An Updated and Expanded Narrative Real Estate Acquisition Due Diligence Checklist

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THE NARRATIVE checklist provided below is an updated and expanded version of the checklist that originally appeared as "A Narrative Real Estate Acquisition Due Diligence Checklist" in *The Practical Real Estate Lawyer*, Volume 17, Number 6, November 2001. The genesis of the 2001 article was a letter I once wrote to a client who wanted a detailed explanation of what was included within the scope of the due diligence process when acquiring commercial real property. While significantly more expansive than the 2001 article, this updated checklist is not exhaustive, and I would anticipate that every seasoned practitioner will have items that could be added or expanded. It is also unlikely that all of the issues covered in this checklist will apply to every transaction or be of importance to every client. For example, it will be a rare property where snow removal/storage and seismic safety zones will each be issues. This checklist is intended to help both the attorney and client identify and allocate responsibility for specific due diligence tasks in the commercial real property acquisition process. Clear allocation of responsibility for the various checklist items between the attorney, client and other project participants (e.g., consultants, title company, etc.) helps to avoid duplicated efforts or the overlooking of important issues.

"Due Diligence" is a broad and often overused term that business and real estate attorneys as well as other professionals frequently use, that is often misunderstood by clients. Defined in Black's Law Dictionary as "*[s]uch a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent*

man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case," the term is typically used by transactional attorneys to refer to the inspection and investigation process rather than the standard for review. This article addresses many of the issues that commonly arise in the due diligence process related to commercial real property. Note that many of the issues covered in this article will also apply to the due diligence process pertaining to mortgage lending and commercial leases.

Sometimes commercial purchase agreements or loan documents will contain at least some representations and warranties regarding the condition of a property (e.g., title, environmental, physical, etc.). While disclosures or representations and warranties by a seller in a purchase agreement or by a borrower in loan documents regarding the condition of a property (whether required by statute, common law or otherwise) may be useful to a buyer or lender in the due diligence process, it is important to keep in mind that, should there be errant disclosures or nondisclosures, the value of any contractual representation and warranty is limited to the judgment-worthiness of the seller or borrower, as applicable. As a result, one should always be cautious in relying on any such disclosures and include verification of such disclosures as part of the due diligence process.

As with most practice aids, any good checklist evolves over time (as this one has) based on experiences of the individual attorney and market and technological changes, as well as shifts and developments in applicable laws and regulations. My goal is for this checklist to serve as: (i) a good starting point for the practitioner that has not yet developed a checklist; (ii) a resource that more seasoned practitioners can use to modify and augment their existing checklist; (iii) a reference resource for newer attorneys and paralegals; and (iv) a resource that can be provided to clients to generally explain the real estate due diligence process.

Narrative Real Estate Acquisition Due Diligence Checklist

I. Title Issues. The title review process is used to determine the condition of the title to be transferred to a buyer at closing, identifying potential title problems and occasionally disclosing non-title issues related to a property. Typically, the buyer and its attorney will work with a title insurance company to review the status of title, resulting in an owner's policy of title insurance being issued at closing. However, in a small minority of states (and typically only within certain regions of such states), the title review process is still performed primarily by attorneys, which may result in the issuance of an attorney's title opinion.

A. Title Commitment / Preliminary Report. Commonly, the initial step in the title review process is the issuance by a designated title insurance company of a title insurance commitment or a preliminary title report. Title commitments and preliminary reports are effectively equivalent documents, and any preference for one rather than the other is simply a matter of custom and practice in any given state. For example, what is often called a preliminary report in California and some other western states is referred to as a title commitment in Minnesota and the majority of other states. For simplicity, I will refer to each of these documents in this article as a title commitment. A title commitment provides documentation of the current state of title for the property and includes the precise legal description of the property. It is essentially a snapshot (or Snapchat for the more tech savvy), frozen in time, of the condition of title. The title commitment can be a vital indicator of title problems (e.g., some or all of the property is not owned by the entity that is designated as the "seller" in the purchase agreement). The title commitment also provides the buyer with a list of all current exceptions to title for the property (as revealed by a review of the public

record), such as unpaid taxes, easements, purchase options, mortgages / deeds of trust, judgment and other liens, restrictions, equitable servitudes and other encumbrances. The title commitment may also contain information regarding appurtenant benefits to the property, such as access easements or water rights. It is usually prudent for the buyer to have the title insurer provide copies, when available, of all of the items that are listed as exceptions to title in the title commitment, particularly any items that will remain in effect after closing (e.g., easements; covenants, conditions and restrictions; and equitable servitudes).

B. Abstracts. With the ever-increasing use of title insurance, abstracts of title have become less relevant for many buyers and lenders, at least in urban areas. Most title insurers base the title commitment on a previously issued title insurance policy and/or a tract search of the property public records. Although some attorneys still issue title opinion letters, particularly in rural areas, many law firms no longer provide this service to their clients. In addition, from a buyer's perspective, title insurance is often preferable to an attorney title opinion, both because of the typically larger financial capacity of a title insurer and the fact that title insurance claims are based on strict liability, while a claim under a title opinion is based on professional negligence. If an abstract of title exists for the property, it is a good idea to get the original abstract at closing as a historic record for the property. However, actually updating the abstract may not be worth the cost.

C. Registered Land. In certain limited areas of the country, when dealing with registered property (i.e., Torrens property), the buyer should carefully review the current certificate of title as part of the title review process. All of the recitals and memorials on the certificate of title should also be listed in the schedules of exceptions on the title commitment. As a rule of thumb, it is easier to remove a memorial than a recital. However, where a recital and some types of memorials need to be removed (e.g., an abandoned easement or obsolete mortgage), it may require a quasi-judicial proceeding (in some states referred to as a "proceeding subsequent") to amend the certificate of title to remove the obsolete reference. As this proceeding typically cannot be completed prior to closing, the parties can either adjust the purchase price to compensate the buyer for the issue or the seller can enter into a letter of undertaking or other post-closing agreement that obligates the seller to diligently take the actions necessary to clear the noted items from the certificate of title.

