

New York Lawyers' Practical Skills Series



Includes Forms
on CD

Real Estate Transactions— Commercial Property

Christina Kallas, Esq.*

2012–2013

* I acknowledge with gratitude the invaluable support of my husband, Xenophon A. Theophall, in this work as in everything that I do.

NEW YORK STATE BAR ASSOCIATION



CONTENTS

| | | |
|-----|--|----|
| I. | Overview of Commercial Real Estate Practice..... | 1 |
| A. | Introduction..... | 1 |
| B. | Distinctions from Residential Real Estate Practice | 1 |
| | 1. Sophistication of Clients..... | 1 |
| | 2. Variety of Interests Transferred..... | 1 |
| | 3. Number of Participants..... | 2 |
| | 4. Identity of Lender and Owner | 2 |
| | 5. Value of Property | 3 |
| | 6. Compliance with Governmental Requirements..... | 3 |
| | a. Securities Laws..... | 3 |
| | b. Green Regulations: Federal, State and Local | 3 |
| | c. Americans with Disabilities Act Compliance | 5 |
| | d. Financial Services Modernization Act of 1999 (Gramm-Leach-Bliley).... | 5 |
| | 7. Security Concerns..... | 5 |
| | 8. Anti-Discrimination Laws | 6 |
| C. | Similarities to Residential Real Estate Practice | 7 |
| | 1. Obtaining Information Needed to Prepare Contract of Sale | 7 |
| | 2. Preparing the Description | 8 |
| | 3. The Survey..... | 8 |
| | 4. Title Questions..... | 8 |
| | 5. Proof of Payment of Charges | 9 |
| | 6. Zoning..... | 9 |
| | 7. Historic Preservation Districts..... | 10 |
| | 8. Role of Local Counsel | 10 |
| | 9. Preparing the Documents | 10 |
| | a. Use of Sample Forms | 10 |
| | b. Assembling the Documents | 11 |
| | (1) Using Software to Create Your Own Templates | 11 |
| | (2) Document Assembly Software | 11 |
| | (3) Amassing the Requisite Information | 11 |
| D. | The Retainer Agreement | 12 |
| E. | Ethical Practices..... | 12 |
| II. | Types of Commercial Property | 12 |
| A. | Vacant Land..... | 13 |
| B. | Single-Tenant Properties..... | 13 |
| C. | Office Buildings..... | 13 |
| D. | Apartment Buildings..... | 14 |
| E. | Shopping Centers | 14 |
| | 1. Tenant Mix | 14 |
| | 2. Zoning and Land Use Approvals..... | 15 |
| | 3. Constitutional Issues..... | 15 |
| | 4. Environmental Issues..... | 15 |
| F. | Hotels, Casinos and Resorts..... | 15 |
| | 1. Financing a Resort Property | 16 |
| | 2. Constitutional Issues..... | 16 |

