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### Feasibility Study License

This Feasibility Study License (the "License") is executed between \_\_\_\_\_, as Seller, and \_\_\_\_\_, as Prospective Buyer in order to permit ("Prospective Buyer") to make various Inquiries, Tests and Studies as to all or portions of the property described in Exhibit A hereto (the "Property").

1. **Inquiries.** At any time prior to \_\_\_\_\_ (the "Investigation/Feasibility Review Period") while this License is in full force and effect, and at Prospective Buyer's sole expense, Prospective Buyer or Prospective Buyer's authorized agents shall have the right to make the following inquiries ("Inquiries"): Prospective Buyer may enter upon the Property for purposes of making surveys and site analyses, test borings, engineering studies, wetland studies, soil borings, soil analysis, water and sewer location availability studies, environmental studies, market studies (including costs, marketing or other analysis in order to determine the feasibility of its project), as Prospective Buyer may deem necessary ("Tests and Studies"), and to contact governmental authorities.

2. **Prospective Buyer's INDEMNITY and Restoration Obligations.** Prospective Buyer shall not cause or permit damage or injury to the Property, and upon termination of this License, Prospective Buyer shall promptly restore the surface of the Property to the condition existing prior to the Tests and Studies conducted pursuant to this License and compensate Seller for any crop-related damages, if any, and such obligation shall survive the termination of this License. **PROSPECTIVE BUYER SHALL INDEMNIFY, HOLD HARMLESS, AND DEFEND SELLER FROM AND AGAINST ALL LIENS, CLAIMS, CAUSES OF ACTION, SUITS, LIABILITIES, COSTS, DAMAGES, AND EXPENSES (INCLUDING ATTORNEYS' FEES AND COURT COSTS), INCLUDING DEATHS, DISEASE OR SICKNESS OR OR INJURIES TO EMPLOYEES OF PROSPECTIVE BUYER OR OTHER PERSONS, OR DAMAGES TO PROPERTY, DIRECTLY OR INDIRECTLY, PROXIMATELY OR REMOTELY, ARISING OUT OF, RESULTING FROM OR RELATING, IN WHOLE OR IN PART, TO THE ACTS OR OMISSIONS OF PROSPECTIVE BUYER OR ITS AGENTS, EMPLOYEES OR INDEPENDENT CONTRACTORS UNDER THE PROVISIONS OF THIS LICENSE (THE "INDEMNIFIED LIABILITIES"), EVEN IF SUCH INDEMNIFIED LIABILITIES ARISE FROM OR ARE ATTRIBUTABLE TO THE CONCURRENT NEGLIGENCE OR STRICT LIABILITY OF SELLER, AND SUCH INDEMNIFICATION SHALL SURVIVE THE TERMINATION OF THIS LICENSE, OR THE CLOSING OF ANY PURCHASE OF THE PROPERTY BY PROSPECTIVE BUYER, AS THE CASE MAY BE. THE INDEMNITY AND OBLIGATIONS OF PROSPECTIVE BUYER IN THIS**

**PARAGRAPH 2 ARE REFERRED TO IN THIS LICENSE AS THE "PROSPECTIVE BUYER'S INDEMNITY AND RESTORATION OBLIGATIONS."**

**3. Not a Sales Contract or Offer.** Seller may at anytime and without liability to Prospective Buyer terminate this License. Seller is not obligated to sell the Property to Prospective Buyer and Prospective Buyer is not obligated to buy the Property.

**4. Capacity of Seller.** The person executing this License and any of the documents at the Closing on behalf of Seller may execute the same in her capacity as Trustee, and in no other capacity whatsoever, and such person shall have no personal liability under this License or under any of such documents. All liability of Seller shall be limited solely to the assets of such Trust at the time any such liability may be established. The provisions of this Paragraph shall survive the Closing.

**6. Confidentiality.** Prospective Buyer will promptly furnish Seller with a copy of all Inquiries, Tests or Studies made of the Property for or by Prospective Buyer. Prospective Buyer will keep the contents or results of Inquiries, Tests or Studies confidential (except to the extent required to be divulged under the Open Records Act of the State of Texas), unless Seller's written consent to divulge the Inquiries, Tests, or Studies is obtained from Seller, or unless required by law or unless Prospective Buyer buys the Property.

Dated \_\_\_\_\_.

**SELLER:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(Name)  
(Title)

**PROSPECTIVE BUYER:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
(Name)  
(Title)

**Real Estate Sales Contract**  
(State Bar Form)

This contract to buy and sell real [**include if applicable:** and personal] property is between Seller and Buyer as identified below and is effective on the date (“Effective Date”) of the last of the signatures by Seller and Buyer as parties to this contract and by Title Company to acknowledge receipt of the Earnest Money. Buyer must deliver the Earnest Money to Title Company and obtain Title Company's signature before the Earnest Money Deadline provided in section A.1. for this contract to be effective. If the Earnest Money is paid by check and payment on presentation is refused, Buyer is in default.

Seller:

Address:

Phone:

Fax:

Type of entity:

Seller's Attorney:

Address:

Phone:

Fax:

Seller's Broker:

Address:

Phone:

Fax:

Buyer:

Address:

Phone:

Fax:

Type of entity:

Buyer's Attorney:

Address:

Phone:

Fax:

Buyer's Broker:

Address:

Phone:

Fax:

Property: The land commonly known as [**describe property**] and more fully described in Exhibit A ("Land") [**include the following phrases that are applicable, tailoring punctuation and conjunctions as necessary**], together with improvements to the Land ("Improvements"), the leases associated with the Land and Improvements ("Leases"), and the personal property described in Exhibit A ("Personal Property").

Title Company:

Address:

Phone:

Fax:

Underwriter:

Purchase Price

Cash portion:

Seller-financed portion (principal amount of note):

Interest rate:

Maturity date:

Payment schedule:

Third-party-financed portion:

Total purchase price:

Earnest Money:

Surveyor:

Survey Category:

Buyer's Liquidated Damages:

Seller's Additional Liquidated Damages:

County for Performance:

**A. Deadlines and Other Dates**

All deadlines in this contract expire at 5:00 P.M. local time where the Property is located. If a deadline falls on a Saturday, Sunday, or national holiday, the deadline will be extended to the next day that is not a Saturday, Sunday, or national holiday. A national holiday is a holiday designated by the federal government. Time is of the essence.

1. Earnest Money Deadline: **[date]**

2. Delivery of Title Commitment: **[[date]/[number]** days after the Effective Date]
3. Delivery of Survey: **[[date]/[number]** days after the Effective Date]
4. Delivery of UCC Search: **[[date]/[number]** days after the Effective Date]
5. Delivery of legible copies of instruments referenced in the Title Commitment, Survey, and UCC Search: **[[date]/[number]** days after the Effective Date]
6. Delivery of Title Objections: **[[date]/[number]** days after the Effective Date/**[number]** days after delivery of the Title Commitment, Survey, and legible copies of the instruments referenced in them]
7. Delivery of seller's records as specified in Exhibit C: **[[date]/[number]** days after the Effective Date]
8. End of Inspection Period: **[[date]/[number]** days after the Effective Date]
9. Closing Date: **[[date]/[number]** days after the Effective Date]
10. Closing Time: **[time]**

**B. Closing Documents**

1. At closing, Seller will deliver the following items:

General Warranty Deed **[include if applicable: with Vendor's Lien]**

Special Warranty Deed **[include if applicable: with Vendor's Lien]**

Bill of Sale and Assignment

IRS Nonforeign Person Affidavit

Evidence of Seller's authority to close this transaction

Notices, statements, and certificates as specified in Exhibit D



2. At closing, Buyer will deliver the following items:

Evidence of Buyer's authority to consummate this transaction

Deceptive Trade Practices Act waiver

Seller-financing documents

Promissory Note

Deed of Trust

Deed of Trust to Secure Assumption

Security Agreement

Financing Statement

The documents listed in this section B are collectively known as the “Closing Documents.” Unless otherwise agreed by the parties before closing, the Closing Documents will be prepared using the forms contained in appendix A of the current edition of the *Texas Real Estate Forms Manual* (State Bar of Texas).

**C. Exhibits**

The following are attached to and are a part of this contract:

Exhibit A—Description of the Land [**include if applicable:** and Personal Property]

Exhibit B—Representations; Environmental Matters

Exhibit C—Seller's Records

Exhibit D—Notices, Statements, and Certificates

**D. Purchase and Sale of Property**

Seller agrees to sell and convey the Property to Buyer, and Buyer agrees to buy and pay Seller for the Property. The promises by Buyer and Seller stated in this contract are the consideration for the formation of this contract.

#### **E. Interest on Earnest Money**

Buyer may direct Title Company to invest the Earnest Money in an interest-bearing account in a federally insured financial institution by giving notice to Title Company and satisfying Title Company's requirements for investing the Earnest Money in an interest-bearing account. Any interest earned on the Earnest Money will be paid to the party that becomes entitled to the Earnest Money.

#### **F. Title and Survey**

1. *Review of Title.* The following statutory notice is provided to Buyer on behalf of the real estate licensees, if any, involved in this transaction: Buyer is advised that it should either have the abstract covering the Property examined by an attorney of Buyer's own selection or be furnished with or obtain a policy of title insurance.

2. *Title Commitment; Title Policy.* "Title Commitment" means a Commitment for Issuance of an Owner Policy of Title Insurance by Title Company, as agent for Underwriter, stating the condition of title to the Land. The "effective date" stated in the Title Commitment must be after the Effective Date of this contract. "Title Policy" means an Owner Policy of Title Insurance issued by Title Company, as agent for Underwriter, in conformity with the last Title Commitment delivered to and approved by Buyer.

3. *Survey.* "Survey" means an on-the-ground, staked plat of survey and metes-and-bounds description of the Land, prepared by Surveyor or another surveyor satisfactory to Title Company, dated after the Effective Date, and certified to comply with the current standards and specifications as published by the Texas Society of Professional Surveyors for the Survey Category.

4. *UCC Search.* "UCC Search" means reports prepared by [a nongovernmental provider/[describe preparer]], stating the instruments that are on file in the Texas secretary of state's UCC records and in the UCC records of the county in which the Property is located, showing as debtor Seller and all other owners of the Personal Property during the five years before the Effective Date of this contract.

4. *UCC Search.* "UCC Search" means reports stating the instruments that are on file in the Texas secretary of state's UCC records and in the UCC records of the county in which the Property

is located, showing as debtor Seller and all other owners of the Personal Property during the five years before the Effective Date of this contract. The report of the Texas secretary of state's UCC records will be prepared by the Texas secretary of state, and the report of the county UCC records will be prepared by [a nongovernmental provider/[describe preparer]].

5. *Delivery of Title Commitment, Survey, UCC Search, and Legible Copies.* Seller must deliver the Title Commitment to Buyer by the deadline stated in section A.2.; the Survey by the deadline stated in section A.3.; the UCC Search by the deadline stated in section A.4.; and legible copies of the instruments referenced in the Title Commitment, Survey, and UCC Search by the deadline stated in section A.5.

6. *Title Objections.* Buyer has until the deadline stated in section A.6. ("Title Objection Deadline") to review the Survey, Title Commitment, UCC Search, and legible copies of the title instruments referenced in them and notify Seller of Buyer's objections to any of them ("Title Objections"). Buyer will be deemed to have approved all matters reflected by the Survey, Title Commitment, and UCC Search to which Buyer has made no Title Objection by the Title Objection Deadline. The matters that Buyer either approves or is deemed to have approved are "Permitted Exceptions." If Buyer notifies Seller of any Title Objections, Seller has five days from receipt of Buyer's notice to notify Buyer whether Seller agrees to cure the Title Objections before closing ("Cure Notice"). If Seller does not timely give its Cure Notice or timely gives its Cure Notice but does not agree to cure all the Title Objections before closing, Buyer may, within five days after the deadline for the giving of Seller's Cure Notice, notify Seller that either this contract is terminated or Buyer will proceed to close, subject to Seller's obligations to resolve the items listed in Schedule C of the Title Commitment, remove the liquidated liens and exceptions that arise by, through, or under Seller after the Effective Date, and cure only the Title Objections that Seller has agreed to cure in the Cure Notice. At or before closing, Seller must resolve the items that are listed on Schedule C of the Title Commitment, remove all liquidated liens and exceptions that arise by, through, or under Seller after the Effective Date of this contract, and cure the Title Objections that Seller has agreed to cure.

#### **G. Inspection Period**

1. *Review of Seller's Records.* Seller will deliver to Buyer copies of Seller's records specified in Exhibit C, or otherwise make those records available for Buyer's review, by the deadline stated in section A.7.

2. *Entry onto the Property.* Buyer may enter the Property before closing to inspect it, subject to the following:

- a. Buyer must deliver evidence to Seller that Buyer has insurance for its proposed inspection activities, in amounts and with coverages satisfactory to Seller;
  - b. Buyer may not unreasonably interfere with existing operations or occupants of the Property;
  - c. Buyer must notify Seller in advance of Buyer's plans to conduct tests so that Seller may be present during the tests;
  - d. if the Property is altered because of Buyer's inspections, Buyer must return the Property to its preinspection condition promptly after the alteration occurs;
  - e. Buyer must deliver to Seller copies of all inspection reports that Buyer prepares or receives from third-party consultants or contractors within three days of their preparation or receipt; and
  - f. Buyer must abide by any other reasonable entry rules imposed by Seller.
3. *Buyer's Right to Terminate.* Buyer may terminate this contract for any reason by notifying Seller before the end of the Inspection Period.
4. *Buyer's Indemnity and Release of Seller*
- a. *Indemnity.* Buyer will indemnify, defend, and hold Seller harmless from any loss, attorney's fees, expenses, or claims arising out of Buyer's investigation of the Property, except for repair or remediation of existing conditions discovered by Buyer's inspection.
  - b. *Release.* Buyer releases Seller and those persons acting on Seller's behalf from all claims and causes of action (including claims for attorney's fees and court and other costs) resulting from Buyer's investigation of the Property.

**H. Representations**

The parties' representations stated in Exhibit B are true and correct as of the Effective Date and must be true and correct on the Closing Date.

**I. Condition of the Property until Closing; Cooperation; No Recording of Contract**

1. *Maintenance and Operation.* Until closing, Seller will (a) maintain the Property as it existed on the Effective Date, except for reasonable wear and tear and casualty damage; (b) operate the Property in the same manner as it was operated on the Effective Date; [and] (c) comply with all contracts and governmental regulations affecting the Property[;/.] [**include if applicable:** and (d) not transfer or dispose of any of the Personal Property, except to sell inventory and use supplies in the normal course of operating the Property.] Until the end of the Inspection Period, Seller will not enter into, amend, or terminate any contract that affects the Property other than in the ordinary course of operating the Property and will promptly give notice to Buyer of each new, amended, or terminated contract, including a copy of the contract, in sufficient time so that Buyer may consider the new information before the end of the Inspection Period. If Seller's notice is given within three days before the end of the Inspection Period, the Inspection Period will be extended for three days. After the end of the Inspection Period, Buyer may terminate this contract if Seller enters into, amends, or terminates any contract that affects the Property without first obtaining Buyer's written consent.

2. *Casualty Damage.* Seller will notify Buyer promptly after discovery of any casualty damage to the Property. Seller will have no obligation to repair or replace the Property if it is damaged by casualty before closing. Buyer may terminate this contract if the casualty damage that occurs before closing would materially affect Buyer's intended use of the Property, by giving notice to Seller within fifteen days after receipt of Seller's notice of the casualty (or before closing if Seller's notice of the casualty is received less than fifteen days before closing). [**Include if applicable:** The casualty damage will be deemed to materially affect Buyer's intended use if the estimated amount of the damage exceeds [**percent**] percent of the Purchase Price.] If Buyer does not terminate this contract, Seller will (a) convey the Property to Buyer in its damaged condition, (b) assign to Buyer all of Seller's rights under any property insurance policies covering the Property, and (c) pay to Buyer the amount of the deductibles and coinsurance provisions under any insurance policies covering the Property, but not in excess of the cost to repair the casualty damage and less any amounts previously paid by Seller to repair the Property. If Seller has not insured the Property and Buyer does not elect to terminate this contract in accordance with this section, the Purchase Price will be reduced by the cost to repair the casualty damage.

3. *Condemnation.* Seller will notify Buyer promptly after Seller receives notice that any part of the Property has been or is threatened to be condemned or otherwise taken by a governmental or quasi-governmental authority. Buyer may terminate this contract if the condemnation would materially affect Buyer's intended use of the Property by giving notice to Seller within fifteen days after receipt of Seller's notice to Buyer (or before closing if Seller's notice is received less than fifteen days before closing). The condemnation will be deemed to materially affect Buyer's intended use if [**specify reason, e.g.,** the condemnation would eliminate all curb cuts on Main Street]. If Buyer does

not terminate this contract, (a) Buyer and Seller will each have the right to appear and defend their respective interests in the Property in the condemnation proceedings, (b) any award in condemnation will be assigned to Buyer, and (c) if the taking occurs before closing, the description of the Property will be revised to delete the portion taken.

4. *Claims; Hearings.* Seller will notify Buyer promptly of any claim or administrative hearing that is threatened, filed, or initiated before closing that affects the Property.

5. *Cooperation.* Seller will cooperate with Buyer (a) before and after closing, to transfer the applications, permits, and licenses held by Seller and used in the operation of the Property and to obtain any consents necessary for Buyer to operate the Property after closing and (b) before closing, with any reasonable evaluation, inspection, audit, or study of the Property prepared by, for, or at the request of Buyer.

6. *No Recording.* Buyer may not file this contract or any memorandum or notice of this contract in the real property records of any county. If, however, Buyer records this contract or a memorandum or notice, Seller may terminate this contract and record a notice of termination.

**J. Termination**

1. *Disposition of Earnest Money after Termination*

a. *To Buyer.* If Buyer terminates this contract in accordance with any of Buyer's rights to terminate, Seller will, within five days of receipt of Buyer's termination notice, authorize Title Company to deliver the Earnest Money to Buyer, less \$100, which will be paid to Seller as consideration for the right granted by Seller to Buyer to terminate this contract.

b. *To Seller.* If Seller terminates this contract in accordance with any of Seller's rights to terminate, Buyer will, within five days of receipt of Seller's termination notice, authorize Title Company to pay and deliver the Earnest Money to Seller.

2. *Duties after Termination.* If this contract is terminated, Buyer will promptly return to Seller all documents relating to the Property that Seller has delivered to Buyer and all copies that Buyer has made of the documents. After return of the documents and copies, neither party will have further duties or obligations to the other under this contract, except for those obligations that cannot be or were not performed before termination of this contract.

**K. Closing**

1. *Closing.* This transaction will close at Title Company's offices at the Closing Date and Closing Time. At closing, the following will occur:

- a. *Closing Documents.* The parties will execute and deliver the Closing Documents.
- b. *Payment of Purchase Price.* Buyer will deliver the Purchase Price and other amounts that Buyer is obligated to pay under this contract to Title Company in funds acceptable to Title Company. The Earnest Money will be applied to the Purchase Price.
- c. *Disbursement of Funds; Recording; Copies.* Title Company will be instructed to disburse the Purchase Price and other funds in accordance with this contract, record the deed and the other Closing Documents directed to be recorded, and distribute documents and copies in accordance with the parties' written instructions.
- d. *Delivery of Originals.* Seller will deliver to Buyer the originals of Seller's Records.
- e. *Possession.* Seller will deliver possession of the Property to Buyer, subject to the Permitted Exceptions existing at closing and any lien and security interest in favor of Seller, if the sale is seller-financed.

2. *Transaction Costs*

- a. *Seller's Costs.* Seller will pay the basic charge for the Title Policy; one-half of the escrow fee charged by Title Company; the costs to prepare the deed; the costs to obtain, deliver, and record releases of all liens to be released at closing; the costs to record all documents to cure Title Objections agreed to be cured by Seller; Title Company's inspection fee to delete from the Title Policy the standard printed exception for parties in possession; the costs to obtain the Survey, UCC Search, and certificates or reports of ad valorem taxes; the costs to deliver copies of the instruments described in section A.5.; and Seller's expenses and attorney's fees.
- b. *Buyer's Costs.* Buyer will pay one-half of the escrow fee charged by Title Company; the costs to obtain, deliver, and record all documents other than those to be recorded at Seller's expense; the additional premium for the "survey/area and boundary deletion" in the Title Policy, if the deletion is requested by Buyer; the costs of work required by Buyer to have the survey reflect matters other than those required under this contract; the costs to obtain financing of the Purchase Price, including the incremental premium costs of

mortgagee's title policies and endorsements and deletions required by Buyer's lender; and Buyer's expenses and attorney's fees.

c. *Ad Valorem Taxes.* Ad valorem taxes for the Property for the calendar year of closing will be prorated between Buyer and Seller as of the Closing Date. Seller's portion of the prorated taxes will be paid to Buyer at closing as an adjustment to the Purchase Price. If the assessment for the calendar year of closing is not known at the Closing Date, the proration will be based on taxes for the previous tax year, and Buyer and Seller will adjust the prorations in cash within thirty days of when the actual assessment and taxes are known. Seller will promptly notify Buyer of all notices of proposed or final tax valuations and assessments that Seller receives after the Effective Date and after closing. If this sale or Buyer's use of the Property after closing results in the assessment of additional taxes for periods before closing, Buyer will pay the additional taxes. If Seller changes the use of the Property before closing, resulting in the assessment of additional taxes for periods before closing, Seller will pay the additional taxes. All taxes due as of closing will be paid at closing.

d. *Income and Expenses.* Income and expenses pertaining to operation of the Property will be prorated as of the Closing Date on an accrual basis and paid at closing as a credit or debit adjustment to the Purchase Price. Invoices that are received after closing for operating expenses incurred on or before the Closing Date and not adjusted at closing will be prorated between the parties as of the Closing Date, and Seller will pay its share within ten days of notice of Buyer's invoice.

e. *Postclosing Adjustments.* If errors in the prorations made at closing are identified within ninety days after closing, Seller and Buyer will make postclosing adjustments to correct the errors within fifteen days of receipt of notice of the errors.

f. *Brokers' Commissions.* Buyer and Seller each indemnify and agree to defend and hold the other party harmless from any loss, attorney's fees, and court and other costs arising out of a claim by any person or entity claiming by, through, or under the indemnitor for a broker's or finder's fee or commission because of this transaction or this contract, whether the claimant is disclosed to the indemnitee or not.

3. *Issuance of Title Policy.* Seller will cause Title Company to issue the Title Policy to Buyer as soon as practicable after closing.

## **L. Default and Remedies**



1. *Seller's Default.* If Seller fails to perform any of its obligations under this contract or if any of Seller's representations is not true and correct as of the Effective Date or on the Closing Date ("Seller's Default"), Buyer may elect either of the following as its sole and exclusive remedy:

a. *Termination; Liquidated Damages.* Buyer may terminate this contract by giving notice to Seller on or before the Closing Date and Closing Time and have the Earnest Money, less \$100 as described above, returned to Buyer unless Seller's Default relates to the untruth or incorrectness of Seller's representations for reasons not reasonably within Seller's control. If Seller's Default occurs after Buyer has incurred costs to investigate the Property after the Effective Date and Buyer terminates this contract in accordance with the previous sentence, Seller will also pay to Buyer as liquidated damages the lesser of Buyer's actual out-of-pocket expenses incurred to investigate the Property after the Effective Date or the amount of Buyer's Liquidated Damages, within ten days of Seller's receipt of an invoice from Buyer stating the amount of Buyer's expenses.

b. *Specific Performance.* Unless Seller's Default relates to the untruth or incorrectness of Seller's representations for reasons not reasonably within Seller's control, Buyer may enforce specific performance of Seller's obligations under this contract. If title to the Property is awarded to Buyer, the conveyance will be subject to the matters stated in the Title Commitment.

2. *Buyer's Default.* If Buyer fails to perform any of its obligations under this contract ("Buyer's Default"), Seller may elect either of the following as its sole and exclusive remedy:

a. *Termination; Liquidated Damages.* Seller may terminate this contract by giving notice to Buyer on or before the Closing Date and Closing Time and have the Earnest Money paid to Seller. If Buyer's Default occurs after Seller has incurred costs to perform its obligations under this contract and Seller terminates this contract in accordance with the previous sentence, Buyer will also reimburse Seller for the lesser of Seller's actual out-of-pocket expenses incurred to perform its obligations under this contract or the amount of Seller's Additional Liquidated Damages, within ten days of Buyer's receipt of an invoice from Seller stating the amount of Seller's expenses.

b. *Specific Performance.* Seller may enforce specific performance of Buyer's obligations under this contract. If title to the Property is awarded to Buyer, the conveyance will be subject to the matters stated in the Title Commitment.

3. *Liquidated Damages.* The parties agree that just compensation for the harm that would be caused by a default by either party cannot be accurately estimated or would be very difficult to accurately estimate and that the Earnest Money and the amounts provided above are reasonable forecasts of just compensation to the nondefaulting party for the harm that would be caused by a default.

4. *Attorney's Fees.* If either party retains an attorney to enforce this contract, the party prevailing in litigation is entitled to recover reasonable attorney's fees and court and other costs.

**M. Miscellaneous Provisions**

1. *Notices.* Any notice required by or permitted under this contract must be in writing. Any notice required by this contract will be deemed to be delivered (whether actually received or not) when deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this contract. Notice may also be given by regular mail, personal delivery, courier delivery, facsimile transmission, or other commercially reasonable means and will be effective when actually received. Any address for notice may be changed by written notice delivered as provided herein. Copies of each notice must be given by one of these methods to the attorney of the party to whom notice is given.

2. *Entire Contract.* This contract, together with its exhibits, and any Closing Documents delivered at closing constitute the entire agreement of the parties concerning the sale of the Property by Seller to Buyer. There are no oral representations, warranties, agreements, or promises pertaining to the sale of the Property by Seller to Buyer not incorporated in writing in this contract.

3. *Amendment.* This contract may be amended only by an instrument in writing signed by the parties.

4. *Prohibition of Assignment.* Buyer may not assign this contract or any of Buyer's rights under it without Seller's prior written consent, and any attempted assignment is void. This contract binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

4. *Assignment.* Buyer may assign this contract and Buyer's rights under it only to an entity in which Buyer possesses, directly or indirectly, the power to direct or cause the direction of its management and policies, whether through the ownership of voting securities or otherwise, and any other assignment is void. This contract binds, benefits, and may be enforced by the parties and their respective heirs, successors, and permitted assigns.

5. *Survival.* The obligations of this contract that cannot be performed before termination of this contract or before closing will survive termination of this contract or closing, and the legal doctrine of merger will not apply to these matters. If there is any conflict between the Closing Documents and this contract, the Closing Documents will control.
6. *Choice of Law; Venue; Alternative Dispute Resolution.* This contract will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. Venue is in the County for Performance, except as otherwise provided by applicable law. Time permitting, the parties will submit in good faith to an alternative dispute resolution process before filing a suit concerning this contract.
7. *Waiver of Default.* It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays taking any action with respect to the default.
8. *No Third-Party Beneficiaries.* There are no third-party beneficiaries of this contract.
9. *Severability.* The provisions of this contract are severable. If a court of competent jurisdiction finds that any provision of this contract is unenforceable, the remaining provisions will remain in effect without the unenforceable parts.
10. *Ambiguities Not to Be Construed against Party Who Drafted Contract.* The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this contract.
11. *No Special Relationship.* The parties' relationship is an ordinary commercial relationship, and they do not intend to create the relationship of principal and agent, partnership, joint venture, or any other special relationship.
12. *Counterparts.* If this contract is executed in multiple counterparts, all counterparts taken together will constitute this contract.
13. *Confidentiality.* The parties will keep confidential this contract, this transaction, and all information learned in the course of this transaction, except to the extent disclosure is required by law or court order or to enable third parties to advise or assist Buyer to investigate the Property or either party to close this transaction.
14. *Waiver of Consumer Rights.* BUYER WAIVES ITS RIGHTS UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT, SECTION 17.41 ET SEQ.

OF THE TEXAS BUSINESS AND COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. AFTER CONSULTATION WITH AN ATTORNEY OF ITS OWN SELECTION, BUYER VOLUNTARILY CONSENTS TO THIS WAIVER.

\_\_\_\_\_  
[Name and title of seller]

Date:

\_\_\_\_\_  
[Name and title of buyer]

Date:

Title Company acknowledges receipt of Earnest Money in the amount of \$\_\_\_\_\_ and a copy of this contract executed by both Buyer and Seller.

[Name of title company]

By: \_\_\_\_\_

Name:

Title:

Date:

**Exhibit A**

**Description of the Land [and Personal Property]**

All personal property associated with the Land and Improvements, except the following: [**list exceptions**].

The following described personal property: [**describe property**].

**Exhibit B****Representations; Environmental Matters****A. Seller's Representations to Buyer**

Seller represents to Buyer that the following are true and correct as of the Effective Date and will be true and correct on the Closing Date.

1. *Authority.* Seller is a **[specify type of organization]** duly organized, validly existing, and in good standing under the laws of the state of [Texas/**state**] with authority to convey the Property to Buyer. This contract is, and all documents required by this contract to be executed and delivered to Buyer at closing will be, duly authorized, executed, and delivered by Seller.

2. *Litigation.* There is no litigation pending or threatened against Seller that might affect the Property or Seller's ability to perform its obligations under this contract **[include if applicable: , except: [specify]]**.

3. *Violation of Laws.* Seller has not received notice of violation of any law, ordinance, regulation, or requirements affecting the Property or Seller's use of the Property **[include if applicable: , except: [specify]]**.

4. *Licenses, Permits, and Approvals.* Seller has not received notice that any license, permit, or approval necessary to operate the Property in the manner in which it is currently operated will not be renewed on expiration or that any material condition will be imposed in order to obtain their renewal **[include if applicable: , except: [specify]]**.

5. *Condemnation; Zoning; Land Use; Hazardous Materials.* Seller has not received notice of any condemnation, zoning, or land-use proceedings affecting the Property or any inquiries or notices by any governmental authority or third party with respect to the presence of hazardous materials on the Property or the migration of hazardous materials from the Property **[include if applicable: , except: [specify]]**.

6. *No Other Obligation to Sell the Property or Restriction against Selling the Property.* Except for granting a security interest in the Property, Seller has not obligated itself to sell the Property to any party other than Buyer. Seller's performance of this contract will not cause a breach of any other agreement or obligation to which Seller is a party or to which it is bound.

7. *No Liens.* On the Closing Date, the Property will be free and clear of all mechanic's and materialman's liens and other liens and encumbrances of any nature except the Permitted Exceptions, and no work or materials will have been furnished to the Property that might give rise to mechanic's, materialman's, or other liens against the Property other than work or materials to which Buyer has given its consent.

8. *No Other Representation.* Except as stated above or in the notices, statements, and certificates set forth in Exhibit D, Seller makes no representation with respect to the Property.

9. *No Warranty.* Seller has made no warranty in connection with this contract.

**B. “As Is, Where Is”**

THIS CONTRACT IS AN ARMS-LENGTH AGREEMENT BETWEEN THE PARTIES. THE PURCHASE PRICE WAS BARGAINED ON THE BASIS OF AN “AS IS, WHERE IS” TRANSACTION AND REFLECTS THE AGREEMENT OF THE PARTIES THAT THERE ARE NO REPRESENTATIONS, DISCLOSURES, OR EXPRESS OR IMPLIED WARRANTIES, EXCEPT FOR THE WARRANTY OF TITLE STATED IN THE CLOSING DOCUMENTS AND SELLER'S REPRESENTATIONS TO BUYER SET FORTH IN SECTION A OF THIS EXHIBIT B.

THE PROPERTY WILL BE CONVEYED TO BUYER IN AN “AS IS, WHERE IS” CONDITION, WITH ALL FAULTS. [**Include if applicable:** SELLER MAKES NO WARRANTY OF CONDITION, MERCHANTABILITY, OR SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE PERSONAL PROPERTY.] ALL WARRANTIES, EXCEPT THE WARRANTY OF TITLE IN THE CLOSING DOCUMENTS, ARE DISCLAIMED.

The provisions of this section B regarding the Property will be included in the deed [**include if applicable:** and bill of sale] with appropriate modification of terms as the context requires.