D. ALTA/ACSM Survey. In connection with obtaining an owner's policy of title insurance (and the deletion of the standard exemption regarding items that may be shown by a survey), the title insurance company may require an ALTA (American Land Title Association) / American Congress on Surveying and Mapping Land Title survey of the property ("ALTA survey"). Even if the title insurance company does not require an ALTA survey, it is often still prudent for the buyer of commercial property to obtain one. An ALTA survey is a comprehensive survey of the existing, as-built state of the property that locates the parcel boundaries, existing improvements, adjacent infrastructure and recorded and apparent unrecorded easements and interests. The ALTA survey is often one of the most useful documents in the due diligence process, especially when it includes one or more of the optional levels of detail available. First, with the physical survey, the buyer can review and confirm that the property surveyed it matches the property the buyer intends to purchase. It is often quite difficult from the legal description in the purchase agreement (particularly metes and bounds descriptions) for non-surveyors to determine the precise location of the

property. Even those familiar with legal descriptions will sometimes mistake certain existing physical improvements (bushes, fences, curb line) as a property line. Second, an ALTA survey provides the buyer with the precise location of utility and other easements and physical encumbrances which are described in the exception schedule of the title commitment, and it illustrates the precise location of physical improvements located on the property. Once again, because it is often difficult for many to determine with any precision the location of utility easements based on the metes and bounds descriptions, an ALTA survey will disclose potential easement issues or problems (e.g., a utility easement running across an area where the buyer wishes to construct improvements). Third, an ALTA survey will disclose any physical encroachments onto or from the property, which may consist of improvements from an adjacent property that are partially located on the surveyed property or improvements on the surveyed property that extend onto a neighboring parcels. Common encroachments include fences near the boundary line that do not correspond with the true boundary lines, potential prescriptive easements and physical improvements or encroachments onto or from the property in question. If the buyer is going to obtain an ALTA survey, that survey should be obtained early enough in the due diligence process so that there is adequate time to address any title problems disclosed in the survey prior to the end of the due diligence period.

E. Mortgages & Deeds of Trust. The title commitment should disclose any existing financing that has been secured by a mortgage or deed of trust, as applicable by state. Typically, the buyer or any existing lender will require that existing financing be paid off at closing, although that is not the case if a loan that is secured by the property is to be assumed by the buyer or where a lender is providing for junior financing that will be subject to the senior mortgage or deed of trust.

F. Other Liens. In addition to mortgages or deeds of trust, the title commitment should disclose any other existing monetary liens on the property. Such other monetary liens typically fall into one of three categories—tax liens, judgment liens and mechanic's liens. In almost all instances, a buyer or lender will want such monetary liens satisfied or otherwise removed as a condition to closing. Mechanic's liens are often the trickiest of the three categories, because of the "relation back" doctrine that applies, with some variation, in most states. Under the relation back doctrine, the priority of a mechanic's lien with respect to all work on or materials supplied for the project is based on the date on which the work was first performed on the project by the first provider of services or materials in an open and obvious manner (rather than the date when the lien is filed). As a result of this doctrine, the priority for a mechanic's lien that is filed after closing may be end up having senior priority to the deed or new financing – an unexpected (and likely unpleasant) surprise for a buyer or lender. The risk of a post-closing mechanic's lien that relates back prior to closing is typically addressed by the buyer or lender having obtained title insurance coverage for mechanic's liens, with the title insurance company in turn securing: (i) an affidavit from the buyer or borrower, as appropriate, that no work has been performed on the property as of the date of closing for which the applicable contractors or suppliers have not been fully paid; and (ii) if the work was already commenced prior to closing, an indemnity from the seller and/or borrower that such work has or will be paid for in full.

G. Easements, REAs & CC&Rs. The buyer should make sure to carefully review any: (i) easements; (ii) reciprocal easement agreements ("REAs"); (iii) covenants, conditions and restrictions ("CC&Rs"); and/or (iv) similar encumbrances that may affect use of the property. As these types of encumbrances will

continue to burden the property, it is important that the buyer determine, prior to committing to close, whether these encumbrances are acceptable. For example, significant restrictions typically affect multi-parcel developments such as office or industrial parks with shared facilities. Buyers should be cautious of provisions in any REAs or CC&Rs that permit further restrictions to be placed on the use of the property in question (e.g., relocation of access roads or right of master developer to grant further easements on common areas) or expansions of the existing use of the property. A property may also be subject to an equitable servitude (sometimes referred to as a negative easement), which prevents that property from being used for certain purposes. Common examples of such equitable servitudes include conservation easements (i.e., all or portions of the lands must be preserved in current condition or otherwise subject to only certain uses) or agricultural preservation (i.e., land that must be kept for agricultural uses and which cannot be developed for the allowable zoning (typically commercial or residential).

H. Water Rights. The buyer should determine the scope and nature of any water rights related to the property. Water rights tend to be an issue in certain parts of the country, particularly in the arid portions of the western states. If a property is fully serviced by municipal water and sewer utility service, water rights for usage typically will not be an issue for the buyer unless the buyer is looking to upgrade the level of service to the property. Water rights can take a number of forms, but the two most common are: (i) the right to appropriate ground or surface water for use; and (ii) the right to access and use water for commercial or recreational purposes (e.g., deeded lake, river or ocean access). If important water rights for the property have been separated from the fee interest or are derived from an off-site source (e.g., shared well located on neighboring property), the buyer will want to make sure that the purchase agreement adequately addresses the transfer of all necessary water rights to the buyer at closing. For example, if subsurface water rights belong to a third party, the buyer will need to make sure that an adequate source of water is available for the buyer's intended use of the property. Similarly, if the property relies on an easement for access to recreational water facilities, the buyer will want to make sure that the access easement is covered by title insurance.

I. Oil, Gas, Mineral and Timber Rights. It is important to determine whether title to the property to be acquired excludes mineral, oil or gas rights or is subject to third-party sand, gravel or timber rights. To the extent that the mineral, oil and gas rights have been severed from the fee ownership, it is critical to determine to what extent, if any, those severed rights may affect the surface use of the property by the buyer. Often, underlying mineral, oil and gas rights include limited or no surface rights (either within the reservation itself or as a matter of state law). Because of the dynamics of oil and gas deposits, in combination with lateral extraction technologies, it is often possible to extract oil and gas from under a property without entering onto the surface of that property or otherwise disturbing the surface use by the fee owner of the property. On the other hand, timber, sand and gravel rights typically include significant surface use of the property and thus are more likely to have an effect on the use and value of the property.

