survive the Closing.

14. Representations and Warranties. Seller represents and warrants to Buyer that:

(a) Seller has not received any written notice of any unresolved or unsettled claims, lawsuits, actions or other proceedings or administrative hearings, and, to Seller's actual knowledge, none of the foregoing has been threatened, whether involving a governmental entity or private party, that affect or may reasonably be expected to affect the Property or in which Seller is a party by reason of ownership of the Property or any part thereof;

(b) except for the Permitted Exceptions, the Leases and the Assumed Contracts, Seller is not a party to any contracts or agreements affecting the Property that will bind the Property or Buyer after Closing (except for the obligations accruing under the Rejected Contracts during the period after Closing, not to exceed 30 days, until the termination of the Refused Contracts becomes effective);

(c) Seller has not granted to any person or entity, other than the Tenants, any presently effective right or option to occupy the Property or any portion thereof;

(d) Seller has not received written notice of any uncured violation of applicable zoning, building, fire, safety, health or environmental laws, rules or regulations with respect to the Property; and

(e) true and complete copies of the Leases, including any amendments thereto, have been or will be furnished by Seller to Buyer pursuant to Section 4(a); the Leases are in full force and effect; the Leases are accurately identified in Exhibit B hereto; no security deposits have been paid by the Tenants except as provided for in the Leases; no rent has been paid more than one month in advance under any of the Leases; no rent abatement or other thing of value has been given to any Tenant other than as set forth in the Leases; to the actual knowledge of Seller, none of the Tenants are in material default in the performance of their respective obligations under the Leases; to the actual knowledge of Seller, Seller is not in default in the performance of Seller's obligations under the Leases; and no brokerage commissions are owing by Seller in connection with any of the Leases.

As used herein, the "actual knowledge" of Seller means the actual, not constructive or imputed, knowledge of _____, without any obligation of such person(s) to make any independent investigation of the matters being represented and warranted or to make any inquiry of any other persons. The foregoing representations and warranties shall be true as of Closing and shall survive Closing for a period of six months; provided that with respect to any Lease as to which a Tenant Estoppel is not furnished by the applicable Tenant, the representation and warranty set forth in Section 18(e) shall survive without limitation. The obligation of Buyer to close the Transaction is expressly subject to and conditioned upon the foregoing representations and warranties being true as of Closing, and Buyer shall confirm the same upon Closing.

15. "As-is" Sale. Buyer acknowledges that Buyer is relying solely upon its own inspections with regard to the condition of the Property, and that Buyer is purchasing the Property "as is," without any representation or warranty by Seller as to the condition of the Property, or as to its fitness for any particular purpose. In addition, Buyer specifically affirms that Buyer's purchase of the Property is made without any representation or warranty by Seller as to the environmental condition of the Property. The above provisions of this Section are subject to any express representations and warranties set forth in this Agreement. In the event that Seller furnishes to Buyer copies of any environmental or other reports regarding the condition of the Property, Seller shall not be deemed to have made any representations or warranties regarding the completeness, accuracy or quality of such reports or the competence of the preparer of such reports, Seller shall have no obligations to Buyer with respect to such reports, and Buyer shall have no right to rely on such reports.

16. Management Pending Closing. Until the date of Closing, Seller shall: (a) maintain the Property in substantially the same condition as it is in as of the date of this Agreement (subject to Sections 10 and 11); (b) manage the Property in a commercially reasonable manner and in a manner consistent with Seller's management of the Property prior to the date of this Agreement; (c) continue the Leases, Assumed Contracts and insurance policies relative to the Property in full force and effect and neither cancel, amend nor renew any of the same or enter into any new lease other than in accordance with Section 6(c); and (d) within two business days after Seller receives notice thereof, advise Buyer of any litigation, arbitration or administrative

proceeding concerning or affecting the Property. Upon Closing, the Property shall be in substantially the same condition as on the date of this Agreement, subject to Sections 10 and 11.

17. Notices. Any notice required or intended to be given under the terms of this Agreement shall be in writing, shall be addressed to the party to be notified at the address set forth below or at such other address as each party may designate for itself from time to time by notice hereunder, and shall be deemed to have been given, delivered or served upon the earliest of (i) upon receipt or refusal, if given by U.S. certified or registered Mail, with return receipt requested, (ii) upon receipt or refusal, if given by regularly scheduled overnight delivery carrier, or (iii) receipt if given by email or personal delivery:

If to Seller: ABC Company, LLC

_____

_____

Email:_____

If to Buyer: XYZ Company, LLC

_____

_____

Email:_____

18. Assignment. Buyer may not assign Buyer's rights or obligations under this Agreement other than (a) to an entity controlling, controlled by or under common control with Buyer, or (b) to a qualified intermediary in connection with an Exchange (as defined in Section 23). Buyer will not be released from its obligations under this Agreement by reason of any assignment by Buyer. Subject to the foregoing provisions of this Section, this Agreement shall inure to the benefit of and be binding on the parties hereto and their respective heirs, legal representatives, successors and assigns.

19. Like-Kind Exchange. Seller and Buyer shall cooperate fully with the other in order to facilitate Buyer's or Seller's desire to structure the purchase of the Property as part of a so-called like-kind exchange (the "Exchange") pursuant to Section 1031 of the Internal Revenue Code of 1986, as amended, if Buyer or Seller elects to effect an Exchange; provided that: (a) the Closing shall not be delayed or affected by reason of the Exchange, nor shall the consummation or accomplishment of the Exchange be a condition precedent or condition subsequent to Seller's or Buyer's obligations under this Agreement; (b) the Exchange shall not affect or diminish Buyer's or Seller's rights under this Agreement; (c) neither Seller nor Buyer shall be required to acquire or hold title to any real property for purposes of consummating the Exchange (Buyer or Seller may use a qualified intermediary to acquire or hold title); and (d) with respect to any Exchange, the non-exchanging party shall not incur any out-of-pocket expense in facilitating the Exchange for the exchanging party (other than for review of documents related to the Exchange). Neither Seller nor Buyer make representations or guarantees to the other that the Transaction will result in any particular tax treatment or will qualify as an exchange under Section 1031 of the Internal Revenue Code.

20. Miscellaneous. The covenants, agreements, representations and warranties of Seller and Buyer under this Agreement shall not survive Closing, except as otherwise expressly provided herein.

If the day by which any action is to be taken, any notice is to be given or any document or information is to be furnished pursuant to this Agreement is not a business day, then the time for the taking of such action, giving of such notice or furnishing of such document or information shall be automatically extended to the next subsequent business day. As used herein, "business day" shall mean any day other than a Saturday, Sunday or legal holiday.

The headings to the Sections of this Agreement have been inserted for convenience only and shall in no way modify or restrict any provisions hereof or be used to construe any such provisions.

If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws, such provision shall be fully severable, and this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Agreement.

The submission of this Agreement by one party to the other does not constitute an offer by the submitting party unless such party has executed this Agreement.

Words of any gender used in this Agreement shall be held to include any other gender, and words in the singular number shall be held to include the plural, where the sense requires.

This Agreement constitutes the entire agreement between the parties hereto and supercedes all prior negotiations regarding the subject matter hereof. This Agreement may not be modified except by an instrument in writing executed by the parties hereto.

This Agreement may be executed in multiple counterparts, each of which shall be considered an original document.

This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Seller and Buyer have executed this Agreement as of the Effective Date.

ABC COMPANY, LLC

By:_____

Name:_____

Title:_____

XYZ COMPANY, LLC

By:_____

Name:_____

Title:_____

[TITLE COMPANY]

For the sole purpose of agreeing to be bound by Section 3(c).

By:_____

Name:_____

Title:_____

EXHIBIT A—Legal Description

EXHIBIT B—Leases

EXHIBIT C—Form of Tenant Estoppel Certificate

EXHIBIT D—Form of Limited Warranty Deed

EXHIBIT E—Form of Assignment and Assumption of Leases

EXHIBIT F—Form of Assignment and Assumption of Intangible Personal Property

EXHIBIT G—Form of Bill of Sale

EXHIBIT H—Form of Notice to Tenants

Exhibit C
Estoppel Certificate

RE: [TITLE OF LEASE] (the "Lease") dated _____, _____ by ABC Company, LLC ("Landlord") and _____ ("Tenant"), for space (the "Premises") in the building located at 123 Main Street, Anywhere, Ohio (the "Building")

Tenant understands that Landlord is selling its interest in the Building to XYZ Company, LLC or its assigns ("Buyer"), and that in connection therewith the Lease will be assigned to Buyer. Tenant hereby certifies to and for the benefit of Landlord, Buyer and any lender providing acquisition or other financing to Buyer related to the Building (a "Lender") that the following information with respect to the Lease is true and correct and may be relied upon by Landlord, Buyer and any Lender.

1. The Lease has not been assigned, amended or modified in any way, nor has the Premises been sublet in whole or in part, except as follows: _____
_____
_____
_____.

2. A true and complete copy of the Lease, including, if any, all amendments and modifications, is attached hereto as Exhibit A.

3. The Lease is presently in full force and effect according to its terms and is the valid and binding obligation of Tenant.

4. The original term of the Lease commenced on _____, _____ and will expire on _____, _____, with no right of Tenant to extend except as follows: _____
_____.

5. To the best of Tenant's knowledge, neither Tenant nor Landlord is in default under the Lease nor does any state of facts exist which with the passage of time or the giving of notice, or both, could constitute a default under the Lease.

6. All conditions under the Lease to be satisfied by Landlord as of the date hereof have been satisfied, and all contributions, if any, required to be paid by Landlord under the Lease to date for improvements to the Premises have been paid.

7. As of this date, to the best of Tenant's knowledge, there are no existing defenses or off-sets which Tenant has against the enforcement of the Lease by Landlord.

8. No rent has been paid by Tenant under the Lease more than one month in advance of the due date.

9. Tenant has not paid any security deposit under the Lease except for a security deposit in the amount of $_____ as provided for in the Lease.

10. The annual base rent under the Lease is currently $_____ and the monthly

installments of additional rent are currently in the amount of $_____.

DATED as of _____, 20___.

[TENANT]

By:_____
Name:_____
Title:_____

Exhibit D
Limited Warranty Deed

ABC COMPANY, LLC, an Ohio limited liability company, for valuable consideration paid, hereby grants, with limited warranty covenants, to XYZ COMPANY, LLC, an Ohio limited liability company, whose tax-mailing address is _____, the following real property:

The real property situated in the State of Ohio, County of _____, and City of Anywhere, being more particularly described in Exhibit A hereto.

Prior instrument reference: _____, Recorder's Office, _____ County, Ohio.

Subject to [PERMITTED EXCEPTIONS].

Executed as of the ____ day of _____, 2015.

ABC COMPANY, LLC

By:_____
Name:_____
Title:_____

STATE OF OHIO
COUNTY OF _____, SS:

The foregoing instrument was acknowledged before me this ____ day of _____, 2015, by _____, _____ of ABC Company, LLC , an Ohio limited liability company, on behalf of the limited liability company.

_____
Notary Public

This instrument was prepared by: _____
_____
_____

Exhibit E
Assignment and Assumption of Leases

THIS ASSIGNMENT AND ASSUMPTION OF LEASES (the "Assignment") is entered into as of the ____ day of _____, 2015, by ABC COMPANY, LLC, an Ohio limited liability company ("Assignor"), and XYZ COMPANY, LLC, an Ohio limited liability company ("Assignee").

Contemporaneously herewith, Assignor is conveying to Assignee the land and building located at and commonly known as 123 Main Street, Anywhere, Ohio (the "Property"). The Property is subject to the leases set forth in the rent roll (the "Rent Roll") which is attached hereto as Exhibit A (such leases being collectively called the "Leases").

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor hereby assigns to Assignee all of Assignor's right, title and interest in and to the Leases, and Assignee hereby accepts such assignment and assumes the obligations of Assignor accruing under the Leases on and after the date of this Assignment.

Assignor shall indemnify and hold Assignee harmless from any and all liabilities and claims arising from the Leases and relating to the period of time prior to the date of this Assignment. Assignee shall indemnify and hold Assignor harmless from any and all liabilities and claims arising from the Leases and relating to period of time on and after the date of this Assignment.

Assignor and Assignee have executed this Assignment as of the date first set forth above.

ABC COMPANY, LLC

By:_____
Name:_____
Title:_____

XYZ COMPANY, LLC

By:_____
Name:_____
Title:_____

Exhibit F
Assignment and Assumption of Intangible Personal Property

This instrument is executed and delivered as of the ____ day of _____, 2015, pursuant to that certain Purchase and Sale Agreement (the "Agreement") dated _____, 2015, by ABC COMPANY, LLC, an Ohio limited liability company ("Assignor"), and XYZ COMPANY, an Ohio limited liability company ("Assignee"), covering the real property described in Exhibit A attached hereto ("Real Property").

1. Assignment and Assumption. For good and valuable consideration Assignor hereby assigns, transfers, sets over and conveys to Assignee, as-is, where is in accordance with the Agreement, and Assignee hereby accepts and assumes (a) all the right, title and interest of Assignor in and to the management, service, supply and other contracts related to the operation of the Real Property as set forth in Exhibit B hereto (the "Service Contracts"), and (b) all the right, title and interest of Assignor in and to any and all of the other intangible personal property (which rights may be non-exclusive) related to the Real Property to the extent transferable without consent and without violating the terms thereof, including, without limitation, all trade names and trademarks associated with the Real Property, the plans and specifications and other architectural and engineering drawings for the Real Property and improvements located on the Real Property; warranties; and contract rights related to the construction, operation, ownership or management of the Real Property; and governmental permits, approvals and licenses (the "Intangible Personalty").

2. Indemnities.

(a) Assignor shall indemnify, defend and hold harmless Assignee from and against any and all liabilities and claims arising from the Service Contracts or the Intangible Personalty and relating to the period of time prior to the date of this Assignment.

(b) Assignee assumes and agrees to perform the obligations of Assignor under the Service Contracts and the Intangible Personalty on and after the date of this Assignment; and shall indemnify, defend and hold harmless Assignor from and against any and all liabilities and claims arising from the Service Contracts or the Intangible Personalty and relating to the period of time on and after the date of this Assignment.

3. Successors. This Assignment of Intangible Personal Property shall be binding on and inure to the benefit of Assignor and Assignee and their respective successors and assigns.

Assignor and Assignee have executed this Agreement as of the date first above written.

ABC COMPANY, LLC

By:_____
Name:_____
Title:_____

XYZ COMPANY, LLC

By:_____
Name:_____
Title:_____

Exhibit G
Bill of Sale

THIS BILL OF SALE is executed and delivered as of the ____ day of _____ , 2015, by ABC COMPANY, LLC, an Ohio limited liability company ("Grantor"), to XYZ COMPANY, LLC, an Ohio limited liability company ("Grantee").

Contemporaneously herewith, Grantor is conveying to Grantee the land and building located at and commonly known as 123 Main Street, Anywhere, Ohio (the "Real Estate").

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Grantor does hereby bargain, sell and deliver to Grantee, without representation or warranty, all of the right, title and interest of Grantor in and to any and all of the fixtures, equipment, machinery, furniture, furnishings, apparatus, supplies and other tangible personal property of every nature or description owned by Seller now located in or on, and used in connection with, the operation, ownership or management of the Real Property, excluding any personal property owned by tenants or other third parties (collectively, the "Tangible Personal Property").

To have and to hold unto Grantee, its successors and assigns forever.

Grantor has not made and does not make any express or implied warranty or representation with respect to the Tangible Personal Property, including but not limited to merchantability of the Tangible Personal Property or its fitness for any particular purpose, the condition of the Tangible Personal Property, or the quality or capacity of the Tangible Personal Property.

Grantor has executed this Bill of Sale as of the date first set forth above.

ABC COMPANY, LLC

By:_____
Name:_____
Title:_____

Exhibit H
Notice to Tenants

_____, 2015

_____
_____
_____
_____

Re: 123 Main Street, Anywhere, Ohio

Ladies and Gentlemen:

Please be advised that the premises of which you are a tenant at the above referenced property, and the landlord's interest in your lease, were purchased on _____, 2015, by XYZ Company, LLC, an Ohio limited liability company. All future payments, rent and otherwise, should be made by wire transfer as follows:

Bank Name:
ABA #:
Acct Name:
Acct #:
Please Notify:

Any notices required to be sent pursuant to your lease and any inquiries or concerns should be sent and/or directed to:

XYZ Company, LLC
_____
_____
Attention:_____

Very truly yours,

ABC COMPANY, LLC

By:_____
Name:_____
Title:_____

[Sample Letter of Intent]

_____, 2015

ABC Company, LLC

_____

_____

Re: 123 Main Street, Anywhere, Ohio (the "Property")

Ladies and Gentlemen

This letter sets forth the intention of XYZ Company, LLC ("Buyer") to negotiate an agreement (a "Purchase and Sale Agreement") to purchase the Property from ABC Company, LLC ("Seller") on the following basic terms:

1. Purchase Price. $_____.

2. Due Diligence. Buyer will have a ____-day period (the "Due Diligence Period") to perform its due diligence with respect to the Property and the prospects for ownership and operation of the Property. Buyer may terminate the Purchase and Sale Agreement by giving written notice of termination prior to expiration of the Due Diligence Period.

3. Deposit. Buyer shall make an initial deposit of $_____, which shall be refunded to Buyer if Buyer terminates the Purchase and Sale Agreement prior to expiration of the Due Diligence Period. If Buyer does not terminate the Purchase and Sale Agreement prior to expiration of the Due Diligence Period, Buyer shall make an additional deposit of $_____ within one business day after expiration of the Due Diligence Period.

4. Closing. Closing shall occur within _____ days after expiration of the Due Diligence Period.

5. Access. Until and unless a Purchase and Sale Agreement is entered into by Seller and Buyer, Buyer shall not be entitled to access to the Property without Seller's prior consent. From and after the effective date of a Purchase and Sale Agreement, Buyer shall be entitled to access to the Property in accordance with its terms.

6. Brokers. Neither Seller nor Buyer has dealt with any broker or other commissionable agent in connection with this transaction, other than _____. Upon closing, Seller shall pay a commission to _____ in accordance with a separate agreement between Seller and _____.

7. Closing Costs and Prorations. Seller shall pay for title insurance costs, transfer and conveyance fees and taxes and costs customarily paid by sellers of similar properties in the area of the Property. Buyer shall pay for survey costs, recording costs and costs customarily paid by purchasers of similar properties in the area of the Property. Real estate taxes, operating expenses and income shall be prorated as of the date of closing.

8. Exclusive Negotiation Period. In consideration of Buyer's agreement to negotiate in good faith to enter into a Purchase and Sale Agreement, Seller agrees that it will not sell, contract to sell or enter into discussions or negotiations for the sale of the Property

during the period from the date of this letter until the earlier of (a) _____, 2015 (the period from the date of this letter through _____, 2015 being called the "Negotiation Period") or (b) the effective date of a Purchase and Sale Agreement. Seller may market the Property to third parties during the pendency of a Purchase and Sale Agreement, provided that the right of any third party to purchase the Property shall be subject and subordinate to the rights of Buyer under the Purchase and Sale Agreement.

9. Confidentiality. Seller and Buyer shall maintain the confidentiality of the transaction contemplated by this letter. Buyer shall maintain the confidentiality of the information furnished by Seller to Buyer, or otherwise obtained by Buyer, regarding the Property, other than information that is generally available to the public.

10. Purchase and Sale Agreement. The parties shall attempt in good faith to negotiate and enter into a Purchase and Sale Agreement by the end of the Negotiation Period. At such time, if any, that the parties enter into a Purchase and Sale Agreement, this letter shall be merged into the Purchase and Sale Agreement and shall be of no further force or effect. Upon the expiration of the Negotiation Period without the parties having entered into the Purchase and Sale Agreement, this letter shall be of no further force or effect; provided, however, that the provisions of paragraph 8 shall survive expiration of the Negotiation Period.

This letter is intended to set forth basic terms under which Buyer has an interest in purchasing, and Seller has an interest in selling, the Property. Neither the execution and delivery of this letter by Buyer, nor the acceptance of this letter by Seller, shall create any binding obligation on either party hereto, except that, by acceptance of this letter, the parties agreed to be bound by the provisions of paragraphs 8 and 9.

XYZ COMPANY, LLC

By: _____
Name: _____
Title: _____

ACCEPTED:

ABC COMPANY, LLC

By: _____
Name: _____
Title: _____

[Sample Confidentiality Agreement]

_____, 2015

XYZ COMPANY, LLC

_____

_____

Ladies and Gentlemen:

ABC Company, LLC ("Owner") owns the office property located at and commonly known as 123 Main Street, Anywhere, Ohio (the "Property"). XYZ Company, LLC ("Buyer") has indicated an interest in purchasing the Property, and has requested information about the Property to evaluate the possible purchase of the Property (the "Property Information"). As a condition of furnishing the Property Information to Buyer, Owner requires that Buyer enter into this letter agreement for the benefit of Owner.

Buyer acknowledges that the Property Information constitutes confidential information of Owner, and agrees to keep the Property Information completely confidential; provided that Buyer may disclose the Property Information to Buyer's principals, employees, agents, attorneys, accountants, consultants and engineers in connection with Buyer's proposed purchase of the Property (collectively, "Buyer Representatives"), so long as Buyer (a) gives written notice to Owner identifying such Buyer Representatives (which written notice need only state the names of firms in the case of Buyer Representatives that are outside attorneys, accountants, consultants or engineers), and (b) informs such Buyer Representatives of the confidential nature of the Property Information and directs such Buyer Representatives, and such Buyer Representatives expressly agree, to treat the Property Information confidentially in accordance with this letter agreement. Further, Buyer agrees that, except to the extent provided otherwise in a binding agreement for the purchase of the Property, Buyer will, at the request of Owner, return to Owner the Property Information provided by Owner and cause any Buyer Representatives to return to Owner any Property Information in their possession.

This letter agreement shall be fully effective whether or not Owner and Buyer enter into a purchase and sale transaction with respect to the Property.

Buyer may accept this letter agreement by signing this letter in the spaces provided below and returning the signed letter.

ABC COMPANY, LLC

By:_____
Name:_____
Title:_____

Accepted and agreed to:

XYZ COMPANY, LLC

By:_____
Name:_____
Title:_____

Seller's Closing Checklist

Sale of 123 Main Street, Anywhere, Ohio, by
ABC Company, LLC to XYZ Company, LLC

1. Limited Warranty Deed
2. Assignment and Assumption of Leases
3. Assignment and Assumption of Intangible Personal Property
4. Bill of Sale
5. Certificate Updating Representations and Warranties
6. Non-Foreign Certificate
7. Closing Affidavit
8. Tenant Estoppel Certificates
9. Subordination, Non-Disturbance and Attornment Agreements
10. Notice to tenants
11. Termination of rejected service contracts
12. Payoff letter—existing mortgage loan
13. Closing Statement
14. Letter of escrow instructions
15. Organizational/authorizing documents for ABC Company, LLC
    a. Articles of Organization
    b. Certificate of Existence
    c. Operating Agreement
    d. Authorizing resolution
16. GET CASH

Buyer's Closing Checklist

Purchase of 123 Main Street, Anywhere, Ohio, by
XYZ Company, LLC from ABC Company, LLC

A. Purchase transaction
   1. Documents
      a. Limited Warranty Deed
      b. Conveyance fee statement
      c. Assignment and Assumption of Leases
      d. Assignment and Assumption of Intangible Personal Property
      e. Bill of Sale
      f. Certificate Updating Representations and Warranties
      g. Non-Foreign Certificate
      h. Closing Affidavit
      i. Tenant Estoppel Certificates
      j. Notice to tenants
      k. Termination of rejected service contracts
      l. Payoff letter—existing mortgage loan
      m. Closing Statement
      n. Letter of escrow instructions
      o. Organizational/authorizing documents for ABC Company, LLC
         i. Articles of Organization
         ii. Certificate of Existence
         iii. Operating Agreement
         iv. Authorizing resolution
   2. Due diligence
      a. Title insurance commitment
      b. Insured closing letter
      c. Survey
      d. UCC search
      e. Environmental report
      f. Property condition report
      g. Insurance coverages

h. Zoning/land use review

i. Review of leases

B. Financing

1. Documents

a. Loan Agreement

b. Promissory Note

c. Mortgage

d. Assignment of Rents

e. Guaranty

f. Environmental Indemnity Agreement

g. UCC Financing Statement

2. Due diligence

a. Appraisal

b. Environmental report

c. Property condition report

d. Evidence of insurance coverages

e. Title insurance commitment

f. Insured closing letter

g. Survey

h. UCC search

i. Rent roll

j. Copies of leases

k. Tenant Estoppel Certificates

l. Subordination, Non-Disturbance and Attornment Agreements

m. Organizational/authorizing documents for ABC Company, LLC

i. Articles of Organization

ii. Operating Agreement

iii. Certificate of Existence

iv. Authorizing Resolution

n. Organizational/authorizing documents for XYZ Company, LLC

i. Articles of Organization

ii. Operating Agreement

iii. Certificate of Existence

iv. Authorizing Resolution

o. Legal opinion

p. Evidence of zoning compliance

q. If seller is dissolving or the property is substantially all of seller's assets, then provisions for seller's final returns for sales tax (if any), commercial activity tax, unemployment compensation, and employee withholding for state income tax.

Seller Letter Regarding Sale

_____, 2015

Acme Title Agency, Inc.

_____

_____

Attn:_____

Re: Sale of 123 Main Street, Anywhere, Ohio, by ABC Company, LLC ("Seller") to XYZ Company, LLC ("Buyer")

Ladies and Gentlemen:

We represent Seller in connection with the captioned transaction. In that regard, we are delivering to you with this letter, to be held by you in escrow and released only in accordance with the terms of this letter, the following documents (collectively, the "Documents"):

1. Original Limited Warranty Deed (the "Deed") executed by Seller;

2. Original counterpart of Assignment and Assumption of Leases (the "Lease Assignment") executed by Seller;

3. Original counterpart of Assignment and Assumption of Intangible Personal Property (the "Intangibles Assignment") executed by Seller;

4. Original Bill of Sale executed by Seller;

5. Original Certificate Updating Representations and Warranties executed by Seller;

6. Original Non-Foreign Certificate executed by Seller;

7. Original Closing Affidavit executed by Seller;

8. Multiple original counterparts of a notice to tenants executed by Seller; and

9. Certificate of Managing Member of Seller (with Articles of Organization, Operating Agreement and Resolutions of the Members of Seller attached as exhibits)

You are to hold the Documents in escrow and release the Documents only in accordance with the terms of this letter.

You are authorized and directed to release the Documents from escrow if, and only if, upon such release:

a. You have received matching counterparts of a Closing Statement (the "Closing Statement") executed by Seller and Buyer (receipt by fax or email is satisfactory);

b. You have received an original counterpart of the Lease Assignment executed by

Buyer;

c. You have received an original counterpart of the Intangibles Assignment executed by Buyer; and

d. You are in receipt of immediately available funds in the amount of the total disbursements indicated on the Closing Statement (the "Funds"), and are authorized, subject only to the release of the Documents from escrow, to disburse the Funds in accordance with the Closing Statement.

Immediately upon release of the Documents from escrow, you are to disburse the Funds in accordance with the Closing Statement, including a disbursement to Seller in the amount of $_____ as indicated in the Closing Statement, in accordance with the wiring instructions furnished to you.

Upon release of the Documents from escrow, please deliver to me the counterpart of the Closing Statement executed by Buyer and the original counterparts of the Lease Assignment and the Intangibles Assignment executed by Buyer.

If you are not able, under the conditions set forth above, to release the Documents and disburse the Funds as set forth above by the close of business on _____, 2015, then you should, not later than _____, 2015, return the Documents to me.

Please indicate your acceptance of the escrow described herein by signing a copy of this letter in the space provided below and returning the signed letter to me.

Very truly yours,

Donald J. Shuller

Acme Title Agency, Inc. accepts the escrow described in the above letter, and agrees to perform the duties set forth above.

ACME TITLE AGENCY, INC.

By:_____

Name:_____

Date: _____, 2015 Title:_____

American Title Insurance Company Commitment Letter

_____, 2015

Acme Title Agency, Inc.
_____
_____
Attn:_____

Re: American Title Insurance Company Commitment No. _____ (the "Commitment"); 123 Main Street, Anywhere, Ohio

Ladies and Gentlemen:

We represent XYZ Company, LLC ("Buyer") in connection with its purchase from ABC Company, LLC ("Seller") of the improved real property located at and commonly known as 123 Main Street, Anywhere, Ohio. Buyer is obtaining a loan (the "Loan") from Choice Bank, N.A. ("Lender") to finance such purchase.

We are enclosing the following:

1. Form of Limited Warranty Deed (the "Deed") to be executed and delivered by Seller to Buyer
2. Real Property Conveyance Fee Statement of Value;
3. Original counterpart of an Assignment and Assumption of Leases (the "Lease Assignment") executed by Buyer;
4. Original counterpart of an Assignment and Assumption of Intangible Personal Property (the "Intangibles Assignment") executed by Buyer;
5. Form of Bill of Sale (the "Bill of Sale") to be executed and delivered by Seller to Buyer;
6. Form of Certificate Updating Representations and Warranties (the "Update Certificate") to be executed and delivered by Seller to Buyer;
7. Form of Non-Foreign Certificate (the "Non-Foreign Certificate") to be executed by Seller;
8. Form of a notice to tenants (the "Tenant Notice") to be executed by Seller;
9. Certificate of Managing Member of Buyer (with Articles of Organization, Operating Agreement and Resolutions of the Members of Buyer attached as exhibits);
10. Two original counterparts of a Loan Agreement (the "Loan Agreement") between Lender and Buyer, executed by Buyer;
11. Original Promissory Note (the "Note") in the principal amount of $_____ payable by Buyer to the order of Lender, executed by Buyer;

12. Two originals of an Open-End Mortgage, Security Agreement and Fixture Filing (the "Mortgage") granted by Buyer to Lender, executed by Buyer;

13. Two originals of an Assignment of Rents and Leases (the "Assignment of Rents") granted by Buyer to Lender, executed by Buyer;

14. Original Guaranty (the "Guaranty") by _____ ("Guarantor") for the benefit of Lender, executed by Guarantor; and

15. Two original counterparts of an Environmental Indemnity Agreement (the "Environmental Indemnity") by Buyer and Guarantor for the benefit of Lender, executed by Buyer and Guarantor.

Seller will furnish or cause to be furnished to you the original Deed, Bill of Sale, Update Certificate and Non-Foreign Certificate, an original counterpart of the Lease Assignment and the Intangibles Assignment, and multiple counterparts of the Tenant Notice, each executed by Seller in the forms enclosed. Lender will furnish or cause to be furnished to you an original counterpart of each of the Loan Agreement and the Environmental Indemnity, executed by Lender. Further, we anticipate that the following additional documents and funds will be furnished to you:

1. Matching counterparts of a Closing Statement (the "Closing Statement") executed by Seller, Buyer and Lender;

2. The net proceeds of the Loan (the "Loan Proceeds");

3. Funds from Buyer ("Buyer's Funds") in an amount which, when combined with the Loan Proceeds, is sufficient to make the disbursements provided for in the Closing Statement; and

4. All other documents, funds and evidence required by you in order for you to issue the policies described in items c and d below, including, but not limited to, all documents and evidence necessary to satisfy the requirements of Schedule B—Section 1 of the Commitment.

Please indicate your acceptance of the escrow described herein by signing a copy of this letter at the bottom and returning the signed copy to me. Upon my receipt of this letter signed by you, Buyer will, if other closing conditions have then been satisfied, (a) wire transfer Buyer's Funds to your escrow account, and (b) request Lender to wire transfer the Loan Proceeds to your escrow account, in each case in accordance with wiring instructions furnished by you.

The Loan Proceeds and Buyer's Funds may be disbursed by you, for the benefit of Buyer, to make all of the disbursements provided for in the Closing Statement, if, and only if, upon such disbursements:

a. You have received all of the documents identified above;

b. You have filed the Deed for record in the Office of the Recorder of _____ County, Ohio;

c. You are in a position to issue to Buyer an owner's policy of title insurance in the amount of $_____ in accordance with the Commitment, subject only to the exceptions set forth in items _____ of Schedule

B—Section 2 of the Commitment, and with an ALTA Form 9 (comprehensive) endorsement, an access endorsement, a "same as" survey endorsement, and a tax parcel endorsement;

d. You are in a position to issue to Lender a loan policy of title insurance in the amount of $_____ with respect to the Mortgage; and

e. You are authorized by Lender to disburse the Loan Proceeds.

You may disburse the Loan Proceeds and Buyer's Funds prior to completing the filing described in item b above, provided that (i) you are in a position to insure the gap by issuing the owner's and loan policies of title insurance described in items c and d above, (ii) you are authorized by Lender to disburse the Loan Proceeds, and (iii) you promptly complete the filing described in item b above.

If you are not able, under the conditions set forth above, to disburse the Loan Proceeds and Buyer's Funds as set forth above by the close of business on _____, 2015, then you should, on the immediately following business day, return the Loan Proceeds to Lender and return Buyer's Funds to Buyer.

You are to deliver to me promptly after closing the owner's policy of title insurance described above and a time-stamped copy of Deed. You are to deliver to me promptly when available the original recorded Deed.

Very truly yours,

Donald J. Shuller

Acme Title Agency, Inc. accepts the escrow described in the above letter, and agrees to perform the duties set forth above.

ACME TITLE AGENCY, INC.

By:_____
Name:_____
Date: _____, 2015 Title:_____

Supplementary Materials

Provided by Jack S. Levey; Plunkett Cooney; Columbus, Ohio

Available at: www.plunkettcooney.com/blogs-keeping-it-real-blog,inspect-commercial-property

Keeping it Real
Marketable Title & Real Estate Dispute Resolution Blog

Top 3 Questions About Allowing Buyers to Inspect Commercial Property

POSTED BY JACK S. LEVEY
JUNE 1, 2015

Commercial property sellers may want to consider the benefits of a right of an entry agreement before allowing potential buyers to conduct inspections.

Most buyers won't buy property without inspecting it. Sometimes a buyer may want to inspect even before signing a purchase agreement.

The inspection provisions deserve careful attention. Here are three questions every seller should ask when negotiating the buyer's inspection rights. But first, ask the most important question - Can I enforce the buyer's promises concerning the inspection?

You can skip this question if the purchase agreement will be signed before the inspection starts. But what if the buyer wants to start before a purchase agreement has been negotiated, much less signed? If that's the case, you may need a separate right of entry agreement.

A right of entry grants the buyer the right to enter the property for a stated purpose. You can use a right of entry to cover the same concerns as the inspection provisions of the purchase agreement. A right of entry is a must if there is only an unsigned term sheet, or a term sheet that was signed only by the brokers.

A right of entry can also be helpful if the buyer and seller are signing a letter of intent. Putting the inspection provisions in a separate right of entry makes it harder for the buyer to argue that those provisions weren't binding. It also helps keep the letter of intent shorter. Just make sure that the letter of intent does not say the buyer can start its inspection without first signing an acceptable right of entry.

If you don't want to use a separate right of entry, make sure the letter of intent covers three important points. First, even if other provisions are non-binding, the letter of intent should state that the inspection provisions are binding immediately. Second, it should state that those obligations of the buyer survive even if the deal terminates. Third, it should cover all the inspection-related issues you would include in a purchase agreement.

Now let's turn to the Top 3 questions every seller should ask when negotiating those provisions, whether in a purchase agreement, a right of entry, or a letter of intent.

1. Have I put appropriate limits on the buyer's activities?

Have I required the buyer to respect the rights of the tenants and other occupants? Do any tenants have special privacy needs that need to be respected, such as medical offices, research facilities, or health clubs? Is there information that you have promised not to disclose, such as a tenant's report of gross sales?

Does the agreement require the buyer to get your written consent before conducting soil borings or other intrusive inspections? Can you withhold that consent in your sole discretion? If you haven't reserved sole discretion, how long can you take to consent or refuse, and what are reasonable grounds for saying no?

Are you willing to let the buyer talk with your tenants, service contractors and other third parties? If the contract doesn't restrict that right, assume that the buyer will talk with them.

You probably don't want to withhold a lease or an engineering report. But what about lease abstracts? Leasing or other marketing plans? Appraisals of market value? Have you excused yourself from providing attorney-client communications, such as a legal analysis of a tenant dispute?

2. Am I taking on costs or liabilities that the buyer should pay?

Does the buyer agree to repair all damage caused by the inspection? Better yet, give yourself the right to choose between repairing it yourself at the buyer's cost or having the buyer make the repairs.

Suppose someone is injured or killed during the inspection, or someone's property is damaged. Make sure the buyer has agreed to indemnify the owner, the property manager, and perhaps the lender. Has the buyer waived its employer's immunity under the Ohio worker's compensation law? If not, the indemnity may be unenforceable if the injured person was the buyer's employee.

The buyer's indemnity promise is only as good as the buyer's net worth. Buyers are often single purpose entities. Have you required the buyer to supply liability insurance? Are the owner and the property owner listed as additional insureds? Has your risk manager or insurance agent approved the coverage type and amounts? Make sure the agreement requires the buyer to supply proof of coverage before the buyer can enter the property.

What if the buyer fails to pay one of its inspection companies? The inspection company may not be entitled to a mechanic's lien, but you should not have to bear the cost of fighting that lien in court. Has the buyer agreed to remove the lien and reimburse you for your expenses and liabilities?

Finally, you don't want to be sued over a mistake in a document that someone else prepared. Has the buyer agreed that you are not vouching for the accuracy of surveys, title insurance policies, environmental reports, or other information prepared by third parties?

3. Have I restricted what the buyer can do with the information?

If not, the buyer can use it for any purpose. Have you required the buyer to keep the information confidential and to return the information, including all copies, if the deal does not close? Have you required the buyer to obtain confidentiality agreements from its own agents and consultants before giving them access to the information?

Keeping it real.

Letters of intent have led to multimillion dollar lawsuits, even when one party thought the deal was conditioned on the parties signing a more comprehensive agreement later. As with any other legal document, signing them without an attorney's review can be an expensive way to save money.

TAGS: COMMERCIAL LEASING, REAL ESTATE

Right of Entry Agreement

THIS RIGHT OF ENTRY AGREEMENT (this "Agreement") is dated as of _____, 2016 between **<BUYER_NAME>**, an Ohio _____ ("Buyer"), and **<SELLER_NAME>**, an Ohio limited liability company ("Owner").

BACKGROUND: Owner, as Seller, and Buyer are parties to a Letter of Intent (the "LOI") dated as of _____, 2016 concerning the potential purchase and sale of property owned by Owner located in _____, _____ County, Ohio, comprising _____ County tax parcels _____ and _____, and [encompassing approximately _____ acres, more or less] [commonly known by the street address _____] (the "Property"). Buyer and Owner are entering into this Agreement as a condition to Buyer's access to the Property, as contemplated by the LOI, during the period (the "Due Diligence Period) beginning on _____, 2016 and ending upon the termination of the LOI. Buyer and Owner therefore agree hereby as follows:

ARTICLE 1 - INSPECTION

1.1 Due Diligence. Owner hereby grants to Buyer, its agents, employees, and representatives, a continuing right of reasonable access to the Property during the Due Diligence Period, to conduct surveys, engineering, geotechnical and environmental inspections and tests (excluding intrusive inspections and sampling except upon Owner's prior written consent in each instance, which may not be unreasonably withheld, conditioned or delayed), and any other non-invasive inspections, non-invasive studies, non-invasive tests, and non-invasive investigations as may Buyer reasonably require (collectively the "Inspections") to determine whether in Buyer's sole discretion, for any reason or no reason, the Property is acceptable to Buyer. If any inspection or test disturbs the Property, Buyer shall restore the Property to the same condition as existed before the inspection or test or, at Owner's option, reimburse Owner for the cost of so doing. Upon termination of the LOI for any reason, Buyer, if requested by Owner, Buyer shall provide to Owner copies of any third party reports, studies, surveys or other physical examinations made on the Premises, along with reliance letters in favor of Owner to the extent readily obtainable by Buyer.

1.2 Indemnity. Buyer shall indemnify Owner and Owner's managers and members from all any and all claims, damages, liabilities and expenses ("Loss"), including reasonable attorneys' fees, asserted against or suffered by Owner or Owner's managers or members as a result of any entry by Buyer, its agents, employees or representatives, including any Loss for mechanic's liens, and including Loss for personal injury or wrongful death. Buyer's obligations are not limited by the amount of any insurance that Buyer maintains or is required by this Agreement to maintain, nor by the immunity as a complying employer conferred by the Ohio Workers' Compensation Act, including the immunity codified in Ohio Revised Code Section 4123.74 and Section 5, Article II of the Ohio Constitution, or any comparable immunity as an employer conferred by the laws of any other jurisdiction, all of which Buyer hereby waives for the benefit of each indemnitee.

1.3 Insurance. During the Due Diligence Period, Buyer at its expense shall maintain in force a policy of commercial general liability insurance, on an occurrence and not a claims made basis, and including coverage for all of Buyer's indemnity obligations in this Agreement, endorsed to show Owner as additional insured, with policy limits of at least $_____ for bodily injury or death in any one accident, and at least $_____ for property damage, effected under standard form policies, issued by insurers of recognized responsibility authorized to do business in the state in which the Property is located and having a national rating of A-XI or better. At least two business days (i.e. excluding Saturdays, Sundays and Ohio or U.S. legal holidays) before Buyer or its representatives enter onto the Property to conduct any activities under this Section 0, Buyer shall deliver to Owner certificates of the required insurance coverage. If Buyer's insurance coverage expires during the Due Diligence Period, Buyer shall deliver to Owner, at least 15 business days before the date of expiration, a certificate of the renewal of the coverage accompanied by evidence reasonably satisfactory to Owner of payment of premium. Buyer's insurance must be primary, non-contributing, and contain a waiver of subrogation in favor of Owner and its managers and members.

1.4 Notice of Entry; Non-interference. Buyer shall give Owner at least 24 hours' notice before entry upon the Property for any purpose. At Owner's option, a representative of Owner may accompany Buyer and Buyer's representatives. Buyer shall not interference with Owner's and any tenants' use and occupancy of the Property.

1.5 Mechanic's Liens. Buyer shall keep the Property free of mechanic's liens of Buyer's contractors and consultants, including any direct or remote subcontractors, suppliers and laborers performing work or labor upon on the Property in connection with, or furnishing material in furtherance of, any of Buyer's Inspections. Within five business days' notice of the filing of any lien described in this paragraph, Buyer shall either cause the lien to be satisfied of record or shall file a statutory bond with the court under Ohio Revised Code Section 1311.04. If Buyer fails to do so, Owner at its option may, without further investigation and at Buyer's expense, do any or all of the following: file the statutory bond, pay the lien claimant, and take any other action reasonably appropriate to remove the encumbrance of the lien.

1.6 Confidentiality. Except to the extent disclosure is required by law, Buyer shall maintain in strict confidence any information disclosed to Buyer concerning the Property, and all other information disclosed to or discovered by Buyer or its consultants. Buyer shall not make or permit any disclosure, whether through press releases or any other means of publication (oral or written), of any such documentation and information, except to such brokers, attorneys, lenders and others as are involved in the negotiation and consummation of this transaction (collectively, the "Representatives"). Buyer shall advise each of its Representatives of the confidential nature of any documentation and information disclosed to them and of Buyer's obligations under this Section; Buyer acknowledges that there may be no adequate remedy at law, and acknowledges that Owner will have the right to seek injunctive relief.

1.7 Survival. All of Buyer's obligations under this 0survive the expiration of the LOI and the termination of this Agreement.

ARTICLE 2 - MISCELLANEOUS

2.1 Assignment; Parties Bound. Buyer shall not assign its rights under this Agreement without Owner's prior written consent, and any such prohibited assignment will be void.

2.2 Headings. The captions and headings of this Agreement are for convenience only and in no way limit or enlarge the scope or meaning of the language of this Agreement.

2.3 Modification and Waiver. No amendment of this Agreement will be effective unless it is in writing and signed by the parties. No waiver of satisfaction of a condition or nonperformance of an obligation under this Agreement will be effective unless it is in writing and signed by the party granting the waiver, and no such waiver will constitute a waiver of satisfaction of any other condition or nonperformance of any other obligation, or of any future satisfaction or performance of the same condition or obligation.

2.4 Governing Law. This Agreement, and all matters arising under or in connection with this Agreement, including all tort claims, shall, in all respects, be governed, construed, applied, and enforced in accordance with the law of the state in which the Property is located, without application of that state's principles of conflict of laws. Each party hereby irrevocably and unconditionally consents to submit to the exclusive jurisdiction of the courts of that state and of the United States of America located in the county where the Property is located, for any actions, suits or proceedings arising out of or relating to this Agreement, including all tort claims, and the transactions contemplated by this Agreement; and agrees not to commence any action, suit or proceeding related thereto except in that court. The parties hereby voluntarily, irrevocably and unconditionally waive any right to have a jury participate in resolving any dispute concerning any matter arising under or in connection with this Agreement, including all tort claims.

2.5 No Third Party Beneficiary. This Agreement is not intended to give or confer any benefits, rights, privileges, claims, actions, or remedies to any person or entity as a third party beneficiary, decree, or otherwise, except that the obligations of indemnity and defense are also intended for the express benefit of, and may be directly enforced by, any of the described indemnitees.

2.6 Entirety and Amendments. This Agreement constitutes the entire agreement of the parties concerning the subject matter of this Agreement and incorporates all prior negotiations and understandings relating thereto. Neither party is relying on any representation made by or on behalf of the other party that is not set forth in this Agreement. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought.

2.7 Partial Invalidity. If any provision of this Agreement is unenforceable to any extent, the remainder of this Agreement, or the application of that provision to any persons or circumstances other than those as to which is held unenforceable, will be unaffected by that unenforceability and will be valid and be enforceable to the fullest extent permitted by law

2.8 Notices. All notices required or permitted under this Agreement shall be in writing and shall be served on each party at the address set forth under its signature. Any such notices shall be either (a) sent by overnight delivery using a nationally recognized overnight courier, in which case notice shall be deemed delivered one business day after deposit with that courier, (b) if confirmed by another permitted method, fax or sent by e-mail, in which case notice shall be deemed delivered when receipt is confirmed by the addressee, by means other than an automatic response generated by the fax machine or email system (provided that e-mail notices that are not received before 5:00 p.m. (standard or daylight time, whichever is then in effect), at the place of receipt on a business day shall be deemed effective upon the commencement of the next business day), or (c) sent by personal delivery, in which case notice shall be deemed delivered upon receipt. A party's address may be changed by written notice to the other party; provided, however, that no notice of a change of address shall be effective until actual receipt of the notice. Either party may give notice by means of its attorney.

2.9 Execution in Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of the counterparts shall constitute one Agreement. To facilitate execution of this Agreement, the parties may execute and exchange by telephone facsimile counterparts, or the email exchange of scanned copies, of the signature pages.

OWNER:
<SELLER_NAME>

By: _____ _____, 2016
_____, Manager

NOTICE ADDRESS: <Seller_Name>
_____
_____
Attn: _____
Fax: _____
_____@_____

BUYER:
<BUYER_NAME>

By: _____ _____, 2016
Name:

NOTICE ADDRESS: <Buyer_Name>
_____
_____
Attn: _____
Fax: _____
_____@_____

Miscellaneous Clauses

Buyer's Default. If this transaction fails to close due to Buyer's default, then Seller's sole remedy shall be to terminate this Agreement and receive the Earnest Money (including the right to receive from Buyer or Escrow Agent, as the case may be, any Earnest Money Deficiency, as defined below) as liquidated damages, Seller waiving all other rights or remedies in the event of a default by Buyer. Buyer and Seller have considered carefully the loss to Seller occasioned by taking the Property off the market as a consequence of the negotiation and execution of this Agreement, Seller's expenses incurred in connection with the preparation of this Agreement and Seller's performance under this Agreement, and the other damages, general and special, which Buyer and Seller realize and recognize Seller will sustain but which Buyer and Seller agree would be impracticable or extremely difficult to calculate at this time if Buyer defaults. Based on all those considerations, Buyer and Seller agree that the Earnest Money, together with the interest thereon, represents a reasonable estimate of Seller's damages. Seller agrees to accept the Earnest Money as Seller's total damages and relief under this Agreement if Buyer defaults in its obligations to close under this Agreement, Seller waiving all other rights and remedies. The right to receive the Earnest Money as full liquidated damages is Seller's sole and exclusive remedy in the event of default under this Agreement by Buyer, and Seller hereby waives and releases any right to (and hereby covenants that it shall not) sue Buyer: (a) for specific performance of this Agreement, or (b) to recover any damages of any nature or description other than or in excess of the Earnest Money, but not the right to recover from Buyer any Earnest Money Deficiency. As used in this Agreement, "Earnest Money Deficiency" means (i) any amount required to be deposited pursuant to this Agreement, but not deposited, by Buyer as Earnest Money, and (ii) any amount deposited as Earnest Money and wrongfully demanded by and paid to Buyer, whether or not the payment to Buyer violated the instructions to the Escrow Agent.

Procedure for Indemnity; Waiver of Immunity. The following provisions govern actions for indemnity under this Agreement. Promptly after receipt by an indemnitee of notice of any third party claim, the indemnitee shall, if a claim in respect thereof is to be made against the indemnitor, deliver to the indemnitor written notice thereof and the indemnitor shall have the right to participate in and, if the indemnitor agrees in writing that it will be responsible for any Losses incurred by the indemnitee with respect to the claim, to assume the defense thereof, with counsel mutually satisfactory to the parties; provided, however, that an indemnitee shall have the right to retain its own counsel, with the fees and expenses to be paid by the indemnitor, if the indemnitee reasonably believes that representation of the indemnitee by the counsel retained by the indemnitor would be inappropriate due to actual or potential differing interests between the indemnitee and any other party represented by the counsel in the proceeding. The failure of an indemnitee to deliver written notice to the indemnitor within a reasonable time after indemnitee receives notice of the claim will relieve the indemnitor of any liability to the indemnitee under this indemnity only if and to the extent that the failure is prejudicial to its ability to defend the action, and the omission so to deliver written notice to the indemnitor will not relieve it of any liability that it may have to any indemnitee other than under this indemnity. If an indemnitee settles a claim without the prior written consent of the indemnitor, then the indemnitor will be released automatically from liability with respect to the claim unless the indemnitor has unreasonably withheld consent to the settlement. The indemnitor's obligations are not limited by the amount of any insurance that the indemnitor maintains or is required by this Agreement to maintain, nor by the immunity as a complying

employer conferred by the Ohio Workers' Compensation Act, including the immunity codified in Ohio Revised Code Section 4123.74 and Section 5, Article II of the Ohio Constitution, or any comparable immunity as an employer conferred by the laws of any other jurisdiction, all of which the indemnitor hereby waives for the benefit of each indemnitee.

Assignment; Parties Bound. Neither party may assign this Agreement without the prior written consent of the other, and any such prohibited assignment will be void; provided, however, that if, but only if, (x) all of Buyer's representations and warranties under this Agreement or any document delivered in connection with this Agreement will be accurate in all material respects as of the date of the assignment and the date of Closing, as though made by the assignee or nominee, (y) Buyer's proposed assignee or nominee agrees, for Seller's express benefit, to assume the performance of all of Buyer's obligations under this Agreement, and (z) Buyer expressly agrees not to be released from the assumed obligations and to be liable for the performance of all obligations of its assignee or nominee, and waives any defenses whereby a surety but not a principal may be released, Buyer may, by written notice to Seller at least 10 business days before the Closing Date, accompanied by evidence that the conditions of this Section 2.1 have been met, (a) assign this Agreement without Seller's consent to an Affiliate, or (b) direct that Seller convey the Property to an Affiliate as Buyer's nominee. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the respective legal representatives, successors, assigns, heirs, and devisees of the parties. Any purported assignment in violation of this Section __ will be void and will confer no rights on the assignee. "Affiliate" means (a) an entity that directly or indirectly controls, is controlled by or is under common control with Buyer or (b) an entity at least a majority of whose economic interest is owned by Buyer; and "control" means the power to direct the management of that entity through voting rights, ownership or contractual obligations.

10.6. Compliance with Anti-Money Laundering Laws, International Trade Control Laws and OFAC Regulations.

10.6.1 As used in this Agreement, "Anti-Money Laundering Laws" means all applicable laws, regulations and sanctions, state and federal, criminal and civil, that: (w) limit the use of and/or seek the forfeiture of proceeds from illegal transactions; (x) limit commercial transactions with designated countries or individuals believed to be terrorists, narcotics dealers or otherwise engaged in activities contrary to the interests of the United States; (y) require identification and documentation of the parties with whom a financial institution conducts business; or (z) are designed to disrupt the flow of funds to terrorist organizations.

10.6.2. To Seller's knowledge, without any duty of investigation, Seller: (i) is not under investigation by any governmental authority for, nor has Seller been charged with, or convicted of, money laundering, drug trafficking, terrorist-related activities, any crimes which in the United States would be predicate crimes to money laundering, or any violation of any Anti Money Laundering Laws; (ii) has not been assessed civil or criminal penalties under any Anti-Money Laundering Laws; (iii) has not had any of its funds seized or forfeited in any action under any Anti Money Laundering Laws; and (iv) is not a Person named in any executive orders or lists published by OFAC as a Specially Designated National and Blocked Person.

10.6.3 To Buyer's knowledge, without any duty of investigation, Buyer (including its constituent entities): (i) is not under investigation by any governmental authority for, nor has Buyer been charged with, or convicted of, money laundering, drug trafficking, terrorist-related activities, any crimes which in the United States would be predicate crimes to money laundering, or any violation of any Anti Money Laundering Laws; (ii) has not been assessed civil or criminal penalties under any Anti-Money Laundering Laws; (iii) has not had any of its funds seized or forfeited in any action under any Anti Money Laundering Laws; and (iv) is not a Person named in any executive orders or lists published by OFAC as a Specially Designated National and Blocked Person.

2.5. Seller's Knowledge. Whether or not capitalized, terms such as "to Seller's knowledge," "best knowledge of Seller", or like phrases mean the actual present and conscious knowledge of Jane Doe and John Doe (each, a "Seller's Representative"), or either of them individually, without any duty of inquiry or investigation; provided that so qualifying Seller's knowledge shall in no event give rise to any personal liability on the part of Seller's Representative or any other officer or employee of Seller, on account of any breach of any representation or warranty made by Seller in this Agreement. Seller warrants and represents that Seller's Representatives are senior executives of Seller's property manager who have direct oversight and supervisory responsibility for the Property and, to Seller's knowledge, no officers, agents or employees of Seller have materially greater knowledge of the matters set forth in this Section ___ [Insert section or article number containing Seller's reps and warranties].

[Cite as *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 177 Ohio App.3d 7, 2008-Ohio-148.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stonehenge Land Company,	**:**	
Appellee,	**:**	
		No. 07AP-449
v.	**:**	**(C.P.C. No. 06 CVC 02-2724)**
Beazer Homes Investments, L.L.C.,	**:**	**(REGULAR CALENDAR)**
Appellant.	**:**	
Stonehenge Land Company,	**:**	
Appellant,	**:**	
		No. 07AP-559
v.	**:**	**(C.P.C. No. 06 CVC 02-2724)**
Beazer Homes Investments, L.L.C.,	**:**	**(REGULAR CALENDAR)**
Appellee.	**:**	

O P I N I O N

Rendered on January 17, 2008

Luper, Neidenthal & Logan, L.P.A., and David M. Scott, for Stonehenge Land Company.

Bailey Cavalieri L.L.C., and David A. Dye, for Beazer Homes Investments, L.L.C.

APPEALS from the Franklin County Court of Common Pleas.

SADLER, Judge.

{¶1} This case involves consolidated appeals from the judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict, on the breach-of-contract claims of plaintiff-appellee and cross-appellant, Stonehenge Land Company ("Stonehenge") against defendant-appellant and cross-appellee, Beazer Homes Investments, L.L.C. ("Beazer").

{¶2} The relevant factual and procedural history follows. This case concerns the development of a residential subdivision located in the city of Groveport in Franklin County, and known as "Elmont Place." Stonehenge is a land developer, and Beazer is in the business of building and selling single-family homes. On July 27, 2000, Stonehenge entered into a written contract with Beazer's predecessor-in-interest, Crossmann Communities, Inc., d.b.a. Beazer Homes, relating to Beazer's purchase of all of the lots to be developed in Elmont Place (the "2000 contract"). In April 2002, the parties executed an amendment to the 2000 contract, which allowed Stonehenge to sell some lots to another builder, thereby reducing the number of lots that Beazer was required to purchase.

{¶3} By letter dated June 9, 2004, Beazer's counsel advised Stonehenge that Beazer did not wish to acquire any additional lots in the Elmont Place development. By letter dated September 9, 2004, however, Beazer's counsel advised Stonehenge that, despite having not received a response to its previous letter, Beazer had reevaluated its position and now wished to move forward with purchasing additional lots. Later, following additional negotiations, the parties entered into another contract dated November 23, 2004 (the "2004 contract"). This

contract concerned only the lots located in Sections 1 and 2 of Phase III of the Elmont Place development.

{¶4} The 2004 contract provided for separate purchase prices for lots in Sections 1 and 2, and contained the following provision with respect to earnest money, including a liquidated-damages clause:

> **2. Earnest Money Deposit. Upon execution of this Agreement, Builder shall deposit Seventeen Thousand Dollars ($17,000) (the Earnest Money) with Developer, to be held by Developer in trust upon and subject to the terms and conditions set forth herein.**
>
> **Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified. In such event, damages will be impossible to ascertain; therefore, such forfeiture of the Earnest Money shall constitute liquidated damages and not a penalty, and shall be Developer's sole remedy at law or in equity for a breach of any covenants or agreements of this Agreement to be performed or observed by Builder.**
>
> **Notwithstanding the foregoing, and any other provision of this Agreement to the contrary also notwithstanding, as to the first ten (10) Lots in each Section, provided that the Builder has deposited the Earnest Money with Developer for the respective Section, Developer shall be entitled to all remedies at law and in equity, including the right to pursue specific performance.**
>
> **The Earnest Money otherwise shall be refunded or forfeited in accordance with the terms contained in this Agreement, and if all the terms and conditions of this Agreement are satisfied or waived and a transaction is closed, then the Earnest Money shall be applied as a One Thousand Dollar ($1,000) credit toward the purchase price as to each specific Lot as to which the transaction is closed.**
>
> **When future sections are developed, Builder shall deposit Earnest Money in the amount of One Thousand Dollars ($1,000) per Lot when Developer notifies Builder, in writing, that all necessary and appropriate construction permits and plat approvals have been obtained. The said Earnest Money shall be applied as a credit in the same amount toward the purchase price of each such Lot.**

{¶5} Section 4 of the 2004 contract required that Beazer "take down" at least two lots per month, and also provided:

> **If Builder fails to take down the required number of Lots in any single calendar month, Builder will stand in default, and upon *five (5) business days' written* notice thereof to Builder, *at the expiration of which Builder shall still have failed to take down the required number of Lots*, Developer may terminate this agreement and retain the balance of the Earnest Money as liquidated damages (and not as a penalty, since damages will be impossible to determine).**
>
> **Notwithstanding the foregoing, Developer may require assurances from Builder at any reasonable time (and from time to time) as to Builder's readiness, willingness, and ability to perform under this Agreement. Builder's failure to *provide Developer with* assurances upon Developer's reasonable request within the reasonable time requested by Developer, and/or any breach by Builder, shall entitle Developer to retain the balance of the Earnest Money and, further, relieve Developer of any further obligation under this Agreement.**
>
> **(Emphasis sic.)**

{¶6} The 2004 contract also contained an integration clause:

> **14. Entire Agreement and Modification. This Agreement sets forth the entire and final agreement and understanding of the parties with respect to the subject matter hereof. Any and all prior agreements, understandings, or undertakings, whether written or oral, with respect to the same, are hereby superseded and replaced by this Agreement. This Agreement may not be modified or amended except by an instrument in writing, executed by each party.**

{¶7} Both the 2000 contract and the 2004 contract contained provisions related to default and cure, nonwaiver, and notices as follows:

> **15. Cure and Default. Except as provided in section 4, no failure or default by either party hereto concerning any act required by it shall result in the termination of any right of either party hereunder until such party shall have failed to remedy such failure or cure such default within thirty (30) days after the receipt of written notice of the failure to [sic] default. Receipt shall be assumed upon the earlier of actual receipt or three (3) days after such notice is placed in the U.S. Mail, *properly addressed with postage prepaid*.**

16. Non-Waiver. No waiver, forbearance, of [sic] failure by any party of its right to enforce any provision of this Agreement shall constitute a waiver or estoppel of such party's right to enforce such provision in the future.