**C. Environmental Matters**

AFTER CLOSING, AS BETWEEN BUYER AND SELLER, THE RISK OF LIABILITY OR EXPENSE FOR ENVIRONMENTAL PROBLEMS, EVEN IF ARISING FROM EVENTS BEFORE CLOSING, WILL BE THE SOLE RESPONSIBILITY OF BUYER, REGARDLESS OF WHETHER THE ENVIRONMENTAL PROBLEMS WERE KNOWN OR UNKNOWN AT CLOSING. ONCE CLOSING HAS OCCURRED, BUYER INDEMNIFIES, HOLDS

HARMLESS, AND RELEASES SELLER FROM LIABILITY FOR ANY LATENT DEFECTS AND FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY, INCLUDING LIABILITY UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA), THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA), THE TEXAS SOLID WASTE DISPOSAL ACT, OR THE TEXAS WATER CODE. **BUYER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY ARISING AS THE RESULT OF SELLER'S OWN NEGLIGENCE OR THE NEGLIGENCE OF SELLER'S REPRESENTATIVES.** BUYER INDEMNIFIES, HOLDS HARMLESS, AND RELEASES SELLER FROM ANY LIABILITY FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY ARISING AS THE RESULT OF THEORIES OF PRODUCTS LIABILITY AND STRICT LIABILITY, OR UNDER NEW LAWS OR CHANGES TO EXISTING LAWS ENACTED AFTER THE EFFECTIVE DATE THAT WOULD OTHERWISE IMPOSE ON SELLERS IN THIS TYPE OF TRANSACTION NEW LIABILITIES FOR ENVIRONMENTAL PROBLEMS AFFECTING THE PROPERTY.

The provisions of this section C regarding the Property will be included in the deed [**include if applicable:** and bill of sale] with appropriate modification of terms as the context requires.

**Exhibit C**

**Seller's Records**

To the extent that Seller has possession of the following items pertaining to the Property, Seller will deliver or make the items or copies of them available to Buyer by the deadline stated in section A.7.:

**Governmental**

governmental licenses, certificates, permits, and approvals

tax statements for the current year and the last [number] years

notices of appraised value for the current year and the last [number] years

records of regulatory proceedings or violations (for example, condemnation, environmental)

other: [specify]

**Land**

soil reports

environmental reports

engineering reports

prior surveys

site plans

other: [specify]

**Facilities**

as-built plans, specifications, and mechanical drawings for improvements



warranty agreements

management, employment, labor, service, equipment, supply, and maintenance agreements

insurance policies

ADA and other building inspection reports

engineering reports

environmental reports

operating and maintenance plans (for example, asbestos maintenance plans)

life-safety plans

other: **[specify]**

**Financial**

annual operating statements for the most recent **[number]** years of operation

monthly operating statements since the close of the last fiscal year

balance sheet as of **[date]**

books and records for the Property

utility bills for the most recent **[number]** months of operation

other: **[specify]**

**Leases**

Leases

commission and leasing agent agreements

rent roll setting forth for each Lease:

tenant's name

square footage leased

date of expiration of current and renewal terms

renewal options

basic rent and formula for any additional rents

amount of additional rent paid during the last [**number**] [months/years]

prepaid rent

delinquent rent

security deposit

current tenant or landlord defaults

options to purchase any portion of the Property

rights of first refusal to lease other space

rights to rent concessions, tenant improvements, or other allowances

unpaid or contingent brokerage commissions (including commission on renewals)

estoppel letters and/or subordination agreements

other: [**specify**]

**Exhibit D**

**Notices, Statements, and Certificates**

The following notices, statements, and certificates are delivered to Buyer and are incorporated by reference into this contract.

Notice regarding real property located adjacent to tidally influenced, submerged lands of Texas, described in section 33.135 of the Texas Natural Resources Code

Notice concerning public easements to the public beach, described in section 61.025 of the Texas Natural Resources Code

Notice concerning the bonded indebtedness of, or rates to be charged by, a utility or other special district, described in sections 49.452 and 54.016(h)(4)(A) of the Texas Water Code

Seller's disclosure of the condition of residential property, described in section 5.008 of the Texas Property Code

Condominium declaration, bylaws, and association rules, described in section 82.156 of the Texas Property Code

Resale certificate from the condominium owners' association, described in section 82.157 of the Texas Property Code

Seller's disclosure of the location of pipelines under the surface of unimproved property to be used for residential purposes, described in section 5.010 of the Texas Property Code

Notice of additional tax liability for vacant land that has been subject to a special tax appraisal method, described in section 5.010 of the Texas Property Code

Notice of deed restrictions, described in section 230.005 of the Texas Local Government Code

Notice concerning underground storage tanks, described in section 334.9 of title 30 of the Texas Administrative Code

Notice concerning insulation to be installed in a new home, described in section 460.16 of title 16 of the Code of Federal Regulations

Lead-paint warning statement, described in section 745.100 *et seq.* of title 40 of the Code of Federal Regulations

Notice concerning asbestos, described in sections 1910.1001 and 1926.1101 of title 29 of the Code of Federal Regulations

11-08-99

PROMULGATED BY THE TEXAS REAL ESTATE COMMISSION (TREC)

UNIMPROVED PROPERTY CONTRACT

NOTICE: Not For Use For Condominium Transactions

1. PARTIES: \_\_\_\_\_ (Seller)
agrees to sell and convey to \_\_\_\_\_ (Buyer)
and Buyer agrees to buy from Seller the property described below.

2. PROPERTY: Lot \_\_\_\_\_, Block \_\_\_\_\_, \_\_\_\_\_ Addition,
City of \_\_\_\_\_, \_\_\_\_\_ County,
Texas, known as \_\_\_\_\_
(Address/Zip Code), or as described on attached exhibit, (the Property). The Property [ ]
is [ ] is not subject to mandatory membership in an owners' association. The TREC
Addendum For Property Subject To Mandatory Membership In An Owners' Association [ ]
is [ ] is not attached.

NOTICE TO BUYER: If the Property is subject to mandatory membership in an owners'
association, Seller notifies Buyer under §5.012, Texas Property Code, that, as a purchaser
of property in the residential community in which the Property is located, you are obligated
to be a member of an owners' association. Restrictive covenants governing the use and
occupancy of the Property and a dedicatory instrument governing the establishment,
maintenance, and operation of this residential community have been or will be recorded in
the Real Property Records of the county in which the Property is located. Copies of the
restrictive covenants and dedicatory instrument may be obtained from the county clerk.
You are obligated to pay assessments to the owners' association. The amount of the
assessments is subject to change. Your failure to pay the assessments could result in a
lien on and the foreclosure of the Property.

3. SALES PRICE:
A. Cash portion of Sales Price payable by Buyer at closing . . . . . \$ \_\_\_\_\_
B. Sum of all financing described below . . . . . \$ \_\_\_\_\_
C. Sales Price (Sum of A and B) . . . . . \$ \_\_\_\_\_

4. FINANCING: Within \_\_\_\_\_ days after the effective date of this contract Buyer shall apply
for all third party financing or noteholder's approval of any assumption and make every
reasonable effort to obtain financing or assumption approval. Financing or assumption
approval will be deemed to have been obtained when the lender determines that Buyer has
satisfied all of lender's financial requirements (those items relating to Buyer's net worth,
income and creditworthiness). If financing or assumption approval is not obtained within
\_\_\_\_\_ days after the effective date hereof, this contract will terminate and the earnest
money will be refunded to Buyer. Each note to be executed hereunder must be secured
by vendor's and deed of trust liens.

The portion of Sales Price not payable in cash will be paid as follows: (Check applicable
boxes below)

[ ] A. THIRD PARTY FINANCING:
[ ] (1) This contract is subject to approval for Buyer of a third party loan in an
amount not to exceed \_\_\_\_\_% of the Sales Price, evidenced by a third
party first lien promissory note of not less than \$ \_\_\_\_\_, due in

full \_\_\_\_\_ year(s), with interest not to exceed \_\_% per annum for the first \_\_\_\_\_ year(s) of the loan.

- (2) This contract is subject to approval for Buyer of a third party loan in an amount not to exceed \_\_\_\_\_% of the Sales Price, evidenced by a third party second lien promissory note of not less than \$\_\_\_\_\_, due in full in \_\_\_\_\_ year(s), with interest not to exceed \_\_\_\_\_% per annum for the first \_\_\_\_\_ year(s) of the loan.

- B. SELLER FINANCING: A promissory note from Buyer to Seller of \$\_\_\_\_\_, bearing \_\_\_\_\_% interest per annum, secured by vendor's and deed of trust liens, in accordance with the terms and conditions set forth in the attached TREC Seller Financing Addendum. If an owner policy of title insurance is furnished, Buyer shall furnish Seller with a mortgagee policy of title insurance.

- C. ASSUMPTION:

- (1) Buyer shall assume the unpaid principal balance of a first lien promissory note payable to \_\_\_\_\_ which unpaid balance at closing will be \$\_\_\_\_\_. The total current monthly payment including principal, interest and any reserve deposits is \$\_\_\_\_\_. Buyer's initial payment will be the first payment due after closing.

- (2) Buyer shall assume the unpaid principal balance of a second lien promissory note payable to \_\_\_\_\_ which unpaid balance at closing will be \$\_\_\_\_\_. The total current monthly payment including principal, interest and any reserve deposits is \$\_\_\_\_\_. Buyer's initial payment will be the first payment due after closing.

Buyer's assumption of an existing note includes all obligations imposed by the deed of trust securing the note.

If the unpaid principal balance(s) of any assumed loan(s) as of the Closing Date varies from the loan balance(s) stated above, the  cash payable at closing  Sales Price will be adjusted by the amount of any variance; provided, if the total principal balance of all assumed loans varies in an amount greater than \$350.00 at closing, either party may terminate this contract and the earnest money will be refunded to Buyer unless the other party elects to eliminate the excess in the variance by an appropriate adjustment as closing. If the noteholder requires (a) payment of an assumption fee in excess of \$\_\_\_\_\_ in C(1) above or \$\_\_\_\_\_ in C(2) above and Seller declines to pay such excess, or (b) an increase in the interest rate to more than \_\_\_\_\_% in C(1) above, or % in C(2) above, or (c) any other modification of the loan documents, Buyer may terminate this contract and the earnest money will be refunded to Buyer. A vendor's lien and deed of trust to secure assumption will be required which shall automatically be released on execution and delivery of a release by noteholder. If Seller is released from liability on any assumed note, the vendor's lien and deed of trust to secure assumption will not be required.

**NOTICE TO BUYER:** The monthly payments, interest rates or other terms of some loans may be adjusted by the lender at or after closing. If you are concerned about the possibility of future adjustments, do not sign the contract without examining the notes and deeds of trust.

**NOTICE TO SELLER:** Your liability to pay the note assumed by buyer will continue unless you obtain a release of liability from the lender. If you are concerned about future liability, you should use the TREC Release of Liability Addendum.

**D. CREDIT APPROVAL ON ASSUMPTION OR SELLER FINANCING:**

Within \_\_\_\_\_ days after the effective date of this contract, Buyer shall deliver to Seller  credit report  verification of employment, including salary  verification of funds on deposit in financial institutions  current financial statement to establish Buyer's creditworthiness or assumption approval or seller financing and  \_\_\_\_\_.

If Buyer's documentation is not delivered within the specified time, Seller may terminate this contract by notice to Buyer within 7 days after expiration of the time for delivery, and the earnest money will be paid to Seller. If this contract is not so terminated, Seller will be deemed to have accepted Buyer's credit. If the documentation is timely delivered, and Seller determines in Seller's sole discretion that Buyer's credit is unacceptable, Seller may terminate this contract by notice to Buyer within 7 days after expiration of the time for delivery and the earnest money will be refunded to Buyer. If Seller does not so terminate this contract, Seller will be deemed to have accepted Buyer's credit. Buyer hereby authorizes any credit reporting agency to furnish to Seller at Buyer's expense copies of Buyer's credit reports.

5. **EARNEST MONEY:** Buyer shall deposit \$ \_\_\_\_\_ as earnest money with \_\_\_\_\_ at \_\_\_\_\_ (Address), as escrow agent, upon execution of this contract by both parties. Additional earnest money of \$ \_\_\_\_\_ must be deposited by Buyer with escrow agent on or before \_\_\_\_\_. If Buyer fails to deposit the earnest money as required by this contract, Buyer will be in default.

6. **TITLE POLICY AND SURVEY:**

- A. **TITLE POLICY:** Seller shall furnish to Buyer at  Seller's  Buyer's expense an owner policy of title insurance (the Title Policy) issued by \_\_\_\_\_ (the Title Company) in the amount of the Sales Price, dated at or after closing, insuring Buyer against loss under the provisions of the Title Policy, subject to the promulgated exclusions (including existing building and zoning ordinances) and the following exceptions:
- (1) Restrictive covenants common to the platted subdivision in which the Property is located.
  - (2) The standard printed exception for standby fees, taxes and assessments.
  - (3) Liens created as part of the financing described in Paragraph 4.
  - (4) Utility easements created by the dedication deed or plat of the subdivision in which the Property is located.
  - (5) Reservations or exceptions otherwise permitted by this contract or as may be approved by Buyer in writing.
  - (6) The standard printed exception as to discrepancies, conflicts, shortages in area or boundary lines, encroachments or protrusions, or overlapping improvements.
  - (7) The standard printed exception as to marital rights.

- (8) The standard printed exception as to waters, tidelands, beaches, streams, and related matters.

Within 20 days after the Title Company receives a copy of this contract, Seller shall furnish to Buyer a commitment for title insurance (the Commitment) and, at Buyer's expense, legible copies of restrictive covenants and documents evidencing exceptions in the Commitment other than the standard printed exceptions. Seller authorizes the Title Company to mail or hand deliver the Commitment and related documents to Buyer at Buyer's address shown below. If the Commitment is not delivered to Buyer within the specified time, the time for delivery will be automatically extended up to 15 days.

B. SURVEY: (Check one box only)

- (1) Within \_ days after the effective date of this contract, Buyer shall obtain a survey at Buyer's expense.
- (2) Within \_ days after the effective date of this contract, Seller shall cause a survey to be delivered to Buyer at Seller's expense.
- (3) Within \_ days after the effective date of this contract, Seller shall deliver to Buyer the existing survey plat of the Property dated \_\_\_\_\_, which  will  will not be recertified to a date subsequent to the effective date of this contract at the expense of  Buyer  Seller.

The survey must be made by a Registered Professional Land Surveyor acceptable to the Title Company and any lender.

Buyer may object to existing building and zoning ordinances, items 6A (1) through (8) above and matters shown on the survey if Buyer determines that any such ordinance, items or matters prohibits the following use or activity: \_\_\_\_\_.

Buyer will have 7 days after the receipt of the latter of the Commitment or survey to object in writing to matters disclosed in the Commitment or survey. Buyer's failure to object under Paragraph 6 within the time allowed will constitute a waiver of Buyer's right to object; except that the requirements in Schedule C of the Commitment will not be deemed to have been waived. Seller shall cure the timely objections of Buyer or any third party lender within 20 days after Seller receives the objections and the Closing Date will be extended as necessary. If objections are not cured by the extended Closing Date, this contract will terminate and the earnest money will be refunded to Buyer unless Buyer elects to waive the objections.

**NOTICE TO SELLER AND BUYER:**

- (1) Broker advises Buyer to have an abstract of title covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a Title Policy. If a Title Policy is furnished, the Commitment should be promptly reviewed by an attorney of Buyer's choice due to the time limitations on Buyer's right to object.
- (2) If the Property is situated in a utility or other statutorily created district providing water, sewer, drainage, or flood control facilities and services, Chapter 49 of the Texas Water Code requires Seller to deliver and Buyer to sign the statutory notice relating to the tax rate, bonded indebtedness, or standby fee of the district prior to final execution of this contract.
- (3) If the Property abuts the tidally influenced waters of the state, Section 33.135, Texas Natural Resources Code, requires a notice regarding coastal area property to be included in the contract. An addendum either promulgated by TREC or required by the parties should be used.
- (4) Buyer is advised that the presence of wetlands, toxic substances, including asbestos and wastes or other environmental hazards or the presence of a threatened or endangered species or its habitat may affect Buyer's intended use of the Property. If Buyer is concerned



about these matters, an addendum either promulgated by TREC or required by the parties should be used.

- (5) If the Property is located outside the limits of a municipality, Seller notifies Buyer under §5.011, Texas Property Code, that the Property may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the Property is located within a municipality's extraterritorial jurisdiction or is likely to be located within a municipality's extraterritorial jurisdiction, contact all municipalities located in the general proximity of the Property for further information.
- (6) Unless expressly prohibited in writing by the parties, Seller may continue to show the Property for sale and to receive, negotiate and accept back up offers.

## 7. PROPERTY CONDITION:

- A. **INSPECTIONS, ACCESS AND UTILITIES:** Buyer may have the Property inspected by an inspector selected by Buyer, licensed by TREC or otherwise permitted by law to make such inspections. Seller shall permit access to the Property at reasonable times for inspection, repairs and treatment and for reinspection after repairs and treatment have been completed. Seller shall pay for turning on utilities for inspection and reinspection.
- B. **ACCEPTANCE OF PROPERTY CONDITION NOTICE:** Buyer should determine the availability of utilities to the Property suitable to satisfy Buyer's needs, (check one box only):

(1) In addition to any earnest money deposited with escrow agent, Buyer has paid Seller \$\_\_ (the "Option Fee") for the unrestricted right to terminate this contract by giving notice of termination to Seller within \_\_\_\_ days after the effective date of this contract. If Buyer gives notice of termination within the time specified, the Option Fee will not be refunded, however, any earnest money will be refunded to Buyer. If Buyer does not give notice of termination within the time specified, Buyer will be deemed to have accepted the Property in its current condition and the Option Fee  will  will not be credited to the Sales Price at closing.

(2) Buyer accepts the Property in its present condition.

8. **BROKERS' FEES:** All obligations of the parties for payment of brokers' fees are contained in separate written agreements.

9. **CLOSING:** The closing of the sale will be on or before \_\_\_\_\_, \_\_\_\_\_ or within 7 days after objections to matters disclosed in the Commitment or by the survey have been cured, whichever date is later (the Closing Date). *If financing or assumption approval has been obtained pursuant to Paragraph 4, the Closing Date will be extended up to 15 days if necessary to comply with lender's closing requirements. If either party fails to close this sale by the Closing Date, the non-defaulting party will be entitled to exercise the remedies contained in Paragraph 15. At closing Seller shall furnish tax statements or certificates showing no delinquent taxes and a general warranty deed conveying good and indefeasible title showing no additional exceptions to those permitted in Paragraph 6.*

10. **POSSESSION:** Seller shall deliver possession of the Property to Buyer at closing and funding.

**11. SPECIAL PROVISIONS:** (Insert only factual statements and business details applicable to this sale. TREC rules prohibit licensees from adding factual statements or business details for which a contract addendum, lease or other form has been promulgated by TREC for mandatory use.)

**12. SETTLEMENT AND OTHER EXPENSES:**

A. The following expenses must be paid at or prior to closing:

- (1) Appraisal fees will be paid by \_\_\_\_\_.
- (2) The total of loan discount fees may not exceed \_\_\_\_\_% of the loan of which Seller shall pay \_\_\_\_\_ and Buyer shall pay the remainder. The total of any buydown fees may not exceed \_\_\_\_\_ which will be paid by \_\_\_\_\_.
- (3) Seller's Expenses: Releases of existing liens, including prepayment penalties and recording fees; release of Seller's loan liability; tax statements or certificates; preparation of deed; one-half of escrow fee; and other expenses stipulated to be paid by Seller under other provisions of this contract.
- (4) Buyer's Expenses: Loan application, origination and commitment fees; loan assumption costs; preparation and recording of deed of trust to secure assumption; lender required expenses incident to new loans, including preparation of loan documents, recording fees, tax service and research fees, warehouse or underwriting fees, copies of restrictions and easements, amortization schedule, premiums for mortgagee title policies and endorsements required by lender, credit reports, photos; required premiums for flood and hazard insurance; required reserve deposit for insurance premiums and ad valorem taxes; interest on all monthly installment notes from date of disbursements to one month prior to dates of first monthly payments; one-half of escrow fee; and other expenses stipulated to be paid by Buyer under other provisions of this contract.

B. If any expense exceeds an amount expressly stated in this contract for such expense to be paid by a party, that party may terminate this contract unless the other party agrees to pay such excess. In no event will Buyer pay charges and fees expressly prohibited by governmental loan program regulations.

**13. PRORATIONS AND ROLLBACK TAXES:**

A. PRORATIONS: Taxes for the current year, interest, maintenance fees, assessments, dues and rents will be prorated through the Closing Date. If taxes for the current year vary from the amount prorated at closing, the parties shall adjust the prorations when tax statements for the current year are available. *If a loan is assumed* and the lender maintains an escrow account, the escrow account must be transferred to Buyer without any deficiency. Buyer shall reimburse Seller for the amount in the transferred account. Buyer shall pay the premium for a new insurance policy. If taxes are not paid at or prior to closing, Buyer will be obligated to pay taxes for the current year.

B. ROLLBACK TAXES: If this sale or Buyer's use of the Property after closing results in the assessment of additional taxes, penalties or interest (Assessments) for periods prior to closing, the Assessments will be the obligation of the Buyer. If Seller's change in use of Property prior to closing or denial of a special use valuation on the Property claimed by Seller results in Assessments for periods prior to closing, the Assessments will be the obligation of Seller. Obligations imposed by this paragraph will survive closing.

**14. CASUALTY LOSS:** If any part of the Property is damaged or destroyed by fire or other casualty loss after the effective date of the contract, Seller shall restore the Property to its previous condition as soon as reasonably possible, but in any event by the Closing Date. If Seller fails to do so due to factors beyond Seller's control, Buyer may either (a) terminate this contract and the earnest

money will be refunded to Buyer (b) extend the time for performance up to 15 days and the Closing Date will be extended as necessary or (c) accept the Property in its damaged condition and accept an assignment of insurance proceeds. Seller's obligations under this paragraph are independent of any obligations of Seller under Paragraph 7.

- 15. DEFAULT:** If Buyer fails to comply with this contract, Buyer will be in default, and Seller may either (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money as liquidated damages, thereby releasing both parties from this contract. If, due to factors beyond Seller's control, Seller fails within the time allowed to make any non-casualty repairs or deliver the Commitment, Buyer may either (a) extend the time for performance up to 15 days and the Closing Date will be extended as necessary or (b) terminate this contract as the sole remedy and receive the earnest money. If Seller fails to comply with this contract for any other reason, Seller will be in default and Buyer may either (a) enforce specific performance, seek such other relief as may be provided by law, or both, or (b) terminate this contract and receive the earnest money, thereby releasing both parties from this contract.
- 16. DISPUTE RESOLUTION:** It is the policy of the State of Texas to encourage the peaceable resolution of disputes through alternative dispute resolution procedures. The parties are encouraged to use an addendum approved by TREC to submit to mediation disputes which cannot be resolved in good faith through informal discussion.
- 17. ATTORNEY'S FEES:** The prevailing party in any legal proceeding brought under or with respect to the transaction described in this contract is entitled to recover from the non-prevailing party all costs of such proceeding and reasonable attorney's fees.
- 18. ESCROW:** The earnest money is deposited with escrow agent with the understanding that escrow agent is not (a) a party to this contract and does not have any liability for the performance or nonperformance of any party to this contract, (b) liable for interest on the earnest money and (c) liable for any loss of earnest money caused by the failure of any financial institution in which the earnest money has been deposited unless the financial institution is acting as escrow agent. At closing, the earnest money must be applied first to any cash down payment, then to Buyer's closing costs and any excess refunded to Buyer. If both parties make written demand for the earnest money, escrow agent may require payment of unpaid expenses incurred on behalf of the parties and a written release of liability of escrow agent from all parties. If one party makes written demand for the earnest money, escrow agent shall give notice of the demand by providing to the other party a copy of the demand. If escrow agent does not receive written objection to the demand from the other party within 30 days after notice to the other party, escrow agent may disburse the earnest money to the party making demand reduced by the amount of unpaid expenses incurred on behalf of the party receiving the earnest money and escrow agent may pay the same to the creditors. If escrow agent complies with the provisions of this paragraph, each party hereby releases escrow agent from all adverse claims related to the disbursement of the earnest money. Escrow agent's notice to the other party will be effective when deposited in the U.S. Mail, postage prepaid, certified mail, return receipt requested, addressed to the other party at such party's address shown below. Notice of objection to the demand will be deemed effective upon receipt by escrow agent.
- 19. REPRESENTATIONS:** Seller represents that as of the Closing Date (a) there will be no liens, assessments, or security interests against the Property which will not be satisfied out of the sales proceeds unless securing payment of any loans assumed by Buyer and (b) assumed loans will not

be in default. If any representation in this contract is untrue on the Closing Date, this contract may be terminated by Buyer and the earnest money will be refunded to Buyer. All representations contained in this contract will survive closing.

**20. FEDERAL TAX REQUIREMENT:** If Seller is a "foreign person," as defined by applicable law, or if Seller fails to deliver an affidavit that Seller is not a "foreign person," then Buyer shall withhold from the sales proceeds an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service together with appropriate tax forms. IRS regulations require filing written reports if cash in excess of specified amounts is received in the transaction.

**21. AGREEMENT OF PARTIES:** This contract contains the entire agreement of the parties and cannot be changed except by their written agreement. Addenda which are a part of this contract are (list):  
\_\_\_\_\_  
\_\_\_\_\_.

**22. CONSULT YOUR ATTORNEY:** Real estate licensees cannot give legal advice. This contract is intended to be legally binding. READ IT CAREFULLY. If you do not understand the effect of this contract, consult your attorney BEFORE signing.

Buyer's Attorney is: \_\_\_\_\_ Seller's Attorney is: \_\_\_\_\_

**23. NOTICES:** All notices from one party to the other must be in writing and are effective when mailed to, hand-delivered at, or transmitted by facsimile machine as follows:

**To Buyer at:** \_\_\_\_\_ **To Seller at:** \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Telephone: ( ) \_\_\_\_\_ Telephone: ( ) \_\_\_\_\_

Facsimile: ( ) \_\_\_\_\_ Facsimile: ( ) \_\_\_\_\_

EXECUTED the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ (THE EFFECTIVE DATE).  
(BROKER: FILL IN THE DATE OF FINAL ACCEPTANCE.)

\_\_\_\_\_  
Buyer Seller

\_\_\_\_\_  
Buyer Seller

The form of this contract has been approved by the Texas Real Estate Commission. Such approval relates to this contract form only. TREC forms are intended for use only by trained real estate licensees. No representation is made as to the legal validity or adequacy of any provision in any specific transaction. It is not suitable for complex transactions. Extensive riders or additions are not to be used. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, 1-800-250-8732 or (512) 459-6544 (http://www.trec.state.tx.us) TREC NO. 9-4. This form replaces TREC NO. 9-3

Initialed for Identification by Buyer \_\_\_\_\_ and Seller \_\_\_\_\_ **01ATREC NO. 9-4**

Unimproved Property Contract Concerning \_\_\_\_\_ Page Nine 11-08-99  
(Address of Property)

**BROKER INFORMATION AND RATIFICATION OF FEE**

Listing Broker has agreed to pay Other Broker \_\_\_\_\_ of the total sales price when Listing Broker's fee is received. Escrow Agent is authorized and directed to pay Other Broker from Listing Broker's fee at closing.

_____ Other Broker		_____ License No.		_____ Listing Broker		_____ License No.	
represents	<input type="checkbox"/> Seller as Listing Broker's subagent			represents	<input type="checkbox"/> Seller and Buyer as an intermediary		
	<input type="checkbox"/> Buyer only as Buyer's agent			agent	<input type="checkbox"/> Seller only as Seller's agent		
_____ Associate		_____ Telephone		_____ Listing Associate		_____ Telephone	
_____ Broker Address				_____ Selling Associate		_____ Telephone	
_____ Telephone		_____ Facsimile		_____ Broker Address			
_____ Telephone		_____ Facsimile		_____ Telephone		_____ Facsimile	

**RECEIPT**

Receipt of  Contract and  \$ \_\_\_\_\_ Earnest Money in the form of \_\_\_\_\_  
 \_\_\_\_\_ is acknowledged. Escrow Agent: \_\_\_\_\_ Date: \_\_\_\_\_  
 200 \_\_\_\_\_  
 By: \_\_\_\_\_ Telephone: ( ) \_\_\_\_\_  
 Address \_\_\_\_\_ Facsimile: ( ) \_\_\_\_\_  
 City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

**IMPROVED PROPERTY ADDENDUM TO  
TREC NO. 9-4 (ED. 11-08-99) CONTRACT**

**Between**

\_\_\_\_\_  
**("Seller")**

**and**

\_\_\_\_\_  
**("Buyer")**

**Effective Date:** \_\_\_\_\_

IMPROVED PROPERTY ADDENDUM TO  
TREC No. 9-4 (Ed. 11-08-99) CONTRACT

This Addendum (the "Addendum") is executed as an Addendum to the Unimproved Property Contract TREC No. 9-4 (Ed. 1-08-99) (which together with this Addendum and all other Addenda and Exhibits is called the "Agreement" or the "Contract") between \_\_\_\_\_ (which together with its successors and assigns, is referred to as "Seller") and \_\_\_\_\_ (which together with its successors and assigns are referred to as "Buyer"). The provisions of this Addendum amend and supersede any provisions in the Unimproved Property Contract to the contrary and set forth additional understandings and agreements between Buyer and Seller. This Contract is binding upon and inures to the benefit of the parties hereto, their successors and assigns. The provisions of this Contract survive closing of the sale to Buyer.

**23. Improved Property.** For convenience of the parties, the parties have used the TREC No. 9-4 (Ed. 1-08-99) Unimproved Property Contract. The parties have amended the Unimproved Property Contract to add provisions negotiated by the parties concerning its status as improved property. The Property also includes:

**A. Improvements, Fixtures and Equipment.** All buildings, improvements, fixtures, and all property of every kind and character and description (personal or real) owned by Seller located on, attached to, or used in connection with the Property;

**B. Appurtenances.** All rights, privileges and appurtenances pertaining thereto, including any right, title, and interest of Seller in and to adjacent streets, alleys, and rights-of-way;

**C. Leases, Rents and Security Deposits.** Seller's interest in and to all leases or rents and security deposits including those described on Exhibit B attached hereto;

**D. Warranties.** Seller's interest in all third party warranties or guaranties, if transferable, relating to the Property or to any tangible personal property and fixtures located on, attached to, or used in connection with the Property;

**E. Trade Names.** Seller's interest in any trade names, if transferable, used in connection with the Property.

**F. Licenses and Permits.** Seller's interest in and to all licenses, permits and service contracts with respect to the Property, including the Licenses Permits and Service Contracts described on Exhibit B.

**24. Closing.** The Closing will occur in the offices of the Title Company on or before the later to occur of (a) on or before \_\_\_ days after the Effective Date of this Contract (subject at Buyer's option to being extended 1 day for each day after the Effective Date that Seller's delay in delivering a copy of the Records to Buyer or access to the Property), or (b) 7 days after all conditions for Closing have been satisfied or waived by Buyer.

**25. Records.** Within \_\_\_ days from the date hereof, Seller shall deliver or make available to Buyer for Buyer's inspection and/or copying at Seller's expense the following records [the items to be furnished pursuant

to this Paragraph 25 are collectively called the "Records"] however, Seller's obligation to provide Records does not extend to providing records after Closing:

**A. Licenses and Permits.** Copies of all licenses and permits with respect to the ownership and operation of the Property in Seller's possession.

**B. Environmental Matters.** Copies of all correspondence, reports, inspections, and other documents held by Seller regarding the environmental aspects of the Property or any hazardous substances (as herein defined) affecting or related to the Property. Seller authorizes and hereby directs any environmental engineer who has performed environmental inspection services for Seller to discuss with Buyer all matters covered by any reports prepared by such engineers for Seller or others.

**C. Violation Notices.** A copy of any notice received by Seller indicating that the Property, or any portion thereof, is not in compliance with applicable law.

**D. Authorizations.** The corporate resolution of the board of directors of Seller or other appropriate documentation authorizing the execution of this Contract and the transactions contemplated thereby.

**E. Leases and Service Contracts.** Copies of all leases pertaining to the Property, including any modifications, supplements, or amendments to the leases ("Leases") together with a current rent roll of all leases affecting the Property certified by Seller to be true and correct and copies of all service, maintenance and management agreements relating to the ownership and operation of the Property ("Service Contracts").

**F. Inventory.** A current inventory of all tangible personal property and fixtures owned by Seller and located on, attached to, or used in connection with the Property.

**G. Financing Documents.** Copies of all notes and deeds of trust assumed or taken subject to by Buyer.

**H. Warranties and Guaranties.** Copies of all warranties and guaranties relating to the Property, or any part thereof, or to the tangible personal property and fixtures owned by Seller and located on, attached to, or used in connection with the Property.

**I. Insurance.** Copies of all fire, hazard, liability, and other insurance policies held by Seller on or affecting the Property.

**J. Commission Agreements.** Copies of all leasing or other commission agreements with respect to the Property that are being assumed by Buyer.