J. Taxes and Assessments. In conjunction with the title review, the buyer should determine what real property taxes and assessments will apply to the property after closing. The buyer should pay particular attention to the presence of any special assessments (pending or levied) or whether the property is located within a special assessment district. Issues with assessments often arise in the context of newly subdivided/

platted property where significant public infrastructure has been or will be constructed. Special assessments may also arise in connection with areas under redevelopment (e.g., new street lights and related improvements). If the property being acquired is currently (or was recently) agricultural property that is (or has recently been) converted to a more intensive, non-agricultural use, there may be a significant increase in property taxes. A number of states also have property tax provisions that encourage the preservation of agricultural property, sometimes referred to as "green acres" or "open space" provisions (e.g., conservation easements). These provisions are typically structured so that agricultural properties that remain agricultural in use (or open space that remains undeveloped) are taxed at much lower agricultural (or open space) rates rather than the higher non-agricultural rates applicable to adjacent properties. These provisions may also permit deferment of a portion of the taxes and special assessments until the agricultural land is developed. Typically, green acres provisions include significant restrictions on conversions of the property to non-agricultural uses or include substantial penalties and/or tax and assessment recapture provisions in the event that the land is taken out of agricultural use. Conservation easements, on the other hand, typically prohibit any significant development of the land and are difficult to remove once in place. Finally, the buyer should determine whether the sale of the property will trigger a reassessment of the property. This issue is of particular importance in states like California, where Proposition 13 has placed limits on annual increases in assessments of property value but requires a reassessment to market value in most situations where a property is sold or transferred. If the property is income-producing rental property, the buyer should determine whether there are any applicable state or local rental taxes, as some jurisdictions tax rental income (e.g., Florida and Arizona). Note that many leases in states with a rental tax will require the tenant to pay the rental tax in addition to base rent and additional rent. However, failure to properly account for rental taxes may skew the projected pro forma for a property and result in an overvaluation of the property.

K. Title Insurance Endorsements. During the title review process, the buyer should check with the title insurer as to the availability of endorsements for the property. Typically, individual buyers will require standard title insurance endorsements in connection with a purchase transaction. It is good practice to explicitly mention these endorsements in the purchase agreement and/or the buyer's title objection letter and require the issuance of the required endorsements as conditions to closing. Examples of commonly-sought owner endorsements include: (i) a zoning endorsement insuring that the present use of the property complies with applicable zoning laws; (ii) a contiguity endorsement that insures that the parcels comprising the property are contiguous; (iii) a survey accuracy endorsement; (iv) a location endorsement insuring that the legal description matches the address for the property; and (v) a specific access endorsement insuring the property has access from a public right-of-way. Depending on the context of the transaction, there may be other endorsements that are desirable or appropriate. For example, if the property being purchased is undeveloped, many buyers will require what is commonly referred to as a "Sear's" endorsement. Although the policy limits on title insurance are typically based on the purchase price or fair market value of the property, a Sear's endorsement: (a) provides the buyer with the ability (within a stated time period following the closing) to increase the policy limits of the title insurance coverage in connection with the later construction of improvements on the property within the designated time period and (b) eliminates the risk that the title insurer will impose additional exceptions on a reissuance of a policy with higher limits after completion of construction. Finally, if there will be a purchase money deed of trust or mortgage on the property,

the lender will also have a list of required endorsements, many that may overlap with the buyer's desired endorsements.

L. Gap Coverage. While a title commitment is merely a snapshot / Snapchat of the state of title at a given point in time, title matters are not static, and buyers and lenders need to address any changes to title that may occur between the effective date of the title commitment (which often lags behind the date on which the title commitment is issued, sometimes by several weeks depending on the jurisdiction) and the date of closing. Purchase and loan agreements typically require the buyer or borrower to disclose any title issues that first arise after the date of the purchase or loan agreement and prior to closing, but during this period, items that can effect title are often unknown to the parties (e.g., the filing of tax or judgment liens or rogue documents, i.e., documents that are recorded errantly or improperly against the property). The period between the effective date of the title commitment and closing is often referred to as the "gap" period. Most buyers and lenders will obtain "gap" coverage with their title insurance policy to provide coverage for any claims against title to a property that are unknown to or not caused by the buyer or lender (as applicable) that first arise during the gap period. Title insurance companies typically reduce their exposure to gap claims by updating the title commitment near the closing date. However, in most jurisdictions, there is a time lag between when a document is presented and accepted for recording and the date that such document appears in the records. In time, as more jurisdictions modernize their public land records, this lag time will shrink, but it is unlikely to ever completely disappear.

II. Physical Condition. This section covers various issues pertaining to the physical condition of any buildings, improvements and infrastructure on or serving the property in question.

A. Soils & Geotech Reports. Soils and geotechnical studies (soils reports) are often part of the due diligence process if development is being considered for a property or if the property is located in an area where there are general geological concerns (e.g., sink holes, settlement or shallow groundwater). A soils report will typically review both surface and subsurface conditions to determine the bearing capacity of the soil. This directly affects what can be built on the site as well as the type of foundation structures that can be used, both of which have cost implications. Soils reports will also typically disclose whether there are soils or geotechnical issues of concern, such as sinkholes, landslides, liquefaction, settlement, shallow groundwater, shallow subsurface rocks or otherwise unsuitable soils. If the desired development of a property will not be serviced by municipal sanitary sewers, then the soils reports will also examine whether there is a sufficient percolation rate to support an on-site septic system.

B. Structural. If there are existing improvements located on the property, the buyer should consider having a qualified architect, engineer, contractor or building inspector determine the condition of those improvements and identify potential problem areas, such as deferred maintenance or necessary upgrades or repairs. The buyer will want to understand the potential cost and schedule effects of any required work to the property so that the purchase price is appropriate. If work is being performed on improvements prior to closing, the buyer should obtain copies of any design or construction contracts and determine whether the seller's rights under those contracts are assignable to the buyer. The buyer should also determine whether the contractors working on the property have been and/or are being paid and whether proper lien waiv-

ers have been or will be obtained by the seller for work performed prior to closing so that the buyer and its lender have adequate protection from mechanic's lien claims related to pre-closing work on the property.

C. Accessibility. Depending on the desired use of the property, it may be important to determine whether existing improvements comply with applicable accessibility requirements, including the Americans with Disabilities Act ("ADA"). Keep in mind that a change in use of the property after closing or the construction of additional improvements may trigger significant additional accessibility compliance requirements. For example, under the ADA, "public accommodations" (i.e., retail, restaurants and other businesses generally open to the public) have more stringent standards than other types of commercial facilities. Consequently, an existing commercial building may be in compliance with accessibility standards for its existing use but not for a new use that would constitute a public accommodation.

D. Site Improvements & Drainage. Depending on the nature of the property, the buyer should consider inspecting the non-building site improvements (e.g., drainage systems or retaining walls) both as to condition and design, paying particular attention to potential drainage and subsidence issues (e.g., ponding water, storm water control and/or soil erosion). If the property includes a storm water retention pond, drainage swale/channel or similar improvements, the buyer will want to make sure to become familiar with any requirements related to the use and maintenance of those improvements. In some instances, a portion of the storm water system for a property may be located on adjacent property, typically pursuant to an easement. Conversely, if a property includes storm water improvements, those improvements may service other adjacent properties. Prudent buyers will have their attorneys or consultants review any easements or other documents (which may include conditional use permits or variances) related to storm water improvements.