17. Notices. All notices shall be in writing, and shall be deemed delivered when deposited in the U.S. Mail, addressed to the notices as follows:

Crossmann Communities, Inc.
dba Beazer Homes
Attn: Jeff Lodgson [sic, Logsdon]
929 Eastwind Drive, Suite 223
Westerville, Ohio 43081

Stonehenge Land Company
Attn: Mo M. Dioun
41 North High Street
New Albany, Ohio 43054

(Emphasis sic.)

{¶8} Following execution of the 2004 contract, Beazer deposited the $17,000 in earnest money and closed on 16 lots in Phase III, Section 1 of Elmont Place. On May 12, 2005, Stonehenge notified Beazer that all necessary construction permits and plan approvals had been obtained for Phase III, Section 2. It is undisputed that Beazer did not deposit any earnest money for Section 2, nor did it purchase any lots in Section 2.

{¶9} The evidence suggests that between May 12, 2005, and November 2, 2005, Beazer's legal counsel wrote several letters to Stonehenge indicating Beazer's position that it had no contractual obligation to purchase additional lots. Then, by letter dated November 2, 2005, Stonehenge's counsel sent a letter to Beazer's counsel, which stated:

> **Dear Mr. Dye:**
>
> **This firm represents The Stonehenge Company ("Stonehenge"). We are responding to your letters to Mr. VanSlyck and Mr. Dioun regarding Crossman's [sic, Crossmann's] obligations under the Purchase Agreement (the "Agreement") for the Elmont Place Subdivision ("Elmont").**
>
> **Under any reasonable interpretation of the Agreement, Crossman [sic, Crossmann] is in breach. The Agreement required Crossman [sic, Crossmann] to deposit one thousand dollars ($1,000) per lot in earnest money with Stonehenge when written notice is given that all necessary and appropriate construction permits and plat approvals have been obtained for Section 2 at Elmont. * * ***
>
> **By letter dated May 12, 2005, Stonehenge gave written notice that all necessary construction permits and plot [sic] approvals for Section 2 at Elmont have been obtained. Despite Stonehenge's repeated demands for payment of earnest money, Crossman [sic, Crossmann] has failed to deposit the earnest money as required by the Agreement. Crossman's [sic, Crossmann's] failure to make the deposit of earnest money is a material breach of the Agreement.**
>
> *** * ***
>
> *** * * If I do not hear from you in five business days from the date of this letter, I will assume you have no interest in negotiating a resolution of this dispute, and we will proceed accordingly.**

{¶10} On February 27, 2006, Stonehenge filed a complaint against Beazer, which stated causes of action for breach of the 2000 and 2004 contracts, intentional misrepresentation, and fraudulent inducement, and sought damages in excess of $300,000. The breach-of-contract claims included claims that Beazer breached its duty to purchase Phase III lots under both the 2000 and 2004 contracts and that it anticipatorily breached its duty to purchase Phase IV lots under both contracts.

{¶11} The parties filed cross-motions for summary judgment. With respect to the breach-of-contract claims, Beazer argued that it did not breach either contract, Stonehenge's claims were barred because it had not satisfied the condition precedent of properly serving a notice of default, and the liquidated-damages provision in the 2004 contract limited Stonehenge's damages to the amount of earnest money already deposited. Stonehenge argued that Beazer breached both the 2000 and 2004 contracts by failing to purchase certain lots in Phase III and any lots in Phase IV, and that Stonehenge is entitled to specific performance as a remedy for these breaches. With respect to the tort claims, Beazer argued that Stonehenge could not establish the element of justifiable reliance common to both claims, and Stonehenge argued that genuine issues of material fact existed with respect to that element.

{¶12} By decision and entry dated February 21, 2007, the trial court granted summary judgment in favor of Stonehenge on its claim for breach of its obligations to purchase Phase III lots under the 2004 contract. The court found that Stonehenge's failure to provide written notice of default, in accordance with the provisions for such notice set forth in the contract, was a "technical breach" of the notice provision, but that it was not a "material" breach. Therefore, the court reasoned, the failure to comply with the notice provision did not entitle Beazer to summary judgment on the breach-of-contract claims.

{¶13} The court found that Stonehenge is entitled to damages for breach of contract, but is not entitled to specific performance. This is because the 2004 contract only provides for specific performance as to any lots with respect to

which Beazer had deposited earnest money but then failed to purchase. Since Beazer had purchased all lots for which it had deposited earnest money, specific performance was not available. The trial court further found that the liquidated-damages provision is ambiguous as to whether it provides merely for retention of earnest money already deposited or whether it also allows Stonehenge to recover monies that it expected Beazer would deposit for Phase III lots, but that never were in fact deposited. Therefore, it determined that the jury would decide what the liquidated-damages provision meant.

{¶14} As to Beazer's obligation to purchase Phase IV lots, the court denied both parties' summary-judgment motions. The court recognized that the 2004 contract contains an integration clause, but noted that the 2000 contract concerns *all phases* of Elmont Place, whereas the 2004 contract only concerns Phase III. Therefore, the court determined that there remained a question for the jury whether the 2004 contract superseded the 2000 contract with respect to Phases III and IV, or whether it only superseded the 2000 contract with respect to Phase III. In other words, the jury was to determine whether Beazer's obligation to purchase Phase IV lots under the 2000 contract survived the parties' execution of the 2004 contract. Finally, the court denied both parties' motions for summary judgment with respect to the tort claims.

{¶15} Beazer made several motions in limine, including a motion to exclude any evidence as to the actual value of the Elmont Place lots, and other evidence as to Stonehenge's actual damages, arguing that the liquidated-damages clause

precluded the jury's consideration of such evidence. The court denied the motion and allowed Stonehenge to introduce evidence of its actual damages.

{¶16} Following a four-day trial, the jury answered a series of interrogatories. The jury granted judgment in favor of Beazer on the fraudulent-inducement and intentional-misrepresentation claims. The jury determined that the 2004 contract "nullified," or superseded, the 2000 contract, with respect to Phase III lots, and that Beazer did not breach the 2000 contract when it failed to purchase Phase IV lots. Therefore, it granted judgment in favor of Beazer with respect to Stonehenge's claims for breach of the unsuperseded portion of the 2000 contract; that is, the claims based on Beazer's failure to purchase Phase IV lots. With respect to Stonehenge's claims for breach of the obligation to purchase Phase III lots under the 2004 contract (for which the trial court had already granted summary judgment to Stonehenge), the jury determined that the liquidated-damages provision does not limit Stonehenge's damages to earnest money already deposited. The jury awarded Stonehenge $359,522 in damages for breach of the 2004 contract, and $100,000 in attorney fees. Finally, the jury determined that Stonehenge had not made reasonable efforts to mitigate its damages and had incurred $45,960 in damages that it could have avoided by mitigating.

{¶17} After trial, Beazer moved the court for a judgment notwithstanding the verdict, pursuant to Civ.R. 50(B). Specifically, it argued that the jury's award of attorney fees was unsupported by the evidence because Stonehenge had offered no evidence as to the reasonableness of the fees. The trial court agreed and granted the motion. Beazer also moved the court for an award of attorney fees

expended in its successful defense of Stonehenge's claims under the 2000 contract, which the trial court denied.

{¶18} Each party filed a separate appeal, and we consolidated the appeals for decision. In its appeal, Beazer advances three assignments of error for our consideration, as follows:

> **Assignment of Error Number One**
>
> **The Trial Court erred in granting Appellee's Motion for Summary Judgment because Appellant was not given a contractually required notice of default and opportunity to cure.**
>
> **Assignment of Error Number Two**
>
> **The Trial Court erred by submitting the issue of Appellee's actual damages to the jury when the Court had already determined that there was a clear and unambiguous contract provision for liquidated damages.**
>
> **Assignment of Error Number Three**
>
> **The Trial Court erred by denying Appellant's motion for an award of attorneys' fees, to which Appellant was entitled pursuant to the terms of the 2000 Purchase Agreement.**

{¶19} In its appeal, Stonehenge advances the following assignments of error for our review:

> **Assignment of Error No. 1: The Trial Court erred by granting Beazer's Motion for Judgment Notwithstanding the Verdict and vacating the jury award of attorney's fees.**
>
> **Assignment of Error No. 2: The Trial Court erred by denying Stonehenge an award of prejudgment interest.**
>
> **Assignment of Error No. 3: The Trial Court erred by failing to order a post-trial hearing to allow Stonehenge to present complete evidence of its attorneys fees.**

{¶20} We begin with Beazer's first assignment of error, in which Beazer argues that the trial court erred in concluding that Stonehenge's breach-of-contract claim was not barred by Stonehenge's failure to provide notice of default and an opportunity to cure, according to the specific procedure set forth in the 2004 contract. The contract provided that no failure or default by any party results in termination of any right under the contract until the party shall have failed to cure the default within 30 days after receipt of written notice of the failure or default, and that any such written notices were to be sent via U.S. Mail to Stonehenge in care of employee Jeff Logsdon. See ¶7, supra.

{¶21} The trial court found that the letter dated November 2, 2005, from Stonehenge's attorney to Beazer's attorney, constituted sufficient notice of default and of Stonehenge's intent to declare a breach and to pursue its remedies under the contracts. The court determined that Stonehenge's failure to address the letter to Logsdon, at the address provided in the contracts, was a technical breach of the notice provision, but was not material or prejudicial. The court also found that Beazer had both actual notice of Stonehenge's declaration of default and intent to declare a breach, and an opportunity to cure.

{¶22} On appeal, Beazer argues that the trial court's determination undermined the purpose for which the notice provision was negotiated, which was to make the designated decision-maker, Logsdon, aware of circumstances in which Stonehenge believed Beazer to be in default and of how long Beazer had to decide whether or not to cure. The only case that Beazer cites in support of its

position is the case of *Cummings v. Getz* (Feb. 11, 1985), Butler App. No. CA84-09-105, which does not support Beazer's argument.

{¶23} In *Cummings*, a former tenant sued her landlord for return of her security deposit, and the landlord asserted the affirmative defense that the tenant had not given the contractually required 30-day written notice of intent to vacate at the end of the lease term. The court of appeals held that in the context of a residential lease, the purpose of requiring written notice of intent to vacate is to create certainty. However, the court determined that the tenant's failure to provide written notice of intent to vacate was immaterial because she had requested that the landlord allow her and her husband to terminate the lease before the expiration of the lease term, and he had advised her that she would have to wait until the end of the term. Thus, because the landlord had actual notice that the tenant intended not to renew her lease, her failure to comply with the notice terms was not a defense to the tenant's breach-of-contract action.

{¶24} Our research reveals support for the trial court's conclusion that where there is evidence of actual notice, a technical deviation from a contractual notice requirement will not bar the action for breach of contract brought against a party that had actual notice. In *Interstate Gas Supply, Inc. v. Calex Corp.*, Franklin App. No. 04AP-980, 2006-Ohio-638, we held:

> **"The long and uniformly settled rule as to contracts requires only a substantial performance in order to recover upon such contract. Merely nominal, trifling, or technical departures are not sufficient to breach the contract." *Ohio Farmers' Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, paragraph two of the syllabus. "A court should confine the application of the doctrine of substantial performance to cases where the party has made an honest or good**

> **faith effort to perform the terms of the contract." *Burlington Resources Oil & Gas Co. v. Cox* (1999), 133 Ohio App.3d 543, 548, 729 N.E.2d 398, citing *Ashley v. Henahan* (1897), 56 Ohio St. 559, 47 N.E. 573, paragraph one of the syllabus. "For the doctrine of substantial performance to apply, the part unperformed must not destroy the value or purpose of the contract." *Hansel v. Creative Concrete & Masonry Constr. Co.*, 148 Ohio App.3d 53, 2002-Ohio-198, 772 N.E.2d 138, at ¶12, citing *F.C. Mach. Tool & Design, Inc. v. Custom Design Techonologies, Inc.* (Dec. 27, 2001), Stark App. No. 2001CA00019, citing *Wengerd v. Martin* (May 6, 1998), Wayne App. No. 97CA0046. Furthermore, "when the facts presented in a case are undisputed, whether they constitute performance or a breach of the contract, is question of law for the court." *Luntz v. Stern* (1939), 135 Ohio St. 225, 237, 20 N.E.2d 241.**
>
> **Id. at ¶35.**

{¶25} Stonehenge's attorney's letter to Beazer's attorney may have deviated from the contract's express terms as to where Stonehenge was required to send written notice of default and election to pursue contractual remedies for breach. However, under the facts and circumstances of this case, we cannot say that this technical deviation was sufficient to constitute breach of the 2004 contract that would relieve Beazer of liability for its breach. See, e.g., *Ohio Farmers' Ins. Co. v. Cochran* (1922), 104 Ohio St. 427, 135 N.E. 537, paragraph two of the syllabus (holding that merely nominal, trifling or technical departures are not sufficient to constitute breach of contract); see also *Roger J. Au & Son, Inc. v. N.E. Ohio Regional Sewer Dist.* (1986), 29 Ohio App.3d 284, 292, 29 OBR 349, 504 N.E.2d 1209 (stating that "[t]here is no reason to deny the claims for lack of written notice [if a party] was aware of [a disputed fact] and had a proper opportunity to investigate and act on its knowledge, as the purpose of the formal notice would thereby have been fulfilled").

{¶26} "A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution without performing acts that would otherwise have been conditions precedent." 5 Corbin on Contracts (1951) 920, 922, Section 977. On this principle, Ohio courts have concluded that the "renunciation of a contract by one of the parties constitutes a breach of contract which gives rise to a cause of action for damages, and in such a case notice, demand and tender are waived." *Loft v. Sibcy-Cline Realtors* (Dec. 13, 1989), Hamilton App. No. C-880446, 1989 Ohio App. LEXIS 4593, at *7. Here, Beazer repudiated the contract by failing and refusing to perform the obligations that went to the heart of the contract itself – the purchase of lots. Under those circumstances, Beazer cannot now insist that Stonehenge scrupulously adhere to every term of the contract. *Midwest Payment Sys., Inc. v. Citibank Fed. Sav. Bank* (S.D.Ohio 1992), 801 F.Supp. 9, 13.

{¶27} For all of the foregoing reasons, Beazer's first assignment of error is overruled.

{¶28} In support of its second assignment of error, Beazer contends that the trial court erred in determining that the liquidated-damages provision of the 2004 contract was ambiguous, and in submitting the issue of damages to the jury. The question of whether a contract is ambiguous is a question of law. *Wells v. C.J. Mahan Constr. Co.*, Franklin App. No. 05AP-180, 2006-Ohio-1831, ¶21, citing *Latina v. Woodpath Dev. Co.* (1991), 57 Ohio St.3d 212, 214, 567 N.E.2d 262. An appellate court reviews a trial court's resolution of legal issues de novo, without deference to the result that was reached by the trial court. *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313, 667 N.E.2d 949. A court should interpret a contract to give

effect to the intention of the parties as manifested by the language of the contract. *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 67 O.O.2d 321, 313 N.E.2d 374, paragraph one of the syllabus. When the terms of the contract are clear and unambiguous, courts may not create a new contract by finding intent not expressed by the terms. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 245-246, 7 O.O.3d 403, 374 N.E.2d 146.

{¶29} In this case, the liquidated-damages provision is contained within Section 2 of the 2004 contract and provides:

> **Earnest Money Deposit. Upon execution of this Agreement, Builder shall deposit Seventeen Thousand Dollars ($17,000) (the Earnest Money) with Developer, to be held by Developer in trust upon and subject to the terms and conditions set forth herein.**
>
> **Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified. In such event, damages will be impossible to ascertain; therefore, such forfeiture of the Earnest Money shall constitute liquidated damages and not a penalty, and shall be Developer's sole remedy at law or in equity for a breach of any covenants or agreement of this Agreement to be performed or observed by Builder.**
>
> **Notwithstanding the foregoing, and any other provision of this Agreement to the contrary also notwithstanding, as to the first ten (10) Lots in each Section, provided that the Builder has deposited the Earnest Money with Developer for the respective Section, Developer shall be entitled to all remedies at law and in equity, including the right to pursue specific performance.**
>
> **The Earnest Money otherwise shall be refunded or forfeited in accordance with the terms contained in this Agreement, and if all the terms and conditions of this Agreement are satisfied or waived and a transaction is closed, then the Earnest Money shall be applied as a One Thousand Dollar ($1,000) credit toward the purchase price as to each specific Lot as to which the transaction is closed.**
>
> **When future Sections are developed, Builder shall deposit Earnest Money in the amount of One Thousand Dollars ($1,000) per Lot when**

> **Developer notifies Builder, in writing, that all necessary and appropriate construction permits and plat approvals have been obtained. The said Earnest Money shall be applied as a credit in the same amount toward the purchase price of each such Lot.**
>
> **(Emphasis added.)**

{¶30} The trial court concluded that the liquidated-damages provision was ambiguous as to whether it provides only for Stonehenge to keep any earnest money that Beazer had *already deposited*, or whether it also entitles Stonehenge to monies it *expected* would be deposited, but that Beazer never ultimately deposited. Contrary to the trial court's conclusion, we think that the language is clear and unambiguous.

{¶31} The liquidated-damages provision states, "Builder shall forfeit the earnest money to Developer if Builder fails or refuses to perform its obligations herein specified." Contract terms are to be given their plain and ordinary meaning. *Sharonville v. Am. Emp. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶6, citing *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 167-168, 24 O.O.3d 274, 436 N.E.2d 1347. "Earnest money" is defined as "[a] deposit paid (often in escrow) by a prospective buyer (esp. of real estate) to show a good-faith intention to complete the transaction, and ordinarily forfeited if the buyer defaults." Black's Law Dictionary (8th Ed.2004) 547. Because "earnest money" plainly refers to a "deposit paid" and does not refer to a deposit not yet paid, the liquidated-damages clause only encompasses those monies that Beazer had *already* deposited with Stonehenge prior to Beazer's breach. Therefore, the measure of Beazer's damages was readily ascertainable by reference to the

language of the contract, and the trial court erred in submitting this issue to the jury instead of resolving the issue as a matter of law. The fact that the liquidated damages may be far less than Stonehenge's actual damages does not change this result. If the language of a contract is clear and unambiguous, courts must enforce the instrument as written. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd*. (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096.

{¶32} For all of the foregoing reasons, Beazer's second assignment of error is sustained.

{¶33} In support of its third assignment of error, Beazer argues that the trial court erred in denying Beazer's motion for attorney fees expended in its successful defense of Stonehenge's claim for breach of the 2000 contract vis-à-vis Phase IV lots. It directs our attention to a provision within the 2000 contract that states:

> **In the event a party hereto engages counsel to represent such party in connection with any breach or default, or threatened breach or default, hereof by the other party or to construe or enforce compliance with this Agreement, then the non-breaching or non-defaulting party and/or the party otherwise prevailing in any action to enforce or construe this Agreement, or any settlement associated therewith, shall be entitled to recover from the other all attorney fees, disbursements and costs to be incurred.**

{¶34} Attorney fees are generally not recoverable in contract actions. *First Bank of Marietta v. L.C. Ltd.* (Dec. 28, 1999), Franklin App. No. 99AP-304. Such a principle comports with the "American Rule" that requires each party involved in litigation to pay its own attorney fees in most circumstances. *Sorin v. Warrensville Hts. School Dist. Bd. of Edn.* (1976), 46 Ohio St.2d 177, 179, 75 O.O.2d 224, 347 N.E.2d 527. An exception to that rule allows for the recovery of attorney fees if the

parties contract to shift fees. *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 699, 725 N.E.2d 1193, citing *Pegan v. Crawmer* (1997), 79 Ohio St.3d 155, 156, 679 N.E.2d 1129.

{¶35} In denying Beazer's motion for attorney fees the trial court explained:

> **The jury returned a verdict in favor of [Beazer] on [Stonehenge's] breach of contract claim relating to the 2000 Purchase Agreement. The 2000 Purchase Agreement contained a provision stating that the non-breaching party in an action to enforce or interpret the 2000 Purchase Agreement is entitled to its reasonable attorney's fees. [Beazer] has moved the Court for an award of its attorney's fees, based on such verdict, and has requested a hearing to determine the reasonable amount thereof.**
>
> **At trial, the Court determined that the question of whether an award of attorney's fees was to be made and if so the amount thereof, was to be submitted to the jury. * * * [Beazer] offered no evidence at trial from which a determination could be made of the amount or reasonableness of attorney's fees to be awarded to [Beazer], and as such the Court is incapable of making such an award.**

{¶36} On appeal, Beazer argues that it did not have to present evidence at trial regarding its attorney fees expended in defense of Stonehenge's claim for breach of the 2000 contract, because its right to recover these fees only vested when the jury rendered a verdict in its favor on that claim. Beazer maintains that it would have been inappropriate and confusing to the jury if it had presented evidence as to its attorney fees at the same time it presented substantive evidence that it had not breached the 2000 contract.

{¶37} In response, Stonehenge presents two arguments, which we will address in turn. First, it points out that the jury answered "yes" to the interrogatory inquiring, "Was the 2000 Purchase Agreement, as amended in 2002, nullified by the 2004 Purchase Agreement?" Stonehenge argues that because the

jury determined that the 2000 contract had been "nullified," then the *entire contract*, including the attorney fees provision, is unenforceable.

{¶38} We note initially that the trial court did not rely on this interrogatory in denying Beazer's motion for attorney fees. More important, however, the record demonstrates that the jury did not determine that the *entire 2000 contract* had been nullified. The *only* issue before the jury respecting whether the 2004 contract nullified the 2000 contract was whether or not Beazer's 2000 contract obligation to purchase Phase IV lots survived the 2004 contract. Stonehenge claimed that Beazer had breached the 2000 contract by failing to purchase Phase IV lots, and Beazer's defense to that claim was that the 2004 contract superseded all terms in the 2000 contract that would have obligated Beazer to purchase Phase IV lots.[1] The jury interrogatory that Stonehenge cites does not even encompass whether the 2004 contract nullified the attorney fees provision, or other non-Phase IV lot

[1] Jury Instruction No. 10 states:

"Stonehenge also claims that Beazer breached the parties' contract with respect to Phase 4 of Elmont Place. Stonehenge also alleges that the 2004 Purchase Agreement was an amendment to the parties' contract that did not relieve Beazer of its obligations to buy the lots in Phase 4. According to Stonehenge, the subject matter of the 2004 Purchase Agreement was limited to Phase 3 of Elmont Place. Therefore, Stonehenge asserts that Beazer remained obligated pursuant to the 2000 Purchase Agreement, as amended in 2002, to purchase 10 lots in Phase 4. Stonehenge alleges that statements by Beazer that it would be making no further purchases of lots at Elmont Place constitutes an anticipatory breach of Beazer's contractual obligation to purchase the lots in Phase 4 of Elmont Place. * * *

"Beazer denies that it breached the contract with respect to Phase 4. Beazer contends that the terms of the 2000 Purchase Agreement, as amended in 2002, created no obligation on the part of Beazer to purchase, nor on the part of Stonehenge to sell, the Phase 4 lots. Rather, Beazer claims the parties intended only to establish the price at which such lots would be sold to Beazer, if Beazer wanted to purchase and Stonehenge wanted to sell those lots, if Stonehenge did not exercise its right to rezone Phase 4 for condominiums. Beazer also claims the 2004 Purchase Agreement superseded all terms of the 2000 Purchase Agreement, as amended in 2002, and that under the 2004 Purchase Agreement Beazer had no obligation to purchase lots in Phase 4.

"You must decide whether the amended 2000 Purchase Agreement obligated Beazer to purchase Phase 4 lots." (Emphasis added.)

purchase-related provisions; *the interrogatory only concerns whether the 2004 contract nullified Beazer's obligation to purchase Phase IV lots*. By its answer to the interrogatory, the jury indicated it found that Beazer's obligation under the 2000 contract to purchase Phase IV lots had been nullified by the parties' 2004 contract. The interrogatory does not mean that Beazer is not entitled to attorney fees under the 2000 contract; on the contrary, the interrogatory means that Beazer successfully defended itself against Stonehenge's claims that Beazer's obligation to purchase Phase IV lots survived the 2004 contract, and that Beazer had breached that obligation. Thus, under the 2000 contract, Beazer had a right to its reasonable attorney fees expended in defense of that claim.

{¶39} But Stonehenge also argues that the trial court correctly observed that Beazer was required to present evidence of its attorney fees at trial and that because Beazer failed to do so, the trial court correctly denied Beazer an award of fees or an opportunity to present evidence to the court. In reply, Beazer argues that requiring it to present evidence to the jury as to its attorney fees "had the legal effect of shifting to Beazer the burden of proof on a matter on which [Stonehenge] had such burden * * * [because evidence about Beazer's attorney fees was a matter] that the jury could not possibly have distinguished as being applicable to Beazer's case only." Beazer maintains that this, coupled with the fact that its right to attorney fees only "vested" upon the jury's verdict in its favor on Stonehenge's claim for breach of the 2000 contract, required that Beazer's claim for attorney fees be addressed not at trial but in a posttrial motion hearing.

{¶40} Beazer does not provide any authority for the proposition that a right to attorney fees under a contractual fee-shifting provision only vests upon the jury returning a verdict for the prevailing party. However, we note that this court has previously held that a plaintiff's right to *statutory* attorney fees did not vest until she received a judgment in her favor. *Pasco v. State Auto Mut. Ins. Co.*, Franklin App. No. 04AP-696, 2005-Ohio-2387, ¶20. In the case of *Keal v. Day*, 164 Ohio App.3d 21, 2005-Ohio-5551, 840 N.E.2d 1139, the First Appellate District held that for purposes of a contract providing for reasonable attorney fees for the "prevailing party" in any dispute over the contract, the term "prevailing party" means "one in whose favor the decision or verdict is rendered and judgment entered." Id. at ¶8.

{¶41} We are persuaded that Beazer did not acquire the right to attorney fees for its successful defense of Stonehenge's claim for breach of the 2000 contract until the jury rendered its verdict in Beazer's favor on this claim. Thus, it was not required to seek its reasonable attorney fees until that time. We note that Beazer moved for an award of attorney fees and a hearing on the issue merely three days after the jury rendered its verdict. Under these circumstances, we agree that the trial court erred in summarily denying Beazer's motion for a hearing on its request for attorney fees. Accordingly, we sustain Beazer's third assignment of error.

{¶42} We now move on to Stonehenge's appeal. Because they are interrelated, we will address Stonehenge's first and third assignments of error together. In its first assignment of error, Stonehenge argues that the trial court

erred in granting Beazer's motion for judgment notwithstanding the verdict ("JNOV") and vacating the jury's award of attorney fees. In its third assignment of error, it maintains that the trial court should have allowed Stonehenge a posttrial hearing in order to submit additional evidence on the issue of attorney fees.

{¶43} A motion for JNOV should be granted when the trial court, construing the motion most strongly in favor of the nonmoving party, finds that upon any determinative issue, reasonable minds could come to but one conclusion upon the evidence submitted, and such conclusion is adverse to the nonmoving party. *Mantua Mfg. Co. v. Commerce Exchange Bank* (1996), 75 Ohio St.3d 1, 4, 661 N.E.2d 161. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon a motion for JNOV. *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 137, 17 OBR 281, 477 N.E.2d 1145, quoting *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275, 74 O.O.2d 427, 344 N.E.2d 334. "A motion * * * for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 58 O.O.2d 424, 280 N.E.2d 896. Thus, our review is de novo. *Hale v. Spitzer Dodge, Inc.*, Franklin App. No. 04AP-1379, 2006-Ohio-3309, ¶15, citing *Miller v. Lindsay-Green, Inc.,* Franklin App. No. 04AP-848, 2005-Ohio-6366, ¶52.

{¶44} The parties' 2004 contract provides that the nonbreaching and/or prevailing party in an action to enforce the contract "shall be entitled to recover from the other its reasonable attorney fees." The trial court granted Beazer's motion for JNOV as to the jury's award of attorney fees under the 2004 contract

because, it found, Stonehenge had presented no evidence as to the reasonableness of its fees. Stonehenge argues that it presented evidence as to the reasonableness of its attorney fees through the testimony of its owner, Mr. Dioun, who testified that the fees Stonehenge seeks to recover are reasonable. Stonehenge also argues that Beazer never presented evidence that Stonehenge's fees were unreasonable. Stonehenge admits that it did not present "complete evidence of its attorney's fees," but argues this was because the trial court required it to present proof of its attorney fees during trial rather than at a posttrial hearing. It contends that the trial court should have held a separate posttrial hearing on attorney fees, but does not specify what other evidence would constitute "complete" evidence of its attorney fees.

{¶45} In response, Beazer points out that even though the 2004 contract provided that Stonehenge was *entitled* to its reasonable attorney fees by virtue of its status as a prevailing party, Stonehenge still had to prove that the amount it sought was in fact reasonable in the circumstances of this case. We agree. "A party seeking an award of attorney fees has the burden of demonstrating the reasonable value of such services." *DeHoff v. Veterinary Hosp. Operations of Cent. Ohio, Inc.*, Franklin App. No. 02AP-454, 2003-Ohio-3334, ¶145; see also *Roth Produce Co. v. Scartz* (Dec. 27, 2001), Franklin App. No. 01AP-480 ("A 'reasonable' fee must be related to the work reasonably expended on the case and not merely to the amount of the judgment awarded").

{¶46} "In calculating attorney fee awards, we require that a number of factors be considered, including, among other things, the time and labor involved

in maintaining the litigation, the novelty and difficulty of the questions presented, the professional skill required to perform the necessary legal services, the reputation of the attorney, and the results obtained." *Christe v. GMS Mgt. Co., Inc.* (2000), 88 Ohio St.3d 376, 378, 726 N.E.2d 497, citing *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 145-146, 569 N.E.2d 464. The factual determination of reasonableness must also be predicated upon an analysis of the hourly rates charged multiplied by the hours actually and necessarily spent, along with the aforementioned considerations of difficulty and complexity of the case, the attorney's reputation, and the results obtained. *Bittner*.

{¶47} In the present case, as Stonehenge concedes, the only evidence it presented as to its attorney fees was the testimony of Mr. Dioun. Mr. Dioun merely testified that his attorney fees were reasonable in his opinion and that the amount of fees that Stonehenge was requesting was consistent with what the attorneys estimated their fees would be for this litigation. But he did not know whether the hourly rates charged are typical for the market, which hourly rates were charged to Stonehenge, exactly who had worked on the case, or how much Stonehenge had actually been charged. He did not personally review Stonehenge's attorney invoices. This evidence is insufficient for the jury to determine the reasonableness of the attorney fees that Stonehenge seeks.

{¶48} Moreover, the trial court did not err in submitting the attorney-fee issue to the jury rather than holding a separate posttrial hearing on the matter. "Generally, attorney's fees are allowable as damages in breach of contract cases where the parties have bargained for a particular result and the breaching party's

wrongful conduct led to the legal fees being incurred." *Natl. Eng. & Contracting Co. v. U.S. Fid. & Guar. Co.*, Franklin App. No. 03AP-435, 2004-Ohio-2503, ¶23, citing *Westfield Cos. v. O.K.L. Can Line*, 155 Ohio App.3d 747, 2003-Ohio-7151, 804 N.E.2d 45. Because the attorney fees being sought herein were in the nature of damages, the trial court was required to submit the issue to the jury. "If the fees are damages, then the availability and amount of such fees have to be determined by the jury." *Christe*, 88 Ohio App.3d at 378, citing *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 557, 644 N.E.2d 397. Accordingly, the trial court correctly submitted the issue of Stonehenge's attorney fees to the jury, rather than holding a separate hearing on the issue.

{¶49} For all of the foregoing reasons, Stonehenge's first and third assignments of error are overruled.

{¶50} In its second assignment of error, Stonehenge argues that the trial court erred in the calculation of prejudgment interest. The trial court awarded prejudgment interest "only for the time period after the breach, and prior to the Court's entry of judgment herein, which was not already covered by Plaintiff's interest calculation at trial, i.e. from March 9, 2007 to the date of filing of this decision." Stonehenge argues that it was entitled to prejudgment interest on the jury's damage award from June 2005, at eight percent per annum, for a total of $43,141.53. In light of our disposition of Beazer's second assignment of error, which alters the amount of compensatory damages upon which any prejudgment interest calculation would be based, we find Stonehenge's second assignment of error to be moot, and we overrule it on that basis.

{¶51} In summary, we overrule Beazer's first assignment of error and sustain Beazer's second and third assignments of error; and we overrule Stonehenge's first and third assignments of error on their merits, and its second assignment of error as moot. We affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and remand this cause to that court for further proceedings consistent with law and with this opinion.

Judgment affirmed in part and reversed in part, and cause remanded.

PETREE and KLATT, JJ., concur.

MARK-IT PLACE FOODS, INC., d.b.a. Festival Foods, Appellant and Cross-Appellee,

v.

NEW PLAN EXCEL REALTY TRUST, INC., et al., Appellees and Cross-Appellants.

[Cite as *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust,* 156 Ohio App.3d 65, 2004-Ohio-411.]

Court of Appeals of Ohio,

Fourth District, Scioto County.

No. 03CA2863.

Decided Jan. 26, 2004.

Stanley C. Bender, for appellant and cross-appellee, Mark-It Place Foods, Inc., d.b.a. Festival Foods.

Miller, Searl & Fitch and R. Alan Lemons; Day, Ketterer, Raley, Wright & Rybolt, Ltd., James K Brooker and Robert J. McBride, for appellant Fleming Companies, Inc.

Satzbert, Trichon, Kogan & Wertheimer, P.C., Mark E. Kogan and Christopher N. Jones; and Ruggiero & Haas and Daniel P. Ruggiero, for appellee and cross-appellant New Plan Excel Realty Trust, Inc.

PETER B. ABELE, Judge.

{¶1} This is an appeal from several Scioto County Common Pleas Court judgments that resolved various claims between Mark-It Place Foods, Inc., d.b.a. Festival Foods ("Festival"),

plaintiff below and appellant herein, Fleming Companies, Inc. ("Fleming"), defendant below and appellant herein, and New Plan Excel Realty Trust, Inc. ("New Plan"), defendant below and cross-appellant herein. Festival assigned the following errors for our review:

FIRST ASSIGNMENT OF ERROR

"The trial court erred in failing to grant summary judgment in favor of Mark-It Place Foods, Inc., dba Festival Foods, on its complaint against New Plan Excel Realty Trust, Inc."

SECOND ASSIGNMENT OF ERROR

"The trial court erred in granting summary judgment to New Plan Excel Realty Trust, Inc., against Mark-It Place Foods, Inc., dba Festival Foods."

THIRD ASSIGNMENT OF ERROR

"The trial court erred in failing to construe the facts most favorably to Mark-It Place Foods, Inc., dba Festival Foods, when ruling on the motion for summary judgment by New Plan Excel Realty Trust, Inc."

FOURTH ASSIGNMENT OF ERROR

"The trial court erred in holding that privity of contract prevent[ed] Mark-It Place Foods, Inc., dba Festival Foods, from maintaining an action directly against New Plan Excel Realty Trust, Inc., for breach of contract."

FIFTH ASSIGNMENT OF ERROR

"The trial court erred in holding that Mark-It Place Foods, Inc., dba Festival Foods, could not maintain an action directly against New Plan Excel Realty Trust, Inc., as third-party of the lease."

SIXTH ASSIGNMENT OF ERROR

"The trial court erred in holding that the estoppel letters can be considered as evidence of reasonable reliance by New Plan Excel Realty Trust, Inc."

SEVENTH ASSIGNMENT OF ERROR

"The trial court erred when it failed to hold, as a matter of law, that the lease was clear and unambiguous on its face, that Mark-It Place Foods, Inc., dba Festival Foods, and Fleming Companies, Inc. had the exclusive right to sell foodstuffs and that a sale of

foodstuffs by Wal-Mart violated the lease."

EIGHTH ASSIGNMENT OF ERROR

"The trial court erred when it considered parol evidence to change a contract clear and unambiguous on its face."

NINTH ASSIGNMENT OF ERROR

"The trial court erred in holding that Mark-It Place Foods, Inc., dba Festival Foods, and Fleming Companies, Inc., could not recover from New Plan Excel Realty Trust, Inc., rents paid under protest."

TENTH ASSIGNMENT OF ERROR

"The trial court erred in holding that R.C. [Chapter] 1331 had application to the lease."

ELEVENTH ASSIGNMENT OF ERROR

"The trial court erred in finding Section 6.3 of the lease to be 'overbroad'."

{¶2} Fleming advances its own assignments of error as follows:

FIRST ASSIGNMENT OF ERROR

"The trial court erred in granting summary judgment to New Plan Excel Realty Trust, Inc. on Fleming Companies, Inc.'s cross-claim against New Plan."

SECOND ASSIGNMENT OF ERROR

"The trial court erred in denying the motion for summary judgment of Fleming Companies, Inc. on its cross-claim against New Plan."

THIRD ASSIGNMENT OF ERROR

"The trial court erred in granting summary judgment to New Plan on its cross-claim against Fleming."

{¶3} Finally, New Plan posits the following cross-assignments of error for review:

FIRST CROSS-ASSIGNMENT OF ERROR

"The trial court erred in holding that an issue of fact existed as to New Plan Excel Realty Trust, Inc.'s ('New Plan') reasonable reliance on the valid estoppel letter signed by Fleming Companies, Inc. ('Fleming') and Mark-It Place Foods, Inc. ('Mark-It'), and that

New Plan was not entitled to judgment as a matter of law based on its estoppel theories."

SECOND CROSS-ASSIGNMENT OF ERROR

"The trial court erred in failing to hold that under the interpretation of Section 6.3 of the lease urged by Fleming and Mark-It the rent abatement would constitute an unenforceable penalty."

{¶4} In the late 1980s, Wal-Mart Stores, Inc. ("Wal-Mart") began to explore the possibility of opening a store in the Scioto County area. Wal-Mart retained the services of Leo Eisenberg Co. ("Eisenberg"), a nationwide developer and shopping-center manager, to examine the area. Eisenberg found an appropriate location in New Boston. Eisenberg then formed the New Boston Development Company ("NBDC") to build and to later own the shopping center intended to house the new Wal-Mart store. NBDC sought other tenants for the shopping center as well and, on July 27, 1989, entered into a "shopping-center lease" ("the lease") whereby it agreed to let 52,628 square feet to Scrivner, Inc. ("Scrivner"), for use as a supermarket. That lease contained the following "exclusive-use" provision:

"Neither Lessor nor any affiliate or related party shall, without Lessee's prior written consent, own, operate or grant any lease or permit any assignment or sublease for a store (or any portion of a store) in the Shopping Center or any of Lessor's real estate located within 1,500 yards of the Shopping Center which permits a tenant under such lease to *sell or offer for sale groceries, meats, poultry, seafood, dairy products, fruits, vegetables or baked goods*, provided these restrictions shall not be deemed to prohibit a restaurant serving prepared food." (Emphasis added.)

{¶5} In November of that year, NBDC leased a 112,238 square foot building and garden center in the shopping center to Wal-Mart. The lease did not include any provision to prohibit Wal-Mart from selling any of the items listed in the above-cited exclusive-use provision,[1] and it is undisputed that, "from its opening day," Wal-Mart sold foodstuffs such as "chips, nuts, beverages,

[1] The lease provided that Wal-Mart could use the demised premises for "any lawful purpose."

cereal, cookies, canned meats, pasta and other convenience food items."

{¶6} On June 14, 1990, Scrivner assigned its leasehold interest to S.M. Flickinger Co. ("Flickinger"), which, on January 9, 1991, entered into a "sublease agreement" subletting the premises to Festival. Fleming is the successor in interest to Flickinger.

{¶7} In 1992, NBDC decided to sell the shopping center. New Plan expressed interest in acquiring the property and began examining the shopping-center leases. It appears that during the course of this examination process, New Plan may have discovered both the exclusive-use covenant in Scrivner's lease (the property occupied by Festival Foods under the aforementioned sublease) and the absence of a reciprocal restrictive-use covenant in Wal-Mart's lease. In any event, New Plan sent an "estoppel letter" to NBDC and to Fleming asking, among other things, their assurances that there were "no defaults under the terms of the [l]ease." NBDC and Scrivner executed the letter and signified their assent to that representation. Festival, likewise, consented to "execution and delivery of [the] Estoppel Letter."[2] An updated "tenant estoppel certificate," reaffirming that there were no breaches in the lease, was provided to New Plan two months later. On the basis of those assurances, New Plan acquired the shopping center in early 1993.

{¶8} In December 1998, Fleming sent a letter to New Plan to notify the company that Wal-Mart was selling foodstuffs at its New Boston store in violation of its assigned lease's exclusive-use provision. Fleming asked that New Plan promptly take action to "ensure that Wal-Mart immediately discontinue the sale of groceries, meats, poultry, seafood, dairy products, fruits, vegetables or baked goods to the public." No action was taken, and Fleming discontinued its rental payments.[3]

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[2] The letter also provided that it would "be void and of no effect if it [was] not executed by all parties hereto, including the *Purchaser*. * * *" (Emphasis added.) It appears from the copies of the letter in the record that New Plan never executed the document.

[3] The exclusive-use provision of the lease also contained a rent-abatement clause that provided that in the event of any

{¶9} Festival commenced the instant action on November 17, 1999, and alleged that New Plan and Fleming had violated the lease's terms by permitting Wal-Mart to sell foodstuffs. The sublessee asked for damages, as well as a declaratory judgment to construe its rights and obligations under the lease.

{¶10} Fleming denied liability to its sublessee. Fleming also filed a cross-claim against New Plan and alleged that the lessor breached the lease by permitting Wal-Mart to sell foodstuffs. Like Festival, Fleming asked for damages and a declaration of its rights and obligations under the lease. New Plan denied liability on the complaint and the cross-claim. The lessor also filed a cross-claim and counterclaim against its sublessor and sublessee and alleged that they were in default for failure to pay rent. New Plan asked for, inter alia, all rental payments due under the lease as well as possession of the demised premises.

{¶11} These matters proceeded through a lengthy discovery process and, on February 23, 2001, all parties filed motions for summary judgment on their respective claims. On March 9, 2001, the trial court issued its decision and judgment and addressed many of the different issues in the competing claims, counterclaim, and cross-claims.

{¶12} First, the trial court held that Festival was a sublessee in the shopping center and could not bring an action against New Plan on the original lease, because no privity of contract existed between them. Second, the trial court concluded that no breach of the lease's exclusive-use provision occurred by permitting Wal-Mart to sell particular food items. In reaching that conclusion, the court found that the provision was "overbroad" and should be construed only "to prohibit other supermarkets in the New Boston Shopping Center and any other store primarily engaged in the sale

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violation of its terms by the lessor, rent payment obligations would be "abated during the period of such violation."

of foodstuffs." In view of the fact that Wal-Mart was not a "supermarket," and was not primarily engaged in sale of foodstuffs, the court concluded that New Plan did not violate its lease with Fleming. Thus, the court granted summary judgment in favor of New Plan on both the complaint and the cross-claim. The trial court also found that this judgment rendered moot Festival's claim against Fleming.[4]

{¶13} That same day, the trial court issued an entry that cancelled a scheduled trial date and directed New Plan to file a motion for summary judgment on its cross-claim for rent against Fleming. New Plan filed its motion on March 27, 2001, and argued that Fleming owed $846,729.88 in rent.[5] Further, New Plan argued that although it was entitled to cancel the lease for nonpayment of rent, it would "defer exercising" that right unless Fleming failed to pay rent in the future.

{¶14} The trial court issued its decision on October 24, 2001, and granted New Plan summary judgment against Fleming in the amount of $846,729.88, together with interest at the rate of one and a half percent (1½ percent) per month. Although the court did not rule on the issue of whether New Plan was entitled to retake possession of the premises as a result of Fleming's breach of the lease, the court did state that "New Plan may not terminate the lease and retake possession upon any *future default* by Fleming to pay rent or other charges due under the lease until such time as the Fourth District Court of Appeals has an opportunity to rule on this Court's earlier decision." (Emphasis added.)

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[4] Various other issues were also addressed in the trial court's judgment, including (1) finding that it remained a genuine issue of material fact as to whether New Plan could reasonably rely on the estoppel letter and estoppel certificate to defend against a claim of breach and (2) holding that the lease's rent-abatement provision was a liquidated-damages clause rather than an unenforceable penalty provision. However, because the court concluded that no breach occurred by allowing Wal-Mart to sell food items, these issues were largely irrelevant at the time.

[5] An affidavit by Daniel S. Dornfeld, corporate counsel for New Plan, verified that this was the correct amount of rent due and owing under the lease.

{¶15} Several appeals were taken from those judgments but were ultimately dismissed by this court for the lack of a final appealable order. See *Mark-it Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.*, Scioto App. Nos. 01CA2816 and 01CA2817, 2002-Ohio-3704. The matter was remanded to the trial court for the resolution of (1) New Plan's counterclaim against Festival and (2) New Plan's demand for restitution of the premises. On November 12, 2002, the trial court issued a judgment in favor of Festival on New Plan's counterclaim for rent payments, but in favor of New Plan on its claim for restitution of the premises.[6] This appeal followed.[7]

I

{¶16} Before we review the merits of the assignments of error, we pause to address the standard of review. Most of the claims at issue were resolved by summary judgment. We note that appellate courts review summary judgments de novo. See *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887, 694 N.E.2d 167; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41, 654 N.E.2d 1327; *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107, 614 N.E.2d 765. In other words, appellate courts afford no deference to a trial court's summary judgment decision, see *Hicks v. Leffler* (1997), 119 Ohio App.3d 424, 427, 695 N.E.2d 777; *Dillon v. Med. Ctr. Hosp.* (1993), 98 Ohio App.3d 510, 514-515, 648 N.E.2d 1375; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786, and conduct their own independent review to determine whether summary judgment was appropriate. *Woods v. Dutta* (1997), 119 Ohio App.3d 228, 233-234, 695 N.E.2d 18; *Phillips v. Rayburn* (1996), 113 Ohio App.3d 374, 377, 680 N.E.2d 1279;

[6] This portion of the trial court's judgment was directed solely at Fleming because Festival had, apparently, already surrendered possession of the premises to Fleming.

[7] On January 15, 2003, this court issued an order to permit the case sub judice to proceed on the basis of the briefs and assignments of error filed in the consolidated cases that had previously been dismissed. We also agreed to address whether New Plan was entitled to restitution of the premises without requiring any further briefs by the parties on that issue.

McGee v. Goodyear Atomic Corp. (1995), 103 Ohio App.3d 236, 241, 659 N.E.2d 317.

{¶17} Summary judgment under Civ.R. 56(C) is appropriate when a movant can demonstrate that (1) no genuine issues of material fact exist; (2) the movant is are entitled to judgment in its favor as a matter of law; and (3) reasonable minds can come to only one possible conclusion and that conclusion is adverse to the opposing party, with the evidence construed most strongly in favor of the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201; *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46. We further note that parties moving for summary judgment bear the initial burden of showing that no genuine issues of material fact exist and that the moving party is entitled to judgment in its favor as a matter of law. See *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Once that burden is met, the onus shifts to the nonmoving party to provide rebuttal evidentiary materials. See *Trout v. Parker* (1991), 72 Ohio App.3d 720, 723, 595 N.E.2d 1015; *Campco Distributors, Inc. v. Fries* (1987), 42 Ohio App.3d 200, 201, 537 N.E.2d 661; *Whiteleather v. Yosowitz* (1983), 10 Ohio App.3d 272, 275, 461 N.E.2d 1331. With these principles in mind, we turn our attention to the proceedings below and to the parties' assignments of error.

II

{¶18} We jointly consider Festival's fourth and fifth assignments of error, as they are dispositive of its claims in this case. The trial court held, in essence, that even if a breach of the shopping-center lease occurred by virtue of Wal-Mart's selling foodstuffs, Festival could not maintain an action against New Plan because it is a sublessee of Fleming and had no privity of contract with the successor in interest to the original lessor. Festival argues that the court erred in

that ruling. We disagree with Festival.

{¶19} It is well settled that no privity of contract exists between a sublessee and an original lessor. See *Crowe v. Riley* (1900), 63 Ohio St. 1, 9, 57 N.E. 956; see, also, *Zevchik v. Kassai* (Dec. 24, 1997), Cuyahoga App. No. 71823; *Houser v. Columbia Gas Transm. Corp.* (Oct. 4, 1988), Franklin App. No. 87AP-1227. More than a century ago, the Ohio Supreme Court held that a lessor cannot maintain an action against a sublessee for breach of covenant in an original lease. *Crowe*, supra, 63 Ohio St.at 9. Subsequent cases have likewise held that sublessees cannot maintain actions against the lessor on the original lease. See *Cleveland v. A.J. Rose Mfg. Co.* (1993), 89 Ohio App.3d 267, 271, 624 N.E.2d 245; *Hooper v. Seventh Urban, Inc.* (1980), 70 Ohio App.2d 101, 109, 434 N.E.2d 1367; *House of LaRose Cleveland, Inc. v. Lakeshore Power Boats, Inc.* (Jun. 18, 1992), Cuyahoga App. No. 60904. The sublessee must, instead, seek redress against its sublessor — the original lessee. *Coffman v. Huber* (1965), 13 Ohio Misc. 126, 128, 232 N.E.2d 676.[8]

{¶20} Festival does not contest the general application of these principles but instead attempts to circumvent them. First, Festival contends that contracting parties can alter the general rules of contract law in their agreements and that this is precisely what was done in the lease and the sublease. Second, Festival argues that it was a third-party beneficiary of the original lease and should be permitted to enforce its terms against the successor in interest to the original lessor (New

[8] These are well-established principles of landlord-tenant law. See, e.g., 65 Ohio Jurisprudence 3d (1996) 276, Landlord and Tenant, Section 271 (the sublessee cannot maintain an action against the original lessor upon the original lease); 3 McDermott, Ohio Real Property Law (1966) 55, Section 18-43A (neither privity of estate nor privity of contract exists between the lessor and the sublessee and, hence, the sublessee cannot enforce the lessor's covenants); 49 American Jurisprudence 2d (1995) 919, Landlord and Tenant, Section 1183 (as between the original lessor and the sublessee, there is no privity of contract or estate and therefore the sublessee does not acquire any rights to enforce the covenants or agreements of the lessor contained in the original lease); 1 Taylor, Landlord and Tenant (9th Ed. 1904) 130, Section 109 (as no privity of contract exists between an under-lessee and the original lessor, the covenants between the latter and the original lessee do not effect the under-lessee); 1 McAdam, Landlord and Tenant (5th Ed. 1934) 249, Section 70 (there is no privity of contract between the paramount landlord and the sublessee and neither can sue the other for breach of the original lease).

Plan). We are not persuaded by these contentions.

{¶21} To begin, Festival cites no authority in its brief, and we have found none in our own research, in which a court has ever held that an original lessor could alter the fundamental rules of privity of contract and be held liable to a sublessee on covenants in an original lease. Moreover, we believe several important reasons explain why we should not adopt that position.

{¶22} First, if the successor in interest to the original lessor was made liable to the sublessee, then reciprocal liability must also be extended to the sublessee (e.g., for rent payments). The lessor may arguably agree in the original lease to bind itself to a future sublessee, but there is no conceivable way that a future sublessee (who is not even involved in the original transaction) could possibly agree to bind itself to the original lessor. Second, contractual privity goes to the very heart of actionable breach and is a fundamental principle of contract law.[9] Privity of contract between parties, including lessors and lessees, is a fundamental prerequisite to bringing suit for the breach of a contract and we do not believe that the parties in the instant case could alter those principles in the lease agreement.

{¶23} Festival's third-party beneficiary argument is equally unavailing.[10] As a general proposition, a third party for whose benefit a contract has been entered may bring an action for a breach of that contract. See *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161,

[9] See *Mahalsky v. Salem Tool Co.* (C.A.6, 1972), 461 F.2d 581, 584 (Ohio law recognizes no action for breach of contract absent privity); see, also, *Cincinnati, Hamilton & Dayton RR. Co. v. Metro. Natl. Bank* (1896), 54 Ohio St. 60, 68, 42 N.E. 700 (there can be no cause of action upon a contract unless there is privity of contract between the obligor and the party complaining); *Vought v. Columbus, Hocking Valley & Athens RR. Co.* (1898), 58 Ohio St. 123, 50 N.E. 442, at paragraph two of the syllabus (a party cannot, for his own benefit, insist upon the performance of a contract between others to which he is not a party or privy).

[10] Here again, as with its argument that contracting parties can circumvent privity requirements in lease agreements, Festival Foods cites no authority, and we have found none in our research, to establish third-party beneficiary principles have been applied to allow a sublessee to recover from an original lessor for the breach of a lease agreement.

566 N.E.2d 1220; *Rhorbacker v. Citizens Bldg. Assn. Co.* (1941), 138 Ohio St. 273, 276, 34 N.E.2d 751; *Thompson v. Thompson* (1854), 4 Ohio St. 333, at paragraph six of the syllabus. However, only an *intended* third-party beneficiary may exert rights to a contract to which it is not a party. *TRINOVA Corp. v. Pilkington Bros., P.L.C.* (1994), 70 Ohio St.3d 271, 277, 638 N.E.2d 572. There are three categories of intended third-party beneficiaries: (1) a creditor beneficiary; (2) a donee beneficiary; and (3) an incidental beneficiary. *Visintine & Co. V. New York, Chicago & St. Louis RR. Co.* (1959), 169 Ohio St. 505, 507, 160 N.E.2d 311; see, also, *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 40, 521 N.E.2d 780. Only the first two categories, however, may bring an action as a third-party beneficiary. An incidental beneficiary under a contract to which he is not a party cannot recover from the promisor in breach. *Visintine & Co.*, supra, 169 Ohio St. at 507; *Hill*, supra, 36 Ohio St.3d at 41; see, also, *Cullen v. Ohio Dept. of Rehab. & Corr.* (1998), 125 Ohio App.3d 758, 766, 709 N.E.2d 583; *Doe v. Adkins* (1996), 110 Ohio App.3d 427, 436, 674 N.E.2d 731.

{¶24} Festival does not argue that it is either a creditor beneficiary or a donee beneficiary and, from our review of the record, we do not believe that it falls under either category. A party is a "creditor beneficiary" if the performance of the promise satisfies a duty owed by the promisee to the beneficiary. *Visintine & Co.*, supra, 169 Ohio St. at 507; *Hill*, supra, 36 Ohio St.3d at 40. We have found nothing in the record to suggest that Scrivner owed a debt or other such "duty" to Festival when it entered the original lease. Indeed, the fact that the sublease provides for rental payments in exchange for subletting the premises tends to indicate that the sublease was intended purely as a business transaction and was not intended to discharge any obligation owed to the sublessee.

{¶25} By contrast, a party is a "donee beneficiary" if performance of the promise is meant to bestow some gratuitous benefit rather than to satisfy a legal obligation. 18 Ohio Jurisprudence 3d (2001) 46-47, Contracts, Section 149; see, also, 4 Corbin, Contracts (1951) 76-77, Section 782. Here

again, we find nothing in the record to suggest that Scrivner intended to bestow a gratuitous benefit on a subsequent sublessee. The provisions of the sublease relating to the payment of rent belie any contention that a gift formed the basis of this transaction.

{¶26} For these reasons, we find no merit to Festival's arguments as to why the fundamental rules regarding the lack of privity of contract between lessors and sublessees should not apply in the case sub judice. We thus agree with the trial court that Festival could not maintain an action in breach against New Plan. Festival counters that if it cannot maintain an action against New Plan, it would be left "with no rights of recourse in the event of a breach." As we noted previously, however, any recourse by sublessees must be against their sublessor — the original lessee. *Coffman,* supra, 13 Ohio Misc. at 128, 232 N.E.2d 676.[11]

{¶27} In any event, for the reasons stated above, we find no merit in Festival's fourth and fifth assignments of error, and they are, accordingly, overruled. Festival's remaining assignments of error all go to the merits of its claims against New Plan or the merits of New Plan's defenses to those claims. In light of our agreement with the trial court that Festival cannot maintain an action for breach against New Plan, these assignments of error have been rendered moot and will be disregarded pursuant to App.R. 12(A)(1)(c).

III

{¶28} We now turn our attention to Fleming's first assignment of error wherein it asserts that the trial court erred by granting summary judgment in favor of New Plan. At the heart of this assignment of error is the question of what interpretation should be given to the original lease provision that prohibits the lessor from leasing space in the shopping center to any store that sells

[11] One of the claims in Festival's original complaint was against the successor in interest to its sublessor (Fleming) for the breach of its obligation to prohibit Wal-Mart from selling foodstuffs. The trial court dismissed that

"groceries, meats, poultry, seafood, dairy products, fruits, vegetables or baked goods." Based upon the evidence of the parties' prior actions or inactions,[12] together with deposition testimony to establish the parties' original intent,[13] the trial court interpreted this provision as solely prohibiting the lessor from leasing space to "other supermarkets" or "store[s] primarily engaged in the sale of foodstuffs." Thus, because Wal-Mart is not a supermarket primarily engaged in the sale of foodstuffs, the trial court concluded that New Plan's predecessor in interest did not violate the terms of the lease by leasing space to Wal-Mart. Fleming argues that the trial court erred in giving this interpretation to the lease. We agree.

{¶29} Our analysis begins from the basic premise that leases are contracts and are subject to the traditional rules of contract interpretation. See *Christe v. GMS Mgt. Co.* (1997), 124 Ohio App.3d 84, 88, 705 N.E.2d 691; *Frenchtown Square Partnership v. Lemstone, Inc.* (May 10, 2001), Mahoning App. No. 99CA300; *Hamilton v. Briede* (Apr. 21, 1997), Butler App. No. CA96-11-227. The cardinal purpose in construing contracts is to ascertain and give effect to the parties' intention. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898; *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920; *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374, at paragraph one of the syllabus. The intent of the parties to a contact is presumed to reside in the language they choose to employ in that agreement. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353, 361, 678 N.E.2d 519; *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio

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claim and Festival has not appealed that portion of the court's judgment.

[12] The court noted that Fleming and Festival did not object to food sales by Wal-Mart in the "estoppel letter" of 1992, the "estoppel certificate" of 1993, or in any of its internal documents.

[13] The court cited testimony from Louise McFall and C. W. Ansell to the effect that the parties intended to have only one supermarket in the shopping center but several "anchor stores" that would, incidentally, sell food items.

St.3d 130, 509 N.E.2d 411, at paragraph one of the syllabus; *Blosser v. Enderlin* (1925), 113 Ohio St. 121, 148 N.E. 393, at paragraph one of the syllabus. Common words used in a written instrument will be given their ordinary meaning unless (1) manifest absurdity results, or (2) some other meaning is clearly evidenced from the instrument. *Foster Wheeler*, supra, 78 Ohio St.3d at 361; *Chicago Title Ins. Co. v. Huntington Natl. Bank* (1999), 87 Ohio St.3d 270, 273, 719 N.E.2d 955; *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 374 N.E.2d 146, at paragraph two of the syllabus. We also note that the interpretation of written contracts is a question of law that, unlike issues of fact that are afforded great deference, is reviewed on appeal de novo. *Alexander*, supra, at paragraph one of the syllabus; *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d 143, 144, 679 N.E.2d 1119; *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 313, 667 N.E.2d 949.