**K. As-Built Plans.** A copy of the "as-built" plans and specifications of the Property.

**L. Utilities.** Copies of all invoices for utilities and repair expenses incurred by Seller for operation of the Property for each month for the preceding two (2) years prior to the Effective Date of this contract.

**M. Tax Returns.** A copy of Seller's income and expense statement for the Property from \_\_\_\_\_ to \_\_\_\_\_.

Seller warrants and represents to the Buyer, to the best of the Seller's knowledge, that the Records represent all of the documents and records in the Seller's possession or control pertaining to the Property.



**26. Property Analysis.**

**A. Inspections, Studies and Assessments.** At any time prior to the Closing while this Contract is in full force and effect, and at Buyer's sole expense, Buyer or Buyer's authorized agents have the right to enter upon the Property and make the following inquiries in addition to the inquiries permitted by Paragraphs **7A** and **B** of the Contract (collectively called the "inspections, studies and assessments"):

**1. Land and Environmental Studies.** surveys and site analyses, engineering studies, wetland studies, soil borings, soil analysis, and environmental assessments, including the performance of tests such as soils tests, air sampling, or paint sampling, and to review the records of the preparer of any environmental report prepared in connection with the Property and to discuss the preparer's findings with its engineers, as Buyer may deem necessary and to contact governmental authorities as to the Property;

**2. Structural Inspection.** Physical property inspections including, but not limited to, structural pest control, mechanical, structural, electrical, or plumbing inspections;

**3. Feasibility Study.** Economic feasibility studies;

**4. Local Law Compliance.** Compliance inspections to determine compliance with zoning ordinances, restrictions, building codes, and statutes (e.g., ADA, OSHA, and others).

Seller shall permit Buyer and Buyer's inspectors access to the Property at reasonable times. Seller shall pay for turning utilities on for inspections.

**B. Review Periods.** This Contract is conditioned upon Buyer's satisfaction, in Buyer's sole judgment, that the Property and the Title and Survey Review Items are satisfactory as follows within the following period (the "Information Review Periods"):

**1. Inquiries as to Property Condition.** Buyer has \_\_\_ days (the "Inquiries Period") after Seller makes all of their Records and the Property available to Buyer for inspection to elect either to continue with the Contract or to terminate the Contract by sending to Seller one of the following notices of its election: (a) Buyer's notice to continue with closing the sale of the Property in accordance with the Contract ("Buyer's Notice of Contract Continuance"), or (b) Buyer's notice of termination of the Contract ("Buyer's Notice of Contract Termination"). In the event Buyer sends Seller, Buyer's Notice of Contract Termination, within the Inquiries Period, this Contract automatically terminates, the Option Fee is retained by Seller, and all obligations and liabilities of the parties cease and terminate (except Buyer's Restoration Obligation).

**2. Title, Survey and Review of Review Items.** Within 5 days of the Effective Date of this Contract, Seller shall place an order with the Title Company to furnish to Buyer for Buyer's review a Commitment For Title Insurance (the "Title Commitment") together with legible copies of all instruments referred to in the Title Commitment. The Title Company shall be requested to furnish these items to Buyer within \_\_\_ days of the Effective Date of this Contract. Buyer may waive or expand the detail of the Survey specified in Paragraph **6B** of the Contract.

Buyer will have a period of \_\_\_ days after the later to occur of the following delivery to Buyer of the Title Commitment, all of the instruments referred to in the Title Commitment, and the Survey (the "Title and Survey Review Items") within which to review and object to any matters reflected by the Title and Survey Review Items (the "Title and Survey Review Period"). Any such Title and Survey Review Item to which Buyer shall not

object shall be deemed to be accepted by Buyer as an exception to the warranty of title to be contained in the Closing documents and are referred to herein as "Permitted Encumbrances"; provided, however, liens and title defects shown on Schedule C to the Title Commitment are not Permitted Encumbrances and are to be paid off or otherwise cured by Seller.

Among other matters, Buyer may raise objection as to the following types of matters: vacancies, boundary line conflicts, encroachments, restrictive covenants affecting the use of the property, and lack of, or impaired or reduced access to \_\_\_\_\_ Road.

If there are objections by Buyer as to which notice has been timely given by Buyer to Seller as above provided, Seller shall have until the later to occur of the Closing Date specified in Paragraph 9 or up to \_\_\_\_ days after receipt of such objections (the "Seller's Review Item Cure Period") to satisfy such objections; provided, however, Seller shall notify Buyer as soon as practicable of any matter objected to by Buyer (other than liens or title defects) that Seller does not intend to cure or attempt to cure. If Seller delivers written notice to Buyer that Seller is unable or unwilling to satisfy or cure a matter so objected to by Buyer (other than liens or title defects), Buyer shall on or before the later to occur of (a) the Closing Date, or (b) \_\_\_\_ days after request from Seller either (1) waive the objection to the matter that Seller has so notified Buyer that it will not cure and accept title subject to the matter to which Buyer had previously so objected (such uncured matters then becoming a Permitted Encumbrance) or (2) terminate this Contract by sending Buyer's Notice of Contract Termination to Seller.

In the event Buyer sends Buyer's Notice of Contract Termination, the Earnest Money shall be refunded to Buyer, except for the Option Fee which shall be paid to Seller, and all obligations and liabilities of the parties shall cease and terminate (except Buyer's Restoration Obligation).

Upon request of Buyer, Seller agrees to secure and provide, in recordable form, appropriate Affidavits of Use and Possession covering all of the lands claimed by Seller within the Survey, and the recording of such Affidavits will be a requirement of Closing.

**3. Buyer's Restoration Obligation.** BUYER SHALL NOT CAUSE OR PERMIT DAMAGE OR INJURY TO THE PROPERTY, AND UPON TERMINATION OF THIS CONTRACT, BUYER SHALL PROMPTLY RESTORE THE SURFACE OF THE PROPERTY TO THE CONDITION EXISTING PRIOR TO THE TESTS AND STUDIES CONDUCTED PURSUANT TO THIS CONTRACT, AND SUCH OBLIGATION SHALL SURVIVE THE TERMINATION OF THIS CONTRACT. BUYER SHALL DEFEND SELLER FROM AND AGAINST AND SHALL PAY THE FOLLOWING ("LIABILITIES"):  
ALL LIENS, CLAIMS, CAUSES OF ACTION, SUITS, LIABILITIES, COSTS, DAMAGES, AND EXPENSES (INCLUDING ATTORNEYS' FEES AND COURT COSTS) ARISING OUT OF, RESULTING FROM OR RELATING TO THE ACTS OF BUYER OR ITS AGENTS, EMPLOYEES OR INDEPENDENT CONTRACTORS UNDER THE PROVISIONS OF THIS SUBPARAGRAPH. SUCH OBLIGATION SHALL SURVIVE THE TERMINATION OF THIS CONTRACT, OR THE CLOSING, AS MAY BE. THE OBLIGATION OF THE BUYER IN THIS PARAGRAPH **26B** IS REFERRED TO IN THIS CONTRACT AS THE "BUYER'S RESTORATION OBLIGATION."

**C. Estoppel Certificates.** Within \_\_\_\_\_ days after the Effective Date of this Contract, Seller shall deliver to Buyer estoppel certificates signed not earlier than \_\_\_\_\_ by each tenant leasing space in the Property stating that, as of the date signed: no default exists under the terms of the lease agreement by either lessor or lessee; the amount of any rental payments made in advance, if any; the amount of any security deposits made, if any; the amount of any offsets against rent, if any; and that the tenant has no defenses against the payment of rent accruing under the terms of the lease agreement. If Seller is

unable to deliver the estoppel certificates in accordance with the terms of this paragraph without fault by the specified time, Buyer may (i) terminate this Contract and the Earnest Money shall be refunded to Buyer; (ii) extend the time for performance up to 15 days and the Closing Date shall be extended as necessary; or (iii) waive Seller's requirement to deliver the estoppel certificates.

**27. Warranties and Representations.**

**A. By Seller.** The term "*knowledge of Seller*" or "*to the best of Seller's knowledge*" or "*no knowledge of Seller*" when used herein or otherwise made by Seller means the current, express awareness of facts or other information of Seller as of the date of this Contract and as of any time thereafter to the Closing, and without undertaking any special inquiry or investigation by such person and without searching public records or the Seller's files.

Buyer agrees that the Seller is not under a duty of inquiry or investigation in order to make such representations and have no liability to them for failing to discover whether a condition as to which a representation as to the knowledge of Seller is made is true or exists, even if the means to know are at hand or could be discovered upon inquiry. Seller is not liable to Buyer for being negligently ignorant.

Such terms do not include the past knowledge of Seller, if not within the current, express awareness of Seller.

Representations of "no knowledge" or as to some condition as existing to the "knowledge of Seller" or "to the best of Seller's knowledge" is not an express or implied representation or warranty that the condition does exist or does not exist, but is only a representation as to the actual knowledge of Seller as of the Contract.

If on or before Closing, Buyer discovers or learns that a representation or warranty made to Buyer is materially inaccurate, then, unless Seller who made the representation or warranty intentionally mislead the Buyer, Buyer's sole remedy is to terminate the Contract and receive a refund of the Earnest Money. The Closing of this sale shall constitute a waiver and release of any claims by Buyer against the Seller as to any representation or warranty determined by Buyer to be inaccurate prior to Closing.

In order to induce Buyer to enter into this Contract, Seller makes the following warranties and representations in addition to those otherwise contained in this Contract, all of which will be true and correct as of the date hereof and as of the date of Closing:

**1. Authority.** Seller is, and at Closing will be, authorized and permitted to enter into this Contract and to perform all covenants and obligations hereunder, and its right to execute this Contract is not limited by any other agreements. The person signing this Contract on behalf of Seller has been authorized to do so. The execution and delivery of this Contract, the consummation of the transaction described herein and compliance with the terms of this Contract will not conflict with, or constitute a default under, any agreement to which Seller is a party or by which Seller or the Property is bound, or violate any regulation, law, court order, judgment, or decree applicable to Seller or the Property.

**2. No Litigation or Proceedings.** To the extent of the actual knowledge of Seller, there is no litigation or proceeding pending or threatened against or relating to any of the Property; and to the actual knowledge of Seller, there are no pending or threatened or contemplated condemnation actions or special assessments with respect to the Property. Seller has received no request (written or otherwise) from any

governmental entity with regard to the dedication of any of the Property. Seller has no knowledge of any pending or contemplated change in any governmental regulation or private agreement applicable to Buyer's use of the Property after Closing.

3. **No Claims.** No person, corporation, or other entity has or, on the date of Closing, shall have any right or option to acquire the Property.

4. **Compliance.** To the extent of the actual knowledge of Seller, Seller has complied with and the Property is in compliance with all applicable laws, ordinances, regulations, statutes, rules, and restrictions relating to the Property.

5. **Possession.** At the Closing, the Property will be conveyed free of the rights of possession of any third parties in or to the Property except for easements, if any, filed of record or visible and apparent on the ground.

6. **Environmental Investigations.** Seller has no actual knowledge that any investigation, administrative order, consent order and agreement, litigation or settlement with respect to materials classified as municipal or industrial waste by the State of Texas, or as hazardous waste by the U.S. Environmental Protection Agency or the State of Texas, is proposed, threatened, anticipated or in existence with respect to the Property. Seller has no actual knowledge that the Property is currently on any Federal or state "superfund" or "super-lien" lists.

Seller has not received notification from any governmental agency which would indicate that any of the Property has been contaminated by any of the following substances (called collectively in this Contract "hazardous substances or materials or toxic waste"): any materials classified as municipal or industrial waste by the State of Texas, or as hazardous waste by the U.S. Environmental Protection Agency or the State of Texas, toxic or hazardous wastes, pollutants or other hazardous substances, including without limitation, asbestos, PCB's, petroleum products and byproducts, substances defined or listed as hazardous substances or toxic substances or similarly identified in or pursuant to state or federal law or regulations.

7. **Leases.** Each written lease to be furnished to Buyer under this Contract shall be in full force and effect according to its terms without amendment or modification that is not disclosed to Buyer in writing. All the leases shall contain the entire written or oral agreements of any kind for the leasing, rental, or occupancy of any portion of the Property. Seller shall disclose in writing to Buyer:

(i) any lease modifications, amendments, or defaults made subsequent to the date the leases are furnished to Buyer but prior to closing;

(ii) any failure by Seller to comply with all of Seller's obligations under the leases;

(iii) any facts or circumstances that would constitute a default by Seller under any lease or entitle any tenant to offsets or damages;

(iv) any lease in which tenant does not actually occupy the premises leased;

(v) if any rent under any lease has been collected in advance of the current month;

(vi) if any concessions, bonuses, free rents, rebates, or other matters affect the rental for any tenant;

(vii) if any of the leases or rentals or other sums payable under the leases have been assigned or otherwise encumbered, except as security for loan(s) assumed or taken subject to as provided in this contract; and

(viii) if any tenant under any lease is in default.

**B. By Buyer.** In order to induce Seller to enter into this Contract, Buyer makes the following warranties and representations which will be true and correct as of the date hereof and as of the date of Closing:

**1. Authority.** Buyer is, and at Closing will be, authorized and permitted to enter into this Contract and to perform all covenants and obligations hereunder, and its right to execute this Contract is not limited by any other agreements. The person signing this Contract on behalf of Buyer has been authorized to do so. The execution and delivery of this Contract, the consummation of the transaction described herein and compliance with the terms of this Contract will not conflict with, or constitute a default under, any agreement to which Buyer is a party or by which Buyer is bound, or violate any regulation, law, court order, judgment, or decree applicable to Buyer.

**2. No Litigation or Proceedings.** To the extent of the actual knowledge of Buyer, there is no litigation or proceeding pending or threatened against or relating to Buyer's authority to purchase the Property.

**28. Operations Prior to Closing.** Seller covenants that from and after the date hereof, Seller shall comply with the following:

**A. Prohibitions.**

**1. Liens.** Seller may not create or permit any lien or other encumbrance affecting the Property, other than the lien for taxes not yet due and payable and existing liens to be released at the Closing;

**2. Waste.** Seller may not commit any waste or nuisance upon the Property;

**3. Encumbrances.** Seller may not impose any easements, covenants, conditions, or restrictions on the Property except as are approved in writing by Buyer, which approval will not be unreasonably withheld;

**4. Proceedings.** Seller may not institute or participate in any zoning, platting, or other governmental action regarding the Property; or

**5. Agents.** Seller may not enter into or modify any contract, lease or other agreement that in any way affects the Property and that will survive the Closing except as are approved in writing by Buyer, which approval will not be unreasonably withheld.

**B. Actions to Be Taken.** Seller is to promptly advise Buyer in writing of any notices concerning the Property that Seller receives from any appraisal districts, taxing authorities, or any governmental agency having jurisdiction over the Property, and of any litigation, arbitration, or administrative hearing concerning the Property.

**29. Conditions Precedent to Buyer's Performance.** The obligations of Buyer to close the transaction described in this Contract are subject to the following conditions precedent:

**A. Representations and Warranties.** All the representations and warranties of Seller set forth in this Contract must be true and correct as of the date of execution of this Contract and on the date of Closing.

**B. Permitted Encumbrances.** There has been no change in the matters reflected on the Title Commitment or Survey from those matters appearing therein on the date thereof (except those changes requested by Buyer in its notice of objections), and no encumbrance or title defect affects the Property except Permitted Encumbrances.

**C. Compliance.** Seller must have duly performed and complied with all covenants, acts and agreements to be performed or complied with by Seller on or prior to the date of Closing.

**D. Appraisal.** The Property appraises for a fair market value of at least the Sales Price; provided, Buyer orders within 30 days of the Effective Date of this Contract and obtains on or before Closing an appraisal, at Buyer's expense, of the Property by a licensed appraiser of Buyer's selection.

In the event any of the foregoing conditions are not satisfied or waived in writing by Buyer prior to the Closing, Buyer may terminate this Contract by delivery of a written termination notice to Seller on or before the date of Closing, in which event the Earnest Money shall be immediately returned to Buyer free of claims by Seller and the parties shall have no further obligations to each other except as expressly set forth to the contrary under this Contract.

**30. Dispute Resolution.** If a dispute arises between the parties either as to pre-Closing or post-Closing matters (a "Dispute"), then the parties agree to use the following dispute resolution procedures:

**A. Mediation.** If a Dispute arises between the parties, the following mediation procedures will be employed prior to either party pursuing arbitration:

**1. Meeting of the Parties.** Individuals with decision-making authority regarding the Dispute who represent the parties will promptly meet and attempt in good faith to negotiate a resolution of the Dispute.

**2. ADR.**

**(a) Selection of Mediator.** If, within 10 days after such meeting, the parties have not succeeded in negotiating a resolution of the Dispute, they will jointly appoint a mutually acceptable neutral person not affiliated with either of the parties (the "neutral"), using the services of the American Arbitration Association if they have been unable to agree upon such appointment within 20 days from the initial meeting. The fees of the neutral shall be shared equally by the parties.

(b) **ADR.** In consultation with the neutral, the parties will select or devise an alternative dispute resolution procedure ("ADR") by which they will attempt to resolve the Dispute, and the time and the place for the ADR to be held, with the neutral making the decision as to the procedure, and/or place and time, not later than 10 days after selection of the neutral.

(c) **Process.** The parties must participate in good faith in the ADR to its conclusion as designated by the neutral. All meetings, mediation conferences, ADR and other proceedings shall be in Austin, Texas.

**B. Arbitration.** If the parties are not successful in resolving the Dispute through the ADR, then the Dispute must proceed to a binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. All meetings, arbitration hearings and other proceedings shall be in Austin, Texas. The costs of the arbitration shall be allocated by the arbitrator.

**31. Notices.** Any notice, document or payment required or permitted to be delivered or remitted hereunder or by law shall be given by one of the following methods:

A. in person;

B. by deposit in the United States mail, postage prepaid, addressed to the party to whom directed at the address set out in this Contract;

C. by delivery to a nationally recognized courier service addressed in accordance herewith.

Additionally, but not in lieu of the above methods, notice may be given by telephone or telefax to the telephone numbers listed in this Contract.

**32. Closing.** In addition to the matters to occur at closing specified in the Contract the following shall occur:

A. **Seller's Actions.** At closing Seller shall furnish, at Seller's expense:

1. **Tax Statements.** Seller shall cause to be delivered to the Title Company and to the Buyer tax statements showing no delinquent taxes on the Property.

2. **Bill of Sale.** Seller shall cause to be delivered to the Title Company and to the Buyer a Bill of Sale with warranties to title conveying title, free and clear of all liens, to any personal property defined as part of the Property in paragraph 2 and conveyed by this Contract.

3. **Assignment of Leases, Rents and Security Deposits.** Seller shall cause to be delivered to the Title Company and to the Buyer an assignment of all leases to or on the Property duly executed by Seller.

4. **Assignment of Licenses, Permits, Warranties, Service Contracts, and Management Agreements.** Seller shall cause to be delivered to the Title Company and to the Buyer to the extent

assignable, an assignment duly executed by Seller of any licenses and permits, maintenance, management or other contracts, and any warranties or guaranties defined as part of the Property.

5. **Certified Rent Roll.** Seller shall cause to be delivered to the Title Company and to the Buyer a current rent roll of the Property certified by Seller

6. **Insurance.** Seller shall cause to be delivered to the Title Company and to the Buyer to the extent assignable, an assignment duly executed by Seller of any one or more of the insurance policies held by Seller pertaining to the Property.

7. **Authorizations.** Seller shall cause to be delivered to the Title Company and to the Buyer evidence that the person executing this contract is legally capable and authorized to bind Seller.

8. **Deposits and Prepaid Rents.** Seller shall, at closing, tender to Buyer any security deposits, prepaid expenses, and advanced rental payments paid by any and all tenants.

9. **UCC Search.** Seller shall deliver to the Buyer and to the Title Company a UCC Search showing no filed financing statements as to the Property or if there are filed financing statements a letter from the Secured Party addressed to the Title Company and the Buyer stating that the Secured Party will release its Financing Statement (or transfer the Financing Statement to Buyer's lender) upon satisfaction of conditions specified in the letter. Seller shall satisfy the conditions set forth in the letter as of Closing. The term "UCC Search" means reports prepared by [a non-governmental provider, stating the instruments that are on file in the Texas secretary of state's UCC records and in the UCC records of the county in which the Property is located, showing as debtor Seller and all other owners of the Personal Property during the five years before the Effective Date of this Contract

B. **Prorations.** The following items shall be prorated as of the Closing Date and such prorations shall be reflected on the settlement statements prepared by Escrow Agent on the Closing Date and shall serve to adjust the Sales Price. Such prorations shall be made on the basis of a 365-day year, as of 11:59 p.m. on the day preceding the Closing Date.

1. **Revenues.** All rentals, receipts and other revenues from the Property which have been actually received by Seller and which are allocable to the period from and after the Closing Date shall be credited to Buyer. Buyer shall be entitled to collect all rentals, receipts and other revenues from the Property which are delinquent or due on or after the Closing Date. All rentals, receipts, and other revenues of any kind whatsoever (together, "Revenues") from the Property collected by Buyer shall be credited: if specifically identified by reference to invoice or month, to such invoice or month; and if not so specifically identified: first to current Revenues not delinquent, and second to delinquent Revenues, in the inverse order of delinquency. All Revenues which relate to the month in which the Closing Date occurs shall be credited first to Revenues for the month in which the Closing Date occurs, and second to delinquent Revenues, in the inverse order of delinquency. Any such delinquent Revenues when applied as provided herein which relate in whole or in part to any period prior to the Closing Date shall be remitted by Buyer to Seller when collected by Buyer (net only of any reasonable collection expenses actually incurred by Buyer). Any such delinquent Revenues when applied as provided herein, which relate in whole or part to any period on or subsequent to the Closing Date shall be remitted by Seller to Buyer when and if collected by Seller (net only of any reasonable collection expenses actually incurred by Seller). Seller shall have the right to enforce and collect any Revenues that are attributable to periods before the Closing Date by any means other than exercising termination or termination of possession rights or other rights under the Leases (except that Seller shall at all



times have the right to bring a suit or suits for damages to collect any Revenues), and Buyer shall reasonably cooperate in such enforcement and collection efforts at no cost to Buyer other than any attorneys' fees incurred by Buyer. *[Note: Additional provisions may be needed for retail leases.]*

**2. Property Taxes.** Seller shall be responsible for all ad valorem taxes and assessments, general and special, with respect to the Property for periods prior to the calendar year containing the Closing Date. Ad valorem taxes and assessments, general and special, with respect to the Property for the calendar year containing the Closing Date shall be prorated between Seller and Buyer at Closing, as of the Closing Date. All ad valorem tax proration shall be based on tax rates and assessments for the calendar year containing the Closing Date unless such rates and/or assessments are unavailable. If either the tax rates or the tax assessments for the Property for the calendar year containing the Closing Date are not available, then such proration shall be made based on the tax rates and assessments for the prior year (or if only the assessed value for the calendar year containing the Closing Date is known, then based on the prior year's tax rates and the current year's assessed value), and shall be adjusted between Seller and Buyer after the Closing as soon as such rates and assessments for the year of the Closing are available. The provisions of this Section **32B2** shall survive Closing.

**3. Security Deposits.** All security and other deposits, if any, including any accrued interest thereon if such interest is required to be remitted to Tenants pursuant to their respective Leases, held by Seller on the Closing Date on behalf of any Tenants under any Leases shall be credited to Buyer, and Escrow Agent shall deliver a notice signed by Seller to such Tenants advising them that: (i) Buyer has purchased the Property, and (ii) the security deposit, if any, is the responsibility of Buyer.

**4. Utility Charges.** Final meter readings on all utilities charged to the Property shall be made as of the day preceding the Closing Date. Seller shall arrange for and pay for final billings of utilities to the day preceding the Closing Date, and Buyer shall be responsible for utilities used on or after the Closing Date. Any prepaid water, sewer, and other utility charges allocable to the period from and after the Closing Date shall be credited to Seller.

**5. Service Contracts.** Seller shall pay (or be charged by a proration for) all charges due pursuant to the Service Contracts which are allocable to the period prior to the Closing Date, and Buyer shall be responsible for all such charges due from and after the Closing Date pursuant to the Property Service Contracts. Prepaid charges allocable to the period from and after the Closing Date in connection with the Property Service Contracts, shall be credited to Seller at Closing. Accrued and unpaid charges allocable to the period prior to the Closing Date in connection with such Service Contracts shall be credited to Buyer at Closing. The provisions of this Section **32B5** shall survive Closing.

**6. Licenses and Permits.** Prepaid charges allocated to the period from and after the Closing Date in connection with any licenses or permits for the Property shall be credited to Seller at Closing. Accrued and unpaid charges allocable to the period prior to the Closing Date in connection with any such licenses or permits shall be credited to Buyer at Closing.

**7. Capital Expenditures; Leasing Costs.** In the event Seller desires to make any capital expenditure after the Contract Date, Seller shall notify Buyer in writing (a "Capital Notice"). In the event Seller desires to enter into or modify any Lease after the Contract Date, Seller shall notify Buyer in writing (a "Lease Notice"). In the event such Capital Notice or Lease Notice is delivered to Buyer prior to the expiration of the Contingency Period, Buyer may either (i) approve such capital expenditure or Lease (or amendment thereto), as applicable in which event Seller shall be credited with the amount of such capital

expenditure or leasing costs, as applicable, at Closing or (ii) terminate this Agreement. In the event Buyer fails to respond to Seller’s Capital Notice or Lease Notice given pursuant to the preceding sentence within 5 days of such Capital Notice or Lease Notice, Buyer shall be deemed to have elected option (i) above. In the event such Capital Notice or Lease Notice is delivered to Buyer after the expiration of the Contingency Period and prior to the Closing Date, Buyer may either approve or disapprove such capital expenditure. In the event Buyer fails to respond to Seller’s Capital Notice or Lease Notice given pursuant to the preceding sentence within 3 days of such Capital Notice or Lease Notice, Buyer shall be deemed to have approved such capital expenditure, or leasing costs, as applicable. In the event Buyer disapproves such capital expenditure or leasing costs, as applicable, Seller shall have the option to terminate this Agreement within three (3) days of Buyer’s disapproval, in which event the Earnest Money shall be returned to Buyer, and Seller and Buyer shall have no further obligations hereunder. In the event Buyer approves, or is deemed to have approved such capital expenditure or leasing costs, as applicable, Seller shall be credited with the amount of such capital expenditure or leasing costs, as applicable, at Closing. In the event of an emergency, Seller shall have the right to make any capital expenditure reasonably necessary in keeping with the quality and image of the Property and/or in accordance with the requirements of the Leases, and Seller shall be credited with the amount of such capital expenditure at Closing. As used in this Section, “capital expenditure” shall mean any expenditure in excess of [\$10,000.00].

**8. Operating Expenses.** Except as otherwise expressly provided herein to the contrary, Seller shall be responsible for and bear all operating expenses for the Property accrued for the period prior to the Closing Date and Buyer shall be responsible for and bear all operating expenses of the Property accrued for the period on and after the Closing Date. Prorations of items under Sections **32B5** and **32B6** shall be made at Closing on the best information available with an adjustment and reconciliation to the extent necessary on a mutually agreed date within 90 days following the Closing Date, with payment from one party to the other (to the extent required) to be made within 30 days following reconciliation. Such prorations, as adjusted as of the 90th day following the Closing Date, shall be considered final and binding for all purposes absent material mistake of fact. To the extent that any Lease provides for any adjustment of previously paid estimated amounts of real estate tax or operating expense reimbursements on a date subsequent to the Closing Date, Seller shall be entitled to receive, or shall be responsible to pay, as the case may be (when such amounts are actually received or payable by Buyer), Seller’s pro rata share of any such adjusted amounts that are applicable to periods ending prior to the Closing Date. After Closing, Seller agrees to reasonably cooperate with Buyer in providing Buyer access to Seller’s books and records relating to such adjustments under the Leases so that Buyer may adequately perform such adjustments.

The provisions of this Section **32B** shall survive Closing.

**33. Effective Date.** The effective date of this Contract (the "Effective Date") is the date upon which a fully signed Contract, together with the Earnest Money, is delivered to the Title Company.

**BUYER:**

**SELLER:**

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**EXHIBIT A****Land Description**

[Insert]

**EXHIBIT B****Listing of Leases, Service Contracts and Permits****1. Service Contracts.**

- a. **Security.** Commercial Sales Proposal/Agreement between \_\_\_\_ Management and ADT Security Services, Inc. dated September 25, 1998 for a period of five years from the scheduled installation date of September 29, 1998.
- b. **Laundry.** Lease Agreement and Supplemental Agreement, both dated July 15, 1998, between CoinMach Corporation and \_\_\_\_\_ Apartments for the exclusive installation, operation and marketing of the laundry equipment on the premises for a period of 10 years after the installation of said equipment. 1998 + 10 years. \$71,400 prepaid bonus paid to Seller in 1998, subject to \$595/mo. rebate if terminated prior to 10 year term. Rental to Owner is 40% of gross receipts.
- c. **Cable.** Time Warner Communications Standard Form of Service and Easement Agreement dated June 17, 1997 between Time Warner Entertainment-Advance/Newhouse Partnership, Austin Division d/b/a Time Warner Communications and \_\_\_\_\_ Apartments. 1997 + x years. Bulk Service payable by Owner per unit.
- d. **Trash Service.** Service Agreement between Texas Disposal Systems, Inc. and \_\_\_\_\_ Apartments for service between June 28, 1997 and June 28, 2008.
- e. **Advertising.** Ad Insertion Agreement between Apartments For Rent and \_\_\_\_\_ Apartments dated October 28, 1999 for 1 year beginning December 1, 1999 and ending December 1, 2000.
- f. **Pest Control.** Commercial Pest Control Proposal and Service Agreement dated December 8, 1998 between Worldwide Pest Control and \_\_\_\_\_ Apartments for a period of 1 year and automatically renewable without 30-day written notice.

- g. Billing Services.** Ratio Utility Billing Collection Agreement between \_\_\_\_\_ Apartments and Aquameter for a period of 1 year beginning September 1, 1999.
- 2. Rent Roll.** Rent Roll certified as of \_\_\_\_\_, 2000 from \_\_\_\_\_ Management.
- 3. Permits.**

  - a. Swimming Pool or Spa.** Permit to Operate a Swimming Pool or Spa for \_\_\_\_\_ Apartments -Pool #1, from the Austin-Travis County Health Department, Environmental Health Services Division to \_\_\_\_\_ Apartments, issued under Permit No. 1659 dated June 23, 1999 with an expiration date of July 18, 2000.
  - b. Swimming Pool or Spa.** Permit to Operate a Swimming Pool or Spa for \_\_\_\_\_ Apartments - Pool #2, from the Austin-Travis County Health Department, Environmental Health Services Division to \_\_\_\_\_ Apartments, issued under Permit No. 1660 dated June 23, 1999 with an expiration date of July 18, 2000.
- 4. Certificate of Occupancy.** Certificate of Occupancy from the Department of Planning & Development, City of Austin, Texas dated August 13, 1992 issued under Permit No. 117209 (originally issued April 22, 1971 to \_\_\_\_\_ Apartments).

TEXAS ASSOCIATION OF REALTORS®
COMMERCIAL IMPROVED PROPERTY EARNEST MONEY CONTRACT

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1. PARTIES: \_\_\_\_\_ (Seller) agrees to sell and convey to \_\_\_\_\_ (Buyer) and Buyer agrees to buy from Seller the Property described below.

2. PROPERTY: The real property situated in \_\_\_\_\_ County, Texas, described as follows or as described on attached exhibit:

together with: (a) all buildings, improvements, fixtures, and all property of every kind and character and description (personal or real) owned by Seller located on, attached to, or used in connection with the Property; (b) all rights, privileges and appurtenances pertaining thereto, including any right, title, and interest of Seller in and to adjacent streets, alleys, and rights-of-way; (c) Seller's interest in and to all leases or rents and security deposits; (d) Seller's interest in and to all licenses and permits with respect to the Property; (e) Seller's interest in all third party warranties or guaranties, if transferable, relating to the Property or to any tangible personal property and fixtures located on, attached to, or used in connection with the Property; and (f) Seller's interest in any trade names, if transferable, used in connection with the Property. The property sold by this contract is called the "Property". The metes and bounds description determined by the survey of the Property under paragraph 6(b) shall replace any exhibit describing the perimeter boundaries of the Property if it differs from the exhibit. NOTICE: Any property to be excluded from the sale should be described in paragraph 11.

3. SALES PRICE:
(a) Cash portion of Sales Price payable by Buyer ..... \$ \_\_\_\_\_
(b) Sum of all financing described in paragraph 4 ..... \$ \_\_\_\_\_
(c) Sales Price [sum of (a) and (b)] ..... \$ \_\_\_\_\_

4. FINANCING: The portion of the Sales Price not payable in cash shall be paid as follows:
[ ] (a) ASSUMPTION: Buyer shall assume the unpaid principal balance of a first lien promissory note payable to \_\_\_\_\_
dated \_\_\_\_\_, which balance at closing will be \$ \_\_\_\_\_.