E. Roads. The buyer should check whether the property has adequate access from public or private roads and streets. If new or additional access is required, the buyer should speak with the applicable public works department to determine: (i) if additional access is possible; and (ii) the procedure, cost and lead time for establishing the necessary access. Note that although a property abuts a major road or highway, there may still be significant limitations on direct access to such road or highway (e.g., spacing requirements for access points and/or limited access allowed, such as right in and right out only). It may also be worthwhile to consult with the applicable local and/or state agency to determine what road improvements are planned for adjacent roads and determine the potential impact of those planned improvements, as projected road improvements or realignments could significantly enhance or diminish the desirability of the property. For example, installation of a median barrier could make access for a property significantly more difficult. Finally, in parts of the country where weather is an issue, make sure to determine if there are any seasonal restrictions on roads, including winter closures or springtime weight restrictions.

F. Rail Access. Where applicable, a buyer should consult with any railroad(s) regarding access (existing or potential) from the property to sidings, spurs and mainlines located on or near the property. Contact the applicable railroad to determine whether there are existing access and/or trackage agreements that may benefit the property and whether those agreements are assignable in connection with a transfer of the property. Determine whether existing stubs and sidings are sufficient for the buyer's desired use of the property and, if not, explore the cost, process and lead times for improving existing or constructing addi-

tional sidings or stubs to service the property. Alternatively, if the property includes existing sidings and/or stub lines that are not required by the buyer, it is prudent to look into the process, costs and timing for the abandonment and removal of such trackage.

G. Circulation, Parking & Loading. It is typically important to determine whether: (i) the property has sufficient parking (auto and truck) for the buyer's intended use; and (ii) such parking can be accommodated on site or through an easement with an adjacent property. Similarly, when applicable, a buyer should determine whether the property has sufficient truck loading facilities, including any user-specific concerns (e.g., dock high loading or turning radii) and whether the vehicular circulation on the property is adequate and appropriate for the intended use. In situations where there is shared parking, one should check as to whether there are restrictions placed on parking use in any CC&Rs or similar documents and determine/confirm the compatibility of the other users who will be sharing parking with the buyers intended use. For example, an office building sharing parking with a movie theater complex should have minimal parking conflicts, as most workers will have left for the day before the evening movie crowd begins to arrive. Keep in mind that certain uses have a heavier parking demand. For example, a sit-down restaurant or health club will each typically require more parking than an equivalent amount of retail space. Also, be sure to know whether there are any unique facilities in the area that may periodically impact parking. For example, properties located near sports stadiums and arenas will likely have to deal with traffic and parking issues on game days. Finally, in winter climates, it is prudent to determine how the current owner handles snow and ice removal storage, as that will affect both the available parking in the winter and operational costs for the property.

H. Access to Public Transit. The availability of public transit can have a significant effect on the value and desirability of a property for certain uses. For example, proximity to a light rail station or a bus transit hub is typically considered an asset for an office or retail development. Consequently, if the buyer plans a transit-sensitive use, it is important to determine how the property is currently serviced by existing public transit and whether there are significant plans for changes in public transit that may affect the property.

I. Utility Service. The buyer should check with the applicable utility providers to determine whether the property has adequate service levels available and determine the procedures for entering into agreements for any new or enhanced service with the appropriate utility providers. It is important to determine whether development of the property may be affected by any utility-related moratoria or allocation programs, particularly with respect to water and sewer. For example, as a mechanism to manage or control expansion and growth, some municipalities have established urban utility limits that delineate properties that can be serviced with extensions of existing municipal utility infrastructure (typically water and sewer). In such instances, a property within such an urban utility limit line may be worth significantly more or otherwise have better development potential than similar adjacent property that is located outside the applicable utility limit line. If inadequate service exists or new service is required, the buyer should determine availability, timing and costs of upgrading the existing utility service. For uses reliant on high-speed internet access, one should check to determine the availability of fiber-optic connections. Similarly, certain users will want to determine whether the property has adequate wireless coverage and/or whether wireless cover-

age can be enhanced for the property. Where new or expanded utility service will be needed by the buyer, it is a good idea to check out the costs for service. For example, in more arid parts of the country, there are significant fees associated with water and sewer hook-ups or expansions of service.

J. Resource Usage & Efficiency. Resource use, cost, efficiency and similar sustainability concerns will be important factors for some buyers. Where these things are issues, the buyer will want to obtain from the seller any available energy rating for the building(s) (e.g., Energy Star) as well as utility records for the past couple of years. At least one state (California) now requires owners of commercial property to disclose the energy rating of the property to any buyer, tenant or lender at least 24 hours prior to the execution of a purchase agreement, lease or loan agreement to be secured by a deed of trust on the property. This requirement effectively requires most commercial property owners to participate in the EPA's Energy Star program. Given the limited water supplies in certain parts of the country, buyers must be sensitive to any water restrictions or recycled water use requirements. Some California cities (including San Francisco and Riverside) have specific ordinances that require installation and maintenance of recycled water systems for certain developments.

K. LEED Certification. LEED stands for Leadership in Energy and Environmental Design. The LEED certification systems are administered by the U.S. Green Building Council for new construction and existing buildings, and the program is intended to promote environmentally responsible and efficient use of resources in buildings. At this point, compliance with LEED standards is voluntary only. With respect to commercial buildings, the LEED program offers certified ratings on a scale that ranges from "Certified" through "Platinum." If a buyer is acquiring a property that includes a LEED-certified building or a building that is undergoing LEED review, the buyer should be aware of the impact on building operations of seeking or maintaining a LEED certification. Compliance with LEED standards may require certain operational restrictions on building tenants and lead to higher operational costs than if those tenants were located a similar building that was not LEED-certified. As a result, in some instances, the benefit of attracting tenants to a LEED-certified building may be offset by the need to adjust rental rates to account for higher LEED compliance costs so that the rental rates remain competitive with the non-LEED-certified properties in the marketplace.

L. Wells & Septic Systems. Where applicable, the buyer should determine whether there are any wells (water, oil, gas or monitoring) located on the property. In some states (e.g., Minnesota), the presence of certain types of wells must be disclosed by the seller prior to closing. Operating water wells may require permits, while inoperative wells may require sealing and/or regulatory closure. If there are (or have been) oil and gas wells on the property, there may be soil and/or water contamination present, resulting from the operation of those wells. Where the water for a property will come from an on-site well, make sure to have the quality and quantity (i.e., gallons per hour) tested. In some instances, the output of the well may limit the permitted development of the property. At least one state (Minnesota) also requires sellers to disclose when a property is serviced by a private septic system.