{¶30} The exclusive-use provision of the lease in the instant case states that the lessor shall not, without prior written consent of the lessee, grant a lease in the shopping center that permits a tenant to sell, or offer to sell, "groceries, meats, poultry, seafood, dairy products, fruits, vegetables or baked goods * * *." These prohibited items are not defined in the lease, but we believe their meaning is clear enough. "Groceries" are the commodities sold by a "grocer," who is one who sells foodstuffs and various household supplies. American Heritage Dictionary (2d Ed. 1985) 577. Meats, poultry, seafood, dairy products, fruits, and vegetables are self-explanatory. We have found no definition for "baked goods" per se, but "baked" means to cook in an oven, id. at 152, and "goods" are defined as "commodities," id. at 587, which are articles of trade or commerce — i.e., they may be sold. Id. Thus, "baked goods" are food items that are baked in an oven and placed for sale.

{¶31} The trial court construed these words to mean that the contracting parties meant to exclude only "supermarkets" or other "stores primarily engaged in the sale of foodstuffs." We

disagree with that construction for several reasons. First, the word "supermarket" or the phrase "primarily engaged in the sale of foodstuffs" do not appear in the exclusive-use provision of the lease. Courts should refrain from reading terms into instruments when these terms do not otherwise exist. *Stotridge v. Admr.* (June 3, 1992), Pickaway App. No. 91CA18 (Stephenson, P.J., dissenting). Second, we believe that the trial court's interpretation of the contract language is too restrictive. If the lease provision prohibited only the sale of "groceries," then we might agree that the provision could either be construed as meaning "supermarket" or that the term is sufficiently ambiguous to warrant consideration of parol evidence. We note that no case law in Ohio appears to define the term "groceries," but other jurisdictions have, at times, struggled with what is encompassed by that term.[14] Be that as it may, the lease provision at issue here specifies more than just "groceries." It also states that the lessor shall not lease premises to any store that sells "meats, poultry, seafood, dairy products, fruits, vegetables or baked goods * * *." This language indicates that the parties meant to prohibit not just the sale of "groceries" by supermarkets but also the sale of other specified items by any type of store. For instance, pursuant to the lease, "baked goods" could not be sold by any store, whether that store is a "supermarket" or is another type of store. Had the parties to the lease simply meant to exclude supermarkets, they could have used either that specific term or they could have expressly

[14] Courts in California have held that the term "groceries" is sufficiently vague to allow introduction of parol evidence to show whether parties intended to permit the sale of beer in a store, see *Purity Stores, Ltd. v. Linda Mar Shopping Ctr., Inc.* (Cal.App. 1960), 2 Cal. Rptr. 397, 399-400, but have also held that the sale of items such as toothpaste, shampoo, soap, etc., was outside the definition of "foodstuffs" normally associated with the term "groceries." See *Hildebrand v. Stonecrest Corp.* (Cal.App. 1959), 344 P.2d 378, 385. Nevertheless, as noted by the court in *Purity Stores*, supra, at 400, traditional grocery stores have now become "supermarkets." In *Darby v. Pennsylvania Pub. Util. Comm.* (Pa.Sup.Ct. 1959), 150 A.2d 378, 380, the court adopted the definition of "groceries" promulgated by the Interstate Commerce Commission as being "articles for human consumption" and "articles used in the preparation of food." Id. at 380, citing *Scott Truck Line, Inc. v. United States* (D.C. Colo. 1958) 163 F.Supp. 118, 121; *Bird Trucking Co. V. United States* (D.C. Wis. 1955), 159 F.Supp. 717, 719-721. More recently, a Florida court ruled that "groceries" are articles of food and other goods sold by a "grocer," which was defined as a dealer in staple food stuffs and household supplies. *Winn-Dixie Stores, Inc. v. 99 Cent Stuff* (Fla.App. 2002), 811 So.2d 719, 722. The court noted that today, groceries include more than just food. These cases all appear to support the trial court's decision that "groceries" include "supermarkets." However, as noted above, the lease provision specifies more than just "groceries" and refers to sale of other specific food items as well.

stated that no other store in the shopping center could sell "groceries." They would not have inserted a litany of other prohibited items. Moreover, by interpreting the exclusive-use provision as prohibiting other supermarkets, we would be forced to ignore the express language of the lease that prohibits any store from selling "meats, poultry, seafood, dairy products, fruits, vegetables or baked goods."

{¶32} Our third reason for our disagreement with the trial court's interpretation is that the court impermissibly based its decision on extrinsic evidence outside the four corners of the lease. The trial court considered (1) the parties' actions, or inactions, with regard to subsequent estoppel letters and (2) deposition testimony by several individuals as to the original intent of the parties in entering the lease agreement. We believe that the first category of evidence was improper. Action or inaction of parties subsequent to execution of the lease agreement may go to the issue of waiver or estoppel to assert a breach of that agreement, but we fail to see how it would have any bearing on the parties' original intent in entering the lease.

{¶33} We also believe that the trial court erred when it considered deposition testimony regarding the parties' original intent in entering the lease. When a contract is unambiguous, intentions not expressed by writing in the contract are deemed to have no existence and cannot be shown by parole evidence. See *TRINOVA Corp.*, supra, 10 Ohio St.3d at 275; *Aultman Hosp. Assn.*, supra, 46 Ohio St.3d at 53; *Charles A. Burton, Inc. v. Durkee* (1952), 158 Ohio St. 313, 109 N.E.2d 265, at paragraph two of the syllabus. Thus, extrinsic evidence is admissible to ascertain intent only when the contract is unclear or ambiguous, or when the circumstances surrounding it give the plain language special meaning. *Kelly*, supra, 31 Ohio St.3d at 132; *Graham*, supra, 76 Ohio St.3d at 313-314; *Shifrin v. Forest City Ent., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499. As we noted previously, we believe that the language of the exclusive-use provision in the lease is clear and

unambiguous and should have been afforded its plain and ordinary meaning. Thus, we do not believe that the trial court should have resorted to extrinsic evidence to ascertain the parties' intent.

{¶34} Having concluded that the exclusive-use provision of the lease has a broader meaning than was afforded to it by the trial court, we must now address whether that provision amounted to an illegal restraint of trade in violation of R.C. Chapter 1331. New Plan argued below that if the exclusive-use provision was given its literal meaning, then it would violate state restraint-of-trade laws. The trial court essentially ruled in its March 9, 2001 judgment that the law was not violated because the lease provision prevented letting space only to "supermarkets" or to "store[s] primarily engaged in the sale of foodstuffs." Now that we have given the provision a more expansive reading, consistent with the terminology used therein, it is necessary to revisit the issue of state restraint-of-trade laws.

{¶35} Our analysis begins with R.C. 1331.06, which provides that any contract in violation of provisions in that chapter is null and void. R.C. 1331.01(B)(6) specifies that a "trust" is unlawful. A "trust" is defined, inter alia, as a combination by two or more persons to carry out restrictions in either trade or commerce or to prevent competition in the sale of produce or commodities. Id. at (B)(1) and (3). The gist of New Plan's argument is that by virtue of the exclusive-use provision in the lease, NBDC (its predecessor in interest) and Scrivner (Fleming's predecessor in interest) combined to form an illegal "trust" in restraint of trade. We disagree.

{¶36} The Ohio Supreme Court recognized years ago that if antitrust laws were construed literally or strictly, no partnership could be formed, no corporation could be organized, no vendor could agree to a reasonable limitation upon his future business, and scores of other activities that have been permitted and approved of in this country for centuries would be banned. See *List v. Burley Tobacco Growers' Co-Operative Assn.* (1926), 114 Ohio St. 361, 377, 151 N.E. 471. Thus,

the court held that contracts in restraint of trade are not illegal unless they are unreasonable. Id. at paragraph four of the syllabus; see, also, *Potters Med. Ctr., Inc. v. Ratchford* (1985), 18 Ohio St.3d 253, 255, 480 N.E.2d 789; *Stark Cty. Milk Producers' Assn. v. Tabeling* (1934), 129 Ohio St. 159, 166, 194 N.E. 16.

{¶37} In *C.K. & J.K., Inc. v. Fairview Shopping Ctr.* (1980), 63 Ohio St.2d 201, 407 N.E.2d 507, at paragraph one of the syllabus, the Ohio Supreme Court held that a provision in a shopping-center lease granting a lessee the exclusive right to carry on a certain line of business in the shopping center does not constitute an illegal restraint of trade under R.C. Chapter 1331 as long as the scope and effect of the grant is not unreasonably broad. The exclusive-use provision in that case involved restricting the sale of liquor, alcoholic beverages, wines, and beer by the glass but, because it did not affect the whole community and did not extend beyond the shopping center, the court found that the provision was not unreasonably broad. Id. at 206.

{¶38} Similarly, in the instant case, the restrictive-use provision prohibits stores only from selling groceries and other specified food items in the shopping center. It did not affect the rest of the New Boston community and, thus, appears to pass muster under *C.K. & J.K., Inc.* Moreover, we believe that the exclusive-use provision satisfies other criteria adopted by courts to determine whether such provisions are reasonable. For example, the federal District Court for the Southern District of Ohio has opined that the factors to examine when determining whether an exclusive-use provision is overbroad are (1) the relevant product and geographic markets, together with the showing of unreasonable impact upon competition in these markets due to the restrictive covenant; (2) the availability of alternate sites for the entity excluded by the operation of such covenant; (3) the significance of competition eliminated by the exclusivity clause, and whether present or future competitors were the parties excluded; (4) the scope of the restrictive covenant and whether it varies

depending on the circumstances; and (5) the economic justifications for including the restrictive covenant in the lease. *Child World, Inc. v. S. Towne Centre, Ltd.* (D.C. Ohio 1986), 634 F.Supp. 1121, 1130-1131.[15]

{¶39} Weighing these factors in light of the evidentiary materials submitted below, we are not persuaded that the exclusive-use provision constitutes an unreasonable restraint of trade. As noted previously, this provision pertains only to tenants within that particular shopping center. It does not affect the rest of the community. Our review of the record has found no evidence to suggest that this provision restricted entry of, or prohibited competition by, any grocer or seller of foodstuffs outside the shopping center and in the larger New Boston community. We emphasize that antitrust laws exist for the protection of competition, not competitors, *ACME Wrecking Co., Inc. v. O'Rourke Constr. Co.* (Mar. 1, 1995), Hamilton App. No. C-930856, and that the essence of competition is not within a shopping center but between shopping centers. *Carm's Foods, Inc. v. Fred W. Albrecht Grocery Co.* (May 14, 1984), Stark App. No. CA-6309.

{¶40} Therefore, New Plan has not carried its burden on summary judgment to establish that this particular provision works an illegal restraint of trade. For these reasons, we agree with the trial court and conclude, even under our more expansive reading of the exclusive-use provision, that the lease does not violate R.C. Chapter 1331.

{¶41} Having concluded that the lease's exclusive-use provision precludes more than simply supermarkets or stores engaged primarily in the sale of foodstuffs, and having found that such provision does not constitute an illegal restraint of trade in violation of R.C. Chapter 1331, we need

[15] Ohio's restraint-of-trade statutes are patterned after the Sherman Anti-Trust Act and, as a consequence, courts in this state have interpreted Ohio law in light of the interpretation of the Sherman Act. *C.K. & J.K., Inc. v. Fairview Shopping Ctr.* (1980), 63 Ohio St.2d 201, 204, 407 N.E.2d 507. Thus, it is appropriate to turn to federal case law for guidance in determining the reasonableness of these provisions.

to apply the plain language of the lease to determine only whether New Plan breached its covenants. We believe that the evidentiary materials submitted below establish that it did.

{¶42} In support of its motion for summary judgment, Fleming introduced a copy of the lease between NBDC and Wal-Mart. Fleming contends, and our review of that document bears out this contention, that nothing in that lease prohibits Wal-Mart from selling any of the items mentioned in the lease to Fleming's predecessor in interest. Moreover, the evidentiary materials reveal that Wal-Mart actually sold those items. Photographs included in the exhibits to support New Plan's motion for summary judgment show dairy products, cookies ("baked goods"), and other grocery-type items being sold at Wal-Mart. In light of these photographs, as well as other evidence in the record and New Plan's concession in its motion for summary judgment that Wal-Mart sold various "food" items, we believe that New Plan violated the lease to Fleming.

{¶43} For these reasons, we agree with Fleming that the trial court erred in granting summary judgment to New Plan. Accordingly, its first assignment of error is well taken and is hereby sustained.

IV

{¶44} We now turn to Fleming's second assignment of error and argument that the trial court erred by overruling its motion for summary judgment against New Plan. The basis for this argument is that the lease's exclusive-use provision clearly and unambiguously restricted leasing space in the shopping center to any store without prohibiting that store from selling the items set forth in the lease provision. Because Wal-Mart leased space without any restrictions on the items that it could sell, and because Wal-Mart actually sold items that it should have been prohibited from selling, Fleming contends that New Plan breached the lease and that judgment should have been entered against it as a matter of law. Although we agree with Fleming's interpretation of the exclusive-use provision, for

the following reasons we disagree with its conclusion that it was automatically entitled to judgment against New Plan.

{¶45} In response to Fleming's cross-claim, New Plan asserted a variety of defenses, including estoppel. Part of this defense involved the use of a so-called "estoppel" letter and "estoppel" certificate. The "estoppel letter" was dated November 23, 1992, and represented, inter alia, that, as of that date, no "defaults under the terms of the lease" had occurred between NBDC and its lessee and sublessee (Scrivner and Festival). That letter stated, however, that it would be "void and of no effect" if it was not executed by all parties thereto. It is undisputed that the letter was not executed by New Plan and, hence, by its terms, the letter is void and of no effect.

{¶46} On January 28, 1993, Scrivner and Festival tendered to New Plan an "Updated Tenant Estoppel Certificate." The gist of this estoppel certificate, which had an attached copy of the November 1992 estoppel letter, was that the "representations and warranties" made in the attached letter would be "binding" on Scrivner and Festival Foods and enure to the benefit of New Plan.

{¶47} In ruling on the motions for summary judgment, the trial court held that New Plan could not rely on the November estoppel letter in support of its estoppel defense because that letter was not executed pursuant to its terms. The January estoppel certificate, however, was properly executed, and the court held that this constituted some evidence to support New Plan's defense. The trial court concluded that a genuine issue of material fact remained as to whether New Plan justifiably relied on the estoppel certificate and, thus, Fleming was not entitled to summary judgment in its favor as a matter of law.[16] Fleming argues on appeal that New Plan could not rely on either the estoppel letter or the estoppel certificate and that the trial court should have granted it summary

[16] Of course, the primary reason for denying Fleming's motion for summary judgment was the court's conclusion that the exclusive-use provision in the lease did not bar Wal-Mart from selling those items specified in the lease

judgment on its claim. We are not persuaded.

{¶48} New Plan asserted in its answer that Fleming's claim against it was barred by the doctrine of estoppel, not by the estoppel letter and estoppel certificate. Although those documents have considerable bearing on whether estoppel may apply, they are not completely dispositive. Before we discuss the specifics of the estoppel letter and certificate, however, we must address the issue of estoppel in general. For the following reasons, we do not believe that Fleming carried its initial burden on summary judgment with respect to that issue. As we mentioned previously, the party moving for summary judgment has the initial burden to show that no genuine issues of material fact exist (either with respect to its claims or with respect to any defenses to those claims) and that it is entitled to judgment in its favor as a matter of law. In the case sub judice, we note that Fleming's motion for summary judgment barely addressed the estoppel issue and did not address several of the elements necessary to negate the use of that defense by New Plan.

{¶49} We note at the outset that "estoppel" is a term that parties frequently use quite loosely. *In re Estate of Cecere* (1968), 17 Ohio Misc. 101, 104, 242 N.E.2d 701. In its broadest sense, "estoppel" is a bar that precludes a person from denying a fact that has become settled by an act of the person himself. See *Sanborn v. Sanborn* (1922), 106 Ohio St. 641, 647, 140 N.E. 407. There are three broad categories of estoppel, namely (1) estoppel by record; (2) estoppel by deed; and (3) estoppel in pais ("equitable estoppel"). 42 Ohio Jurisprudence 3d (1983) 8, Estoppel and Waiver, Section 2. New Plan did not expressly state in its answer what type of estoppel it was invoking but, after reviewing the arguments raised in its motions below and its briefs on appeal, we conclude that New Plan raised "equitable estoppel."

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provision.

{¶50} The purpose of equitable estoppel is to prevent fraud and to promote the interests of justice. *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145, 555 N.E.2d 630; see, also, *Goldauskas v. Elyria Foundry Co.* (2001), 145 Ohio App.3d 490, 495, 763 N.E.2d 645; *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 246, 743 N.E.2d 484. Equitable estoppel arises when one party induces another party to believe that certain facts exist and the other party changes his position to his detriment in reasonable reliance on those facts. *Chubb v. Ohio Bur. Of Workers' Comp* (1998), 81 Ohio St.3d 275, 279, 690 N.E.2d 1267; *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.* (1994), 71 Ohio St.3d 26, 34, 641 N.E.2d 188; *Ensel v. Levy* (1889), 46 Ohio St. 255, 19 N.E. 597, at the syllabus. To invoke the doctrine of equitable estoppel, a party must demonstrate (1) a factual misrepresentation; (2) that is misleading; (3) that induced actual reliance, which was both reasonable and in good faith; and (4) that caused detriment to the relying party. *Hoeppner v. Jess Howard Elec. Co.*, 150 Ohio App.3d 216, 2002-Ohio-6167, 780 N.E.2d 290, at ¶ 43; *Myers v. Myers*, 147 Ohio App.3d 85, 2002-Ohio-405, 768 N.E.2d 1201, ¶ 30; *Gruber v. Kopf Bldrs., Inc.* (2001), 147 Ohio App.3d 305, 2001-Ohio-4361, 770 N.E.2d 598, ¶ 23.

{¶51} From our review of Fleming's summary judgment motion and the supporting evidentiary materials, it does not appear that Fleming sufficiently negated the elements of New Plan's estoppel defense. There is little or nothing in the motion to show the absence of a misleading factual representation. Fleming argued in its motion that "[t]he representations within the Estoppel Letter are limited to Fleming's actual knowledge," which suggests the lack of a knowing factual misrepresentation. But Fleming cites no evidentiary materials to support that contention. Moreover, there does not appear to be any qualification of that sort in either the estoppel letter or the estoppel certificate.

{¶52} Assuming arguendo that Fleming did carry its initial burden on this issue, New Plan

adduced evidence in rebuttal to show that Fleming was aware of the breach but purposely misrepresented in the estoppel letter and certificate that no breach existed. New Plan cited deposition testimony by Dan Slade, expert counsel retained by Festival Foods, to the effect that representatives who signed the documents knew that the "certifications and representations they were making * * * were false[.]" Thus, genuine issues of material fact exist with regard to whether Fleming made false and misleading factual representations to New Plan.

{¶53} That aside, we also agree with the trial court's conclusion that genuine issues of material fact exist regarding whether New Plan could reasonably rely upon representations made by Fleming's predecessor in interest. The 1993 estoppel certificate incorporated the previous estoppel letter, which provided that there were "no defaults under the terms of the lease" and represented that New Plan could "rely" on that representation. New Plan submitted evidence below to the effect that it relied on that representation when it acquired the shopping center from NBDC. Given the fact that Fleming is a large and sophisticated corporation, and considering that it purposely represented to New Plan the absence of defaults under the terms of the lease and that New Plan could rely on those representations, we agree that sufficient evidence of reasonable reliance exists to survive a motion for summary judgment.

{¶54} Fleming counterargues in its brief that because the 1992 estoppel letter is "void" for the failure of New Plan to execute it, and because the 1993 estoppel certificate incorporates the 1992 letter, the subsequent certificate must also be void. We are not persuaded. We need not engage in a lengthy discussion of whether the incorporation of the void estoppel letter into the subsequent certificate renders the certificate void. Even if the subsequent estoppel certificate is void, neither the estoppel letter nor the estoppel certificate is a "magic bullet" that proves or disproves equitable

estoppel. These exhibits are merely some evidence of that defense.[17] Whether the terms of the certificate fail due to a technicality in its execution is largely irrelevant because it was still represented to New Plan that no default occurred under the lease and that New Plan could rely on that representation. A failure to properly execute the estoppel letter or the certificate may be considered by the trier of fact in determining reasonable reliance, but it does not change the fact that such representations were made.

{¶55} Fleming also contends that New Plan could not rely on these documents as a matter of law because it already had notice of the breach of lease at the time it sent the estoppel letter and certificate.[18] Although Fleming refers to evidence in the record to support its contention that New Plan had notice of the breach, we believe that this is an issue that is best left to be determined by the trier of fact.

{¶56} Even assuming arguendo that New Plan did have notice of the breach before receiving the estoppel letter and certificate, and hence could not show reasonable reliance thereon to prove its defense of equitable estoppel, Fleming still has another hurdle before it would be entitled to

[17] Estoppel certificates are broadly defined as "[a] signed statement by a party, such as a tenant * * * certifying for the benefit of another party that a certain statement of fact is correct as of the date of the statement, such as * * * that there are no defaults * * *." Black's Law Dictionary (5th Ed. 1979) 495. Ohio courts have noted that estoppel certificates are useful devices to preserve and enhance the marketability of commercial property, *Freshman v. Attaboy Manufacturers' Rep., Inc.* (Feb. 2, 1993), Franklin App. No. 92AP-638, and are commonly used by landlords in financial transactions. *Katz v. M.M.B. Co.* (May 8, 1986), Cuyahoga App. No. 50579. Nevertheless, the use of such instruments does not replace the common-law defense of equitable estoppel. Thus, when an estoppel certificate fails for one reason or another, the party may still rely on the common-law defense of equitable estoppel. In other words, even if the estoppel letter and certificate at issue herein are void, New Plan can still avail itself of the doctrine of equitable estoppel and it is up to Fleming, as the party moving for summary judgment, to demonstrate that no genuine issues of material fact exist with respect to that defense and that it was entitled to judgment in its favor as a matter of law.

[18] Fleming cites *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145, 555 N.E.2d 630, wherein the Ohio Supreme Court held that, to invoke equitable estoppel, a party's reliance on conduct of another must be reasonable "in that the party claiming estoppel *did not know and could not have known that its adversary's conduct was misleading*." (Emphasis added.) Because New Plan allegedly knew about the breach of lease before it received the estoppel letter and estoppel certificate, Fleming contends that it cannot show reasonable reliance on those documents and, hence, cannot prove equitable estoppel.

summary judgment. New Plan also asserted in its answer to Fleming's cross-claim the defense of "waiver." Waiver is a vague term used for a great variety of purposes, 42 Ohio Jurisprudence 3d, supra, at 155, Section 93, and, as with its claim of equitable estoppel, New Plan is somewhat vague as to how it intends to apply that defense in this case.

{¶57} Generally speaking, waiver is the voluntary relinquishment of a known right. *State ex rel. Wallace v. State Med. Bd. of Ohio* (2000), 89 Ohio St.3d 431, 435, 732 N.E.2d 960; *White Co. v. Canton Transp. Co.* (1936), 131 Ohio St. 190, 2 N.E.2d 501, at paragraph one of the syllabus; *Michigan Auto Ins. Co. v. Van Buskirk* (1927), 115 Ohio St. 598, 155 N.E. 186, at paragraph one of the syllabus. A "waiver" can be found in a great variety of circumstances. For example, "waiver by estoppel" exists when the acts and conduct of a party are inconsistent with an intent to claim a right, and have been such as to mislead the other party to his prejudice and thereby estop the party having the right from insisting upon it. See *Motz v. Root* (1934), 53 Ohio App. 375, 376-377, 4 N.E.2d 990. We also note that the waiver of contractual rights typically requires consideration unless the actions of the party making the waiver are such that he must be estopped from insisting upon the right claimed to have been relinquished. *Marfield v. Cincinnati, D. & T. Traction Co.* (1924), 111 Ohio St. 139, 145, 144 N.E. 689. A waiver may be enforced by anyone having a duty to perform, but who has changed his or her position as a result of the waiver. *Chubb*, supra, 81 Ohio St.3d at 279; *Andrews v. Teachers Retirement Sys.* (1980), 62 Ohio St.2d 202, 205, 404 N.E.2d 747.

{¶58} Applying these principles to the instant case, and construing the evidence adduced below in a light most favorable to New Plan as the nonmoving party, we conclude that genuine issues of material fact exist as to whether Fleming's predecessor in interest waived its right to claim a breach. New Plan may well have known about the breach prior to receiving the estoppel letter and estoppel certificate, and may well have negated any claim to the defense of equitable estoppel.

However, this does not relieve Fleming of the responsibility for the actions of its predecessor in interest. If Scrivner knew of the breach, and apparently there is evidence in the record to suggest that it did, but represented to New Plan that no breach had occurred and allowed New Plan to acquire the shopping center, in part, on the assumption that it would not bring any claim for breach of the lease, this could constitute a waiver of its rights. Again, this issue is best left for final determination by the trier of fact. For all these reasons, we find that genuine issues of material fact exist regarding New Plan's defense of equitable estoppel and waiver. Thus, the trial court did not err in refusing to grant Fleming's motion for summary judgment on its claims against New Plan. Thus, Fleming's second assignment of error is without merit and is hereby overruled.

V

{¶59} Fleming argues in its third assignment of error that the trial court erred in the relief it awarded to New Plan for what the court deemed was Fleming's breach of the lease. In light of the fact that we have sustained its first assignment of error and that we have reversed the judgment for New Plan, this assignment of error is now rendered moot and will be disregarded pursuant to App.R. 12(A)(1)(c). We further note that by reversing summary judgment for New Plan, we also reverse the trial court's October 24, 2001 judgment granting New Plan back rent in the amount of $846,729.88, as well as its November 12, 2002 judgment granting New Plan restitution of the premises.

VI

{¶60} We now turn to New Plan's first cross-assignment of error. New Plan argues that the trial court erred by not entering summary judgment in its favor on its cross-claim against Fleming. Specifically, New Plan argues that it was entitled to rely on the estoppel letter and the estoppel certificate as a matter of law and that Fleming is therefore estopped from asserting a breach of the lease. We reject this argument for many of the same reasons we rejected it when raised by

Fleming.[19]

{¶61} New Plan introduced copies of both the estoppel letter and estoppel certificate below. Those documents show that Fleming represented that no breach of the lease had occurred. New Plan also pointed to Dan Slade's testimony that those documents were signed by representatives who knew the representations to be false. We conclude that this evidence constitutes sufficient evidence to establish a misleading representation. Because the estoppel certificate specified that those representations could be relied on by New Plan, we believe that evidence of reasonable reliance exists. There is also no question that if New Plan is found in breach of the lease, there was detrimental reliance. In short, we conclude that New Plan carried its initial burden on summary judgment to show that the principles of equitable estoppel apply here.

{¶62} By the same token, however, we believe that Fleming carried its burden of rebuttal to show that New Plan's reliance was not reasonable. Fleming points to evidence to suggest that New Plan knew of the breach of the exclusive-use provision in the lease when it examined the leases of the shopping center before acquiring it from NBDC. This raises genuine issues of material fact as to whether New Plan's reliance on representations made by Fleming was reasonable. For these reasons, we conclude that summary judgment for New Plan would have been improper here.

{¶63} We also parenthetically note that New Plan was not entitled to summary judgment on the basis of its waiver defense. Despite having previously held that the representations of Fleming's predecessor in interest may have constituted a waiver of its rights to sue for a breach of the lease, we also find that evidence was introduced below to show that Scrivner may not have been aware of the breach when it executed the estoppel letter and certificate. As mentioned previously, a waiver is the

[19] Again, we emphasize that the issue here is not so much the effect of the estoppel letter and certificate as it is the applicability of the defense of equitable estoppel for which those documents are some evidence but are not necessarily

relinquishment of a known right. *State ex rel. Wallace*, supra, 89 Ohio St.3d at 435; *White Co.*, supra, at paragraph one of the syllabus. Thus, a party cannot be deemed to have waived a right based on material facts the existence of which it did not know. *Michigan Auto Ins. Co.*, supra, at paragraph one of the syllabus; see, also, *In re Estate of Fetzer* (App. 1954), 71 Ohio Law Abs. 275, 279, 130 N.E.2d 732; *Western & Southern Life Ins. Co. v. Bennett* (1933), 45 Ohio App. 498, 501, 187 N.E. 361. If Scrivner was not aware of the breach at the time it gave the estoppel letter and estoppel certificate, then it obviously cannot be said to have waived its right to enforce the breach. Once again, this is another issue best left to the trier of fact.

{¶64} In any event, for all of these reasons, we find no merit in New Plan's first cross-assignment of error, and it is hereby overruled.

VII

{¶65} New Plan argues that the second assignment of error involves the rent-abatement provision in the lease agreement. Section 6.3 of the lease provides that, "[i]n the event of any violation of the terms of this [exclusive-use provision], all rental obligations under this Lease *shall be abated during the period of such violation*, and Lessee shall not be in default for failure to pay any rental allocated to such period." (Emphasis added.) This lease has an initial term of 20 years and, further provides for an automatic renewal for 6 additional terms of 5 years each unless the lessee chooses not to renew. Pursuant to Sections 2 and 26 of the lease between NBDC and Wal-Mart, the initial term of Wal-Mart's lease is 20 years and may be renewed at the option of the lessee for 6 more consecutive periods of 5 years each. Given the terms of these leases and the fact that the Wal-Mart lease was in violation of the exclusive-use provision of the lease to Fleming's predecessor in interest,

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conclusive.

the rent-abatement provision could conceivably allow for Fleming to remain as a tenant in the shopping center rent-free for several more decades before the Wal-Mart lease expires.

{¶66} New Plan argued below that the rent-abatement provision constituted an unenforceable penalty provision in the lease and should not be applied here. The trial court disagreed and held that the provision is an enforceable liquidated-damages clause. New Plan argues on appeal that this judgment is erroneous. We agree.

{¶67} Our analysis begins from the premise that Ohio law generally respects the freedom of contract. The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to speak without restraint. *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 36, 514 N.E.2d 702; *Blount v. Smith* (1967), 12 Ohio St.2d 41, 47, 231 N.E.2d 301; see, also, *Fodor v. First Natl. Supermarkets, Inc.* (1992), 63 Ohio St.3d 489, 493, 589 N.E.2d 17 (Douglas, J., concurring). In some circumstances, however, complete freedom of contract is not permitted for public-policy reasons. *Fuschino v. Smith* (Jan. 5, 2001), Clark App. No. 2000-CA-31; *Boice v. Emshoff* (Dec. 3, 1998), Seneca App. No. 13-98-23; *Tremco, Inc. v. Kent* (May 29, 1997), Cuyahoga App. No. 70920. One such reason is that the law generally disfavors penalty provisions for breaches of contract. While parties may insert into their contract a clause that apportions damages in the event of a default (a liquidated-damages clause), they may not agree to a provision that operates as a penalty and punishes a party for breach. See *DeCastro v. Wellston City School Dist. Bd. of Edn.* (2002), 94 Ohio St.3d 197, 201, 761 N.E.2d 612; *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 381, 613 N.E.2d 183.

{¶68} Deciding whether a contract provision is a valid liquidated-damages clause or an unenforceable penalty is difficult. The Ohio Supreme Court held that the following test should be applied in making that determination:

> "Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof." *Lake Ridge Academy*, supra, 66 Ohio St.3d at 382; see, also, *Samson Sales, Inc. v. Honeywell, Inc.* (1984), 12 Ohio St.3d 27, 465 N.E.2d 392, at the syllabus; *Jones v. Stevens* (1925), 112 Ohio St. 43, 146 N.E. 894, at paragraph two of the syllabus.[20]

{¶69} We need not address the first and third criteria of this test in relation to the lease provision and issue in the case sub judice because we find that the rent-abatement clause renders the entire contract so unreasonable that it could not possibly have been within the contemplation of the parties. As stated previously, the rent-abatement clause provides for the abatement of Fleming's rent during the period of the violation. The lease under which Wal-Mart currently occupies the shopping center runs for a twenty-year term with the option to renew for 6 more periods of 5 years each. Essentially, this lease could run for a total of 50 years. Because there does not appear to be any mechanism to renegotiate the Wal-Mart lease, or any means by which New Plan could prevent Wal-Mart from selling the prohibited food items, the breach could conceivably continue for decades, during which time Fleming could remain in the shopping center rent-free. We believe that this is the type of draconian "penalty" clause meant to be prohibited under the aforementioned case law.

{¶70} Fleming counters that it "remains willing to pay rent and will do so when Wal-Mart's Lease is restricted as required by [Section] 6.3" of the lease. Thus, Fleming concludes, New Plan's "speculative argument" about it remaining in the shopping center "rent free for 40 years should be

[20] We note that the question of whether a contract clause is a liquidated-damages provision or a penalty is a question of law for trial courts and is reviewed on appeal de novo. See, e.g., *Westbrock v. W. Ohio Health Care Corp.* (2000), 137 Ohio App.3d 304, 321, 738 N.E.2d 799; *Courtad v. Winner*, Summit App. No. 20630, 2002-Ohio-2094, ¶ 19; *Republic-Franklin Ins. Co. v. GRC Trucking* (Dec. 13, 2001), Cuyahoga App. No. 79559.

quickly dismissed." We are not persuaded.

{¶71} First, we have found nothing in the Wal-Mart lease to allow New Plan to "restrict" Wal-Mart's sale of these particular food items, and Fleming has not cited any. Second, even if Fleming remains "willing" to pay rent, notwithstanding the abatement clause, it arguably has no legal obligation to pay any rent (given the breach), and it requires a substantial leap of faith to conclude that it would do so simply out of its motive for fair play.[21]

{¶72} In any event, for these reasons we agree with New Plan that the rent-abatement clause constitutes an unenforceable penalty. This does not, however, mean that New Plan completely avoids all consequences for the breach. On remand, if New Plan cannot convince the trier of fact as to the merits of its estoppel and waiver defenses and thus is found in breach of the lease, then Fleming is entitled to recover whatever compensatory damages it can prove to have sustained as a result of the breach.[22] Therefore, New Plan's second cross-assignment of error is well taken and hereby sustained.

VIII

{¶73} To summarize, we affirm the trial court's dismissal of the claims brought by Festival against New Plan. However, we sustain Fleming's first assignment of error on grounds that Section 6.3 of the lease was violated when space was leased to Wal-Mart without prohibiting Wal-Mart from selling the food items specified in the lease to Fleming's predecessor in interest. Whether that lease

[21] If Fleming is sincerely interested in remaining in the shopping center because, either under reduced rent or under some other change in circumstances, we encourage the parties to make a good-faith attempt to negotiate a settlement with New Plan on remand. We encourage New Plan to negotiate a settlement as well. There is nothing in this opinion that New Plan should misconstrue as excusing the breach of the lease with Fleming's predecessor in interest.

[22] See Everett v. Reece (Feb. 24, 1989), Lucas App. No. L-88-060; *Mentor Lagoons, Inc. v. Laity* (May 24, 1985), Lake App. No. 10-184; see, also, 30 Ohio Jurisprudence 3d (1999) 147-148, Damages, Section 120; 22 American Jurisprudence 2d (1988) 781-782, Damages, Section 727.

violation amounts to a breach will depend on whether the trier of fact accepts New Plan's estoppel and/or waiver defenses. If the trier of fact rejects them and finds that New Plan has breached the lease, it should then proceed to determine what compensatory damages are due to Fleming in light of our finding that the rent-abatement clause constitutes an unenforceable penalty pursuant to New Plan's second assignment of error.

{¶74} With all that in mind, the judgment of the trial court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part
and cause remanded.

EVANS, J., concurs.
KLINE, P.J., concurs in judgment only

Chapter 2a: Acquisition Documents

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Chapter 2a: Acquisition Documents

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I. Pre-Contract Considerations

A. Consider the parties and the property involved.

1. You may receive a call from a client indicating they want to sell their existing real property or they want to purchase new real property. You will need to obtain important information from your client in order to proceed with your representation of either a buyer or seller in a transaction.
2. Buyer and seller—are the buyer and seller sophisticated/experienced parties (i.e., real estate company/corporation) or are the buyer and seller unsophisticated/inexperienced parties? Are the buyer and seller individuals or a corporation, limited liability company or partnership?
3. Real property—what type of real property is contemplated by the transaction? Raw/vacant land, developed land, residential, commercial/industrial/retail land? Are there any tenants that currently occupy the land? Does the property or any improvements located thereon have any known issues or problems (such as environmental, access, structural, compliance with laws)?
4. Personal property—is there personal property that will be included in the transaction, such as equipment, machinery or other personal property items?
5. Real ##—is there a real estate broker involved? If so, who is paying the commission on the sale?
6. Lender—will the buyer obtain financing to acquire the property? If so, do they have a particular lender engaged or will they need to secure a loan commitment from a lender during the due diligence/financing period of the purchase agreement?

B. Letters of intent.

1. Will the parties use a letter of intent? Letters of Intent ("LOI") are often used in real estate transactions to address the basic terms of the proposed transaction. For example, in connection with the purchase and sale of real property, a LOI would address purchase price, amount of the earnest money deposit, closing conditions, if any, due diligence period, and representations and warranties, if any. LOIs are often drafted and negotiated by business people and real estate brokers involved in the transaction, with sometimes limited involvement of attorneys. LOIs range in complexity, with some consisting of a few sentences while others containing many pages and exhibits.

2. Enforceability under Ohio Law—Ohio law recognizes LOIs as being an agreement to create an agreement at a later date and therefore not an enforceable contract unless the parties can demonstrate that the LOI includes the following traditional elements of a contract:

   a. An offer;

   b. Acceptance of the offer;

   c. A meeting of the minds of the parties;

   d. Consideration; and

   e. Certainty as to the essential terms of the contract.

   The Ohio Supreme Court stated that "it is not the law that an agreement to make an agreement is per say unenforceable. The enforceability of such an agreement depends rather on whether the parties have manifested an intention to be bound by its terms and whether these intentions are sufficiently definite to be specifically enforced." (*Normandy Place Associates v. Beyer*, 2 Ohio St. 3d, 102, 106 (1982)). It is recommended that in the event the parties desire to clearly enter into a non-binding letter of intent, that the LOI contain some express, non-binding language, such as the following: "This letter will not constitute a binding agreement, but merely sets forth the terms and conditions upon which the parties will proceed to negotiate and prepare the definitive purchase agreement."

3. Pros and cons of using LOI in transactions—Non-binding LOIs are useful to parties to set forth the basic business terms of a transaction and to assist practitioners in drafting the definitive purchase agreement. The downside to using LOIs is that they are frequently highly negotiated and time consuming to finalize. The time and expense of negotiating a LOI could be used to draft and negotiate the terms and conditions of the definitive purchase agreement.

C. Transaction preparation checklist.

1. A real estate preparation checklist is a detailed breakdown of all of the items and documents that should be considered in connection with a real estate transaction. This type of preparation checklist will detail

information pertaining to the property, such as the use of the property, if there is existing title work or surveys available, proposed purchase price, etc. As the transaction proceeds towards closing, the preparation checklist may be revised and updated so that it evolves into a closing checklist. The checklist is an important tool in order to ensure that the parties consider the various due diligence items and other important considerations involved in proceeding with a real estate transaction. Checklists can be very basic, simple forms or depending on the transaction, can be very detailed and complex.

2. Please refer to Appendix A for a sample transaction Preparation Checklist.

II. The Purchase Contract

A. Overview.

Once a buyer and seller have entered into discussions with respect to the purchase and sale of real property, the operative document to be drafted is a purchase and sale agreement (the "Purchase Agreement"). The Purchase Agreement will include the terms of a letter of intent, if applicable, and otherwise include the basic business terms of the transaction, such as purchase price, due diligence period, representations and warranties, contingencies to closing, closing documents, etc. Purchase Agreements are highly negotiated documents as they govern the terms and conditions of the purchase and sale of the property.

B. Typical purchase agreement provisions.

1. Parties.

   Purchase agreement should contain the exact legal name of the buyer and seller and identify each party as an individual, corporation, limited liability company or partnership.

2. Description of real and personal property.

   a. Real property—Purchase agreement should contain a written legal description of the real property being sold. If a title commitment or existing title policy is not available, use the most recent title document (i.e., deed or mortgage) provided that such document contains the entire real property being sold. To constitute a valid legal description, the legal description language must use sufficient terms to enable a court of law to identify the land. (*Eggleston's Lessee v. Bradford*, 10 Ohio 312, 1840 WL 58 (1840).)

   b. Deed requirements—If a deed conveying title to real property is presented to the county auditor or in the case of Cuyahoga County, the Fiscal Officer, and the deed contains a legal description for land that is split from the grantor's (i.e., seller's)

parcel(s) of land as shown in the county auditor's or fiscal officer's records, or if the legal description of the land being conveyed is different from the legal description shown in the prior deed, a boundary survey plat in conformity with the new legal description must be submitted with the deed (Ohio Rev. Code § 315.251(A)). Note that whenever a survey is made of lands being conveyed, the name of the surveyor who prepared the survey must be included in the deed (Ohio Rev. Code § 5301.25(B)). In most cases, the name of the survey is included within the legal description of the property that has been surveyed. In addition, Ohio Rev. Code § 319.20 requires that any instrument presented to the county auditor for tax transfer must include a reference to the volume and page of the recording of the prior recorded instrument by or through which the grantor claimed title. Finally, as a practice note, many counties in Ohio require a new legal description to be approved by the County Engineer or Tax Map Department prior to recording the deed. It is recommended that practitioners contact the county where the conveyance instrument will be recorded to determine if preapproval is required for the legal description as this can take time and cause delays in the transfer of the real property.

c. There are generally two methods of describing real property in Ohio as follows:

i. Description by platted subdivision: For example:

Situated in the City of Village of Hunting Valley, County of Cuyahoga and State of Ohio and known as being all of Lot "C" in the Lot Split Plat for Ames Family Limited Partnership of part of Original Orange Township Lot Nos. 51 and 60, Tract No. 1 and Lot Nos. 3 and 5, Tract 2 as shown by the plat recorded in Volume 281, Page 21 of Cuyahoga County Map Records and subject to all legal highways, reservations, restrictions and easements of record.

ii. Metes and Bounds description: For example:

Situated in the city of North Royalton, County of Cuyahoga and State of Ohio and known as being part of Parcel "D" in the Lot Split Plat for City of North Royalton of part of Original Royalton Township Section No. 19 as shown in the recorded plat in Volume __365__, Page __88__ of Cuyahoga County Map Records and more fully described as follows:

Beginning at a point in the centerline of West Wallings Road (60 feet wide) at its intersection with the Westerly line of said Parcel "D";

Thence South 10°–20'–00" East along the Westerly line of said Parcel "D" a distance of 30.38 feet to a point on the Southerly line of West Wallings Road, as aforesaid, and the principal place of beginning;

Thence North 70°–39'–02" East along the Southerly line of West Wallings Road, as aforesaid, 28.35 feet to a point;

Thence South 10°–20'–00" East 31.44 feet to a point

Thence South 79°–40'–00" West 28.00 feet to a point on the Westerly line of said Parcel "D";

Thence North 10°–20'–00" West along the Westerly line of said Parcel "D," a distance of 27.00 feet to a point and the principal place of beginning, be the same more or less.

d. Personal property—If personal property is being included in the transaction, the personal property should be specifically listed. For example, tangible personal property, such as equipment, inventory, furniture and intangible personal property, such as leases, warranties, permits, plans and specifications.

C. Earnest money deposit.

1. Amount—typically a negotiated cash amount.
2. Who has possession of Earnest Money Deposit? A buyer generally does not want to provide the Earnest Money Deposit directly to the seller. A title company or broker generally maintains possession of the Earnest Money Deposit so that in the event the buyer terminates the agreement resulting from its due diligence inspections (discussed below) or a breach of the Purchase Agreement by either party, the funds are readily available to the other party.
3. Is Earnest Money Deposit made into an interest bearing account and if so, who retains interest earned thereon? Earnest Money Deposit can be deposited into an interest bearing account if tax identification number of buyer is provided to title company. Typically, buyer receives the benefit of any interest earned on the deposit.
4. Earnest Money, and typically any interest earned thereon, is credited against the purchase price at closing.
5. What happens to Earnest Money Deposit if buyer or seller defaults under the purchase agreement? Please refer to default remedies as further addressed below.

D. Representations and warranties.

1. Buyer perspective—When representing a buyer in a purchase and sale transaction, there are standard representations and warranties that a buyer should seek from a seller in the Purchase Agreement. These types

of representations address a seller's title and ownership of the property, condition of the property and seller's receipt of written notice and other knowledge of impending assessments, condemnations or violations of applicable law. Although a Purchase Agreement may contain certain representations and warranties, it is still important for a buyer to fully and thoroughly complete its own due diligence of the property as further addressed below. The following details examples of buyer oriented representations and warranties that may be included in a Purchase Agreement:

SAMPLE REPRESENTATIONS AND WARRANTIES—BUYER PERSPECTIVE:

a. Seller has not received any notice from any governmental authority advising that the Real Property is in material violation of any federal, state or local laws, ordinances, rules, statutes or regulations.

b. Seller has good and clear fee simple, marketable and insurable title to the Real Property evidenced in the appropriate public records, free from all easements, rights-of-way, liens, security interests, encumbrances and defects of any kind, except for the Permitted Encumbrances. All real estate taxes, assessments, water and sewer charges and other municipal charges pertaining to the Real Property, to the extent due and owing, have been paid in full.

c. Seller has received no notice of any increase in either the tax rate or property assessment with respect to the Real Property at the federal, state or local level. Seller has not been notified of possible future improvements by any public authority, any part of the cost of which would or might be assessed against the Real Property, or of any contemplated future assessments of any kind.

d. There is no litigation or claim pending or threatened against or involving the Real Property or this transaction, and to Seller's knowledge, there are no facts or circumstances which could give rise to any such claim or litigation. Seller has received no notice of taking, condemnation, betterment or assessment, actual or proposed, with respect to the Real Property; no such taking, condemnation, betterment or assessment has occurred; and Seller has no reason to believe that any such taking, condemnation, betterment or assessment has been proposed or is under consideration.

e. Seller is a limited liability company duly organized and validly existing under the laws of the State of _____; and Seller has taken or prior to Closing will take all requisite action to approve, execute, deliver and perform this Agreement and each and every other agreement and document delivered by Seller in connection herewith has been taken by Seller. This Agreement and each and every other agreement and document delivered by Seller in

connection herewith have been duly executed and delivered by Seller and constitute the binding obligations of Seller enforceable in accordance with its terms and will not violate any other contractual obligations of Seller or any law, judgment, regulation, injunction or demand of any court or governmental authority and Seller are not currently in default of the same.

f. Neither the Real Property nor Seller's operations on the Real Property are in violation of any Environmental Law (as defined herein); there has been no release of any Hazardous Material (as defined herein) at the Real Property that would reasonably be expected to require investigation, reporting or remediation pursuant to any Environmental Law; Seller is not currently generating, transporting or disposing of Hazardous Materials or handling, manufacturing, possessing, or storing any Hazardous Materials, except as are customarily used in the ordinary course of Seller's operations at the Real Property and except in material compliance with applicable Environmental Law; the Real Property has not been used for the disposal of Hazardous Materials; there are not presently, nor have there ever been, any underground storage tanks located on the Real Property; and Seller has delivered to Buyer correct and complete copies and results of: (i) any material, written reports, studies, analyses, tests or monitoring in the control and custody of the Seller prepared within the past five (5) years pertaining to any Hazardous Materials at, under, about or migrating to or from, the Real Property; and (ii) all material reports and documents relating to compliance with Environmental Law at the Real Property, including all material correspondence to and from any governmental authorities related thereto and all material environmental filings with any governmental authorities within the past five (5) years. For purposes hereof, "Hazardous Materials" shall mean any chemical, pollutant, contaminant, hazardous material, hazardous substance, hazardous waste, universal waste, toxic substance, petroleum or petroleum product or by-product, asbestos-containing material, polychlorinated biphenyl and any other chemical, pollutant, substance, material or waste regulated under any Environmental Law. For purposes hereof, "Environmental Law" shall mean any federal, state or local law, rule, regulation, ordinance, or order pertaining to contamination, pollution or protection of the environment, human health or safety.

g. As of the Closing Date, the Real Property shall be free from mechanic's, materialmen's, laborer's and broker's liens or the possibility of the rightful filing thereof. If any material or labor has been furnished to the Real Property, within the one hundred twenty (120) day period immediately preceding the Closing Date,

Seller shall furnish evidence satisfactory to Buyer and the Title Company of the payment in full for all such material and labor.

h. The Real Property is subject to no leases or rights of occupancy by third parties.

i. From the Effective Date hereof until the Closing Date, Seller will neither do, commit or suffer to be done any act or thing which would adversely affect Seller's present title to the Real Property.

j. No party has any claim to the Real Property by reason of any Purchase Agreement, option to purchase, right of first refusal, land installment contract, lease or other agreement or instrument or by adverse possession or other prescriptive rights."

2. Unless the Purchase Agreement specifies that the representations and warranties survive after the recording of the deed, the representations and warranties will merge into the deed. When representing a buyer in a purchase transaction, it is preferable that the representations and warranties specifically survive the closing and the recording of the deed for a period of time (unlimited is preferred, but two (2) years is a typical survival period).

3. Seller's perspective—A Seller is generally motivated to provide as little representations and warranties as possible to a buyer in a Purchase Agreement. When representing a seller, the representations and warranties should only include those matters that the seller has knowledge of and that a buyer could not determine through its own due diligence (i.e., written notice of condemnation, violation of applicable laws, etc.). Seller's generally prefer to include very broad AS-IS, WHERE-IS language in the Purchase Agreement, such as:

SAMPLE AS-IS WHERE-IS LANGUAGE—SELLER PERSPECTIVE:

OTHER THAN TO THE EXTENT OF THE EXPRESS REPRESENTATIONS SET FORTH IN THIS PURCHASE AGREEMENT (HEREIN CALLED THE "EXPRESS REPRESENTATIONS"), SELLER DOES NOT, BY THE EXECUTION AND DELIVERY OF THIS AGREEMENT, AND SELLER SHALL NOT, BY THE EXECUTION AND DELIVERY OF ANY DOCUMENT OR INSTRUMENT EXECUTED AND DELIVERED IN CONNECTION WITH CLOSING, MAKE ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, OF ANY KIND OR NATURE WHATSOEVER, WITH RESPECT TO THE PROPERTY, AND ALL SUCH REPRESENTATIONS AND WARRANTIES ARE HEREBY DISCLAIMED. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, OTHER THAN TO THE EXTENT OF THE EXPRESS REPRESENTATIONS, SELLER MAKES, AND SHALL MAKE, NO EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY AS TO MATTERS OF TITLE, ZONING, TAX CONSEQUENCES, PHYSICAL OR ENVIRONMENTAL CONDITION (INCLUDING, WITHOUT LIMITATION, LAWS, RULES, REGULATIONS, ORDERS AND REQUIREMENTS PERTAINING TO THE USE, HANDLING, GENERATION, TREATMENT, STORAGE OR

DISPOSAL OF ANY TOXIC OR HAZARDOUS WASTE OR TOXIC, HAZARDOUS OR REGULATED SUBSTANCE), VALUATION, GOVERNMENTAL APPROVALS, GOVERNMENTAL REGULATIONS OR ANY OTHER MATTER OR THING RELATING TO OR AFFECTING THE PROPERTY (HEREINAFTER COLLECTIVELY CALLED THE "DISCLAIMED MATTERS"). PURCHASER AGREES THAT, OTHER THAN TO THE EXTENT OF THE EXPRESS REPRESENTATIONS, WITH RESPECT TO THE PROPERTY, (A) PURCHASER HAS NOT RELIED UPON AND WILL NOT RELY UPON, EITHER DIRECTLY OR INDIRECTLY, ANY REPRESENTATION OR WARRANTY OF SELLER, (B) PURCHASER IS FAMILIAR, IN ALL RESPECTS, WITH THE PROPERTY AND HAS BEEN OCCUPYING A PORTION OF THE REAL PROPERTY AS TENANT PURSUANT TO THE LEASE, (C) WILL CONDUCT SUCH INSPECTIONS AND INVESTIGATIONS OF THE PROPERTY (INCLUDING, BUT NOT LIMITED TO, THE PHYSICAL AND ENVIRONMENTAL CONDITION THEREOF) AND RELY UPON SAME AND, (D) UPON CLOSING, SHALL ASSUME THE RISK THAT ADVERSE MATTERS, INCLUDING, BUT NOT LIMITED TO, THE DISCLAIMED MATTERS, MAY NOT HAVE BEEN REVEALED BY PURCHASER'S INSPECTIONS AND INVESTIGATIONS. SUBJECT TO THE EXPRESS REPRESENTATIONS, SELLER SHALL SELL AND CONVEY TO PURCHASER, AND PURCHASER SHALL ACCEPT, THE PROPERTY "AS IS", "WHERE IS", AND WITH ALL FAULTS, AND, OTHER THAN THE EXPRESS REPRESENTATIONS, THERE ARE NO ORAL AGREEMENTS, WARRANTIES OR REPRESENTATIONS, COLLATERAL TO OR AFFECTING THE PROPERTY BY SELLER OR ANY THIRD PARTY. THE TERMS AND CONDITIONS OF THIS SECTION SHALL EXPRESSLY SURVIVE THE CONSUMMATION OF THE PURCHASE AND SALE OF THE PROPERTY ON THE CLOSING DATE, THE DELIVERY OF THE DEED AND THE PAYMENT OF THE PURCHASE PRICE, WITHOUT REGARD TO ANY LIMITATIONS UPON SURVIVAL SET FORTH IN THIS AGREEMENT.

4. Please note that practitioners should confirm the AS-IS requirements in the jurisdiction where the property is located as some jurisdictions have specific font/All Caps requirements. With respect to the survivability of representations and warranties, a seller will desire that there be no survival or a limited period of survival of the representations and warranties (such as six (6) months to one (1) year).

E. Buyer's due diligence.

1. Buyer Perspective—When representing a buyer in a purchase transaction, the Purchase Agreement should require that seller provide buyer with copies of any due diligence documents, including, but not limited to, title policies, deeds, surveys, environmental reports, construction documents, rent rolls, maintenance contracts, etc., in seller's possession within a specified period after the effective date of the Purchase Agreement. A buyer can save time and money by obtaining copies of the seller's existing due diligence associated with the property by having a starting point in which to order new reports, surveys, etc.

2. The Purchase Agreement should provide a buyer with a specified period of time to perform any and all investigations, reports, surveys, etc. pertaining to the real property and all improvements located thereon in order for a buyer to be satisfied with the condition of the property. This period of time is traditionally called the "Due Diligence Period" or "Inspection Period" in Purchase Agreements. A Due Diligence Period can be as long or as short a period of time as the buyer requires to complete its due diligence, but typically range from 30-60 days (this period can be longer or extended due to additional investigations that may be required as a part of the diligence process). After the end of the Due Diligence Period, buyer should have the right to terminate the Purchase Agreement in the event it is not satisfied with the condition of the property, in its sole and absolute discretion, and receive a refund of its earnest money deposit.

3. The following contains sample due diligence period language to be included in a Purchase Agreement:

SAMPLE DUE DILIGENCE PERIOD LANGUAGE—BUYER PERSPECTIVE:

> *During the period commencing on the Effective Date and ending sixty (60) days thereafter (the "Inspection Period"), Seller shall permit Buyer and Buyer's representatives, agents and contractors to enter the Real Property at any reasonable time for the purpose of conducting surveys, inspections, tests, soil borings, ground water monitoring, appraisals, engineering reports, environmental studies and zoning inspections, review of applicable laws, ordinances and regulations and any other activities required by Buyer in order to determine the suitability of the Real Property for Buyer's purchase (collectively, the "Inspections"). All Inspections shall be performed at Buyer's sole cost and expense. If Buyer is not satisfied with the results of the Inspections applicable to the Real Property, or in the event Buyer is denied access to the Real Property, Buyer may, during the Inspection Period, elect to terminate this Agreement by giving written notice to Seller as provided hereinbelow. If Seller does not receive such written notice from Buyer on or before the last day of the Inspection Period, Buyer's Conditions shall terminate and be of no further force or effect.*

4. Title and Survey—Title and Survey review, which is a standard part of any due diligence, will be further addressed below.

5. Seller's Perspective—A seller should provide buyer with a due diligence period, so that the buyer can satisfy itself with the condition of the property and that any AS-IS language is actually meaningful in providing the buyer with the opportunity to inspect the property. Although having a buyer complete its due diligence is necessary to a transaction, a seller is also interested in limiting the due diligence period to only the amount of time reasonably necessary for the buyer to conduct its due diligence inspections and limiting the amount of invasive testing that a buyer can perform on the property. For example, the longer a due diligence period

continues, the longer that the property is not being marketed and the buyer has the opportunity to terminate the Purchase Agreement. A seller desires to limit the buyer's ability to perform invasive testing at the property (such as soil borings) unless the buyer obtains the seller's prior written consent. In the event that buyer performs invasive testing at the property, discovers some environmental contamination, and then terminates the Purchase Agreement, the seller now has knowledge of such contamination and may have reporting and remediation liability under applicable law as well as disclosing such information to other potential buyers.

F. Closing conditions/contingencies.

1. Buyer perspective—When representing a buyer, the Purchase Agreement should include certain closing conditions that are required to be satisfied on or prior to closing, such as satisfaction of the condition of the property through its due diligence investigations, obtaining or satisfying itself that it can obtain necessary governmental permits, certificates and other compliance matters, confirming that the municipal zoning of the property is appropriate for buyer's intended purpose, financing contingency, and reaffirmation of the seller's representations and warranties in the Purchase Agreement. If the buyer's stated closing conditions in the Purchase Agreement are not satisfied, then traditionally, the buyer has the right to terminate the Purchase Agreement and receive a refund of its earnest money deposit.

2. The following includes sample conditions to closing from a buyer's perspective in the Purchase Agreement:

   SAMPLE CLOSING CONDITIONS—BUYER PERSPECTIVE

   a. Buyer shall have accepted the condition of the Real Property upon completion of any and all inspections as Buyer may elect during the Due Diligence Period.

   b. Seller shall have delivered to Buyer all reports concerning the environmental condition of the Real Property, if any, as are available to Seller.

   c. Buyer shall have obtained written confirmation from appropriate entities that all utilities (including, without limitation, water, storm drainage, sewer service, natural gas, electricity, and telephone) are currently available to the Real Property or will be available to the Real Property, at the boundary line of the Real Property as of the Closing Date through recorded and enforceable permanent private easements or properly dedicated permanent public easements, are installed and operational, are in compliance with all rules and regulations of the governmental units, agencies or other entities having jurisdiction over such utilities and easements, and are adequate and sufficient to provide such quantities, pressures and capacities as are necessary to enable the Real Property to be used for Buyer's Use.

d. Buyer shall have received and approved the Title Policy, as evidenced by a proforma policy or a marked binder therefor to be delivered at Closing and effective as of the Closing Date.

e. Buyer's Board of Directors and senior management shall have approved in writing the purchase of the Real Property and completion of the transaction as contemplated by this Agreement, and the execution and delivery of the documents and instruments required of Buyer hereunder.

f. Seller and Buyer shall have delivered all items required to be delivered by it under this Agreement and shall have performed all of their obligations under this Agreement.

g. All representations and warranties by Seller in this Agreement or in any written statement that shall be delivered to Buyer by Seller under this Agreement shall be true and correct on and as of the Closing Date as though made at that time.

h. The form and substance of all certificates, instruments, opinions, and other documents delivered to Buyer under this Agreement shall be satisfactory in all respects to Buyer and its counsel.

i. All representations and warranties by Buyer in this Agreement or in any written statement that shall be delivered to Seller by Buyer under this Agreement shall be true and correct on and as of the Closing Date as though made at that time.

j. The form and substance of all certificates, instruments, opinions and other documents delivered to Seller under this Agreement shall be reasonably satisfactory to Seller.

k. Buyer shall have determined, to its sole satisfaction, that it or Seller, as the case may be, will be able to obtain the Permits and Zoning as set forth herein.

