

# Law & Accounting

## Shifting realities of real estate purchase and sale contracts

Months into the coronavirus (COVID-19) crisis, the adverse impact on U.S. businesses and the global economy remains uncertain. Every market sector has been impacted by the pandemic amidst measures being taken to curb its spread. The real estate industry is no exception. Shelter-at-home orders, issued by federal and local governments, have caused cascading effects that interrupt normal business operations. Purchasers and sellers with active real estate transactions are questioning who shoulders the burden of these tumultuous times.

Nationwide, the real estate industry is facing considerable challenges to keep transactions moving forward while complying with regulatory orders from governmental authorities. In Colorado and California, these regulatory orders introduce the terms “essential” and “nonessential” related to services and businesses. Those businesses and services deemed “essential” are permitted to remain operational and ordered to implement specific social distancing requirements.

While the debate is very real on the designation of essential and nonessential, each jurisdiction is beginning to offer guidance. Because of this, some local governments such as the city and county of Denver’s Mayor’s Office released its own “Denver



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order” that further identifies essential services as “professional services, such as legal, insurance, real estate and tax preparation services, including ancillary and supporting services.” Providing clarity on what a nonessential designation can mean is the stark economic reality of a mandatory reduction of staff or forced closure.

Practically speaking, business choices in a real estate transaction will be dependent on the current phase of the deal cycle. For example, those in the midst of negotiations to purchase/sell an asset likely are able to contract around potential effects of the pandemic. This may allow postponing the effective date of the contract in order to monitor the current financial impact on the property. In contrast, those already under contract are advised to re-review the terms to analyze the pandemic’s impact on existing obligations and deadlines.

Unlike construction- and financing-related contracts that typically include “force majeure” events, commercial real estate purchase

contracts customarily are silent on disasters outside of condemnation or casualty. Likely, the contract will not address the current pandemic or provide an extension to deadlines or termination rights for force majeure events. Further, the applicability of other remedies, such as the “frustration of purpose” doctrine, are questionable. As a result, practitioners are including force majeure and similar provisions in purchase contracts to allow deal compliance flexibility for events outside of either party’s control.



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Absent any deal-specific termination rights or contingencies, parties under contract outside any diligence period should operate as though they are obligated to move forward with the transaction or risk default. Both parties should be prepared for unexpected delays, including tenant defaults or hold-over evictions as many localities are not enforcing evictions for tenants during the crisis; and slower response times from third-party vendors, such as surveyors, title companies and local governments. While these delays may

offer deadline extensions, such terms are uniquely negotiated on a deal-by-deal basis. Some suggested topics for review are: representations and covenants relating to current operations; impacts of tenant defaults and late payments; timing of third-party deliverables and approvals; status of any necessary financing; and local government operations where the property is located.

To step in and help address business uncertainty, on March 27, the federal government passed the Coronavirus Economic Stabilization Act of 2020, which provides \$500 billion for emergency relief to distressed industries such as the airlines and other eligible businesses. Part of the act reserves nearly \$377 billion in assistance for small businesses. It remains to be seen in the coming months whether this will provide widespread relief to the real estate industry.

In the interim, many professional organizations in varying jurisdictions have released new guidance relating to their form purchase contracts to help address transactional dilemmas caused by COVID-19. The Colorado Bar Association has approved an addendum form for existing purchase contracts, which provides extensions for delays caused by a shutdown of governmental and business operations or for individual quarantine. Though the

CBA addendum addresses obligations of the parties generally, deal specifics will require review, and the Colorado Real Estate Commission has yet to approve such an addendum. Similarly, the California Association of Realtors has released a more expansive amendment to their form purchase agreement, Form CVA 3/20. The new options for parties include an extension of closing to address the “unforeseen circumstances” of the pandemic, termination of the contract or a carveout to the buyer’s waiver of its financing contingency for COVID-19 impacts. As stated above, despite the offered guidance and unless otherwise indicated, modifications to existing contracts are strictly voluntary and subject to negotiation and mutual consent.

Because most commercial real estate practitioners utilize customized contracts rather than forms, we advise consulting with an attorney to consider how best to navigate the landscape of unknowns to address any current or pending contract concerns. This will allow the contracting parties to formulate feasible options to address these unknowns in a time when normal services, businesses and our daily lives are in a state of flux. ▲

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