| | | |
|-------|--|----|
| G. | Industrial Properties | 17 |
| H. | Permits | 17 |
| I. | Not for Profit Ownership of Real Estate..... | 18 |
| J. | Projects for a Public Purpose | 18 |
| K. | When the Character of the Use Is Not Clear..... | 19 |
| L. | Ownership of Property by a Sovereign Nation | 19 |
| M. | Air Rights..... | 19 |
| III. | Types of Transactions and Standard Documents..... | 20 |
| A. | Purchase and Sale Standard Documents | 20 |
| 1. | Contract of Sale | 20 |
| a. | Minimum Terms Required for Enforceability of a Contract of Sale..... | 20 |
| b. | Customary Provisions..... | 22 |
| (1) | Timing..... | 23 |
| (2) | Down Payment..... | 23 |
| (3) | Payment of Purchase Price | 24 |
| (4) | Adjustments | 24 |
| (5) | Brokers..... | 24 |
| (6) | Representations | 25 |
| (7) | “Boilerplate” Provisions | 26 |
| (8) | Risk of Loss | 27 |
| (9) | Conditions to Sale..... | 28 |
| (a) | Removal of Liens | 28 |
| (b) | Loan Contingency | 28 |
| (c) | Physical Testing..... | 28 |
| (d) | Environmental Issues..... | 28 |
| (i) | Emerging Construction Standards..... | 28 |
| (ii) | Environmental Due Diligence | 29 |
| (iii) | Buildings on Contaminated Properties | 29 |
| c. | <i>Kass v. Grais</i> —The Mailbox Rule | 30 |
| d. | Costs | 30 |
| e. | Remedies | 30 |
| f. | Confidential Information | 31 |
| g. | Estoppel Certificates..... | 31 |
| h. | Ethical Considerations | 32 |
| (1) | Misrepresentations and Failure to Make Full Disclosure | 32 |
| (2) | The Unrepresented Party | 32 |
| 2. | Written Authorization of Client..... | 32 |
| 3. | The Deed | 33 |
| a. | Form..... | 33 |
| b. | Writing, Acknowledgment, Seal..... | 33 |
| c. | Identification of Parties and Description of Property | 34 |
| d. | Consideration..... | 34 |
| B. | Mortgage Loan Documents | 34 |
| 1. | Loan Commitment..... | 35 |
| 2. | Promissory Note | 35 |

| | | |
|----|---|----|
| 3. | Permanent Mortgage | 37 |
| a. | Assignment of Leases and Rents | 37 |
| b. | Property Operation | 38 |
| c. | Waste | 38 |
| d. | Due on Sale Clause..... | 38 |
| e. | Escrowed Items..... | 38 |
| f. | Insurance Requirements Generally..... | 39 |
| g. | Estoppel Certificates..... | 39 |
| h. | Subordination, Attornment and Nondisturbance Agreements (SANDs).... | 39 |
| i. | UCC Financing Statements | 40 |
| j. | Release from Mortgage Lien | 40 |
| k. | Mortgage Remedies | 40 |
| 4. | Distinctions from Construction Lending..... | 41 |
| a. | Nature of the Risk..... | 41 |
| b. | Coordination with Permanent Lender..... | 41 |
| c. | Construction Contracts | 42 |
| d. | Construction Loan Contract..... | 42 |
| e. | Obtaining Required Approvals..... | 42 |
| 5. | Second Mortgage Loans and Other Options | 42 |
| 6. | Wraparound Mortgage Loans..... | 43 |
| 7. | Mezzanine Loans and Spreader Agreements | 43 |
| 8. | Sale/Leaseback and Leasehold Mortgage Loans..... | 44 |
| C. | Leases..... | 44 |
| 1. | Nature of a Lease..... | 44 |
| 2. | Representing the Tenant | 44 |
| 3. | Representing the Landlord | 45 |
| 4. | Representing the Prospective Buyer..... | 45 |
| 5. | Major Lease Provisions | 46 |
| a. | Premises..... | 46 |
| b. | Rent..... | 46 |
| c. | Tenant Finishing and Alterations | 47 |
| d. | Use | 48 |
| e. | Services..... | 48 |
| f. | Insurance..... | 48 |
| g. | Assignment and Subletting..... | 50 |
| h. | Renewal and Extension of Lease Term | 51 |
| i. | Environmental Concerns | 51 |
| j. | Option to Purchase and Right of First Refusal | 52 |
| k. | Remedies | 53 |
| l. | Major Provisions Guarantee | 53 |
| m. | Major Provisions Security Deposit..... | 53 |
| 6. | Memorandum of Lease..... | 53 |
| 7. | Commercial Rent Tax..... | 54 |
| 8. | Negotiating and Numbers..... | 54 |
| 9. | Solving Title Problems Involving Leases..... | 54 |