3. Seller perspective—Sellers traditionally desire to limit the number and extent of closing conditions, however, there are certain closing conditions and documents that are necessary in any transaction, including, but limited to, the delivery of a deed, assignment of any leases or other contracts that buyer is assuming, a bill of sale to transfer personal property, if applicable, and a closing statement.

G. Default provisions.

1. Buyer Perspective—The Purchase Agreement should include a provision that addresses what rights and remedies both parties have in the event either party defaults under the terms of the Purchase Agreement. From a buyer's perspective, it desires to obtain a return of its earnest money deposit and also the right to pursue an action against the seller to specifically enforce the terms of the Purchase Agreement (i.e., force seller to sell the property to buyer). Alternatively, a buyer is interested in

limiting its liability in the event it defaults under the Purchase Agreement by only providing that seller can retain the earnest money deposit as liquidated damages and not purse any separate action against buyer. The following contains sample default language in the Purchase Agreement from a buyer's perspective:

SAMPLE DEFAULT LANGUAGE—BUYER PERSPECTIVE

> *Buyer's Default: In the event that Seller is ready, willing and able to convey the Real Property in accordance with this Agreement, and the Buyer is obligated under the terms of this Agreement to consummate the transaction evidenced by this Agreement but fails to consummate this Agreement and take title, the parties recognize and agree that the damages Seller will sustain will be difficult if not impossible to ascertain. Therefore, the parties agree that, in the event of Buyer's default, Seller shall be entitled to receive and retain the Earnest Money as liquidated damages for Buyer's failure to close. Seller's right to receive and retain the Earnest Money shall constitute the waiver by Seller of all other rights and remedies against Buyer's except for those rights and/or obligations that are expressly stated to survive the termination of this Agreement.*
>
> *Seller's Default: If Closing is not concluded through no default of Buyer, Buyer, at its option, may: (a) elect to enforce the terms of this Agreement by action for specific performance, and/or exercise any other right or remedy available to it at law or in equity or (b) terminate this Agreement by notice to Seller. In either of the foregoing events, Buyer shall be entitled to an immediate refund of the Earnest Money after notice to Seller and to Escrow Agent. In the event of a successful specific performance action by Buyer, the full Purchase Price shall be paid to Seller at the time of Closing less all costs to pursue. Upon any termination under (b) above, the parties shall have no further rights and obligations under this Agreement other than those rights and/or obligations that are expressly stated to survive expiration or termination of this Agreement.*

2. Seller perspective—Although allowing the buyer to have a right to specifically enforce the terms of the Purchase Agreement are often requested, most sellers will not offer this provision in the initial draft of the Purchase Agreement. In the event of a default by buyer, traditionally seller retains the earnest money deposit as liquidated damages resulting from buyer's breach. The following contains sample language from a seller's perspective:

SAMPLE DEFAULT LANGUAGE—SELLER PERSPECTIVE:

> *Seller's Default. If the purchase and sale of the Property contemplated hereby is not consummated in accordance with the terms and provisions of this Agreement due to circumstances or conditions which constitute a default by Seller under this Agreement (a "Default" by Seller), the Earnest Money*

shall be refunded to Purchaser promptly upon request, and Purchaser, as its sole and exclusive remedies, may either exercise the right to: (i) terminate this Agreement, in which event all rights and obligations of the parties under this Agreement shall expire, and this Agreement shall become null and void; or (ii) sue Seller to collect actual monetary damages; provided, however, that Purchaser shall be precluded from, and hereby waives all rights to pursue specific performance of this Agreement and in the event that Purchaser elects to seek to recover damages from Seller on account of any default by Seller under this Agreement, Seller's liability to Purchaser for all damages, of any nature whatsoever, shall not exceed the amount of Earnest Money deposited by Purchaser as of the date Seller receives notice from Purchaser of a default by Seller, and Purchaser shall not claim, sue for or accept an award for more than the maximum amount of damages hereinabove set forth on account of or in connection with this Agreement or any default by Seller under this Agreement. In no event shall Purchaser have the right to recover from Seller any special or consequential damages.

Buyer's Default. In the event that Seller is ready, willing and able to convey the Real Property in accordance with this Agreement, and the Buyer is obligated under the terms of this Agreement to consummate the transaction evidenced by this Agreement but fails to consummate this Agreement and take title, the parties recognize and agree that the damages Seller will sustain will be difficult if not impossible to ascertain. Therefore, the parties agree that, in the event of Buyer's default, Seller shall be entitled to receive and retain the Earnest Money as liquidated damages for Buyer's failure to close. Seller's right to receive and retain the Earnest Money shall constitute the waiver by Seller of all other rights and remedies against Buyer's except for those rights and/or obligations that are expressly stated to survive the termination of this Agreement.

III. Pre-Closing Issues—Title and Survey Review

A. Title commitment review.

From a buyer's perspective, the title commitment provides an accurate report of the current state of title for the property along with a copy of the recorded documents for the buyer's review. The title commitment also provides a rough draft of the buyer's final Owner's Title Insurance Policy for the property that will be issued at closing, so it is important that the buyer and its counsel carefully review the title commitment and associated documents and work with the title company and seller to make sure the title commitment is as "clean" as possible. A buyer and its counsel should review the underlying documents or so-called Schedule B, Section II items, to understand the scope and content of deeds, easements, restrictions, and other encumbrances of record. By way of example:

(i) a prior deed of record affecting the property could impose certain restrictions on the use of the property (i.e., property may only be used for industrial purposes) or contain a reservation of an easement right over the property; (ii) a declaration of covenants and restrictions for an office or industrial park could contain various restriction on the use, construction requirements, setback requirements, etc; (iii) gas or oil leases that encumber the property and the rights of such parties in and to the property (access rights, royalty payments, etc.); and (iv) utility easements that may prohibit the construction of improvements and buildings within the easement areas. The title commitment will also list any mortgages, UCC financing statements and other liens of record that should be carefully reviewed by the buyer's counsel to insure that those items that are not being assumed by buyer at closing, will be removed/released at closing. Generally, this requires working with both the title company and seller to insure that the appropriate payoff letters and lien releases will be provided at closing. The title commitment also sets forth the status of real estate taxes and assessments of the property. Buyer's counsel should also insure that any outstanding real estate taxes due and owing are paid at closing and that real estate taxes are prorated by the parties in the purchase agreement. Since real estate taxes are paid in arrears in Ohio, buyers and sellers generally prorate real estate taxes at closing (i.e., seller is responsible for real estate taxes through the date of closing and the buyer is provided a "credit" against the purchase price so that when the real estate taxes become due for said tax year, the buyer has the necessary funds to pay the real estate taxes for the portion of seller's ownership).

Please refer to Appendix B for a sample title commitment.

B. Surveys.

Generally, there are two types of surveys that are used in commercial real estate transactions:

1. The boundary survey is a graphic depiction of the property's legal description. The boundary survey will provide information on the total acreage of the property and whether the legal description "closes" meaning that the legal description ends and begins at the same point. The boundary survey requires a registered surveyor to access the property and find the existing boundary pins or set new pins to mark the boundary. This type of survey is valuable if only an accurate depiction of the property is required or if a new legal description must be prepared for the property in order to convey the property (some jurisdictions require that all legal descriptions be approved prior to being included on the deed).

2. The ALTA/ACSM Land Title Survey is the most detailed and comprehensive of the property surveys. The ALTA Survey depicts the boundaries of the property, all of the buildings and other structures on the property, easements and other documents of record that affect the property that can be graphically shown on the survey map. In addition,

there are optional requirements called "Table A Items" that a party can choose to be included on the ALTA Survey, which includes information on the zoning for the property, whether the property is within a flood zone and whether the property has access to utilities. In order to include the encumbrance and easement information on the survey, the surveyor must be provided the current title commitment for the property. A copy of the ALTA Survey is provided to the title company so that the standard survey exception is removed from the Title Policy and also it can be used to remove special exceptions to title that are shown on the ALTA Survey as not affecting the property (for example, an easement could be recorded of record and the ALTA Survey can depict that the easement does not affect the property; thus the easement can be removed from the final owner's title insurance policy.) In addition, the buyer cannot obtain a Comprehensive Endorsement, Access Endorsement, or Same as Survey Endorsement to the Owner's Title Policy without an ALTA Survey.

C. Steps after survey and title review.

1. Once a buyer completes the title and survey review, it must confirm if there are any issues that need to be addressed by the seller, such as identifying a financial encumbrance that must be paid off at closing, or if there is an easement or restrictive covenant that negatively impacts the buyer's proposed use of the property.

2. A Purchase Agreement typically affords a buyer the opportunity to object to title and survey matters during the due diligence period. If the title work and survey reveal significant issues, and the seller is unable to correct the issue (such as having a utility easement released/relocated), then a buyer may desire to terminate the Purchase Agreement.

IV. Pre-Closing Issues—Additional Due Diligence

A. Appraisals.

In transactions where there is a lender involved in providing financing to the buyer in order for the buyer to purchase the property, lenders generally require that the property be appraised as a part of the lender's due diligence. Prior to hiring an appraiser, the parties should first determine if the commercial appraiser has professional certifications such as the MAI professional designation from the Appraisal Institute or ASA designation from the American Society of Appraisers and if the appraiser is on the list of appraisers approved by the lender. An appraisal is required by the lender to confirm the value of the property as compared to the amount of the loan approved by such lender.

B. Environmental review of the property.

As a part of the buyer's due diligence, it is important to investigate the environmental condition of the property. This investigation is often done by an environmental consultant and resulting report from the investigation is called a

Phase I Environmental Site Assessment ("Phase I"). Prior to hiring an environmental consultant in transactions where a lender is involved, the buyer should first determine if the consultant is on the lender's list of approved environmental consultants. During the Phase I process the environmental consultant will research the previous uses of the property, perform a site visit and assessment, and perform a records search for any environmental issues related to or near the property. The important feature of the Phase I is that it satisfies the "all appropriate inquiry" requirements under CERCLA (The Comprehensive Environmental Response, Compensation and Liability Act (42 (U.S.C. Section 9601). With the "all appropriate inquiry" requirement satisfied, the perspective buyer of the property obtains the innocent purchaser defense to environmental liability under CERCLA. The innocent purchase defense is important to buyers, because if a future environmental contamination issue is discovered, the buyer will have a defense to such environmental matters because it has completed its due diligence and can rely on such Phase I report.

In some situations, the Phase I may uncover past uses or environmental issues that require further investigations. In these cases, the environmental consultant may recommend a Phase II investigation which is a more detailed evaluation of the environmental condition of the property. The Phase II investigation includes soil borings to evaluate the subsurface soil condition of the property for evidence of contamination. The Phase II may include testing the property's ground water for evidence of contamination. From a buyer's perspective, a purchase agreement should contemplate and allow for such invasive Phase II work to be performed at the property. From a seller's perspective a purchase agreement should require seller's consent to any type of invasive testing.

C. Building Inspections.

If the property is improved, the perspective buyer may retain a building evaluation consultant to review the condition of the buildings and other improvements on the property. During the building evaluation process, the consultant performs an extensive site evaluation of the building including a review of the structural condition, the condition of the roof, condition of all electrical, plumbing and HVAC systems, and the condition of the parking lot. The consultant prepares a report providing the current condition of the building structure and systems. The report also includes an estimate of the remaining life of the roof, parking lot and HVAC systems.

The seller and buyer should also be aware that some municipalities require a point of sale inspection or a safety inspection prior to the transfer of the property. During these inspections a representative of the municipality, most likely a city building inspector, will perform a site inspection and provide the seller and buyer with a list of issues that need to be corrected prior to the transfer of the property. Although point of sale inspections and/or safety inspections for commercial buildings are somewhat rare, it is prudent to contact the city during the due diligence period to confirm whether or not the city requires any type of pre-closing inspections.

D. Zoning and governmental permitting.

The buyer's due diligence should also include a review of the property's compliance with local zoning ordinances. A buyer may request a Zoning Confirmation Letter from the local municipal building department or planning department which confirms that the property is a conforming use under the current zoning ordinances, that the property complies with all of the zoning requirements, that the property is not subject to any conditional use permits or variances and that the property is not subject to any zoning violations. The review of the property's zoning can also be performed by a due diligence consultant who will prepare a report that confirms the zoning of the property and provides an overview of the requirements of the zoning regulations. The buyer should also request from either the seller or the local municipality copies of the current Certificate of Occupancy and other municipal permits that are required, as a buyer will generally need to obtain a new Certificate of Occupancy as a result of its new ownership of the property.

Appendix A
Real Estate Preparation Checklist

Location of Property:	
Seller:	
Buyer:	
If Buyer/Seller is an individual—married?	
Personal Property:	
Purchase Price:	
Earnest Money Deposit:	
Letter of Intent:	Yes: _____ No: _____ Copy provided_____
Current Deed for Property:	Yes:_____ No:_____ Copy provided_____
Current Leases:	Yes: _____ No: _____ If Yes, party and term of Lease_____ Copy provided_____
Use of Property:	Commercial/Industrial _____ Retail_____ Residential_____ Other_____
Current Property Status:	Operating_____ Closed_____ Vacant/unimproved_____
Existing Title Insurance Policy/Title Commitment:	Yes: _____ No: _____ Copy provided _____
Existing Survey:	Yes: _____ No: _____ Copy provided_____
Appraisal/Book Value:	Yes:_____ No: _____ Copy provided_____
Building Condition Reports:	Yes: _____ No: _____ Copy provided_____

Environmental Reports (Phase I/Phase II):	Yes: _____ No: _____ Copy provided_____
State or Federal Permits:	Yes: _____ No: _____ No Knowledge: _____ Copy provided _____
Certificate of Occupancy:	Yes: _____ No: _____ Copy provided _____
Building Code Violations:	Yes: _____ No: _____ No Knowledge: _____ Copy provided _____
Zoning Classification of Property:	
Zoning Variances:	Yes: _____ No: _____ No Knowledge: _____ Copy provided _____
Zoning Violations:	Yes: _____ No: _____ No Knowledge: _____ Copy provided _____
Real Property Taxes Evidence:	Yes: _____ No: _____ Copy provided_____
Outstanding Mortgages/Deeds of Trust:	Yes: _____ No: _____ No Knowledge: _____ Copy provided_____
Other Liens:	Yes: _____ No: _____ No Knowledge: _____ Copy provided_____
Title Company:	
Broker:	
Evidence of Corporate Good Standing Buyer/Seller:	Yes_____ No_____ Copy provided _____

Appendix B
Sample Title Commitment

Chicago Title Insurance Company

COMMITMENT FOR TITLE INSURANCE

BY

Chicago Title Insurance Company

Chicago Title Insurance Company, a Missouri corporation ("Company"), for a valuable consideration, commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the Proposed Insured named in Schedule A, as owner or mortgagee of the estate or interest in the land described or referred to in Schedule A, upon payment of the premiums and charges and compliance with the Requirements; all subject to the provisions of Schedule A and B and to the Conditions of this Commitment.

This Commitment shall be effective only when the identity of the Proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A by the Company.

All liability and obligation under this Commitment shall cease and terminate 6 months after the Effective Date or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue the policy or policies is not the fault of the Company.

The Company will provide a sample of the policy form upon request.

IN WITNESS WHEREOF, Chicago Title Insurance Company has caused its corporate name and seal to be affixed by its duly authorized officers on the date shown in Schedule A.

Chicago Title Insurance Company

By: _____ President

ATTEST: _____ Secretary

FORM 72-83-06 (3/07) ALTA Commitment - 2006

CHICAGO TITLE INSURANCE COMPANY

701 FIFTH AVENUE, #2300, SEATTLE, WA 98104

A.L.T.A. COMMITMENT
SCHEDULE A

Order No.:

Title Unit: Customer Number:
Phone: Buyer(s):
Fax:
Officer:

Commitment Effective Date: SEPTEMBER 15, 2009 at 8:00 A.M.

1. Policy or Policies to be issued:

ALTA Owner's Policy
STANDARD POLICY (6/17/2006)
GENERAL SCHEDULE RATE

Amount: $0.00
Premium:
Tax:

Proposed Insured:

Policy or Policies to be issued:
ALTA Loan Policy

Amount: $0.00
Premium:
Tax:

Proposed Insured:

Policy or Policies to be issued:
ALTA Loan Policy

Amount: $0.00
Premium:
Tax:

Proposed Insured:

2. The estate or interest in the land which is covered by this Commitment is:

FEE SIMPLE

3. Title to the estate or interest in the land is at the effective date hereof vested in:

REAL ESTATE DEVELOPMENT COMPANY, A WASHINGTON CORPORATION

4. The land referred to in this Commitment is described as follows:

SEE ATTACHED LEGAL DESCRIPTION EXHIBIT

COMMA805/KLC/11.1.05

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE A
(Continued)

Order No.:
Your No.:

LEGAL DESCRIPTION EXHIBIT
(Paragraph 4 of Schedule A continuation)

PARCEL A:

GOVERNMENT LOTS 3 THRU 12, INCLUSIVE, THE FRACTIONAL SOUTHWEST QUARTER, THE NORTH HALF OF THE SOUTHEAST QUARTER, THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER, THE NORTH HALF OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER, THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER, AND THE NORTH HALF OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 6, TOWNSHIP 21 NORTH, RANGE 7 EAST, WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON;
EXCEPT THAT PORTION OF THE SOUTH 70 FEET OF THE NORTH HALF OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 6 LYING EAST OF THE EASTERLY RIGHT OF WAY LINE OF THE EARL MAXWELL ROAD, AS CONVEYED TO HELEN BREMMEYER BY QUIT CLAIM DEED RECORDED UNDER RECORDING NUMBER 9105231034; AND
EXCEPT THAT PORTION THEREOF CONVEYED TO CASCADE LAND CONSERVANCY, A WASHINGTON NON-PROFIT CORPORATION, BY BARGAIN AND SALE DEED RECORDED UNDER RECORDING NUMBER 20021217000887; AND
EXCEPT ANY PORTION THEREOF LYING WITHIN THE EARL MAXWELL ROAD RIGHT OF WAY.

PARCEL B:

THE WEST HALF OF THE WEST HALF OF THE NORTHEAST QUARTER, THE EAST HALF OF THE NORTHWEST QUARTER, AND THE FRACTIONAL SOUTH HALF OF SECTION 7, TOWNSHIP 21 NORTH, RANGE 7 EAST, WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON;
EXCEPT ANY PORTIONS THEREOF LYING WITHIN THOSE CERTAIN STRIPS OF LAND CONVEYED TO KING COUNTY BY DEEDS RECORDED UNDER AUDITOR'S FILE NUMBERS 1107075 AND 5305193; AND
EXCEPT THAT PORTION THEREOF CONVEYED TO CASCADE LAND CONSERVANCY, A WASHINGTON NON-PROFIT CORPORATION, BY BARGAIN AND SALE DEED RECORDED UNDER RECORDING NUMBER 20021217000887; AND
EXCEPT THAT PORTION OF THE SAID WEST HALF OF THE WEST HALF OF THE NORTHEAST QUARTER OF SAID SECTION 7 LYING SOUTHERLY OF SAID TRACT OF LAND CONVEYED TO CASCADE LAND CONSERVANCY; AND
EXCEPT ANY PORTIONS THEREOF LYING WITHIN THE RIGHTS OF WAY FOR EARL MAXWELL ROAD (290TH AVENUE SOUTHEAST), EARL MAXWELL ROAD CONNECTION (SOUTHEAST 312TH WAY) AND GREEN RIVER GORGE COUNTY ROAD.

CHICAGO TITLE INSURANCE COMPANY

A.L.T.A. COMMITMENT
SCHEDULE B

Order No.:
Your No.:

Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company.

GENERAL EXCEPTIONS

A. Rights or claims of parties in possession, or claiming possession, not shown by the Public Records.

B. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.

C. Easements, prescriptive rights, rights-of-way, liens or encumbrances, or claims thereof, not shown by the Public Records.

D. Any lien, or right to a lien, for contributions to employee benefit funds, or for state workers' compensation, or for services, labor, or material heretofore or hereafter furnished, all as imposed by law, and not shown by the Public Records.

E. Taxes or special assessments which are not yet payable or which are not shown as existing liens by the Public Records.

F. Any lien for service, installation, connection, maintenance, tap, capacity, or construction or similar charges for sewer, water, electricity, natural gas or other utilities, or for garbage collection and disposal not shown by the Public Records.

G. Unpatented mining claims, and all rights relating thereto; reservations and exceptions in United States Patents or in Acts authorizing the issuance thereof; Indian tribal codes or regulations, Indian treaty or aboriginal rights, including easements or equitable servitudes.

H. Water rights, claims or title to water.

I. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the Public Records, or attaching subsequent to the effective date hereof but prior to the date the proposed Insured acquires of record for value the estate or interest or mortgage thereon covered by this Commitment.

SPECIAL EXCEPTIONS FOLLOW

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Order No.:
Your No.:

SPECIAL EXCEPTIONS

A 1. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	KING COUNTY
PURPOSE:	PUBLIC ROAD AND HIGHWAY
AREA AFFECTED:	PORTIONS OF SAID PREMISES AND OTHER PROPERTY LYING WITHIN STRIPS OF LAND 60 FEET IN WIDTH
RECORDED:	JUNE 9, 1936
RECORDING NUMBER:	2900738

B 2. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	KING COUNTY
PURPOSE:	PUBLIC ROAD AND HIGHWAY
AREA AFFECTED:	PORTION OF PARCEL B LYING WITHIN A STRIP OF LAND 60 FEET IN WIDTH
RECORDED:	JANUARY 5, 1938
RECORDING NUMBER:	2979719

C 3. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	UNITED STATES OF AMERICA
PURPOSE:	ELECTRIC TRANSMISSION LINE AND APPURTENANCES; ACCESS ROADS FOR INGRESS AND EGRESS
AREA AFFECTED:	PORTIONS OF PARCEL A AS DESCRIBED IN DOCUMENT
RECORDED:	SEPTEMBER 2, 1965
RECORDING NUMBER:	5923555

D 4. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	FRANK L. MALONE, HIS HEIRS AND ASSIGNS
PURPOSE:	NON-EXCLUSIVE RIGHT TO USE AND MAINTAIN AN EXISTING ROAD
AREA AFFECTED:	A SOUTHWESTERLY PORTION OF PARCEL A AS DESCRIBED AND DELINEATED IN DOCUMENT

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Order No.:
Your No.:

SPECIAL EXCEPTIONS

RECORDED:	OCTOBER 26, 1971
RECORDING NUMBER:	7110260533

E 5. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	CITY OF TACOMA, A MUNICIPAL CORPORATION
PURPOSE:	RIGHT OF WAY TO CONSTRUCT, RECONSTRUCT, INSTALL, OPERATE, INSPECT AND MAINTAIN A WATER TRANSMISSION PIPELINE, OR PIPELINES, AND APPURTENANT EQUIPMENT
AREA AFFECTED:	PORTION OF PARCEL B LYING WITHIN A STRIP OF LAND 100 FEET IN WIDTH AS DESCRIBED AND DELINEATED IN DOCUMENT
RECORDED:	FEBRUARY 18, 1975
RECORDING NUMBER:	7502180145

L SAID EASEMENT HAS BEEN MODIFIED BY DOCUMENT RECORDED UNDER RECORDING NUMBER 9412200234.

F 6. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	UNITED STATES OF AMERICA
PURPOSE:	ELECTRIC TRANSMISSION LINE AND APPURTENANCES
AREA AFFECTED:	PORTION OF PARCEL A AS DESCRIBED AND DELINEATED IN DOCUMENT
RECORDED:	JULY 28, 1977
RECORDING NUMBER:	7707280276

G 7. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	PUGET SOUND POWER & LIGHT COMPANY
PURPOSE:	THE RIGHT TO INSTALL, MAINTAIN AND REMOVE AN UNDERGROUND ELECTRICAL TRANSMISSION LINE
AREA AFFECTED:	A SOUTHWESTERLY PORTION OF PARCEL A AS DESCRIBED AND DELINEATED IN

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Order No.:
Your No.:

SPECIAL EXCEPTIONS

	DOCUMENT
RECORDED:	AUGUST 22, 1978
RECORDING NUMBER:	7808220693

H 8. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	DARYLE SKAUGSTAD AND LOIS JEAN BROADWAY, HUSBAND AND WIFE
PURPOSE:	RECONSTRUCTION, USE AND MAINTENANCE OF A ROAD FOR INGRESS AND EGRESS
AREA AFFECTED:	A SOUTHWESTERLY PORTION OF PARCEL A AS DESCRIBED AND DELINEATED IN DOCUMENT
RECORDED:	NOVEMBER 30, 1987
RECORDING NUMBER:	8711300861

I 9. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	LARRY LARSON AND JO-ANN LARSON, HUSBAND AND WIFE
PURPOSE:	RECONSTRUCTION, USE AND MAINTENANCE OF EXISTING ROAD FOR INGRESS AND EGRESS
AREA AFFECTED:	A SOUTHWESTERLY PORTION OF PARCEL A AS DESCRIBED AND DELINEATED IN DOCUMENT
RECORDED:	NOVEMBER 2, 1990
RECORDING NUMBER:	9011020580

J 10. COVENANT TO BEAR PART OR ALL OF THE COST OF CONSTRUCTION OR REPAIR OF EASEMENT GRANTED OVER ADJACENT PROPERTY:

PURPOSE OF EASEMENT:	RECONSTRUCTION, USE AND MAINTENANCE OF EXISTING ROAD
RECORDING NUMBER:	9101280325

K 11. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Order No.:
Your No.:

SPECIAL EXCEPTIONS

GRANTEE:	CITY OF TACOMA
PURPOSE:	THE RIGHT AND PRIVILEGE TO CONSTRUCT, RECONSTRUCT, INSTALL, OPERATE, INSPECT AND MAINTAIN A WATER TRANSMISSION PIPELINE, OR PIPELINES, AND APPURTENANT EQUIPMENT
AREA AFFECTED:	PORTION OF PARCEL B AS DESCRIBED AND DELINEATED IN DOCUMENT
RECORDED:	DECEMBER 20, 1994
RECORDING NUMBER:	9412200234

M 12. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	CITY OF TACOMA, A MUNICIPAL CORPORATION
PURPOSE:	INGRESS AND EGRESS
AREA AFFECTED:	PORTION OF PARCEL B LYING WITHIN A STRIP OF LAND 20 FEET IN WIDTH AS DESCRIBED AND DELINEATED IN DOCUMENT
RECORDED:	MAY 25, 2001
RECORDING NUMBER:	20010525001007

N 13. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

DISCLOSED BY:	BARGAIN AND SALE DEED
IN FAVOR OF:	CASCADE LAND CONSERVANCY, A WASHINGTON NON-PROFIT CORPORATION
PURPOSE:	ROADS
AFFECTS:	PORTIONS OF PARCEL A AS DESCRIBED AND DELINEATED IN DOCUMENT
RECORDED:	DECEMBER 17, 2002
RECORDING NUMBER:	20021217000887

O 14. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

DISCLOSED BY:	DONATION DEED (TIMBER)
IN FAVOR OF:	CASCADE LAND CONSERVANCY, A WASHINGTON NON-PROFIT CORPORATION

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Order No.:
Your No.:

SPECIAL EXCEPTIONS

PURPOSE:	ROADS
AFFECTS:	PORTIONS OF PARCEL A AS DESCRIBED AND DELINEATED IN DOCUMENT
RECORDED:	DECEMBER 17, 2002
RECORDING NUMBER:	20021217000888

P 15. EASEMENT AND THE TERMS AND CONDITIONS THEREOF:

GRANTEE:	CLAIRE ASHTON
PURPOSE:	BURIED UTILITIES RIGHT OF WAY
AREA AFFECTED:	A SOUTHWESTERLY PORTION OF PARCEL A AS DESCRIBED AND DELINEATED IN DOCUMENT
RECORDED:	SEPTEMBER 11, 2008
RECORDING NUMBER:	20080911000966

AG 16. EXCEPTIONS AND RESERVATIONS CONTAINED IN DEED:

FROM:	PACIFIC COAST COAL COMPANY
RECORDED:	AUGUST 11, 1936
RECORDING NUMBER:	2908905

AH AFFECTS: PORTION OF PARCEL B LYING WITHIN THE SOUTH HALF OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 7

Q 17. EXCEPTIONS AND RESERVATIONS CONTAINED IN DEED:

FROM:	WEYERHAEUSER COMPANY (FORMERLY WEYERHAEUSER TIMBER COMPANY), A WASHINGTON CORPORATION
RECORDED:	MAY 13, 2009
RECORDING NUMBER:	20090513001186

R 18. PAYMENT OF THE REAL ESTATE EXCISE TAX, IF REQUIRED.

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Order No.:
Your No.:

SPECIAL EXCEPTIONS

THE PROPERTY DESCRIBED HEREIN IS SITUATED WITHIN THE BOUNDARIES OF LOCAL TAXING AUTHORITY OF UNINCORPORATED KING COUNTY. PRESENT RATE IS 1.78%.

ANY CONVEYANCE DOCUMENT MUST BE ACCOMPANIED BY THE OFFICIAL WASHINGTON STATE EXCISE TAX AFFIDAVIT. THE APPLICABLE EXCISE TAX MUST BE PAID AND THE AFFIDAVIT APPROVED AT THE TIME OF THE RECORDING OF THE CONVEYANCE DOCUMENTS.

s 19. GENERAL AND SPECIAL TAXES AND CHARGES, PAYABLE FEBRUARY 15, DELINQUENT IF FIRST HALF UNPAID ON MAY 1, SECOND HALF DELINQUENT IF UNPAID ON NOVEMBER 1 OF THE TAX YEAR (AMOUNTS DO NOT INCLUDE INTEREST AND PENALTIES):

YEAR:	2009
TAX ACCOUNT NUMBER:	062107-9003-00
LEVY CODE:	4845
ASSESSED VALUE-LAND:	$ 94,617.00
ASSESSED VALUE-IMPROVEMENTS:	$ 0.00
GENERAL & SPECIAL TAXES:	BILLED: $ 1,093.56
	PAID: $ 546.78
	UNPAID: $ 546.78

AFFECTS: PARCEL A

t 20. GENERAL AND SPECIAL TAXES AND CHARGES, PAYABLE FEBRUARY 15, DELINQUENT IF FIRST HALF UNPAID ON MAY 1, SECOND HALF DELINQUENT IF UNPAID ON NOVEMBER 1 OF THE TAX YEAR (AMOUNTS DO NOT INCLUDE INTEREST AND PENALTIES):

YEAR:	2009
TAX ACCOUNT NUMBER:	072107-9003-09
LEVY CODE:	3530
ASSESSED VALUE-LAND:	$ 57,071.00
ASSESSED VALUE-IMPROVEMENTS:	$ 0.00
GENERAL & SPECIAL TAXES:	BILLED: $ 643.30
	PAID: $ 321.65
	UNPAID: $ 321.65

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Order No.:
Your No.:

SPECIAL EXCEPTIONS

AFFECTS: PARCEL B AND OTHER PROPERTY

U 21. THE LANDS DESCRIBED HEREIN ARE DESIGNATED ON THE TAX ROLLS AS FOREST LAND, AND THE LAND VALUE REDUCED PURSUANT TO RCW 84.33. THE TIMBER LOCATED THEREON IS NOT TAXED AS REAL PROPERTY BUT WILL BE SUBJECT TO COLLECTION OF A TAX UPON HARVESTING THEREOF. IN THE EVENT THAT SAID PROPERTY IS REMOVED FROM ITS PRESENT DESIGNATION OF FOREST LAND IT MAY BECOME LIABLE TO THE ASSESSMENT OF A COMPENSATING TAX FOR PRIOR YEARS. ANY SALE OR TRANSFER OF SAID PROPERTY REQUIRES COMPLETION OF AN APPLICATION, AND SUBMISSION TO THE COUNTY ASSESSOR WITHIN 60 DAYS OF SUCH SALE, REQUESTING THAT THE CLASSIFICATION BE CONTINUED.

NOTE: IF THE PROPOSED TRANSACTION INVOLVES A SALE OF THE PROPERTY SO CLASSIFIED OR DESIGNATED, THERE WILL BE ADDITIONAL REQUIREMENTS REGARDING THE REAL ESTATE EXCISE TAX AFFIDAVIT. PLEASE CONTACT KING COUNTY ASSESSOR'S RECORDS SECTION OR THE COMPANY FOR ADDITIONAL INFORMATION.

V APPLICATIONS PERTAINING TO SAID DESIGNATION WERE RECORDED UNDER RECORDING NUMBERS 7501150367 AND 7501150368.

W 22. THE PROPOSED CONVEYANCE MUST BE AUTHORIZED BY RESOLUTION OF THE DIRECTORS OF THE FOLLOWING NAMED CORPORATION AND A COPY SUBMITTED:

.... REAL ESTATE DEVELOPMENT COMPANY

X 23. TITLE IS TO BE VESTED IN PERSONS NOT YET REVEALED AND WHEN SO VESTED WILL BE SUBJECT TO MATTERS DISCLOSED BY A SEARCH OF THE RECORDS AGAINST THEIR NAMES.

Y 24. **THE LEGAL DESCRIPTION IN THIS COMMITMENT IS BASED ON INFORMATION PROVIDED WITH THE APPLICATION AND THE PUBLIC RECORDS AS DEFINED IN THE POLICY TO ISSUE. THE PARTIES TO THE FORTHCOMING TRANSACTION MUST NOTIFY THE TITLE INSURANCE COMPANY PRIOR TO CLOSING IF THE DESCRIPTION DOES NOT CONFORM TO THEIR EXPECTATIONS.**

Z NOTE 1:
A SURVEY HAS BEEN RECORDED UNDER RECORDING NUMBER 8609269004.

AA AFFECTS: PARCEL B AND OTHER PROPERTY

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE B
(Continued)

Order No.:
Your No.:

SPECIAL EXCEPTIONS

AB NOTE 2:
A SURVEY HAS BEEN RECORDED UNDER RECORDING NUMBER 8609269005.

AC AFFECTS: PARCEL A AND OTHER PROPERTY

AI NOTE 3:
OUR EXAMINATION DISCLOSES THAT THE PROPERTY DESCRIBED HEREIN AS PARCEL B DOES NOT CONFORM WITH THE PROPERTY DESCRIBED IN THE REAL PROPERTY TAX ACCOUNT UNDER WHICH THE PROPERTY IS TAXED. THE REAL PROPERTY AS DESCRIBED HEREIN MAY NOT COMPLY WITH LOCAL SUBDIVISION ORDINANCES. TITLE INSURANCE POLICIES DO NOT PROVIDE COVERAGE FOR LOSS BY REASON OF THIS MATTER.

AD NOTE 4:
EFFECTIVE JANUARY 1, 1997, DOCUMENT FORMAT AND CONTENT REQUIREMENTS HAVE BEEN IMPOSED BY WASHINGTON LAW. FAILURE TO COMPLY WITH THE FOLLOWING REQUIREMENTS MAY RESULT IN REJECTION OF THE DOCUMENT BY THE COUNTY RECORDER OR IMPOSITION OF A $50.00 SURCHARGE.

FOR DETAILS OF THESE STATEWIDE REQUIREMENTS PLEASE VISIT THE KING COUNTY RECORDER'S OFFICE WEBSITE AT WWW.METROKC.GOV/RECELEC/RECORDS AND SELECT ONLINE FORMS AND DOCUMENT STANDARDS.

THE FOLLOWING MAY BE USED AS AN ABBREVIATED LEGAL DESCRIPTION ON THE DOCUMENTS TO BE RECORDED TO COMPLY WITH THE REQUIREMENTS OF RCW 65.04. SAID ABBREVIATED LEGAL DESCRIPTION IS NOT A SUBSTITUTE FOR A COMPLETE LEGAL DESCRIPTION WHICH MUST ALSO APPEAR IN THE BODY OF THE DOCUMENT:

PORTIONS OF SECTIONS 6 & 7-21-7.

END OF SCHEDULE B

Chapter 3:
Title Insurance for Commercial Real Estate Transactions

Prepared and Presented By:
Steven E. Elder
Nathan E. Heinz
Fidelity National Title Insurance Company
Columbus, Ohio

Presented By:
Linda M. Green
Fidelity National Title Group
Cleveland, Ohio

Table of Contents

Chapter 3:
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Hackers Attacking Real Estate Transactions

Since 2013, we have seen hackers use creative methods to divert closing funds to their own accounts.

A hacker will compromise an email account of a party to the transaction. They can attack real estate agents, attorneys, buyers, sellers, lenders, title companies or 1031 exchange accommodators.

The hacker will monitor emails relating to the transaction. Once emails are sent containing wire instructions, the hacker will intercept that email and delete the email within the compromised account.

The hacker then sends a spoofed email to the party sending the wire (buyer, lender, or title company). Email spoofing is the creation of email messages with a forged sender address, making it appear that the email is sent from a particular email address even when it is not. The spoofed email will appear to come from the party who had sent the legitimate wire instructions but will contain the hacker's wire instructions.

The hacker can also send the email with the fake instructions directly from the compromised account. The hacker will then delete the falsified emails from the "sent" and "deleted" folders of the compromised account.

The party sending the wire will receive the fake instructions and will unknowingly wire funds to the hacker.

The hacker will then intercept and delete further emails to create confusion while escaping with the money. By the time the parties realize the deception, the money is gone.

<u>If you receive wire instructions via email, call the party who is purporting to send the email to verify the instructions are legitimate. Use a known correct number to make this call—do not use the phone number provided in the email.</u>

In March 2015, a Fidelity residential office in Kansas closed a sale transaction. The sellers

provided Jill, the escrow officer with Fidelity, written instructions to cut a check for their proceeds and deliver it to their real estate agent. They intended on using the proceeds towards the closing costs and down payment for another property they were purchasing at another title company. Jill followed their instructions, cut them a check and had it delivered to their real estate agent's office.

The very next day Jill received emails purportedly from their real estate agent's office asking her to wire the proceeds instead. The instructions did not come from the sellers, nor did they come from the real estate agent she worked with throughout the transaction. Instead they were from an assistant of the real estate agent. The assistant, however, had not worked on this transaction until now.

Below is the email chain between Jill and the hacker. (The typos in the hacker's emails have not been edited.)

> *From Real Estate Agent: Hello Jill! Has the Jones been funded?*
>
> *From Jill: Yes—didn't you get your checks?*
>
> *From Real Estate Agent: They are telling me about having problem with there account, just want to be sure. Thanks*
>
> *From Jill: Need a little more information so I know how to help! Thanks*
>
> *From Real Estate Agent: They have issue with bank acct.. Can they receive funds with another acct?*
>
> *From Real Estate Agent: They want the funds wired?*
>
> *From Jill: Ok, so I thought they were taking our check to ABC Title for the closing. Is ABC refusing to honor our check? They were OK with that last week.*
>
> *From Real Estate Agent: They receive the checks but they want the payments stop on the checks and wire to proceed.*
>
> *From Jill: That check has to be returned to us. We will wire out tomorrow.*
>
> *From Real Estate Agent: Ok, But the Jones wont be able bring the check down tomorrow morning because of work schedule, hey will like to mail the check back to you I i hope that os ok with you. iI will forward the account they are using to receive the funds in the AM. Have a good night. Thanks*
>
> *From Real Estate Agent: Good morning Jill! Kindly forward the address to mail the check to, below is the info for the proceed.*
> *BANK NAME: ABC Bank*
> *ACCT NAME: JOHN DOE*
> *ACCT NUMBER: xxxxxxxxxx*
> *ROUTING NUMBER: yyyyyyyyyy*
> *Pls do get back to as soon as you receive this message. Sorry for the inconvenience Thanks*
>
> *From Jill: Please call me. I do not know what you are wanting.*
>
> *From Real Estate Agent: Am so sorry am in a middle of meeting right now which am not allowed to call, i can only email you. What i meant was that, the seller of 123 Main street, which is (Mr. and Mrs. Jones) want check voided or put a stop pay because of the problem they are having with bank acct, and want the fund proceeds to the info iI send to you few mins ago. Am very sorry for the inconvenience. Thanks*

Upon receipt of this email Jill picked up the phone, and called the seller and the real estate

agent directly to find out exactly how she could help. Neither of them knew what she was talking about. Next she called the assistant to the real estate agent who also knew nothing about the emails. Turns out the email account was completely made up. The assistant confirmed he did not have an email address from the account Jill was receiving these emails from. She stopped replying to the emails, but the impersonator sent two more emails.

> *From: Real Estate Agent Pls do send the address you want the check to be mail to. i wait to hear back from you.*
>
> *From: Real Estate Agent Am sorry to bother you this much, Are you not the closer of this transaction? Attached is the HUD.*

It did not stop there. The impersonator called Jill to find out when the funds would be sent. Jill told him she knew he was an imposter and not to call or contact her any further. Law enforcement was contacted and the seller's funds were protected.

Warning signs:

1. Real estate agent's assistant, who had not been working on the transaction, was asking for funds to be wired
2. Poor grammar throughout the emails
3. It was a "rush request" in that the check could not be returned to Jill for proper voiding and the wire had to be sent in the meantime.

The FBI refers to this type of crime as Business Email Compromise ("BEC"). The FBI sent the press release below on August 27, 2015. (Note that this includes all forms of Business Email Compromise, not just those attacks on title companies.)

> *STATISTICAL DATA*
>
> *The BEC scam continues to grow and evolve and it targets businesses of all sizes. There has been a 270 percent increase in identified victims and exposed loss since January 2015. The scam has been reported in all 50 states and in 79 countries. Fraudulent transfers have been reported going to 72 countries; however, the majority of the transfers are going to Asian banks located within China and Hong Kong.*
>
> *The following BEC statistics were reported to the Internet Crime Complaint Center from October 2013 to August 2015:*
>
> - *Total U.S. Victims: 7,066*
> - *Total U.S. exposed dollar loss: $747,659,840.63*
> - *Total non-U.S. Victims: 1,113*
> - *Total non-U.S. exposed dollar loss: $51,238,118.62*
> - *Combined Victims: 8,179*
> - *Combined exposed dollar loss: $798,897,959.25*
>
> *(Exposed dollar loss includes actual and attempted loss in United States dollars.)*
>
> *These totals, combined with those identified by international law enforcement agencies during this same time period, bring the BEC exposed loss to over $1.2 billion.*

SUGGESTIONS FOR PROTECTION

Raised awareness of the BEC scam has helped businesses detect the scam before sending payments to the fraudsters. Some financial institutions reported holding their customer requests for international wire transfers for an additional period of time, to verify the legitimacy of the request.

Businesses reported using the following new measures for added protection:

- *Create intrusion detection system rules that flag e-mails with extensions that are similar to company e-mail. For example, legitimate e-mail of abc_company.com would flag fraudulent e-mail of abc-company.com.*
- *Register all company domains that are slightly different than the actual company domain.*
- *Verify changes in vendor payment location by adding additional two-factor authentication such as having a secondary sign- off by company personnel.*
- *Confirm requests for transfers of funds. When using phone verification as part of the two-factor authentication, use previously known numbers, not the numbers provided in the e-mail request.*
- *Know the habits of your customers, including the details of, reasons behind, and amount of payments.*
- *Carefully scrutinize all e-mail requests for transfer of funds to determine if the requests are out of the ordinary.*

Mechanic's Lien Coverage

Title commitments contain a general Schedule B exception for "any unfiled mechanic's or materialman's liens". Buyers and lenders usually require deletion of this exception as a condition to purchasing the property or lending money to be secured by the property.

Situation 1.

Buyers often purchase a property that is the subject of ongoing construction or recently completed construction and require deletion of the mechanic's lien exception. The purchaser is requesting the title insurer to accept the risk of any recorded mechanic's liens as a result of the work done at the behest of seller or seller's tenants.

In order to accept this risk, title insurers will require the following items from the seller for review:

1. Project budget and total cost of construction
2. Construction contract
3. Indemnity from seller, or another acceptable indemnitor(s), and financial statements to prove the financial stability of the indemnitor(s).
4. Sworn cost statements from owner and GC
5. Lien waivers from GC, subs and suppliers for payments made to date

Title insurers will often charge a premium to purchaser in order to accept this risk. In some states (such as Ohio and Oregon), title insurers are required by state insurance regulations to charge an additional premium to accept this risk.

The title insurer will sometimes hold a portion of seller proceeds in escrow until the construction is complete and all subs and suppliers have been paid.

Situation 2.

Lender requires coverage over mechanic's liens for recent or ongoing work conducted by borrower

There are many factors that go into a title insurer's consideration of whether to provide coverage and what coverage to provide in a construction mortgage scenario:

1. State law regarding priority of mortgages vs. mechanic's liens. Most states also differentiate between funds advanced for purposes of construction and funds advanced for general purposes.

   In some states (South Carolina), construction disbursements have priority if lender has no notice of a lien at the time of disbursement. The title insurer would only need to run an updated search at the time of each draw.

   In some states (Illinois), mechanic's lien claimants have priority once the contract with the GC is signed. Title insurers require that lender funds are moved through their internal construction escrow department. The construction escrow department will conduct a diligent review of sworn cost statements from owner and GC and lien waivers prior to disbursing funds.

   In some states (Minnesota), mechanic's lien claimants have priority which relates back to first visible improvement of construction. The title insurer may require recordation of the mortgage prior to any commencement of work on the property.

   In some states (Wisconsin), most types of mortgagees have priority over any subsequent recorded mechanic's lien.

2. Lender requirements.

   HUD often requires full mechanic's lien coverage for all funds disbursed.

   Many other lenders accept the ALTA 32-series of endorsements in states where priority of construction loan advances cannot be obtained by statute. The ALTA 32-series of endorsements do not provide protection for parties that were not disclosed on the paperwork the GC/owner submitted with each draw app.

   In Ohio, the Notice of Commencement is typically filed subsequent to the mortgage so that the mortgage has priority over any lien claimants. An endorsement is provided stating that no liens have been recorded since the last draw and that the title company acknowledges the amount of the advance. The mortgage must be drafted in accordance with the Open-End Mortgage statute in Ohio Revised Code 5301.232.

3. Review of documentation related to the construction project and the parties:
    a. Project budget and total cost of construction
    b. Construction contract
    c. Indemnity from borrower, or another acceptable indemnitor(s), and financial statements to prove the financial stability of the indemnitor(s).
    d. Sworn cost statements from owner and GC
    e. Lien waivers from GC, subs and suppliers for payments made to date
    f. General information regarding project—Is the purpose of the project economically viable? Is the property being built on spec or are there tenants with signed leases in place?
    g. If a construction loan scenario:
        i. Construction loan agreement
        ii. Indemnity from GC and financial statements to prove the financial stability of the GC. This is only required if the title insurer requires a construction escrow and "trailing" lien waivers are provided to the title insurer on a 30-day delay.
        iii. Infusion of equity from borrower at the beginning of the project

Explanation of old ALTA 9 Coverages versus New ALTA 9 Coverages for Owner's Policies

Prior versions of the ALTA 9.2 endorsement for Owner's Policies provided coverage for 4 matters:

1. Restrictions
2. Encroachments
3. Minerals
4. Private Rights (option to purchase, right of first refusal, right of prior approval of future purchase or occupant)

The new ALTA 9.2-06 (4/2/2012) endorsement only provides coverage for Restrictions.

The new ALTA 28.1-06 (4/2/2012) endorsement only provides coverage for Encroachments.

The new ALTA 35.1-06 (4/2/2012) endorsement only provides coverage for Minerals.

The new ALTA 9.9-06 (4/2/2013) endorsement only provides coverage for Private Rights.

The ALTA 9-06 (4/2/2012) endorsement for Loan Policies still provides coverage for the first three matters above.

Note that title insurance regulations in a few remaining states, including Florida, require title insurers to use prior versions of the ALTA 9.2 Endorsement, which provided coverage for all four matters above.

Chart for 9-06, 28-06, 35-06 Series of Endorsements Updated Since 2012

- 9-06 Restrictions, Encroachment, Minerals—Loan Policy 4/2/12
  - Contains all coverages. This endorsement should be obtained on loan policies if all coverages can be provided.
- 9.1-06 Restrictions—Unimproved Land—Owners Policy 4/2/12
  - Only contains CCR coverage. Does not contain encroachment or minerals coverage. This endorsement should be obtained on unimproved owners policies. Add the 28.1 for encroachments/35-series for minerals if applicable.
- 9.2-06 Restrictions—Improved Land—Owners Policy 4/2/12
  - Only contains CCR coverage. Does not contain encroachment or minerals coverage. This endorsement should be obtained on improved owners policies. Add the 28.1 for encroachments/35-series for minerals if applicable.
- 9.3-06 Restrictions—Loan Policy 4/2/12
  - Only contains CCR coverage. Does not contain encroachment or minerals coverage. This endorsement should be obtained on loan policies only if the encroachments coverage under the 28.1 cannot be obtained or the minerals coverage under the 35.1 cannot be obtained.
- 9.6-06 Private Rights—Loan Policy 4/2/12
  - Insures against loss/damage due to Private Rights on a loan policy.
- 9.6.1-06 Private Rights—Current Assessments—Loan Policy 4/2/15
  - Identical to the 9.6-06 endorsement, except that the 9.6.1-06 endorsement only insures against loss due to those current assessments due and payable at the Date of Policy
- 9.7-06 Restrictions, Encroachment, Minerals—Land Under Development—Loan Policy 4/2/12
  - Contains all coverages and includes additional coverage for future improvements that are depicted on Site Plans. This endorsement should be obtained if land is under development.
- 9.8-06 Restrictions—Land Under Development—Owners Policy 4/2/12
  - Does not contain encroachment or minerals coverage. Includes additional coverage for future improvements that are depicted on Site Plans. This endorsement should be obtained if land is under development.
- 9.9-06 Private Rights—Owners Policy 4/2/13
  - Insures against loss/damage due to Private Rights on an owner's policy.
- 9.10-06 Restrictions, Encroachment, Minerals—Current Violations—Loan Policy 4/2/13
  - Identical to the 9-06 but used when violation of a Covenant could eventually result in forfeiture or reversion, but there is no current violation.

- 28-06 Easement—Damage or Enforced Removal 10/16/08
  - Provides forced removal coverage for a specific easement identified in Schedule B.
- 28.1-06 Encroachments—Boundaries and Easements 4/2/12
  - Provides the encroachment coverages that are also in the ALTA 9-06 endorsement.
  - Item 4 contains a provision for encroachments listed in Schedule B that can be carved out from coverage.
- 28.2-06 Encroachments—Boundaries and Easements 2/4/13
  - Provides the encroachment coverages that are also in the ALTA 9-06 endorsement, but only as to particular improvements.
  - Item 4 contains a provision for encroachments listed in Schedule B that can be carved out from coverage.
- 28.3-06 Encroachments—Boundaries and Easements—Described Improvements and Land Under Development 4/2/15
  - Includes additional coverage for future improvements that are depicted on Site Plans. This endorsement should be obtained if land is under development.

- 35-06 Minerals and Other Subsurface Substances—Buildings 4/2/12
  - Provides mineral coverage for <u>buildings</u>.
- 35.1-06 Minerals and Other Subsurface Substances—Improvements 4/2/12
  - Provides minerals coverage for <u>all improvements.</u>
- 35.2-06 Minerals and Other Subsurface Substances—Described Improvements 4/2/12
  - Provides minerals coverage for <u>particular improvements.</u>
- 35.3-06 Minerals and Other Subsurface Substances—Land Under Development 4/2/12
  - Includes additional coverage for future improvements that are depicted on Site Plans. This endorsement should be obtained if land is under development

Encroachment Coverages Provided by 28.1-06 (4/2/2012) (Owners) and 9-06 (4/2/2012) (Loan) Endorsements

<u>All coverage against loss</u> (including forced removal, diminution of value and unmarketability of title) is provided by these endorsements for:

- Any encroachments that are not shown on Schedule B.

<u>Forced removal coverage only</u> is provided by these endorsements for:

- Encroachments from adjoining land onto Land only if the encroachment is not excepted on Schedule B. (If such an encroachment is excepted on Schedule B, no coverages are provided.)

- Encroachments from Land onto adjoining land regardless of whether or not the encroachment is excepted on Schedule B.
- Encroachments from Land onto easement regardless of whether or not the encroachment is excepted on Schedule B.

28.1-06 (4/2/2012) (owners) carve encroachment out from coverage—Encroachments on Schedule B can be carved out from coverage on paragraph 4 of the 28.1-06 endorsement.

9-06 (4/2/2012) (loan) carve encroachment out from coverage—Encroachments on Schedule B can be carved out from coverage. To do so, the title insurer should provide the 9.3-06 (4/2/2012) CCR endorsement and the 28.1-06 (4/2/2012) encroachments endorsement.

ALTA Endorsement Form 28.1-06 (Encroachments—Boundaries and Easements—4/2/2012)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only, "Improvement" means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;

   b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;

   NOTE NOT INCLUDED ON ENDORSEMENT: Paragraphs 3(a) and 3(b) provide all coverage (including forced removal, diminution of value and unmarketability of title) for all encroachments that are not identified in Schedule B.

   c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or

   d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.

   NOTE NOT INCLUDED ON ENDORSEMENT: Paragraphs 3(c) and 3(d) provide forced removal coverage only for all encroachments of improvements on the Land which encroach onto easements or adjoining land, whether or not the encroachments are identified in Schedule B.

   NOTE NOT INCLUDED ON ENDORSEMENT: If identified in Schedule B, coverage is NOT provided for any encroachment of improvements from adjoining land onto the Land

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the encroachments listed as Exceptions _____ of Schedule B.

   NOTE NOT INCLUDED ON ENDORSEMENT: If the title company chooses to exclude certain encroachments from coverage, those encroachments would be listed within Paragraph 4.

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.

ALTA Endorsement Form 9.0-06 (Restrictions, Encroachments, Minerals—Loan Policy 4/2/2012)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only:

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.

   b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. A violation of a Covenant that:

      i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,

      ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or

      iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;

   b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;

   c. Enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or

   d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. The Company insures against loss or damage sustained by reason of:

   a. An encroachment of:

      i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or

      ii. an Improvement located on adjoining land onto the Land at Date of Policy unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;

      NOTE NOT INCLUDED ON ENDORSEMENT: Paragraphs 4(a)(i) and 4(a)(ii) provide all coverage (including forced removal, diminution of value and unmarketability of title) for all encroachments that are not identified in Schedule B.

b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or

c. Damage to an Improvement located on the Land, at Date of Policy:

i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

NOTE NOT INCLUDED ON ENDORSEMENT: Paragraphs 4(b) and 4(c)(i) provide forced removal coverage only for all encroachments of improvements on the Land which encroach onto easements or adjoining land, whether or not the encroachments are identified in Schedule B.

ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

a. any Covenant contained in an instrument creating a lease;

b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;

c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;

d. contamination, explosion, fire, fracturing, vibration, earthquake or subsidence; or

e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

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.

Minerals Exceptions and Endorsements

Once minerals have been severed from the surface estate, title companies will no longer insure any interest in the minerals. (As a general rule, title companies do not search mineral interests after finding a severance. If a party is interested in confirming the current ownership of a mineral interest, there are companies—referred to in some states as "Landmen"—that will perform such work. Note that these types of searches often are time-consuming and costly, depending on the location of the property. Fidelity can provide contacts for such services on request.)

Minerals can be severed from the surface estate by a deed or lease conveying the minerals estate OR a deed conveying the surface estate but reserving the minerals estate for the grantor.

National Approach

If the minerals are severed, the title commitment will contain an exception for the minerals estate on Schedule A or Schedule B. In some geographical areas with a history of mining and drilling, we assume that mineral interests have been severed even if the deed containing the severance or reservation cannot easily be located. Such deeds may date to the 1800s and would take considerable time—and cost—to obtain.

If there is no exception for minerals included on Schedule A or Schedule B of the commitment, the minerals estate is essentially insured by the policy.

Even if an exception for minerals is included on the commitment, it is possible that the title company will still provide an endorsement insuring against loss. The endorsement would insure against loss caused by forced removal of improvements caused by a future exercise of a right to use the surface of the land for the extraction of minerals.

The endorsements provided for owner's policies are the 35-06, 35.1-06, 35.2-06 and 35.3-06 endorsement.

This same coverage is incorporated into the 9-06 endorsement for loan policies.

Some factors that we would consider before providing such an endorsement are:

1. State law on whether minerals estate owners must reimburse surface estate owners for damages or accommodate the surface estate owners' use of the property
2. Likelihood of mining in the geographical area
3. Municipal laws preventing mining in the area

Note that this coverage is prohibited in some jurisdictions, such as Oklahoma.

Ohio Approach

Due to the increased oil and gas activity in Ohio, all of the major title underwriters now show the following title exception in both loan and owner's policies issued in Ohio:

"Any lease, grant, exception or reservation of minerals or mineral rights together with any rights appurtenant thereto."

The title underwriter may choose to delete the above exception entirely if the property is located in an urban municipality with no history of oil and gas exploration or drilling such as Columbus, Cincinnati, Cleveland, Akron or Toledo.

Criteria that a title underwriter may use before providing the 35-06, 35.1-06, 35.2-06 and 35.3-06 endorsement for owner's policies or the 9-06 endorsement for loan policies:

- 100 year title search in area without oil/gas development is performed and no severance or oil/gas lease was recorded.
- Title search to 1859 in area with oil/gas development is performed and no severance or oil/gas lease was recorded.
- No active wells or mines appear in the area on the ODNR websites

An additional title exception appears in only a Loan Policy and reads as follows:

"Oil and gas leases, pipeline agreements or any other instruments related to the production or sale of oil and gas which may arise subsequent to the date of the Policy pursuant to Ohio Revised Code Section 1509.31."

Section D of the statute referenced in this title exception provides that, a recorded oil and gas lease (which is not in default) has super-priority over that of a prior recorded mortgage. If the owner of the mortgaged property was entitled to royalties before the foreclosure sale, those royalties will be paid to the purchaser of the foreclosed property.

This exception cannot be removed from any Loan Policy issued for Ohio property.

Nonimputation Endorsements

- 15-06 (6/17/06)—Full Equity Transfer—used when the entire equity interest of the Insured is being transferred.
- 15.1-06 (6/17/06)—Additional Insured—used when the incoming owner of a portion of the equity interest of the Insured requests to be named as an Additional Insured under a policy
- 15.2-06 (6/17/06)—Partial Equity Transfer—used when a portion of the equity interest of the Insured is being transferred.

Nonimputation endorsements are requested for transactions in which the incoming party is not acquiring the property via deed—instead the incoming party is purchasing the equity interests in the existing corporation, LLC, or partnership.

Why is this endorsement necessary? The "Exclusions from Coverage" section of the ALTA Owner's Policy Jacket (6/17/06) excludes from coverage the following:

> *3. Defects, liens, encumbrances, adverse claims, or other matters*
>
> *(a) created, suffered, assumed, or agreed to by the Insured Claimant;*
>
> *(b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;*
>
> *(e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.*

The incoming party will step into the shoes of the outgoing party and will "acquire" the knowledge that the outgoing party had which could have been imputed to the Insured entity.

This imputing of knowledge is not an issue when the incoming party is actually purchasing the property. The incoming party would be considered a bona fide purchaser under the recording acts.