M. RF Interference. Some buyers will want to consider whether there are any radio frequency ("RF") interference issues related to the property. There are several aspects to the RF interference issue.

First, if there are existing users generating or sensitive to RF on the property (e.g., a wireless telecommunications facility on a tower or roof or attached to a structure), those users' existing leases or licenses may include provisions that prohibit the property from creating any activities that create RF interference for such users. Second, such users' rights may otherwise constrain the development or redevelopment of a property. For example, a wireless telecommunications carrier with transmission antennae located on the roof or side of a building likely will not have an obligation to relocate their equipment in connection with redevelopment activities. Alternatively, if those users' agreements permit redevelopment, the costs for relocating the RF-sensitive user are likely shifted to the property owner, adding to development costs. The second aspect to the RF interference issue is for the buyer to determine the potential effect that existing uses on or adjacent to the property (e.g., wireless telecommunications or microwave facilities or high voltage electrical transmissions) may have on RF-sensitive equipment or operations that the buyer intends to operate at the property.

N. Solar & Wind Facilities. While less common than the RF interference issue discussed above, some properties (including third-party rooftop facilities) may be affected by solar and wind turbine issues. The due diligence issues related to solar and wind facilities are similar to those arising from wireless telecommunications and other RF-sensitive activities, except in the case of solar (where there are often restrictions on any development or redevelopment that will adversely impact the sun exposure of the applicable equipment) and wind turbines (where there may be restrictions on any development or redevelopment that diminishes the wind to such facilities). In some instances, where the solar or wind facility is located on an adjacent property, it is possible that the operator of that facility has obtained negative easements impacting the property that the buyer has under contract. Any such negative easements should be disclosed in the title examination process.

III. Environmental (Physical). This section covers a wide array of issues, focusing on the physical condition of the property from an environmental perspective as well as other environmental factors that impact the value and use of a property. Environmental due diligence typically has two general objectives: (i) evaluating existing environmental liabilities associated with the property; and (ii) determining whether the buyer's intended use or development will create environmental liabilities or violate applicable environmental laws. Proper environmental due diligence on a property is important to avoid the unpleasant surprise of discovering a significant environmental issue after closing. In addition, proper environmental due diligence enables a buyer or lender to establish what is referred to as an "innocent purchaser" defense to avoid liability for claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The EPA generated regulations for CERCLA to establish due diligence standards (i.e., the "All Appropriate Inquiry" rule), which are a predicate for any party to claim an "innocent purchaser" defense. Below is a discussion of the common components of environmental due diligence.

A. Phase One Environmental Assessment. A Phase One Environmental Assessment ("Phase One") is typically prepared by a third-party environmental consultant and consists of a survey/overview of the general environmental condition and environmental history of a particular property, with a focus on the actual or potential presence of hazardous materials or other adverse environmental conditions on a property. Conducting a proper Phase One that meets the Federal requirements for scope and content (again, the

"All Appropriate Inquiry" rule) prior to acquiring or accepting a mortgage on a property can help shield a purchaser from certain future liability under CERCLA for preexisting environmental conditions affecting the property and alert a lender as to whether its collateral value has been imported adversely. A proper Phase One will identify both actual (known) and potential problems such as underground storage tanks ("USTs") and contamination from hazardous materials. The contents of the Phase One are based on the environmental consultant's review of the historical documentation related to the property, regulatory databases, interviews with those who have direct knowledge of the history and operation of the property and a walk-through inspection of the site by the environmental consultant. If potential or actual environmental concerns are discovered during the course of these activities, the Phase One report will generally include specific recommendations for follow-up testing, remediation and/or studies (e.g., ground water test wells). Environmental review is often one of the most time-consuming elements in a due diligence review. Accordingly, it is important for the buyer to have a realistic understanding of the schedule for the environmental review during negotiations of the purchase agreement. For the same reason, it is important to begin working on the Phase One early in the due diligence process so that the environmental consultant has enough time to complete its work and the buyer has adequate time to review the Phase One prior to waiving any environmental contingency. It is important to note that a Phase One is not an exhaustive environmental review of a property. For example, a Phase One typically does not include specific inspections for asbestos, lead (in paint or plumbing), radon, delineation of wetlands or a review of environmental compliance. For a more detailed explanation of the scope of a Phase One, there are numerous resources available on the web with such explanations, in various levels of detail. If a buyer is concerned about environmental issues that are outside the scope of the standard Phase One protocol, the buyer should consider expanding the scope of the environmental consultant's work to include those additional issues, which can often be done for an additional charge. Finally, Phase Ones are typically certified to the specific party that commissioned the work (usually the buyer and/or lender). If other parties will need to rely on the Phase One, it is best to negotiate that issue with the environmental consultant prior to the preparation of the Phase One. After completion of the Phase One, many environmental consultants will, for an additional fee, issue what is commonly referred to as a "reliance letter" that authorizes parties who are not specifically named as a beneficiary in the original Phase One to rely on the contents of that report.

B. Phase Two Environmental Study. If a Phase One discloses problems or potential environmental issues with a property, the environmental consultant will typically recommend that specific additional tests or studies on a property be conducted ("Phase Two studies"). Phase Two studies often involve physical inspection and testing of the property, such as collecting core samples and testing ground water. Such additional work is typically focused on specific issues of concern identified in the Phase One (e.g., potential groundwater contamination resulting from existing or previously removed USTs). If the presence of regulated hazardous materials contamination is confirmed by the Phase Two study, further reporting, monitoring, investigation and/or remediation may be necessary, based upon the extent and magnitude of that contamination. When negotiating the due diligence period in the purchase agreement, it is prudent for a buyer to include enough time to obtain and review a Phase One and, if necessary, perform a Phase Two study. This issue is often resolved by a provision that allows the buyer to extend the due diligence period for a specified additional period in the event the Phase One recommends the performance of a Phase Two study.

C. Asbestos. If asbestos is known or suspected to be present on a property, it is advisable to engage a qualified consultant to prepare an asbestos survey and report. Asbestos work can often be performed, at an additional cost, by the environmental consultant that prepares the Phase One for the property. Alternatively, most environmental consultants will be able to refer you to a qualified asbestos inspector. Asbestos can be found in a number of building products used in older construction, including pipe insulation, plaster, floor tiles, mastic and roofing materials. There are several important issues to consider related to asbestos. These issues are: (i) identifying whether and to what extent asbestos is present; (ii) identifying the form of the asbestos and its condition; and (iii) determining whether abatement, encapsulation or removal of the asbestos will be necessary. Dealing with asbestos issues can have significant cost and schedule impacts on construction activities. If asbestos is present, the buyer needs to consider those impacts in determining whether to proceed with a purchase and/or whether a price reduction may be justified. It is important to remember that, unlike many other construction activities, asbestos abatement work tends to be very invasive and typically requires that areas where asbestos work is being performed are sealed off and cannot be used or occupied during the asbestos abatement/containment process. In addition, asbestos abatement/containment work typically requires specially-licensed contractors, who are subject to very prescriptive environmental and safety protocols.