Buyer's initial payment shall be the first payment due after closing. Buyer's assumption of the existing note includes all obligations imposed by the deed of trust securing the note, recorded in Vol. \_\_, Page \_\_ in the real property records of the county where the Property is located. If the unpaid principal balance of the assumed loan as of the Closing Date varies from the loan balance stated above, the cash payable at closing shall be adjusted by the net amount of any variance; provided, if the total principal balance of all assumed loans varies in amount greater than \$ \_\_\_\_\_ at closing either party may terminate this contract and the Earnest Money shall be refunded to Buyer unless either party elects to eliminate the excess in the variance by an appropriate adjustment at closing. Buyer may terminate this contract and the Earnest Money shall be refunded to Buyer if the note holder on assumption requires: (i) Buyer to pay an assumption fee in excess of \$ \_\_\_\_\_, and Seller declines to pay such excess; (ii) an increase in the interest rate to more than \_\_\_% ; o r (iii) any other modification of the loan documents. A vendor's lien and deed of trust to secure assumption shall be required, which shall automatically be released on execution and delivery of a release by the note holder. If Seller is released of liability on any assumed note, the vendor's lien and deed of trust to secure assumption shall not be required. If assumption approval is required by the note holder, Buyer shall apply for assumption approval within \_\_\_\_\_ days after the Effective Date of this contract and shall make every reasonable effort to obtain assumption approval. Assumption approval shall be deemed to have been obtained when the lender has determined that Buyer has satisfied all of lender's financial conditions (those items relating to Buyer's ability to qualify for assumption). If assumption approval is not obtained within \_\_\_\_\_ days after the Effective Date, this contract shall terminate and the Earnest Money shall be refunded to Buyer.

- (b) THIRD PARTY FINANCING: Buyer shall apply for a third party first lien note of \$ \_\_\_\_\_ payable at  monthly  quarterly  \_\_\_\_\_ intervals for not less than \_\_\_\_\_ years with the initial interest rate not to exceed \_\_\_\_\_% p e r annum. Within \_\_\_\_\_ days after the Effective Date of this contract Buyer shall apply for all third party financing and shall make every reasonable effort to obtain financing approval. Financing approval shall be deemed to have been obtained when the lender has determined that Buyer has satisfied all of lender's financial conditions (those items relating to Buyer's ability to qualify for approval of a loan). If financing approval is not obtained within \_\_\_\_\_ days after the Effective Date, this contract shall terminate and the Earnest Money shall be refunded to Buyer. Each note to be executed hereunder shall be secured by vendor's and deed of trust liens.
- (c) SELLER FINANCING: At closing, Buyer shall execute and deliver a promissory note (the Note) from Buyer to Seller of \$ \_\_\_\_\_, bearing \_\_\_\_\_% interest per annum and interest at the maximum rate of interest, but not to exceed the maximum rate of interest, per annum allowed by law on matured, unpaid amounts. The Note shall be secured by vendor's and deed of trust liens and an assignment of leases payable at the place designated by Seller. The Note  shall  shall not provide for liability (personal or corporate) against the maker in the event of default. The Note shall be payable as follows:
- (1) In one payment due \_\_\_\_\_ after the date of the Note with interest payable  monthly  quarterly  annually  \_\_\_\_\_.
- (2) In  monthly  quarterly  annually  \_\_\_\_\_ installments of \$ \_\_\_\_\_  including interest  plus interest beginning \_\_\_\_\_ after the date of the Note and continuing at  monthly  quarterly  annual  \_\_\_\_\_ intervals thereafter for \_\_\_\_\_

when the entire balance of the Note shall be due and payable.

- (3) Interest only in  monthly  quarterly  annually  \_\_\_\_\_ installments for the first \_\_\_\_ year(s) and thereafter in installments of \$ \_\_\_\_\_  including interest  plus interest beginning \_\_\_\_\_ after the date of the Note and continuing at  monthly  quarterly  annual  \_\_\_\_\_ intervals thereafter for \_\_\_\_\_ when the entire balance of the Note shall be due and payable.

Unless the parties agree otherwise, the most recent forms prepared by the State Bar of Texas shall be used for the Note and deed of trust required by this paragraph 4(c). The Note may be prepaid in whole or in part at any time without penalty. Any prepayments are to be applied to the payment of the installments of principal last maturing and interest shall be immediately cease on the prepaid principal. The lien securing payment of the Note will be inferior to any lien securing any superior note described in this contract. If an Owner Policy of Title Insurance is furnished, Buyer, at Buyer's expense, shall furnish Seller with a Mortgagee Title Policy in the amount of the Note at closing. If all or any part of the Property is sold or conveyed without prior written consent of the Seller, then the Seller at Seller's option may declare the outstanding principal balance of the Note, plus accrued interest, to be immediately due and payable. The creation of a subordinate lien, any sale thereunder, any deed under threat or order of condemnation, any conveyance solely between the parties, the passage of title by reason of death of a maker or by operation of law shall not be construed as a sale or conveyance of the Property. In addition to the principal and interest installments, Buyer  shall  shall not deposit with Seller a pro rata part of the estimated annual ad valorem taxes on the Property and a pro rata part of the estimated annual insurance premiums for the improvements on the Property. If Buyer deposits taxes and insurance deposits with Seller, Buyer agrees that the taxes and insurance deposits are only estimates and may be insufficient to pay total taxes and insurance premiums, and Buyer agrees to pay any deficiency within 30 days after notice from Seller. If Buyer deposits taxes and insurance deposits with Seller, Buyer's failure to pay the deficiency shall constitute a default under the deed of trust. If any superior lien holder on the Property is collecting escrow payments for taxes and insurance, any requirement to deposit taxes and insurance deposits with Seller shall be inoperative so long as payments are being made to the superior lien holder. Any act or occurrence which would constitute default under the terms of any lien superior to the lien securing the Note shall constitute a default under the deed of trust securing the Note. The Note shall include a provision for reasonable attorney's fees if the Note is placed in the hands of an attorney for collection.

- (d) CREDIT APPROVAL ON ASSUMPTION OR SELLER FINANCING: Within \_\_\_\_ days after the Effective Date of this contract, Buyer shall deliver to Seller:  credit report;  verification of employment, including salary;  verification of funds on deposit in financial institutions;  current financial statement; and  \_\_\_\_\_; to establish Buyer's creditworthiness for assumption approval or seller financing. If Buyer's documentation is not delivered within the specified time, this contract shall terminate and the Earnest Money shall be refunded to Buyer. If Buyer's documentation is timely delivered, and Seller determines in Seller's sole discretion that Buyer's credit is unacceptable, Seller may terminate this contract by written notice to Buyer within \_\_\_\_ days after expiration of the time for delivery and the Earnest Money shall be refunded to Buyer. If Seller does not so terminate this contract within the time specified, Seller shall be deemed to have accepted Buyer's credit.

5. **EARNEST MONEY:** Buyer shall deposit \$ \_\_\_\_\_ as Earnest Money with \_\_\_\_\_

(Escrow Agent) at \_\_\_\_\_  
 (Address) on the Effective Date of this contract. The Earnest Money shall be deposited in an  interest  non-interest bearing account in a federally insured financial institution chosen by Escrow Agent and any interest shall be credited to Buyer. If Buyer fails to deposit the Earnest Money as required by this contract, Buyer shall be in default.

## 6. TITLE POLICY AND SURVEY:

- (a) TITLE POLICY: Seller shall furnish to Buyer at Seller's expense an Owner Policy of Title Insurance (the Title Policy) issued by \_\_\_\_\_ (the Title Company) in the amount of the Sales Price, dated at or after closing, insuring Buyer against loss under the provisions of the Title Policy, subject only to those title exceptions permitted by this contract, or as may be approved by Buyer in writing, and the standard printed exceptions contained in the promulgated form of Title Policy; provided however that: (1) the exception as to area and boundaries  shall  shall not be deleted except for any shortages in area at the expense of  Buyer  Seller; and (2) the exception as to restrictive covenants shall be endorsed "None of Record", unless restrictions are approved by Buyer. Within \_\_\_\_\_ days after the Title Company receives a copy of this contract Seller shall furnish Buyer a commitment for Title Insurance (the Commitment) including copies of recorded documents evidencing title exceptions. Seller authorizes the Title Company to deliver the Commitment and related documents to Buyer at Buyer's address. Buyer shall have \_\_\_\_\_ days after receipt of the Commitment and legible copies of documents evidencing title exceptions required by this contract to object in writing to matters disclosed in the Commitment other than the standard printed exceptions as described or limited in this paragraph.
- (b) SURVEY REQUIRED: *(Check (1) or (2) only)*
- (1) Within \_\_\_\_\_ days after:  the Effective Date of this contract;  the date by which Buyer is required to complete inspections, studies or assessments in paragraph 7(b); *(check (i) or (ii) only):*
- (i) Buyer may obtain a survey of the Property at Buyer's expense.
- (ii) Seller, at Seller's expense, shall furnish to Buyer a survey of the Property dated after the Effective Date of this contract.

Buyer may, within \_\_\_\_\_ days after Buyer's receipt of the survey object in writing to any matter which constitutes a defect or encumbrance to title on the survey or if the survey shows any part of the Property to lie in a 100-year flood plain area.

- (2) Within \_\_\_\_\_ days after the Effective Date of this contract, Seller shall furnish Buyer a true and correct copy of Seller's existing survey of the Property dated \_\_\_\_\_. The survey [*check (i) or (ii)*]: (i)  shall be recertified no earlier than \_\_\_\_\_ at the expense of  Buyer  Seller; (ii)  shall not be recertified. Within \_\_\_\_\_ days after Buyer receives a copy of the survey or after Buyer receives a copy of the recertified survey, whichever is later, Buyer may object in writing to any matter shown on the survey which constitutes a defect or encumbrance to title or if the survey shows any part of the Property to lie in a 100-year flood plain area.

The survey required by this paragraph 6(b) shall be made by a Registered Professional Land Surveyor acceptable to the title company and any lender. The survey shall: (i) identify the Property by metes and



bounds or platted lot description; (ii) show that the survey was made and staked on the ground with corners permanently marked; (iii) set forth the dimensions and total area of the property; (iv) show the location of all improvements, highways, streets, roads, railroads, rivers, creeks, or other waterways, fences, easements, and rights of way on the Property with all easements and rights of way referenced to their recording information; (v) show any discrepancies or conflicts in boundaries, any visible encroachments, and any portion of the Property lying within the 100 year floodplain as shown on the current Federal Emergency Management Agency map; and (vi) contain the surveyor's certificate that the survey is true and correct.

Buyer's failure to object under paragraph 6(a) or 6(b) within the time allowed shall constitute a waiver of Buyer's right to object except that the requirements in Schedule C of the Commitment shall not be deemed to have been waived. If objections are made by Buyer, or any third party lender, Seller shall cure the objections within 20 days after the date Seller receives them. The Closing Date shall be extended as necessary to cure objections. If objections are not cured by the extended Closing Date, this contract shall terminate and the Earnest Money shall be refunded to Buyer unless Buyer elects to waive the objections.

**7. PROPERTY CONDITION / FEASIBILITY STUDIES: (Check (a) or (b) only)**

- (a) PRESENT CONDITION:
- (1) Buyer accepts the Property in its present "as-is" condition. Buyer shall pay for any repairs required by a lender.
- (2) Buyer accepts the Property in its present condition provided that Seller, at Seller's expense, shall complete the following repairs prior to closing: \_\_\_\_\_
- \_\_\_\_\_ Buyer shall pay for any other repairs required by a lender.
- (b) INSPECTIONS AND FEASIBILITY STUDIES: Within \_\_\_\_ days after the Effective Date of this contract Buyer, at Buyer's expense, may complete or cause to be completed inspections of the Property (including all improvements and fixtures) by inspectors of Buyer's choice. Inspections may include but are not limited to: (i) physical property inspections including, but not limited to, structural pest control, mechanical, structural, electrical, or plumbing inspections; (ii) economic feasibility studies; (iii) any type of environmental assessment or engineering study including the performance of tests such as soils tests, air sampling, or paint sampling; and (iv) compliance inspections to determine compliance with zoning ordinances, restrictions, building codes, and statutes (e.g., ADA, OSHA, and others). Seller shall permit Buyer and Buyer's inspectors access to the Property at reasonable times. Seller shall pay for turning utilities on for inspections. If Buyer determines, in Buyer's sole judgment, that the Property is not suitable for any reason for Buyer's intended use or is not in satisfactory condition, then Buyer may terminate this contract by providing written notice of termination and copies of all reports of inspections, studies, or assessments completed or caused to be completed by Buyer under this paragraph to Seller within the time required to complete the inspections, studies, or assessments under this paragraph, and the Earnest Money shall be refunded to Buyer less the sum of \$ \_\_\_\_\_ to be retained by Seller as independent consideration for Buyer's right to terminate under this paragraph. If Buyer does not terminate this contract within the time required any objections with respect to the inspections, studies and assessments under this paragraph shall be deemed waived by Buyer. If this contract does not close through no fault of Seller, Buyer shall restore the Property to its original condition if altered due to inspections, studies, or assessments completed by Buyer or Buyer's inspectors.

Within \_\_\_\_ days after the Effective Date of this contract Seller shall deliver to Buyer (*strike any not to be delivered*):

- (1) a current rent roll of all leases affecting the Property certified by Seller to be true and correct;
- (2) copies of all leases pertaining to the Property, including any modifications, supplements, or amendments to the leases;
- (3) a current inventory of all tangible personal property and fixtures owned by Seller and located on, attached to, or used in connection with the Property;
- (4) copies of all notes and deeds of trust assumed or taken subject to by Buyer;
- (5) copies of all service, maintenance and management agreements relating to the ownership and operation of the Property;
- (6) copies of all warranties and guaranties relating to the Property, or any part thereof, or to the tangible personal property and fixtures owned by Seller and located on, attached to, or used in connection with the Property;
- (7) copies of all fire, hazard, liability, and other insurance policies held by Seller on or affecting the Property;
- (8) copies of all leasing or other commission agreements with respect to the Property that are being assumed by Buyer;
- (9) a copy of the "as-built" plans and specifications of the Property;
- (10) copies of all invoices for utilities and repair expenses incurred by Seller for operation of the Property for each month for the preceding two (2) years prior to the Effective Date of this contract;
- (11) a copy of Seller's income and expense statement for the Property from \_\_\_\_\_ to \_\_\_\_\_; and
- (12) copies of all previous environmental assessments, studies, or analyses affecting the Property in Seller's possession.

**8. BROKER'S REPRESENTATION AND FEES:** \_\_\_\_\_  
 (Listing Broker):  represents Seller only;  acts as an intermediary between Seller and Buyer. Any other broker represents:  Seller as Listing Broker's Subagent;  Buyer only. Seller shall pay Listing Broker (*choose only one*):

- a) the fee specified by separate agreement between Listing Broker and Seller.
- b) a total cash fee of either \$ \_\_\_\_\_ or \_\_\_\_\_ % of the total Sales Price in \_\_\_\_\_ County, Texas on closing of this sale, which Escrow Agent shall pay from Seller's proceeds of the sale. If Seller defaults, the cash fee shall be due and payable in full. If Buyer defaults, Escrow Agent is

authorized to pay Listing Broker one-half of any Earnest Money Seller receives under this contract not to exceed the amount of the cash fee.

**9. CLOSING:**

- (a) The closing of the sale shall be on or before \_\_\_\_\_ or within 7 days after objections to title or the survey have been cured, whichever date is later (the Closing Date); however, if financing or assumption approval has been obtained pursuant to paragraph 4, the Closing Date shall be extended up to 15 days only if necessary to comply with lender's closing instructions (for example, survey, insurance policy, property repairs, closing documents). If either party fails to close this sale by the Closing Date, the non-defaulting party shall be entitled to exercise the remedies contained in paragraph 15.
- (b) At closing Seller shall furnish, at Seller's expense (*strike any not to be furnished*):
- (1) tax statements showing no delinquent taxes on the Property;
  - (2) a  General  Special Warranty Deed conveying good and indefeasible title to the Property showing no additional exceptions to those permitted in paragraph 6;
  - (3) a Bill of Sale with warranties to title conveying title, free and clear of all liens, to any personal property defined as part of the Property in paragraph 2 and conveyed by this contract;
  - (4) an assignment of all leases to or on the Property duly executed by Seller;
  - (5) to the extent assignable, an assignment duly executed by Seller of any licenses and permits, maintenance, management or other contracts, and any warranties or guaranties defined as part of the Property in paragraph 2 or conveyed by this contract;
  - (6) a current rent roll of the Property certified by Seller;
  - (7) to the extent assignable, an assignment duly executed by Seller of any one or more of the insurance policies held by Seller pertaining to the Property; and
  - (8) evidence that the person executing this contract is legally capable and authorized to bind Seller.

**10. POSSESSION:** Seller shall deliver possession of the Property to Buyer on \_\_\_\_\_ in its present or required repaired condition, ordinary wear and tear excepted. Any possession by Buyer prior to closing or Seller after closing that is not authorized by a separate written lease agreement, shall establish a landlord-tenant at sufferance relationship between the parties.

**11. SPECIAL PROVISIONS:**

**12. SALES EXPENSES:** To be paid in cash at or prior to closing:

- (a) Seller's Expenses: Releases of existing liens, including prepayment penalties and recording fees; release of Seller's loan liability; tax statements or certificates; preparation of deed; one-half of escrow fee; and other expenses stipulated to be paid by Seller under other provisions of this contract.

- (b) Buyer's Expenses: All loan fees or expenses (e.g., fees for application, origination, discount, appraisal, assumption, recording, tax service, mortgagee title policies, credit reports, document preparation and the like); preparation and recording of deed of trust to secure assumption; required premiums for flood and hazard insurance; interest on all periodic installment payment notes from date of disbursements to one payment period prior to dates of first monthly payments; one-half of escrow fee; fees for copies and delivery of title commitment and related documents; and other expenses stipulated to be paid by Buyer under other provisions of this contract.
- (c) If any sales expense exceeds the amount stated in this contract to be paid by either party, either party may terminate this contract unless either party agrees to pay such excess.

**13. PRORATIONS AND ESTOPPEL CERTIFICATES:**

- (a) PRORATIONS: Insurance (at Buyer's option) if a transfer is permitted by the insurance carrier, interest on any assumed loan, current taxes, and any rents shall be prorated through the Closing Date. If the amount of the ad valorem taxes for the year in which the sale is closed is not available on the Closing Date, proration of taxes shall be made on the basis of taxes assessed in the previous year, with a subsequent cash adjustment of such proration to be made between Seller and Buyer, if necessary, when actual tax figures are available. If Buyer is assuming payment of or taking subject to any existing loan on the Property, all reserve deposits for the payment of taxes, insurance premiums, and other charges, shall be transferred to Buyer by Seller and Buyer shall pay to Seller the amount of such reserved deposits at closing.
- (b) ESTOPPEL CERTIFICATES: Within \_\_\_\_\_ days after the Effective Date of this Contract, Seller shall deliver to Buyer estoppel certificates signed not earlier than \_\_\_\_\_ by each tenant leasing space in the Property stating that, as of the date signed: no default exists under the terms of the lease agreement by either lessor or lessee; the amount of any rental payments made in advance, if any; the amount of any security deposits made, if any; the amount of any offsets against rent, if any; and that the tenant has no defenses against the payment of rent accruing under the terms of the lease agreement. If Seller is unable to deliver the estoppel certificates in accordance with the terms of this paragraph without fault by the specified time, Buyer may (i) terminate this contract and the Earnest Money shall be refunded to Buyer; (ii) extend the time for performance up to 15 days and the Closing Date shall be extended as necessary; or (iii) waive Seller's requirement to deliver the estoppel certificates.
- (c) Seller shall, at closing, tender to Buyer any security deposits, prepaid expenses, and advanced rental payments paid by any and all tenants.

**14. CASUALTY LOSS AND CONDEMNATION:**

- (a) If any part of the Property is damaged or destroyed by fire or other casualty loss, Seller shall restore the Property to its previous condition as soon as reasonably possible, but in any event by the Closing Date. If Seller is unable to do so without fault, Buyer may: (i) terminate this contract and the Earnest Money shall be refunded to Buyer; (ii) extend the time for performance up to 15 days and the Closing Date shall be extended as necessary; or (iii) accept the Property in its damaged condition and accept an assignment of insurance proceeds. Provisions of the Texas Property Code to the contrary shall not apply.
- (b) If prior to closing condemnation proceedings are commenced against any portion of the Property, Buyer may: (i) terminate this contract by written notice to Seller within \_\_\_\_\_ days after

Buyer is advised of the condemnation proceeding and the Earnest Money shall be refunded to Buyer; or (ii) appear and defend in the condemnation proceeding and any award in condemnation shall, at Buyer's election, become the property of Seller and the sales price shall be reduced by the same amount or any award shall become the property of Buyer and the sales price shall not be reduced.

15. **DEFAULT:** If Buyer fails to comply with this contract, Buyer shall be in default. Seller may either: enforce specific performance, seek other relief as may be provided by law, or both; or terminate this contract and receive the Earnest Money as liquidated damages, thereby releasing the parties from this contract. If Seller is unable without fault to make any noncasualty repairs, deliver the estoppel certificates, or deliver the Commitment within the time allowed, Buyer may either terminate this contract and receive the Earnest Money as the sole remedy or extend the time for performance up to 15 days and the Closing Date shall be extended as necessary. If Seller fails to comply with this contract for any other reason, Seller shall be in default and Buyer may either enforce specific performance, seek such other relief as may be provided by law, or both; or terminate this contract and receive the Earnest Money, thereby releasing the parties from this contract.
16. **ATTORNEY FEES:** If, Buyer, Seller, Listing Broker, Other Broker, or Escrow Agent is a prevailing party in any legal proceeding brought under or with relation to this contract or this transaction, such party shall be entitled to recover from the non-prevailing parties all costs of such proceeding and reasonable attorney fees. The provisions of this paragraph shall survive closing.
17. **ESCROW:** If either party makes demand for the payment of the Earnest Money, Escrow Agent has the right to require from all parties and brokers a written release of liability of Escrow Agent for disbursement of the Earnest Money. Any refund or disbursement of Earnest Money under this contract shall be reduced by the amount of unpaid expenses incurred on behalf of the party receiving the Earnest Money, and Escrow agent shall pay the same to the creditors entitled thereto. At closing, the Earnest Money shall be applied first to any cash down payment, then to Buyer's closing costs and any excess refunded to Buyer. Demands and notices required by this paragraph shall be in writing and delivered by hand delivery or by certified mail, return receipt requested.
18. **MATERIAL FACTS**
- (a) Seller shall convey the Property on closing: (i) with no liens, assessments, Uniform Commercial Code or other security interests against the Property which will not be satisfied out of the Sales Price unless securing payment of any loans assumed by Buyer; (ii) without any assumed loans in default; and (iii) with no parties in possession of any portion of the Property as lessees, tenants at sufferance, or trespassers except tenants under the written leases delivered to Buyer pursuant to this contract.
- (b) To the best of Seller's knowledge and belief (*choose (1) or (2) only*):
- (1) Seller is not aware of any material defects to the Property except as stated in the attached Property Condition Statement.
- (2) Seller is not aware of.
- (i) any material defects to the Property except: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

- (ii) any environmental hazards or conditions affecting the Property which would violate any federal, state or local statutes, regulations, ordinances or other requirements and more specifically, but without limitation, whether: (1) the Property is or has ever been used for the storage or disposal of hazardous substances or materials or toxic waste, a dump site or landfill, or the housing of any underground tanks or drums; (2) radon, asbestos insulation or fireproofing, urea-formaldehyde foam insulation, lead-based paint or other pollutants or contaminants of any nature now exist or have ever existed on the Property; (3) wetlands, as defined by federal or state law or regulation are on the Property; and (4) threatened or endangered species or their habitat, as defined by the Texas Parks and Wildlife Department or the U.S. Fish and Wildlife Service, are on the property; except as follows:  
  
\_\_\_\_\_

- (c) Each written lease to be furnished to Buyer under this contract (the leases) shall be in full force and effect according to its terms without amendment or modification that is not disclosed to Buyer in writing. All the leases shall contain the entire written or oral agreements of any kind for the leasing, rental, or occupancy of any portion of the Property. Seller shall disclose in writing to Buyer: (i) any lease modifications, amendments, or defaults made subsequent to the date the leases are furnished to Buyer but prior to closing; (ii) any failure by Seller to comply with all of Seller's obligations under the leases; (iii) any facts or circumstances that would constitute a default by Seller under any lease or entitle any tenant to offsets or damages; (iv) any lease in which tenant does not actually occupy the premises leased; (v) if any rent under any lease has been collected in advance of the current month; (vi) if any concessions, bonuses, free rents, rebates, or other matters affect the rental for any tenant; (vii) if any of the leases or rentals or other sums payable under the leases have been assigned or otherwise encumbered, except as security for loan(s) assumed or taken subject to as provided in this contract; and (viii) if any tenant under any lease is in default.

**19. NOTICES:** All notices shall be in writing and effective when hand-delivered, mailed by certified mail return receipt requested, or sent by facsimile transmission to:

Buyer at _____	Seller at _____
_____	_____
Phone ( ) _____	Phone : ( ) _____
Fax..( ) _____	Fax: ( ) _____

**20. FEDERAL TAX REQUIREMENT:** If Seller is a "foreign person", as defined by applicable law, or if Seller fails to deliver an affidavit that Seller is not a "foreign person", then Buyer shall withhold from the sales proceeds at closing an amount sufficient to comply with applicable tax law and deliver the same to the Internal Revenue Service, together with appropriate tax forms. Internal Revenue Service regulations require filing written reports if cash in excess of specified amounts is received in the transaction.

**21. DISPUTE RESOLUTION:** The parties agree to negotiate in good faith in an effort to resolve any dispute related to this contract that may arise. If the dispute cannot be resolved by negotiation, the dispute shall be submitted to mediation before the parties resort to arbitration or litigation and a mutually acceptable mediator shall be chosen by the parties to the dispute who shall share the cost of mediation services equally.

22. **AGREEMENT OF THE PARTIES:** This contract shall be binding on the parties, their heirs, executors, representatives, successors, and assigns. This contract shall be construed under and in accordance with laws of the State of Texas. This contract contains the entire agreement of the parties and cannot be changed except by written agreement. If this contract is executed in a number of identical counterparts, each counterpart is deemed an original and all counterparts shall, collectively, constitute one agreement. Buyer  may  may not assign this contract. If Buyer assigns this contract Buyer shall be relieved of any future liability under this contract only if the assignee assumes in writing all obligations and liability of Buyer under this contract. Addenda which are part of this contract are:
- 
23. **TIME:** Time is of the essence in this contract. Strict compliance with the times for performance stated in this contract is required.
24. **EFFECTIVE DATE:** The Effective Date of this contract for the purpose of performance of all obligations shall be the date this contract is received by the Escrow Agent after all parties have executed this contract.
25. **MISCELLANEOUS:**
- (a) Buyer should have an Abstract covering the Property examined by an attorney of Buyer's selection, or Buyer should be furnished with or obtain a Title Policy.
  - (b) If the Property is situated in utility or other statutorily created district providing water, sewer, drainage, or flood control facilities and services, Chapter 50 of the Texas Water Code requires Seller to deliver and the Buyer to sign the statutory notice relating to the tax rate, bonded indebtedness, or standby fee of the district prior to final execution of this contract.
  - (c) If the Property adjoins or shares a common boundary with the tidally influenced submerged lands of the state, Section 33.135 of the Texas Natural Resources Code, requires a notice regarding coastal area property to be included in the contract.
  - (d) Buyer should not rely upon any oral representations about the Property from any source. Seller and any broker have no knowledge of any defects in the Property other than what has been disclosed in this contract or other writing.
  - (e) Brokers are not qualified to render property inspections, surveys, engineering studies, environmental assessments, or inspections to determine compliance with zoning, governmental regulations, or laws. Buyer should seek experts to render such services. Selection of inspectors and repairmen is the responsibility of the Buyer and not the Broker.
26. **CONTRACT AS OFFER:** The execution of this contract by the first party constitutes an offer to buy or sell the Property. Unless accepted by the other party by 5:00 p.m. (in the time zone in which the Property is located) on \_\_\_\_\_, \_\_\_\_\_ the offer shall lapse and be null and void.

**This is intended to be a legally binding contract. READ IT CAREFULLY. NO REPRESENTATION OR RECOMMENDATION IS MADE BY BROKER OR ITS AGENTS OR EMPLOYEES AS TO THE**

**LEGAL SUFFICIENCY, LEGAL EFFECT, OR TAX CONSEQUENCES OF THIS DOCUMENT OR TRANSACTION. CONSULT YOUR ATTORNEY BEFORE SIGNING.**

Buyer's  
Attorney \_\_\_\_\_

Seller's  
Attorney \_\_\_\_\_

\_\_\_\_\_  
Buyer

\_\_\_\_\_  
Seller

\_\_\_\_\_  
Buyer

\_\_\_\_\_  
Seller



**AGREEMENT BETWEEN BROKERS**

Listing Broker has agreed to pay \_\_\_\_\_  
\_\_\_\_\_, Other Broker, a fee of \$ \_\_\_\_\_ or \_\_\_\_% of the Sales Price when  
the Listing Broker's fee is received. Escrow Agent is authorized and directed to pay Other Broker from Listing  
Broker's fee at closing. This Agreement Between Brokers supersedes any prior offers and agreements for  
compensation between Brokers.

\_\_\_\_\_  
Other Broker License No

\_\_\_\_\_  
Listing Broker License No.

By: \_\_\_\_\_

By: \_\_\_\_\_

\_\_\_\_\_  
Other Broker's Address Phone No.

\_\_\_\_\_  
Listing Broker's Address Phone No.

**Receipt**

On this day, \_\_\_\_\_ Escrow Agent acknowledges receipt of: (a)  
 Contract; and (b)  Earnest Money in the form of \_\_\_\_\_.

Escrow Agent \_\_\_\_\_ By \_\_\_\_\_

Address: \_\_\_\_\_ Phone: \_\_\_\_\_

COMMERCIAL PROPERTY CONDITION STATEMENT  
(TAR Form 053)

[Reserved for TAR Form 053]

[Reserved for TAR Form 053]



**d. Blanks and Survey Matters.****(1) Title Policy–Survey Exception Deletion.** [page 3, ¶6(a) *Title Insurance*].

The box in this paragraph as to whether the title insurance is to have the survey exception deleted and at whose expense has been left blank. We generally recommend that buyers require that the title insurance being provided to the buyer be endorsed to delete the so-called “survey exception” from the printed exceptions listed in the title policy to be delivered to the buyer at closing. If this is done, the title insurance company is basically insuring the validity and accuracy of the legal description and the surveyor’s work (many surveyors do not have malpractice insurance and are otherwise judgment proof). Even if the survey exception is deleted, the exact square footage calculation is not a matter which can be insured by title company and its insurance in any event.

The plat attached to the Contract is dated 1996. The surveyor’s certificate is not addressed to subsequent owners of the Property. This survey drawing does not meet the standards for a “land title survey” which is the standard required for a title company to insure the boundaries description of property in Texas. Also, in order for a title company to insure the boundaries description of a tract, the survey needs to be current (within 6 months) and its certificate must be addressed to the title company (as well as to the buyer).

[page 3, ¶6(b) *Survey Required*]. The Contract states that the Buyer “may” obtain a survey of the Property at the Buyer’s expense. It is prudent to have the Property resurveyed under the standards of a land title survey and otherwise have it meet the requirements of the title company (even if you as the buyer pay for the expense). However, the time frame to close the sale may not allow for such a survey.

**(2) Addresses.** [page 8, ¶19 *Notices*]. The Buyer’s address needs to be inserted.

**(3) Buyer’s Attorney.** [page 9]. *Buyer’s Attorney*: our Firm’s name (and my name), address, and telephone and fax nos. need to be inserted.

**(4) Broker.** [page 5, ¶9]. *Broker’s Representations and Fees*. The broker’s name needs to be inserted; similarly *Agreement Between Brokers* on page 9 needs to be completed prior to executing the Contract.

**e. General Title Company Exceptions.** Title insurance will typically (unless the Contract addresses the issue) take exception for “visible and apparent easements” and “parties in possession”. These exceptions can be deleted based on the Title Company’s inspection of the Property, which is a customary procedure with generally a nominal charge. We generally recommend that ¶ 11 *Special Provisions* or an Addendum be attached to the Contract requiring these exceptions be deleted from the Title Policy as a condition to closing and that if the Title Company, based on its inspection of the Property, is to take exception for any matters determined by it to be a problem covered by such type exceptions, then the Buyer reserves the right to object to such matter and not close or to delay closing until the matter is satisfied.