If the incoming party purchases a nonimputation endorsement, the title insurer agrees not to impute the knowledge that the outgoing party had to the Insured.

To provide the nonimputation endorsement, the title insurer will require a full review of the facts surrounding the transaction, a nonimputation affidavit and indemnity executed by the outgoing parties, and possibly financial statements of the indemnitor for review.

When negotiating a purchase agreement on behalf of an incoming party, include a requirement for the outgoing party to cooperate with the title insurer by executing a nonimputation affidavit and indemnity.

Sample Affidavit—Exhibit A

State of _____)
ss)
County of _____)

Affidavit and Indemnity

The undersigned, being first duly sworn, on oath, deposes and says the following:

1. The undersigned is _____[*title or capacity*] of _____ [*name of entity*]_____.

2. To the best knowledge of the undersigned,

   a. There are presently no defects in or liens, encumbrances or other claims against the Title to the property described in the Commitment for Title Insurance No. _____, having an Effective Date of _____, issued by [*insert name of the insuring company*] (hereinafter referred to as "the Company") other than as disclosed in exceptions Nos. _____on Schedule B—Section 2 of said commitment, other than the following: (If none, state "None"); and;

   b. There are presently no inchoate rights which may ripen into any defect, lien, encumbrance or claim against the Title to said property except as may be created by any instrument or action required in Schedule B—Section 1 of said commitment, other than the following: (If none, state "None")

3. The undersigned makes these statements after having questioned all of the other partners and the employees and agents, if any, of [*name of entity*] who have had any substantial contact with any transaction or negotiation involving the property described in said commitment.

4. The undersigned hereby indemnifies the Company and agrees to hold it harmless against any loss which the Company may suffer by virtue of any valid claim made under the said endorsement based on the existence of any defect in or lien, encumbrance, right or claim against or with respect to the Title to the aforesaid property which was not disclosed above but which should have been so disclosed in order to make all statements above true and correct. The undersigned understands such losses may include court costs and attorney's fees expended by the Company in defending the Title or interest of the insured against such lien, encumbrance, right or claim.

5. The undersigned makes these statements and gives the aforesaid indemnity for the purpose of inducing the Company to issue the endorsement attached hereto as Exhibit A to one or more of the owner's or loan policies issued pursuant to the said Commitment for Title Insurance. The undersigned further agrees to pay all court costs and reasonable attorney's fees which the Company may expend in enforcing the terms of this indemnity agreement.

Dated: _____

_____
[Name of Affiant & Indemnitor]
[Standard form jurat.]
[Standard form acknowledgment, if useful.]

Sample Affidavit—Exhibit B

State of _____)
ss)
County of _____)

Affidavit

The undersigned, being first duly sworn, on oath, deposes and says the following:

1. The undersigned is _____ [*title or capacity*] of _____ [*name of entity*].

2. To the best knowledge of the undersigned,

   a. There are presently no defects in or liens, encumbrances or other claims against the Title to the property described in the Commitment for Title Insurance No. _____, having an Effective Date of _____, issued by [*insert the name of the company insuring*] (hereinafter referred to as "the Company") other than as disclosed in exceptions Nos. _____ on Schedule B—Section 2 of said commitment, other than the following: (If none, state "None"); and

   b. There are presently no inchoate rights which may ripen into any defect, lien, encumbrance or claim against the Title to said property except as may be created by any instrument or action required in Schedule B—Section 1 of said commitment, other than the following: (If none, state "None")

3. The undersigned makes these statements after having questioned all of the other officers, directors, employees, partners and agents, if any, of [name of entity] who have had any substantial contact with any transaction or negotiation involving the property described in said commitment.

4. The undersigned makes these statements for the purpose of inducing the Company to issue the endorsement attached hereto as Exhibit A to one or more of the owner's or loan policies issued pursuant to the said Commitment for Title Insurance.

Dated: _____

_____
[Name of Affiant]
[Name of Affiant]
[Standard form jurat.]

Indemnity

The following indemnity is given to the Company as a further inducement to it to issue the said endorsement, as aforesaid.

The undersigned hereby indemnifies the Company against any loss which the Company may suffer by virtue of any valid claim made under the said endorsement based on the existence of any defect in or lien, encumbrance, right or claim against or with respect to the Title to the aforesaid property which was not disclosed in the above affidavit but which should have been

so disclosed in order to make all statements in the affidavit true and correct. The undersigned understands such losses may include court costs and attorney's fees expended by the Company in defending the title or interest of the insured against such lien, encumbrance, right or claim.

The undersigned further agrees to pay all court costs and reasonable attorney's fees which the Company may expend in enforcing the terms of this indemnity agreement.

Dated: _____
[Name of Company]

By: _____
[Name and title of officer]
[Standard form acknowledgement.]

New Ohio Receivership Statute

A. Background on previous Receivership law

The historic statutory powers of a receiver in Ohio derive from the old Ohio Rev. Code § 2735.05, which stated that "a receiver may bring and defend actions in his own name as receiver, take and keep possession of property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes." This statute left the court with discretion to authorize a broad range of powers for a receiver and resulted in case law the produced a lack of uniformity within Ohio regarding the procedures for the sale of real estate by a receiver.

1. Case law in Ohio

a. *Director of Transp. of Ohio v. Eastlake Land Dev.*, 177 Ohio App. 3d 379, 2008-Ohio-3133

In Eastlake, the trial court appointed a receiver in March 2003 in a foreclosure action that was filed by the State of Ohio who held a first mortgage on two parcel of land located in Lake County that were owned by Eastlake Land Development. The receiver proposed to sell the property free and clear of all liens with the consent of the State of Ohio. American First Federal (AFF), a third-party lienholder, objected, but there was no evidentiary hearing on the proposed sale of property. The receiver's motion to sell did not indicate that the receiver was selling the property free and clear of all liens and the trial court ordered the sale without payment to AFF, AFF appealed the sale order on the grounds that the court had no authority to sell the property fee and clear of the AFF lien. The appeals court held that the trial court lacked authority to authorize the receiver to sell the property free and clear of AFF's lien without its consent. Due process requires notice, opportunity to be heard, independent appraisal of the property and a public sale.

b. *The Park Nat'l Bank v. Cattani, Inc*., 2010-Ohio-1291 (Ohio Ct. App., Warren Cty. 2010).

In Catani, the court affirmed the trial court's order granting the court-appointed receiver's motion to sell real property free and clear of liens. All parties have been properly served with the receiver's motion and notified that certain urgent exigent circumstances existed that made it necessary for the receiver to sell the property as soon as possible. The court in this case found that

> *the trial court may authorize a receiver to sell property at a private sale free and clear of liens under certain circumstances, and because the pending sales contract represents the highest and best offer for the troubled property, the trial court did not abuse its discretion by authorizing the receiver to sell the property free and clear of all liens and encumbrances.*

c. *Huntington Nat'l Bank v. Motel 4 Baps, Inc*., 2010-Ohio-5792 (Ohio Ct. App., Cuyahoga Cty. 2010).

This case further supports the receiver's authority to sell property. In this case the property was set to be sold at auction and Motel 4, the owner of the property, filed a motion to stay the receiver's auction, claiming that the receiver failed to provide Motel 4 notice of the sale as required by Ohio Rev. Code § 2329.26 and that the sale constructively cut off Motel 4's redemption rights. The appellate court ruled that the receiver is not bound by the service requirement set forth in Ohio Rev. Code § 2329.26 since these requirements relate to writs of execution and not receivership sales. Motel 4 also claimed that it was not served with actual notice of the sale and therefore deprived of its right to due process. The appellate court also disagreed with this argument since Motel 4 filed an emergency motion to stay the receiver's auction before the second scheduled auction date and therefore clearly had notice of the sale.

d. *Huntington Nat'l Bank v. Caitlin & Bridget Cunningham, LLC*, CV-10-717066 (C.P. Ct., Cuyahoga Cty. 2011).

This case shows that Ohio case law related to the court-appointed receiver's ability to sell real property free and clear of liens is far from settled. The decision by the court states that absent express consent by all parties in interest, a receiver may not sell property free and clear of all liens. This case involved the sale of an office condominium and the court in its ruling distinguished both the Eastlake and Cattani decisions by stating that the Eastlake decision did not rest entirely on procedural due process grounds and that the authority relied upon in Cattani was significantly more limited than the relief that was granted by the court.

e. *American Enter. Bank v. Garfield Hts. Prop., LLC, et al*., 2013-Ohio-2526 (June 20, 2013)

Finally, a very recent case that does support the ability of the court to appoint a receiver. In this case the borrower alleged that the trial court erred when it appointed the receiver without clear and convincing evidence that a receiver was needed and without conducting an evidentiary hearing and also that the receiver's bond of $1,000 was inadequate and unreasonably low. The mortgage that the lender foreclosed on had clear language that allowed the lender to appoint a receiver in a foreclosure action without notice, without regard to the insolvency of the mortgagor and without regard to the value of the property. The court felt this was sufficient for the appointment of a receiver and that the trial court was not statutorily obligated to conduct an evidentiary hearing. The court also determined that it was within the trial court's discretion to set the receiver's bond based on the reputation of the receiver and there was other case law indicating that in similar situations receiver's bonds were set as low as 0 and $100.

2. Problems insuring title.

Many title companies in Ohio refused to insure title to property that was sold by a receiver because the case law allowing such a sale varied greatly from jurisdiction to jurisdiction. If a title company did agree to insure the title to property sold by a receiver there was usually a very strict set of procedures that would need to be followed and each sale would be reviewed by a title underwriter to determine whether all of these procedures had been followed. Any party having any interest in the property, including all secured creditors, must be served with a copy of the complaint and order of sale, unlike a foreclosure, lis pendens did not apply and all lien holders who filed liens even after the date the complaint was filed needed to be added as necessary parties to the action. The order approving the sale has to be a final order and a title insurance policy could not be issued until all appeal periods had been exhausted.

B. Efforts leading up to the passage of Substitute House Bill 9.

Substitute House Bill 9 (KB. 9) originates from Bills introduced in the 129th General Assembly and was signed into law by Governor Kasich on December 19, 2014. The stated purpose of H.B. 9 is to

> *amend sections . . . 2735,01, 2735.02 and 2735.04 . . . of the Revised Code to add to and clarify the powers of a receiver, to provide a procedure for a receiver's sale of property and to establish a Study Commission on Receivership Laws to study matters related to receiverships and payment of public utility services.*

In January 2012, the Banking, Commercial and Bankruptcy Law Committee of the Ohio State Bar Association formed an ad hoc Subcommittee to consider and prepare revisions to Ohio's receivership statutes. The goal of the subcommittee was to create a model statute which would promote uniformity in receivership practice throughout Ohio. Additionally, the subcommittee wanted to clarify the powers of a receiver and ensure that buyers of property sold to them by a receiver could obtain clear title and title insurance. The OSBA Real Property Section collaborated on the drafting of the new receivership provisions. With the assistance of the OSBA's legislative counsel and key sponsors Representative Peter Stautberg and Senator Bill Coley H.B. 9 became law and took effect on March 23, 2015.

It is important to note that the bill almost was not enacted due to huge lobbying effort by the Ohio utility companies. Utility reconnections costs associated with a receivership sale have been a huge issue for receivers for many years, Ohio utility companies have demanded that court-appointed receivers bring unsecured old utility charges current and also make substantial monetary deposits toward future utility service before allowing utility services to resume. This often drained receiverships of cash and gave utility companies super priority liens over real estate taxes and secured creditors. H.B. 9 initially sought to address this issue by treating prior utility charges in the same fashion as other unsecured creditors. This of course did not sit well with the utility companies who then sought to dismantle the entire law. No agreement on utility reconnection was reached during many months of negotiation leading up to the enactment of H.B. 9. As a compromise, uncodified Section 34 of H.B. 9 creates a new, six-member Study

Committee in the General Assembly to study and consider: (1) the jurisdiction of the PUCO and the courts with respect to receiverships (to continue gathering information on utility reconnection); and (2) the definitions and provisions of the federal Bankruptcy Code that may be used in the Ohio Revised Code.

C. Appointment and Powers of a Receiver.

1. Appointment of a Receiver—Ohio Rev. Code § 2735.01.

A few notable changes have been made to this statute. A receiver can now be appointed in a mortgage foreclosure if the borrower is in default and the borrower has consented in writing to the appointment of a receiver either in the mortgage itself or some other lender document. Previously this statute required that the borrower was in default and the property was probably insufficient to discharge the debt. A receiver can also be appointed solely to enforce an assignment of leases and rents.

The statute also identifies what specific property or affairs over which a receiver may be appointed. If a receiver is appointed to vacate a fraudulent purchase of property, in a foreclosure, to enforce an assignment of leases and rents or after a judgment to dispose of property the receiver is appointed only with respect to the property that is the subject of the action, if a receiver is appointed when a corporation or other business entity is in imminent danger of insolvency the receiver may manage all of the affairs of the business entity. Finally, if a receiver is appointed to carry a judgment into effect or in any other case where a receiver may be appointed the receiver may manage all the affairs of the business entity or only with respect to the particular property as determined by the court,

2. Ohio Rev. Code § 2735.02.

This statute has been changed to allow the lender or other party seeking the receivership to make a recommendation to the court as to the person to be appointed receiver in the case. This recommendation must be given "priority consideration" by the court. An attorney for a party to the receivership cannot be appointed as the receiver for the case,

3. Powers of the Receiver.

Ohio Rev. Code § 2735.04(A) now provides that the powers of a receiver will be set forth in the court order appointing the receiver. These powers may be modified upon application by the receiver or any party to the action. The following revisions and clarifications on the powers of a receiver have also been made:

a. Receiver powers under Ohio Rev. Code § 2735.04 are expressly available to receivers appointed in proceedings to aid in execution and for attachment under Chapters 2333 and 2715.

b. Clarifies that receivers may be appointed for all types of Ohio business entities that have been dissolved, are insolvent or have forfeited their entity rights

c. Receivers now have the power to execute deeds, leased or other documents of conveyance of real or personal property

d. Clarifies that receivers have the power to open and maintain deposit accounts in the receiver's name

4. Costs to complete construction.

A receiver is now expressly authorized (Ohio Rev. Code § 2735.04(A)(4)) to enter into contracts for construction or completion of construction but only if "existing lien rights will not be impacted." Along with the customary administrative expenses for receiver fees and receiver's counsel fees, costs to complete construction work authorized by the court under a contract entered into by a receiver are taxed as court costs or administrative expenses of the action, Finally, the court may require additional deposits to be made to cover the costs of construction, but only if the parties consent.

D. New process to complete a receivership sale

1. Selling property free and clear of liens

Ohio Rev. Code § 2735.04 (D) (2) sets out a 4 step process for the sale of property by a receiver free and clear of liens. The steps are as follows:

a. An application for sale is made by either the receiver or the first mortgage holder. If the receiver has entered into a purchase agreement for the sale of the property, then the application will set forth the identity of the buyer and the proposed terms of the sale. If the property will be sold by either a public or private auction or any other method the court determines to be fair to the owner, then the application will set forth the proposed procedures for the conduct of the sale.

b. A notice of sale must be given in accordance with the Rules of Civil Procedure to all parties having a recorded lien encumbering the property, at least 10 days prior to the sale,

c. An opportunity for a hearing must be given to all parties served with the Notice of Sale. If no party objects to the sale or requests a hearing the court may proceed without a hearing.

d. An order of sale, which is a final appealable order, setting forth the required procedure for or the terms of the sale is issued by the court.

No separate confirmation of sale is required unless the property is being sold by either a public or private auction or other sale process. In that case, the confirmation of sale will confirm the sale process and approve the proposed sale. Finally, if the property is sold by purchase agreement the receiver will need to file with the court and serve all parties a report of sale setting forth the date of sale, name of purchaser, purchase price, amount of net proceeds, a copy of the closing statement and any other information the court may require.

2. Lis Pendens.

One of the more difficult issues to deal with in trying to convey marketable title under the old receivership statute and case law was determining what to do when a lien was recorded against the property after the Complaint by the receiver to sell the property was filed. Most title companies issuing title insurance to the buyer in a receivership sale would require that all lien claimants be made a party to the transaction no matter when the lien was recorded against the property. This would require multiple title updates prior to the issuance of the final Order of Sale to make sure no additional parties needed to be brought into the action. H.B. 9 addresses this problem in Ohio Rev. Code § 2735.02(D)(2)(b) by providing that no notice of sale needs to be given to a lien claimant or other person holding an interest in the property if that interest "is barred by lis pendens pursuant to § 2703.26 of the Revised Code". This section further indicates that either a preliminary judicial report or a commitment for an owner's policy must be submitted to the court to determine those parties necessary to the action.

3. Receivership Deed.

If the sale is conducted in accordance with all of the requirements outlined in item no. 1 above the receiver will execute and deliver a receiver's deed to the purchaser. The filing of the deed itself assumes that the property is being sold free and clear of all liens. There is no longer any need to attach a copy of a court order authorizing the sale free and clear of liens.

E. Statutory Right of Redemption.

H.B. 9 now provides the owner with a statutory right of redemption. Ohio Rev. Code § 2734.04 (D)(7) provides that the court's order approving the receiver's authority to sell the real estate shall establish a reasonable time, but not less than three days for the owner to exercise his right of redemption. To exercise the right of redemption the owner must pay to the receiver either the sale price or an amount equal to the total of all the liens on the property including all principal, interest, costs, and other amounts secured by those liens through the date of payment to the receiver.

ALTA Endorsement Form 9.0-06 (Restrictions, Encroachments, Minerals—Loan Policy 4/2/2012)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only:

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.

   b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. A violation of a Covenant that:

      i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,

      ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or

      iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;

   b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;

   c. Enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or

   d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. The Company insures against loss or damage sustained by reason of:

   a. An encroachment of:

      i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or

      ii. an Improvement located on adjoining land onto the Land at Date of Policy

      unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;

   b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or

c. Damage to an Improvement located on the Land, at Date of Policy:

i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

a. any Covenant contained in an instrument creating a lease;

b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;

c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;

d. contamination, explosion, fire, fracturing, vibration, earthquake or subsidence; or

e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

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.

ALTA Form 9.1-06 (Covenants, Conditions and Restrictions Unimproved Land—Owner's Policy—4/2/12)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only, "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.

3. The Company insures against loss or damage sustained by the Insured by reason of:

    a. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation; or

    b. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

    a. any Covenant contained in an instrument creating a lease;

    b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or

    c. except as provided in Section 3.b, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

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.

ALTA Form 9.2-06 (Covenants, Conditions and Restrictions Improved Land—Owner's Policy—4/2/12)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only,

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.

   b. "Improvement" means a building, structure located on the surface of the Land, road, walkway, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;

   b. Enforced removal of an Improvement as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or

   c. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. any Covenant contained in an instrument creating a lease;

   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or

   c. except as provided in Section 3.c., any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

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.

ALTA Form 9.3-06 (Covenants, Conditions and Restrictions—Loan Policy—4/2/12)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only:

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.

   b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to the Land at Date of Policy that by law constitutes real property.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. A violation of a Covenant that:

      i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,

      ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or

      iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;

   b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;

   c. Enforced removal of an Improvement as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or

   d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. any Covenant contained in an instrument creating a lease;

   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or

   c. except as provided in Section 3.d, any Covenant pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances.

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.

ALTA Form 9.6-06 (Private Rights—Loan Policy—4/2/13)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only:

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument recorded in the Public Records at Date of Policy.

   b. "Private Right" means (i) a private charge or assessment; (ii) an option to purchase; (iii) a right of first refusal; or (iv) a right of prior approval of a future purchaser or occupant.

3. The Company insures against loss or damage sustained by the Insured under this Loan Policy if enforcement of a Private Right in a Covenant affecting the Title at Date of Policy (a) results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or (b) causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. any Covenant contained in an instrument creating a lease;

   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; or

   c. any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances; or

   d. any Private Right in an instrument identified in Exceptions (_____) in Schedule B.

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.

ALTA Form 9.6.1-06 (Private Rights—Current Assessments Loan Policy—4/2/15)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only:

   (a) "Covenant" means a covenant, condition, limitation, or restriction in a document or instrument recorded in the Public Records at Date of Policy.

   (b) "Private Right" means:

      (i) a private charge or assessment due and payable at Date of Policy;

      (ii) an option to purchase;

      (iii) a right of first refusal; or

      (iv) a right of prior approval of a future purchaser or occupant.

3. The Company insures against loss or damage sustained by the Insured under the policy if enforcement of a Private Right in a Covenant affecting the Title at Date of Policy:

   (a) Results in the invalidity, unenforceability, or lack of priority of the lien of the Insured Mortgage; or

   (b) Causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   (a) Any Covenant contained in an instrument creating a lease;

   (b) Any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land; [or]

   (c) Any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances [; or

   (d) Any Private Right in an instrument identified in Exception(s) _____ in Schedule B].

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 to it.

ALTA Form 9.7-06 (Restrictions, Encroachments, Minerals–Land Under Development–Loan Policy– 4/2/12)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only:

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.

   b. "Future Improvement" means a building, structure, road, walkway, driveway, curb, lawn, shrubbery or trees to be constructed on or affixed to the Land in the locations according to the Plans and that by law will constitute real property.

   c. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.

   d. "Plans" means the survey, site and elevation plans or other depictions or drawings prepared by (*insert name of architect or engineer*) dated ____, last revised _____, designated as (*insert name of project or project number*) consisting of ___ sheets.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. A violation of a Covenant that:

      i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,

      ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or

      iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;

   b. A violation of an enforceable Covenant by an Improvement on the Land at Date of Policy or by a Future Improvement, unless an exception in Schedule B of the policy identifies the violation;

   c. Enforced removal of an Improvement located on the Land or of a Future Improvement as a result of a violation of a building setback line shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy, unless an exception in Schedule B of the policy identifies the violation; or

   d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. The Company insures against loss or damage sustained by reason of:

    a. An encroachment of:

        i. an Improvement located on the Land at Date of Policy or a Future Improvement, onto adjoining land or onto that portion of the Land subject to an easement; or

        ii. an Improvement located on adjoining land onto the Land at Date of Policy,

        unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;

    b. Damage to an Improvement located on the Land at Date of Policy or a Future Improvement:

        i. that encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

        ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

    a. any Covenant contained in an instrument creating a lease;

    b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;

    c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;

    d. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or

    e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

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.

ALTA Form 9.8-06 (Covenants Conditions & Restrictions–Land Under Development–Owners Policy–4/2/12)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only:

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.

   b. "Future Improvement" means a building, structure, road, walkway, driveway, curb to be constructed on or affixed to the Land in the locations according to the Plans and that by law will constitute real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.

   c. "Improvement" means a building, structure located on the surface of the Land, road, walkway, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.

   d. "Plans" means the survey, site and elevation plans or other depictions or drawings prepared by (*insert name of architect or engineer*) dated ____, last revised _____, designated as (*insert name of project or project number*) consisting of ___ sheets.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. A violation of an enforceable Covenant by an Improvement on the Land at Date of Policy or by a Future Improvement, unless an exception in Schedule B of the policy identifies the violation;

   b. Enforced removal of an Improvement located on the Land or of a Future Improvement as a result of a violation of a building setback line shown on a plat of subdivision recorded or filed in the Public Records at Date of Policy, unless an exception in Schedule B of the policy identifies the violation; or

   c. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. any Covenant contained in an instrument creating a lease;

   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;

c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances; or

d. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence.

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.

ALTA Form 9.9-06 (Private Rights—Owner's Policy—4/2/13)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only:

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument recorded in the Public Records at Date of Policy.

   b. "Private Right" means (i) an option to purchase; (ii) a right of first refusal; or (iii) a right of prior approval of a future purchaser or occupant.

3. The Company insures against loss or damage sustained by the Insured under this Owner's Policy if enforcement of a Private Right in a Covenant affecting the Title at Date of Policy based on a transfer of Title on or before Date of Policy causes a loss of the Insured's Title.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. any Covenant contained in an instrument creating a lease;

   b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;

   c. any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances; or

   d. any Private Right in an instrument identified in Exception(s) _____ in Schedule B.

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.

ALTA Form 9.10-06 (Restrictions, Encroachments, Minerals—Current Violations—Loan Policy 4/2/13)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 5 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For the purposes of this endorsement only:

   a. "Covenant" means a covenant, condition, limitation or restriction in a document or instrument in effect at Date of Policy.

   b. "Improvement" means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. A violation at Date of Policy of a Covenant that:

      i. divests, subordinates, or extinguishes the lien of the Insured Mortgage,

      ii. results in the invalidity, unenforceability or lack of priority of the lien of the Insured Mortgage, or

      iii. causes a loss of the Insured's Title acquired in satisfaction or partial satisfaction of the Indebtedness;

   b. A violation on the Land at Date of Policy of an enforceable Covenant, unless an exception in Schedule B of the policy identifies the violation;

   c. Enforced removal of an Improvement located on the Land as a result of a violation, at Date of Policy, of a building setback line shown on a plat of subdivision recorded or filed in the Public Records, unless an exception in Schedule B of the policy identifies the violation; or

   d. A notice of a violation, recorded in the Public Records at Date of Policy, of an enforceable Covenant relating to environmental protection describing any part of the Land and referring to that Covenant, but only to the extent of the violation of the Covenant referred to in that notice, unless an exception in Schedule B of the policy identifies the notice of the violation.

4. The Company insures against loss or damage sustained by reason of:

   a. An encroachment of:

      i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or

      ii. an Improvement located on adjoining land onto the Land at Date of Policy

   unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;

b. A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or

c. Damage to an Improvement located on the Land, at Date of Policy:

i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or

ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

5. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

a. any Covenant contained in an instrument creating a lease;

b. any Covenant relating to obligations of any type to perform maintenance, repair, or remediation on the Land;

c. except as provided in Section 3.d, any Covenant relating to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances;

d. contamination, explosion, fire, fracturing, vibration, earthquake or subsidence; or

e. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substances.

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.

ALTA Form 28-06 (Easement—Damage or Enforced Removal—2/3/10)

Issued by Fidelity National Title Insurance Company

The Company insures against loss or damage sustained by the Insured if the exercise of the granted or reserved rights to use or maintain the easement(s) referred to in Exception(s) _____ of Schedule B results in:

(1) damage to an existing building located on the Land, or

(2) enforced removal or alteration of an existing building located on the Land.

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.

ALTA Endorsement Form 28.1-06 (Encroachments—Boundaries and Easements—4/2/2012)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only, "Improvement" means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.

3. The Company insures against loss or damage sustained by the Insured by reason of:

    a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;

    b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;

    c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or

    d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the encroachments listed as Exceptions _____ of Schedule B.

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.

ALTA Endorsement Form 28.2-06 (Encroachments—Boundaries and Easements—Described Improvements - 4/2/2012)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only, "Improvement" means each improvement on the Land or adjoining land at Date of Policy, itemized below:

   _____

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;

   b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;

   c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or

   d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.

4. Sections 3.c. and 3.d. of this endorsement do not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the following Exceptions, if any, listed in Schedule B: _____

[The Company may list any Exceptions appearing in Schedule B for which it will not provide insurance pursuant to Section 3.c. or Section 3.d. The Company may insert "None" if it does not intend to limit the coverage.]

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.

ALTA Endorsement Form 28.3-06 (Encroachments—Boundaries and Easements—Described Improvements and Land Under Development 4/2/13)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusions in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only:

   (a) "Improvement" means a building, structure, or paved area, including any road, walkway, parking area, driveway, or curb located on the surface of the Land or the surface of adjoining land at Date of Policy that by law constitutes real property.

   (b) "Future Improvement" means any of the following to be constructed on the Land after Date of Policy in the locations according to the Plans and that by law constitutes real property:

      (i) a building;

      (ii) a structure; or

      (iii) a paved area, including any road, walkway, parking area, driveway, or curb.

   (c) "Plans" mean the survey, site and elevation plans, or other depictions or drawings prepared by (*insert name of architect or engineer*) dated (*insert date prepared*), last revised (*insert date last revised*), designated as (*insert name of project or project number*) consisting of (*insert number of sheets*) sheets.

3. The Company insures against loss or damage sustained by the Insured by reason of:

   a. An encroachment of any Improvement or Future Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an Exception in Schedule B of the policy identifies the encroachment;

   b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;

   c. Enforced removal of any Improvement or Future Improvement located on the Land as a result of an encroachment by the Improvement or Future Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement or Future Improvement; or

   d. Enforced removal of any Improvement or Future Improvement located on the Land that encroaches onto adjoining land.

4. Sections 3(c) and 3(d) of this endorsement do not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the following Exceptions, if any, listed in Schedule B: _____

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 to it.

ALTA Endorsement 35.06 (Minerals & Other Subsurface Substances—Buildings—4/2/12)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusion in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only, "Improvement" means a building on the Land at Date of Policy.

3. The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of any Improvement resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or

   b. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substance; or

   c. the exercise of the rights described in paragraph ____ of Schedule A or exception ____ of Schedule B.

   *** Instructional note: Paragraph 4(c) can be deleted if title insurer does not carve out any specific mineral rights from coverage.**

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.

ALTA Endorsement 35.1-06 (Minerals & Other Subsurface Substances—Improvements—4/2/12)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusion in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only, "Improvement" means a building, structure located on the surface of the Land, and any paved road, walkway, parking area, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.

3. The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of any Improvement, resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or

   b. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substance; or

   c. the exercise of the rights described in paragraph ____ of Schedule A or exception ____ of Schedule B.

   *** Instructional note: Paragraph 4(c) can be deleted if title insurer does not carve out any specific mineral rights from coverage.**

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.

ALTA Endorsement 35.2-06 (Minerals & Other Subsurface Substances—Described Improvements—4/2/12)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusion in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only, "Improvement" means each improvement on the Land at Date of Policy itemized below:

   _____

3. The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of any Improvement resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or

   b. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substance; or

   c. the exercise of the rights described in paragraph ____ of Schedule A or exception ____ of Schedule B.

   *** Instructional note: Paragraph 4(c) can be deleted if title insurer does not carve out any specific mineral rights from coverage.**

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.

ALTA Endorsement 35.3-06 (Minerals & Other Subsurface Substances—Land Under Development—4/2/12)

Issued by Fidelity National Title Insurance Company

1. The insurance provided by this endorsement is subject to the exclusion in Section 4 of this endorsement; and the Exclusions from Coverage, the Exceptions from Coverage contained in Schedule B, and the Conditions in the policy.

2. For purposes of this endorsement only:

   a. "Improvement" means a building, structure located on the surface of the Land, and any paved road, walkway, parking area, driveway, or curb, affixed to the Land at Date of Policy and that by law constitutes real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.

   b. "Future Improvement" means a building, structure, and any paved road, walkway, parking area, driveway, or curb to be constructed on or affixed to the Land in the locations according to the Plans and that by law will constitute real property, but excluding any crops, landscaping, lawn, shrubbery, or trees.

   c. "Plans" means the survey, site and elevation plans or other depictions or drawings prepared by (*insert name of architect or engineer*) dated ____, last revised _____, designated as (*insert name of project or project number*) consisting of ___ sheets.

3. The Company insures against loss or damage sustained by the Insured by reason of the enforced removal or alteration of an Improvement or a Future Improvement, resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from:

   a. contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; or

   b. negligence by a person or an Entity exercising a right to extract or develop minerals or other subsurface substance; or

   c. the exercise of the rights described in paragraph ____ of Schedule A or exception ____ of Schedule B.

   *** Instructional note: Paragraph 4(c) can be deleted if title insurer does not carve out any specific mineral rights from coverage.**

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.

ALTA Endorsement Form 15-06 (Nonimputation—Full Equity Transfer—6/17/06)

Issued by Fidelity National Title Insurance Company

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or Knowledge, as of Date of Policy, of

[name of outgoing interests]

imputed to the Insured by operation of law, provided

[name of incoming interests]

acquired the Insured as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.

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 to it.

ALTA Endorsement Form 15.1-06 (Nonimputation—Additional Insured—6/17/06)

Issued by Fidelity National Title Insurance Company

For purposes of the coverage provided by this endorsement,

[identify the "incoming" partner, member or shareholder]

("Additional Insured") is added as an Insured under the policy. By execution below, the Insured named in Schedule A acknowledges that any payment made under this endorsement shall reduce the Amount of Insurance as provided in Section 10 of the Conditions.

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or Knowledge, as of Date of Policy, of

[identify, as applicable, the existing and/or exiting partner(s) of the Insured partnership entity, member(s) or manager(s) of the Insured limited liability company entity, or officer(s) and/or director(s) of the Insured corporate entity]

imputed to the Additional Insured by operation of law, to the extent of the percentage interest in the Insured acquired by Additional Insured as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.

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 to it.

AGREED AND CONSENTED TO:

INSURED ENTITY

By: _____

Name: _____

Its: _____

ALTA Endorsement Form 15.2-06 (Nonimputation—Partial Equity Transfer—6/17/06)

Issued by Fidelity National Title Insurance Company

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or Knowledge, as of Date of Policy, of

> **[identify, as applicable, the existing and/or exiting partner(s) of the vestee partnership entity, member(s) or manager(s) of the vestee limited liability company entity, or officer(s) and/or director(s) of the vestee corporate entity]**

whether or not imputed to the entity identified in paragraph 3 of Schedule A or to the Insured by operation of law, but only to the extent that the Insured acquired the Insured's interest in entity as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy.

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 to it.

Chapter 4: Assignments and Subleases

Jack S. Levey
Plunkett Cooney, P.C.
Columbus, Ohio

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The author wishes to acknowledge Columbus attorney Mark W. Iannotta for his helpful suggestions regarding the bankruptcy section of this chapter.

Chapter 4:
Assignments and Subleases

Jack S. Levey
Plunkett Cooney, P.C.
Columbus, Ohio

I. Introduction

A sublease and an assignment of lease each result in someone other than the original tenant having the exclusive right to possess the premises. For brevity, we will use the word "transfer" to mean both assignments and subleases, as well as other transactions that have a similar result.

A. In Ohio, a tenant may freely assign the lease or sublet, absent an express restriction in the lease. Because a restriction against assignment or subletting is a restraint on alienation, some courts have opined that the restriction must be construed narrowly. *Fairbanks v. Power Oil Co. of Ohio*, 81 Ohio App. 116, 36 Ohio Op. 418, 77 N.E.2d 499 (3d Dist. Marion County 1945). A prohibition against assigning the lease does not prohibit subleasing. A prohibition against subleasing does not prohibit assignments.

B. A landlord will want the lease to restrict both, as well as a variety of other transfers that could otherwise be used to circumvent the restrictions.

C. Many of the restrictions on transfer were developed when the market was more landlord-oriented. In today's soft market, some landlords are more flexible. On the other hand, the soft market makes it just as crucial for the landlord to control future occupancy.

II. Assignments and Subleases—What's the Difference and Who Cares?

There are legal and practical differences between assignments and subleases.

A. Characteristics of an assignment.

An assignment of the tenant's interest in the lease transfers the tenant's entire remaining leasehold estate to the assignee, along with all of the assignor's contractual rights under the lease. The assignor retains no further interest in the leasehold or the lease. The assignee is in privity of contract with the assignor,

and in privity of estate with the landlord. Unless otherwise released, the assignor remains liable to the landlord for all of the tenant's lease obligations, as surety for the assignee, but with all of the defenses available to a surety. *Gholson v. Sabin*, 137 Oh. St. 551, 19 Ohio Op. 309, 31 N.E.2d 858, 139 ALR 75 (1941).

1. The assignee acquires the right to enforce the lease against the landlord.

2. The assignee must perform whatever obligations the lease imposes on the tenant. The tenant and assignee cannot pick and choose which rights or obligations to transfer.

    a. The assignee's liability to the landlord for rent is limited to the rent accruing during the term of the assignee's interest. If assignee ABC later assigns the lease to subsequent assignee DEF, ABC is not responsible to the landlord for rent that accrues after that subsequent assignment, unless ABC at some point expressly covenanted with the landlord, or for the landlord's benefit, to assume performance of the tenant's lease obligations. *Gholson v. Sabin*, 137 Oh. St. 551, 19 Ohio Op. 309, 31 N.E. 2d 858, 139 ALR 75 (1941).

    b. A typical assignment will include the assignee's express covenant to assume the obligation to pay rent and to perform all of the other tenant's obligations under the lease. Often the lease will require that this covenant be for the express benefit of the landlord, as well as the benefit of the assignor/tenant, as a condition to the landlord's consent. Other landlords enter a direct agreement with the assignee, in which the landlord consents to the assignment and the assignee covenants to assume performance of the obligations.

3. *Reasons to prefer an assignment.*

    If the entire premises are being transferred for the entire remaining term, one party may prefer using an assignment instead of a sublease in any of the following cases:

    a. The lease prohibits subletting but not assignment.

    b. The tenant wants to negotiate a release from the landlord in connection with the transfer.

    c. The transferee wants a direct relationship with the landlord.

    d. The landlord or the transferee has concerns about the tenant's continued solvency.

    e. The landlord or the transferee wants to create a novation.

B. Characteristics of a sublease.

Unlike an assignment, the sublease does not create privity of estate between the landlord and the subtenant. The subtenant is not in privity of estate or privity of contract with the landlord. The tenant remains the owner of the leasehold estate and the holder of all contractual rights created by the lease.

1. If the tenant transfers its right to possess the entire premises for the entire remaining term, the transaction is an assignment and not a sublease. To be a sublease, the transfer must either grant exclusive possession of less than the entire leased premises (sometimes called a partial sublease, as opposed to a total sublease), or must end before the lease term ends, or both. A reversion as brief as one day will be enough to make the transaction a sublease. *Joseph Bros. Co. v. F.W. Woolworth Co.*, 844 F.2d 369 (6th Cir. 1988).

2. The tenant/sublessor remains directly liable to the landlord for all lease obligations. The subtenant's obligations run only to the sublessor.

3. The tenant/sublessor and the subtenant can negotiate the scope of the subtenant's obligations. The subtenant's obligations may be narrower than the scope of the tenant's lease obligations.

4. The landlord cannot enforce the sublease against the subtenant. Some landlords will not consent to a sublease unless they receive the right to enforce the subtenant's obligations. Different landlords accomplish this in different ways. The landlord may require the tenant to assign its rights under the sublease as further security for the tenant's lease obligations. The sublease itself may state that the subtenant's obligations run to the landlord as well as to the sublessor. Or the landlord may require a separate agreement among the landlord, the tenant and the subtenant, covering the following issues, among others:

    a. The landlord consents to the sublease.

    b. The landlord can enforce the subtenant's obligations but has no obligation to the subtenant.

    c. Upon notice from the landlord that the tenant is in default, the subtenant will pay rent directly to the landlord.

    d. The sublease is subordinate to the lease. If the lease terminates before the sublease, or if the lease is rejected in bankruptcy, landlord can elect to allow the subtenant to remain in possession, in which case the subtenant will attorn to the landlord, or the landlord can terminate the right of possession at any time.

5. The subtenant cannot enforce the lease or the sublease against the landlord. The subtenant's only rights are against the tenant. If the landlord's failure to perform results in a constructive eviction, the subtenant may have an action against the tenant for breach of the covenant of quiet enjoyment.

6. *Reasons to prefer a sublease.*

    Even if the entire premises are being transferred for the entire remaining term, one party may prefer using a sublease with a one-day reversion instead of an assignment in any of the following cases:

    a. The lease prohibits assignment but not subletting.

b. The sublease rent is less than the lease rent.

c. The sublease rent is greater than the lease rent but the transferee wants to pay, or the tenant wants to receive, the cash over the remaining lease term and not in a lump sum.

d. The lease imposes some obligations that the transferee does not want to undertake.

e. The tenant wants the option to re-enter if the transferee fails to perform.

f. The landlord or the transferee wants to avoid the risk of a novation.

III. Other Forms of Transfer—Why It's Not Enough to Simply Restrict Assignments and Subleases

A well-drafted lease will prohibit not only assignment and subletting, but a variety of other transactions that might otherwise allow the tenant to circumvent the restrictions against transfer.

A. Merger or consolidation.

A merger or consolidation of the tenant does not constitute an assignment of the lease and does not violate a prohibition against subletting, but may violate a prohibition against transferring the lease by operation of law. *Fairbanks v. Power Oil Co. of Ohio*, 81 Ohio App. 116, 36 Ohio Op. 418, 77 N.E.2d 499 (3d Dist. Marion Cty. 1945); see cases cited in Annotation, 39 A.L.R. 4th 879.

B. Transfer of equity interest in the tenant.

A sale or other transfer of the stock of a corporate tenant or the membership interest in an LLC tenant is not an assignment or subletting.

C. Change in general partnership.

Query whether admission or withdrawal of a partner in a general partnership tenant would constitute an assignment under Ohio's Uniform Partnership Act, Ohio Rev. Code Chapter 1775, under the rule laid down in *Fairway Development Co. v. Title Ins. Co. of Minn.*, 621 Fed. Supp. 120 (N.D. Ohio 1985).

1. If so, does the adoption of the Ohio Revised Uniform Partnership Act, Ohio Rev. Code Chapter 1776, change that result?

2. If the Revised Uniform Partnership Act does change the result, would an assignment nonetheless occur if the disassociation of a partner triggered a dissolution of the partnership under Ohio Rev. Code § 1776.61?

D. Management agreement.

A tenant may use a management agreement calling for the "manager" to pay all expenses of the business, hire all the employees, operate the business, cover all operating shortfalls, and keep all or some portion of the gross revenues. At least one court has ruled that management agreements of this type violate a prohibition against subleasing. *Tillman v. Hasan*, 2004-Ohio-687, 2004 WL 291161 (Ohio Ct. App. 6th Dist. Lucas Cty. 2004).

E. Licenses.

Licenses create a lesser right of possession than a lease. The Ohio Supreme Court, examining this distinction, opined in, *Di Renzo v. Cavalier*, 165 Ohio St. 386, 135 N.E.2d 394 (Ohio 1956):

> *A license to do an act upon land involves the exclusive occupation of the land by the licensee, so far as is necessary to do the act, and no further, whereas a lease gives the right of possession of the land, and the exclusive occupation of it for all purposes not prohibited by its terms. * * **
>
> *Whether an instrument is a license or a lease depends generally on the manifest intent of the parties gleaned from a consideration of its entire contents.*

1. A major factor under *Di Renzo v. Cavalier* is the degree to which the lessee or licensee is granted the right to exclusive possession.

2. The Hamilton County Municipal Court applied *Di Renzo v. Cavalier* to determine whether an agreement for a shopping center kiosk was a lease or a license. *Schloss v. Sachs*, 63 Ohio Misc.2d 457, 631 N.E.2d 212 (Hamilton Co. Mun. 1993), but these same tests can be applied to determine whether a transaction is a sublease or a license granted by the tenant. *Schloss v. Sachs* held that in the context of modern retail leasing, "In cases of leases, the space or place is easily and ordinarily described in physical terms independent of any specific use. Thus, to this court, a license connotes much less than a lease." The court also noted that:

> > *If the lessee/licensee has the right of exclusive possession, irrespective of how much control the lessor/licensor has over the lessee/licensee or the operation of its business, then the agreement constitutes a lease since a possessory interest in real estate has been conveyed. This is true even if the lessor/licensor has the power to change the specific area of exclusive possession of the lessee/licensee. * * **
> >
> > *One test of whether there is a license or a lease is whether the place or space involved can be described without regard to the use to which the licensee/lessee will make of the space or place. In cases of licenses, the place or space is most easily described in terms of the licensee's use—the selling of wigs in Bewigged by Suzzi, Inc.; or the placing of washing machines in United Coin Meter Co.* * **

> *A mall may grant a license to a roving vendor, but a fixed space over which the vendor has possession to the exclusion of others amounts to a leasehold. * * **
>
> *Especially concerning real estate, a "bright line" must be drawn somewhere, and this court believes that the essential factors requiring a written lease are (1) a defined space or place, however small, which the lessor [sic] occupies, (2) to the exclusion of others, and (3) that the use of the space or place is not merely incidental to the performance of the contract.*

IV. Other Obstacles to Assignment or Subletting

Other provisions of the lease can block a transfer even if consent to the transfer itself is not required. Bankruptcy courts can sometimes override these restrictions as discussed below.

A. Use clause.

In an office lease, the use clause may not be much of an obstacle. It can be a profound obstacle in a retail lease. Even if the tenant and the transferee are in similar lines of business, differences in the type of merchandise, or in the emphasis on one line of merchandise over another, may mean that the transferee cannot carry on its typical line of business within the confines of the tenant's original use clause. Changing the use clause will probably require the landlord's consent, and the lease may give the landlord considerable discretion over whether to grant or withhold that consent.

B. Trade name.

Retail leases typically require the tenant to operate under a given trade name. The transferee will most likely be operating under a different name, which will require consent unless the lease contains an exception.

C. Percentage rent.

Percentage rent based on sales is typically paid monthly or quarterly and adjusted annually. The sublease or assignment should make certain to allocate responsibility for percentage rent between the tenant and the assignee or subtenant.

D. Signage.

Leases often require the tenant to obtain consent to any signs. An office building will typically have building standard signage, so that a change in the name will not make much difference. Subleasing a portion of the office premises may cause a problem if there is a limit to the number of directory listings or suite signs for the premises. In a shopping center or other retail lease, all signage typically requires the landlord's consent. Because the tenant's signs will not be suitable for the transferee, consent from the landlord will be necessary.

E. Operating hours.

Operating hours may pose a challenge if the transferee needs to open later or close earlier than the lease permits.

F. Restrictions on alteration or decoration.

Restrictions on alteration or decoration may be a problem. Even an office tenant may want to redecorate, repaint or remodel. Retailers typically identify their stores by color scheme, layout, and fixturing. Restrictions on these activities may require obtaining the landlord's consent.

G. Radius restrictions.

Radius restrictions are found in some retail leases, and prohibit the tenant from operating another location within a given distance from the premises. If the transferee has other stores within the prohibited radius, the landlord's consent will probably be necessary.

H. Unique obligations may occur in some leases.

A law firm's office lease in downtown Minneapolis required the tenant to maintain a law library open to other lawyers in the building. When the law firm attempted to sublet to a bank, this obligation scuttled the deal and put the law firm in default of its lease. *Leonard, Street & Deinard v. Marquette Assocs.*, 353 NW2d 198 (Minn. App. 1984).

V. Landlord Consent

A. Obligation to be reasonable.

Ohio law does not require landlords to be reasonable in granting or withholding consent to the transfer of a commercial lease. Many leases provide that the landlord will not withhold consent unreasonably.

B. Consequences of unreasonably withholding consent.

A failure to grant consent can be a defense to damages for the tenant's abandoning the premises, *GMS Management Co., Inc. v. Vliet,* 2006-Ohio-515, 2006 WL 287955 (Ohio Ct. App. 9th Dist. Summit Cty. 2006), or may violate the landlord's obligation to mitigate damages. See B. Cavitt, "Tenant Strategy Upon Transfer Prohibition," in B. Shaffer, Ed., *The Sublease and Assignment Deskbook* (American Bar Association, Section of Real Property, Probate and Trust Law 2006). At least one state appellate court awarded damages for the tenant's lost profits when the landlord unreasonably withheld consent in violation of the lease, preventing the sale of the tenant's business. *Vranas & Associates, Inc. v. Family Pride Finer Foods, Inc.*, 147 Ill. App. 3d 995, 101 Ill. Dec. 151, 498 N.E.2d 333 (2d Dist. 1986).

C. Change of use.

1. Withholding consent may be reasonable if the proposed assignment or subletting is for a use that is not permitted by the lease. *GMS Management Co., Inc. v. Vliet,* 2006-Ohio-515, 2006 WL 287955 (Ohio Ct. App. 9th Dist. Summit Cty. 2006). The lease in *GMS Management* permitted the tenant to use the premises for an optician's office only. The court held that the landlord acted reasonably in rejecting proposed assignments to a hair braiding business, a beauty salon and a charitable office.

2. Even with a broad use clause, such as a clause permitting use of the premises "for any lawful purpose," withholding consent may be reasonable if the proposed assignee will use the premises for a purpose that would have a substantial negative impact on the rest of the property, as when a supermarket anchoring a neighborhood shopping center would be changed to a J.C. Penney store. *Kroger Co. v. Rossford Indus. Corp.,* 25 Ohio Misc. 43, 51 Ohio Op. 2d 382. 54 Ohio Op. 2d 38, 261 N.E.2d 355 (C.P. 1969).

D. Inadvertent consent.

At common law, a covenant not to assign the lease was personal to the tenant. The landlord's consent terminated the restriction, so that the assignee, and any future assignees, could freely make further assignments without need for consent. *Dumpor's Case,* 4 Co. Rep. 119b, 76 East Rep. 1110. The current status of the Rule in Dumpor's Case in Ohio is unclear. The Rule in Dumpor's Case repealed in some states and has been criticized in Ohio. The safer practice is to address the issue when drafting the lease, by expressly stating that consent to an assignment does not waive the restriction.

Landlords have also faced the argument that their acceptance of rent from an assignee constitutes acceptance of the assignment. Ohio courts have enforced lease provisions that state that acceptance of rent from an assignee or subtenant does not constitute landlord's consent to the assignment or sublease. *Feller, LLC v. Wagner,* 2012-Ohio-5972 (Ohio Ct. Ap. 10th Dist. Franklin Cty. 2012).

E. Agreed standards.

The lease may specify examples of reasonable grounds for withholding consent. The landlord will want the lease to specify that the list is not exclusive. The following standards are taken from a typical shopping center lease, which provides that:

> *Without limiting any other reason for withholding consent, it is reasonable for the Landlord to withhold consent to a Transfer unless it has been shown to Landlord's satisfaction that:*
>
> *1. the assignee, subtenant, occupant, concessionaire, franchisee or licensee (any of the foregoing, a "Transferee") is an experienced and successful owner and operator of a business of the same type and quality as that to be operated on the Premises pursuant to the provisions of this Lease;*

2. *not less than two full years have elapsed since the more recent of the commencement of the Term and the immediately preceding Transfer, if any;*

3. *the Transferee has a good business and personal reputation and agrees to operate its business on the Premises under a name at least as well known and of at least equal reputation as the name under which Tenant is conducting its business on the Premises pursuant hereto at the date of the request for Landlord's consent;*

4 *the Transferee has not been bankrupt or the holder of 50% or more of the issued shares of any class of shares of a corporation or of an interest in a partnership or limited liability company, any of which has been bankrupt in the five years preceding the date of the proposed Transfer;*

5 *the Transferee has financial strength at least as great as that of Tenant and all guarantors of or sureties for Tenant's obligations under this Lease, in the aggregate;*

6. *the Transferee is likely both to attract as large a number of the members of the consuming public to the Shopping Center as Tenant, and to generate as high a volume of sales from the business being conducted on the Premises as Tenant;*

7. *the Transferee, unless otherwise required by the Landlord, shall operate the same business as is required to be operated by the Tenant pursuant to Section ** with similar merchandise or merchandising policies as existed prior to the Transfer;*

8. *the Transferee is not an existing occupant of any part of the Shopping Center and has not then recently been a prospect involved in bona fide negotiations with Landlord respecting the leasing of any premises in the Shopping Center and is not in any way affiliated with such existing occupant or bona fide prospect;*

9. *the portion of the Premises subject to the proposed assignment or subletting is regular in shape with appropriate means of ingress and egress and suitable for normal purposes;*

10 *the proposed Transferee is not a governmental unit (or subdivision or agency thereof) and is not entitled to diplomatic, sovereign or similar immunity; and*

11. *the Transfer would not result in a breach of any agreement by which Landlord is bound with respect to any part of the Shopping Center.*

F. Reimbursement of expenses.

The lease may require the tenant to reimburse the landlord for the expense of reviewing a request for consent, whether or not consent is granted. Again, different leases take different approaches. There may be a flat fee, a reimbursement (with or without a cap) of landlord's attorney fees and other out-of-pocket costs, or a combination of those approaches.

G. Sharing of profit.

Leases may provide that any profits in connection with a transfer must be paid to the landlord.

1. The landlord should consider drafting the lease so as to let the tenant keep at least half the profit, to create an incentive for the tenant to seek the highest rent possible.
2. The tenant will want to negotiate the definition of profit to be net of broker's commissions, advertising expense, legal fees, tenant-financed improvements, and the value of any services, amenities or personal property.
3. The tenant should also pay particular attention to the effect that this clause would have on the sale of the tenant's business. If possible, the tenant should negotiate excluding a sale of the entire business from the operation of the profit-splitting clause. If this is not possible, the tenant should negotiate the definition of profit so as to exclude payment for anything other than the value of the leasehold.

H. Right to recapture.

Many leases give the landlord the option to terminate the lease if the tenant requests consent to a transfer. In the case of a partial sublease, the termination affects only the part of the premises that would be sublet. In the case of an assignment or a total sublease, the landlord can terminate the entire lease. In either case, the lease then permits the landlord to deal directly with the proposed transferee. The recapture clause typically gives the landlord complete discretion; the landlord is not obligated to be reasonable in deciding whether to recapture. Some leases include this recapture provision even if the lease prohibits the landlord from unreasonably withholding consent.

1. Landlords like the recapture option because it lets the landlord control the remarketing of the premises, and gives the landlord more control over the property.
2. If the tenant simply wants to walk away from the lease and free itself from the lease obligations, the recapture clause may not be objectionable. Unfortunately, when negotiating the lease, the tenant has little ability to predict whether the recapture will be a help or a burden.
3. A strong tenant will resist the recapture clause. The clause can be particularly inconvenient to a tenant who anticipates a later growth in its business and wants to sublet a portion of the premises temporarily until it needs the space for its own operation.
4. The recapture can play havoc with the tenant's ability to sell its business. Some landlords have been known to get greedy when they realize that they can destroy the value of the tenant's business or the value of an important location for that business.

5. If the tenant cannot remove the recapture clause, the tenant should try to negotiate some limits on the right to recapture. If the lease permits the tenant to make certain types of transfers without consent, the recapture clause should be coordinated with those exceptions so that those transactions do not trigger a right to recapture. The recapture right should have a short decision time for the landlord, so that the option to recapture is waived unless exercised within that time limit. The tenant might also want the right to rescind its request for consent, so as to be able to reinstate the lease if the landlord exercises the recapture right.

I. Commonly permitted transactions.

The lease may provide that certain transfers do not require the landlord's consent. Or, if the lease does not require the landlord to be reasonable in consenting to transfer requests generally, the lease may require the landlord not to unreasonably withhold consent to certain transfers.

1. Sale of tenant's business.

Most businesses want the right of transfer in connection with a sale of the business. Larger retail chains may need the ability to sell part of the chain as well. In that case, the landlord may want to set a minimum number of stores being sold, or may set a minimum geographic area (e.g., all stores within the state, or within a given region). The landlord may also want to establish minimum qualifications for the buyer. In the case of single-location tenants, the landlord may need to keep the right to consent, but might agree that consent will not be unreasonably withheld if the buyer meets certain qualifications.

2. Mergers and consolidations

Mergers and consolidations are not technically assignments of the lease, although they may violate a covenant against transfers by operation of law. The question becomes whether to restrict them. A larger tenant will certainly insist on the right to engage in mergers and consolidations without needing the landlord's consent, but may be willing to condition this right on the financial strength of the surviving or resulting entity. Changes in the ownership structure, management or control pose a greater threat to the landlord in the case of small companies, and the landlord may want to retain some measure of right to consent.

3. Equity transfers among existing owners of tenant.

Many leases will permit a change of the equity ownership among the existing equity owners (shareholders, partners, LLC members, etc.) of the tenant.

4. Estate planning.

Restrictions against stock transfers or other changes of control can interfere with succession planning or estate planning for family businesses. See J. Levey, "Impact of Subleasing and Assignment Clauses on Transfers of Business", in B. Shaffer, Ed., *The Sublease and Assignment Deskbook* (American Bar Association, Section of Real Property, Probate and Trust Law 2006).

a. At a minimum, the tenant will want an exception for transfer in connection with the estate plan or by will, trust or intestacy to a family member of the equity owner.

b. The tenant may also want flexibility to transfer equity interests to family members during the principal owner's lifetime in order to take advantage of gift tax exclusions or other estate planning techniques.

c. The landlord has a legitimate interest in restricting these transfers. The landlord may be relying on the experience, skill or reputation of the principal owner. This concern can be addressed by putting operating standards into the lease, so that the company will have to continue meeting those standards even after the change of ownership.

5. Affiliates.

Tenants often seek the right to transfer to subsidiaries, parent companies, or other companies under common ownership and control. This exception can be abused if the lease does not restrict mergers, consolidations and equity transfers. The tenant could assign the lease to a newly created subsidiary and then sell the stock of the new subsidiary to the transferee, or merge the new subsidiary into the transferee. For this reason, some landlords will not agree to this exception unless the lease states that cessation of the affiliate relationship between the tenant and the transferee constitutes a new transfer requiring the landlord's consent.

J. Restrictions against becoming a subtenant or assignee.

Landlords do not want their tenants competing with them for leasing space in the property. If a tenant needs additional space, or wants to renew its lease or move to a more desirable location within the property, the landlord wants that tenant to deal with the landlord, and not to acquire that space from another tenant. Consider a lease restriction that prohibits the tenant from subleasing or taking an assignment of lease for other space in the property, even if the lease for that other space does not require the lessee to obtain the landlord's consent. (Suggested by S. Spencer Compton and J. Stein, "Landlord's Checklist of Silent Lease Issues," (3d Ed.) *Practical Real Estate Lawyer* Vol. 29, No.3, May, 2013.) A sample clause might read:

*Except as permitted by Section * * *, Tenant shall not, without the prior written consent of Landlord in each instance, become the assignee of any lease for, or the subtenant or occupant of, any other premises in the Project, whether or not the lease for those premises permits that transaction without need to obtain Landlord's consent.*

K. Landlord induces tenant to move by taking over tenant's existing lease.

Sometimes a landlord will induce a tenant to move out of a competing building by offering to take over the payments on the tenant's existing lease. Consider broadening the definition of sublease to cover any arrangement by which another person agrees to take over the lease payments, or to reimburse tenant for the lease payments, or obtains the right to exercise control over disposition of the lease. Suggested by S. Spencer Compton and J. Stein, "Landlord's Checklist of Silent Lease Issues," (3d. Ed.) *Practical Real Estate Lawyer* Vol. 29, No.3, May, 2013.

VI. Practical Challenges of the Sublease

A. Space and configuration.

Partial subleases present special problems. Are the subleased premises configured for practical use? Do the subleased premises have adequate restrooms, and if not, is there access to common restrooms? Is there a separate entrance? What about a reception area, or an elevator lobby? If there is an elevator lobby, are the subleased premises sufficiently visible to be found without special signage in the corridor? Apart from directional signage, does the lease require the landlord to furnish additional suite signage identifying the subtenant, and any necessary additions to the building directory? Does the subleased space have its own thermostat and adequate HVAC? If the tenant needs after-hours HVAC on a given occasion and the subtenant doesn't (or vice versa), can the service be separated so that the after-hours charges are not imposed on the entire original premises? These are a few of the space issues that may arise in connection with partial subleases.

B Holdover.

If the subtenant fails to vacate at the end of the lease term, the tenant will be responsible for holdover rent (usually at a substantial penalty rate) on the entire premises, not just on the sublet portion. The lease may also require the tenant to indemnify the landlord against loss of rent from the replacement tenant, liability to the replacement tenant, or other damages resulting from the holdover. This issue should be addressed in the sublease, so that the tenant/sublessor is adequately indemnified.

C. Enforcement of the tenant's rights against the landlord.

Whether the sublease is partial or total, the subtenant cannot enforce any of the landlord's obligations. The sublessor will not want to take on the liability for those obligations. The sublease needs to address how far the sublessor must go in attempting to get the landlord to perform.