| | | |
|-----|--|----|
| | D. Section 1031 Exchange Transactions | 54 |
| | E. Pop-Up Stores | 55 |
| IV. | Role of Title Insurance | 56 |
| | A. Marketable Title and Insurable Title | 56 |
| | B. Timing of Determination of State of Title | 56 |
| | C. Title Report | 56 |
| | D. Recording Statutes | 57 |
| | E. Typical Title Encumbrances | 58 |
| | F. Incorporeal Interests in Real Property | 58 |
| | 1. Restrictive Covenants | 58 |
| | 2. Easements | 59 |
| | a. Creation of an Easement | 59 |
| | b. Easements Not in Writing | 60 |
| | 3. Additional Searches | 61 |
| | G. Adverse Possession Issues | 61 |
| | H. Zoning and Building Ordinances | 61 |
| | I. Liability of Title Insurer | 62 |
| | J. Extent of Title Insurance Coverage | 63 |
| | K. Title Agents | 64 |
| | L. Working With the Title Insurer | 64 |
| V. | Closing | 64 |
| | A. Organization | 64 |
| | B. Closing Statements | 65 |
| | C. Adjustments | 65 |
| | D. Acceptable Funds | 66 |
| | E. Insurance | 66 |
| | F. Documents to Be Recorded | 66 |
| | 1. Deed and RP-5217 Form | 66 |
| | 2. Mortgage Satisfaction and New Mortgage | 67 |
| | 3. Assignment of Mortgage, Consolidation and Extension Agreement | 68 |
| | 4. Assignment of Leases | 68 |
| | 5. Memorandum of Lease | 68 |
| | 6. Power of Attorney | 68 |
| | G. Documents Executed but Not Recorded | 69 |
| | 1. FIRPTA Affidavit | 69 |
| | 2. IRS Form 1099-S Filing | 70 |
| | 3. New York City Real Property Transfer Tax Return (NYC-RPT) | 70 |
| | 4. Owner's Registration Card | 71 |
| | 5. New York State Transfer Tax Return—TP-584 | 71 |
| | 6. Mortgage Tax | 71 |
| | 7. Mortgage Recording Tax Return MT-15 | 72 |
| | 8. Bill of Sale for Personal Property Being Conveyed | 72 |
| | H. Impact of Technology on Real Estate Practice | 72 |
| | 1. MERS | 72 |
| | 2. Electronic Document Filing | 72 |
| | 3. E-Filing Services | 73 |

| | | |
|-----|---|-----|
| I. | Closing Costs | 73 |
| VI. | Post-Closing..... | 73 |
| A. | Reporting Requirements | 73 |
| B. | Final Considerations | 74 |
| C. | USA Patriot Act of 2001..... | 74 |
| D. | Electronic Tax Payments | 75 |
| E. | Privacy Concerns; Impact on Land Records..... | 75 |
| | Commercial Real Estate Forms Index | 79 |
| | Table of Authorities | 351 |
| | About the Author | 355 |

**COMMERCIAL REAL ESTATE
TRANSACTIONS—FORMS**

INDEX OF FORMS*

| | |
|--|-----|
| Contract of Sale | 81 |
| Bargain and Sale Deed with Covenant Against Grantor's Acts (Individual or Corporation) (Standard NYBTU Form 8007) | 107 |
| Quitclaim Deed (Individual or Corporation) (Standard NYBTU Form 8009) | 111 |
| Executor's Deed (Individual or Corporation) (Standard NYBTU Form 8010) | 113 |
| Administrator's Deed (Form 8005-B)..... | 117 |
| Checklist of Document Recording Guidelines from New York City Department of Finance..... | 119 |
| FNMA/FHLMC Uniform Multifamily Note | 129 |
| FNMA/FHLMC Multifamily Mortgage | 143 |
| Sample Form of Modification, Consolidation and Extension Agreement..... | 191 |
| Mortgagee's Certificate of Reduction (NYBTU 8033) | 207 |
| MTA Building Loan Contract | 209 |
| Standard Form of Office Lease | 215 |
| Standard Form of Store Lease..... | 221 |
| Sample Memorandum of Lease | 227 |
| MTA Affidavit of Shareholders | 229 |
| Consent of Shareholders to Sale or Lease | 231 |
| Certificate of Authority | 235 |
| General Affidavit of Seller (First American Title Insurance Co.) | 237 |
| Satisfaction of Mortgage..... | 240 |
| Power of Attorney—Instructions | 241 |
| Power of Attorney—New York Statutory Short Form..... | 243 |
| Power of Attorney—Suggested Modifications to New York Statutory Short Form..... | 249 |
| Power of Attorney—New York Statutory Gifts Rider Authorization for Certain Gift Transactions | 251 |
| Power of Attorney—Suggested Modifications to New York Statutory Gifts Rider | 255 |
| Affidavit of Title (Lender's Form) | 259 |
| Sample F.I.R.P.T.A. Certification and Affidavit | 261 |
| Sample Form 1099-S and Instructions..... | 263 |