**2. As Is.**

**a. “As Is”.** [page 4, ¶7(a)(1)]. The Contract is a sale “in its present ‘as is’ condition”, which is the TAR language for an “as is” sale. It is arguable that the Property is being sold subject to pre-existing environmental matters.

**b. 10 Day Inspection Period.** [page 4, ¶7(b) *Inspections and Feasibility Period*]. The Contract permits the Buyer 10 days to conduct all inspections of the Property. Attached to the Contract is a Commercial Property Condition Statement (our faxed copy is illegible) dated \_\_\_\_\_, 2000 signed by \_\_\_\_\_ indicating potential asbestos at the Property (I could not really read what it said).

**c. Unchecked Box.** [page 4, ¶7(b) *Inspections and Feasibility Period*]. The box has erroneously not been marked but should be.

**d. Verifications.** I have not verified the following, but will leave this to your verification, unless you request that we inquire as to any of the following:

- (1) Proper zoning.
- (2) Proper permitting.
- (3) Utilities.
- (4) Access restrictions.
- (5) Real estate broker's agreements.
- (6) Property construction.
- (7) Presence of tenants or other parties.
- (8) Environmental matters.
- (9) Ad valorem tax classification of the Property.

**e. Cross Access.** The plat attached to the Contract does not indicate any barriers along the southern portion of the parking lot. Inquiry should be made as to whether the Property to the south has used this area as an access way to \_\_\_\_\_ Blvd. If so, then a release should be obtained as a condition to closing and the Contract should address this condition.

### **3. Property Description.**

**a. Contract Description.** [page 1, ¶2]. The Property is described by street address and by reference to the attached Exhibit A, which is a copy of the plat of the Property. This is ok for contract purposes.

**b. Associated Property.** [¶2 and ¶9(3)-(7)]. The Contract contains a broad description of personal property and property rights as being sold to the Buyer in addition to the "land and buildings". If any of these items seem to apply to the purchase these items need to be called to our attention to assure you that adequate procedures are set up in the Contract to pass clear title to these items (for example, the TAR Contract does not provide for verification that there are no personal property liens against personal property being purchased and title insurance and title companies do not cover this point).

If this Property relies upon easements (for example, access ways across other Property in addition to public access), then we need to be advised of this so that the Contract can address this type matter.

**4. Contract Time Frames.** We recommend that you prepare a contract time line for the various deadlines under the Contract (and provide us with a copy). I will assume that you will monitor the deadlines and the production of the items to be produced and delivered by the Seller to the Buyer as they will be coming to you (for example, ¶7(b) items (1)-(10) and (12) are to be provided by the Seller to the Buyer within 10 days of the Effective Date of the Contract.

**5. Representations and Warranties and Records.**

**a. Condition.** [page 18, ¶18(a) *Material Facts and Commercial Property Condition Statement*. Attached to the Contract is a Commercial Property Condition Statement dated \_\_\_\_\_, 2000 signed by only 1 of the 2 Sellers. This form needs to be dated as of a current date and signed by both Sellers.

**b. Records.** [pages 4-5, ¶7(b) *Inspection and Feasibility Studies, Items (1)-(9) and (12)*]. The Contract on pages 4-5 contains an extensive list of the records to be delivered by the Seller to the Buyer for the Buyer's review. I recommend that a letter be sent to the Seller after the 10 day period itemizing and confirming the items received and stating that you assume that as to the other items not furnished they do not exist.

**c. Other Reps.** You should consider whether any additional representations should be requested of the Seller.



**CONTRACT SALE CALENDAR**

**Buyer:** \_\_\_\_\_

**Seller:** \_\_\_\_\_

**Contract:** TREC “Unimproved” Property Form as modified by Addendum

**Effective Date:** \_\_\_\_\_, 2000

**Property:** \_\_\_\_\_

<b>Time Period Due</b>	<b>Actual Date Done</b>	<b>¶ Number</b>	<b>Action</b>
On Effective Date	<b>Due:</b> 6/28/00 <b>Done:</b> _____	33	<u>Contract Execution:</u> Parties execute 3 originals.
On Effective Date	<b>Due:</b> _____ <b>Done:</b> _____	Receipt Page 4 and 33	<u>Escrow Opened:</u> mm/dd/yy
On or before Effective Date	<b>Due:</b> _____ <b>Done:</b> _____	7B	<u>Contract Consideration:</u> Option Fee paid to Seller.
20 days of Effective Date of Contract	<b>Due:</b> _____ <b>Done:</b> _____	6A 26B2	<u>Title Commitment Requested:</u> Title company requested within ___ days by Seller to issue Commitment and to deliver to Buyer's attorney the Commitment and copies of any instruments to be listed as Schedule B title exceptions.
On or before ___ days of Effective Date	<b>Due:</b> _____ <b>Done:</b> _____	6B	<u>Survey Delivered:</u> Surveyor hired by Seller (Buyer) within ___ days; surveyor requested to deliver copies of Survey and fieldnotes to Seller, Buyer and Buyer's attorney.
On or before 20 days after receipt of Survey and Commitment	<b>Due:</b> _____ <b>Done:</b> _____	6B & 26B2	<u>Title and Survey Review:</u> Buyer may make objections to Seller regarding the Commitment and/or the Survey.

**Due Diligence for Income Producing Properties**

**Appendix 17-74**

On or before __ days after objections disclosed	<p><b>Due:</b> -----</p> <p><b>Done:</b> -----</p>	6B & 26B2	<u>Curative Efforts</u> : Seller to satisfy title and survey exceptions on or before Closing Date or __ days.
On or before closing or __ days after request of Seller	<p><b>Due:</b> -----</p> <p><b>Done:</b> -----</p>	6B, 9 & 26B2	<u>Failure to Cure</u> : Buyer's election to terminate Contract if Buyer's objections are not satisfied.
__ days of Effective Date	<p><b>Due:</b> -----</p> <p><b>Done:</b> -----</p>	7B & 2B1	<u>Inquiries Period</u> : Period for Buyer to undertake inspections, studies and assessments of Property.
__ days of Effective Date	<p><b>Due:</b> -----</p> <p><b>Done:</b> -----</p>	26C	<u>Estoppel Certificate</u> . Buyer may terminate or extend for 15 days if Seller does not provide.
On or before mm/dd/00	<p><b>Due:</b> -----</p> <p><b>Done:</b> -----</p>	9	Closing Date.

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
**Austin, Texas 787**\_\_\_\_\_  
**Telephone (512)**\_\_\_\_\_  
**Telefax (512)**\_\_\_\_\_  
 \_\_\_\_\_, 2000

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Re: Confidentiality Agreement as to Prospects for Acquisition of Interests in \_\_\_\_\_, Austin, Texas (the "*Prospect*")

Dear \_\_\_\_\_:

In connection with \_\_\_\_\_ (“\_\_\_\_\_”) furnishing you materials and other information, disclosed orally or in written form (collectively, the “*Confidential Materials*”) related to the Prospect, you agree to the following terms and conditions of this Confidentiality Agreement (the "*Agreement*"):

**1. Confidential Materials.** As a condition to the Confidential Materials being furnished to you and by you to your directors, officers, partners, employees, agents, advisors, attorneys, accountants, consultants, bankers and financial advisors ("*representatives*"), you agree to handle the Confidential Materials in accordance with the provisions of this Agreement and to take or abstain from taking certain other actions as herein set forth.

**2. Non-Disclosure of Materials.** You and your representatives shall use the Confidential Materials solely for the purpose of evaluating a possible transaction between Seller and you. You shall keep the Confidential Materials confidential and shall not disclose any of the Confidential Materials in any manner whatsoever; provided, however, that (a) you may make any disclosure of information contained in the Confidential Materials to which Seller gives its prior written consent, and (b) any information contained in the Confidential Materials may be disclosed to your representatives who need to know such information for the purpose of evaluating a possible transaction with Seller and who agree in writing in advance of disclosure to them to abide by this Agreement and keep such information confidential. You shall be responsible for any breach of this Agreement by your representatives. You agree to maintain a written record as to the persons to whom you disclose the Confidential Materials and to provide Seller with a listing of all such persons (“*distributees*”), including the means of contacting such persons, upon request of Seller. Seller may contact any distributee of the Confidential Information and may enter into a Definitive Agreement with any distributee to sell an interest in the Prospect without compensation to you or your representatives.

**3. Non-Disclosure of Existence of Negotiations.** Without the prior written consent of Seller, or unless required by law, neither you nor your representatives shall disclose to any other person that you or they have received the Confidential Materials. Without the prior written consent of Seller, neither you nor

your representatives shall disclose to any person that discussions or negotiations are taking place between the parties concerning a possible transaction between the parties as to the Prospect, including the status of such discussions or negotiations.

**4. Return of Confidential Materials.** Promptly upon the written request of Seller, you will return all originals and copies of the Confidential Materials to Seller. All notes, studies, reports, memoranda and other documents prepared by you or your representatives that contain or reflect the Confidential Materials shall be destroyed upon written request of Seller and you will provide Seller written confirmation of such fact within 5 days of request by Seller.

**5. Disclaimer of Warranty.** *Although Seller has endeavored to include in the Confidential Materials information that Seller believes to be relevant for the purpose of your initial evaluation of the Prospect, you acknowledge that neither Seller, its partners, any of the principals of its partners including \_\_\_\_\_, nor any of their representatives make any express or implied representation or warranty as to the accuracy or completeness of the Confidential Materials. You agree that neither Seller, its partners, any of the principals of its partners including \_\_\_\_\_, nor any of their representatives shall have any liability to you or to any of your representatives relating to or resulting from the use of the Confidential Materials, or any errors therein or omissions therefrom, except for material misrepresentation by any such person making a representation who has current actual awareness of making a material representation at the time it is made. Neither Seller, any of the principals of its partners including \_\_\_\_\_, any of their representatives nor any other person have made or make any representation or warranty to you or other persons as to the accuracy or completeness of the Confidential Materials. You hereby acknowledge and agree that you and your representatives accept the Confidential Materials "as is", and without representation or warranty, express or implied, by Seller as to the suitability of the Prospect for you and that in making your decision to enter into a transaction with Seller as to the Prospect, neither you nor your representatives will rely upon the Confidential Materials nor upon any statement or information provided by Seller, verbally or in writing, in evaluating whether to enter into a transaction with Seller, any of its partners or with \_\_\_\_\_. You agree to make your decision about any such transaction based solely upon your own independent investigation of the Prospect and not based on the Confidential Materials.*

**6. Definitive Agreement.** Unless and until a written definitive agreement ("*Definitive Agreement*") between Seller, its principals, successors or assigns, and you with respect to a transaction has been executed and delivered, neither Seller nor you will be under any legal obligation of any kind whatsoever with respect to a proposed transaction by virtue of this or any other written or oral expression by any of them, or their representatives; except, in the case of this Agreement, for the matters specifically agreed to herein. Either party may terminate discussions or negotiations regarding a possible transaction at any time without any liability except as agreed to herein, unless and until a binding Definitive Agreement has been executed and delivered.

**7. Standstill.** Until the expiration of 2 years from the date hereof, neither you, your heirs, successors or assigns nor those of your representatives to whom the Confidential Materials have been disclosed or who have been made aware of the discussions between the parties concerning a possible transaction, shall, without the prior written consent of Seller, in any manner acquire, agree to acquire or make any proposal to acquire, directly or indirectly, any interest in the Prospect or the present or future owner of the Prospect, or any part thereof.

**8. Remedies.** You acknowledge that in the event of any breach of this Agreement, Seller, its partners and principals could not be made whole solely by monetary damages. Accordingly, Seller, its partners and principals in addition to monetary damages and any other remedy to which any of them may be entitled by law or in equity, shall be entitled to an injunction to prevent breaches of this Agreement, and to an order compelling specific performance of this Agreement without proof of actual damages. Each party further agrees to waive, and use its best efforts to cause its representatives to waive, any requirement for the securing or posting of any bond in connection with such remedy. You shall reimburse Seller, its partners and principals for all costs and expenses, including reasonable attorneys' fees, incurred by Seller in the event it successfully enforces the obligations of you and your representatives hereunder.

**9. Miscellaneous.** This Agreement represents the entire understanding and agreement of the parties hereto and may be modified or waived only by a separate writing expressly so modifying or waiving this Agreement. No failure or delay by Seller in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder. This Agreement shall be governed and construed in accordance with the internal laws of the State of Texas without regard to the laws of conflict of laws. The captions contained in this Agreement are for convenience only and shall not affect the construction or interpretation of any provisions of this Agreement. The parties acknowledge that each party and its counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendments or exhibits hereto.

**10. WAIVER OF CONSUMER RIGHTS.** *You waive your rights under the Deceptive Trade Practices-Consumer Protection Act, Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of your own selection, you voluntarily consent to this waiver.*

**11. Dispute Resolution.** If a dispute arises between the parties as to whether a party has defaulted or as to any other matter relating in any manner to the Prospect or this Agreement, then the parties hereto, and their representatives, agree to use the following mediation and arbitration procedures:

**a. Mediation.** Individuals with decision-making authority regarding the dispute who represent the parties will promptly meet and attempt in good faith to negotiate a resolution of the dispute. If, within 10 days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will jointly appoint a mutually acceptable neutral person not affiliated with either of the parties (the "neutral"), using the services of the American Arbitration Association if they have been unable to agree upon such appointment within 20 days from the initial meeting. The fees of the neutral shall be shared equally by the parties. In consultation with the neutral, the parties will select or devise an alternative dispute resolution procedure ("ADR") by which they will attempt to resolve the dispute, and the time and the place for the ADR to be held, with the neutral making the decision as to the procedure, and/or place and time, not later than 10 days after selection of the neutral. The parties must participate in good faith in the ADR to its conclusion as designated by the neutral. All meetings, mediation conferences, ADR and other proceedings shall be in Austin, Texas.

**b. Arbitration.** If the parties are not successful in resolving the dispute through mediation, then the dispute must proceed to a binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. All meetings, arbitration hearings and other

proceedings shall be in Austin, Texas. The costs of the arbitration shall be allocated by the arbitrator. **The parties waive any right for the arbitrator to award punitive damages.**

The provisions of this Paragraph 12 survive the expiration of the term of this Agreement and/or the entry into a transaction as to the Prospect and also apply to any disputes, either before or after the closing of any transaction between the parties or their heirs, successors and assigns.

Very truly yours,

\_\_\_\_\_

By: \_\_\_\_\_  
Its General Partner

By: \_\_\_\_\_  
\_\_\_\_\_(Name)  
\_\_\_\_\_(Title)

**Agreed and accepted** this \_\_\_\_ day of \_\_\_\_\_, 2000 by the undersigned. As part of the Confidentiality Agreement and as a material inducement to Seller furnishing the Confidential Materials to the undersigned, the undersigned represent to you that we have had no interest in the Prospect, or any part thereof, prior to your bring this prospect to our attention. Additionally, we represent that in the event that a Definitive Agreement is entered into by Seller with the undersigned or any person to whom you disclose the Confidential Materials that no brokerage commission, finder's fee or other compensation shall be owing by Seller, its partners and principals to the undersigned or to any person by, through, or under the undersigned or the undersigned's heirs, successors and assigns.

**ASSIGNMENT OF EARNEST MONEY CONTRACT**

(Due Diligence Period - Free Look [or Non-Refundable Assignment Fee])

THE STATE OF TEXAS                   §  
   §  
 COUNTY OF \_\_\_\_\_               §

WHEREAS, \_\_\_\_\_ as Buyer (“Assignor”) and the \_\_\_\_\_ as Seller (“Seller”) executed that one certain Commercial Improved Property Earnest Money Contract (“Contract”) for the sale to Buyer of the real property situated in \_\_\_\_\_ County described as \_\_\_\_\_ acres, located on \_\_\_\_\_ Drive in \_\_\_\_\_, Texas, together with all rights, privileges and appurtenances pertaining thereto (hereinafter referred to as the “Property”), a copy of which Contract is attached hereto as Exhibit A; and

WHEREAS, the Contract was receipted by \_\_\_\_\_ (“Title Company”) on \_\_\_\_\_, 2000, and the Contract in Paragraph \_\_\_ provides that such date is the effective date of the Contract (“Contract’s Effective Date”); and

WHEREAS, Assignor deposited with the Title Company \$ \_\_\_\_\_ as the earnest money required by the Contract (“Earnest Money”); and

WHEREAS, the Earnest has [not] been held in an interest bearing account; and

[WHEREAS, the Buyer has paid Seller \$ \_\_\_\_\_ as a non-refundable option fee (the “Option Fee”); and]

WHEREAS, Assignor desires to assign to Assignee all of its interest as Buyer under the Contract, including

- (a) Buyer’s interest in the Earnest Money [and the Option Fee,] and
- (b) Buyer’s interest in the Title Commitment and in any surveys, inspection reports, soil tests, environmental audits, studies, warranties, rights, and permits obtained or to be obtained by Assignor under or in connection with the Contract (the “Due Diligence Items”)

(the “Assigned Contract Rights”); and

WHEREAS, \_\_\_\_\_, a \_\_\_\_\_ (“Assignee”) desires to acquire the Assigned Contract Rights and agrees to assume all of Assignor’s obligations under the Contract upon the terms and conditions and for the consideration herein expressed.

NOW, THEREFORE, in consideration of \$10.00, the receipt and sufficiency of which is hereby acknowledged, and the further consideration of the parties’ satisfaction of the terms and provisions described below, Assignor hereby assigns the Assigned Contract Rights to Assignee, and Assignee hereby agrees to assume all of Assignor’s obligations under the Contract from and after the expiration of the Inspection Period, if Assignee has not terminated the Assignment during the Inspection Period (as defined below) upon the terms and conditions herein provided.

**1. Substitute Earnest Money.**

**a. Deposit Amount and Deposit Deadline.** Assignee is to deposit the sum of \$ \_\_\_\_\_ (“Substitute Earnest Money”) together with an executed original of this Assignment of Earnest Money Contract (“Assignment”) executed by Assignee with the Title Company prior to 5:00 p.m. C.S.T. \_\_\_\_\_, 2000 (“Deposit Deadline”).

The execution of this Assignment by the first party constitutes an offer to buy or sell the Assigned Contract Rights. Unless accepted by the other party by the Deposit Deadline the offer shall lapse and be null and void. The offer may be accepted by Assignee by Assignee’s depositing with the Title Company an Assignment executed by Assignee together with a cash or a check payable to the Title Company in the amount of the Substitute Earnest Money. The date that the Title Company receipts for this Assignment executed by both parties and the Substitute Earnest Money is referred to herein as the “Effective Date of this Assignment.”

**b. Disposition of Substitute Earnest Money.** The Substitute Earnest Money shall be returned to Assignee, if the Assignment is terminated by Assignee during the Inspection Period (as defined herein) less the sum of \$ \_\_\_\_\_ (“Independent Contract Consideration”). The Independent Contract Consideration is to be paid by the Title Company to the Assignor and retained by Assignor as independent consideration for Assignee’s right to terminate this Assignment. If the Assignment is not terminated by Assignee during the Inspection Period, the Substitute Earnest Money will be substituted for the funds deposited by Assignor with the Title Company as Earnest Money and the funds deposited by the Assignor with the Title Company as Earnest Money together with any interest accrued thereon shall be released by the Title Company to Assignor.

The Substitute Earnest Money shall be deposited by the Title Company in an interest bearing account in a federally insured financial institution chosen by the Title Company and any interest shall be credited to Assignee.

**2. Assignment Fee.**

**a. Amount and Deadline.** Prior to the expiration of the Inspection Period Assignee shall deposit the sum of \$ \_\_\_\_\_ (“Assignment Fee”) with \_\_\_\_\_, Attorney at Law, acting as an escrow agent for this Assignment (“Assignment Fee Escrow Agent”). If Assignee fails to deposit the Assignment Fee with the Assignment Fee Escrow Agent as required by this Assignment, Assignee shall be deemed to have terminated this Assignment pursuant to Paragraph 3c hereof and the Assigned Contract Rights shall automatically revert to Assignor without requirement of notice to Assignee. The Assignment Fee is paid as cash consideration for the assignment of the Assigned Contract Rights and does not apply to the Sales Price of the Property.

***Alternative Where Assignment Fee is Paid To Assignor’s Agent Upfront.***

[Assignee shall deposit the sum of \$ \_\_\_\_\_ (herein referred to as the “Assignment Fee”) with \_\_\_\_\_, Attorney at Law, acting as an escrow agent for this assignment (the “Assignment Fee Escrow Agent”) within 3 days of the Effective Date of this Assignment. If Assignee fails to deposit the Assignment Fee with the Assignment Fee Escrow Agent as required by this Assignment, Assignee shall be in default. The Assignment Fee is paid to Assignor and does not apply to the Sales



Price of the Property. The Assignment Fee is consideration for the assignment by Assignor to Assignee of the Assigned Contract Rights.]

**b. Disposition of Assignment Fee.** Upon payment of the Assignment Fee to the Assignment Fee Escrow Agent this Assignment shall become final and unconditional and the Assignment Fee shall be paid by the Assignment Fee Escrow Agent to Assignor.

**Alternative Where Assignment Fee is Paid To Assignor's Agent Upfront.**

**[b. Disposition of Assignment Fee.** If the assignment is terminated by Assignee during the Due Diligence Period, the Assignment Fee shall be returned by the Assignment Fee Escrow Agent to Assignee less the sum of \$\_\_\_\_\_ (the "Independent Contract Consideration for the Termination Right"). The Independent Contract Consideration for the Termination Right is to be retained by Assignor as independent consideration for Assignee's right to terminate this Assignment.

If the assignment is not terminated by Assignee during the Due Diligence Period, the Assignment Fee will be paid by the Assignment Fee Escrow Agent to Assignor and the interest accrued thereon shall be paid by the Assignment Fee Escrow Agent to Assignee.

**c. Interest on Assignment Fee.** The Assignment Fee is to be held by the Assignment Fee Escrow Agent in an interest bearing account in a federally insured financial institution chosen by the Assignee and any interest shall be for the account of Assignee.

**3. Escrow.** The Title Company and the Assignment Fee Escrow Agent are referred to as an "Escrow Agent" and the monies held by the Escrow Agent are referred to as the "Escrowed Monies". If either party makes demand for Escrowed Monies held by Escrow Agent, the Escrow Agent has the right to require from all parties and brokers a written release of liability of Escrow Agent for disbursement of the monies held by the Escrow Agent. Any refund or disbursement of Escrowed Monies shall be reduced by the amount of unpaid expenses incurred on behalf of the party receiving the Escrowed Money, and Escrow Agent shall pay the same to the creditors entitled thereto. Demands and notices required by this paragraph shall be in writing and delivered by hand delivery or by certified mail, return receipt requested.]

**3. Inspection.**

**a. Inspection Period.** Assignee shall have the period ("Inspection Period") from the Effective Date of this Assignment until 5:00 p.m. C.S.T. on \_\_\_\_\_, 2000 to inspect the Property, to examine the Title Commitment and documents furnished or to be furnished by the Title Company, to conduct a survey of the Property, to review Assignor's records as to the Property, and to undertake any other due diligence activities permitted under the Contract ("Due Diligence Review Items").

**b. Extension of Inspection Period.** Assignee may extend the Inspection Period until 5:00 p.m. C.S.T. on \_\_\_\_\_, 2000, upon payment to Assignor prior to 5:00 C.S.T. \_\_\_\_\_, 2000 of \$\_\_\_\_\_ ("Extension Fee"). The Extension Fee is not refundable to Assignee even if Assignee terminates

this assignment within the Inspection Period as extended. The Extension Fee is paid to Assignor and does not apply to the Sales Price of the Property.

c. **Termination.** During this Inspection Period Assignee, at its option, may terminate this Assignment. In the event Assignee elects to terminate this Assignment, then Assignee shall be entitled to the return of the Substitute Earnest Money (less the \$\_\_\_\_\_ Independent Contract Consideration) together with any accrued interest.

d. **Cooperation and Further Assurances.** Assignor will cooperate fully with Assignee to facilitate the inspection and review of the Due Diligence Review Items.

e. **Due Diligence Items in Assignor's Possession.** Assignor shall immediately deliver to Assignee any Due Diligence Review Items, within Assignor's possession. Assignee shall promptly deliver to Assignor all non-proprietary materials pertaining to the Property that Assignee obtains pursuant to the Contract. Assignor will authorize all persons which have provided services to Assignor in connection with the Property to disclose to Assignee all information gathered by such persons in respect to the Property, including surveyors, engineers and attorneys ("**Services Contracted for by Assignor**"). Assignor has not incurred any costs that are unpaid as of the date hereof for Services Contracted for by Assignor in respect of the Property, and Assignee does not assume any liability for the Services Contracted for by Assignor. Assignee may, if Assignee elects, independently contract for services with the same or other persons to provide services to Assignee under the Contract.

#### 4. **Representations, Warranties and Covenants.**

a. **Assignor to Assignee.**

(1) **Modifications to Contract.** Assignor agrees not to modify or in any way alter the terms of the Contract without the prior written consent of Assignee.

(2) **Release of Seller.** Assignor agrees not to waive, excuse, condone or in any manner release or discharge the Seller of or from the obligations, covenants, conditions and agreements of Seller to be performed under the Contract.

(3) **Termination of Contract.** Assignor agrees not to terminate the Contract.

(4) **Performance of Contract.** Assignor agrees to abide faithfully by, perform and discharge each and every material obligation, covenant, and agreement of the Contract to be performed by Buyer to be performed prior to the expiration of the Inspection Period and shall obtain the Assignee's consent prior to exercising any elections or taking any actions.

(5) **Forwarding Notices.** Assignor agrees to send promptly to Assignee any notice or demand that Assignor receives from Seller.

(6) **Enforcement of Seller's Obligations.** Assignor agrees to vigorously enforce the obligations of the Seller under the Contract.

(7) **Assignor's Title.** Assignor represents and warrants to Assignee that Assignor has not assigned, pledged or otherwise encumbered the Assigned Contract Rights. No person other than

Assignor has an interest in the Buyer's rights under the Contract. Assignor has the right, power and capacity to make this Assignment. This Assignment is valid, binding and enforceable against Assignor in accordance with its terms. The person signing this Assignment on behalf of Assignor is authorized to execute same on behalf of Assignor and Assignor's obligations under this Assignment do not require the consent of any other party and do not violate the provisions of any agreement to which Assignor is a party.

(8) **Status of Contract.** The Assignor has no actual knowledge that the Contract is not in full force and effect.

(9) **Complete Copy of Contract.** The copy of the Contract attached hereto as Exhibit A is a true, correct and complete copy of the Contract and the Contract has not been modified or amended in any respect, nor has any provision thereof been waived.

(10) **No Knowledge of Default.** Assignor has no actual knowledge that either Seller or Buyer is in default under the Contract.

(11) **Notice of Default by Assignor.** Assignor agrees to notify promptly Assignee of any notice of default by Assignor that Assignor receives.

(12) **Assignee Cure Rights** Assignee is hereby given the right to undertake to cure any default by Assignor on the Contract.

(13) **Consent by Assignor to Assignment.** Assignor shall obtain Seller's consent for Assignor to assign the Assigned Contract Rights to Assignee prior to the Closing Date; provided, however, if Seller fails to give its consent to the assignment, then Assignor shall execute and deliver to Assignee prior to closing an irrevocable and unconditional special power of attorney in form satisfactory to the Title Company and Assignee (a form is attached as Exhibit B for consideration by the Title Company) for Assignee to act as Assignor's special agent to close the purchase of the Property in Assignor's name as provided in the Contract (except the Title Policy shall be waived in such transaction and Assignor shall receive a credit) in the amount of the premium for the unissued title policy and simultaneously Assignor (or Assignee acting pursuant to the special power of attorney) shall convey the Property to Assignee by deed in substantially the same form as executed by Seller upon the same terms as the Contract as if Assignor were the Seller and Assignee were the Buyer named therein and Assignor shall provide Assignee with an Owners Title Policy in the amount of the Sales Price under the Contract naming Assignee as the insured and in the form approved by Assignee pursuant to the Assignment.

(14) **Further Assignment by Assignee.** Assignee may assign its rights and obligations under this Assignment to a third party, but any such assignment shall not release Assignee, without obtaining the written release of Assignor.

(15) **Commissions.** No commission agreement exists as to Buyer's interest or the Property (other than such commissions as Seller may have contracted for, but as to which Buyer has no liability).

(16) **Status of Assignor's Due Diligence.**

(a) **Title Commitment.** [*Recite status of Title Commitment and status of objection notices given to Seller.*].

(b) **Survey.** [*Recite status of Survey and status of objection notices given to Seller.*].

(c) **Other Items.** [*Recite status of Due Diligence as to other Due Diligence Items and status of objection notices given to Seller.*].

(d) **No Notice of Adverse Matters.** Assignor has received no notice that \_\_\_\_\_.

**b. Assignee to Assignor.**

(1) **Not Responsible for Contract Performance During Inspection Period.** Assignee is not liable to Assignor or to Seller to perform Buyer's obligations during the Inspection Period.

**Alternative**

[Assignee agrees to abide faithfully by, perform and discharge each and every material obligation, covenant, and agreement of the Contract to be performed by Buyer to be performed after the Assignment Closing Date.]

(2) **Forwarding Notices.** Assignee agrees to send promptly to Assignor any notice or demand that Assignee receives from Seller.

(3) **Binding.** This Assignment is valid, binding and enforceable against Assignee in accordance with its terms. The person signing this Assignment on behalf of Assignee is authorized to execute same on behalf of Assignee and Assignee's obligations under this Assignment do not require the consent of any other party and do not violate the provisions of any agreement to which Assignee is a party.

5. **Assignee's Dealings with the Seller.** Assignor authorizes Assignee to contact the Seller and the Title Company and obtain the Due Diligence Review Items from the Seller. Assignee shall furnish Assignor a copy of any Due Diligence Review Items it receives from the Seller or the Title Company, which have not already been furnished to the Seller. The Seller is not a third party beneficiary of the representations, warranties or covenants of the parties to this Assignment.

6. **Commission.** In the event Assignee, its successors and assigns, close the purchase of the Property, Assignee shall be responsible for payment of any real estate commission owing by Assignee to \_\_\_\_\_.

7. **Indemnity.**

a. **Disclaimer.** Assignor shall not be responsible for the discharge and performance of any duties or obligations to be performed and/or discharged in connection with the Assigned Contract Interests after the Assignment Closing Date.

b. **Assignor to Assignee.** Assignor agrees to perform all of the terms, covenants and conditions of the Contract prior to the Assignment Closing Date, but not after the Assignment Closing Date, and agrees to indemnify, save and hold harmless Assignee from and against any and all loss, liability, claims or causes of action existing in favor of or asserted by any person arising out of or relating to the Assignor's

failure to perform any duties or obligations required by the owner of the Assigned Contract Rights prior to the Assignment Closing Date.

**c. Assignee to Assignor.** Assignee agrees to perform all of the terms, covenants and conditions of the Contract from and after the Assignment Closing Date, but not prior thereto, and agrees to indemnify, save and hold harmless Assignor from and against any and all loss, liability, claims or causes of action existing in favor of or asserted by any person arising out of or relating to the Assignee’s failure to perform any duties or obligations required by the owner of the Assigned Contract Rights after the Assignment Closing Date.

***Alternative to Indemnity in Cases where Seller is to Release Assignor on Assignment Effective Date.***

[The Assignment is conditioned upon Seller releasing Assignor from liability on the Contract, which condition may be waived by Assignor upon such terms and conditions as Assignor may impose and Assignee may accept.]

**8. Default.** In the event any party hereto shall fail to fully and timely perform any of such party's obligations hereunder, the non-defaulting party may (a) enforce specific performance of this Assignment, (b) bring suit for damages and/or (c) exercise any other remedies it may have at law or in equity. The prevailing party in any litigation between any of the parties hereto shall be entitled to reasonable attorneys’ fees and reimbursement for reasonable costs.

**9. Notice.** Notice may be given by the methods provided in the Contract to the parties hereto at the following addresses:

**Assignor:**

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
Austin, Texas 787\_\_  
Phone: (512)\_\_\_\_\_  
Fax: (512)\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
Austin, Texas 787\_\_  
Phone: (512)\_\_\_\_\_  
Fax: (512)\_\_\_\_\_

**Assignee:**

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Texas \_\_\_\_\_  
Attn.: \_\_\_\_\_  
Phone: ( )\_\_\_\_\_  
Fax: ( )\_\_\_\_\_

\_\_\_\_\_  
Graves, Dougherty, Hearon & Moody,  
A Professional Corporation  
515 Congress Avenue, Suite 2300  
Austin, TX 78701-3587  
Phone: (512) 480-5736  
Fax: (512) 482-8401

**Assignment Escrow Agent:**

\_\_\_\_\_, Esq.