D. Recognition by the landlord.

If the tenant/sublessor defaults under the lease, the sublease ends and the subtenant must vacate. If the space is not critical to the subtenant's business, this may not matter. A sophisticated subtenant will not sign a critical sublease without a written recognition agreement from the landlord, agreeing to let the subtenant remain in possession upon the tenant's default, so long as the subtenant is performing its obligations under the sublease. The landlord's willingness to do so will depend on the amount of the sublease rent as compared to the lease rent, the size and configuration of the subleased premises, which tenant obligations the subtenant would be willing to assume, the subtenant's credit, and a host of other factors.

E. Risk allocation.

Commercial leases shift risks between the landlord and the tenant in numerous ways. The landlord (and probably the tenant/sublessor) will want comparable waivers, releases, and limitations of liability from the subtenant. The subtenant will want comparable subrogation waivers from the landlord. And the tenant/sublessor will want the subtenant to indemnify it for any acts or omissions that result in the tenant indemnifying the landlord. These provisions may include:

1. Tenant releases or waivers of damages, for all damage to the tenant's personal property and other contents, even if caused by negligence of the landlord, or damage that could be insured by a standard policy of business interruption insurance, business personal property insurance, etc.
2. Reciprocal waivers of subrogation (or of direct claims) for matters that are, could be or are required to be covered by property insurance.
3. Exculpation provisions, limiting the enforcement of any judgment against the landlord to the landlord's equity in the property.
4. Indemnification against liability arising out of tenant's use of the premises, negligence, or other acts or omissions.
5. Releasing the landlord from obligations arising after the sale or other transfer of the building.

F. Estoppel certificates.

The landlord may want the right to obtain an estoppel certificate from the subtenant. The subtenant may want the right to obtain an estoppel certificate from the landlord. Neither will be able to demand one from the other unless a direct agreement between them includes a provision granting that right.

VII. Practical Problems of the Assignment

A. Novation and release.

If the assignee enters a direct agreement with the landlord to assume the assignor's lease obligations, and if the assignor is also released from further liability under the lease, the parties have created a novation—a new agreement between the landlord and the assignee. *216 Jamaica Avenue LLC v. S&R Playhouse Realty Co.,* 540 F.3d 433, 2008 WL 3914906 (6th Cir. 2008). The Sixth Circuit in that case noted: (quotation marks in the original):

> *Under Ohio law, "[a] contract of novation is created where a previous valid obligation is extinguished by a new valid contract, accomplished by substitution of parties or of the undertaking, with the consent of all the parties, and based on valid consideration." Chicago Title Ins. Corp. v. Magnuson, 487 F.3d 985, 994 (6th Cir. 2007) (internal quotation marks omitted, alteration in original) see also Lexford Prop. Mgmt., LLC v. Lexford Prop. Mgmt., Inc., 770 N.E.2d 603, 607 (Ohio Ct. App. 2001). The party invoking a novation (here, the current owner, 216 Jamaica) bears the burden of establishing its existence. See Chicago Title, 487 F.3d at 994.*

1. A novation becomes expensive for the assignee if the original lease gives the landlord the right to demand that rent be paid in gold coin, a fairly common practice in pre-1933 long term leases. Payment in gold assured the landlord that the purchasing power of the rent would remain relatively constant over the lease term.

    a. Congress in 1933 prohibited the enforcement of obligations to pay in gold. Joint Resolution of 1933, 48. Stat. 112, 113 (1933), previously codified at 31 USCA 463, codified as amended 31 USCA § 5118(d)(2) (2006).

    b. Under a 1977 amendment, creditors can now require payment in gold on obligations to do so entered into after October 27, 1977. 91 Stat. 1227, 1229, codified as amended at 31 USCA 5118(d)(2).

    c. Leases that require payment in gold coin therefore pose special concerns for the assignee. If the assignor is released by the assignment, or by separate release, the obligation to pay in gold is revived. *216 Jamaica Avenue LLC v. S&R Playhouse Realty Co.*, 540 F.3d 433, 2008 WL 3914906 (6th Cir. 2008). See also cases cited at § 46.8.5, *Baldwin's Ohio Practice,* Kenton L. Kuehnle with Jack S. Levey, West Publishing. The difference in the amount of rent can be staggering.

2. Not every assignment and assumption of a lease necessarily creates a novation. A novation occurs only if the landlord substitutes the assignee as a new tenant with the intent to form a new contract and surrender the old. *Miller v. C.K.L., Inc*, 1985 WL 9401 (Ohio App. 4th Dist. Gallia Cty. 1985); *City Nat. Bank & Trust Co. v. Swain,* 29 Ohio Law Abs. 161939 WL 8003 (Ohio App. 2d Dist, Franklin Cty. 1939). But at least one Ohio court has ruled that a novation can occur even without the landlord expressly releasing the original tenant; surprisingly, the court implied a release from the fact that the landlord consented to the assignment. *Myers v. Pertu*, 1992 WL 397668 (Ohio App. Fifth Dist., Richland Cty.). Contrast this result with the lease in *216 Jamaica Avenue LLC v. S&R Playhouse Realty Co.,* which expressly provided that if the landlord consented to an assignment the tenant was automatically released.

3. If the lease grants the landlord an option to demand payment in gold, the landlord may decide that it is more profitable to release the assignor and create a novation. The assignor's secondary liability as surety may be much less valuable than the right to demand greatly increased rent from the assignee. For the same reason, the assignee may want to insist on a clause negating the intent to create a novation, and a covenant on the assignor's part not to accept a release from the landlord.

B. Ability to reclaim the leasehold if the assignee defaults.

The tenant may want the option to re-enter and reclaim its leasehold if the assignee fails to perform certain obligations. The tenant may have taken a promissory note in connection with the assignment, especially if the assignment is in connection with the sale of the tenant's business. Or the assignee may expose the tenant to liability by failing to perform the lease obligations if the assignor was not released.

1. Unless the tenant reserved a right to re-enter, or received a collateral re-assignment from the assignee, the tenant has no right to resume occupancy.

2. Note that any re-assignment to the tenant may require an additional consent from the landlord. For obvious reasons, it is best to seek and obtain that consent at the time of the original assignment, and not when the assignee defaults.

C. Reciprocal indemnity.

If the landlord is not releasing the assignor, the assignor will want the assignee to indemnify it for any failure to perform the tenant's obligations from and after the assignment. If the assignee is not getting a firm estoppel from the landlord, the assignee will want the assignor to indemnify it for any undisclosed failure to perform the tenant's obligations occurring before the assignment.

D. Status of previous guaranty.

The landlord should make sure that any guaranties will continue in effect after the assignment. In some situations, the landlord will want to obtain an express agreement from the guarantor that the guaranty applies to the obligations of the assignee.

1. An assignment may create an equitable defense on the part of the guarantor.

2. Even if the guaranty contains a waiver of the equitable defense, an assignment that creates a novation may terminate the guaranty unless the guarantor expressly agrees that the guaranty applies to the assignee's obligations.

3. Even with a waiver of equitable defenses, and even if no novation occurred, the language of the guaranty may not be adequate to guaranty the assignee's obligations under the assigned lease. The Franklin County Court of Appeals found that a guaranty of the obligations of the tenant, its successors and assigns, did not guaranty the obligations of a company that took an assignment from the tenant's assignee. *Brogan v. Coughlin Servs., Inc.,* 2014-Ohio-469, 2014 WL 546831 (Ohio Ct. App. 10th Dist. Franklin Cty. 2014), finding that under the clear and unambiguous terms of the guaranty, "Tenant, its personal representatives, heirs, successors and assigns" did not include a corporation that took an assignment from the tenant's assignee.

VIII. Bankruptcy

Things can change rapidly and drastically if a party to a lease or sublease files bankruptcy. The trustee in bankruptcy or the debtor in possession (in either case, for purposes of this outline, the "trustee") has the power to assume or reject executory contracts, including leases, and to ignore many of the contractual restrictions on transfer. 11 U.S.C. § 365. A non-residential lease is deemed rejected unless the trustee assumes the lease before the earlier of the date of entry of an order confirming the plan, or 120 days after the date of the order for relief. In either case, the trustee can for good cause move the court to extend the deadline for 90 days, but the court cannot grant a second extension without the landlord's prior written consent. 11 U.S.C. § 365(d)(4).

A. Right to reject or assume.

As a condition to assuming the unexpired lease, § 365(b) requires the trustee to:

1. Cure, or give adequate assurance that the trustee will promptly cure, any existing non-monetary default, other than a default consisting of insolvency or the filing of a bankruptcy proceeding. Failure to operate as required by the lease can be cured at and after the time of assumption.

2. Compensate, or give adequate assurance that the trustee will promptly compensate, any person other than the debtor who was injured by the default.

3. Provide adequate assurance of future performance. In the case of a shopping center lease, § 365(b)(3) provides that the landlord is entitled to adequate assurance:

    a. Of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

    b. That any percentage rent due under such lease will not decline substantially;

    c. That assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

    d. That assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

B. Bankruptcy Court's ability to modify executory contracts.

The trustee is not bound by any provision in the lease prohibiting, restricting, or conditioning the assignment of the lease (11 U.S.C. § 365(e)), except that:

1. The trustee cannot assign a lease (including a sublease) without consent of the other party if applicable law excuses the other party from accepting performance from or rendering performance to the trustee or to an assignee.

2. The landlord of a shopping center lease is entitled to adequate assurance of future performance, as described above.

3. This power allows the bankruptcy court to modify or eliminate many of the restrictions discussed § III., above, but subject to the limitations of § 365(b)(3) in the case of shopping center leases.

4. The bankruptcy court's willingness to modify the lease depends heavily on the facts of the specific case, and may vary greatly from court to court and from judge to judge.

C. Sublessor's bankruptcy.

The tenant's bankruptcy creates a risk for the landlord as well as for the subtenant. If the trustee rejects the lease, the sublease or both:

1. Rejection of a lease constitutes a breach, but does not terminate the lease.

2. If the term of the sublease has commenced, the subtenant has the option of remaining in possession, and offsetting the sublease rent by the damages resulting from the tenant/sublessor's post-rejection non-performance. 11 USC 365(h)(1)(B). For that reason, some commentators recommend that landlords consider requiring that all subleases provide either that the subtenant must attorn to the landlord if the lease is rejected in bankruptcy, or that the subtenant will vacate upon notice from the landlord that the lease has been rejected. See David L. Pollack, *A Bankruptcy Primer for Landlord Tenant & Matters,* ACREL Papers, Spring 2008, *http://files.ali-aba.org/thumbs/datastorage/skoob/articles/BKAC0803TAB09-Pollack_thumb.pdf*.

D. Prompt action.

Often necessary if a party to a lease or sublease files bankruptcy. If the lawyer for a non-bankrupt party is not expert in bankruptcy law, it may be wise to engage bankruptcy counsel as soon as possible so that crucial rights are not lost.

Assignment and Subletting Clause—Office Project (Sample, with Recapture)

5.08. ASSIGNMENT AND SUBLETTING

Except as set forth in Section 5.08.D, Tenant shall not, without Landlord's prior written consent [*OPTIONAL:* , which will not be unreasonably withheld, as more particularly discussed in Section 5.08.H]: (a) assign this Lease or any interest under this Lease; (b) permit any assignment of this Lease by operation of law; (c) sublet the Premises or any part thereof; (d) permit any Change of Control (as defined in Section 5.08.C) to occur; (e) permit the use of the Premises by any parties other than Tenant, its agents and employees (any of the foregoing, a *"Transfer"*); or become the Transferee (other than by operation of law or as the result of a Change of Control) of any lease for, or occupant of, any other premises in the Project, whether or not the lease for those premises permits that Transfer without need to obtain Landlord's consent. Any Transfer in violation of this Section will be void, and will confer no interest on the assignee, sublessee or other Transferee.

A. Landlord's Recapture Option. Tenant shall notify Landlord in writing of any proposed Transfer at least 60 days in advance, including a copy of the proposed Transfer, the proposed effective date of the Transfer, the name and address of the proposed Transferee the consideration for the Transfer. [*Insert the following if consent is not to be unreasonably withheld:* If Landlord in good faith determines that Tenant's request is not reasonable, then] Landlord may at its option, recapture the space described in Tenant's notice by written notice to Tenant given within 30 days after receipt of Tenant's notice. If Tenant's notice covers all of the Premises, and Landlord exercises its recapture right, the Term will expire on the effective date stated in Tenant's notice as fully as if that date had been the Termination Date. If the proposed Transfer and Landlord's recapture is for less than the entire Premises, annual Base Rent and Tenant's Proportionate Share will be adjusted on the basis of the Net Rentable Area retained by Tenant in proportion to the Net Rentable Area stated in Section 1.01 as being contained in the Premises, and this Lease as so amended will continue thereafter in full force and effect. If the Lease is terminated as provided for in this Lease and Landlord does not re-let Premises, Tenant shall be under no further financial obligation to Landlord.

B. Net Profit. If Landlord, upon receiving Tenant's notice of a proposed Transfer, does not exercise its recapture option, Landlord in its sole discretion may withhold its consent to the proposed Transfer. If Landlord, upon receiving Tenant's notice of a proposed Transfer, does not exercise its recapture option, Landlord in its sole discretion may withhold its consent to the proposed Transfer. [*If consent is not to be unreasonably withheld, delete the first two sentences*.] If Landlord consents to the proposed Transfer, Tenant shall pay to Landlord 50% of all net profit derived by Tenant from the Transfer, including (a) the amount of all rent payable by the Transferee, and any lump sum or sums payable for the Transfer, less in either case the expenses reasonably incurred by Tenant with unaffiliated third persons in connection with the Transfer (i.e., brokerage commissions, tenant finish work, and the like), in excess of (b) the annual Base Rent and Additional Rent payable by Tenant under this Lease. If a part of the consideration for the Transfer is payable other than in cash, the payment of Landlord's share of the non-cash consideration shall be in a form satisfactory to both parties. Tenant shall furnish to

Landlord upon request a complete, certified statement by an independent certified public accountant, setting forth in detail the computation of all net profit derived and to be derived from the Transfer. The profit due under this Lease shall be paid to Landlord within five business days of receipt by Tenant of each payment made from time to time by the Transferee.

C. Change of Control. If Tenant is a corporation, a general or limited partnership, limited liability company, or other form of business association, and if the stock or other equity interests in Tenant are not listed on a national securities exchange (as defined in the Securities Exchange Act of 1934), then any Change of Control (as defined below) shall be deemed to be a Transfer. *"Change of Control"* means any transfer (including by way of merger, consolidation, or other reorganization of Tenant, or any transfer or issuance of shares, general partner interests, or membership) to others than the then present holders thereof, of (a) in the case of a corporation, the ownership of stock possessing, and of the right to exercise, at least 50% of the total combined voting power of all classes of stock of issued, outstanding and entitled to vote for the election of directors, whether by direct ownership, or indirect ownership through ownership of stock of another corporation or otherwise, and (b) in the case of any other type of business association, the ownership of either (i) interests possessing, and of the right to exercise, at least 50% of the total combined voting power to direct either the management of Tenant or the persons who are authorized to manage Tenant, or (ii) the right to receive at least 50% of the profits, losses or cash flow distributions of Tenant.

D. Affiliate Transactions. Tenant may, upon 30 days' prior notice to Landlord, but without need for Landlord's consent and without giving rise to Landlord's recapture option or to Landlord's right to share in profits, assign the Lease or sublease the Premises to a company that holds a controlling percentage in Tenant, or in which Tenant holds a controlling percentage. Any subsequent Change of Control of the Transferee is a separate Transfer pursuant to Section 5.08.C.

E. No Release. No Transfer will release or discharge Tenant of or from any liability, whether past present or future, under this Lease, and Tenant shall continue fully liable under this Lease. The sublessee or sublessees or assignee shall agree in a form satisfactory to Landlord to comply with and be bound by all the terms, covenants, conditions, provisions and agreements of this Lease to the extent of the space sublet or assigned (and to the extent that this Lease should conflict with any Transfer then this Lease shall prevail). Tenant shall deliver to Landlord, promptly after execution, an executed copy of each Transfer and an agreement of compliance by each Transferee and, in the case of an assignment, if Landlord so requests, an unconditional guaranty by Tenant, all satisfactory to Landlord. Landlord may grant any Transferee any forebearances, extensions, renewals or amendments, or other concessions without giving rise to any release or defense of Tenant, and Tenant waives any defense that might otherwise be available to a surety, other than Transferee's performance in full of Tenant's obligations.

F. Landlord's Expenses. Concurrently with Tenant's notice of any request for consent to any assignment, sublease or other transaction described in this Section 5.08, Tenant shall pay to Landlord a fee of $____ to defray Landlord's expenses in reviewing the request, and Tenant shall also reimburse Landlord immediately upon request for Landlord's attorneys' fees incurred in connection with considering any request for consent.

H. Reasonable Grounds. Without limiting any other grounds upon which Lessor may reasonably withhold its consent, examples of reasonable grounds for Landlord to withhold its consent to a Transfer include:

(1) in Landlord's reasonable judgment, the Transferee is of a character or is engaged in a business that is not in keeping with the standards of the Project, or is deleterious to the reputation of the Project or of Landlord, or that the proposed Transferee is not sufficiently experienced or financially responsible to perform its obligations under the proposed assignment, sublease or other documents governing the Transfer;

(2) the Transferee is then an occupant of any part of the Project or has within the six months preceding the request for consent to Transfer been a prospect involved in bona fide negotiations with Landlord respecting the leasing of any premises in the Project (or is in any way affiliated with such existing occupant or bona fide prospect), and Landlord has sufficient available vacant space in the Project to lease to the Transferee, or, by virtue of expiring or terminated leases, or the exercise of relocation, termination or similar options, can obtain sufficient available vacant space in the Project, to lease to the Transferee, by the proposed date of the Transfer or within a reasonable time thereafter;

(3) in Landlord's reasonable judgment, the portion of the Premises subject to the proposed assignment or subletting, or the portion of the Premises remaining, is not in a configuration that would be reasonably leasable to a third party, due to being irregular in shape or lack of appropriate means of ingress and egress suitable for normal purposes;

(4) the proposed Transferee is (A) a governmental unit (or subdivision or agency thereof) or (B) entitled to diplomatic, sovereign or similar immunity, or (C) not subject to suit in the courts of the State of Ohio, or (D) subject to suit only in the Ohio Court of Claims; or

(5) the Transfer would result in a breach of any agreement, covenant or restriction affecting the Project or by which Landlord is bound with respect to any part of the Project.

Further Reading

A. *Baldwin's Ohio Practice,* Kenton L. Kuehnle with Jack S. Levey, West Publishing, §§ 45:14-45:18 and 46.8.5.

B. Sidney G. Saltz & Martin P. Miner, "Subleases, A New Approach—Revisited," American Bar Association's *Real Property, Probate and Trust Journal*, updating their 1999 article "Subleases: A New Approach—A Proposal."

C. American Bar Association, *Subleasing and Assignments Desk Book.* Real Property, Probate and Trust Law Section.

D. *S*. Spencer Compton and J. Stein, "Landlord's Checklist of Silent Lease Issues," (3d Ed.) *Practicing Law Institute's Practical Real Estate Lawyer*, Vol. 29, No.3, May, 2013.

Chapter 4a: Commercial Landlord Tenant Law

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I. The Basics

A. The premises.

Try to obtain a copy of the site plan if the Premises is part of a larger center—"a picture is worth a thousand words."

1. Is the leased Premises part of a retail center, an office building, a warehouse? Is it a stand-alone facility?
2. Is the leased Premises an outparcel of a larger development?

B. The players.

1. Understand the underlying goals and objectives of Landlord and Tenant.
    a. Landlord wants control. Landlord wants to know who is in possession of the Premises, how the Premises will be used and whether the occupant has the financial resources and business experience necessary to operate successfully at the Premises and abide by the terms of the lease.
    b. Tenant wants flexibility. Tenant may view the right to assign or sublease as an exit strategy.
2. Understand the business of Landlord and Tenant. For example:
    a. If the Premises is part of a shopping center, Landlord will care a great deal about protecting the tenant mix and restricting Tenant's ability to assign the lease or sublet the Premises. For a shopping center owner, tenant mix may be as important as rental revenue.
    b. If the space is in a warehouse, are there floor load limits that need to be complied with?

3. A prospective subtenant or assignee should conduct a thorough due diligence investigation—not only as to the physical characteristics of the Premises but the underlying documents to which it is subject, such as landlord's mortgage and the prime lease.

C. Due diligence and monitoring.[1]

1. Landlord should conduct adequate due diligence on Tenant before entering into the lease, including, but not limited to:
   a. Background and credit checks.
   b. Review of financials.
   c. On-line investigations (surprising what a Google search reveals).
   d. Identities of Tenant and any guarantors including ownership structure.
   e. References.
2. Landlord should also consider adding a representation from Tenant in the lease as to Tenant's organizational structure and that Tenant or Tenant's accountant, attorney or corporate officer provide an annual certification as to such ownership structure.[2]
3. If the lease is assigned to an affiliate, Landlord may require that Tenant's affiliate remain an affiliate throughout the lease term and if should such affiliation cease, Landlord is notified.[3]
4. Tenant should not be allowed to assign or sublease if Tenant is in default.[4]

II. Assignment

A. Basic concepts.

1. An assignment is a transfer by Tenant of the entire term and Tenant's "estate", i.e., Tenant's entire interest in the lease whereas a sublease is a transfer of less than Tenant's entire interest.[5] "Generally, an assignment divests the original lessee of his interest in the property but not of his

[1] "Landlord's Checklist of Silent Lease Issues" (2d Ed.) by Landlord's Silent Lease Issues Subcommittee, Commercial Leasing Committee, Real Property Law Section, New York, State Bar Association. NYSBA N.Y. *Real Property Law Journal*, Spring 2008, Vol. 36, No. 2.

[2] This may become important for determining change of control.

[3] "Landlord's Checklist of Silent Lease Issues" (3d Ed.) *The Practical Lawyer*, American Law Institute-American Bar Association Committee on Continuing Professional Education, May, 2013.

[4] Practice pointer: Watch for *de minimus* defaults that could restrict the ability to assign or sublease. When representing tenants, consider adding a proviso that provided Tenant is not in default beyond any applicable notice and cure periods.

[5] Milton R. Friedman & Patrick A. Randolph, Jr., "Friedman on Leases," 7-82 Patrick A. Randolph, Jr. ed., *Practicing Law Institute 2007* (2004).

responsibilities under express covenants provided in the lease." *Manlow Investment Co. v. Host Marriott Corp.,* 9th Dist. No. 02CA0100-M, 2003-Ohio-2347 at ¶ 7.

2. Typically, an assignment and assumption of lease agreement will specify that assignee assumes all obligations under the lease from and after a specified date. Unless it is part of the overall transaction, an assignee will not want to assume any retroactive obligations of Tenant by a general assignment and assumption of the lease.

3. The assignment is made by Tenant to assignee, assignee pays rent directly to Landlord and has a direct relationship with Landlord.

4. Tenant may seek to be released from its obligations under the lease in case of an assignment because the assignee will have a direct relationship with Landlord, but most landlords will refuse to grant such a request because Landlord will want Tenant to continue to have secondary liability under the lease.

B. Consent of landlord.

1. If the lease is silent as to assignment (or subletting), Landlord's consent to assignment is not required.

2. Be careful about any "silence is deemed to be consent" provision in the Lease. Landlord's consent may be predicated on Landlord obtaining consent from Landlord's lender. Therefore, any "deemed consent" could create an unsatisfactory issue for Landlord should an assignment or sublease occur because Landlord was unresponsive. Tenant will want Landlord to timely give consent so that Tenant is not delayed in its business activities. One compromise might be to put some language in bold text into the consent request to the effect that Landlord's consent will be deemed to be given unless Landlord responds to the request within [___] days.

3. More frequently, the lease will provide that Landlord's consent to an assignment (or sublease) "shall not be unreasonably withheld."

    a. Determining what is "reasonable" is sometimes a question of the specific facts. Landlord and Tenant may want to agree up front on what is "reasonable".

    b. The burden of proof is on the Tenant to prove that Landlord's refusal to consent to an assignment (or sublease) is unreasonable.

    c. When considering whether to grant consent or not, Landlord may want to consider:

        i. <u>Business experience of assignee (or subtenant)</u>. for example, if the business is a restaurant, does the assignee (or subtenant) have restaurant ownership or management experience?

ii. Prospective use of the premises. Does the assignee (or subtenant) intend to use the Premises for the same use as Tenant? If not, will the use violate any exclusive use provisions granted to other tenants? Will the use fit into the current tenant mix of the center?

iii. Financial net worth of assignee. Does assignee have a financial net worth (more liquid, less goodwill) to sustain the business and pay the rent? [6]

iv. Percentage of sales rent. If the rent due under the lease includes a percentage of Tenant's gross sales, Landlord will want to evaluate how assignee's gross sales might compare to Tenant's sales.

d. In order to shield Landlord from assertions by Tenant that Landlord's refusal to consent is unreasonable, a lease may include a list of factors that Landlord may consider before granting consent to an assignment. For example, Landlord may not want a tenant that is currently in litigation with Landlord or is a controversial tenant or is a specified entity that might have a reputation for aggressive litigation programs against landlords or governments.[7]

C. The lease may provide that LANDLORD'S consent to assignment is not required in certain instances, such as:

1. Merger or consolidation.
2. Sale of stock for publicly traded corporations (but not for closely held corporations).
3. Sale of substantially all of the assets of Tenant's business.
4. An assignment from Tenant, as an individual, to an entity in which the individual is the controlling shareholder.

   An assignment to an entity meeting a specific financial net worth threshold determined in advance by the Landlord and set forth in the lease.
5. An assignment to Tenant's franchisor.
6. An intra-company transfer.
7. In the event of a multi-store sale for a retail tenant.[8]

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[6] Practice Pointer: Landlord will want "goodwill" excluded from financial net worth.

[7] "*Landlord's Checklist of Silent Lease Issues* (Third Edition), Ibid.

[8] Practice Pointer: If Tenant is a national chain, it may be more likely that Tenant will sell a portfolio of stores rather than all of the company's assets. Tenant will not want to obtain Landlord's consent for the sale of a portfolio of stores which could hold up Tenant's transaction.

D. Assignments without Landlord's consent.

The lease may provide that certain instances are deemed to be assignments made without Landlord's consent, such as: a change in control of Tenant (or any guarantor of the lease) that is a privately-owned corporation, partnership, limited liability company, or business trust, whether said change of control consists of the transfer of stock, partnership interests, membership interests, or beneficial interests in trust, the sale of assets, or any agreement creating a right in anyone other than the original shareholders, partners, members, or holders of beneficial interests of said Tenant to conduct Tenant's business or to control any such guarantor.

E. Some lease provisions may be construed as de facto restrictions on assignment:

1. Permitted use clause.

If the lease contains a provision that limit's Tenant's use to a specific purpose and no other purpose, Tenant's ability to assign the lease will be limited to a pool of potential assignees or subtenants that intend to use the Premises for the same purpose as Tenant. If the permitted use clause is broad, i.e. any lawful purpose, but the lease provides that Tenant's use is subject to exclusive use provisions in effect at the time of the lease, Tenant's ability to assign (or sublease) may be restricted. Also, if the lease provides that Tenant's use is subject to any exclusive use provisions or leasing restrictions in effect at the time of the assignment (or sublease), Tenant's ability to assign the lease (or sublease the Premises) may be restricted. The use clause is also important because if the use changes, there may be changes in the Premises for which Landlord could be liable, such as ADA, for example, or that trigger other legal requirements.

2. Alterations.

The lease may prohibit non-structural alterations which may impact a potential assignee who might need to retrofit the space for its particular use.

3. Signage.

The lease may prohibit or limit signage such that assignment of the lease becomes impossible. For example, if an office lease prohibits a change in signage on a directory sign, it may be a non-starter for a prospective assignee.

4. Trade name.

The lease may provide that Tenant is required to operate its business under a particular trade name. If assignee does not intend to operate under the same trade name, an assignment will be impossible. A better

approach is for a Landlord to permit a change in the trade name if the proposed assignee or subtenant meets the criteria for such assignment or sublease as set forth in the lease.

F. Assignments by operation of law.

1. Assignments by operation of law are involuntary transfers and may be made without regard to restrictions in the lease. Typically, such involuntary transfers are made as a result of: (1) Death of Tenant, if an individual, (b) Judicial sale, (3) Bankruptcy, (4) Appointment of a receiver, and (5) Merger of corporate tenant.
2. The lease may provide, however, that assignments by operation of law are prohibited.

III. Subleases

A. Basics.

1. A sublease is a transfer of less than Tenant's entire interest. In other words, Tenant retains a reversionary interest and has the *right* of possession under the prime lease. Therefore, a "sublease" that is for the entire term of the prime lease rather than a shorter term (such as expiring one day before the prime lease expires) may be considered not to be a sublease but an assignment because Tenant, as sublandlord, retains no reversionary interest.
2. "A sublease stands and falls with the prime lease"[9]
3. Unlike an assignment in which the assignee has a direct relationship with Landlord, a subtenant under a sublease has no direct relationship with the Landlord. (See discussion in Section 6 regarding estoppels and non-disturbance agreements). As such, Landlord is not obligated to accept rent from the subtenant. The subtenant's rights are derived from Tenant under the prime lease, as sublandlord.
4. Subtenant is charged with knowledge of the terms of the prime lease and, as a result, should demand a copy of the prime lease (even if rent provisions are redacted) and understand the terms. First and foremost, the subtenant should confirm that the prime lease permits subletting and, if prime landlord's consent is required, that the sublease is conditioned upon prime landlord's consent.

B. Parties to consider in sublease scenario.

In the sublease scenario, there are three parties' interests to consider—the Landlord, the Tenant/sublandlord and subtenant. "Subleases: A New Approach Revisited" 41 *Real Prop. Prob. & Tr. J.* 1(2006) discusses the various approaches that some practitioners take when drafting a sublease, such as incorporating the

[9] *Friedman*, pgs. 7-144.

prime lease by reference in the sublease, an "off-the-shelf" approach, an all-inclusive approach in which the sublease mirrors the prime lease, and the pitfalls of each method. The journal contains an excellent form of generic sublease.

C. Issues of concern for parties involved in sublease.

Below is a non-inclusive list of issues of concern for each party involved in the sublease transaction (in no particular order of importance):

1. Landlord (prime landlord).

a. Right to terminate the lease and recapture the premises (if granted such a right under the prime lease) if Landlord refuses to grant consent to the sublease.

b. Depending on the size of the Premises, Landlord may want the sublease to include a provision that subtenant has no right to subdivide the leased Premises.

c. Landlord may want to receive the "over-rent" (difference between rent paid by Tenant under the prime lease and rent paid by the subtenant).[10]

d. Subtenant is required under the sublease to carry the same insurance as Tenant under the prime lease and Landlord is named as an insured.

e. Subtenant is prohibited from assigning the lease or subletting the Premises.[11]

f. No one but subtenant shall be in possession of the Premises.

g. Subtenant complies with rules imposed by the landlord for the Premises.

h. The sublease is subject to and subordinate to the prime lease.

i. Any encumbrances on title are against the subleasehold interest only and not against Landlord's fee interest.

j. Consent of Landlord to the sublease is not a waiver of Landlord's rights to consent to other assignments or subleases.

k. Subtenant's use of the Premises will not breach the terms of other tenant leases or exclusive use rights granted by Landlord to other tenants in the same center.

l. Landlord may want to bill subtenant directly for costs or accept rent directly from subtenant even though Tenant is still primarily liable under the Lease.

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[10] Practice pointer: If Landlord keeps all of the "over-rent," Tenant will have no incentive to sublease the Premises and may elect to abandon or terminate the lease. One option could be to split the "over-rent" 50/50.

[11] Practice pointer: For a large commercial tenant, this requirement may not be acceptable for business reasons.

2. Tenant/sublandlord.

a. Sublease must expire prior to the expiration of the prime lease. [Remember that the Tenant/Sublandlord retains a reversionary interest.]

b. Subtenant must remove personal property at the end of the lease term. If not, Tenant/sublandlord needs right to remove subtenant's personal property and dispose of it at subtenant's cost to avoid a holdover under the prime lease.

c. In addition to right of periodic inspection of the leases Premises, Tenant/sublandlord may want right to access the Premises at the end of the lease term to remove any of Tenant/sublandlord's personal property or alterations required to be removed pursuant to the prime lease.

d. If subtenant holds over, Tenant/sublandlord may want subtenant to pay any damages that Tenant/sublandlord incurs under the prime lease for such hold over.

In addition to other events of default under the sublease, Tenant/sublandlord may want to include as an additional event of default under the sublease that any default under the prime lease caused by subtenant is a default under the sublease.

3. Subtenant.

a. First and foremost, the Tenant/sublandlord has the right to sublease the Premises and, if Landlord's consent is required by the prime lease, that the sublease is conditioned upon such consent.[12]

b. The prime lease is in full force and effect and Tenant/sublandlord is not in default thereunder.[13]

c. Subtenant has obtained a copy of the prime lease and any amendments thereto and subtenant's intended use of the Premises is permitted under the prime lease.

d. The sublease includes provisions that require Tenant/sublandlord (who has no right of physical possession of the Premises) to make demand upon Landlord to perform Landlord's obligations under the prime lease, such as repair and maintenance obligations.

e. Tenant/sublandlord will not terminate the prime lease without subtenant's consent.

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[12] Practice pointer: If other items, such as signage, parking or alterations require prime landlord's written consent, include those items in the form of Consent so that the prime landlord needs to be approached only once. Also, obtaining prime landlord's consent may be a long-lead time item—start the process early.

[13] See § V regarding estoppels and NDA.

f. If Tenant/sublandlord receives a rent abatement due to damage or casualty, subtenant likewise receives a rent abatement.

g. Covenant that if subtenant pays rent dutifully under the prime lease, then Tenant/sublandlord will, in turn, pay rent due under the prime lease.

h. Tenant/sublandlord will not amend the terms of the prime lease, if the amended terms will have an adverse effect upon subtenant.[14]

i. Tenant/sublandlord will use reasonable efforts to obtain consent of Landlord if required under the prime lease for alterations or assignment or subletting.

j. Tenant/sublandlord agrees to exercise any renewal options available under the prime lease corresponding to renewal options available to subtenant under the sublease if subtenant exercises such options under the sublease.

k. If subtenant is making improvements to the Premises (a "Tenant Allowance"), the subtenant should make sure that it has a right of offset against future rent if Tenant/sublandlord is obligated to pay the Tenant Allowance but fails to do so.

IV. Consent of Lender

A. If the leased premises are subject to a mortgage, the mortgage may prohibit an assignment or sublease made without lender's consent. If such consent is not obtained, the due on sale clause in the mortgage may be triggered because an assignment or sublease may be defined as a "transfer of interest".

B. Landlord may also want to require that any consent is subject to consent by lender and if Lender does not consent, Landlord's refusal to consent is reasonable.

V. Estoppels and Non-Disturbance Agreement (NDA)

A. Estoppel.

Rather than relying solely on the representation of Tenant/sublandlord that the prime lease is in full force and effect and there are no defaults, subtenant should require that Tenant/sublandlord provide an estoppel certificate from the prime landlord that attests to those facts. The estoppel certificate can be incorporated into the form of Consent (if prime landlord's consent is required) or a non-disturbance agreement.

[14] Practice pointer: Landlord should ask for a materiality threshold.

B. NDA.

As discussed above, the prime landlord and the subtenant have no direct relationship and the sublease rests on the prime lease. If the prime lease is terminated, the sublease collapses. Depending on the situation, the subtenant may want to preserve its right to continue to occupy the Premises and keep its lease in full and force and effect even if the prime lease is terminated. This is particularly true if subtenant will be making a substantial investment in the Premises or if the lease is a long-term lease or if the site is of critical importance to the subtenant. However, the prime landlord may not wish to enter into an NDA with subtenant if the economic terms of the sublease are below market or if the prime landlord has other plans for the leased Premises or some other business reason.

VI. Breach of Assignments and Sublease Provisions and Other Considerations

A. Consider making an assignment or sublease made without Landlord's consent an automatic default without notice and opportunity to cure.

B. Many Landlords charge a fee for review and consenting to any assignment or sublease.

C. If Landlord is sensitive about rent because of prior rent concessions or less than fair market rent or other "sweetheart" terms given to Tenant, Landlord may want an assignment or sublease to be kept confidential.

D. If the lease is assigned or sublet without Landlord's consent and the lease requires such consent, will the lease be automatically void? Under *Brokamp v. Linneman*, 20 Ohio App. 199, 153 N.E. 130 (1st Dist. Hamilton Cty. 1923), the answer is No. Such a breach does not cause an automatic forfeiture but the lease may be voided at the option of the Landlord. If the Landlord knows of the assignment or sublease and accepts rentals after the assignment or subletting, both the breach and the right of forfeiture are waived.

VII. Guarantor and Release of Assignor

A. Most Tenants and guarantors will want released from any underlying liability in case of an assignment.

B. Landlord wants as many people as possible retaining liability for performance.

C. If Landlord is willing to release guarantor or assignor after assignment, Landlord may consider a "burn off" concept, i.e., a complete release if assignee faithfully performs all terms and conditions (not just payment of rent) of Lease for some stated period of time.

VIII. Statutory and Case Law

A. Ohio Rev. Code § 5301.01.

Ohio Rev. Code § 5301.01 provides that a lease for more than three years must be acknowledged with the same formalities as a deed. When calculating the three-year period, one should include all option terms in the calculation.

B. Illustrative cases.

1. Is the lease an assignment or sublease?

a. *Plaza Dev. Co. v W. Cooper Ents., LLC,* 12 N.E.3d 506 (2014) is a case wherein the court considered whether a sublease was an assignment or a sublease and whether a tenant's obligation under a prior lease terminated as of the date of a subsequent lease. Plaza Development Company ("Plaza") entered into a 20-year term ground lease with DF&R Restaurants, as tenant. The tenant's leasehold interest was thereafter assigned by subsequent tenants. In 2007, tenant's interest was assigned to W. Cooper Enterprises LLC ("WCE"). In 2009, WCE assigned its interest to Baja Sol, an affiliate of WCE. Later in 2009, Baja Sol notified Plaza that it ceased operations at the site and desired that the premises be re-let as soon as possible. In May, 2010, Baja Sol subleased the Premises to El Trifuno (the "2010 Lease"). In November 2010, Plaza contacted Baja Sol and WCE alleging that a default balance was due and Plaza subsequently filed an eviction action against WCE, Baja Sol and El Trifuno. In December 2010, WCE, Baja Sol and El Trifuno relinquished possession and Plaza dismissed the eviction action.

In January, 2011, Plaza entered into a 5-year lease (the "2011 Lease") with El Trifuno. In March, 2011, Plaza filed a complaint naming WCE, Baja Sol and another intervening tenant for breach of contract or lease, promissory estoppel, and quasi-contract (Plaza later amended the complaint to add other claims). In May, 2012, WCE and Baja Sol filed a motion for summary judgment arguing in part that Plaza, by entering into the 2011 Lease, terminated the ground lease by operation of law. Plaza opposed that motion and argued that Plaza made reasonable efforts to relet the Premises and the use the rent to mitigate its damages. [Note: See case for a full summary of the pleadings and claims.] The trial court determined that the 2010 Lease was a sublease and not an assignment and once Plaza entered into the 2011 Lease, it eliminated Plaza's right to further rent after January 1, 2011 from WCE and Baja Sol.

The trial court noted the distinction between an assignment of lease and sublease in that the assignment conveys the whole term, leaving no reversionary interest while the sublease grants

the subtenant with an interest that is less than the lessee's or reserves to the lessee a reversionary interest in the term (*citing House of LaRose Cleveland, Inc. v Lakeshore Power Boats, Inc.,* 8th Dist. No. 60904, 1992 WL 140074 (June 18, 1992). When examining whether the 2010 Lease was a sublease, the court looked at such items as the title of the document, whether sublandlord retained the rights and privileges of landlord and whether sublandlord had the right to enforce the terms of the lease. The appeals court agreed with the trial court that the 2010 Lease was sublease. The court of appeals further noted that the sublandlord reserved the right to terminate the agreement in the event of a default.

As to the damage issue, Plaza argued at the trial court level that WCE was liable through the expiration of the term of the ground lease, subject to offset, i.e., payments from the 2011 Lease. WCE and Baja Sol argued that the 2011 Lease terminated the ground lease by operation of law. The trial court determined that the 2011 Lease terminated the ground lease by operation of law and that Plaza entered into the 2011 Lease to mitigate its damages. The court of appeals, however, disagreed that the 2011 Lease terminated the ground lease by operation of law because entering into the 2011 Lease was allowed under the terms of the ground lease, i.e., reentering and reletting in the event of a default.

b. *Albright v. Varicon, LLC*, 2014 WL265798 (Ohio App. 8th Dist.) is a case in which the court considered whether there has been an implied assumption of a lease. Although there was not an express assumption of the lease, the successor tenant continued to occupy the space and pay rent. The appellate court found that the trial court improperly granted summary judgment to the successor tenant who claimed that successor tenant did not impliedly assume the lease and remanded it to the trial court. [*Note*: This case also has a discussion of successor liability involving the transaction between the original tenant and the successor tenant.]

2. Consent.

a. *Love v Beck Energy Corp*., 2015 WL 1453338, 2015-Ohio-1283 is a case involving the assignment of a lease made without landlord's consent and a handwritten provision in the lease that modified the typed provision in the lease regarding assignment. The essential facts are that Beck Energy assigned the lease to XTO Energy without obtaining landlord's consent despite a handwritten provision in the lease that prohibited assignment without landlord's consent. The trial court found that the handwritten language controlled over the pre-printed language. On appeal, the court of appeals noted that the rule of

construction in contacts is that the handwritten prevails over typed or pre-printed terms when there is a conflict between the two (*citing French v Pappalardo*, 8th Dist. No. 57152, 1990 WL 84278 (June 21, 1990). The court of appeals also considered which two provisions (the pre-printed provision allowing assignment and the handwritten provision prohibiting assignment) could be harmonized and concluded that they could not be. Another issue in the Love case was whether there is a reasonableness requirement in the assignment clause. There is no express language stating that the lessor cannot arbitrarily or unreasonably withhold consent. The Eighth District has indicated that when a contract does not contain a limitation that consent cannot be arbitrarily or unreasonably withheld, then consent can be withheld for any reason. *F&L Ctr. Co. v Cunningham Drug Stores, Inc*., 19 Ohio App. 3d 72, 75, 482 N.E.2d 1296 (8th Dist. 1984). The court of appeals notes that the First Appellate District has criticized the Eighth District's decision in *Littlejohn v Parrish*, 168 Ohio App. 3d 456, 2005-Ohio-4850 (1st Dist.) in which the court agreed with the dissent in *F&L Ctr. Co*. that restrictions on assignment are restraints against the alienation of property interests, citing a trend of cases holding that a lessor must act reasonably in withholding consent under a lease providing that lessor's consent to assignment is required. Given the time frame that the lease was signed in the Love case, the court felt compelled to apply the reasoning in the *F&L Ctr. Co.* case. The court of appeals concluded that the consent can be withheld for any reason.

b. *F.W. Englefield, IV v. Corcoran*, 2007 WL1162162 (4th Dist. Ross Cty.) involves the exercise of a purchase option contained in the lease and Landlord's contention that successor tenant's exercise of the purchase option was unenforceable due to a prior breach of compliance with the lease by successor tenant's predecessor. The appellate court stated that even if the tenant's predecessor breached the terms of the lease, such breach did not render the lease void, but voidable at the option of the lessor (*citing Brokamp v. Linneman* (1923) 20 Ohio App. 199, 201, 153 N.E. 130). In order to take advantage of the breach, the lessor must declare a forfeiture by some act; otherwise, if the lessor has waived its right of forfeiture for the claimed breach. So, the appellate court in *Englefield* found that the lessors waived their right to take advantage of the claimed breach because the lessors allowed the tenant to remain on the premises and accept rent.

c. *Renaissance Management v. Jay-Lor Corp*., 2011 WL 2270433 (Ct. of App. 8th Dist. Ohio 2011). In this case, the tenant ("Jay-Lor") sold its restaurant business and wanted the landlord to consent to assignment of the lease whereby Jay-Lor's buyer ("ZTY") would

assume the balance of the lease term. The landlord refused but entered into a new lease with ZTY which lease term included the balance of Jay-Lor's lease term. Approximately five months later, ZTY defaulted on the lease agreement and abandoned the premises. The landlord then entered into a new lease with JRS, who also defaulted. After pursuing ZTY and JRS and finding them to be uncollectible, the landlord sought to collect from Jay-Lor. The court found that had the landlord agreed to an assignment of the lease from Jay-Lor to ZTY, Jay-Lor would have remained contractually obligated and would have been on notice and liable for any unpaid rents if ZTY defaulted. However, because the landlord elected to enter into a new lease (two, in fact), the new lease extinguished the obligation of Jay-Lor.

3. What are Tenant's obligations as assignee?

B&G Properties Ltd. Partnership v OfficeMax, Inc., 2013-Ohio-5255 (8th Dist. Ct. of App., Cuyahoga Cty.), decided Nov. 27, 2013. This case is instructive regarding the obligations and liabilities of a tenant who assigns its lease. Office Max entered into a 20-year lease with B&G, commencing in 1995, but promptly assigned it to Planet Music in 1996, who subsequently assigned it to Borders in 2005. In 2001, Borders filed a Chapter 11 bankruptcy, which ultimately was converted to a liquidation. B&G sought rent from Office Max, and when Office Max refused, B&G took possession and sued Office Max.

Section 7.2(a) of the lease provided for cancellation of the lease if the "Tenant" filed bankruptcy and rejected the lease. "Tenant' was defined in the lease as Office Max, but did not state "and its assigns." The trial court determined that, in the context of the lease, the reference in this clause to "Tenant" referred to the original tenant, i.e. Office Max. Office Max maintained its assignment relieved it of all liability. The Court however noted black letter law providing there is no discharge unless the landlord consents. The Court pointed to § 8.2 of the lease, which incorporated this concept and stated that any assignment would not relieve the tenant (Office Max) of primary liability, even if the landlord consented. The Court noted that since the cancellation provision really inures to the benefit of the landlord by giving the landlord immediate possession of the Premises, most states hold that provision applies to the tenant in possession at the time of the bankruptcy. Following these cases, the Court held that this provision applies to the tenant in possession ***unless*** the parties to the lease make it clear to whom it should apply. Section 7.1(iv) preserved the landlord's right to claim rents after the termination of the lease. Read in conjunction with § 7.2, B&G preserved its right to be compensated for damages in the bankruptcy proceeding. Looking then to the non-release language of § 8.2, the Court found that although the cancellation clause applied to Borders, B&G had the right to collect rent from Office Max, who was jointly and severally liable for rent as a surety, for the balance of the lease term.

The lease also contained a provision that the Court determined relieved the landlord of the duty to mitigate: "Tenant shall remain liable for the Fixed Rent . . . for the balance of said Term, whether Premises by relet or not. . . ." B&G did relet the Premises and Office Max did receive a credit for that rent, so the landlord was not placed in a better position than if no breach occurred. Thus Office Max could not argue that B&G breached its common law duty to mitigate.

The final issue addressed is whether the 5% late fee imposed on Office Max was an unenforceable penalty. Addressing the three prongs to determine if the late fee was a penalty, the Court found it was not (i.e., the damages were not easily ascertainable at the time of the lease, the lease was freely negotiated by parties of equal bargaining power, and there was a clear statement of intent to stipulate damages).

The Court upheld the trial court's ruling stating the provisions were negotiated by sophisticated business entities with equal bargaining power, so "they must live by them."

Of note is that Judge Stewart concurred only in judgment, and Judge Gallagher concurred in judgment only in part, dissenting on the issue of the duty to mitigate, citing *French Town Square Partnership v. Lemstone, Inc.,* 99 Ohio St. 3d 254, 2003-Ohio-3648, as a basis to remand for a determination of whether the landlord's efforts to lease the Premises were reasonable.

4. Assignor as surety and guarantors.

a. *Brogan v. Coughlin Servs., Inc*., 2014-Ohio-469. (10th Dist. Ct. of App., Franklin Cty.), decided Feb. 11, 2014.

In this interesting case, landlord leased property to Coughlin Services, Inc. by lease dated July 27, 1988. The lease was for a three-year term with an option to renew for four consecutive periods of three years each. Albert Coughlin and Melody Coughlin guaranteed the performance of the tenant pursuant to the terms of the following guaranty, relevant portions of which are set forth below:

> *The Guarantors . . . do hereby covenant with the Landlord its successors and assigns, that if default shall at any time be made by the Tenant, its personal representatives, heirs, successors or assigns in the payment rent or in the performance of any other covenants contained in such lease agreement, the Guarantor will pay to the Landlord, its successors or assigns, the rent or any arrearage thereof. . . .*

All four renewal options were exercised by the tenant, Coughlin Services, Inc. Subsequently, Coughlin Services sold its business and assigned the remaining term of its lease to 1457 Schrock Road, Inc. as tenant. 1457 Schrock Road, Inc. subsequently

assigned the lease to 1457 Cruise Thru Drive Thru, Inc. and one Saleh Nofal, individually. The landlord subsequently sold the Premises to the plaintiffs in this case, Sean Brogan and Barbara Brogan. When default occurred on the part of Cruise Thru, Brogans attempted to collect on the Guaranty originally given by Coughlins. In affirming the decision of the trial court finding that the Guaranty was unenforceable as against the Coughlins, the Court of Appeals distinguished between the relationship, which the tenant/assignee has with the Landlord, and the relationship which the Guarantor has with the Landlord. The Guarantors' relationship is specifically governed by the terms of the Guaranty language, not by the terms of the Lease. Here, all of the parties had stipulated that the tenant in the Premises at the time the default occurred was not an "assignee" of the original tenant, Coughlin Services, Inc. This was because intermediate assignments of the lease had taken place passing the leasehold estate down from 1457 Schrock Road, Inc. to Cruise Thru. In no respect could Cruise Thru be considered an assignee of the original tenant. Since the Guarantors liability was limited to assignees of the original tenant, Coughlin Services, the Guarantors' obligation did not extend to a default by Cruise Thru.

b. *Co Le'Mon LLC v. Host Marriott Corp*., 2006 WL 1485235 (Ct. of App. 9th Dist. Ohio 2006). The case centered around an assignment of a lease made by Host Marriott Corp. ("Marriott") to Elias Brothers Restaurant ("Elias") that included an indemnification by Elias of Marriott for any breach or failure to make payments under the lease. Subsequent to the assignment, Elias stopped paying rent and filed for bankruptcy. The landlord attempted to hold Marriott liable as primary obligor under the lease. However, the court found that Marriott was in the position of guarantor of the lease, not as primary obligor under the lease because the lease stated that "Tenant shall have the right to assign this Lease . . . provided Tenant continues to be liable for the prompt and full payment of rentals and other payments required hereunder" (emphasis added). The court further stated that if the intention was for Marriott to be the primary obligor, it should have been expressly stated in the lease. For example, in the case of *Manlaw Investments Co. v. Host Marriott Corp*., 9th Dist. No. 02CA00100-M, 2003-Ohio-2347 ¶ 8 the lease provided that:

> *[M]ay at any time assign this Lease * * * but no assignment or sublease shall reduce or affect in any way any of the obligations of [tenant] hereunder, and all such obligations shall continue in full effect as obligations of the principal and not as obligations of a guarantor or surety, to the same extent as though no assignment or subletting has bene made." [Emphasis added]. Manlaw at ¶8.*

Further, under a Stipulated Order in the bankruptcy proceeding the landlord waived any and all claims against Elias and, as a result, the landlord's claims against Marriott were also discharged.

5. Failure of a condition precedent.

Telecom Acquisition v. Lucic Enterprise, 2012 WL 424955 (Ct. of App. 8th Dist. Ohio 2012). The case involved the assignment of a lease to a tenant/assignee ("Lucic") who purchased the business assets of tenant/assignor ("KAOS"). The assignment of lease was contingent upon the transfer of a liquor permit from KAOS to Lucic but gave no time period within which this event was to occur. It took several years from the liquor permit to be transferred and issued to Lucic. However, Lucic occupied the premises, continued to pay rent to the landlord ("Telecom") and made improvements to the premises. When Lucic attempted to exercise its option to extend the term of the lease, Telecom refused to accept the option to extend the term and filed suit to evict Lucic at the end of the lease term. The Cleveland Municipal Court found in favor of Lucic and against Telecom. Telecom appealed, citing several assignments of error. On the assignment of errors raised by landlord in its appeal, the court held that: (A) that Lucic had standing to renew the lease prior to the transfer of a liquor permit from KAOS to Lucic (a condition precedent in the Assignment of Lease), (B) Telecom was estopped from asserting that its acceptance of rent for several years waived its right to evict Lucic at the expiration of the lease term, (C) the bankruptcy by a guarantor the lease was not a valid basis for Telecom's refusal to honor the renewal of the lease and (D) Telecom could not refuse to honor the renewal of the lease because of non-compliance with a lease provision for which Lucic was not given notice.

IX. Bankruptcy Considerations

A. U.S.C. § 362 provides for an automatic stay against enforcement of actions against the debtor or property of the debtor's estate effective upon the filing of a bankruptcy petition by the debtor. The lease may provide that the filing of bankruptcy by the Tenant is an event of default under the lease. But, the Landlord's enforcement of the lease against a debtor/Tenant in the event of such a default is governed by the Bankruptcy Code.

B. Prior to a rejection or assumption of a lease, the debtor must perform the lease:

1. When do obligations under the lease arise? Pre-petition? Post-petition?

2. Administrative claims.

C. U.S.C. § 365(d)(4) provides that a bankruptcy trustee has 120 days to assume or reject an unexpired lease. But the court may extend such period by 90 days.

1. Assumption of Lease.

a. An assumed lease is an obligation of the debtor's estate.

b. Pre-petition defaults are cured before the lease is assumed and assurance of future performance is given. (11 U.S.C. § 365(f)(1).)

c. Assumed leases in shopping centers are subject to all provisions in the lease including radius, locations, exclusivity and use and that the assignment or assumption of a lease will not disrupt the tenant mix or balance of the shopping center, but the court may override the use provisions. (See 11 U.S.C. § 365(b)(3)(C) and (D) and 11 U.S.C. § 365(f).)

d. Non-monetary defaults, such as continuous operation, may be impossible to cure but such provisions must be adhered to after the lease is assumed. (11 U.S.C. § 365(b).)

2. Ride-through (if the lease is neither assumed nor rejected).

3. Designation rights/auction.

4. Rejection of Lease.

a. Is rejection of the lease a termination of the lease?

b. Effect of rejection:

i. If debtor is the landlord.

ii. If debtor is the tenant.

iii. Dual rejection.

(a) rejection of the prime lease by debtor as tenant.

(b) rejection of the sublease by debtor as landlord.

D. Continuing obligations—a discharge of a debtor's debt by the Bankruptcy Code does not affect liability of other parties under the lease. (See 11 U.S.C. § 524(e).)

E. Damages.

1. Damage cap.

2. Administrative claims.

X. Bringing It All Together

A. Structure Diagram—Exhibit A.

B. Excerpts from sublease between Alice Wonderland and White Rabbit—Exhibit B.

C. Sample sublease consent—Exhibit C.

Exhibit A

MASTER LEASE
Dated: September 2011
Queen of Hearts LLC (Master Landlord)
Alice Wonderland Ltd. (Tenant)
Premises: Suite 120 and other space
Rabbit Crossing, Lancaster, Ohio
Term: 9/1/2011 – 8/31/2016

SUBLEASE
Dated: October 24, 2012
Alice Wonderland Ltd.
(Sublandlord)
White Rabbit LLC
(Subtenant)
Premises: Suite 120
Rabbit Crossing, Lancaster, Ohio
Term: 11/01/2012 to 8/31/2016

SUB-SUBLEASE
Dated: January 27, 2015
White Rabbit LLC
(Sub-Sublandlord)
Cheshire Cat Company
(Sub-Subtenant)
Premises: Suite 120
Rabbit Crossing, Lancaster, Ohio
Term: 02/01/2015 – 8/31/2016
(12:01 a.m.)

Exhibit B

5. Application of Master Lease.

5.1 Sublease Subordinate to Master Lease. This Sublease is and shall be at all times subject and subordinate to the Master Lease.

5.2 Incorporation of Obligations Set Forth in Master Lease. In addition to the obligations of Subtenant under the terms of this Sublease as set forth in the other paragraphs of this Sublease (and except as otherwise expressly provided to the contrary in this Sublease), Subtenant shall also have and perform for the benefit of Sublandlord all obligations of the "Tenant" as are set forth in the Master Lease, which are hereby incorporated into this Sublease as though set forth herein in full, substituting "Subtenant" wherever the term "Tenant" appears, and "Sublandlord" wherever the term "Landlord" appears; provided, however, that Subtenant's obligations under the Master Lease shall be limited to the duration of the Sublease Term. A copy of the Master Lease is attached hereto as Exhibit A. Subtenant confirms that it has read the Master Lease and is familiar with the terms and provisions thereof. Except as otherwise expressly provided herein, the covenants, agreements, terms, provisions and conditions of the Master Lease insofar as they relate to the Premises and insofar as they are not inconsistent with the terms of this Sublease are made a part of and incorporated into this Sublease as if recited herein in full, and the rights and obligations of Landlord and the Tenant under the Master Lease shall be deemed the rights and obligations of Sublandlord and Subtenant respectively hereunder and shall be binding upon and inure to the benefit of Sublandlord and Subtenant respectively. Subtenant recognizes that Sublandlord is not in a position to render any of the services or to perform any of the obligations required by Sublandlord by the terms of this Sublease to the extent that such services or obligations are (a) to be performed or provided by Master Landlord pursuant to the Master Lease, or (b) dependent upon Master Landlord's due and timely performance of its obligations under the Master Lease. Therefore, notwithstanding anything to the contrary contained in this Sublease, Subtenant agrees that performance by Sublandlord of its obligations hereunder are conditional upon due and timely performance by Master Landlord of its corresponding obligations under the Master Lease and Sublandlord shall not be liable to Subtenant for any default of Master Landlord under the Master Lease, except that if Master Landlord shall default in the performance of any of its obligations under the Master Lease, Sublandlord covenants and agrees to, upon the written request of Subtenant, and at Subtenant's sole cost and expense, and provided that Subtenant is not in default hereunder, use its commercially reasonable (not arbitrary) efforts to obtain Master Landlord's compliance with its obligations thereunder (subject to the terms and conditions of this Sublease), including but not limited to any self-help rights available to Sublandlord under the Master Lease. With respect to any damages award obtained by Sublandlord against Master Landlord in connection with Master Landlord's default under the Master Lease, to the extent such default relates to an obligation of Master Landlord which is, by the provisions of this Sublease, intended to benefit Subtenant and/or the Premises during the term of this Sublease, and provided that such damages award applies to damages caused to the Premises and Subtenant actually incurred damages as a result thereof, then, so long as Subtenant is not in default hereunder (beyond any applicable notice and cure period), Subtenant shall be entitled, after Sublandlord compensates itself from such damages award for all of Sublandlord's actual damages and out-of-pocket costs and expenses incurred in obtaining such award, including without limitation, any attorney's fees and court costs and fees, to

receive the remaining amount of such damages award from Sublandlord. Subtenant shall not have any claim against Sublandlord by reason of Master Landlord's failure or refusal to comply with any of the provisions of the Master Lease, unless such failure or refusal is a result of Sublandlord's act or failure to act, and Subtenant shall pay Base Sublease Rent and Additional Rent and all other charges provided for herein without any abatement, deduction or set-off whatsoever. Furthermore, Subtenant further covenants not to take any action or do or perform any act or fail to perform any act which would result in the failure or breach of any of the covenants, agreements, terms, provisions or conditions of the Master Lease on the part of the "Tenant" thereunder. Whenever the consent of Master Landlord shall be required by, or Master Landlord shall fail to perform its obligations under, the Master Lease, Sublandlord agrees to use commercially reasonable (not arbitrary) efforts to obtain such consent (as more specifically provided in Section 5.4, below) and/or performance on behalf of Subtenant. The following provisions of the Original Lease and the First Amendment shall not apply to this Sublease: the last sentence of Section 1.3, Articles 2 (Term), 3 (Rent), 4.3 (except for the right to review and request that Sublandlord object to the allocation of Taxes and/or the final determination of Component Charges), 5 (Security Deposit), Sections 7.1, 7.2 (only as to "the installation of a BTU Unit" and as to having the right to request reimbursement for the cost of any modifications to the HVAC System), 7.4, 9.4, 9.7 and 9.8, 26, Articles 14 (Holding Over), 33 (Commissions), 40 (ADA Compliance) (other than clauses (iii) and (iv) thereof), 41 (Landlord's Exterior Work), 42 (Tenant's Exterior Work), 44 (Right of First Refusal) and 45 (Condition to Effectiveness), and Exhibit "B" of the Original Lease, and the entirety of the First Amendment. Subtenant acknowledges and agrees that the performance of all repairs and maintenance to the HVAC System, and all costs and expenses related thereto, shall be Subtenant's sole responsibility. Sublandlord agrees to transfer to Subtenant the benefit of any warranties of Sublandlord in the HVAC System. In addition, whenever any period for notice from "Tenant" to "Landlord" is specified under the Master Lease, or any period within which "Tenant" is required to do anything under the Master Lease, the period applicable to Subtenant's obligation to give such notice to Sublandlord or to perform under this Sublease shall be two (2) business days shorter than the corresponding period applicable to "Tenant" under the Master Lease (so that Sublandlord shall always have at least two (2) business days within which to give its own notice or performance to Master Landlord); further, wherever any period for notice from "Landlord" to "Tenant" is specified under the Master Lease, Sublandlord shall similarly have an additional period of at least two (2) business days within which to give notice to Subtenant under this Sublease. As between the parties hereto only, in the event of a conflict between the terms of the Master Lease and the terms of this Sublease, the terms of this Sublease shall control only to the extent they are inconsistent with the terms of the Master Lease and their respective counterpart provisions in the Master Lease shall be excluded only to such extent.