D. USTs & ASTs. If underground storage tanks ("USTs") or above ground storage tanks ("ASTs") are located on a property, there may be affirmative reporting, removal and/or site closure obligations for the property owner related to those tanks. Determining the presence of USTs and ASTs (current and historic) is within the normal scope of a Phase One report. However, it is also prudent to request specific representation and disclosure in the purchase agreement, from the seller, regarding this topic. Often, when USTs or ASTs are (or were previously) present on a property, those tanks were used for the storage of hazardous materials (e.g., gasoline, heating oil or fertilizers), and there may be issues related to leakage or other contamination from those storage vessels. If USTs or ASTs have been previously removed from the property, the buyer will want to ascertain that proper regulatory site-closure procedures were followed and completed in connection with the tank removal. In most jurisdictions, tank removal (particularly USTs) tends to be a heavily-regulated topic. In many jurisdictions, once a UST has been properly removed, future buyers and lenders can obtain what are sometimes called "no action" or "no association" letters that provide buyers and lenders with assurance that they will not have liability for the removed UST or related, required remediation.

E. Lead Paint. Lead paint is most problematic in residential settings, particularly multifamily housing where child safety is a concern. Federal law requires disclosure to tenants and buyers in residential buildings constructed prior to 1978. Lead paint can also be problematic in industrial settings, as the presence of lead paint can significantly affect how future repainting and refurbishing activities are conducted, as well as add significant additional costs to those tasks. Sandblasting and removal of old lead paint often requires tenting and other precautions to avoid lead contamination problems in surrounding areas. The environmental consultant that prepares the Phase One typically can also be used to determine whether, and to what extent, lead paint is present on the property or provide the buyer with a referral to a consultant that can address lead paint issues.

F. Mold. Awareness of the potential harmful health impacts of mold in buildings has increased in recent years. This is best evidenced by growth in claims and lawsuits across the country related to the presence of mold in the built environment. Several states have adopted statutes requiring sellers to disclose any known visible or hidden mold issues. At least two states (California and Texas) have mold disclosure requirements that apply to the sale or lease of commercial property. Note that California's disclosure requirements run both ways, and the applicable statutes: (i) require commercial/industrial tenants to notify their landlords of any known mold conditions or chronic water intrusion issues; and (ii) impose certain mold remediation obligations upon commercial/industrial landlords. Buyers should be sensitive to this emerging issue and consult with their environmental consultant regarding best practices for due diligence in this area.

IV. Environmental (Regulatory). In addition to inspection of a property for physical environmental factors, a prudent buyer will also determine the parameters of the environmental regulatory environment that affect the property or its operation, which may include some of the items discussed below.

A. Wetlands. Wetlands and certain uplands located near wetlands or navigable waters are under federal jurisdiction (U.S. Army Corps of Engineers) under section 404 of the Clean Water Act, 33 U.S.C. § 1344, and there are significant restrictions on the use or development of land in those areas. It is important to remember that wetlands are not always actually "wet" or obvious to the casual observer. The presence of wetland conditions can have a significant impact on the value, operation and development potential of a property. As a result, it is important to obtain appropriate disclosures from the current owner as to whether any portion of the property is considered a wetland or otherwise within the jurisdiction of the U.S. Army Corps of Engineers. It is also prudent to check with the applicable jurisdiction(s) to determine whether any existing wetland delineation maps exist that illustrate what portions, if any, of the property are considered regulated wetlands. In addition, there are significant regulatory hurdles related to filling, cutting and/or relocating wetlands areas. Finally, physical inspection of the property should disclose whether poor site drainage may have resulted in the inadvertent conversion of uplands to wetlands.

B. Shorelines & Watersheds. Certain states and municipalities regulate the use of properties located near certain bodies of water or within certain watersheds. Such regulations are in addition to applicable Federal regulations pertaining to wetlands and navigable waters. For example, in South Carolina, land within a certain distance of the ocean or the connected inland waterways is subject to overlay regulation by the South Carolina Coastal Council. Similarly, land within the Lake Tahoe watershed (in California and Nevada) is subject to overlay regulation by the Tahoe Regional Planning Agency. In many parts of the country, lakes are subject to similar state, regional or local shoreline development restrictions. Buyers should assume that any construction activities in, on or near water (e.g., docks, boat ramps or rip rap) may be prohibited or will be subject to substantial restrictive regulations. Similarly, land that drains into certain watersheds may be subject to significant storm water quality restrictions that could materially limit hardscape on the land and/or limit construction activities (e.g., excavation) to certain times of the year. For example, in many parts of California, there are restrictions on grading and excavation during the winter rainy season.

C. Special Risk Zones. Buyers should check with the applicable state and local agencies to determine whether any portion of the property is located in a designated special risk zone. Special risk zones typically fall into three categories: (i) flood; (ii) fire; and (iii) seismic. If a property is located within any type of special risk zone, it can adversely affect the development potential, applicable building standards and/or the availability of financing, as well as insurance requirements and costs.

D. Endangered Species & Protected Habitat. In some areas, the presence of endangered or potentially endangered plant and animal species may significantly restrict the development potential and value of a property. Typically, initial inquiries on this subject can be made at the local planning agency to determine whether there are species of concern or critical habitat in the area. If there is potential for the presence of protected species or habitat on the property, the buyer should consider retaining an appropriate consultant to examine the property for the presence of the species and/or habitat in question. While the endangered species issue often arises in the context of undeveloped properties, keep in mind that it can also affect fully-developed properties. For example, the owner of a high-rise urban office building might encounter endangered species hurdles related to building signage caused by the presence of peregrine falcon nests in the existing signage.

E. FAA Restrictions. Properties located within a few miles of an airport are often subject to significant FAA restrictions as to height and use, particularly if a property is located within a takeoff or approach path for a runway. For example, high-occupancy uses (e.g., theaters or stadiums) and residential uses are typically not permitted within a certain distance of an airport in these areas. Properties located near airports are often subject to overlay height restrictions that may be more stringent than the standard height restrictions established in the applicable zoning code.