\_\_\_\_\_  
Austin, Texas 787\_\_\_\_\_

Phone: (512)\_\_\_\_\_

Fax: (512)\_\_\_\_\_

**Title Company.** Notice may be given to the Title Company at the address provided in the Contract.

**10. Miscellaneous.**

**a. Counterparts.** This Assignment may be executed in multiple counterparts.

**b. Texas Law to Apply.** This Assignment shall be construed under and in accordance with the laws of the state of Texas.

**c. Parties Bound.** This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns. This Assignment, including its representations, warranties and covenants, shall survive the Assignment Closing Date.

**d. Legal Construction.** In case any one or more of the provisions contained in this Assignment for any reason shall be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Assignment shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

**e. Prior Agreements Superseded.** This Assignment constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the within subject matter.

**f. Assignment of Contract.** This Assignment may be assigned by any of the Partition Parties. Such assignee shall expressly assume all of the assigning party's liabilities, obligations and duties hereunder.

**g. Alternative Dispute Resolution.** If a dispute arises between the parties relating to whether a party has breached this Assignment or subsequent to the Effective Date of this Assignment [Assignment Closing Date] as to any matter arising out of this Assignment, then the parties agree to use the following dispute resolution procedures:

**(1) Meeting.** A meeting in Austin, Texas, shall be held promptly between the parties, to attempt in good faith to negotiate a resolution of any dispute.

**(2) Mediation.** If the dispute is not resolved in the meeting, the parties agree to use the following mediation procedures:

(a) **Selection of Mediator.** If, within 10 days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will jointly appoint a mutually acceptable neutral person not affiliated with any of the parties (the “Neutral”), seeking assistance in such regard from the American Arbitration Association, if they have been unable to agree upon such appointment within 10 days from the initial meeting. The fees of the Neutral shall be shared equally by the Parties.

(b) **Procedure.** In consultation with the Neutral, the parties will select or devise a non-binding mediation procedure (“Mediation”) by which they will attempt to resolve the dispute, and the time for the Mediation to be held, with the Neutral making the decision as to the procedure, and/or time, if the Parties do not agree as to such matters (but unless circumstances require otherwise, not later than 10 days after the selection of the Neutral).

(c) **Attempt to Resolve.** The parties agree to participate in good faith in the Mediation to its conclusion as designated by the Neutral. All meetings, Mediation conferences, and other proceedings shall be in Austin, Texas, at such location as the Neutral shall designate.

(3) **Arbitration.** If the parties are not successful in resolving the dispute through Mediation, the parties agree that the dispute shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. All meetings, arbitration hearings, and other proceedings shall be in Austin, Texas, at such location as the arbitrator shall designate. The costs of the arbitration shall be allocated as determined by the arbitrator.

(4) **Provisional Remedies.** Without prejudice to the procedures specified in this Section a party may file a complaint for statute of limitations or venue reasons, or to seek a preliminary injunction or other provisional judicial relief, if in the party’s sole judgment, such action is necessary to avoid irreparable damage or to preserve the *status quo*. Despite such action, the Parties will continue to participate in good faith in the procedures specified in this Section 10(g).

(5) **Waiver of Jury.** The parties waive the right to a jury trial in any litigation between the parties arising out of this Assignment.

h. **Expenses.** Except as otherwise provided in this Assignment, all fees, costs, and expenses incurred in negotiating this Assignment or completing the assignments described in this Assignment shall be paid by the party incurring the fee, cost, or expense.

i. **Amendments and Waivers.** The Assignment may not be amended except in a writing specifically referring to this Assignment and signed by all parties. A right created under this Assignment may not be waived except in a writing specifically referring to this Assignment and signed by the party waiving the right. Failure or delay on the part of a party in exercising any right, power or privilege under this Assignment will not operate as a waiver of any other right, power or privilege. Single or partial exercise of any right, power or privilege will not preclude further exercise of that right, power or privilege. All rights and remedies provided for in this Assignment are cumulative and are not exclusive of any rights or remedies that the parties may otherwise have. No waiver, modification, or discharge, or amendment of this Assignment will be valid without the signed consent of the parties against whom enforcement is sought, except as otherwise provided for in this Assignment.

j. **Captions; Neutral Interpretation.** All paragraphs titles or captions in this Assignment and in any annexed exhibit or schedule referred to in this Assignment are for convenience only, and are not part of this Assignment, and do not affect the meaning of this Assignment. The provisions of this Assignment shall be construed as to their fair meaning, and not for or against any party based upon any attribution to such party as the source of the language in question.

k. **Governing Law; Forum.** THIS ASSIGNMENT SHALL BE CONSTRUED AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND THE OBLIGATIONS OF THE PARTIES ARE AND SHALL BE PERFORMABLE IN WILLIAMSON COUNTY, TEXAS EXCEPT THAT THE MEDIATION AND ARBITRATION PROVISIONS ARE PERFORMABLE IN TRAVIS COUNTY, TEXAS. BY EXECUTING THIS ASSIGNMENT, EACH PARTY HERETO EXPRESSLY:

(1) CONSENTS AND IRREVOCABLY AND UNCONDITIONALLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF ANY TEXAS STATE COURT, OR ANY UNITED STATES FEDERAL COURT, SITTING IN THE MEDINA COUNTY OR TRAVIS COUNTY, TEXAS, OVER ANY SUIT, ACTION OR PROCEEDING ARISING OUT OF THIS ASSIGNMENT;

(2) WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY CLAIM OR DEFENSE THAT SUCH VENUE IS NOT PROPER OR CONVENIENT; AND

(3) CONSENTS TO THE SERVICE OF PROCESS IN ANY MANNER AUTHORIZED BY TEXAS LAW.

ANY FINAL JUDGMENT ENTERED IN AN ACTION BROUGHT HEREUNDER SHALL BE CONCLUSIVE AND BINDING UPON THE PARTIES.

l. **Counterparts.** This Assignment may be executed in counterparts. Each of the counterparts shall be deemed an original instrument, but all of the counterparts shall constitute one and the same instrument notwithstanding that all Parties are not signatories to each counterpart.

m. **Legal Representation.** The parties acknowledge and agree that neither the firm of Graves, Dougherty, Hearon & Moody, P.C. nor any of its attorneys or employees (“GDHM”) represents or is an agent for the Assignor [or the Assignment Escrow Agent]. The parties acknowledge and agree that Jim Nassour does not represent and is not an agent for the Assignee.

**Assignor:**

**Assignee:**

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

\_\_\_\_\_  
President

**Date Executed:** \_\_\_\_\_

**Date Executed:** \_\_\_\_\_



**RECEIPT FOR ASSIGNMENT OF EARNEST MONEY CONTRACT AND  
SUBSTITUTE EARNEST MONEY**

**1. Receipt.** On this \_\_\_\_\_ day of \_\_\_\_\_, 2000, \_\_\_\_\_ Title Company acknowledges receipt of: (a)  Assignment of Earnest Money Contract; and (b)  Substitute Earnest Money in the form of \_\_\_\_\_.

**2. Title Commitment.** The Title Company agrees promptly to reissue its Commitment for Title Insurance naming Assignee as the proposed insured.

\_\_\_\_\_ Title Co., Escrow Agent

By: \_\_\_\_\_

**CONSENT TO ASSIGNMENT**

The undersigned Seller consents to and acknowledges the following:

1. **Assignment.** Seller consents and acknowledges notice of the assignment by \_\_\_\_\_ (“**Assignor**”) to \_\_\_\_\_, its successors and assigns (the “**Assignee**”) of the Assignor’s rights as “Buyer” under the Commercial Improved Property Earnest Money Contract (“**Contract**”) dated \_\_\_\_\_, 2000, for the sale to Buyer of the property situated in \_\_\_\_\_ County described as \_\_\_\_\_ acres of land, more or less, together with any and all rights, privileges and appurtenances pertaining thereto (hereinafter referred to as the “**Property**”).

2. **Title Company and Escrow Agent.** Seller consents to the Title Company and the Escrow Agent substituting Assignee as the Buyer on the Contract, and to the Escrow Agent transferring the earnest money deposit of \$ \_\_\_\_\_ to the Title Company as successor Escrow Agent.

3. **Notice.** Seller acknowledges that the Buyer's attorney will be \_\_\_\_\_, and that any notices to the Buyer under the Contract are to be sent to the following addresses:

\_\_\_\_\_  
\_\_\_\_\_  
Austin, Texas 787\_\_  
Fax: (512)\_\_\_\_\_

With a copy to:  
Graves, Dougherty, Hearon & Moody, a Professional Corporation  
515 Congress Avenue, Suite 2300  
Austin, Texas 78701  
Attention: \_\_\_\_\_  
Fax: (512) 478-1976

4. **Release of Assignor.** Seller agrees that Assignor shall be released from liability on the Contract upon closing under the Contract and delivery to Seller of receipted invoices for the survey and inspection services (including environmental inspections) obtained by Assignor and Assignee with respect to the Property.

5. **Further Assignment.** No further assignment of the Contract will be permitted, provided and except that Assignee may assign the Contract at closing to an entity owned by \_\_\_\_\_.

6. **Commissions.** Seller will pay only those real estate commissions provided, and to the persons named, in the original Contract. Assignor and/or Assignee shall be responsible for any and all other commissions.

7. **Special Conditions.** \_\_\_\_\_.

Dated as of \_\_\_\_\_, 2000.

**Seller:**

\_\_\_\_\_

\_\_\_\_\_

**Exhibit A**

**Earnest Money Contract**

**Exhibit B**

**Special Power of Attorney**



**herein granted to Agent. Such third parties are hereby indemnified and held harmless by me and by the Agent by acting in reliance upon this Power of Attorney and the representations and warranties of my Agent as to the scope of the powers hereby entrusted and granted to my Agent and such third parties are to required to further inquire as to the scope of this Power of Attorney.** The Power of Attorney is a power coupled with an interest and runs with Assignor's interest in the Property.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 2000.

PRINCIPAL:

\_\_\_\_\_

AGENT:

\_\_\_\_\_

By: \_\_\_\_\_

\_\_\_\_\_  
President

THE STATE OF TEXAS           §  
  §  
COUNTY OF TRAVIS           §

                  This instrument was acknowledged before me on the \_\_\_\_\_ day of \_\_\_\_\_, 2000,  
by\_\_\_\_\_.

\_\_\_\_\_  
Notary Public, State of Texas

THE STATE OF TEXAS           §  
  §  
COUNTY OF \_\_\_\_\_       §

                  This instrument was acknowledged before me on the \_\_\_\_\_ day of \_\_\_\_\_, 2000,  
by \_\_\_\_\_, President of \_\_\_\_\_, a Texas corporation, on behalf of said corporation.

\_\_\_\_\_  
Notary Public, State of Texas

EXHIBIT 1

ASSIGNMENT OF EARNEST MONEY CONTRACT

[Attached is a copy of the Assignment of Earnest Money Contract. The Assignment of Earnest Money Contract calls for the attachment to it as an Exhibit the Durable Special Power of Attorney. The Durable Special Power of Attorney has been intentionally omitted as an Exhibit to the copy of the Assignment of Earnest Money Contract attached as an Exhibit to the Durable Special Power of Attorney]

ADDRESSES:

**Assignor/Principal:**

\_\_\_\_\_  
\_\_\_\_\_  
Austin, Texas 787\_\_\_\_  
Phone: (512)\_\_\_\_\_  
Fax: (512)\_\_\_\_\_

with a copy to:

\_\_\_\_\_, Esq.  
\_\_\_\_\_  
Austin, Texas 787\_\_\_\_  
Phone: (512)\_\_\_\_\_  
Fax: (512)\_\_\_\_\_

**Assignee/Agent:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Texas \_\_\_\_\_  
Attn.: \_\_\_\_\_  
Phone: ( ) \_\_\_\_\_  
Fax: ( ) \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
Graves, Dougherty, Hearon &  
Moody, P.C.  
515 Congress Avenue, Suite 2300  
Austin, TX 78701-3587  
Phone: (512) 480-5736  
Fax: (512) 482-8401

After Recording Return To:

\_\_\_\_\_ Title Co.  
\_\_\_\_\_  
Austin, Texas 787\_\_

Attn: \_\_\_\_\_, Escrow Officer

Planning Commission and Standing Committees Roster



Planning Commission and Standing Committees Roster

Request for Zoning Verification Letter

Zoning Comfort Letters from City

[Reserved for Zoning Comfort Letter]

[Reserved for Zoning Comfort Letter]

[Reserved for Zoning Comfort Letter]

[Reserved for Zoning Comfort Letter]

[Reserved for Zoning Comfort Letter]



[Reserved for Zoning Comfort Letter]

Summary of Zoning Classifications

[Reserved for Summary of Zoning Classifications]

[Reserved for Summary of Zoning Classifications]

[Reserved for Summary of Zoning Classifications]

Zoning Map

[Reserved for Zoning Map]

Ad Valorem Tax Data Available on the Web



[Reserved for Ad valorem Tax Data]

[Reserved for Ad valorem Tax Data]

[Reserved for Ad valorem Tax Data]

**ARCHITECT'S CERTIFICATE OF COMPLIANCE**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

Re:

Gentlemen:

The undersigned, \_\_\_\_\_ ("Architect"), understands that \_\_\_\_\_ ("Lender") and \_\_\_\_\_ ("Borrower") are considering a financing transaction to be secured by the building located at \_\_\_\_\_ in \_\_\_\_\_, \_\_\_\_\_ (the "Property"). Architect is familiar with the Property. Architect hereby certifies and acknowledges that it has inspected the Property for compliance with the Americans With Disabilities Act of 1990, Pub.L.No. 89-670, 104 Stat. 327, 47 U.S.C. §§ 12101-12213 and 47 U.S.C. § 225 and § 611 (1990), and all rules, regulations, and guidelines promulgated thereunder, and that the Property, as designed, constructed, or since modified is in compliance with the Architectural and Transportation Barriers Compliance Board Final Guidelines-- Americans With Disabilities Act Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 35408 (July 26, 1991) (36 C.F.R. Part 1191), except as set forth in Schedule One attached hereto.

The undersigned further certifies that except as indicated on Schedule One, the Property complies with the Texas Architectural Barriers Law, Article 9102, Texas Revised Civil Statutes.

The undersigned further certifies that it has reviewed the certificates issued by the Texas Department of Licensing and Regulation for the tenants listed on Schedule Two, and all records regarding alterations made available to it. Alterations commenced since January 26, 1992 are listed on Schedule Two.

Sincerely,

[ARCHITECT]

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_



- (1) Discretion. Assumption in discretion of lender with criteria for assumption.
- f. Waiver of Jury Trial.
- g. Choice of Texas law. [LA §1.1 Certain Definitions - State, p. 4][
- h. 360 day year.
- i. Late Charge. [LA §2.2 Interest Rate; Late Charge, p. 5]. 5% late charge in addition to Default Rate interest.
- j. Default Rate. [LA §1.1 Certain Definitions - Default Rate, p. 2] Default Rate is Contract Rate + 500 basis points.
- k. Prepayment. [LA § 2.3(b) Terms of Payment-Maturity, pp. 5-6].
  - (1) Lock out for 1 year. [LA § 2.3(c) Terms of Payment-Prepayment, p. 6]. If loan accelerated during lock out period (other than for casualty loss or condemnation), 5% prepayment premium due.
  - (2) Exit Fee.
    - (a) [LA § 2.3(b) Terms of Payment-Maturity, p. 5]. Due upon acceleration for any reason.
    - (b) [LA § 2.3(b) Terms of Payment-Maturity, p. 5]. Due upon maturity if not converted to Permanent Loan with [Lender 1].
  - (3) Casualty Loss or Condemnation. [LA § 2.3(b) Terms of Payment-Prepayment, p. 6].

No prepayment premium due if prepaid due to casualty loss or condemnation.
  - (4) Prepayment Premium. [LA § 2.3(b) Terms of Payment-Prepayment, p. 6].

May prepay in whole but not in part upon payment of amounts due under §2.3(b) (presumably the Exit Fee) upon 30 days' notice, otherwise no prepayment premium due.

## 2. Fees.

- a. Commitment Fee. 1% Commitment Fee paid as condition of commitment (\$36,250 to be refunded at closing).

- b. Application Fee. \$3,000 Application Fee at time of application.
- c. Expense Deposit. \$12,000 Expense Deposit (loan closing costs).
- d. Prepayment.
  - (1) Lockout/Exit Fee. 1% of Loan Amount.
  - (2) Acceleration: 5% prepayment premium.
- e. Assumption Fee: 1%. [Mtge. 3.9(f)(vi) Transfer or encumbrance of Mortgaged Property, p. 7].
- f. Extension Fee. [LA § 2.5(b) Extension, p.7]. 12 month extension for 1% fee and meet criteria.
- g. Closing costs: include zoning consultant to issue report that
  - (1) the Property complies with all legal and zoning requirements, including that all requisite certificates of occupancy, building permits, and other licenses, certificates, approvals or consents required of any governmental authority have been issued without variance or condition, and
  - (2) following any casualty, the improvements located on the Property may be reconstructed and the current use thereof restore, and
  - (3) there is no litigation, action, citation, injunctive proceedings or like matter pending or threatened with respect to the validity of such matters.





Result: *Not made. You will need to visit with the Loan Broker to determine if you will be able to negotiate this change.*

- d. **§8.1 Transfers of the Property or Beneficial Interest in Borrower.** *The restriction against transfers of interests in the Borrower should carve out transfers of partnership interests due to death of the partnership interest owner or related estate planning transfers to trusts or other entities or among the principals.*

Result: *Change made by changing 3.9(b) p.6 to the Mortgage.*

- e. **Typo.** §2.3 “2020” should be 2002.

Result: *Correction made.*

- f. **§6.14 Single Purpose Entity.** *Speaks in terms of permitting [Lender 2] to have only a pledge of Limited Partnership interests. [Lender 2] is also however getting a pledge of the General Partner’s interests.*

Result: *Correction made.*

- g. **§7.1 Financial Statements of Borrower.** *GAAP accounting standard. Will the financial reports be GAAP?*

Result: *No change made. You will need to advise me if GAAP is a problem.*

- h. **§12.1 Personal Liability Carve Outs.**

- (1) *Environmental indemnity is provided by §11.19 to survive payment of Loan and sale of Property. This should be limited to conditions that arise prior to Lender’s acquisition of title to the Property.*

Result: *No change made, but a similar requested change was made to the Hazardous Materials Indemnity Agreement. I will again request Lender’s counsel to make this change.*

- (2) §12.1(i) *Liability for damage to Project caused by acts or omissions of Borrower. This should be limited to the extent not covered by insurance.*

Result: *No change made. I will again request Lender’s counsel to make this change. You will need to visit with the Loan Broker to determine if you will be able to negotiate this change.*

2. **Hazardous Materials Indemnity Agreement.** *This indemnity is not expressly limited to matters arising during or prior to the term of the Loan This needs to be changed to eliminate indemnifying the Lender for matters arising after the term of the Loan or otherwise.*

Result: *Requested change made. Please note that in order to obtain a release of an arguable risk of continuing liability for environmental liabilities after foreclosure you will need to furnish the Lender with a*

*Site Assessment during the period between 30 and 90 days prior thereto showing that no Hazardous Materials are on the Project and that no violation of Environmental Laws has occurred.*

***No change was made to provide for a similar release of liability in connection with the sale of the Property. I will request that this change be made. You will need to visit with the Loan Broker to determine if you will be able to negotiate this change.***

**3. Assignment of Leases and Rents.**

- a. Revocable License. [¶6]. *The right to revoke the license to Borrower needs to be expressly limited to “solely” upon the occurrence of any Event of Default that is not cured within the cure period provided in the Loan Documents and needs to be reinstated if the Event of Default is subsequently cured.*

Result: *Requested change made.*

- b. Right to Apply Rents. [¶4]. *This provision needs to be revised to require the Lender to apply Rents on the (a) - (c) expenses and towards the [Lender 2] Loan, but in such order as Lender may determine. It needs to be stated that application of Rents on the [Lender 1] Loan does not trigger a prepayment premium*

Result: *Requested change made.*



occurrence of other events such as acceleration and casualty loss. Also, the Loans provide that they are to be governed by the laws of another state and the designation of such state as the forum for suits arising out of the Loan Documents (New York in the case of [Lender 1] and Illinois in the case of [Lender 2]). The Loan Documents contain numerous indemnities, waivers, and releases such as a waiver by you of jury trial, indemnification of the Lender except for its gross negligence for liabilities arising out of the Property

These synopsis are not meant to be a comprehensive listing of the Loan terms. At your request we will review each or any provision with you.

4. **Particular Opinions Required.** We call to your attention the following particular opinions being requested of us.

- a. **Enforceability.** In order to give this opinion, we may have to call the Lender's attention to matters which are unable to opine are enforceable unless revisions are made to the Lender's documents. In permitting us to proceed with the opinion letter, you are authorizing us to make these recommendations to the Lender.

Additionally, there are provisions contained in the Loan Documents that we will not be able to opine that they are enforceable either because the law is not settled enough for us to so opine or because we have doubt as to their enforceability. In these cases we will have to call this to the attention of the Lender.

- b. **Choice of Laws.** The Loan Documents contain provisions whereby you choose to have them governed by another state's laws. The Lenders require that we opine that the choice of another state's law to govern the documents is enforceable ([Lender 1]–New York and [Lender 2]–Illinois). This area of the law is intricate and thus involves more care than some of the other opinions.
- c. **Usury.** The Lenders require that we opine that the Loans are not usurious. This is another intricate area. The Loans involve compensation to the Lender in addition to the interest at rates below the Texas ceiling of 18% per annum. The Loans also contain provisions for late charges, commitment fees, extension fees, and prepayment fees (and in the case of prepayment fees they are payable not only in a case of a voluntary prepayment but also in other cases such upon acceleration or casualty loss). Rendering opinions in such cases that the Loans are not usurious involve considerable legal analysis and effort. This however is a customary requirement.
- c. **Zoning.** The [Lender 1's] opinion requires that we opine as to the proper zoning of the Property. This will require us to independently investigate the zoning classification of the Property.
- d. **Permits and Approvals.** The [Lender 1] opinion requires that we opine as follows:

*“To the best of our knowledge, all permits and approvals that are required for the construction, use and occupancy of the Property have been duly and validly issued by the Governmental Authorities or persons having jurisdiction or rights with respect thereto, are in full force and effect, and are not subject to any appeal, any applicable period for appealing such actions have expired. In connection with our representation of the Borrower, the General Partner and the Joinder Parties, nothing came to our attention that would lead us to believe that the Property does not comply with all laws, ordinances, rules, regulations, covenants and restrictions affecting the construction, occupancy, use and operation thereof.”*

Although this opinion is based on our knowledge, it is based “on the best of our knowledge” which implies a degree of due diligence and care. We will need to visit with the Lender’s counsel to determine what level of inquiry the Lender is requiring. We will not be able to give an opinion that the Property in fact complies with all laws as this would involve an extraordinary effort on our part as well as professional judgments by third party professionals such as architects and engineers.



- (3) **Mortgage in Sufficient Form to Create Lien and in Recordable Form.** [§2(c)(ii)].
  - (4) **Assignment of Leases is in Form Sufficient to Create Valid Assignment of and Lien on Leases and Rents and in Recordable Form.** [§2(c)(iii)].
  - (5) **Financing Statement When Recorded in x shall perfect a security interest in Personal Property.** [§2(c)(iv)].
  - (6) **Loan Documents contain customary and enforceable provisions such as to render rights and remedies of the holder thereof adequate for the realization against the Property including realization by judicial or non-judicial foreclosure.** [§2(c)(v)].
  - (7) **No exemption available to Borrower which would interfere with such right of foreclosure except as provided in §4(a) and 4(b) below.** [§2(c)(v)].
- d. **Joinder–Valid, Binding and Enforceable.** [§2(d)].
- e. **No Usury.** [§2(e)].
- f. **No Proceedings.** [§2(f)]. No knowledge of any legal or administrative proceedings threatened against Borrower....or Property.
- g. **Permits and Approvals.** [§2(g)]. Best of knowledge, all permits and approvals that are required for the construction, use and occupancy of the Property
- (1) have been duly and validly issued by Governmental Authority,
  - (2) are in full force and effect, and
  - (3) are not subject to any appeal, any applicable period for appealing such actions have expired.
- h. **Permits and Approvals.** [§2(g)]. Nothing has come to our attention that would lead us to believe that the Property does not comply with all law, ordinances, rules, regulations, covenants and restrictions affecting the construction , occupancy, use and operation thereof.
- i. **No Conflict.** [§2(h)].
- (1) **Constituent Documents and Other Relevant Document and Law.**

- (a) There is no provision in any Constituent Documents that would impair the power of the Borrower ... to enter into and carry out the undertakings of the Loan Documents.
      - (b) To our knowledge there is no provision of any mortgage, indenture, lease, agreement, license, permit, judgment, decree, order, statute, ordinance, rule or regulation to which Borrower ... or its assets is subject that would impair the power of the Borrower ... to enter into and carry out the undertakings of the Loan Documents.
    - (2) **Applicable Laws.** Loan Documents do not violate, conflict with, result in the breach of, or constitute a default under any Applicable Laws.
  - j. **Zoning.** [§2(i)].
    - (1) **Zoning Classification.** Property is presently zoned \_\_\_ according to Ordinance No. \_\_\_.
    - (2) **Zoning Contemplated by Loan Documents.** This zoning classification permits the use thereof for \_\_\_ as contemplated by the Loan Documents.
3. **Assumptions.** [§ 3].
- a. **No Outside Agreements.** [§ 3(a)].
  - b. **Genuineness, Authenticity and Conformity.** [§ 3(b)].
  - c. **Lender's Authority.** [§3(c)].
  - d. **Capacity.** [§3(d)].
  - e. **Title.** [§ 3(e)].
  - f. **Descriptions.** [§3(f)].
  - g. **Fraud.** [§3(g)].
  - h. **Conduct.** [§ 3(h)].
  - i. **Future Actions.** [§ 3(i)].
4. **Qualifications.** Qualifications for
- a. **Specified Laws.** [§4(a)]. The following:
    - (1) **Principles of Equity.**



(2) **Bankruptcy, Etc.**

- b. **General Laws.** [§4(b)]. Enforceability of certain of the remedial, waiver and other provisions of the Loan Documents and Joinders may be limited by Applicable Laws in addition to “Specified Laws”, however, such Additional Laws do not in our opinion substantially interfere with the realization of the benefits expressed in the Loan Documents except for the economic consequences of any procedural delay which may result from such laws.

5. **Limitations.** Subject to following:

- a. **No Title Opinion.** [§5(a)].
- b. **Licensed only in Texas.** [§5(b)].
- c. **Subsequent Events.** [§5(c)].
- d. **Captions.** [§5(d)].
- e. **Restriction on Use.** [§5(e)].

6. **Definitions.** Definitions for

- a. **Applicable Laws.** [§6(a)].
- b. **Constituent Documents.** [§6(b)].
- c. **Contract.** [§6(c)].
- d. **Knowledge.** [§6(d)].
- (1) Current actual knowledge of lawyers who are participating in drafting opinion letter and in handling transaction.
- (2) Not include constructive knowledge or inquiry knowledge, except, lawyers drafting opinion letter confirm that they have
- (a) made inquiry of the representatives of the Borrower as to the relevant facts concerning this opinion and received answers, and
- (b) made further inquiry if any of the alleged facts were suspect, either on their face or on the basis of other facts known to such lawyer were open to question.
- (3) Lawyer drafting opinion letter has
- (a) made a reasonable examination of his por her files and

- (b) made a reasonable inquiry of other members of the firm if ....
- e. **Governmental Authority.** [§6(e)].

Opinion Letter Format

[Reserved for Opinion Letter Format]

[Reserved for Opinion Letter Format]

[Reserved for Opinion Letter Format]

[Reserved for Opinion Letter Format]

[Reserved for Opinion Letter Format]



[Reserved for Opinion Letter Format]

[Reserved for Opinion Letter Format]



**(2) Exit Fee.**

- (a) [LA § 2.3(b) Terms of Payment-Maturity, p. 5]. Due upon acceleration for any reason.
- (b) [LA § 2.3(b) Terms of Payment-Maturity, p. 5]. Due upon maturity if not converted to Permanent Loan with [Lender 1].

**(3) Casualty Loss or Condemnation.** [LA § 2.3(b) Terms of Payment-Prepayment, p. 6].

No prepayment premium due if prepaid due to casualty loss or condemnation.

**(4) Prepayment Premium.** [LA § 2.3(b) Terms of Payment-Prepayment, p. 6].

May prepay in whole but not in part upon payment of amounts due under §2.3(b) (presumably the Exit Fee) upon 30 days' notice, otherwise no prepayment premium due.

**3. Absolute Assignment of Rents.** [Mtge. Art. 5 Assignment of Rents and Leases, p. 11]. [Assignment of Leases and Rents].

*Note: Assigns both Rents and Leases.*

**4. Venue Selection.** Does not contain this provision.**5. Specific Laws.****a. Texas Report.**

*Note: Insert the Specific Laws qualifications of the Texas Report.*

**6. Due Diligence.****a. Certificate of Principals.** Lender has required that our knowledge-based opinions be based on inquiry of the Client as to facts pertinent to give our opinion.

*Need: Prepare certificate as to Client's knowledge.*

**b. Zoning.** Opinion is to the effect that the zoning of the Property is the zoning contemplated by the loan documents.

*Need: Requested Zoning letter from city.*

**c. Permits.** The opinion is "to the best of our knowledge...."

*Need:* Requested client to furnish us copy of all permits in its records. Requested Seller to do so.

7. **Liens.** [Mtge. 1.1 Definitions-Mortgaged Property, p. 1]. Broad definition of property: licenses, intangibles.
  - a. **UCC Qualifications.**

*Add:* Add Report qualifications.

8. **Attorney if Fact.**
  - a. **Casualty Loss.** [LA §3.1(d) Insurance-Adjustments, p. 9]. Lender appointed as attorney if fact to adjust claims.
  - b. **General.** [Mtge. §8.4 Attorney-in-Fact, pp. 13-14].
  - c. **Rents.** [Assgmt. §8 Appointment, p. 3].
9. **Lender Discretion.**
  - a. **Condemnation.** [LA §3.3 Condemnation]. “sole discretion” to apply proceeds towards loan.
  - b. **Acceleration if Bankruptcy of Joinder Party.** [LA §10.1, p. 25].
  - c. **Waiver.** [LA §11.6 Approvals: Third Parties; Conditions, p. 28].
10. **Indemnification.**
  - a. **Environmental.**

[LA §4.4 Allocation of Risks and Indemnity, p.p. 13-14]. Broad form with exclusion for Lender’s gross negligence and willful misconduct.

[Hazardous Materials Indemnity Agreement, §3.1 Indemnity, pp. 2-3].
  - b. **General.** [LA §8.10, p. 23]. Arising out of ownership, rents, ...
  - c. **Cure Expenses.** [§10.3 Lender’s Right to Perform the Obligation, pp. 24-25].
  - d. **Claims Against the Trustee.** [Mtge. §7.1 Certain Rights, p. 12]. Borrower indemnifies Trustee and indemnity not reduced or impaired by principles of comparative or contributory negligence.
  - e. **Assignment of Rents.** [Assgmt. §10 Indemnification, p. 3]. Excludes gross negligence or willful misconduct.

*Note: Does not comply with the fair notice or express negligence doctrine.*

11. **Due On.**

- a. **Sale.** [LA §8.1 Due on Sale and Encumbrance; Transfers of Interest, p. 21]. [Mtge. §3.9 Transfer or Encumbrance of Mortgaged Property, pp. 4-5]. Not to be unreasonably withheld provided ....
- b. **Existence.** [LA §8.6 Legal Existence, Name, Etc., p. 22].

12. **Usury Savings Clause.** [LA §11.3 Limitation on Interest, pp. 27-28]. [Mtge. §8.1 Limitation on Interest, p. 13].

13. **Waivers.**

- a. **Course of Dealings.** [LA §11.12 Waivers, p. 29]. No course of dealings, delay in exercising rights constitutes a waiver.
- b. **Jury Trial.** [LA § 11.20 Waiver of Jury Trial, p. 31],[J §2(e)]. [HMIA § 17, p. 7].