5.3 Preservation of Master Lease. It is expressly agreed that: (a) if the Master Lease should terminate prior to the Sublease Expiration Date, Sublandlord shall have no liability to Subtenant; and (b) to the extent the Master Lease grants Sublandlord any discretionary right to terminate the Master Lease, whether due to casualty, condemnation, by election by Sublandlord or otherwise, Sublandlord shall be entitled to exercise or not exercise such right in its sole and absolute discretion and without liability to Subtenant. Notwithstanding the foregoing, so long as Subtenant is performing all of Subtenant's obligations as provided in this Sublease, Sublandlord shall not enter into any agreement that will cause either the Master Lease to be terminated or the Premises to be surrendered prior to the expiration of the Sublease Term (except (1) in the event of damage or destruction or condemnation and in

accordance with Sublandlord's rights under the Master Lease or (2) in any other manner in which Subtenant's rights hereunder are preserved), or cause any breach or default by Sublandlord under the Master Lease (not caused by Subtenant) that will result in any such termination or surrender which breach or default remains uncured beyond applicable cure periods. Sublandlord shall not enter into any amendment or other agreement with respect to the Master Lease that will prevent or adversely affect the use by Subtenant of the Premises in accordance with the terms of this Sublease, materially increase the obligations of Subtenant or decrease the rights of Subtenant under this Sublease, shorten the term of this Sublease or increase the rental or any other sums required to be paid by Subtenant under this Sublease, without the prior written consent of Subtenant in each case. In the event Subtenant makes a request that Subtenant is entitled to make under this Sublease, which request requires the approval of Master Landlord, Sublandlord shall use commercially reasonable (not arbitrary) efforts to obtain such approval (but Sublandlord shall not be required to incur any cost or expense in order to do so). Sublandlord shall have no responsibility for or be liable to Subtenant for any default, failure or delay on the part of Master Landlord in the performance or observance by Master Landlord of any of its obligations under the Master Lease, nor shall such default by Master Landlord affect this Sublease or waive or defer the performance of any of Subtenant's obligations under this Sublease, including without limitation the obligation to pay Rent. Notwithstanding the foregoing, the parties do contemplate that Master Landlord will, in fact, perform its obligations under the Master Lease and in the event of any default or failure of such performance by Master Landlord, Sublandlord agrees that it will, upon notice from Subtenant, make demand upon Master Landlord to perform its obligations under the Master Lease. Sublandlord, however, shall have no obligation to sue the Master Landlord on Subtenant's behalf or to terminate the Master Lease as a result of any such default or failure by Master Landlord, except if, as a result of Master Landlord's failure to cure such default or failure after notice from Sublandlord and the expiration of any applicable cure period, Subtenant elects to sue Sublandlord to enforce the terms of this Sublease or the obligations of Master Landlord under the Master Lease. Subtenant agrees that except as otherwise expressly provided herein, Sublandlord shall not be required to dispute any determinations or other assertions or claims of Master Landlord regarding the rights or obligations of Sublandlord under the Master Lease for which Subtenant is or may be responsible under this Sublease or by which Subtenant may be bound.

5.6 Default; Indemnification.

5.6.1 Subtenant. Upon the failure of Subtenant to pay Rent or comply with any other provisions of this Sublease or the occurrence of any other event which constitutes a default under this Sublease beyond any applicable notice and cure period, Sublandlord shall be entitled to all the same rights and remedies against Subtenant on account of such default by Subtenant under this Sublease as are granted in the Master Lease to Master Landlord against Tenant on account of a default by Tenant under the Master Lease. Subtenant hereby agrees to indemnify, protect, defend and hold Sublandlord harmless from and against any and all claims, losses and damages including, without limitation, reasonable attorneys' fees and disbursements: (a) which may at any time be asserted against Sublandlord by (i) Master Landlord for failure of Subtenant to perform any of the covenants, agreements, terms, provisions or conditions contained in the Master Lease which by reason of the provisions of this Sublease Subtenant is obligated to perform, and such failure to perform is not the result of the gross negligence or willful misconduct of Sublandlord, or (ii) any person by reason of

Subtenant's use and/or occupancy of the Premises; and (b) resulting from any failure by Subtenant to comply with the terms of this Sublease and the Master Lease, except to the extent any of the foregoing is caused by the gross negligence or willful misconduct of Sublandlord. The provisions of this Section 5.6 shall survive the expiration or earlier termination of the Master Lease and/or this Sublease. Notwithstanding anything to the contrary herein or in the Master Lease, Sublandlord's partners, members, officers, directors, shareholders, employees and agents shall not be individually liable to Subtenant under any circumstance. Subtenant waives all claims against Sublandlord for any injury or damage to any person or property in or about the Premises, except injury or damage caused by the gross negligence or intentional misconduct of Sublandlord or its agents or employees.

5.6.2 Sublandlord. Sublandlord's failure to perform any provision of this Sublease which it is obligated to perform or the breach of any covenant herein, and the continuation of such failure for thirty (30) days after receipt of written notice from Subtenant of such failure or breach, shall be a default by Sublandlord; except if the failure to perform or the breach cannot reasonably be cured by Sublandlord within thirty (30) days after receipt by Sublandlord of such notice from Subtenant, despite reasonably diligent effort by Sublandlord, Sublandlord shall not be in default if it commences a cure within thirty (30) days after receipt of Subtenant's notice thereof and diligently pursues such cure to completion.

5.7 Sublandlord Representations and Warranties. As of the date of this Sublease, Sublandlord makes the following representations and warranties to Subtenant:

(i) The Master Lease attached as Exhibit A is the full and complete Master Lease, and there are no amendments or modifications thereto except as provided on Exhibit A;

(ii) The Master Lease is in full force and effect;

(iii) To Sublandlord's actual knowledge, neither Master Landlord nor Sublandlord is in default under the Master Lease; and

(iv) There are no agreements between Master Landlord and Sublandlord other than the Master Lease, including without limitation, the Commencement Date Memorandum dated August 17, 2011, and the notices contemplated by the Master Lease, with respect to the Premises or modifying the Master Lease.

15. Contingent Nature of Sublease. This Sublease shall not be effective until Master Landlord has signed and delivered to Sublandlord and Subtenant a written consent to this Sublease as required by the Master Lease (the "**Consent**"). Promptly following execution and delivery hereof by both parties, Sublandlord will submit this Sublease to Master Landlord for such consent. Subtenant agrees that it shall cooperate in good faith with Sublandlord and shall comply with any reasonable request made of Subtenant by Sublandlord or Master Landlord in connection with the procurement of the Consent. In the event, for any reason whatsoever, the Consent is not delivered to Sublandlord within twenty (20) days after Sublandlord's request therefor from Master Landlord (the "**Consent Deadline**"), either party may terminate this Sublease upon written notice to the other, before the Consent is actually delivered to Sublandlord, and upon such termination this Sublease shall be of no further force and effect. In the event this Sublease is terminated due to Sublandlord's failure to obtain the Consent by the Consent Deadline, Sublandlord shall immediately return to Subtenant the Security Deposit and

the first month's Base Sublease Rent paid by Subtenant pursuant to this Sublease. Sublandlord and Subtenant hereby agree, for the benefit of Master Landlord, that this Sublease and Master Landlord's consent hereto shall not (a) create privity of contract between Master Landlord and Subtenant, (b) be deemed to have amended the Master Lease in any regard (unless Master Landlord shall have expressly agreed writing to such amendment), or (c) be construed as a waiver of Master Landlord's right to consent to any assignment of the Master Lease by Sublandlord or any further subletting of the Premises, or as a waiver of Master Landlord's right to consent to any assignment by Subtenant of this Sublease or any subletting of the Premises or any part thereof.

Exhibit C
Sublandlord Consent to Sub-Sublease

Alice Wonderland Ltd., a Delaware corporation ("**Sublandlord**"), as the entity currently entitled to (a) the tenant's interest under that certain Lease dated with a Lease Reference Date as of May 4, 2011 between Sublandlord and Queen of Hearts LLC, a Delaware limited liability company ("**Landlord**") (the "**Lease**"), and (b) the sublandlord's interest in that certain Sublease dated as of October 24, 2012 (the "Sublease") by and between Sublandlord and White Rabbit LLC, a Delaware limited liability company (as "Subtenant" thereunder), as such Lease and Sublease are referenced in that certain Sub-Sublease between White Rabbit LLC ("**Sub-Sublandlord**") and Cheshire Cat Company, a Delaware limited liability company ("**Sub-Subtenant**"), a copy of which is attached hereto as Exhibit A (the "**Sub-Sublease**"), hereby consents to the Sub-Sublease covering the premises as therein described measuring approximately 13,987 square feet and comprising Suite 120 (the "**Sub-Subleased Premises**") within the office building located at Rabbit Crossing, Lancaster, Ohio (the "**Building**").

This consent is given upon the expressed following conditions:

1. Sub-Sublandlord shall continue to remain primarily liable (as a principal and not merely as a surety, accommodation party or guarantor) for the payment of all amounts of rental and other sums and performance of all covenants required of Sub-Sublandlord under the Sublease.

2. There shall be no modifications or amendments of the Sub-Sublease without the prior written consent of Sublandlord.

3. Notwithstanding anything contained in the Sub-Sublease to the contrary, consent by Sublandlord to this sub-subletting shall not include consent to the assignment or transferring of any lease renewal option rights, space option rights, roof access rights (including the right to have any antenna or other equipment on the roof of the Building), early termination rights, special privileges or extra services granted to Sublandlord, or to Sub-Sublandlord, by the Lease or Sublease, or addendum or amendment thereto, or license agreement or letter agreement (and such options, right, privileges or services shall terminate upon such assignment or transfer). It shall be a condition of Sublandlord's consent hereunder that Sub-Sublandlord shall remove its rooftop antenna and ancillary equipment at the Building, together comprising "Licensee's Equipment" as defined in that certain License Agreement dated October 23, 2013 between Landlord and Sub-Sublandlord, within ten (10) days of Sub-Sublandlord vacating the Sub-Subleased Premises (time being of the essence herein), without causing any damage to the Building.

4. In the event of any default under the terms and provisions of the Sublease, Sublandlord shall have the right to collect the rental attributable to the Sub-Subleased Premises directly from Sub-Subtenant without waiving any of Sublandlord's rights against Sub-Sublandlord as a result of such default.

5. Consent to the Sub-Sublease is without waiver of restrictions concerning future assignments, subleases or extensions of the Sub-Sublease. In addition, notwithstanding anything to the contrary contained in the Sub-Sublease, Sub-Subtenant shall not have the right to assign or pledge the Sub-Sublease, nor to sublet the whole or any part of the Sub-Subleased Premises whether voluntarily or by operation of law, nor to permit the use or occupancy of the Sub-Subleased Premises by anyone other than Sub-Subtenant.

6. It shall be a condition of Sublandlord's execution of this Consent that it shall first receive payment of $_____ for its costs and expenses including legal fees in connection with Sublandlord's approval of the Sub-Sublease.

7. Sublandlord shall not be liable for, and Sub-Sublandlord and Sub-Subtenant hereby jointly and severally indemnify and hold Sublandlord harmless from any commission payable associated with the Sub-Sublease.

8. In the event of any conflict between the terms and provisions of the Sublease and the Sub-Sublease, as between Sublandlord and Sub-Sublandlord, the terms and provisions of the Sublease shall control. Nothing contained in this Consent shall be construed as a representation or warranty by Sublandlord and Sublandlord shall not be bound or estopped in any way by the provisions of the Sub-Sublease. Nothing contained in this Consent shall be construed to modify, waive or affect any of the provisions, covenants or conditions in the Sublease, including any rights or remedies of Sublandlord under the Sublease, or otherwise. The execution of this Consent shall not create any obligations from Sublandlord to Sub-Subtenant; Sub-Subtenant's agreement being solely with Sub-Sublandlord and not with Sublandlord.

9. In no event will Sublandlord be liable for any consequential, punitive, indirect or special damages. The provisions of this paragraph shall survive the termination of the Sublease and Sub-Sublease.

10. Notwithstanding anything to the contrary contained in the Sub-Sublease, any termination of the Sublease shall automatically terminate the Sub-Sublease. Upon expiration or termination of the Sub-Sublease and in the event of failure of Sub-Subtenant to vacate the Sub-Subleased Premises, Sublandlord shall be entitled to all the rights and remedies available to a landlord against a tenant holding over after the expiration of a term.

11. Nothing contained in this Consent shall be construed as consent or approval by Sublandlord of any proposed work, alterations or improvements to the Sub-Subleased Premises. Sub-Sublandlord and Sub-Subtenant each hereby acknowledge and agree that Sublandlord's prior written consent shall be required under the Sublease for any proposed work (including re-painting), alterations or improvements to the Sub-Subleased Premises. Notwithstanding anything to the contrary contained in the Sub-Sublease, in no event shall Sub-Subtenant have any interior or exterior Building signage rights except only that, subject to Landlord's prior written consent, Sub-Subtenant shall be allowed to have its name at the Sub-Subleased Premises suite entryway using Building standard suite signage upon payment to Landlord of the cost of obtaining and installing such signage and reimbursement to Sublandlord of any costs and expenses incurred by Sublandlord in connection with the same, if any.

12. Sublandlord for itself, its parent, affiliates, shareholders, members, officers, directors, employees, agents, and managers (collectively, the "Sublandlord Parties") shall be third party beneficiaries of (i) all and any indemnities in the Sub-Sublease given by Sub-Subtenant for the benefit of Sub-Sublandlord and (ii) any release, waiver, discharge or relinquishment of liability under the Sub-Sublease given by Sub-Subtenant for the benefit of Sub-Sublandlord, so that the benefit of all such indemnities, releases, waivers, discharges or relinquishments of liability shall be deemed extended under the Sub-Sublease to cover the Sublandlord Parties. To the

fullest extent allowed by law, (a) Sub-Sublandlord shall indemnify each of the Sublandlord Parties against any judgment, loss, costs, damages, claims, fees or expenses (including legal fees or expenses) which any Sublandlord Party may incur arising out of any injury to person or damage to property on or about the Sub-Subleased Premises or the Building caused by any act or omission of Sub-Sublandlord, its agents, servants, contractors, employees or invitees, and (b) Sub-Subtenant shall indemnify each of the Sublandlord Parties against any judgment, loss, costs, damages, claims, fees or expenses (including legal fees or expenses) which any Sublandlord Party may incur arising out of any injury to person or damage to property on or about the Sub-Subleased Premises or the Building caused by any act or omission of Sub-Subtenant, its agents, servants, contractors, employees or invitees. Such indemnity shall survive the expiration or earlier termination of the Lease Term.

13. Prior to entry into occupation of the Sub-Subleased Premises, Sub-Subtenant shall provide evidence to Sublandlord of compliance by Sub-Subtenant with the insurance provisions in the Lease (as incorporated into the Sublease). Article 12 of the Original Lease (Waiver of Subrogation) shall apply as between Sublandlord, Sub-Sublandlord and Sub-Subtenant. Nothing herein contained shall mitigate the primary liability of Sub-Sublandlord as the "Subtenant" under the Sublease, nor be construed as the release of Sub-Sublandlord from the full performance of the insurance and waiver of subrogation obligations as set forth in Articles 11 and 12 of the Lease. In no event shall any move-in contractor or any other contractor be allowed access to the Sub-Subleased Premises without Sublandlord's prior written approval of such contractor and receipt by Sublandlord's property manager, broker or agent of evidence of insurance of such contractor reasonably acceptable to Sublandlord.

14. Any notice or communication which any party hereto may desire or be required to give to any other party under or with respect to this Consent shall be addressed to such other party as follows:

The manner and effectiveness of the delivery of notices or communication shall be governed by the terms of the Lease.

15. Any estoppel certificate required to be given by Sub-Sublandlord under the Sublease (pursuant to obligations under the Lease incorporated into the Sublease or otherwise) shall also be required to be given by Sub-Subtenant within ten (10) days of written request therefor by Sublandlord.

16. Sub-Subtenant represents and warrants that (a) it is a valid legal entity qualified to do business in the State of Ohio, (b) all persons signing on behalf of Sub-Subtenant are authorized to do so by appropriate actions, and (c) neither Sub-Subtenant, nor any persons or entities holding any legal or beneficial interest whatsoever in Sub-Subtenant, are (i) the target of any sanctions program that is established by Executive Order of the President or published by the Office of Foreign Assets Control, U.S. Department of the Treasury ("**OFAC**"); (ii) designated by the President or OFAC pursuant to the Trading with the Enemy Act, 50 U.S.C. App., § 5, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, the Patriot Act, Public Law 107-56, Executive Order 13224 (September 23, 2001) or any Executive Order of the President issued pursuant to such statutes as any of the same may be amended or renewed from time to time; or (iii) named on the following list that is published by OFAC: "List of Specially Designated

Nationals and Blocked Persons." Sub-Subtenant acknowledges that Sublandlord is relying upon such representations and warranties for the purpose of its execution and delivery of this Consent. If the foregoing representations are untrue at any time during the Sub-Sublease Term, an Event of Default (as defined in the Lease) will be deemed to have occurred under the Sublease.

17. SUB-SUBLANDLORD AND SUB-SUBTENANT ACKNOWLEDGE THAT NEITHER SUBLANDLORD NOR ANY AGENT OR REPRESENTATIVE OF SUBLANDLORD HAS MADE ANY REPRESENTATION OR WARRANTY (I) AS TO THE SUITABILITY OF THE SUB-SUBLEASED PREMISES OR THE BUILDING FOR THE CONDUCT OF SUB-SUBTENANT'S BUSINESS; OR (II) OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO THE SUB-SUBLEASED PREMISES. SUBLANDLORD EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTY THAT THE SUB-SUBLEASED PREMISES ARE SUITABLE FOR SUBTENANT'S INTENDED COMMERCIAL PURPOSE.

18. UNLESS PROHIBITED BY LAW, SUBLANDLORD, SUB-SUBLANDLORD AND SUB-SUBTENANT WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY CLAIM, ACTION, PROCEEDING OR COUNTERCLAIM BY ANY PARTY AGAINST ANOTHER OF ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS CONSENT OR SUB-SUBTENANT'S USE OR OCCUPANCY OF THE SUB-SUBLEASED PREMISES.

19. In any litigation between the parties regarding this Consent, the losing party shall pay to the prevailing party all reasonable expenses and court costs including attorneys' fees incurred by the prevailing party. A party shall be considered the "prevailing party" if: (a) it initiated the litigation and substantially obtains the relief it sought, either through a judgment or the losing party's voluntary action before trial or judgment; (b) the other party withdraws its action without substantially obtaining the relief it sought; or (c) it did not initiate the litigation and judgment is entered for either party, but without substantially granting the relief sought.

20. Notwithstanding anything to the contrary contained in the Sub-Sublease, neither a copy of the Sub-Sublease, nor a short form memorandum thereof, may be recorded or filed of record without the prior written consent of Landlord.

21. The covenants, conditions, provisions and agreements contained in this Consent shall bind Sub-Sublandlord, Sub-Subtenant and each of their successors and permitted assigns, and shall inure to the benefit of Sublandlord and its successors and assigns.

[Signature Page Follows]

Chapter 5: Environmental Due Diligence Issues in Real Property Transactions

Nathan C. Hunt
Thompson Hine LLP
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Environmental Due Diligence Issues in Real Property Transactions

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Nathan Hunt 937-443-6908

ATLANTA CINCINNATI CLEVELAND COLUMBUS DAYTON NEW YORK WASHINGTON, D.C.

Overview

- Sources of Liability
- Protection and Strategies
  - Due Diligence
  - Contractual Provisions
  - Environmental Audits
- Common Problems and drafting tips
- Insurance Overview

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CERCLA Liability

- Environmental Law 101
  - BEWARE of CERCLA!
  - Strict liability
  - Responsible parties are jointly and severally liable for costs of investigating and remediating contaminated property

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Environmental Law 101

- CERCLA imposes liability on
  - Current owners and operators of a facility
  - Owners and operators at the time of disposal of hazardous waste
  - Parties that sent waste to a site for disposal (arrangers)
  - Parties that accepted waste for transport to a site (transporters)

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Environmental Law 101

- CERCLA defenses
  - Third party defense
  - Act of war
  - Act of God
  - Innocent purchaser defense
  - Contiguous property owner defense
  - Bona fide prospective purchaser defense

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Bona Fide Prospective Purchaser

- Eight elements
  - The disposal of hazardous substances occurred prior to acquisition
  - "All appropriate inquiry" was made into the prior owner and uses of the facility prior to acquisition (e.g., Phase I assessment)
  - Legally required notices were provided with respect to the discovery or releases of hazardous substances at the facility
  - "Appropriate care" was exercised by taking "reasonable steps" to stop any continuing release from the facility, to prevent any threatened future release, and to prevent or limit public exposure to any previously released hazardous substance

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Bona Fide Prospective Purchaser

- Full cooperation with all authorized remediation personnel
- Compliance with all required institutional controls
- Compliance with any information request or administrative subpoena issued under CERCLA
- No affiliation with any prior owner or operator.

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Bona Fide Prospective Purchaser

- *PCS Nitrogen Inc. v. Ashley II of Charlestown, LLC,* 714 F.3d 161 (4th Cir. 2013)
  - First federal appellate decision concerning the scope of the BFPP defense
  - Failure to exercise "appropriate care" by taking reasonable steps to contain and prevent contamination
  - Highlights risks of reliance on the BFPP defense and need for strict compliance with the statutory elements

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Bona Fide Prospective Purchaser

- USEPA "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision" December 5, 2012
  - Tenants treated as BFPPs under two scenarios
  - Tenants can derive BFPP status from property owners who maintain compliance with the BFPP elements – USEPA will exercise its enforcement discretion in cases where, through no fault of tenant, owner fails to maintain BFPP elements
  - Tenants satisfies all BFPP elements; essentially takes all the pre and post- acquisition steps required of a prospective purchaser

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Select CERCLA Issues

- Under CERCLA, lessees can be liable as owners or operators
  - *De facto* owner
  - Management of operations specifically related to pollution
- "As is" clauses and the transfer of CERCLA liability
  - Transfers CERCLA liability if coupled with an assumption of liabilities, release and/or indemnity provision

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Sources of Liability – State Statutes

- State superfund analogs
- Other state environmental statutes
- Transfer Acts
  - California – California Health & Safety Code §2539.7
  - Connecticut – Property Transfer Act
  - Michigan – Notice of a "Facility" must be provided to transferee
  - New Jersey – Industrial Site Recovery Act
  - More licensed site professional programs (NJ, MA and NC)

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Other Sources of Liability - Toxic Tort Suits

- Vapor intrusion – New USEPA Guidance in 2015
- Groundwater contamination
- Mold
- Asbestos

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Other Sources of Liability – Common Law

- Nuisance
- Trespass
- Negligence

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Due Diligence Principals

- Guiding Principles
  - Integrate environmental planning into deal analysis: determine risk
  - Bring an environmental attorney and consultant into the planning
  - Allow enough time
  - Shelf life issues on diligence
  - AAI: use a qualified consultant
  - Understand lenders requirements early in deal

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Due Diligence Concerns

- Buyer
  - Identify and quantify liability risks
  - Conduct compliance assessment
  - Qualify for AAI defenses and/or allocate risk to Seller
  - Any institutional controls that will impact use or future value?
  - Are there any environmental liens?
  - How will indemnity be funded post-Closing?
  - Issues raised in environmental reports prior to Closing can cause problems if not resolved

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Due Diligence Concerns

- Lender
  - Same concerns as Buyer
  - Is value of the collateral significantly diminished by contamination?
  - Will potential cleanup costs impact ability to repay loan?
  - The secured lender exemptions do not protect the lender for compliance and other issues that may arise in a foreclosure
  - Trend where lenders will not allow environmental costs to be rolled into loan
  - Approve consultant and determine reliance rights

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Due Diligence Concerns

- Seller
  - Consider conducting diligence prior to putting business for sale
  - Allow Phase II sampling?
  - Regulatory Reporting
    - Increased regulatory scrutiny

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Due Diligence – Common Constraints and Pitfalls

- Common Constraints on Due Diligence
  - Physical
  - Timing
  - Cost
  - Seller concerns
- Avoid common pitfalls with consultants
  - Be wary of relying on someone else's consultant
  - Attorney should retain consultant
  - Don't accept consultant's standard terms
  - What is purpose of consultant's report?

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Due Diligence – What is it Exactly?

- Minimum: Phase I Environmental Site Assessment ("ESA") consistent with current 2013 ASTM standards
- ASTM does not cover:
  - Asbestos-containing materials
    - Consider liability and development issues
  - Lead paint
    - Consider potential disclosure obligations
  - Radon levels
  - Lead in the drinking water
  - Wetlands
  - Mold
  - Regulatory compliance

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Phase I Environmental Site Assessments

- Records review
  - New ASTM standard – ASTM E1527-13
- Site reconnaissance
- Interviews with owners and operators
- Interviews with government officials
- Report prepared by qualified environmental consultant
- Review of sample Phase I report language

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All Appropriate Inquiry

- AAI – What is it?
  - The AAI regulation defines what pre-purchase investigation standards and practices are necessary to be eligible for certain defenses to CERCLA liability
  - New ASTM Standard 1527-13
    - Vapor Intrusion
    - Records Review
  - The innocent landowner, bona fide prospective purchaser and contiguous property owner defenses are all statutory defenses potentially available to parties whose liability attaches through ownership only
  - Buyers and lenders should not rely on AAI as the sole means to allocate risk

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Phase I ESA's Under AAI

- What is the shelf life on an AAI report?
  - Phase I valid for 180 days
  - 180 days to one year with updates
- "Continuing Obligations"
  - Apply to each defense, but not clearly defined
  - What is "Appropriate Care"?

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Environmental Site Assessments – Post-Phase I Investigations?

- When do I need a Phase II?
  - Recognized environmental concerns relating to soil or groundwater contamination
  - Baseline
  - Questionable site history
  - Future transactions
  - Case-by-case
  - Lenders now more likely to require Phase II
  - Leases

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Phase II Assessments

- Terms and conditions for Phase II
  - Buyer responsible for damage
  - Establish the allowable scope of the buyer's Phase II activities
  - Provide that the buyer will share the data with the seller (if the seller wants to see it)
  - Address reporting obligations
- In some cases a seller will resist a purchaser's efforts to conduct Phase II sampling
  - Some indemnity provisions voided for voluntary sampling
  - More common with distressed economy

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Allocating Liability - Seller

- Seller may expressly retain all liability for environmental matters arising out of its or its predecessor's activities and may indemnify the buyer for all such liabilities
  - How long the indemnification will survive?
  - What types of claims are subject to indemnification?
  - "As is" sale?

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Allocating Liability – Sharing Arrangements

- Consider various sharing arrangements for contingent environmental liabilities:
  - Parties split some or all categories of contingent liabilities
  - Seller retains some liability for known problems or problems that arise within a short defined period after the closing
  - Seller agrees to perform a partial or full cleanup in return for an indemnification or a covenant not to sue from the buyer concerning the environmental problem

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Allocating Liability - Buyer

- If the seller is unwilling to indemnify the buyer, buyer must consider whether it will have legal recourse against any other party
- If the buyer is accepting the risk, it should attempt to quantify such risk

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Allocating Liability – Third Party

- The parties can consider transferring the liabilities to a third party, such as an insurance company
  - Coverage for third party claims relating to environmental contamination – PLL policy
  - Environmental Remediation Insurance (replaces Cost Cap) , which requires the insurance company to pay cleanup costs that exceed a specified amount
- Use escrow or equivalent to avoid unsecured claims
  - Consider carefully criteria for payout and termination

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Common Environmental Problems in Real Estate Transactions

- Agreements that do not address whether:
  - Cleanup must meet standards for residential, commercial or industrial uses
  - Published generic standards or site-specific risk-based standards are acceptable
  - Seller can use institutional or engineering controls
- Agreements that do not specify the buyer's right to participate in a cleanup conducted by the seller
- Buyer may have difficulty proving that discovered contamination resulted from pre-closing releases if no or limited Phase II

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Common Environmental Problems in Real Estate Transactions

- Buyers may demolish existing buildings and construct new facilities or substantially renovate existing buildings
- Buyer's construction and the seller's cleanup activities may interfere with one another
- Buyer's activities may identify new environmental problems

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Tips to Avoid Common Problems

- Buyers should perform appropriate due diligence to focus negotiations concerning allocation of liability
- Sellers should consider establishing baseline conditions to avoid liability for problems resulting from post-closing releases
- Get any lender involved early
- Cleanup to published generic standards can eliminate some disputes over scope of cleanup, but may also be more expensive
- Address coordinating construction and cleanup activities

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Tips to Avoid Common Problems

- From a buyer's standpoint, avoid "as is" sale
  - "As is" clauses and the transfer of CERCLA liability
  - Transfers CERCLA liability if coupled with an assumption of liabilities, release and/or indemnity provision
- Buyer should seek solid representations and warranties, including:
  - No releases of hazardous substances
  - No pending or threatened claims or enforcement actions concerning the property
  - Seller has provided copies of all material environmental reports
  - Seller has been in full compliance with all environmental laws

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Tips to Avoid Common Problems

- The agreement should specifically address:
  - The allocation of responsibility for all reasonably expected or potential environmental liabilities
  - The expiration date (if any) of the seller's indemnity and the parties' rights after the expiration date
  - The scope of the indemnity (third party claims or cleanup even if there is no legal requirement to do so)
  - Applicable cleanup levels
  - The buyer's rights to participate in work

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Environmental Insurance

- Allocates potential risks of environmental exposures in commercial transactions and cleanup projects
- Can be tailored to cover virtually any environmental risk
- Not cheap, but usually not cost prohibitive
- Good option when limited Phase II data

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Pollution Legal Liability Insurance

- Flexible menu to address specific issues relating to each transaction
  - Third-party claims or demand for bodily injury, property damage and cleanup costs – on and off site
  - Cleanup costs related to unknown and known pre-existing contamination
  - Future events for pollution emanating from property
  - Cleanup costs of spills and releases
  - Natural resources damage claims

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Pollution Legal Liability

- Regulatory re-openers
- Toxic tort liability claims
- Diminution in first party property value
- First-party business interruption
- Transportation and disposal of waste
- Non-owned disposal sites
- Defense costs

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Key Terms and Conditions

- Named insureds and additional insureds
- Term
- Deductibles and policy limits
- Exclusions
- Definitions
- Reporting
- Cancellation
- Payment

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Potential Uses

- Sale/purchase of real estate; can back up indemnity
  - Funds clean-up of unknown, pre-existing conditions
  - Funds clean-up of new conditions
  - Transfers 3rd party risks and risks of re-openers
  - Facilitates debt financing
- Leases
- Coverage for everyday operations
  - Claims arising from spills, releases, toxic tort, third-party property damage, stigma and mold

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Environmental Remediation Management Insurance

- Protects against cost overruns for remediation expenses
- 5 to 10 year policy
- A fee will be charged (about $10,000) in connection with quote

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Potential Uses

- Facilitate sale/purchase of real estate – creates certainty
- Cap clean-up costs at Superfund sites, Brownfields
- Cap clean-up costs at voluntary cleanups

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QUESTIONS?

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Chapter 6:
Real Estate Law in the Sharing Economy
From airbnb to Crowdfunding for Real Estate Transactions

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Real Estate Law in the Sharing Economy

From airbnb to Crowdfunding for Real Estate Transactions

Jack Gillespie
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Introduction to the Sharing Economy

- Connect people that have things with people that want things – "Matching"
- Has occurred throughout history
- Greatly expanded by technology

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IBM Institute of Business Values Survey: 5,200 C-Suite Executives Fear "Uberization"

The Washington Post

On Leadership

This is what's keeping CEOs up at night

By Jena McGregor November 3

Top executives call it getting "Uber-ized." Having "Uber syndrome." Or even the process of "Uber-ization."

Those are among the phrases that came up repeatedly in a survey IBM conducted, which asked senior executives to describe their biggest fear. In other words, they are most scared of getting disrupted by a digital upstart from outside their industry, the way the ride-booking company Uber has roiled the taxi industry.

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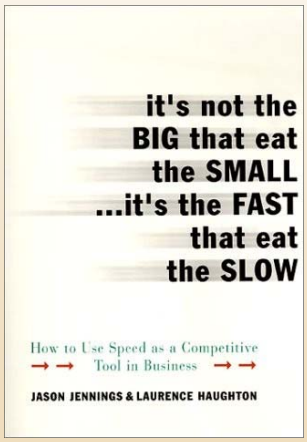
The Defining Characteristic of the "Sharing Economy" is ….



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Running the "Sharing Economy" Race

First, prove the ability to generate significant revenue. Second, seek legal approval.

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STEP 1: Proving Revenue Generation
2-Sided Matching Markets

Platform	Business Sector	Subsidized Side	Subsidy (Attraction)	Payment Side	Payment
20th Century Platforms					
Visa	Financing	Consumers	Credit Card	Merchants	$
Nintendo	Video Games	Players	Hardware (at cost)	Game Developers	$
21st Century Platforms					
Uber	Transportation	Drivers	Cash	Passengers	$
Airbnb	Hospitality	Hosts	Booking	Travelers	$
DraftKings	Sports Betting	Sharks	Advertising	Fish	$
SoFi	Student Loans	Indebted Graduates	↓ Interest Rate	Investors	$

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STEP 2: Seek Legal Approval
Making the Market Safe & Trustworthy

- It is the role of law and government regulation to make markets safe & trustworthy.
- *City of Cleveland v. Ameriquest Mortgage Securities, Inc.*, 621 F. Supp. 2d 513 (N.D. Ohio 2009), *aff'd*, 614 F.3d 496 (6th Cir. 2010) (recognizing "the difference between conduct that is 'lawful,' as in merely 'not legally prohibited,' and conduct that is subject to regulation and, within the context of a regulatory scheme, encouraged").

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But pre-startup permitting and regulation is too slow (i.e., costly) in the "Sharing Economy"

Platform	Business Sector	Regulation Avoided
Uber	Transportation	Local permits, fingerprinting, pickup limitations
Airbnb	Hospitality	Local zoning and occupancy permits and limitations
DraftKings	Sports Betting	Federal Unlawful Internet Gambling Enforcement Act
SoFi	Student Loans	Federal Deposit Insurance Act

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Valuations

▶ Hilton Worldwide	$27.2 billion
▶ airbnb	$25.5 billion
▶ Marriot	$20.9 billion
▶ Starwood	$14.0 billion

* As of April, 2016

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Legal Issues Where Tenant Sublets Apartment

- Trend is for Tenants to seek additional income by renting out units or rooms. Increasingly, Landlords are looking to participate by receiving part of that income.
- Issue is it can trigger technical defaults under loan documents.
  - Landlords are beginning to look into broadening the definition of subletting and specifically restrict temporary subletting via shared economy platforms.
  - Landlords may seek carve outs from lenders. However, this will likely be met with resistance.
- Individuals occupying the space that are not on the lease can lead to liability for the Tenant and the Landlord. Both should work with their insurance carrier to assure coverage.

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Landlord Protections

- Landlord can add to Lease that Tenant bears risk for fines and violations (does not negate Landlord's primary liability to governmental entity
- Tenant required to provide advance notice
- Tenant must pay greater security deposit

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Other Legal Issues Raised

- Municipal Codes and Permits
- Homeowners Association Rules and CCRs
- Taxes, including Hotel Tax
- Legal issues
  - FHA & civil rights laws
  - Selden v. airbnb, Inc., No. 1:16-CV-0933 (D.D.L. May 20, 2016)
  - ADA

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Cleveland, Ohio

- Cleveland Zoning Codes – applies different requirements for apartment house, rooming houses, tourist homes, hotels, dwelling houses and dwelling units.
- Business in Ohio required to register with Secretary of State and obtain a business license
- Taxes – 3% Transient Occupancy Tax and Cuyahoga County separate 5.5% bed tax
- Cleveland Zoning Code has Building and Housing Standards

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airbnb Taxes for Hosts

- Host must determine if need to collect occupancy tax
- Can incorporate it into nightly price
- Some locations airbnb has secured an agreement with local jurisdiction to collect and remit
- US income taxes

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Impact of Home-Sharing on Multi-family Industry

- Trend for couples to start forming alliances in expensive real estate markets. Allows shared amenities such as kitchen and living room, while retaining private living areas.
- Vancouver, one of Canada's most expensive real estate markets, has experienced lenders like Vancity Credit Union offering "mixer mortgages" to support the structure.
- How will this affect the economics of the traditional multi-family sector?

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Landlords of office space are seeing an increase in Tenants wanting to share their office space

- WeWork is an example of a $5B co-working start-up. ShareDesk is another platform.
- Unlike airbnb and Uber, the office sharing platform has a large expense in rent. This can create credit issues for Tenants and Landlords as economic downturns can provide an immediate impact on the largest users – tech companies.

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Real Estate Crowdfunding

- Real Estate law issues
- Securities law issues

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Summary of Common Terms in Crowdfunding

- Sponsor
  - is the real estate expert, the one doing the work
    - Also sometimes called - General Partner (GP), operating partner, managing member, promoter, etc.
- Investor
  - is the person or group with the money for the investment
    - Also sometimes called – limited partner (LP), silent partner, member, money partner, passive partner, etc.
- Platform
  - is the technology solution to facilitate the transaction between Sponsor & Investor
    - Also sometimes called a listing or aggregator site
    - Like the Amazon.com of real estate investments

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What is Equity Crowdfunding For Real Estate?

- Real Estate Crowdfunding is a large number of investors funding a real estate enterprise with small individual investments.
- Unlike other crowdfunding (i.e. Kickstarter), investors in real estate crowdfunding receive a return on their investment rather than tokens from the Project (T-shirts, autographed pictures, etc.)
- Not really traditional crowdfunding at all

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What is Equity Crowdfunding For Real Estate?

- Direct partial ownership in a real estate asset
  - like share of stock is partial ownership in company
- Investor participates in the
  - Full upside potential

    AND
  - Full downside risk

A side note:

- Real estate debt crowdfunding exists but is outside the scope of our discussion today.

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Due Diligence – Crowdfunding Platform

- Sponsor/Principals
- Property Level
- Project Company Level

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Due Diligence – Crowdfunding Platform

- Sponsor/Principal Level
  - Personal (background checks, etc.)
  - References
  - Real estate track record (portfolio, operating experience, financial results)
  - Asset types and markets
  - Relationships (lenders, contractors and unrelated third parties)
  - Litigation

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Due Diligence – Crowdfunding Platform

- Property Level
  - Economic underwriting (pro forma, timeline and budget)
  - Legal (offering memorandum and subscription documents)
  - Physical (title, survey, environmental, etc.)

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Project Company Level

- Articles of Formation/Organization
- Operating Agreement (Platform can negotiate if investor base is large enough)

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Due Diligence - Investor

- Crowdfunding Platform
- Sponsor/Principals
- Sale due diligence as Crowdfunding Platform only more detailed (can't rely on platform)

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Legal Issues in Crowdfunding Operating Agreements

- Phantom income – tax distributions
- Fiduciary duties – Delaware entities can eliminate
- Lack of voting rights
- Transfer restrictions – estate planning
- Fees
- Cashfalls – dilution and penalties

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Types of Platforms:

Contingency Fee

- **Fee** – Percentage Based
  - Usually 2-3% of the capital raised
- **Selling Support** – Yes
  - Broker/Dealer Relationship
- **Who Has Investor Relationship** – Platform
  - Like arranged marriage
- **Investor Fees** – None Directly
- **Other Points** -
  - Help with compliance
  - Some ask for additional fees or profit sharing from sponsor's pocket

Flat Fee

- **Fee** – Fixed Price
  - Usually $5,000 - $30,000
- **Selling Support** – No
  - No Broker/Dealer Relationship
- **Who Has Investor Relationship** – Sponsor
  - Like dating site
- **Investor Fees** – None Directly
- **Other Points** -
  - May be overwhelming to small sponsors to get contacted by 50-100 investors in a week or so

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Platform Examples:

Contingency Fee

- RealtyShares.com

- Fundrise.com

- RealtyMogul.com

- Literally hundreds of others

Flat Fee

- RealCrowd.com

- CrowdStreet.com

- A few more but not as prevalent

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Why do we need crowdfunding at all?

Sponsors only using on some of their deals.

Looking for these benefits:

- Long term diversity of capital
- Marketing tool
- Stay current with the future of the industry

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Crowdfunding for Real Estate Investors

- Title III of Jobs Act – non-accredited investors
- Issuer fundraising limited to $1.0M a year (July 5th House passed Fix Crowdfunding Act Bill 394-4 raising limit to $5.0M)
- Non-accredited making less than $100,000 or net worth less than $100,000 – greater of: $2,000 or 5% of lesser of income/net worth
- Non-accredited making more than $100,000 with net worth more than $100,000 – 10% of lesser of income/net worth

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Crowdfunding for Real Estate Transactions

Rule 506(b) of Regulation D

- Cap: No
- Permitted Investors: Unlimited accredited; up to 35 non-accredited (must qualify as a sophisticated investor)
- Solicitation and Advertising: Not permitted
- Disclosure Requirements: Form D must be filed with the SEC; additional requirements for offers and sales to non-accredited investors

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Crowdfunding for Real Estate Transactions

Rule 506(c) of Regulation D

- Cap: No
- Permitted Investors: Unlimited accredited
- Solicitation and Advertising: Permitted
- Disclosure Requirements: Form D must be filed with the SEC

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Crowdfunding for Real Estate Transactions

Regulation A+

- Cap: Tier 1—$20 million per 12-month period; Tier 2—$50 million per 12-month period
- Permitted Investors: Tier 1—Anyone; Tier 2—Anyone, subject to per-investor investment cap for non-accredited investors
- Solicitation and Advertising: Tier 1 and Tier 2—Permitted, and issuers permitted to "test the waters" before and after the offering statement has been filed
- Disclosure Requirements: Tier 1 and Tier 2—Form 1-A must be filed with SEC

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CONCLUSION

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For those of you looking to invest online?

- Many real estate sponsors online are low quality
- Not all deal returns are equal (IRR vs Cash On Cash)
- Risks of deal & sponsor must be understood clearly
- Beware of investment plans that have short term focus
- The platform is irrelevant they do not do anything to protect you
- Sponsor experience is one of the most important things:
  - a bad sponsor can kill even the best real estate deal
  - Unfortunately the opposite is not true a great sponsor can **not** save a horrible deal
  - Best you hope for is a great sponsor will less frequently choose a horrible deals

SLK COL: #334954v1

Chapter 6a: Impact of Land Use Law on Commercial Development

Charles T. Riehl
Walter | Haverfield LLP
Cleveland, Ohio

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Chapter 6a: Impact of Land Use Law on Commercial Development

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I. Limitations on Governmental Initiatives for Economic Development

A. Ohio's constitutional prohibition on lending aid and credit.

1. Ohio Const., Art. VIII, § 6:

> *No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state, or doing any insurance business in this state for profit.*

2. Ohio Const., Art. VIII, § 13 allows political subdivisions to:

> *In order to create or preserve jobs and employment opportunities to promote economic welfare of the people of the state, political subdivisions may (a) acquire or construct facilities for industry, commerce, distribution, and research (b) and make or guarantee loans, and borrow money and issue bonds to provide monies for the acquisition or construction of such facilities . . . provided that moneys raised by taxation shall <u>not</u> be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section.*

Such aid and credit may <u>*not*</u> be financed by bonds or notes guaranteed by earmarked tax revenue of the municipal corporation. See *Ryan v. Gahanna* below.

B. C.I.V.I.C. Group v. Warren (2000), 88 Ohio St. 3d 37.

Developers sought the city's assistance in the construction of a new street, sewers, water lines, and other improvements to the developer's property. In response, the city passed ordinances authorizing the city to advertise for bids and to contract for the construction of the street and other improvements, whereby the developer would be responsible for 80 percent of the construction costs. The city passed another ordinance that provided for the issuance of bonds and notes for the purpose of raising $300,000 to be used to pay for the construction. Tax revenue was pledged to pay for the notes and bonds. In connection with the ordinances, the city entered into a reimbursement agreement with the developer whereby the city promised to construct a public street in order to provide access to the subdivision and to pay a portion of the associated engineering costs. The developer dedicated the street improvements to the city for public use. In return, the developer agreed to reimburse the city for 80 percent of the cost. Additionally, the agreement provided that the developer was obligated to pay a portion of this debt each time one of the single family residences along the street to be built by the city was sold, but the entire debt was due in 15 years regardless of how many residences were sold. Suit was brought alleging that the agreements were unconstitutional.

The Ohio Supreme Court looked to § 6, Art. VIII, of the Ohio Constitution and found that its purpose is to prohibit private interests from tapping into public funds at the taxpayers' expense. The city argued, however, that the constitutional provision was not implicated because the streets and other improvements have been dedicated for public use, and thus, are city property. Moreover, the city contended that the construction of the streets and utilities are traditional government functions.

In dismissing the City's arguments, the Court noted that cases construing this provision have found that it forbids the union of public and private capital or credit in any enterprise whatsoever. It does not matter that the public may, directly or indirectly, benefit from the enterprise. The Court found that the ordinances and the agreement between the developer and the city violate this provision of the Ohio Constitution. The Court found that,

> *The usual course of business, when developing a residential subdivision, requires the private developer to put in the streets and utilities, and recover the cost in the price of each lot in the development. The property owners are in effect assessed when the property is sold. Here, however, there is no assessment, and the developers still plan to realize the profits on the lots. Moreover, the city is paying 20 percent of the construction bill and financing the remainder of the private developer's costs. The city is also paying advertising costs, permit fee costs, and legal expenses, as well as a portion of the engineering costs. These actions by the city "raise money for" and "loan its credit to or in aid of" private corporations.*

The Court further stated that although a municipality has the power to construct streets and improvements, the Revised Code provides for assessing costs to abutting property owners. Thus, when a new property owner purchases a

property that has benefited from construction financed by special assessment, the new owner is responsible for the remaining payment. This method ensures that in the case of non-payment, the municipality has a method to recover its costs. Here, this procedure was not followed. The reimbursement agreement and enabling ordinances provide that the developer will reimburse 80 percent of the city funds in 32 installments, on a per lot basis. No liens will run with the land when title transfers from the developers to the purchasers. If the corporation becomes insolvent, bankrupt or otherwise, and unable to repay, the city is left without remedy to collect on the outstanding debt. This type of repayment scheme is not authorized by the Revised Code and places taxpayers' funds at risk. If the project fails, the taxpayers are saddled with the debt. This is what § 6, Art. VIII was intended to prevent.

The City went on to argue that § 13, Art. VIII of the Constitution applies. However, the Court rejected this argument stating that the construction of the residential street containing two cul-de-sacs and related improvements does not meet the definition of "industry" or "commerce." Once the construction is complete, no one is benefited except the residential property owners. Ultimately, the Court held that where a city contributes to the payment for, and financing of, a residential subdivision development project, the city is in violation of § 6, Art. VIII of the Ohio Constitution.

C. Westfield Franklin Park Mall LLC v. Toledo/Lucas County Port Auth., 2005-Ohio-5248 (6th Dist.).

In this case, appellants, Westfield Franklin Park Mall, LLC, argued that the Toledo/Lucas Port Authority unconstitutionally exercised its power in issuing bonds for the construction of parking garages and other facilities at mixed use development for a competitor, Crocker Park LLC. The Port Authority is restricted under the same constitutional provisions as municipalities with respect to Art. VIII, §§ 6 and 13. Under the development agreements, the Port Authority would act as an agent for the City of Westlake, would lease the parking garage property, and would issue revenue bonds to finance the project. To pay for the revenue bonds, the City of Westlake levied special assessments as a lien on the property to be paid by Crocker Park. None of the financing relied on the use of general public tax money.

In looking at whether the Port Authority's actions were authorized under the Constitution, the court looked to §§ 6 and 13 of Art. VIII. The court found that § 6, which prohibited private interests from tapping into public funds at taxpayers' expense was tempered by the passage of § 13, which provides exceptions to § 6 to "create or preserve jobs and employment opportunities or to improve the economic welfare of the people of the state." The court summarized that the real issue in this case is whether the aid to Crocker Park, a private entity, constitutes a permissible commerce exception under § 13. With the Crocker Park project including the parking garage, new housing, professional offices, retail stores, and other commercial opportunities, the court concluded that they could not conceive an interpretation of § 13, which would deny that at least the purpose of the project is to "create or preserve jobs and employment opportunities" and "to improve the economic welfare of the people of the state."

The court held that the revenue bonds issued by the Port Authority were to be repaid by special assessments paid by Crocker Park only; therefore, no general tax monies are obligated. Two back-up funds exist to provide for payment in the event that Crocker Park defaults on its payments. In addition, the special assessments constitute a lien on the property, which would apply to future purchasers should the property have to be sold.

C. Ryan v. City Council of Gahanna, 9 Ohio St. 3d 126 (1984).

A city purchased and developed land for an industrial park, through general obligation bonds, where no private developer would have been able to profitably develop the land. The City argued that it was an urban renewal project not subject to Art. VIII, §§ 6 and 13, but did not purchase the property through a community urban redevelopment corporation under Rev. Code Chapter 1728. The court found that

> *it [was] the pledge of tax revenue which makes the notes or bonds . . . an unconstitutional act. If only the full faith and credit of the city . . . had been pledged to repay the notes or bonds, this would have constituted sufficient compliance with [§ 13].*

II. Zoning, Variances, and Other Land Use Regulations

A. Zoning, Variances, and Other Land Use Regulations

Given the maze of local regulations of land for development, it is extremely important to have a competent and well-versed professional in zoning and land use matters in order to analyze the application of local regulations for a particular development project. It is suggested that a developer employ an experienced civil engineer and/or a land use planner (with AICP certification). Further, it is recommended that the developer consult with an attorney experienced in zoning and land use matters to guide the owner/developer through the maze of procedural steps for approvals and to avoid the pitfalls associated therewith which may result in waiver of legal rights.

It is particularly important to introduce relevant and substantial evidence before regulatory boards and commissions at the local government level in order to justify approval of applications for subdivisions, site plans, variances or other special zoning permits. Also, it is critical to have relevant and substantial evidence in the administrative record if the need arises to go to court to preserve one's rights. An inadvertent waiver of one's rights or an untimely assertion of rights can lead to a permanent loss of significant property rights. (See *Grava v. Parkman Township* (1995), 73 Ohio St.3d 379).

1. Zoning uses: permitted or conditional uses.

Virtually every zoning and land development code has a list of permitted uses in the various zoning districts in a community. Review such uses carefully because they are often construed narrowly, in spite of the fact

that Ohio case law generally holds that ambiguities in zoning regulations are to be construed in favor of a property owner. Written confirmation should be received from local zoning officials with respect to whether a use is permitted in a particular zoning district for a particular parcel.

In the event the Code administrator interprets the Code so as not to permit a use, be sure to timely appeal that interpretation as provided in the Code. Many zoning codes prohibit certain uses that are particularly intrusive and obnoxious, specifically certain industrial uses. Often, certain industrial uses are placed in a "conditional use" category within a zoning or development code. Conditional uses are not uses "by right." There is usually a list of standards, both "general and specific" that must be met to be approved as conditional use in a community. Approval of a conditional use is usually determined by the local planning commission or board of zoning appeals. Sometimes such bodies are required to recommend the use to the local legislative body, such as a city council, for final approval. Case law in Ohio is quite clear that a community has broad discretion as to whether to grant a conditional use permit. (*See, e.g., Gerzeny v. Richfield Twp* (1980), 62 Ohio St. 3d 339; and *ESSROC Materials, Inc. v. Board of Zoning Appeals of Poland Twp.* (1997), 117 Ohio App.3d 456.)

Most communities have provisions in their codes and zoning resolutions authorizing a property owner to request a "use" variance from the code prohibitions of a particular use in a particular zoning district. Some municipalities do not permit "use"-type variances to be considered. Townships, by statute (Rev. Code Chapter 519) are required to at least entertain use variances.

A use variance should only be granted upon the finding of an "unnecessary hardship," which generally means the property owner cannot make any economically viable use of the property under the current zoning restrictions. There is not one generally accepted set of legal standards for determining "unnecessary hardship" in order to justify the grant of a use variance. However, the case law of Ohio has made the legal distinction between a "use"-type variance and an "area"-type variance request. *Kisil v. Sandusky* (1984), 12 Ohio St. 3d 30.

A reading of case law in Ohio associated with "use"-type variances reveals the following seven standards that may be applied by a local government in determining whether a use variance is justified under the "unnecessary hardship" standard:

a. The variance requested stems from a condition which is unique to the property at issue and not ordinarily found in the same zone or district;

b. The hardship condition is not created by actions of the applicant. (One court has held that if the applicant purchases the property with knowledge of the use restriction, he is not entitled to a use variance);

c. The granting of the variance will not adversely affect the rights of adjacent owners;

d. The granting of the variance will not adversely affect the public health, safety or general welfare;

e. The variance will be consistent with the general spirit and intent of the zoning code;

f. The variance sought is the minimum which will afford relief to the applicant; and

g. There is no other economically viable use which is permitted in the zoning district.

3. Rezonings.

An additional remedy other than a use variance request for obtaining the right to develop a parcel of property for a use that is not current permitted in the code is through a legislative rezoning of that parcel to a land use category that permits the use. This may be done through either a text amendment to an existing commercial or industrial zoning district in the permitted or conditional use categories or by an amendment to the zoning map to include a particular piece of property into an existing zoning district in the code which permits the use being sought.

Both a text amendment or a map amendment take considerable amount of time to accomplish, assuming one can get the legislative support for such an amendment. The procedure to accomplish such amendments can take at a minimum 60 to 90 days, but more likely up to six months or longer. (The township procedure in Rev. Code § 519 likely takes, at a *minimum*, 90 days.) A referral to the planning commission for its recommendation is always required, whether that be to a municipal planning commission or to a county or regional planning commission when a township amendment is involved.

Additionally, if a significant number of citizens do not agree with the passage of an amendment, they may circulate a referendum petition within 30 days after passage of the amendment and, if they obtain the requisite number of signatures on the petition, suspend the effectiveness of the amendment and have it placed on the ballot the following November for a vote of the constituents as to the effectiveness of the amendment.

4. Area/spatial requirements.

Local zoning and development codes have a plethora of area and other spatial requirements for development of a particular piece of property in a particular zoning district. Such area or spatial requirements relate to: lot areas, lot widths, impervious surface ratios, setbacks from property lines,

setbacks from residential properties for business or commercial development, setbacks from significant environmental features, height of buildings, etc. Of course, every zoning or development code permits applications to be made for variances from these "area"-type requirements. As most of you know, an "area"-type variance is judged on a less strict standard then a "use"-type variance according to the Ohio Supreme Court. *Kisil, supra*; *Duncan v. Middlefield* (1986), 23 Ohio St. 3d 83.

In the *Duncan* case, the Ohio Supreme Court set forth the following seven "factors" be weighed in determining whether a property owner has encountered "practical difficulties" entitling it to a variance from an area requirement:

a. Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;

b. Whether the variance is substantial;

c. Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer substantial detriment as a result of the variance;

d. Whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage);

e. Whether the property owner purchased the property with knowledge of the zoning restrictions;

f. Whether the property owner's predicament feasibly can be obviated through some method other than a variance; and

g. Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting a variance.

No one of the above "factors" controls, but all of them must be analyzed to determine whether in a particular situation a property is entitled to an area variance. ("Area" refers to setback requirements, lot areas, lot widths, height requirements, number of required parking spaces, etc.)

5. Accessory use/development regulations.

There are several other regulations typically found in zoning and development codes related to: parking areas, loading areas, landscaping, sidewalks/trails, etc.

6. Subdivision Regulations

a. Platting process: city, county, and township.

In Ohio, the platting and subdivision process is generally governed by Chapter 711 of the Ohio Revised Code. The sections of that Revised Code Chapter set forth in considerable detail the actual subdivision process applicable to municipal corporations (cities and villages), counties, and townships—i.e., unincorporated areas.

Nevertheless, municipal corporations in Ohio, which have exercised the Ohio Constitution's home rule form of government,[1] may adopt platting and subdivision procedures and other regulations contrary to the procedures in Ohio Rev. Code Chapter 711. Many home rule communities have adopted subdivision regulations which depart from Rev. Code Chapter 711. Generally, until there is further clarification by the Supreme Court, the subdivision processes and regulations of a Home Rule Municipality may differ substantially from state law. Therefore, it would behoove any developer/subdivider to review local municipal codes and subdivision regulations.

Under state law, the approval of a plat of subdivided land is governed by Rev. Code § 711.09, which requires the plat to be approved by the city or village planning commission and such approval endorsed in writing on the plat. In a village that does not have a planning commission, a platting commissioner may be appointed or in the absence thereof, the legislative authority (council) of a village may approve and endorse the plat. In charter municipalities, often both the planning commission and the legislative authority (council) are required to approve subdivision plats. Even though the plat may be finally approved by a legislative authority, the approval of a plat is an administrative act, not a legislative act. *C&D Partnership v. Gahanna* (R. 1984), 15 Ohio St. 3d, 359.[2] *See also State, ex rel. Committee for the Referendum of Ordinance No. 3844-02 v. Norris* (2003), 99 Ohio St. 3d 336, 339. The importance of this distinction is that such approval is not subject to a referendum petition and possible ballot issue and immediate court action can be taken by the aggrieved party. *See, e.g., Buckeye Community Hope Foundation v. Cuyahoga Falls* (1998), 82 Ohio St. 3d 539. Also be aware that the decision may be binding on the parties under the doctrine of *res judicata*. *See*, *Grava v. Parkman*, (1995) 73 Ohio St. 3d 379.