* Some of the forms contained in this monograph are omitted from the forms CD accompanying this publication. These forms are obtainable from the following government agencies: the Internal Revenue Service (1-800-829-1040) <www.irs.gov>, the New York State Department of Tax (1-518-485-6027) <www.tax.ny.gov>.

| | |
|---|-----|
| Current Developments—New York City Department of Finance Automated City Register Information System (ACRIS) (First American Title Insurance Co.)..... | 271 |
| Sample Form and Instructions (NYC-RPT) | 273 |
| Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate and Certification of Exemption from the Payment of Estimated Personal Income Tax (TP-584 and Instructions) | 291 |
| U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests (Form 8288)..... | 303 |
| Mortgage Recording Tax Return (MT-15)..... | 309 |
| UCC Financing Statement (Form UCC1)..... | 313 |
| Nonresident Real Property Estimated Income Tax Payment Form (IT-2663 and Instructions) .. | 315 |
| Assignment of Mortgage with Covenant (Form 8022)..... | 323 |
| Assignment of Mortgage Without Covenant (NY 029)..... | 325 |
| Contract of Exchange (Form 8042) | 329 |
| Affidavit Under Section 255 Tax Law | 333 |
| Real Property Transfer Report (RP-5217) | 335 |
| Application for Exemption From Real Estate Taxes Under Real Property Tax Law § 420-a/b (RP-420-a/b-Use)..... | 337 |
| Mortgage Loans: Covenant Not to Sue Agreement..... | 341 |
| Release of Part of Mortgaged Premises | 343 |
| Spreader Agreement..... | 345 |
| Certificate of Authority to Collect Sales Tax..... | 347 |
| Sample Certificate of Occupancy Search and Certificate of Occupancy..... | 349 |

CHRISTINA KALLAS, ESQ.

Currently in private practice in New York City, Ms. Kallas has an extensive knowledge of and a wide range of experience in all aspects of real estate practice. She has devoted a great deal of her career to commercial real estate, representing clients from individuals to businesses to commercial, investment and savings banks, and mortgage and insurance companies, and handling the sale, lease and financing of all types of commercial properties, including hotels, multi-family apartment complexes, shopping centers, restaurants and garages. On Wall Street, Ms. Kallas was instrumental in developing the new practice area resulting from the private sale of mortgage loans among different types of lenders and governmental agencies. For one investment banking client, long before the sub-prime mortgage crisis of 2008, she uncovered a mortgage sale fraud involving hundreds of institutions and \$1 billion in loan sales, and helped assure the conviction of the perpetrator. Ms. Kallas also has been a Vice President at Smith Barney, Harris Upham & Co. Inc., where she obtained her Series 7 and Series 63 licenses and sat on the trading desk.

Active for many years in the New York Women's Bar Association, www.nywba.org, Ms. Kallas is a past president and former Executive Director, as well as Chair of the Real Estate, Technology and ADR committees. For the Women's Bar Association of the State of New York, Ms. Kallas served for many years as co-chair of the Committee on International Women's Rights.