*Note: Assignment of Leases and Rents does not contain a waiver of jury trial.*

*Note: Jury trial waiver in Joinder is not in all caps or conspicuous.*

- c. **Punitive or Consequential Damages.** [LA §11.21 Waiver of Punitive or Consequential Damages, p. 31].
- d. **Statute of Limitations.** [J §1(f) Waivers, p. 1].
- e. **Waiver of Redemption, Notice and Marshaling of Assets.** [§4.5, p. 9].
- f. **No Mortgagee In Possession.** [Mtge. §4.10 No Mortgagee in Possession, p. 10].
- g. **Claims Against the Trustee.** [Mtge. §7.1 Certain Rights, p. 12]. Borrower indemnifies Trustee and indemnity not reduced or impaired by principles of comparative or contributory negligence.
- h. **Stay, Moratorium and Similar Rights.** [Mtge. § 8.1 Waiver of Stay, Moratorium and Similar Rights, p. 14].

*Note: Other than the Jury waiver in the LA, the other waivers do not comply with the fair notice or the express negligence doctrine.*

14. **Limitation of Liabilities.** [LA §12.1 Limitation on Liability, pp. 31-32].

15. **Limitation on Liability of Lender.** [LA §12.2 Limitation on Liability of Lender's Officers, Employees, etc., p. 32].

- 16.** **Receiver.** [§4.1(e) Remedies-Receiver, p. 8]. Obtain without notice or adequacy of the Mortgaged Property.

ZONING OPINION LETTER FORMAT

[date]

Re: \$ \_\_\_\_\_ Mortgage Loan to \_\_\_\_\_

Ladies and Gentlemen:

We have acted as [special] counsel to \_\_\_\_\_, a \_\_\_\_\_ ("Borrower") [and \_\_\_\_\_, a \_\_\_\_\_, the general partner in Borrower (the "General Partner")], in connection with that certain \$ \_\_\_\_\_ mortgage loan from \_\_\_\_\_ evidenced by the documents described below. In addition, we have acted as [special] counsel to \_\_\_\_\_ (herein collectively referred to as (the "Indemnitors").

For purposes of rendering this opinion, we have examined the zoning ordinances of the City of \_\_\_\_\_, and County of \_\_\_\_\_, \_\_\_\_\_, and conducted such investigations and inquiries as we deem appropriate with local zoning authorities.

Based upon the zoning ordinances currently in effect and our investigation of the uses and improvements upon the Project, known as \_\_\_\_\_, located on the real property described on Exhibit A attached hereto and incorporated herein by reference for all purposes, we render the opinions as follows:

1. Current Zoning. The Land on which the Project is constructed is zoned \_\_\_\_\_ and is subject only to the use restrictions generally applicable to that classification which are contained in the Zoning Ordinance.
2. Conformance with Current Zoning Requirements. Based on the materials available from the City of \_\_\_\_\_ and County of \_\_\_\_\_, \_\_\_\_\_, the survey of the property, and such other information as we deem necessary or appropriate, we have no reason to believe that either the use of the Property or the improvements thereon are nonconforming.
3. Right to Rebuild following Casualty. In the event of casualty, the Project may be rebuilt substantially in its current form (i.e., no loss of square footage, same building footprint) upon satisfaction of the following conditions and/or the limitations **[INSERT specific requirements concerning resumption of construction activity or completion, compliance with new building codes, zoning or subdivision requirements (such as buffering, setbacks, parking, landscaping, impact-related development fees and processing requirements):**  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.
4. No Further Approvals or Licenses Required. The current use of the Project by its present owners for [a \_\_\_\_\_ square foot retail center] [a \_\_\_\_\_ unit apartment complex] is a permitted use under the Zoning Ordinance without the necessity of any rezoning, special exceptions, use permit, variance or other approval. We are not aware of any other permit or license required by the City of \_\_\_\_\_ or County of \_\_\_\_\_, \_\_\_\_\_ that a purchaser must obtain before it may



- acquire the Project or before the Project may *continue* to be used in the manner in which it is presently being used.
5. Compliance with Subdivision Regulations. The Project complies with, or is otherwise exempt from, applicable subdivision regulations.
  6. No Applications Pending. To our knowledge, no application for rezoning of the Project, or for a special or conditional use permit or variance in connection with the Project, is now pending. No proceeding to challenge the zoning, or other governmental approval or use of the Project is pending, or, to the best of our knowledge, overtly threatened.
  7. Certificates of Occupancy Issued. A valid final certificate of occupancy in the name of \_\_\_\_\_ has been issued and is now outstanding for the Project. It is not necessary for a new purchaser of the Property to obtain either a new certificate of occupancy or an amendment to the existing certificate of occupancy in order to own, use and occupy the Project in the manner in which it is presently being used by the current owners and their tenants.
  8. No Violations, All Development-Related Fees Paid. We are unaware of (1) the existence of any violations or alleged violations of any zoning, subdivision, building or similar ordinances or regulations applicable to the Project within the past three years, or ( any enforcement proceedings against the Project that are pending or contemplated. All fees required to have been paid in connection with the development and use of the Project, including any impact-related fees, have been paid, and no such fees which would have applicability to the Project are otherwise pending or contemplated.
  9. No Rent Control. The Project is not subject to any rent control regulations.
  10. Compliance with Set Back Regulations. The Project complies with all applicable setback requirements.
  11. Compliance with Parking Regulations.
    - (a) There exist \_\_\_\_\_ regular parking spaces and \_\_\_\_\_ handicapped parking spaces on the subject property.
    - (b) The zoning ordinance of \_\_\_\_\_ requires that the subject property have \_\_\_\_\_ regular parking spaces and \_\_\_\_\_ handicapped parking spaces, calculated as follows: [provide basis for calculation]
    - (c) The subject property meets the current parking requirements set forth in the zoning ordinance of \_\_\_\_\_.

[Include a similar tab for loading areas if necessary.]
  12. Compliance with Floor Area Ratio Requirements.

- (a) The floor area of the subject property, calculated in conformance with the zoning ordinance of \_\_\_\_\_, is \_\_\_\_\_ square feet.
- (b) The land area of the subject property is \_\_\_\_\_ square feet.
- (c) The floor-area ratio of the subject property, calculated in conformance with the zoning ordinance of \_\_\_\_\_, is \_\_\_\_\_.
- (d) The subject property [meets]/[does not meet] the floor area ratio requirements set forth in the zoning ordinance of \_\_\_\_\_.

13. For your information, we have attached the following information [**choose as applicable**]:

- \_\_\_\_\_ Sections of the applicable zoning ordinance or development code pertaining to (i) the zoning districts affecting the Project, including any applicable overlay districts; (ii) parking requirements; (iii) nonconforming uses or improvements, and any limits on rebuilding the improvements following casualty; and (iv) such other matters as we have deemed material to your inquiry;
- \_\_\_\_\_ Zoning section sheet or tax map indicating the zoning classification for the Property;
- \_\_\_\_\_ Information on property-specific zoning or other land use approvals, including staff reports, adopted ordinances, applicable development conditions or other agreements affecting the use and development of the Property;
- \_\_\_\_\_ Approved site plan for the Project, evidencing approval by the applicable zoning enforcement official; and
- \_\_\_\_\_ Certificates of occupancy (or equivalent evidence) pertaining to the Project.

This opinion letter shall not be relied upon by any party other than Lender, any assignee of Lender, Borrower, their respective successors and/or assigns, and their respective legal counsel.

Sincerely yours,

WILLIAM H. LOCKE, JR.  
BOARD CERTIFIED REAL ESTATE LAW  
COMMERCIAL, RESIDENTIAL AND FARM AND RANCH  
TEXAS BOARD OF LEGAL SPECIALIZATION

WRITER'S DIRECT NUMBER:  
(512) 480-5736

E-MAIL ADDRESS:  
blocke@gdhm.com

\_\_\_\_\_, 2000

Ms. \_\_\_\_\_  
Escrow Agent  
\_\_\_\_\_ Title Company  
\_\_\_\_\_ Road  
Austin, Texas 787\_\_

Federal Express-\_\_\_\_\_ Delivery

Mr. \_\_\_\_\_ [Seller's Attorney]  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, Texas 787\_\_

Federal Express-\_\_\_\_\_ Delivery

\_\_\_\_\_ [Seller]  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn.: \_\_\_\_\_

Federal Express-\_\_\_\_\_ Delivery

**Purchaser's Title Objections Letter**

**Re:** Sale of the property (the "**Property**") described in or to be covered by the Contract for Sale and Purchase of Real Property (the "**Sales Contract**") by \_\_\_\_\_ (the "**Seller**") to \_\_\_\_\_ (the "**Purchaser**")  
Title Co. GF Number: \_\_\_\_\_

Dear Ms. \_\_\_\_\_, Mr. \_\_\_\_\_:

**A. Our Client.** This Purchaser's Title Objections Letter is being sent both by overnight delivery. Our Firm is counsel for \_\_\_\_\_ ("**Purchaser**"), the buying entity which signed the Sales Contract as the Purchaser. This Letter does not amend, waive or override the written Sales Contract between Seller and Purchaser. The title objections made in this Letter may be amended, waived or overridden by us. The matters contained in this Letter does not waive or release Seller from its obligations on the Sales Contract.

**B. Enclosed.** Enclosed with this Letter is a copy of the Commitment for Title Insurance (“Title Commitment”) issued by \_\_\_\_\_ Title Company (the “Title Company”) for \_\_\_\_\_ (the “Title Underwriter”) Effective Date \_\_\_\_\_, 2000 at \_\_\_\_\_ a.m., and Issued Dated \_\_\_\_\_, 2000 at \_\_\_\_\_ a.m., showing the record title holder to the Property as being in the Seller, subject to the matters set forth in Schedules A, B and C and the Terms and Conditions of the Title Commitment, and the Proposed Insured as being Purchaser.

**C. Title and Survey Objection Periods.** The Sales Contract provides in ¶\_\_ that the Purchaser is afforded until \_\_\_\_\_, \_\_\_\_\_, 2000 to object to the status of title reflected in the Title Commitment and in ¶\_\_ until \_\_\_\_\_, \_\_\_\_\_, 2000 to object to the status of the Property reflected in the Survey.

**D. Survey.** The Purchaser has not yet received the Survey, but anticipates receiving it prior to \_\_\_\_\_, 2000. Purchaser reserves its right to object to any matter shown in the Title Commitment based on matters to be reflected by the Survey (*e.g.*, omission of property from the Title Commitment, the location of easements, set back lines, encroachments or the detection of boundary line conflicts) such that Purchaser may object to such matters prior to \_\_\_\_\_, 2000 as reflected on the Survey to be received prior to \_\_\_\_\_, 2000.

**E. Schedule A Objections.** The following objections are made to matters reflected in Schedule A to the Title Commitment:

(1) **Item 2.** It appears from Schedule B that there are various easements appurtenant to the Property and that Item 2 needs to also cover these appurtenant easements. Therefore, objection is raised to the failure to state in Item 2 “easement estate” as to any item that turns out to be an appurtenant easement to the Property.

(2) **Item 4.**

(a) **Omitted Property.** Objection is raised to the omission from the Item 4 of any tract of land that Purchaser determines based on its review of the Survey that it thought it was purchasing that is not included within the description of the Property set out in Item 4. Specific objection is now raised for the failure of Item 4 to include \_\_\_\_\_ as part of the Property being conveyed to Purchaser and insured by the Title Policy to be issued at closing to the property conveyed to \_\_\_\_\_, recorded in Volume \_\_\_\_\_, Page \_\_\_\_\_, \_\_\_\_\_ County Real Property Records.

(b) **Failure to Describe by Plat Reference.** Objection is raised to the description of the Property as being acreage tracts to the extent it is determined that the any of such acreage descriptions are actually platted lots.

(c) **Appurtenant Easements.** Objection is raised to the omission from Item 4 of any easement appurtenant to the Property, including the Items listed in Schedule B, as Items 9\_\_ and 9\_\_, for example if the instruments reflected in such items create reciprocal easements.

**F. Schedule B Objections.** Objection is raised to the inclusion of the following Items as exceptions:

(1) **Item 1, Item 9x:** Objection is raised to the following Items:

(a) Volume , Page . This appears to be applicable to property other than the Property.

(b) Volume , Page . This appears to be applicable to property other than the Property.

(2) **Item 2 - Survey Exception.** Objection is raised/reserved to the inclusion of Item 2 as a general exception, and Purchaser requires that the Title Company review the Survey once it is prepared and list any specific items that it will carry forward into the Title Policy by virtue of the deletion of Item 2 (except for the non-deletable portion of this Item “shortages in area” which may not be deleted under title insurance rules).

(3) **Item 9x - Oil, Gas and Mineral Reservation.** Purchaser objects to the failure of the Title Commitment and Title Policy to contain express insurance as is permitted by Texas Title Insurance Rules expressly insuring that no use may be made of the surface of the Property by the owner of the mineral estate so reserved in the instrument listed as Item 9x.

(4) **Items not Limited by Designation in Schedule B as to the Tract Affected.** Objection is raised to the failure in Schedule B to designate as to the following Items which of the Tracts in Schedule A, Item 4 they relate to and once they are designated in a Updated, Revised Title Commitment, reservation is here made to object to the Items to the extent they are objectionable: Items 9 \_\_\_\_\_.

(5) **Item 9x.** Objection is raised to Item 9 \_\_\_ to the extent that any of the monies to be paid by the owner of the Property pursuant thereto have not been paid prior to closing.

(6) **Item 9x - Lease.** Objection is raised to Item 9 \_\_\_ to the extent that it is determined that the Seller is in default of its obligations under the lease as of closing.

(7) **Items 9x.** Objection is raised to Items 9 \_\_\_\_\_ to the extent that it is determined that the Seller is in default of its obligations under any of these agreements as of closing.

**F. Schedule C Curative Items to Be Cured by Seller.** Objection is raised as to any matters on Schedule C to the Title Commitment that are items that are for the Seller to satisfy in order for the Title Company to issue the Title Policy to the extent Seller does not satisfy same (the “**Schedule C Curative Items to be Cured by Seller**”) including:

(1) **Seller’s Authority.** [Items 5 and 6]. Providing to the Title Company satisfactory proof of the authority of the person signing on behalf of the Seller to bind the Seller.

(2) **Subdivision Association Assessments.** [Item 8]. Providing the Title Company with proof that no unpaid assessments are owing against the Property.

(3) **Legal Description.** [Item 7]. Providing the Title Company with a sufficient legal description of the Property.

(4) **No Defect, Lien or Other Matter After Title Commitment.** [Item 4]. Curing any defect, lien or other matter that arises or is filed after the date of the Title Commitment.

(5) **Curative.** [Item 2]. Providing the Title Company with evidence that:

(a) no person occupying the land claims any interest in that land against the person named in Item 3 of Schedule A;

(b) all standby fees, taxes, assessments and charges against the Property have been paid;

(c) all improvements or repairs to the Property are completed and accepted by the owner, and that all contractors, subcontractors, laborers and suppliers have been fully paid, and that no mechanic's, laborer's or materialmen's liens have attached to the Property that are not released as of closing; and

(d) there is legal right of access to and from the land.

**G. Additional Title Matters to be Delivered by Seller.** As a condition to closing you are to obtain the following documents (the "**Closing Documents to Be Delivered by Seller**"):

(1) **Seller's Affidavits.** Affidavits of the following types of affidavit (which may be combined into one or more affidavits (the "**Seller's Affidavits**") as may be required to issue the Title Policy in form required by the Sales Contract and to close in the fashion required by the Sales Contract

(a) **Non-Foreign Person Affidavit.** Affidavit attesting that the Seller is not a foreign person (the "**Non-Foreign Person Affidavit**").

(b) **Affidavits of Debts and Liens.** Affidavit in form acceptable to the Title Company by the Seller as to there not being "debts or liens" or other matters customarily covered by such form of title company required affidavit to issue the Title Policy to the Purchaser (the "**Affidavits of Debts and Liens**").

(c) **Surveyor's Affidavit.** The affidavit of the Surveyor, at the expense of the Purchaser, in form acceptable to the Title Company to delete the "Parties in Possession Exception", the "Roads Exception" and the "Visible and Apparent Easements Exception" from the Title Commitment and the Title Policy which deletion is to be based on an inspection of the Property undertaken for the Title Company (the "**Surveyor's Affidavit**").

(d) **Non-Production Affidavit.** The affidavit of such affiants as are acceptable to the Title Company to delete any exception to the Title Policy for oil and gas leases or term interests of record in \_\_\_\_\_ County, Texas (the "**Non-Production Affidavit**").

(e) **Affidavit as to Use and Possession.** The affidavit of such affiants as are acceptable to the Title Company as to the use and possession of the Property to issue the Title Policy without the "Parties in Possession Exception", the "Roads Exception" and the "Visible and Apparent Easements Exception" or other similar use and possession exceptions (the "**Affidavits as to Use and Possession**").

(2) **Insured Closing Service Letter.**

(a) **T-51.** A Form T-51 Purchaser Insured Closing Service Letter signed by the Title Underwriter and Purchaser covering the handling by the Title Company of the Settlement Funds (the “**Insured Closing Service Letter**”) and acknowledged by telephone confirmation by the Title Underwriter that it has received in its offices a telefaxed copy of the Insured Closing Service Letter signed by the Purchaser and that the Insured Closing Service Letter is in effect.

(b) **Escrow Account Auditor’s Letter.** Letter from the Title Company’s independent C.P.A. auditor stating that the Escrow Account and other interest bearing accounts opened in the name of the owner/beneficiary of the escrowed funds with the financial institution as the escrow agent are audited as required by the Texas Department of Insurance (the “**Escrow Account Auditor’s Letter**”).

(c) **Updated, Revised Title Commitment.** A currently dated and effective Title Commitment updated as of a time on the Closing Date prior to Closing and revised in accordance with these Purchaser’s Closing Instructions (the “**Updated, Revised Title Commitment**”).

(3) **Title Policy.** As of Closing, before the Title Company may disburse any of the Settlement Funds, the Title Company will need determine that it can as of closing issue to Purchaser an Owner Policy of Title Insurance (the “**Title Policy**”) in the form prescribed by the Texas State Board of Insurance and the Sales Contract, written by the same underwriter that issued the Title Commitment with an Issuance Date and Effective Date and time the same as the Closing Date, under the above-referenced GF number. The Owner Policy must be issued in accordance with the Title Commitment, except as follows:

(a) **Insured’s Name.** The Insured under the Title Policy must read exactly as the Purchaser's name is set forth in the Deed;

(b) **Effective Date.** The effective date and time of the Title Policy must be the date and time on which the Deed is filed of record;

(c) **Description.** The real property described in the Title Policy must be the same property described in the Deed and in the Survey of the Property;

(d) **Title.** Fee simple title to the real property described in the Deed must be shown by the Title Policy to be vested in the Purchaser, and any easements benefitting the real property must be included in the description of the property insured by the Title Policy;

(e) **Survey Exception.** Item 2 of Schedule B of the Owner Policy, must be modified to read “shortages in area” only (the “**Survey Exception**”) [referred to as “**Deletion of the Survey Exception**”] with the cost of the Deletion of the Survey Exception being paid for by the \_\_\_\_\_ and provided, however, if any specific exception is to be listed in Schedule B as a result of the Deletion of the Survey Exception, the Title Company must prior to Closing advise Purchaser and us of the new specific exception.

(f) **Taxes Exception.** Item 3 of Schedule B of the Owner Policy must be modified to except only to taxes, assessments, and stand-by fees for the year 2000 and subsequent years, not yet due and payable (the “**Taxes Exception**”);

(g) **Schedule B Exceptions.** The exceptions to title shown on Schedule B of the Owner Policy must include only the exceptions permitted herein (the “**Permitted Schedule B Exceptions**”).

(h) **Schedule C Items Satisfied.** All matters described on Schedule C of the Commitment must be satisfied and resolved to your complete satisfaction so that none of these matters will appear as exceptions in the Owner Policy (“**Schedule C Items Satisfied**”).

(i) **Parties in Possession Exception and Visible and Apparent Easements Exception.** There must not appear in the Updated, Revised Title Commitment or the Title Policy any exception for:

(a) **Parties in Possession Exception.** “Parties in possession” (the “**Parties in Possession Exception**”).

(b) **Visible and Apparent Easements Exception.** “Visible and apparent easements” (the “**Visible and Apparent Easements Exception**”).

(j) **Inspection Exception.** There must not appear in the Title Policy any matter which would be revealed by an inspection of the Property conducted by the Title Company or its agent or contractor, if an inspection is or would be made by the Title Company, its agent or contractor (the “**Inspection Exception**”). If the inspection reveals matters that are to be listed in the Title Policy, then these matters must be disclosed to Purchaser and us and to Seller and Seller’s Counsel before the Settlement Funds are deposited with the Title Company and must be approved in writing before the request for the wire transfer.

Purchaser reserves its right to make further objection on or before \_\_\_\_\_, 2000 as to title matters. If you have any questions regarding any aspect of this transaction, please call us at your earliest opportunity.

Yours very truly,

GRAVES, DOUGHERTY, HEARON & MOODY  
A Professional Corporation

William H. Locke, Jr.

WHL/cfg  
Enclosure

cc: \_\_\_\_\_





- (2) **Title Company Review of Revised Survey.**
- (3) **Survey.** Have survey revised to reflect the following:
  - [a] **Refer to Title Commitment.** GF # of Title Commitment and Title Commitment Date;
  - [b] **Certificate Addressed to Title Company.** Have Certificate be addressed to Title Company and its underwriter; and
  - [c] **Certificate Addressed to Buyer and Lender.** Have Certificate be addressed to Buyer and Lender.
- (b) **Taxes Exception.** (Schedule B, Item # 5).
  - (1) **Worksheet.** Have Title Company furnish a worksheet as to how they have calculated the tax proration for 2000.
  - (2) **Title Certificates.** Have Title Company furnish pre-closing a copy of the Tax Certificates issued by the Tax offices for each taxing jurisdiction.
  - (3) **New Tax Account No.** Contact Tax Authorities to set up new separate tax account nos. for this tract. Determine if there will be any problem in doing this.
  - [(4) **Open Space/Ag Tax Exemption.** Determine the basis under which the property is being taxed. Does the Buyer need to file any forms with the Tax Authorities to qualify for the Exemption that is currently on the property?]
- (c) **Leases.** (Schedule B, Items 9 \_\_ : \_\_\_\_\_). Must be deleted.
- (d) **Parties In Possession and Visible and Apparent Easements General Exceptions.** (Schedule B, Item 9 \_\_ ). Require the Title Company to make an inspection of the Property as of closing and reissue a revised Title Commitment.
  - (1) **Title Company to Identify Requirements to Delete General Exception.** Ask the Title Company to identify its requirements to delete this exception.

- (2) **Pre-Closing Title Company Inspection.** If it involves inspecting the Property, then ask that the Title Company pre-closing inspect the Property and identify to us what matters it will continue to list as exceptions based on its inspection
- (3) **Further Requirements.** The Title Company needs to list what actions will be needed to delete the exceptions it makes based on its pre-closing inspection (*e.g.*, affidavit of the Seller, etc.).
- (4) **Process.** Determine the process involved in the inspection and make arrangements for the inspection.
- (5) **Cost.** Have Title Company identify the cost and who is to undertake the inspection.
- (6) **Roads.** Have Title Company specifically confirm that it will not make a general exception for “roads” and that it is obtaining from Seller what ever documentation (*e.g.*, affidavits) to insure that there is not access across the Property by adjoining neighbors using existing roads that will survive closing.
- B. Schedule C.**
- 1. **Actions.** Identify actions to resolve and delete conditions to Title Policy issuance.
- 2. **Title Company Sign Off.** Determine acceptance of each such actions with Title Company prior to funding.
- 3. **Title Company Requirements.** Determine Title Company Schedule C requirements related to new entity.
- 4. **Resolutions of Seller/Intermediary Sellers.**
- (a) **Title Company Review.** Have Title Company review all resolutions or other authorizations for entities to sign closing documents.
- (b) **Buyer Review.** Have Title Company/Seller(s) provide Buyer with a copy of each proposed resolution before the pre-closing.
- 5. **Resolutions of Buyer/Buyer’s Assignor.**
- (a) **Title Company Review.** Have Title Company review all resolutions or other authorizations for entities to sign closing documents.

- (b) **Seller/Lender Review.** Provide Seller and Lender with a copy of each proposed resolution before the pre-closing for their review and approval.

## II. **Survey.**

- A. **Addressee.** Surveyor's certificate addressed to Title Company, Title Underwriter, Seller, Buyer and Lender.

- B. **Compare.**

- (1) **Title Policy.** Verify acceptance by Title Company and use in Title Policy.
- (2) **Schedule B Exceptions Depicted.** Locate all Schedule B exceptions.
- (3) **Flood Plain Classification.** Review Surveyor's certificate as to flood plain classification.
- (4) **Lender Approval.** Verify acceptance by Lender.

## III. **Insurance.** Certificate of insurance in form acceptable to Lender:

- A. **Approved Issuers.** Best Rating.

- B. **Approved Coverages.**

- 1. **Lines.**

- (a) **Property.**

- (b) **Liability.**

- (c) **Rent Loss.**

- 2. **Additional Insured/Mortgagee.**

- (a) **Owner.** Owner and its partners and principals specifically listed.

- (b) **Lender.**

- (c) **Manager.**

- 3. **Waiver of Subrogation.** As to Owner and its partners and principals (each specifically referenced).

- 4. **Certificate Holder.** Certificate Holder designation is different than being named as additional insured or mortgagee in Certificate of Insurance.

IV. **Due Diligence Approvals.**

- A. **Termite Inspection.**
- B. **Inspection.**
  - (1) **Building.**
  - (2) **Personal Property - Furniture, Fixtures, Equipment and Supplies.**
- C. **Environmental Audit.**
- D. **Reliance Letter.** Letter from each inspector to Lender confirming that Lender may rely upon Report.
- E. **Local Law Search.**
  - 1. **Zoning.**
    - (a) **Zoning Comfort Letter.** City letter addressed to Buyer and Lender.
    - (b) **Ordinance.** Copy of Ordinance as to Property.
    - (c) **Zoning Map.**
  - 2. **Building Code.**
    - (a) **Code Comfort Letter.** City letter addressed Buyer and Lender.
    - (b) **Certificate of Occupancy.**
    - (c) **Other Applicable Permits.**
      - (1) **Swimming Pool.**
      - (2) **Signage.**
  - 3. **Waste Water Discharge.** LUEs.

**V. Inventory.** **A. Personal Property.**

- 1. **Pre-Closing.** Inventory of all furniture, fixtures, equipment and supplies being sold to Buyer.
- 2. **Confirmation as of Closing.** Confirmation at closing that all Personal Property is in good working order and at site.

**B. Service Contracts.**

- 1. **Laundry.**
- 2. **Cable.**
- 3. **Security.**
- 4. **Trash.**
- 5. **Management.**

**VI. Project Bank Account.**

- A.** Provide evidence that a Bank account has been set up in the borrowing entity's name. If a bank statement is not available by loan closing, then have the Bank provide a letter addressed to Lender acknowledging the existence of the account (attach a copy of the signature card).

**VII. Organizational Documents.**

- A. Provide to Lender.** Provide all organizational documents to the Lender, including preparing resolutions and assignment of the contract to the new entity being formed to close the purchase of the Property. Obtain approval by Lender of organizational documents (e.g., single purpose entity provisions required by Lender).
- B. Assignment.** Assignment from Contract Buyer to Buying Entity.
- C. Certificates.**
  - 1. **Certificate of Existence.** Secretary of State.
  - 2. **Certificate of Good Standing.** Comptroller.

**VIII. Loan Closing Requirements.**

- A. Fee.** Commitment fee and all other fees paid to Lender.
- B. Legal Opinion Approval by Lender.**
  - 1. Choice of Law.**
  - 2. Opining Jurisdictions.**
    - (a) Texas.**
    - (b) Other State.**
  - 3. Usury Considerations.**
    - (a) Classification of Loan under Texas Law.**
      - (1) “Commercial Loan”.**
      - (2) “Qualified Commercial Loan”.**
      - (3) “First Lien Residential Loan”.**
    - (b) Matters to Address in Opinion.**
      - (1) Points.**
      - (2) Prepayment Penalty.**
      - (3) Late Charges.**
      - (4) Savings Clause.**
  - 4. Local Law Compliance.**
    - (a) Zoning.**
    - (b) Building Code.**
  - 5. Personal Property.** Lien perfection and priority.
- C. O & M Plan.** If needed, Buyer to obtain from Environmental Consultant.
- D. Financial Reports.** See Lender's Checklist list other items to be prepared and furnished to Lender including financial statements, Property cash flow audits, appraisals, historical operating statements, “gap” operating statements, and other information required for each loan.

E. **Wire Transfer/Escrow.**

F. **Loan Document Review and Approval.**

**IX. Closing Funding.**

A. **Title Company's Escrow Account.**

1. **Acct. No.** \_\_\_\_\_ Bank: Acct. No. \_\_\_\_\_.

2. **Wire Instructions.** ABA Wire Transfer Instructions. Obtain pre-closing written wire instructions from Title Company.

B. **Buyer's Acct.** \_\_\_\_\_ Bank Acct. No. \_\_\_\_\_.

C. **Title Company to List Steps to Complete Insured Closing Handling of Funds and Funding.** Have the Title Company obtain prior to Closing an insured closing letter (Art. 9.49 of the Texas Insurance Code). Procedure involves:

1. **Letter Returned to Underwriter Pre-Closing.** Letter must be requested, received and signed and returned to the underwriter prior to closing.

2. **Duplicate of Letter delivered to Buyer Pre-Closing.**

3. **Audited Escrow Account.** Title Company must deposit settlement proceeds in an audited escrow account of the Title Company. Letter from Title Company to Buyer confirming audited account status. Verification by Title Company's Bank of account style, status.

4. **Account at Title Company's Bank.** Open account of Title Company at Buyer's Bank to facilitate quick "inside-the-bank" transmission of closing funds to title company as opposed to relying upon Dallas fed wire.

5. **Coverage of Agent.** Have underwriter confirm that the Insured Closing Letter covers closing actions of specified title company escrow agents handling funds.

D. **Fed Id No.** Furnish Title Company with Buyer's Fed Id. No. \_\_\_\_\_.

**X. Closing Documents and Additional Actions.**

A. **Deed.**

1. **Form.** Have Seller (and intermediary Buyer if any) furnish pre-closing a copy of the deed (s) to be used to transfer title from the present owner to the Buying Entity.

2. **Survey.** Revise Deed description.



- 3. **Permitted Exceptions.** Agree on list.
- B. **Assignment of Contract.**
- C. **Service Contracts/Leases.**
- 1. **Termination of Existing Service Contracts/Leases.**
- 2. **Assignment and Assumption of Contracts, Licenses and Permits.**
- (a) **Exhibit.** To be attached as Exhibit to Assignment is list of assigned service contracts.
- (b) **Actions.** Parties need to do the following as of Closing:
  - (1) **Laundry.**
    - [a] **Notice of Sale.** Have Seller provide notice of sale of Project to Buyer. Approve form of Vendor Notification Letter.
    - [b] **Insurance.** Obtain proof of insurance and have Buyer and its Lender listed as additional insureds.
    - [c] **Proration.** Arrange proration of gross receipts sharing. Request proration of prepaid bonus.
    - [d] **Estoppel Certificate.** Have Buyer advise if want to seek.
    - [e] **SNDA.** Lender has advised that it requires the Laundry Lease be subordinated to Lender's Lien. Lender's counsel is to provide a form of SNDA to be sent to Seller to send to Laundry Company.
  - (2) **Cable.**
    - [a] **Notice of Sale.** Have Seller provide notice of sale of Project to Buyer. Agree on form of Vendor Notification Letter and deliver to addressee.
    - [b] **Insurance.** Obtain proof of insurance and have Buyer and its Lenders listed as additional insureds.
    - [c] **Proration.** Arrange proration of monthly service fees owing by Owner.
    - [d] **Estoppel Certificate.** Have Buyer advise if want to seek.

- (c) **Others.** Have Seller notify of change of ownership and prorate expenses.
- (d) **Delivery.** Seller to deliver originals of all Service Contracts.

**D. Assignment and Assumption of Leases.**

- 1. **Notice of Sale.** Have Seller provide notice of sale of Project to Buyer. Prepare form of Tenant Notification Letter. Have Seller prepare and send notice letters to all tenants on certified rent roll.
- 2. **Proration.**
  - (a) **Rents.** Arrange proration of monthly collected rents.
  - (b) **Deposits.** Audit of deposits.
- 3. **Leases.** Seller to deliver original of all Leases.

**E. Bill of Sale.**

- 1. **Inventory.** Seller to attach inventory as Exhibit to Bill of Sale.

- F. Vendors.** Have Seller send notice of sale to any vendors in addition to Service Contract providers.