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[1] But see *Viola Park, Ltd. v. City of Pickerington, Ohio, et al.*, 2007 Ohio 2900; 2007 Ohio App. LEXIS 2669 (5th App. Dist.; June 6, 2007) ruling that Rev. Code §§ 711.17 and 711.39 dealing with vacation of plats are general laws of Ohio and City of Pickerington Codified Ordinances could not conflict with such general laws. The *Viola Park* court adopted the "conflict by implication" test recently established in *American Fin. Servs. v. Cleveland*, 112 Ohio St. 3d 170 (2006).

[2] The *C&D Partnership* case also holds that the actions of the City's council or any of its administrative agencies in denying approval of a plat is not subject to suit for damages under state sovereign immunity law.

Rev. Code § 711.09 requires that the city or village platting authority either approve or refuse approval of the plat within 30 days after the submission of the plat for approval or within such further time as the applying party may agree to. Otherwise, the plat is deemed to be approved and a certificate from the platting authority must be issued evidencing that fact upon demand. There is no specific statutory Ohio law, which states that home rule municipalities may not impose a greater time period for approval of plats or to create by ordinance a regulation that a plat that is not approved within 30 days has been deemed to be refused. Non-home rule municipalities, counties and townships cannot adopt rules that conflict with the time frames in Rev. Code § 711. *See, e.g., P.H. English v. Koster* (1980), 61 Ohio St. 2d 17.[3]

It should be noted that the approval of the plat does not constitute acceptance of the dedication of the street. Rev. Code § 711.091 provides that the city or village engineer in the case of lands with a city or village and the county engineer in the case of lands outside of the city or village shall, upon request by the owner of land upon which the street has been constructed, check the construction and if the engineer finds that the street has been constructed in accordance with the specifications set forth on the approved plat and that the street is in good repair, shall endorse the plat which shall constitute acceptance of the street for public use by the city, village or county as the case may be, provided such street has theretofore been duly dedicated.

The subdivision approval process in charter municipalities is often different from the state statutory process in Rev. Code Chapter 711. As a general matter, there is usually a two-tier approval process. The developer/subdivider must first submit a preliminary plan which shows the layout of the streets, other public improvements and lots in relation to surrounding lands and developments. Once the preliminary plan is approved, the subdivider must then have its engineer or surveyor develop a more detailed, final plat showing the location of all public improvements, dedication language, and other municipal requirements for final plat approval. Usually the preliminary plan approval is only effective for a limited period of time and the subdivider must move forward with preparing all of the final plat documents for planning commission approval or risk starting the process all over again.

As a requirement of final plat approval, many municipalities require a financial guarantee in the form of a performance bond, letter of credit or other escrow agreement in lieu of performance

[3] *Koster* dealt with the Subdivision Regulations of the Geauga County Regional Planning Commission. But see the *Viola Park* case cited in fn. 1.

bond for the cost of all public improvements which the developer is required to construct. Additionally, many municipalities require proof of title and a title insurance policy covering the land areas to be dedicated, as well as liability insurance covering the municipality during the phase of construction of the public improvements and prior to acceptance of dedication of the public improvements. A development agreement or final plat agreement is commonly required by the municipality for these items. The final plat agreement may also include a time limit within which the improvements must be built and the requirement of a maintenance bond for the improvements for a period of time after the improvements have been constructed and accepted for public use.

The remedy for a developer/subdivider whose plat approval is refused is to file a petition in the court of common pleas of that county within 60 days of the local government's refusal. Rev. Code § 711.09. The petition is heard as any other civil bench trial, but the trial court may also consider the transcript of any proceedings before the planning authority. If a preponderance of the evidence supports the recording of the plat, or any modification thereof, the court orders the county recorder, which must be made a party defendant, to record the plat.[4]

Unincorporated areas of a county located outside of municipal corporations—i.e., located in townships in Ohio—may be subdivided pursuant to the specific approval provisions of Rev. Code § 711.10. Under Rev. Code § 711.10, as a general matter, the county or regional planning commission is vested with the approval power for a subdivision plat, which approval must be endorsed in writing on the plat.

The procedure for approval set forth in Rev. Code § 711.10 is that within 5 calendar days after the submission of a plat for approval, the county or regional planning commission must schedule a meeting to consider the plat and send notice of the meeting to the clerk of the board of township trustees of the township in which the plat is to be located. A meeting must take place within

[4] An interesting issue is whether an appeal under Rev. Code § 711.09(C) is the exclusive remedy from a decision of the Planning Commission or whether an appeal must be taken under Rev. Code Chapter 2506. The Ohio Supreme Court has ruled that the failure or refusal of a municipal council to approve a plan for the resubdivision of land which meets the terms of a zoning ordinance already adopted and in existence is an administrative act and an appeal from such failure or refusal to approve lies to the Court of Common Pleas under Chapter 2506 of the Revised Code. *See*, *Donnelly v. Fairview Park*, 13 Ohio St. 2d 1 (1968), syllabus no. 3. But *see*, *Provenzale v. Planning Commission of Bedford Heights*, 2004 Ohio 3468; 2004 Ohio App. LEXIS 3112 (July 1, 2004; 8th App. Dist.) (upholding dismissal of appeal under Chapter 2506 and authorizing appeal under Rev. Code § 711.09); and *Chamberlain Development, Inc. v. Planning Commission of the City of Twinsburg* (Summit App. 1998), 1998 Ohio App. LEXIS 2990 (holding that Rev. Code § 711.09 was the exclusive appellate remedy because it was so designated in the Twinsburg City Code). Although in many respects functionally equal with Rev. Code Chapter 711, Rev. Code § 2506.04 allows the Common Pleas Court to find the administrative order under appeal "unconstitutional."

30 calendar days after submission of the plat and not less than 7 calendar days from the date the notice was sent by the planning commission.

Similar to municipal subdivision approvals, there is a 30-calendar-day time period for approval or refusal to approve of the county or regional planning commission after the submission of the plat. The applying party may agree in writing to any additional time. Otherwise, the plat is deemed to be approved.

Since county and regional planning commissions are creatures of statute in Ohio, they must comply strictly with the provisions of the Ohio Rev. Code. Therefore, the county or regional planning commission cannot require the subdivider to alter the plat as a condition for approval, as long as the plat complies with the general rules governing plats and subdivisions of land properly adopted by the commission and in effect at the time the plat is submitted. See Rev. Code § 711.10.

However, pursuant to S.B. 115 effective April 15, 2005, a county or regional planning commission may grant conditional approval to a plat by requiring the person submitting the plat to alter the plat within a specified period after the end of the 30 calendar days as a condition for approval. When all conditions have been met, the commission shall endorse its final approval on the plat. See Rev. Code § 711.10(C).[5]

Also S.B. 115 now provides for submission of a preliminary plat for review. See Rev. Code § 711.10(B).

Similar to municipal plat denials, the applying party may, within 60 days after a refusal, file a petition in the court of common pleas of that county. It is significant to note that a board of township trustees is not entitled to appeal a decision of a county or regional planning commission under Rev. Code § 711.10.

Rev. Code § 711.10 requires a county or regional planning commission to adopt general rules governing plats and subdivisions of land falling within its jurisdiction. The rules may provide for modifications or variances to the rules in specific cases where unusual topographical and other exceptional conditions require the modification. Subdivision rules may also require the county health department to review and comment upon the plat and may also require proof of compliance with any applicable zoning regulations of the township or the county as a basis for approval of the plat.

[5] For a detailed, in-depth analysis of S.B. 115, see County Commissioners' Association of Ohio Bulletin 2005-02 dated April 2005.

b. Exemptions—lot splits, industrial lands.

The exemptions to subdivision processes under the state code are found in the definition of "subdivision" in § 711.001[6] of the Rev. Code and at § 711.131. The exemptions to the subdivision procedures are:

i. The division or partition of land into parcels of more than five acres not involving any new streets or easements of access;

ii. The sale or exchange of parcels between adjoining lot owners, where such sale or exchange does not create additional building sites;

iii. The division or allocation of parcels of land for private streets serving industrial structures; or

iv. If the planning authority adopts a rule exempting any parcel of land that is four acres or more, and/or parcels in the size range set forth in that rule. See Rev. Code §§ 711.001(C) and 711.133 effective April 15, 2005.

v. Pursuant to Rev. Code § 711.131, a proposed subdivision of a parcel of land along an existing public street which does not involve the opening, widening or extension of any street or road and involves no more than five lots after the original tract has been completely subdivided. In syllabus *1 of *1984 Ohio Op. Atty Gen. No. 73; 1984 Ohio AG LEXIS 33*, the Attorney General stated:

> *Where an owner, for purposes of transfer of ownership, divides a tract of land into five lots, where at least one lot is under five acres, and then further subdivides one of the lots into two or more parcels where at least one parcel is under five acres, the entire tract must be platted if there is a local regulation which requires subdivisions created by conveyances to be platted.*

Under exemption #4 above, the proposed subdivision may be submitted to the planning authority which has jurisdiction over approval of plats under §§ 711.09 and 711.10 of the Rev. Code for approval without a plat. A properly designated representative of the planning authority, usually the municipal engineer, has seven working days after submission of the request under Rev. Code § 711.131 to approve the proposed division. Upon the

[6] Note: Rev. Code § 711.001(B)(2) was amended (S.B. 115; eff. April 15, 2005) to include in the definition of "Subdivision" "the division . . . of land for the opening, widening, or extension of any *public or private* street. . . ." (Emphasis added.)

presentation of a conveyance of the parcel, which is normally a deed, the planning authority's representative must stamp the same "approved by (planning authority); no plat required" and have it signed by the designated official. The planning authority may require the submission of a sketch and other information pertinent to its determination.[7]

Most municipal codes adopted by home rule municipalities have adopted the same or similar exemptions to platting and subdivision requirements.

c. Inspections, dedications and vacations.

The penalties for violations of rules and regulations adopted by the legislative authority of a municipal corporation or the board of county commissioners for subdivisions is set forth in Rev. Code § 711.102. Most municipal corporations and counties, as well as township zoning inspectors, perform inspections of the lands proposed to be platted for compliance with zoning regulations prior to the approval of a plat. The penalty for a violation is a civil fine of not more than $1000. Home rule municipalities generally have much more stringent penalties for violations of subdivision rules and regulations, including criminal enforcement.

Public ownership of the portions of lands set forth in subdivision plats and the acceptance of dedication of those lands are two different concepts in Ohio law. Where the subdivider proposes public streets, utilities, common grounds and other public areas within the subdivision plat and the plat is approved and filed with the county recorder even for record purposes only, the local government assumes fee title to those publicly designated areas in the plat. *Eggert v. Puleo* (1993), 67 Ohio St. 3d 78. *See also, Rutherford v. Board of County Commissioners, Licking Co., Ohio* (2001), 2001 Ohio App. LEXIS 1954 (April 23, 2001) and *Chudzinski v. Mosser*, 1998 Ohio App. LEXIS 3243. The Ohio Supreme Court in *Eggert* further stated that dedication can occur pursuant to Rev. Code § 711.091 when the municipal engineer endorses on the improved plat acceptance of a proposed street as being constructed in accordance with the regulations of the municipality. Approval of a plat, however, is not an acceptance by the public of the dedication of any street or other way or open space that may be shown upon the plat. Rev. Code § 711.09(C) and 711.10. Most municipalities, however, require dedication be accepted by ordinance as set forth in Rev. Code § 723.03. The Ohio Supreme Court, however, has long held that certain actions by a municipality can constitute an acceptance of a common law dedication, absent an ordinance accepting the dedication, where

[7] A survey plat prepared by a registered professional engineer or surveyor may also be required, pursuant to Rev. Code § 315.251.

the municipality has taken some positive action such as the actual improvement of a street or road. *State, ex rel. Fitzthum v. Turinsky* (1961), 172 Ohio St. 148. One court has stated that a common law dedication requires the owner's intent to make such a dedication by an actual offer evidenced by some unequivocal act to make the dedication and that the offer must be accepted by the public. *Vermilion v. Dickason* (1976), 53 Ohio App.2d 138 and *Neeley v. Green* (1991), 73 Ohio App.3d 167, 170.

The importance of these distinctions between the passage of fee title to these lands to the local government and the acceptance of dedication for public use is that the government may have liability for accidents and injuries which may occur on the lands dedicated for public use prior to the acceptance of dedication at a time when the developer may have control over such lands. Therefore, it is important that a local government be indemnified and held harmless by the developer with respect to such third party liabilities until the local government's acceptance of dedication. Municipal corporations often require the developer to provide liability insurance during this period of time. Once the public improvement is completed and accepted for dedication to the public use by the local government, the burden of third party liabilities can then shift to the local government.

d. Vacations.

Rev. Code § 723.04 governs the vacation of public streets. Vacation can be initiated by the petition of a person owning a lot in a municipal corporation. The legislative authority of the municipal corporation must have a hearing and upon being satisfied there is good cause for such vacation and that it will not be detrimental to the general interest, it may, by ordinance declare a public street to be vacated. Any utilities that may run within the vacated public way are deemed by statute to have a permanent easement in the vacated portion of the street. Rev. Code § 723.041. A legislative authority of a municipal corporation may also vacate a street upon its own initiative. Rev. Code § 723.05.

A vacation of a public street may also be initiated upon a petition filed in a common pleas court. Rev. Code § 723.09. As a general matter, when a street is vacated, the adjacent landowners retain their reversionary interest in the land. Each of the abutting landowner's interests extends to the mid-point of the street or alley to which they are adjacent. *State, ex rel. Bedard v. Lockbourne* (1990), 69 Ohio App. 3d 452.

There is also a procedure set forth in the Ohio Revised Code for the vacation of an entire plat. Rev. Code § 711.17. The procedure is by petition through the common pleas court.

B. Planned Unit Developments (PUD).

Most communities in Ohio now have planned unit development ("PUD") regulations in their planning and zoning codes which permit creative design of residential, commercial and industrial subdivisions. PUD regulations telescope the zoning and subdivision functions into a single approval process. Generally, in a PUD, lot size, setbacks, lot coverage, parking and other standard development requirements in the zoning code are relaxed to achieve a better design. Often PUDs are created for newer shopping facilities such as "lifestyle centers" or residential cluster home developments.

The authority for the adoption of PUD regulations for counties and townships are set forth in Rev. Code §§ 303.022 and 519.021. There are no specific State code provisions authorizing planned unit developments in municipalities, but such regulations can be imposed under municipal "home rule" power in charter municipalities. PUDs are to be implemented solely at the discretion of the property owner, and cannot be imposed by local government.

The two most frequently used PUD mechanisms are: (1) the zoning code amendment mechanism which treats approved PUDs as a zoning map amendment, which actually changes the zoning map to include a new district with the special conditions applicable to the specific PUD site, and (2) the conditional use permits approved by the planning commission or board of zoning appeals.

Notable cases:

State ex. Rel. Committee for the Referendum of Ordinance No. 3844-02 v. Norris, 99 Ohio St. 3d 336 (2003), held that the final development plan and final plat of a planned unit development could not be subject to a referendum.

Kure v. City of North Royalton, 34 Ohio App. 3d 227 (8th Dist. 1986), held that assigning a planned unit development designation to land zoned for residential use had the legal effect of rezoning the land. Thus, it was subject to the provision in the city's charter that required zoning changes to be sent to a vote of the electorate.

C. Growth Management Plans.

A relatively new concept in Ohio which is fairly common in other parts of the United States is the concept of residential growth management. This concept has a direct impact upon the timing of development of residential subdivisions.

1. Preconditions for establishment of growth controls.

a. Zoning in place.

b. Zoning based upon comprehensive plan.

i. Plan must reflect policy decisions.

ii. Plan must reflect the results of a thorough and appropriate study.

iii. Factors addressed in the study and policy making may include:

(a) Overall population goals.

(b) Infrastructure and service demands.

(c) School demands.

(d) Environmental demands.

(e) Tax-based demands, including desired mix of revenue sources.

(f) Other quality of life issues, such as aesthetic, historical, or "local character" issues.

2. Types of growth management plans.

The four basic types of growth control measures:[8]

- Adequate public facility plan.
- Phased growth plan.
- Rate of growth plan.
- Urban growth boundaries.

a. Adequate public facilities plan ("concurrency")

This is the most basic plan. Development is permitted where and when adequate public facilities exist to support it. Some facility capacity factors can be objectively measured, such as water, storm and sanitary sewer; others, such as traffic volume, fire protection, schools, or recreational facilities, involve policy determination of acceptable levels of service or capacity in addition to analysis of factual data. It is usually tied fairly closely to basic health and safety issues.

b. Phased growth plan.

This type of plan is a direct regulation of timing and location of development. It is usually geared to adequacy of facilities, but tends to designate particular area(s) of the community as preferred for development. Designation may be based upon relative ease in providing facilities or services, or perhaps upon avoiding or protecting physical elements. Strategic planning of locations where road and sewer construction will be prioritized can greatly assist in implementation or defense of a phased growth plan. However, this phased growth plan is a sophisticated plan, which can be complicated to implement.

[8] These four basic types of growth management programs are identified in Patrick J. *Rohan, Zoning and Land Use Controls*, Vol. 1, Ch. 4 (Eric Damian Kelly, ed., Matthew Bender 1998).

Early legal test of phased growth was *Golden v. Planning Bd. of Ramapo*, as explained below:[9]

Due to its proximity to New York City, the town of Ramapo, NY had experienced two decades of extraordinary population growth. In order to slow the pace of growth, enabling the city to provide sufficient facilities, the town first developed a master plan. The plan's preparation included extensive study of the existing land uses, public facilities, transportation, industry and commerce, housing needs and projected population trends. The town then adopted a comprehensive zoning ordinance and subdivision ordinance, as well as a capital budget based upon sewage district and drainage studies. Next, Ramapo instituted a special permit requirement for residential development. Permits were issued based upon the "points" awarded the proposed development as a result of its access to five essential public improvements or services: (1) sewers, (2) drainage, (3) public schools and recreation facilities, (4) roads, and (5) firehouses. (Permits were not rationed or capped.) Residential development was thus coordinated with the town's ability to provide these improvements or services. The capital budget plan provided for build out by the end of eighteen years.

The New York Court of Appeals upheld the plan. It found that the state enabling statutes implicitly authorized regulation of growth by authorizing restriction of population density and land use, and facilitation of provision of adequate municipal services. Further it found the plan not confiscatory, since restriction on development was temporary, pending planned capital improvements. Also the court held that the plan did not violate substantive due process:

> *[W]here it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth' and hence, the challenged ordinance is not violative of the Federal and State Constitutions.*

c. Rate-of-growth plan.

This type of plan usually places a limit upon number of new dwellings that can be built each year. Growth figures should be derived from careful study with a view toward meeting the realistic needs of the community.

[9] 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *app. dismissed*, 409 U.S. 1003 (1972).

Early approval of rate-of-growth plan can be seen in *Construction Industry Ass'n of Sonoma County v. Petaluma and Schenck v. City of Hudson*, summarized below [10]

i. Petaluma case.

After its population more than doubled in the 1960's, Petaluma, CA adopted a five-year quota upon the number of building permits annually for projects of 5+ residential units. Building permits were allocated pursuant to a point system that favored compliance with the city's general plan and provided for low and moderate income housing units, and allocations were divided equally between east and west, single and multi-family units. A "greenbelt" line was drawn as five-year boundary for urban expansion, beyond which city services and residential growth were not allowed, to encourage in-filling around the city center.

The avowed purposes of the development controls were to insure orderly growth, protect small town character and open space, and provide diverse housing choices. Per the district court's findings, the development limits were not based upon facility limitations but upon a policy judgment of the city. The Court of Appeals for the Ninth Circuit held that the concept of the public welfare was sufficiently broad to sustain the city's interest in safeguarding its small-town character and insuring that growth proceed at an orderly and deliberate pace.

ii. Hudson case.

As a result of a merger between the former City of Hudson Village and Hudson Township in 1994, the city increased in physical size from six square miles to 25 square miles. The population of the city itself more than tripled as a result of the merger. Moreover, from 1990 to 1996, the number of residents living within the current geographical limits of the city increased by about 25%; the population of the area had nearly doubled in the preceding two decades. The city commissioned preparation of a comprehensive plan to accommodate the needs of the existing population and to prepare for anticipated residential growth, leading to passage of a new zoning and planning law in 1996. The legislation specifically set forth the city's intent to manage

[10] *Construction Industry Ass'n of Sonoma County v. Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) and *Schenck v. Hudson*, 114 F.3d 590 (6th Cir. 1997), rev'g 937 F. Supp. 679 (N.D. Ohio 1996), on remand, 997 F. Supp. 902 (N.D. Ohio 1998), aff'd, No. 98-3353, 208 F.3d 215 (6th Cir. 2000), 2000 WL 245482 (unpublished).

residential growth so that it did not exceed the capability of the city's infrastructure, to avoid the need for new infrastructure so the current city needs could be met, to protect the city's unique character, and to encourage nonresidential development to increase the city's tax base.

Under the new law, on an annual basis, the city restricted the number of residential building permits based upon the amount of municipal infrastructure needed to service such developments and the availability of other city services. A preference was given to developments proposing affordable housing, housing for the elderly or disabled, and to lots receiving preliminary or final plat approval prior to the effective date of the ordinance. In the first allotment, the number of applications greatly exceeded the number of permits to be allotted. A number of aggrieved plaintiffs claimed that the system was unconstitutional, and the district court preliminarily enjoined enforcement of the new system as to lots that had already received preliminary or final plat approval and were already improved with water, sewer, and roads. The court did not see a rational connection between the city's refusal to let such development proceed and its underlying concerns for infrastructure development. The court was also concerned that the permit allocation system was not an interim system, and that a specific facility improvement plan was not in place.

In a two-to-one decision, the Sixth Circuit dissolved the preliminary injunction. The court held that a cap on the number of permits for homes to be built in the city unquestionably bears a rational relationship to the city's legitimate concern of controlling growth in residential areas until such time as its infrastructure is able to meet the current and future needs. The appellate court gave substantial deference to the legislative judgment of the city council, particularly with respect to the city's decision to use a lottery system rather than a point system to allocate the limited number of permits. The appellate court recognized the equality inherent in the lottery system, and that administration of a point system would be cumbersome and potentially subjective. On remand, the district court granted summary judgment in favor of the city, which was affirmed by the Sixth Circuit.

See also *Currier Builders, Inc. v. Town of York*[11] in which the magistrate decided that a growth management ordinance that allowed for 84 residential building permits a year did not foreclose all development and therefore did not constitute a de facto moratorium as a matter of law.

The advantage to this plan is that its relatively easy to administer. However, if ordinance is not properly drafted and backed by supporting data, mechanical application may appear arbitrary or inequitable and could lead to constitutional "takings" claims.

d. Urban growth boundaries.

This plan creates a line separating the limit of future urban growth from areas that are to remain rural. Often this might be at the terminus of easy public water or sewer service. Such a line discourages urban sprawl and promotes in-filling. Leapfrog development makes provision of public services more expensive, leaves behind undeveloped pockets, and is more destructive to the environment, aesthetically and ecologically.

An example of this type of plan is *Eastampton Center, LLC v. Township of Eastampton*, 155 F. Supp.2d 102 (D. N.J.), where the district court ruled that developers had standing to bring a Fair Housing Act challenge to zoning amendments that created a "green belt" and reduced the allowable housing construction within the town, but found that the new ordinances placed equal restrictions on future residential opportunities for low income families or families with children. On summary judgment, the court determined that there was no evidence that the zoning amendments were motivated by any reason other than the town's legitimate interest in controlling the rate and character of its growth and dismissed the case.

D. Impact fees.

Generally, impact fees are imposed by local governments by ordinance on certain types of a development and placed in a restricted government fund in order to ameliorate the negative consequences or effects of that type of development. Impact fees are usually imposed on residential development which often does not support a positive net tax return to the local government. Payment of the impact fee is usually triggered by the application for a building permit. The impact fee is generally used to fund public facilities and services offsite. However, the impact fee must be part of a comprehensive development plan for the community that is linked to the capital improvements budget of the community and a comprehensive capital improvements plan.

[11] No. 01-68-PC, 2001 WL 823645, 2001 U.S. Dist. LEXIS 10268 (D. Me. July 20, 2001),

The leading case in Ohio on the subject of impact fees is *Home Builders Association of Dayton and the Miami Valley, et al. v. City of Beavercreek* (2000), 89 Ohio St.3d 121. In that case, the Ohio Supreme Court held: "an exaction adopted by ordinance that partially funds new roadway projects is constitutional if it bears a reasonable relationship between the city's interest in constructing new roadways and the increase in traffic generated by new developments, and if a reasonable relationship exists, it must then be demonstrated that there is a reasonable relationship between the impact fee imposed on a developer and the benefits accruing to the developer from the construction of new roadways." The Court upheld the Beavercreek ordinance imposing an impact fee.

Often times the requirement to reduce the specific impacts of a particular business or industrial development is governed by a development code requirement or subdivision regulation of a local community. For example, if there is shown through a traffic study that there is a direct impact upon roadways and traffic control devices in the vicinity of the development, the developer will be required to contribute to an upgrade to streets and traffic control devices in order to accommodate the additional traffic attributable to that development. This is a reasonable and legitimate requirement if properly demonstrated by the community.

Notable Case:

Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013):

Koontz owned 14.9 acres of property in Florida since 1972. Under a state regulation, all but 1.4 acres of the property became a Riparian Habitat Zone, thereby restricting development without approval from the St. Johns River Water Management District ("District"). In 1994, Koontz sought a permit from the District to develop 3.7 acres of the property. The District agreed to approve the permit if Koontz agreed to either (1) deed the rest of his property into a conservation area and perform mitigation efforts by replacing culverts or plugging drainage canals located miles from his property, or (2) reduce the development to one acre and turn the rest of the property into a deed-restricted conservation area. Koontz agreed to deed the remainder of his property under the first option, but refused to perform off-site mitigation. Therefore, the District denied his permit request.

Koontz filed suit in state trial court claiming that the District improperly exacted his property. On review by the United States Supreme Court, the Court held that the District could not evade limitations of the unconstitutional conditions doctrine by conditioning approval of a land use permit on the landowner's funding of off-site mitigation projects on public land. Further, the Court held that monetary exactions as a condition of land use permits must satisfy the requirements of the *Nollan* and *Dolan* cases that the government's demand have an "essential nexus and rough proportionality" to the impacts of the proposed development.

III. Tax Incentive Mechanisms

A. Tax increment financing (TIF).

Municipalities, townships and counties may use tax incremental financing (TIF) as an economic development mechanism to finance public infrastructure improvements and, in certain circumstances, residential rehabilitation. General public infrastructure improvements are considered a "parcel TIF" and residential rehabilitation projects in distressed areas are considered "Incentive District TIFs." Both TIF processes are governed by Rev. Code § 5709.40 et seq. The parcel TIF implementation process varies slightly from the process for an Incentive District TIF process.

In Parcel TIF's, the legislative authority, by legislation, must designate the specific parcels that will be benefited by the infrastructure improvement and will be, thus, subject to the TIF. Alternatively, in an Incentive District, the parcels subject to the TIF do not necessarily have to be directly benefited by the improvements.

"Incentive district" means an area not more than 300 acres in size enclosed by a continuous boundary in which a project is being, or will be, undertaken ***and*** having *one or more* of the following distress characteristics:

1. At least 50 percent of the residents of the district have incomes of less than 80% of the median income of residents of the political subdivision in which the district is located;
2. The average rate of unemployment in the district during the most recent 12-year period for which data are available is equal to at least 150 percent of the average rate of unemployment for this state for the same period;
3. At least 25 percent of the people residing in the district live at or below the poverty level as defined in the federal Housing and Community Development Act;
4. The district is in a situational distress area as designated by the director of development under division (F) of § 122.23 of the Revised Code;
5. As certified by the engineer for the political subdivision, the public infrastructure serving the district is inadequate to meet the development needs of the district as evidenced by a written economic development plan or urban renewal plan for the district that has been adopted by the legislative authority of the subdivision; or
6. The district is comprised entirely of unimproved land that is located in a distressed area as defined in § 122.23 of the Revised Code.

In each case, the creating legislation must set the amount and duration of the tax exemption. The tax exemption, which is converted to the "payments in lieu of taxes," may be up to 75 percent for up to 10 years. With Local School Board approval, the exemption may be 100 percent up to 30 years.

1. Draft legislation—The legislative authority must draft legislation doing the following:

    a. Designates the parcel(s) to be exempted from taxation;

    b. Declares improvements to private property within the specified area as serving a public purpose;

    c. Delineates the public infrastructure improvements to be made that will directly benefit the parcel;

    d. Specifies the equivalent funds to be created from those redirected monies;

    e. Determines the length of time and percentage of tax exemption. (Not to exceed 30 years and 100 percent exemption).

2. Notify affected Board of Education—The legislative authority must notify the affected school district's board of education (BOE).

    a. If the duration of the TIF is 10 years or less and if the amount of exemption does not exceed 75 percent, the BOE must be notified pursuant to Rev. Code § 5709.83, which provides for notice being sent to the BOE not later than 14 days prior to the day the legislative authority takes formal action to adopt the TIF legislation to allow the BOE to comment on the legislation, and the legislative authority is to "consider" the comments.

    b. If the duration of the TIF is *longer* than 10 years *or* if the percentage of tax exemption *exceeds* 75 percent then the legislative authority must notify the local BOE and *must seek BOE approval* for the years beyond 10 and the percentage in excess of 75 percent. Notice must be sent to BOE 45 business days prior to the intended date for adopting the ordinance.

    However, approval by the BOE is not required if agreements are entered into for the exempt taxpayers to remit service payments in lieu of taxes directly to the affected BOE in an amount equal to what would have been paid if the taxes had not been exempt.

    (Note that state law allows the Board of Education to waive its right to approve proposed TIF exemptions or grant state governmental entities the ability to provide notices in fewer than 45 business days in applicable circumstances.)

3. Board of Education approval, if needed—The BOE, by resolution adopted by the majority of the Board, may approve or disapprove the extended term and/or the percentage in excess, or they may approve the exemption on the condition that the legislative authority and the BOE negotiate an agreement providing for the compensation to the school district equal in value to the percentage of the amount of taxes exempted in the excess years and over the excess percentage so that the compensation is equal in value to a percentage of the taxes the school

district would have received but for the excess TIF exemption. The BOE must certify its resolution to the legislative authority not later than 14 days before the date the legislative authority intends to adopt the ordinance.

4. Revenue sharing plan preparation—In municipalities that levy their own income taxes, if the respective project receiving assistance generates annual payroll for new employees of $1 million or more, legislatively authorized TIFs must be accompanied by revenue-sharing agreements with the affected school district. If a municipality and the BOE fail to execute an acceptable compensation agreement within six months following the passage of the TIF legislation, state law mandates that municipal income tax revenues generated from new employees be divided on a 50/50 basis between the two parties. This arrangement must occur in each year that the TIF is in effect and the statutory payroll threshold is satisfied. Given the requirement that income tax revenues are shared with the affected Boards of Education, municipalities must collect employment and payroll information regarding the project prior to enacting TIF legislation and annually monitor such project data.

5. Adoption of the TIF ordinance—If the BOE fails to certify a resolution within the time prescribed, the legislative authority may adopt the ordinance and may declare the improvements for public purpose for up to 30 years or in excess of 75 percent. The legislative authority may adopt the ordinance at any time after the BOE certifies its resolution or if the Board approves the exemption on the condition that a mutually acceptable compensation agreement be negotiated, the ordinance may be passed at any time after the compensation agreement is agreed upon.

6. Creation of TIF fund—The municipal corporation that receives equivalent funds as service payments in lieu of taxes must create a separate fund by ordinances into which the service payments will be distributed to the municipality by the county treasurer. Monies from this fund may be distributed to the BOE as required.

7. Notice to state and local governments.

Ohio Department of Development—Within 15 days after the adoption of the ordinance, copies of the TIF Ordinance and service payment agreements must be submitted to the Ohio Director of Development.

County Auditor—An application must be submitted to the County Auditor (DTE Form 34 to Appraisal Division) who will forward the application on to the Ohio Dept. of Taxation.

Ohio Department of Taxation—The exemptions are subject to review by the Department of Taxation and its authorization may be finalized approximately six months after the county auditor files the TIF exemption documents with the Tax Equalization Division.

8. The exemption begins—The tax begins in the tax year specified in the ordinance so long as the tax year specified starts after the effective date of the ordinance. If the ordinance specifies a tax year that starts before the effective date of the ordinance or specifies no year whatsoever, the exemption commences with the tax year in which an exempted improvement first appears on the tax list and duplicate.

9. Annual status reports—By March 31 of each year, the municipal corporation must submit a status report to the Ohio Director of Development, indicating the progress of the project during each year that the exemption remains in effect, including:

   a. A summary of the receipts from service payments in lieu of taxes,

   b. Expenditures of money from the funds created;

   c. A description of the public infrastructure improvement financed; and

   d. The quantitative summary of changes in employment in private investment resulting from each project.

10. The exemption ends—The exemption ends on the date specified in the ordinance, on the date the improvement ceases to be a public purpose, or on the date on which the public infrastructure improvements are paid in full from the equivalent funds, whichever occurs first. Any surplus remaining in the equivalent fund must be transferred to the general fund of the municipality upon dissolution of the account.

Notable Cases:

1. *Sugarcreek Township v. Centerville*, 133 Ohio St. 3d 467 (2012)

   Overturning a Second District Court of Appeals decision, this case held TIFs can abate township property taxes on property that has been annexed into a City under a Rev. Code § 709.023, even when the township still has the statutory authority to continue taxing the property. In this case, Township property was annexed to the City of Centerville under Rev. Code § 709.023, but the Court acknowledge that although PILOTs are levied and valued similar to real estate taxes or may be viewed simply as redirected taxes, the Ohio Supreme Court has held that PILOTs are not taxes under Rev. Code § 709.023(H). Until then, the annexed property was subject to both the City and the Township real estate taxes. The City wanted to establish a TIF on the property, but the Township argued that the City could not abate the Township taxes under the TIF. The Ohio Supreme Court disagreed and held that the "annexing municipality may accordingly adopt a tax-increment financing plan under Rev. Code § 5709.40 that temporarily exempts improvements to the annexed property from city and township property taxes on to support the annexed property's economic development."

2. *Chu Bros. Tulsa Partnership, P.L.L. v. Sherwin-Williams Co.*, 187 Ohio App.3d 261 (12th Dist. 2010)

In this case, both parties agree that the terms of the lease in this case govern their real estate tax and assessment obligations. Specifically, the lease in this case provides that Sherwin–Williams was responsible for all "general real estate taxes and assessments," while Chu Brothers paid "special assessments." In its sole assignment of error, Sherwin–Williams asserted that PILOTs are special assessments. In contrast, Chu Brothers argues that PILOTs are not special assessments and the contract requires Sherwin–Williams to pay for the charges. The sole question for the Court's review was whether PILOTs are special assessments.

The court recognized that special assessments are charges imposed by a public authority on property in the immediate vicinity of a public improvement, to pay the cost of the construction, and made with reference to the special benefit that the property derives from the improvement. The Court relied on the Ohio Supreme Court's finding public improvements constructed pursuant to a municipal TIF program "benefit specified parcels of property." *Princeton City School Dist. Bd. of Edn. v. Zaino* (2002), 94 Ohio St.3d 66, 70. Ultimately the court held that although equal to the real property taxes that would have been payable if the property had not received a TIF exemption, PILOT funds are used to pay for the infrastructure improvements that directly benefit the property owner. Therefore, they were special assessments under the lease.

B. Ohio Community Reinvestment Areas.

Pursuant to Rev. Code § 3735.65-70 Community Reinvestment Areas (CRA) are areas of land in which property owners can receive tax incentives for investing in real property improvements. The CRA Program is a direct incentive tax exemption program benefiting property owners who renovate existing, or construct new, buildings. This program permits municipalities or counties to designate areas as CRA where investment has been discouraged in order to encourage revitalization of the existing housing stock and the development of new structures.

While the CRA Program is primarily a housing oriented incentive, it does have considerable value as an economic development tool. The CRA Program was created in 1977. The program underwent major revisions in 1994. In fact, there are two types of Community Reinvestment Areas in Ohio—those created prior to July 1, 1994 and those created after. The regulations governing each type vary considerably. In each case, however, the local legislative authority with jurisdiction over the designated area determines the size, the number of areas as well as the term and extent of the real property exemptions.

A municipality or county must undertake a Housing Survey of the structures within the area proposed as a CRA. The results of the survey must support the finding that the area is one in which housing facilities are located and that new

construction and renovation is discouraged. The local legislation creating the CRA must contain a statement of finding that the area included in the description is one in which "housing facilities or structures of historical significance are located and new housing construction and repair of existing facilities or structures are discouraged."

All property owners meeting the requirements set forth in the local legislation and planning to undertake a real property improvement can apply to the housing officer designated by the local legislative authority. In a pre-1994 CRA the application is made after the improvements have been completed unless otherwise stipulated within the CRA creation legislation. In a post-1994 CRA, residential applications are filed at construction completion, but projects involving commercial or industrial facilities must apply before the project begins.

The term of the exemption for a pre-1994 CRA is as stipulated within the local legislation. Residential projects in a post-1994 CRA receive the percentage and term of the exemption specified within the authorizing legislation. In all commercial and industrial projects in a post-1994 CRA, the exemption percentage and term are to be negotiated between the property owner and the local legislative authority. An agreement meeting the standards set forth in Rev. Code § 3735.671 must be finalized prior to the commercial or industrial project going forward.

Local municipalities or counties can determine the type of development to be supported by the CRA Program by specifying the eligibility of residential, commercial and/or industrial projects. In addition, the local legislative authority must create Tax Incentive Review Council to review performance on all agreements and projects.

If a CRA Agreement is proposed which provides an exemption greater than 50 percent, then the local legislative authority must request the board of education's approval a minimum of 45 business days prior to the scheduled local legislative review. The board of education, by resolution adopted by a majority of the board, shall approve or disapprove the agreement and certify a copy of the resolution to the legislative authority not later than fourteen days before the legislative authority formally considers the agreement. The board may include in its resolution conditions under which it would approve the agreement. The local legislative authority may approve the proposed agreement if the conditions are satisfied. If the board does not approve the proposed agreement or if the conditions are not satisfied, the local legislative authority may approve an agreement so long as the exemption does not exceed 50 percent.

Also, in a municipality that has a local income tax, any project that will generate a new annual payroll of one million dollars or more, the municipality and the board of education must negotiate a revenue sharing agreement outlining the manner and procedure of the agreed upon compensation. If no agreement is reached within six months of the finalization of the CRA Agreement, then the income tax revenues generated by the new employees will be split 50/50 between the municipality and board of education. This provision applies to both a CRA created after July 1, 1994 and those created prior to July 1, 1994.

When a proposed CRA assisted project involves the relocation of any portion of the operations of a business that is located elsewhere within the state to a different jurisdiction within the state, the local government of that jurisdiction must provide to the local legislative authority of the county or municipality from which the relocation will occur a notice not less than 30 days before the formal review or approval of the CRA Agreement. The formal notice must include a copy of the agreement to be considered.

While any CRA created prior to July 1, 1994 is "grandfathered" and many of the post July 1, 1994 CRA provisions do not apply, this exclusion is limited in both time and applicability. A pre-1994 CRA can amend its authorizing legislation twice and still fall within the pre 1994 CRA rules. Any third amendment would impose the post-1994 CRA rules on that area.

Note: There is an argument that the holding in *Sugarcreek Township v. Centerville*, 133 Ohio St. 3d 467 (2012) (See TIF discussion), applies also to CRA tax abatement.

Below is a table summarizing the pre-1994 and post-1994 CRA requirements:

CRA PROGRAMS BENEFITS	**PRE JULY 1, 1994 CRA**	**POST JULY 1, 1994 CRA**
EXEMPTION LEVELS:		
Real Property	Must be 100%	Up to 100% **
Personal Property	None	None
Inventory	None	None
TERM EXEMPTIONS:		
Residential Remodeling (2 units or less; minimum $2500)	Up to 10 years as specified in the legislation that creates the CRA	Up to 10 years as specified in the legislation that creates the CRA
Residential Remodeling (more than 2 units; minimum $5000)	Up to 12 years as specified in the legislation that creates the CRA	Up to 12 years as specified in the legislation that creates the CRA
Residential New Construction	Up to 15 years as specified in the legislation that creates the CRA	Up to 15 years as specified in the legislation that creates the CRA
Commercial and Industrial Remodeling (minimum $5000)	Up to 12 years as specified in the legislation that creates the CRA	Up to 12 years as negotiated and approved in an CRA Agreement

Commercial and Industrial New Construction	Up to 15 years as specified in the legislation that creates the CRA	Up to 15 years as negotiated and approved in an CRA Agreement

** The exemption percentage and term for commercial and industrial projects are to be negotiated on a project specific basis. If the proposed exemption exceeds 50 percent, local school district consent is required unless the legislative authority determines, for each year of the proposed exemption, that at least 50 percent of the amount of the taxes estimated that would have been charged on the improvements if the exemption had not taken place will be made up by other taxes or payments available to the school district. Upon notice of a project that does not meet this standard, the board of education may approve the project even though the new revenues do not equal at least 50 percent of the projected taxes prior to the exemption.

C. A note on other tax abatement mechanisms.

1. Local income tax credits for job creation/retention.

Rev. Code § 718.15 authorizes a city, by ordinance, to grant a refundable or nonrefundable credit against its tax on income to a taxpayer that also receives a refundable Jobs Creation Tax Credit against corporate franchise, income or commercial activity taxes under Rev. Code § 122.17. This credit is measured as a percentage of the new income tax revenue that a city derives from new employees of the taxpayer. Under state law, the maximum term of this credit is 15 years. The city and the taxpayer must enter into an agreement specifying all the conditions of the credit before the city passes the ordinance granting the credit.

Similarly, Rev. Code § 718.151 authorizes a city, by ordinance, to grant to a taxpayer who receives a nonrefundable or refundable tax credit under the Job Retention Credit program, pursuant to Rev. Code § 122.171, a nonrefundable or refundable (respectively) credit against the local income tax. This credit is measured as a percentage of the income tax revenue a city derives from the retained employees of the taxpayer, and the maximum term of the credit is 15 years.

The city and the taxpayer must enter into an agreement specifying all the conditions of the credit before the city passes the ordinance allowing the credit.

2. Constitutional "home rule" income tax credits.

Municipalities have exercised their general "home rule" powers under the Ohio Constitution, Art. XVIII, § 3 to create their own income tax credit programs for job creation and retention without being linked to the State Job Creation and Job Retention tax incentive programs. This would be accomplished by ordinance of Council.

3. Leasehold improvement reimbursement grants.

A few communities, such as the City of Beachwood, Ohio, have enacted a program providing for leasehold improvement reimbursement grants. The grant funds must be paid from the City's non-tax revenue which include: (a) grants from the United States of America and State of Ohio; (b) payments in lieu of taxes now or hereafter authorized by State of Ohio statute to the extent not pledged to pay debt charges on City indebtedness; (c) fines and forfeitures which are deposited in the City's General Fund; (d) fees deposited in the City's General Fund for services provided and from properly imposed licenses and permits; (e) investment earnings on the City's General Fund; (f) proceeds from the sale of assets which are deposited in the City's General Fund; (g) gifts and donations; and (h) rental payments which are deposited in the City's General Fund.

4. Enterprise zones.

Enterprise zones are areas designated by a municipal corporation or county for the purpose of fostering economic development. The municipal corporation or county may enter into enterprise zone agreements with businesses that establish or expand within or relocate to the zone in exchange for property tax and other incentives or governmental support negotiated as part of the enterprise zone agreement. For a municipal corporation to designate a zone, it must be a principal city of a Metropolitan Statistical Area as defined by the U.S. Office of Management and Budget; any county may designate a zone with the consent of the affected municipal corporation or township. The minimum criterion for having a zone designated is that the zone has a population of at least 4,000 (municipal zones) or 1,000 (county zones). If other additional criteria that are indicative of economic distress are also satisfied, incentives may be offered to a somewhat broader range of companies. If only the population criterion is satisfied, companies are eligible for incentives only if they establish new operations in the zone without reducing employment elsewhere in Ohio, relocate from another state, expand at the existing site within the zone, or relocate from elsewhere in Ohio and obtain a special waiver from Development Services Agency (DSA) indicating that the relocation is necessary.

5. Impact of proposed H.B. 182 on certification of the zone.

Under continuing law, a municipal corporation or county seeking to designate an enterprise zone must submit a petition to the DSA for certification. DSA examines the petition to determine if all of the criteria for establishing a zone are met before certifying the zone. Under proposed H.B. 182, which, as of the date of this material, has passed both the House and Senate, a municipal corporation or county seeking to include a retail facility in an enterprise zone may petition the board of education of each school district affected by the proposed zone to waive this retail facilities exclusion. The school boards may waive the exclusion by adopting a resolution approved by the majority of board members.

The bill specifies that, by waiving the retail facilities exclusion, a school board does not waive its right to approve enterprise zone agreements or receive notice of the agreements as required by ongoing law. Ongoing law requires enterprise zone agreements to be approved by school board if the property tax exemption percentage exceeds specified percentages of the otherwise taxable value (75% in most cases) and if the exemption continues for more than ten years.

IV. Eminent Domain

A. Background.

The source of eminent domain powers can be found in two Constitutional provisions: the Fifth Amendment to the United States Constitution and Article I, Section 19 of the Ohio Constitution. Jurisprudence, both in the United States Supreme Court and the Ohio Supreme Court on eminent domain law was relatively non-controversial until 2005 when the U.S. Supreme Court held that, under the Fifth Amendment, taking of property for economic development is permissible. *Kelo v. New London*, 545 U.S. 469 (2005). The *Kelo* case was not an unprecedented departure from prior U.S. Supreme Court precedent, but it did provide an expansive ruling on the scope of the permissible exercise of condemnation powers under the Fifth Amendment to the United States Constitution. Upholding a taking based on an economic development study in the City of New London, the Court upheld New London's taking for "a public use," i.e., economic development, and elimination of urban blight as being a proper "public purpose." Economic development, promoting jobs and increased tax base were permissible public purposes under the *Kelo* case which could justify the exercise of power of eminent domain to take private, even non-blighted, property pursuant to the Fifth Amendment.

The reaction to the *Kelo* case was immediate and vocal. The focus of eminent domain power shifted to the states, both politically and, in Ohio, judicially. About one year after the *Kelo* case, the Ohio Supreme Court decided the case of *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. The Ohio Supreme Court held that, under the Ohio Constitution, the taking of private property solely for the purpose of economic development was prohibited.

B. Overview of Ohio's Eminent Domain Statute (Rev. Code § Chapter 163).

In addition to the *Horney* case, the Ohio legislature, basing its legislation on an eminent domain task force, passed Amended Senate Bill 7 ("S.B. 7") on July 14, 2007. S.B. 7 substantially changed the appropriation process. The Bill requires notice, appraisal, and a good faith offer before the petition for appropriation can be filed. Also, it allows the property owner and the agency to request non-binding mediation. The Bill switches the burden of proof on the threshold issues from the property owner to the agency and reduces the determinative effect of a municipal resolution on the threshold issues.

In addition, in some instances, the Bill makes the agency liable for the property owner's attorneys' fees and costs if the jury award is more than 25 percent greater than good faith offer. S.B. 7 also increases situations were additional compensation is due, such as for goodwill and relocating owners, commercial tenants, and residential tenants. Moreover, property owners now have the right to re-purchase the property if it will not be used for the appropriated use. Nonetheless, S.B. 7 does preserve the right of quick-takes and makes exceptions to particular rules for situations of public exigency, making or repairing roads, and railways.

C. The statutory process.

Eminent domain may only be used to appropriate private property for a "public use." The following are presumed public uses: roads, sewers, schools, public parks, and government buildings. "Public use" does not include any taking that is for conveyance to a private commercial enterprise, economic development, or solely for the purpose of increasing public revenue, unless the property is *conveyed or leased to* one of the following:

1. A public utility, municipal power agency, or common carrier;
2. A private entity that occupies a port authority transportation facility or an incidental area within a publicly owned and occupied project;
3. *A private entity* when the agency that takes the property establishes by a preponderance of the evidence that *the property is a blighted parcel or is included in a blighted area*.

D. Conveyance to private commercial enterprise—blight parcel (Rev. Code § 1.08).

"Blighted area" means an area in which at least 75 percent of the parcels are blighted parcels which substantially impair our areas the sound growth of the political subdivision or are a menace to the public health, safety, morals or welfare in their present condition and use.

"Blighted parcel" for purposes of the eminent domain statute means either of the following:

1. Parcel has *one* or more of the following:
    a. Structure unfit for human habitation because of dilapidation, sanitary, issues, etc.;
    b. Direct threat to public health because of environmentally hazardous conditions, contamination, etc.; or
    c. Tax or special assessment delinquencies exceed FMV and are overdue.

2. Parcel has *two* or more of the following conditions that "adversely affect surrounding property values" *and* that cannot reasonably be corrected through existing land use regulations:

   a. Dilapidation and deterioration;

   b. Age and obsolescence;

   c. Inadequate provision for ventilation, light, air, sanitation, or open spaces;

   d. Unsafe and unsanitary conditions;

   e. Hazards that endanger lives or properties by fire or other causes;

   f. Noncompliance with building, housing, or other codes;

   g. Nonworking or disconnected utilities;

   h. Is vacant or contains an abandoned structure;

   i. Excessive dwelling unit density;

   j. Is located in an area of defective or inadequate street layout;

   k. Overcrowding of buildings on the land;

   l. Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;

   m. Vermin infestation;

   n. Extensive damage or destruction caused by a major disaster when the damage has not been remediated within a reasonable time;

   o. Identified hazards to health and safety that are conducive to ill health, transmission of disease, juvenile delinquency, or crime;

   p. Ownership or multiple ownership of a single parcel when the owner, or a majority of the owners of a parcel in the case of multiple ownership, cannot be located.

Before an agency appropriates property based on a finding that the area is a blighted area or a slum, the agency must adopt a comprehensive development plan that describes the public need for the property.

E. Parties authorized to appropriate.

The law refers to the party authorized to appropriate as the "agency." This term includes public agencies, such as governmental corporations, and private agencies.

F. Purpose of the appropriation.

No agency shall appropriate real property except "as *necessary* and *for public use*."[12] Under the new law, any taking that is for a conveyance to a private commercial enterprise, for economic development, or solely for the purpose of

[12] (Emphasis added.) Rev. Code § 163.021(A).

increasing public revenue is not a "public use" unless the property is conveyed or leased to a public utility, municipal power agency, or an entity related to the port authority.[13] Under the new law, the following are presumed to be public uses: utility facilities, roads, sewers, water lines, public schools, public institutions of higher education, private institutions of higher education, public parks, government buildings, port authority transportation facilities, projects by an agency that is a public utility, and similar facilities and use of land.

Under the law, an agency may appropriate real property for projects that will disrupt the flow of traffic or impede access to property only after the agency makes reasonable efforts to plan the project in a way that will limit those effects. This division does not apply to an agency if it initiated the project for which it appropriates the property under Title 55 (Roads, Highways, and Bridges) of the Revised Code.

G. The property.

Under both the prior law and the current law, if the agency would require less than the whole of any parcel containing a residence structure and the required portion would remove a garage and sufficient land that a replacement garage could not be lawfully or practically attached, the appropriation must be for the whole parcel and all structures. Under the current law, if the property owner waives this provision, the agency shall then appropriate only the portion of the parcel that the agency requires as well as the entirety of any structure that is in whole or in part on the required portion.

Under both the prior and current law, an agency may, at a time prior to or subsequent to the filing of the petition for appropriation, enter on the land for the purposes of making surveys, sounds, drilling, appraisals, and examinations provided notice is given to the property owner not less than 48 hours prior to the entry.

H. The process.

The process of notice, appraisal, and good faith offer is set forth in the current law. The only requirement to filing a petition for appropriation under the prior law was that the agency had been unable to come to an agreement with the property owner for conveyance of the property.

I. Notice.

At least 30 days before filing a petition for appropriation with the court, the agency must provide notice to the owner of the agency's intent to acquire the property. The form of the notice is set forth in Ohio Rev. Code § 163.041. The notice must be delivered personally or by certified mail to the owner or owners' designated representative.

[13] Rev. Code § 163.01(H)(1).

J. Appraisal.

The agency may appropriate real property only after it obtains an appraisal of the property and provides a copy of the appraisal to the owner or, if more than one owner, to each owner or to the guardian or trustee of each owner. When the appraisal indicates that the property is worth less than $10,000, the agency need only provide the owner, guardian, or trustee with a summary of the appraisal. The agency must provide the appraisal or summary of the appraisal at or before the time the agency makes its first offer to purchase the property.

K. Good Faith Offer.

Either at the time of providing notice or after providing the notice but not less than 30 days before filing the petition, the agency must provide the property owner with a written good faith offer to purchase the property. The agency may revise that offer if, before commencing an appropriation proceeding, the agency becomes aware of conditions indigenous to the property that could not reasonably have been discovered at the time of the initial good faith offer, or if the agency and the owner exchange appraisals prior to the filing of the petition. The owner must be given at least 10 days to accept or reject the offer.[14]

L. Attempt for agreement.

An agency may appropriate real property only after the agency is unable to agree on a conveyance or the terms of a conveyance, for any reason, with any property owner unless each owner is incapable of contracting in person, or each owner is unknown, or the residence of each owner is unknown to the agency and none of the owners' residences can be ascertained with reasonable diligence.

M. Petition for appropriation.

Generally, the provisions related to the content of the petition are the same under the prior law and the current law.

1. The petition.

If no agreement can be reached with the property owner, the agency may commence proceedings in the courts by filing a petition for a single parcel or contiguous parcels in common ownership.

2. Service of process.

Where the residence of the owners is known and is within this state, notice of the filing of a petition must be given to all such owners by serving a summons and a copy of such petition in the manner of service of summons in civil actions. When the residences of the owners are

[14] Rev. Code § 163.04(B).

unknown or the owners cannot be served within the state, notice shall be given by publishing the substance of the petition, a statement of the date of the filing, and the date on and after which the matter may be heard. The publication must be once a week for two consecutive weeks, in a newspaper of general circulation in the county, or shall be given by registered mail. When service is made by publication, it must comply with Rev. Code § 2703.16.

3. Non-binding mediation.

The law states that either an owner of property or an agency may request that the issue of the value of the property be submitted to nonbinding mediation.

4. Right of entry with deposit ("quick-takes").

The right of entry with deposit ("Quick-takes") is set forth in the law. If the agency is appropriating for purposes *other than* making or repairing roads open to the public without charge, for implementing rail service, or for a public exigency, a public agency may deposit with the court, at the time of filing, the petition the value of such property appropriated together with the damages, if any, to the residue of the parcel, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. However, the right of possession upon deposit does not extend to structures on the property.

If the agency is appropriating for *making or repairing roads open to the public without charge*, implementing rail service, or for a public exigency, and that qualifies pursuant to § 19 of Art. I, Ohio Constitution,[15] the agency may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the remainder of the property, as determined by the public agency. The agency may then take possession of and enter upon the property appropriated, including structures situated upon the land appropriated. The owner or occupant of the structures on the property must vacate the structures within sixty days after service of summons, after which time the agency may remove the structures.

Any time after the deposit is made by the public agency under the "quick-take" process, the property owner may apply to the court to withdraw the deposit, and such withdrawal shall in no way interfere with the action except that the sum so withdrawn shall be deducted from the sum of the final verdict or award. Upon such application, the court shall direct that the sum be paid to the owner subject to the rights of other parties in interest.

[15] "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." Ohio Constitution, Art. I, § 19.

N. Owner's answer.

Under both the prior law and the current law, the owner may file an answer to the petition. The issues of the agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein. However, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for *the purpose of making or repairing roads* open to the public without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation.

Also under both the prior law and the current law, if no answer is filed, the court can, by motion, declare the value of the property and damages to the remaining unappropriated property to be the amount set forth in any documents properly filed by the agency. In all other cases where an answer it not filed, a jury will assess compensation. If an answer is filed, a hearing date is set within 15 days from the date of the answer.

O. Decision of the court.

The current law changed the burden of proof with respect to the issues of the right to make the appropriation, the inability of the parties to agree, and the necessity of the appropriation (the "threshold issues") from the property owner to the agency, by a preponderance of the evidence. But under the current law, if the appropriation is *not* based on blight, a resolution or ordinance by the council declaring the necessity for the appropriation creates a rebuttable presumption (not a prima facie case, as in the prior law) of the necessity for the appropriation.

As a preliminary matter, the judge determines the threshold issues. If the threshold issues are determined in the agency's favor, the assessment of compensation is determined by a jury. Also, under the current law, if the judge finds against the agency as to the necessity of the appropriation or whether the use is a public use, the court shall award the owner attorneys' fees, expenses, and costs.

The law states that the jury shall determine the value based on the evidence presented with neither party having the burden of proof.

Under the prior law, a property owner who received an adverse ruling on the threshold issues could not appeal until after the jury award. In contrast, under the current law, the right of immediate appeal is granted to the owner of the property who has received an adverse determination on the threshold issues, unless the agency is appropriating the property in the time of public exigency, *for the purpose of making roads or repairing roads*, implementing railroads, or by a public utility owned and operated by a municipal corporation as the result of a public exigency. Otherwise, the property owner can appeal only after the jury assesses compensation. An agency has the right to immediate appeal if any determination is made against it.

Under the prior law and the current law, if an agency takes possession of the property by way of a "quick-take" prior to the judge's ruling and the ruling, or appeal of the ruling, is adverse to the agency, the agency must restore the property to its original condition and compensate the owner for damages.

P. Jury award, fees and costs.

Under the law, the jury award for compensation will include compensation for the property appropriated and damages, if any, to the remaining unappropriated property. The law also provides for additional compensation for persons who are displaced from a dwelling.

In addition, under the law, the jury shall also assess compensation to the owner of a business for loss of goodwill up to $10,000. Moreover, the new law requires that if an owner, commercial tenant, or residential tenant must move or relocate because of the appropriation, the agency must make payment to that person for the following:

1. Actual reasonable moving expenses;
2. Actual direct losses of tangible personal property as a result of moving, not to exceed a reasonable amount;
3. Actual reasonable expenses in searching for a replacement business, not to exceed $5000;
4. Actual and reasonable expenses necessary to reestablish a small business at its new site, not to exceed $10,000; and
5. Actual economic loss resulting from the appropriation, but not including attorneys' fees, and not to exceed 12 months' net profit and to be subject to reduction of time in quick-take situations.

If the agency does not approve these costs, the jury will determine the compensation amount, but the owner will have the burden of proof for those expenses.

If the owner, prior to the trial on compensation, gives the agency a statement as to the valuation of the property and if the final award for compensation is greater than 125 percent of the agency's original offer for the property, the owner is entitled to the attorneys' fees, costs, and expenses which were actually incurred, capped by a formula related to the offer and the jury award. However, the court shall *not* award attorneys' fees, costs, and expenses, if the appropriation was done as a result of a public exigency, *for making or repairing roads*, or for implementing a rail service.

Q. Owner's right of repurchase.

Under the law, if the agency decides not to use the appropriated property for the purposes stated in the petition, the owner has the right to re-purchase the property for fair market value as determined by an independent appraisal. However, the right of re-purchase is extinguished if any of the following apply:

1. The prior owner declines to re-purchase the property;
2. The prior owner fails to re-purchase the property within 60 days after the agency offers the property for re-purchase;
3. A plan, contract, or arrangement is authorized that commences an urban renewal project that includes the property;
4. The agency grants or transfers the property to another person or agency;
5. Five years have passed since the property was appropriated; or
6. Prior to the filing of the petition, the property was blighted, and the prior owner contributed to the blight.

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