F. Noise Restrictions. If a property is located near a major freeway, railroad line, airport or other source of loud noise, there may be use restrictions and/or additional construction requirements related to sound mitigation. Local planning agencies will typically be able to assist the buyer in locating relevant sound contour maps related to the noise-generating source. These sound contour maps indicate the relative decibel levels for a property. Often, there will be significant sound-insulation requirements and/or restrictions on use for property located within high-decibel zones.

G. Environmental Clean-Up & Remediation Funds. If a property has environmental impairments (e.g., subsurface contamination or obsolete underground storage tanks), there may be state, county or local public funds available to assist in the testing, monitoring, clean-up and/or other remediation of such conditions (although many such grant-funding sources require grants to be tied to a specific redevelopment project). When acquiring property with environmental conditions, it is a good practice to determine whether: (i) the seller has previously applied for and/or received any such funding; (ii) existing grant funding is transferable (note that such funding is often tied to both a specific site and a specific development plan for that site); and/or (iii) such funding might be available (that is, if the buyer plans the development scheme for the property).

H. Environmental Permits. It is important to determine whether the existing use of the property requires any environmental permits or is subject to any reporting obligations related to air or water quality. This issue is important regardless of whether the buyer will continue the existing use. The buyer should: (i) obtain copies of all existing environmental permits, plans and reports pertaining to the property; and (ii) check with the applicable enforcement agencies to determine whether there are existing or past violations or nonconformance issues related to the property. The buyer should also determine prospectively what, if any, environmental permits and/or reports will be required in connection with the buyer's intended use. Where there are existing permits or the buyer will require new permits, it is useful to contact the applicable air and water quality agencies to determine the procedures, timing and costs for obtaining and/or transferring permits. To the extent the buyer is depending on existing permits for its intended future use, the buyer should confirm early in the due diligence process that the existing permits are indeed transferable. The buyer may also want to condition its obligation to close upon the successful transfer of any such critical environmental permits.

V. Legal Compliance. This category focuses on legal compliance of the existing property, including the improvements and uses (current and planned) on that property. The buyer should confirm that the existing use of and improvements located on the property comply with applicable zoning, building and life safety codes. This includes checking with the applicable jurisdictions as to the current zoning of the property. It is often useful to review both planning and building department files and records for a property. Those files may contain important information related to the property, such as conditions for use permits or records of past building code violations. If the current use of the property does not comply with the current zoning district, the current use may still be permitted but have significant restrictions. When zoning for a property changes, existing uses and structures which do not comply with the new code requirements are usually "grandfathered in" as nonconforming uses or noncomplying structures. However, zoning and building codes often include significant restrictions or prohibitions on expansions of the nonconforming use and additions or modifications to existing noncomplying structures. In addition, such codes often restrict continuation of a nonconforming use if there is a significant period of nonuse of the property. Similarly, building codes will often require that any reconstruction of a noncomplying structure after significant casualty damage include code upgrades to bring the structure into compliance with current codes. Property improvements are typically considered to be code compliant if the improvements complied with the codes that were in effect at the time of construction of such improvements. This is different than complying with current code requirements, and it is important to keep in mind that codes generally become more (not less) stringent over time. In addition, renovations to existing buildings often can trigger code compliance requirements that are more restrictive. Life safety and accessibility upgrades triggered by renovations may be expensive (e.g., adding sprinklers, providing accessible bathrooms and/or adding an elevator or lift) and add significant amounts to total project costs.

VI. Existing Leases and Contracts.

A. Occupancy Leases. The buyer should require the seller to promptly provide copies of all existing leases (including any lease guaranties) that affect the property. If there are existing leases, the buyer should also require the seller to provide estoppel certificates from each of the tenants prior to closing (e.g.,

no defaults, no prepaid rent, status of security deposits and the like). In some situations, the seller may also have the ability to require its tenants and guarantors to provide current financial statements, which may be useful for a buyer or lender, particularly if the value of the property is based in part on the credit and quality of the existing tenants. Finally, the purchase agreement should require the seller to provide the buyer with a current rent roll for the property. Where a property includes rentals, the buyer should make sure that the purchase agreement places appropriate restrictions on the seller's ability to enter into new leases or to modify or terminate existing leases during the executory period. Issues of concern to the buyer related to existing leases include rent structure, term and renewal, expansion rights, free rent, security deposits, unpaid allowances or other obligations pertaining to individual tenants and any options, rights of offer or first refusal rights that any tenant may have with respect to some or all of the property. Finally, the closing provisions of the purchase agreement need to account for: (i) the seller's assignment of any security deposits, prepaid rent and/or letters of credit to the buyer; (ii) how rent will be proportioned between the parties (accounting for both prepaid rent and any past due rent existing at closing); and (iii) assignment and assumption of the leases at closing.

B. Other Leases & Licenses. In addition to the traditional occupancy or ground leases, some properties will be subject to ancillary leases and licenses for uses such as wireless telecommunication facilities, billboards or parking to support neighboring property. While some of these agreements may produce minimal income for the property owner, the underlying agreements (particularly wireless telecommunications and billboard) may have provisions that have a significant impact on the use or development of the property, so it is worthwhile to review all such agreements.

C. Operation & Maintenance. If there are service contracts on the property (e.g., HVAC maintenance, snow removal, landscaping, janitorial service), the buyer should review these contracts to determine whether they can be canceled at or prior to closing and/or be assigned to the buyer (if desired). The buyer should also require an appropriate representation and warranty from the seller that all such contracts: (i) have been disclosed to the buyer; and (ii) are in good standing.

D. Development & Construction. If a property is not fully developed or is under construction at the time of the purchase and sale transaction, there are additional considerations for a buyer. In such instances, the buyer will want to make sure to carefully review any development agreements (i.e., agreements between the property owner and applicable jurisdiction) and construction contracts that pertain to the property. In each instance, the buyer will want to assure that it will receive the benefit of and/or assignment of such agreements. Where a property is under construction during the executory period or construction will continue following the change of ownership, special care should be taken at closing to allocate costs and risks related to the construction that has occurred through the date of closing. The buyer will also want to make sure that the seller assigns to the buyer the benefit(s) of any rights the seller has under all architecture, engineering and construction contracts for both breach of contract claims as well as any warranties contained in those agreements. The buyer will also want to obtain title insurance coverage protecting them from potential mechanic's liens related to work performed prior to closing that has not been paid for by the seller.

E. Public Financing & Grants. In instances where onsite and/or offsite improvements have been funded through tax increment financing ("TIF") or other public financing or grant mechanisms, the buyer will want to make sure to have the applicable agreements reviewed in detail. TIF and similar public financing and grant agreements often include provisions that can obligate the property owner to: (i) create a certain number and/or type of jobs; (ii) mandate the operation of a certain type of business; and/or (iii) place parameters on hiring for any business operated at the property (e.g., union labor or other hiring preferences). In many instances, failure of a property owner to meet requirements in such agreements can result in penalties, acceleration of repayment and/or loss of forgiveness of portions of the debt.

VII. Approvals and Entitlements. If the buyer intends to develop and/or change the use of the property or make significant changes to the existing improvements, it is often useful to initiate the entitlement process during the due diligence period. It is better to find out early on in the development process whether significant roadblocks to the project exist. The buyer should check with governmental authorities with jurisdiction over the property (i.e., city, county, regional and state) to determine in advance what land use approvals, permits and entitlements will be necessary for the buyer's intended use of the property. In connection with those entitlements, it is important to focus on the length and costs of the approval process and to determine whether any significant exactions (e.g., fees, infrastructure improvements or open space dedication) will be required in connection with the necessary approvals.

A. Subdivision/Platting. It is important to confirm that the property being acquired actually constitutes a legal and separate parcel. This can often be determined by checking with the planning department and will generally be confirmed by a title commitment. Be cautious if subdivision/platting of the property is necessary to close the purchase transaction or develop the property as intended. Depending on the nature of the subdivision and the state where the property is located, the subdivision or platting process may require significant time and money and may include unanticipated or unwanted exactions or conditions of approval.

B. UGB & Growth Moratoria. If the property is undeveloped or if the buyer intends to significantly redevelop the property, make sure to determine whether the property to be purchased is affected by any current or planned urban growth boundary ("UGB") or other growth control limits or moratoria that may adversely affect the buyer's intended use for the property. While such moratoria typically arise in the context of suburban and exurban settings or where there are water or other resource shortages, moratoria may also arise in rural or agricultural settings (e.g., moratoria on permits for logging or frac sand minding).

C. Historic/Open Space Preservation. If the context dictates, check with the local planning department and any state or local historical agencies to determine whether the property is located in an area that is subject to open space or historic preservation controls. If the property is in a potential historic district or area, there may be archeological testing requirements in connection with any excavation or grading on the property or there may be restrictions on alterations to structures in historic areas. Similarly, if a building or other improvement is considered historic or in a historic district, there may be significant restrictions on any future alterations or additions to such buildings and structures, as well as prohibitions on demolition.

D. Required Approvals & Permits. The buyer should determine what permits will be required for the buyer to operate the property. Required permits may include some of the following:

• **Use Permits.** If the proposed use is not expressly permitted under the applicable planning code or zoning regulations, the buyer should determine the procedure and schedule for obtaining any necessary use permit(s). Note that municipalities will occasionally view the issuance of a conditional or special use permit as an opportunity to require monetary exactions or land dedications (e.g., parks or open space) or to impose "social" conditions upon the property (e.g., inclusionary housing or hiring preference for local citizens). Consequently, it is important that the buyer understand both the costs and significant requirements that may attach to any required use permit.

• **Variances.** If the buyer's proposed improvements will not comply with the applicable building or use restrictions (e.g., height, bulk, setbacks), variances may be required. As variances are typically discretionary in nature, there may be significant conditions attached to their issuance. Also be aware that many jurisdictions require a unique hardship to justify the issuance of a variance.

• **Certificates of Occupancy.** The buyer should determine whether a new occupancy permit will be required for the property. Generally, certificates of occupancy are administrative in nature and only require that the property meet certain objective standards (e.g., exiting and other life safety requirements). Obtaining a new or renewed certificate of occupancy may trigger an inspection of the property by the applicable municipality, which in turn may disclose existing code violations that will need to be remediated prior to the issuance of the requested certificate of occupancy.

• **Signage Approval & Permits.** Some types of signage may be prohibited by law or require governmental permits. If there is existing signage on the property, the buyer should determine whether it will be able to replace that signage with its own (or install additional signage) without requiring a new permit.

• **Business Licenses.** The buyer should determine whether the applicable municipality will require a business or operation-related permit or license. It is important for the buyer to make allowances for the lead time necessary to obtain any business permits. Certain permits, such as liquor licenses, may have long application periods. Also, some municipalities will limit the number of licenses issued for certain uses (e.g., pawn shops or liquor stores), and thus it is important to determine the general availability of the desired type of license.

VIII. Miscellaneous

A. Personal Property. Although this checklist focuses on real property issues, buyers should also, as part of the real property due diligence process, inspect and review any items of personal property (both tangible and intangible) that will be included in the purchase. For example, the purchase transaction may include specialty maintenance equipment, furniture or trade fixtures that are necessary for the buyer's use of the property. Equipment, furniture and trade fixtures should be inspected for condition, and UCC searches should be conducted to determine whether any third party may have a security interest in any of

the personal property which is to be transferred to the buyer at closing. There may also be licenses or permits necessary to operate the property or related to the equipment and fixtures that are deemed personal property (e.g., franchise rights, vehicle registration or liquor license). It is important to determine ahead of time whether such permits and licenses will be included in the transaction and confirm that these items are in fact transferable. Buyers should be cautious, as the transfer of certain types of licenses (or an application for a new license) may require significant time and expense.

B. Weather & Seasonal. In some areas of the country, one needs to factor in weather and seasonal considerations. For example, in regions that experience very cold winters with a deep frost line, there are often weight restrictions for secondary roads in the early spring thaw months. In certain climates, road closures can be common due to winter storm conditions during the winter season or flooding in the spring. Seasonal issues may also affect the availability or costs of building methods and/or materials. For example, in very cold winter climate areas, asphalt plants typically close for the winter season, which can sometimes be from mid-October through April or early May. As a result, if certain critical path development work is not performed prior to the end of the asphalt season (e.g., paving), months may be lost in the construction schedule, and the timing of closing may be an important consideration in order to take advantage of a limited building season. Finally, when acquiring property in an unfamiliar region of the country, it makes sense to do some research on building requirements and common problems for that area. In portions of the south, wood decay and termites are significant issues, while in northern and mountainous areas, the frost line and issues related to freeze/thaw cycle heaving are important considerations.

C. Crime Statistics. It may be worth researching crime statistics for the property's surrounding area, depending on the buyer's intended use for the property. This may be particularly important if the buyer is not familiar with the area. Areas that look nice to the average tourist or visitor may have issues that are not apparent from a quick visit to the property. The relative safety of a neighborhood can be a significant factor in connection with certain uses, such as hotels, restaurants and retail operations. Most cities and counties compile annual crime statistics that list the number and type of crimes, as well as the precincts in which the crimes occurred.