**G. Utilities.** In addition to services provided by Service Contracts:

- 1. **Electric.**
  - a. **Prorate.** Parties to arrange for meter reading.
  - b. **Transfer of Service.** Buyer to arrange for utility deposit and transfer of service.
- 2. **Water.**
  - a. **Prorate.** Parties to arrange for meter reading.
  - b. **Transfer of Service.** Buyer to arrange for utility deposit and transfer of service.
- 3. **Gas.**
  - a. **Prorate.** Parties to arrange for meter reading.
  - b. **Transfer of Service.** Buyer to arrange for utility deposit and transfer of service.

**4. Telephone.**

- a. **Prorate.** Parties to arrange for meter reading.
- b. **Transfer of Service.** Buyer to arrange for utility deposit and transfer of service.

**H. Title Company Forms.**

- 1. **Closing Statements.** Have Title Company provide *pro forma* closing statement in advance of “pre-closing”.
  - (a) **Credits.**
    - (1) **Earnest Money.**
    - (2) **Interest.**
    - (3) **Taxes.**
    - (4) **Tenant Deposits.**
  - (b) **Expenses.**
    - (1) **Third Party Services.**
      - [a] **Surveyor**
      - [b] **Inspectors.**
      - [c] **Attorney.**
    - (2) **Lender's Fees.**
    - (3) **Broker.**
  - (c) **Paid/Settled Out Side of Closing.**
    - (1) **Operating Expenses.** Identify.
    - (2) **Employees.** Terminate and rehire.
- 2. **Affidavits of Debts and Liens.** Have Title Company provide Buyer with the form of Affidavit that Seller will sign.
- 3. **Waiver of Inspection.** Notify Title Company that Buyer will not sign and that an inspection will be required.

- a. **Buyer Not to Waive.**
- b. **Title Company to Identify Additional Exceptions by Inspection.**
- c. **Buyer Review/Object.**
  
- 4. **Arbitration.** Notify Title Company that Buyer does not consent to arbitration.
- 5. **Other Forms.** Have Title Company provide Buyer with a copy of any other documents that the Buyer will be requested to sign by the Title Company. Need forms for review before “pre-closing”.
- 6. **Buyer’s Closing Instructions to Title Company.**

WILLIAM H. LOCKE, JR.  
BOARD CERTIFIED REAL ESTATE LAW  
COMMERCIAL, RESIDENTIAL AND FARM AND RANCH  
TEXAS BOARD OF LEGAL SPECIALIZATION

WRITER'S DIRECT NUMBER:  
(512) 480-5736

E-MAIL ADDRESS:  
blocke@gdhm.com

June 28, 2000

Ms. \_\_\_\_\_ Faxed (512) \_\_\_\_\_  
Escrow Agent  
\_\_\_\_\_ Title Company  
\_\_\_\_\_ Street  
Austin, TX 787\_\_

**Buyer's Closing Instructions**

**Re:** Sale of \_\_\_\_\_ (the "**Property**") by \_\_\_\_\_ (the "**Seller**")  
to \_\_\_\_\_ (the "**Buyer**" or the "**Borrower**") Your GF  
Number: \_\_\_\_\_

Dear Ms. \_\_\_\_\_:

**A. Our Clients.** These Closing Instructions are being sent both by telefax and by regular mail. Our Firm is counsel for \_\_\_\_\_ ("**Contract Buyer/Assignor**"), the buying entity which signed the Sales Contract as the Buyer, and for \_\_\_\_\_, the Assignee of the Contract Buyer/Assignor. Set forth below are our instructions for closing the sale of the Property to Buyer. These Closing Instructions do not amend, waive or override the written Sales Contract between Seller and Buyer, but are supplemental to the Sales Contract. These Closing Instructions may be amended, waived or overridden by us. The Closing Instructions do not waive or release Seller from its obligations on the Sales Contract.

**B. Enclosed.** Enclosed with these Closing Instructions are the following:

1. **Assignment.** Assignment of Commercial Improved Property Earnest Money Contract from Contract Buyer/Assignor to the Buyer/Assignee (the "**Assignment**"). The original of this document has been executed by \_\_\_\_\_, the \_\_\_\_\_ of \_\_\_\_\_ on behalf of \_\_\_\_\_ and will need to be executed by \_\_\_\_\_ on behalf of \_\_\_\_\_, the General Partner of the Buyer/Assignee.
2. **Other Enclosures.** \_\_\_\_\_.

**C. Instructions.****1. Closing Documents.** The following documents are referred to herein as the “**Closing Documents**”:**a. Closing Documents to Be Delivered by Buyer.** As a condition to closing, you are to obtain the following documents (the “**Closing Documents to Be Delivered by Buyer**”):**(1) Buyer’s Settlement Statement.** The Buyer’s Settlement Statement being prepared by you and to be executed by the Buyer for your use in closing the purchase by the Buyer of the Property (the “**Closing**”) reflects among other matters the following debits and credits:

**(a) Lines 211 and 511.** The Settlement Statement is to reflect a charge to Buyer on Line 211 and a credit to Seller on Line 511 of a tax proration “to mm/dd/00” (which date and derivative closing cost prorations may change due to delays in Closing and which date as so changed is the “**Settlement Date**” or the “**Closing Date**”).

**(b) Line 201.**

On Line 201 there is to be \$50,000 as a credit an Amount Paid By or In Behalf of Borrower as a credit in calculating the Cash From Borrower) the \$50,000 of Earnest Money initially deposited with the Title Company by the Initial Buyer which as assigned to Buyer (the “**\$50,000 of Earnest Money**”).

**[(b) Lines 506 and 201.** The Settlement Statement is to reflect on Line 506 a charge back to the Seller in calculating the reduction in the Amount Due to Seller of \$25,000 (the “**2<sup>nd</sup> \$25,000 Payment**”) for the portion of the Earnest Money previously delivered by the Title Company to Seller pursuant to Paragraph 1 of the Third Amendment.

The Settlement Statement is to reflect on Line 201 \$50,000 as a credit an Amount Paid By or In Behalf of Borrower as a credit in calculating the Cash From Borrower; the \$50,000 being the \$50,000 of Earnest Money initially deposited with the Title Company (the “**Initial \$50,000 of Earnest Money**”), a portion of which (the 2<sup>nd</sup> \$25,000 Payment) was previously released to Seller in accordance with Paragraph 1 of the Third Amendment and the other portion of which (the **1<sup>st</sup> \$25,000 Payment**) remains on deposit with the Title Company as of Closing.]

**[(b) Line 506.** On Line 506 there is to be a charge back to the Seller of ½ of the cost of the Survey obtained by Buyer in calculating the

Reductions in Amount Due to Seller, being a reimbursement to Buyer by Seller.]

- (c) **Line 801.** The Settlement Statement is to reflect on Line 801 under the column Paid From Borrower's Funds at Settlement a charge to Buyer of \$\_\_\_\_\_ as a loan commitment fee payable to \_\_\_\_\_ Lender.
  - (d) **Lines 1305 and 1306.** The Settlement Statement is to reflect on Lines 1305 and 1306 under the Column titled Paid From Borrower's Funds at Settlement as a payment by Buyer to Contract Buyer/Assignor of \$\_\_\_\_\_ in reimbursement to the Contract Buyer/Assignor of the \$\_\_\_\_\_ of the Earnest Money and Extension Fees paid by the Contract Buyer/Assignor on the Contract.
- (2) **Survey.** The plat with signed Surveyor's Certificate issued by the surveyor (the "**Surveyor**") must be in form satisfactory to the Title Company to Delete the Survey Exception as provided below (the "**Survey**").
  - (3) **Buyer's Affidavits.** Such Affidavits as are required by the Title Company and signed by such persons as are acceptable to the Title Company attesting to the matters set forth therein, including the authority of the persons signing the Closing Documents on behalf of the Buyer (the "**Buyer's Affidavit**").
  - (4) **Tax Letter.** Any letter agreement prepared by the Title Company reflecting the proration of taxes as of the Settlement Date to be signed by the Seller and the Buyer (the "**Tax Letter**").
  - (5) **Assignment of Contract.**
  - (6) **Buyer's Authorizations and the Assignment Authorization.**
    - (a) The resolutions of the Buyer/Assignee, a Texas limited partnership and its General Partner, \_\_\_\_\_, a Texas \_\_\_\_\_ authorizing the execution of the Closing Documents; and
    - (b) The resolutions of the Contract Buyer/Assignor authorizing the execution of the assignment of the Contract to the Buyer/Assignee which authorize the persons signing those documents to sign in the capacity in which those documents are signed (the "**Buyer's Authorization and the Assignment Authorization**").

The Buyer's Authorization and the Assignment Authorization are being delivered to you by the Contract Buyer/Assignor.

- (7) **Certificates as to the Buyer.** Certificates from the Secretary of State and the Comptroller of the State of Texas as to the existence of the Buyer and its General Partner and the good standing of the General Partner of the Buyer.
  - (8) **Schedule C Curative Items to Be Provided by Buyer.** All items deemed necessary by you to satisfy the items listed in Schedule C to the Title Commitment to be provided by Buyer (the "**Schedule C Curative Items to be Provided by Buyer**") including the Buyer's and its General Partner's organizational documents.
  - (9) **Lender.** Loan documents prepared by \_\_\_\_\_ ("**Lender**") to fund \$ \_\_\_\_\_ to Borrower and to be so reflected on Line 202 of Amounts Paid in Behalf of Borrower.
- b. **Closing Documents to Be Delivered by Seller.** As a condition to closing you are to obtain the following documents (the "**Closing Documents to Be Delivered by Seller**"):
- (1) **Deed.** The Seller has previously delivered to you a form of Deed approved by our client to be executed by the Seller and to be delivered by you upon its execution by Seller to Buyer at Closing by recording the same in the Official Public Records for Travis County, Texas; however, \_\_\_\_\_ Lender requires that the Deed contain a vendor's lien, which is to be transferred to it. The Deed will need to contain a form of vendor's lien acceptable to \_\_\_\_\_ Lender.
  - (2) **Schedule C Curative Items to Be Provided by Seller.** All items deemed necessary by you to satisfy the items listed in Schedule C to the Title Commitment (the "**Schedule C Curative Items to Be Provided by Seller**"), including:
    - (a) **Release of Lien.** The Release of Lien releasing the liens listed as Item 5 and the UCC-3 Release of Financing Statement as to Item 6 to Schedule C to the Title Commitment (the "**Liens to xxxx**").
    - (b) **Release of Lien.** The Release of Lien releasing the lien listed as Item 7 to Schedule C to the Title Commitment (the "**Lien to yyyy**").
  - (3) **Seller's Settlement Statement.** Settlement Statement prepared by the Title Company and executed by the Seller (the "**Seller's Settlement Statement**"). It is a condition of Closing that the Seller's Closing Statement be approved by Seller's Counsel and Seller prior to Closing.
  - (4) **Seller's Affidavits.** Affidavits of the following types of affidavit (which may be combined into one or more affidavits (the "**Seller's Affidavits**"), it is a condition to the Buyer's Closing that all Seller's Affidavits or other



documents prepared by the Title Company be approved by us prior to Closing:

- (a) **Non-Foreign Person Affidavit.** Affidavit attesting that the Seller is not a foreign person (the "**Non-Foreign Person Affidavit**").
- (b) **Affidavits of Debts and Liens.** Affidavit in form acceptable to the Title Company by the Seller as to there not being "debts or liens" or other matters customarily covered by such form of title company required affidavit to issue the Title Policy to the Buyer (the "**Affidavits of Debts and Liens**").
- (c) **Surveyor's Affidavit.** The affidavit of the Surveyor in form acceptable to the Title Company to delete the "Parties in Possession Exception", the "Roads Exception" and the "Visible and Apparent Easements Exception" from the Title Commitment and the Title Policy which deletion is to be based on an inspection of the Property undertaken for the Title Company (the "**Surveyor's Affidavit**").
- [(d) **Non-Production Affidavit.** The affidavit of such affiants as are acceptable to the Title Company to delete any exception to the Title Policy for oil and gas leases of record in \_\_\_\_\_ County, Texas (the "**Non-Production Affidavit**").]
- [(e) **Affidavit as to Use and Possession.** The affidavit of such affiants as are acceptable to the Title Company as to the use and possession of the Property to issue the Title Policy without the "Parties in Possession Exception", the "Roads Exception" and the "Visible and Apparent Easements Exception" or other similar use and possession exceptions (the "**Affidavits as to Use and Possession**").]
- [(f) **Affidavit as to Lease Termination.** Affidavit by affiants acceptable to the Title Company for the Title Company to delete any exception for leases, whether of record or not (the "**Affidavit as to Lease Termination**").]
- (5) **Tax Letter.** The Tax Letter executed by the Seller. It is a condition of Closing that the Tax Letter be approved by Seller's Counsel and Seller prior to Closing.
- (6) **Seller's Authorization.** The resolutions of Seller authorizing the execution of the Closing Documents (the "**Seller's Authorization**").
- (7) **Certificates as to the Seller.** Certificates from the Secretary of State and the Comptroller of the State of Texas as to the existence and good standing of the Seller.

- [(8) **Boundary Line Agreement.** Boundary Line Agreement with such parties as will permit the Title Company to insure good and indefeasible title to the \_\_\_\_\_ Acre Tract depicted on the Survey as being as of Closing in Buyer.]
- [(9) **Access [Drainage] Easement.** Access [Drainage] Easement in form satisfactory to Buyer granting an access [a drainage] easement to the Property from \_\_\_\_\_ Road executed by such parties as the Title Company shall require to insure good and indefeasible title to an easement as being in Buyer as of Closing.]
- [(10) **Insured Closing Service Letter.**
- (a) **T-51.** A Form T-51 Purchaser Insured Closing Service Letter signed by Stewart Title Guaranty Company and Buyer covering the handling by the Closing Agent and the Title Company of the Settlement Funds (the “**Insured Closing Service Letter**”) and acknowledged by telephone confirmation by the Title Underwriter to you that it has received in its offices a telefaxed copy of the Insured Closing Service Letter signed by the Buyer and that the Insured Closing Service Letter is in effect.
- (b) **Escrow Account Auditor’s Letter.** Letter from your independent C.P.A. auditor stating that the Escrow Account and other interest bearing accounts opened in the name of the owner/beneficiary of the escrowed funds with \_\_\_\_\_ as the escrow agent are audited as required by the Texas Department of Insurance (the “**Escrow Account Auditor’s Letter**”).]
- [(11) **Consent to Assignment of Contract.** The Consent to the Assignment of the Contract executed by the Seller.]
- c. **Items to be Delivered to Title Company Prior to Closing.** Prior to your Closing the transaction, you must have received from all parties or persons other than the Buyer, fully executed and completed originals of the Seller’s Closing Documents and all other items necessary for you to issue the Title Policy and record the Deed to Buyer (the “**Items to be Delivered to Title Company Prior to Closing**”).
2. **Settlement Funds Required to Close—Lines 303 and 603.** To be delivered to you by wire transfer in conjunction with these Closing Instructions, **but only after receipt from you of your notice to wire and stating to Buyer that you are in receipt of all Items to Be Delivered to Title Company Prior to Closing** (the “**Notice to Wire Funds**”), are funds in the amount of \$ \_\_\_\_\_ representing the net amount that is payable at Closing by Buyer to the Title Company as reflected on Line 303 of the Buyer’s Settlement Statement (the “**Cash From Borrower**”), subject to adjustment due to re-prorations of taxes and home owner's assessments if the Settlement Date is other than \_\_\_\_\_, 2000. Prior to Closing you must review with us and with Buyer the calculation of each item on the Buyer's Settlement Statement, including the Cash From Buyer and the Cash to Seller listed on Line

603. (The Cash From Borrower and the Cash to Seller are collectively called the “**Settlement Funds Required to Close**”)

By receipt of these Closing Instructions, you represent to us that the Escrow Account into which the Settlement Funds are to be deposited pending Closing is an account audited by the Texas State Board of Insurance.

The Earnest Money deposited with you by Buyer was to be held in an interest bearing account to the credit of Buyer. The Buyer’s Settlement Statement does not reflect the payment to the Buyer of the interest accrued on this deposit. You are to pay to Buyer the accrued interest outside of Closing.

In the event that this transaction does not Close with the Deed being recorded on the day of the receipt of the Cash from Buyer, you are instructed to deposit the Settlement Funds in an interest-bearing escrow account of the nature covered by an Insured Closing Service Letter. You are instructed in such connection to obtain and furnish to the Seller and the Buyer an Insured Closing Service Letter from the title insurance underwriter, if the Settlement Funds are held in escrow and not disbursed on the day of receipt.

3. **Documents Required to Close.** You are to determine that all of the foregoing referenced Closing Documents are fully and properly executed and acknowledged when appropriate. You are to determine that all blanks in the Closing Documents are completed before their execution.
4. **Items to Be Delivered to Parties as a Condition of Closing.** Before you disburse any of the Settlement Funds or otherwise advise that this transaction has Closed, you must as a condition of Closing deliver to Seller and to Buyer either in person or by fax with receipt confirmed by telephone call to Bill Locke or Rick Triplett (“**Graves Dougherty**”) and to \_\_\_\_\_ (“**Seller’s Counsel**”) the following items (the “**Items to Be Delivered to Seller and the Buyer as a Condition of Closing**”):
  - a. **Closing Documents.** One copy, certified by you to be true and correct, of the signed originals of the Closing Documents.
  - b. **Updated, Revised Title Commitment.** A currently dated and effective Title Commitment updated as of a time on the Closing Date prior to Closing and revised in accordance with these Buyer’s Closing Instructions (the “**Updated, Revised Title Commitment**”).
5. **Recordation.** Please be certain that the Deed, the Release of Liens and the UCC-3 Release of Financing Statement are immediately as of Closing recorded in the Official Public Records of Travis County, Texas.
6. **Title Policy.** Before you disburse any of the Settlement Funds or otherwise advise Buyer that this transaction has closed, please be certain that Title Company is in a position to issue, and will issue, to Buyer an Owner Policy of Title Insurance (the “**Title Policy**”) in the form prescribed by the Texas State Board of Insurance, written by the same underwriter that issued

the Commitment for Title Insurance (the "**Title Commitment**") with an Issuance Date and Effective Date and time the same as the Closing Date, under the above-referenced GF number. The Owner Policy must be issued in accordance with the Title Commitment, except as follows:

- a. **Insured's Name.** The Insured under the Title Policy must read exactly as the Buyer's name is set forth in the Deed;
- b. **Effective Date.** The effective date and time of the Title Policy must be the date and time on which the Deed is filed of record;
- c. **Description.** The real property described in the Title Policy must be the same property described in the Deed and in the Survey of the Property; and the Access Easement must be the easement route described in the Survey provided by Buyer to you;
- d. **Title.** Fee simple title to the real property described in the Deed must be shown by the Title Policy to be vested in the Buyer, and any easements benefitting the real property must be included in the description of the property insured by the Title Policy, [including but not limited to the Access Easement];
- e. **Survey Exception.** Item 2 of Schedule B of the Owner Policy, must be modified to read "shortages in area" only (the "**Survey Exception**") [referred to as "**Deletion of the Survey Exception**"] with the cost of the Deletion of the Survey Exception being paid for by the Seller and provided, however, if any specific exception is to be listed in Schedule B as a result of the Deletion of the Survey Exception, you must prior to Closing advise Buyer and us of the new specific exception and you are directed to add such exception to Exhibit B to the Deed ;
- f. **Taxes Exception.** Item 3 of Schedule B of the Owner Policy must be modified to except only to taxes, assessments, and stand-by fees for the year 2000 and subsequent years, not yet due and payable (the "**Taxes Exception**");
- g. **Schedule B Exceptions.** The exceptions to title shown on Schedule B of the Owner Policy must include only the exceptions permitted hereby (the "**Permitted Schedule B Exceptions**"). The following exceptions are not permitted:
  - (1) **Item 9x.** \_\_\_\_\_.
  - (2) **Item 9y.** \_\_\_\_\_.
- h. **Schedule C Items Satisfied.** All matters described on Schedule C of the Commitment must be satisfied and resolved to your complete satisfaction so that none of these matters will appear as exceptions in the Owner Policy ("**Schedule C Items Satisfied**"). By disbursing the Settlement Funds, you certify to Seller and Buyer that all matters disclosed in Schedule C of the Commitment have been or will be paid, satisfied, or otherwise resolved to the complete satisfaction of the title

insurer before the Issuance Date of the Owner Policy and that no exceptions for any item on Schedule C of the Title Commitment will be contained in the Owner Policy.

- i. **Parties in Possession Exception, Visible and Apparent Easements Exception, and Roads Exception.** There must not appear in the Updated, Revised Title Commitment or the Title Policy any exception for:
- (a) **Parties in Possession Exception.** “Parties in possession” (the “**Parties in Possession Exception**”).
  - (b) **Visible and Apparent Easements Exception.** “Visible and apparent easements” (the “**Visible and Apparent Easements Exception**”).
  - (c) **Roads.** “Roads” (the “**Roads Exception**”).
- j. **Inspection Exception.** There must not appear in the Title Policy any matter which would be revealed by an inspection of the Property conducted by the Title Company or its agent or contractor, if an inspection is or would be made by the Title Company, its agent or contractor (the “**Inspection Exception**”). If the inspection reveals matters that are to be listed in the Title Policy, then these matters must be disclosed to Buyer and us and to Seller and Seller’s Counsel before the Settlement Funds are deposited with the Title Company and must be approved in writing before the request for the wire transfer.
7. **Title Company’s Acceptance of These Closing Instructions.** If you will not strictly comply with these instructions, then you must immediately notify us and receive written waiver from us. You are directed to follow the Closing Instructions whether or not you sign and return to us a copy of the attached Acceptance.

If you have any questions regarding any aspect of this transaction, please call us at your earliest opportunity.

Yours very truly,

GRAVES, DOUGHERTY, HEARON & MOODY  
A Professional Corporation

William H. Locke, Jr.

WHL/cfg  
Enclosure

cc: Buyer  
Seller’s Attorney

**Title Company's Acceptance of These Instructions**

To: \_\_\_\_\_

We will comply with the Buyer's Closing Instructions contained in the above letter, will record and file the documents as instructed, and will issue or deliver the Title Policy in the form described in the Buyer's Closing Instructions.

\_\_\_\_\_ Title Company  
Escrow Agent

By \_\_\_\_\_  
\_\_\_\_\_, Manager

Date: June 28, 2000

**CLOSING AGREEMENT**

STATE OF TEXAS                    §  
  §  
COUNTY OF \_\_\_\_\_       §

This Closing Agreement is entered into by and between \_\_\_\_\_, a \_\_\_\_\_ (herein referred to as "Seller"), and \_\_\_\_\_, a \_\_\_\_\_ (herein referred to as "Buyer"), for and in consideration of the following recitals and agreements, and Ten Dollars (\$10.00) and other valuable considerations.

**RECITALS**

Seller is the owner of an apartment project (the "Property") in Austin, Texas, known as "\_\_\_\_\_ Apartments" located on and including the land described in Schedule A attached hereto (the "Land"). Seller and \_\_\_\_\_ have entered into a Commercial Earnest Money Contract (the "Contract") dated \_\_\_\_\_, 2000, which was escrowed with \_\_\_\_\_ Title Company (the "Title Company"). The Contract was subsequently extended to provide for a closing date on or about the date of this Closing Agreement (the \_\_\_\_\_ Contract as extended and amended is referred to herein as the "Sales Contract").

In connection with the closing of the sale of the Property from Seller to Buyer, the parties have executed and/or delivered the following documents to each other (the "Closing Documents"):

- (a) a General Warranty Deed executed by Seller conveying the Land, improvements and appurtenances thereto to Buyer;
- (b) an Assignment and Assumption Agreement for Leases and Security Deposits executed by Seller and Buyer assigning certain apartment leases listed on a rent roll certified by the Seller to Buyer, and the rents and security deposits thereunder and laundry leases to Buyer;
- (c) a Tax Payment Agreement concerning post closing verification and adjustment of ad valorem taxes for 2000 that had to be estimated at closing;
- (d) an All Bills Paid Affidavit executed by Seller as to the payment of its bills, including bills for services and taxes, and as to other matters therein specified;
- (c) a Certificate of Non-Foreign Status to be Completed Upon Transfer of United States Real Property Interests executed by Seller;
- (d) Closing Statements prepared by the Title Company; and
- (e) this Closing Agreement whereby each party acknowledges certain matters concerning the sale to Buyer.

NOW, THEREFORE, KNOW ALL PERSONS BY THESE PRESENTS:

1. **Buyer.** \_\_\_\_\_ is referred to as "Buyer" or "Grantee" in the Closing Documents and as "Buyer" or "Purchaser" in the Sales Contract.

2. **Reaffirmation of Sales Contract Representations and Warranties.** Seller and Buyer reaffirm to each other the representations and warranties made to each other, as Seller or Buyer, as the case may be, to the Sales Contract, subject as to Seller to the time limit for survival contained in Paragraph \_\_\_\_ of the Sales Contract.

3. **AS IS.** BUYER HEREBY ACKNOWLEDGE AND AGREE THAT (I) THE PROPERTY IS BEING TRANSFERRED "AS IS" WITH ALL FAULTS AND WITHOUT WARRANTY OR REPRESENTATION, EXPRESSED OR IMPLIED, AS TO THE PHYSICAL CONDITION OF THE PROPERTY; WITH BUYER ASSUMING ALL RISK OF UNSUITABLE CONDITIONS ON THE PROPERTY, INCLUDING THE STRUCTURAL AND/OR MECHANICAL FITNESS OF THE PROPERTY; THERE ARE NO WARRANTIES OR REPRESENTATIONS AS TO THE HABITABILITY, SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR AS TO COMPLIANCE OF THE PROPERTY WITH LAWS AND REGULATIONS; AND (II) SELLER HAS NO KNOWLEDGE OF BUYER'S ASSUMPTIONS OR BELIEFS CONCERNING THE PROPERTY.

4. **Waiver of DTPA.** To the extent permitted by law, Buyer waives the provisions of the Texas Deceptive Trade Practices Act, Chapter 17, subchapter 17.41 through 17.63, inclusive, Vernon's Texas Codes Annotated, Business and Commerce Code.

5. **Title Commitment and Survey.** Seller has caused to be furnished to Buyer a Commitment for Title Insurance issued by the Title Company as GF # \_\_\_\_\_ committing to insure the title to the Property as being in Buyer, subject only to the matters and exceptions set forth therein, and which has been issued and down dated to the closing date and a Survey prepared by \_\_\_\_\_ Engineering as Job No. \_\_\_\_\_ certified as of \_\_\_\_\_, 2000 depicting the Property, including its property lines and set back lines and the placement of improvements in relation thereto. Subject to the satisfaction of the requirements of the Title Company noted in Schedule C of the Commitment for Title Insurance, Buyer acknowledges acceptance of the Commitment for Title Insurance and the Survey and the matters and exceptions reflected therein.

Executed as of \_\_\_\_\_, 2000.

**SELLER:**

\_\_\_\_\_

By: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



**Buyer:**

\_\_\_\_\_

By: \_\_\_\_\_, its Sole General Partner

By: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

STATE OF TEXAS            §  
                                      §  
COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2000, by \_\_\_\_\_, \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_ on behalf of said \_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC, State of Texas

STATE OF \_\_\_\_\_       §  
                                      §  
COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2000, by \_\_\_\_\_, \_\_\_\_\_ of \_\_\_\_\_, a \_\_\_\_\_, on behalf of said \_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC, State of \_\_\_\_\_

**SCHEDULE A**

**Metes and Bounds Description**

[Approved certified field notes of \_\_\_\_\_ Engineering will be attached.]

PRELIMINARY DRAFT OF A  
STATEMENT OF POLICY  
REGARDING LAWYERS' OPINION LETTERS  
ABOUT ZONING AND SUBDIVISION COMPLIANCE  
IN MORTGAGE LOAN TRANSACTIONS\*

IV. BACKGROUND

In 1985, the State Bar of Texas Committee on Lawyers' Opinion Letters in Mortgage Loan Transactions presented a *Statement of Policy*<sup>1</sup> concerning opinion letters in mortgage loan transactions, which was then adopted by the Council of the Real Estate Probate and Trust Section of the State Bar of Texas. The suggested form of opinion in the *Statement of Policy* addressed compliance with laws in a limited fashion, proposing that the attorney state that he has no knowledge that the mortgaged property or its use fails to comply with applicable laws.<sup>2</sup> The proposed statement is, of course, not an opinion of law but a statement of fact about the attorney's knowledge. Its value even as a statement of fact is problematical since a borrower's attorney generally will have no knowledge about activities or conditions at the mortgaged property unless the borrower has consulted with the attorney about compliance issues. As a result, the State Bar of Texas Committee on Opinions as to Compliance (of Property) with Laws in Mortgage Loan Transactions was formed to develop policy guidance for opinions about the many types of laws with which a mortgagor or his property may have to comply. These include, for example, laws relating to discharges into the environment, conservation of natural resources, protection of health and safety in the workplace, control of land utilization, regulation of tax and fiscal matters, and licensing of occupations. This preliminary draft addresses lawyers' opinion letters concerning one of the most common sources of land use and real property development control, namely local zoning and subdivision regulations.<sup>3</sup>

V. PROPOSED POLICY

The use in mortgage loan transactions of a formal opinion letter from the borrower's counsel<sup>4</sup> to verify compliance with local zoning and subdivision laws is discouraged. The interests of both borrowers and lenders in efficiently and accurately ascertaining compliance status are better served when the mortgagee draws not only on the expertise of the lawyer, but also on the advice of design and engineering professionals and information from public officials to form a conclusion about compliance. As an alternative to a uniform opinion letter form, the Committee offers practice suggestions for investigating zoning and subdivision compliance.

VI. POLICY RATIONALE

1. Regulatory Diversity. The rationale for not establishing a uniform zoning and subdivision compliance opinion form begins with the fact that zoning and subdivision regulations are the products of ordinances or orders of individual cities or counties.<sup>5</sup> While state enabling legislation does provide a common framework, that framework is largely procedural<sup>6</sup>. Within very broad substantive guidelines,<sup>7</sup> local governments are free to develop a wide variety of development controls to meet local needs.<sup>8</sup> While there are similarities among the zoning and subdivision ordinances of different jurisdictions, considerable differences remain. An opinion letter format that attempted to address all variations would be hopelessly complex; a format that ignored variations might invite errors and omissions.

2. Significant Factual and Legal Differences. Even if the codes and ordinances of local governments throughout the state were uniform, a formal opinion letter from the borrower's counsel still would not be the method of choice to verify zoning and subdivision compliance in mortgage loan transactions. The opinion letter in the *Statement of Policy* addressed the existence and power of the borrower and the due execution, freedom from usury, and enforceability of the mortgage documents.<sup>9</sup> Each of these opinions can be rendered by examining the borrower's organizational documents, readily obtainable certificates of public officials, and the text of the mortgage documents in the light of relevant cases and statutes. Quite the opposite is true for opinions about zoning and subdivision compliance. Significant differences include the following:
  - a. Many of the relevant facts to which zoning and subdivision ordinances apply are not contained in the mortgage documents, the borrower's organizational documents, certificates of public officials, or in any other documents.
  - b. Investigation of the relevant facts frequently involves specialized skills that the attorney does not have or professional services that the attorney is not licensed to perform.
  - c. The relevant facts depend in part on conduct not only of the borrower, but of tenants and other property occupants, and change over time.
  - d. The line between the relevant facts and the law is often blurred or nonexistent.
  - e. Local zoning and subdivision laws general are not available in official or widely-recognized publications.
  - f. Interpretive decisions by local governments and administrative officials usually are unwritten and unavailable. Few, if any, relevant judicial interpretations are available.
  - g. The lawyer's interpretation of zoning subdivision laws may often prove irrelevant owing to judicial deference to the interpretive decisions of local governments and their administrative officials.

These considerations do not mean that lawyers have no role in answering zoning and subdivision compliance questions. Rather, they challenge the simplistic notion that if there is a question about compliance with laws, the answer is best supplied by a lawyer's opinion letter. For example, federal law imposes emission controls on automobiles. Yet, it would seem a strange practice indeed if one were to consult a lawyer to determine whether a particular automobile complied with emission control regulations. The reality, we submit, is that the lawyer's role in rendering formal opinions or giving other legal advice should be shaped by the specific contours of the legal and factual environment in which he is asked to operate. Thus, any reasoned judgment about the lawyer's proper role in advising the parties to a mortgage loan about zoning and subdivision compliance issues must proceed from a

fuller understanding of how zoning and subdivision regulations typically operate and of the practical and ethical consequences for writing opinion letters that ensue.

3. Analysis of Regulatory Structure. While specific regulations vary, most zoning ordinances do share common structural elements - use control, development and performance standards, and permit requirements. Analysis of these aspects of zoning regulation and of the subdivision platting process highlights a number of issues and problems faced in attempting to verify compliance.

- a. *Use Control.* The core of zoning is the requirement that within a particular geographical area or “zone,” land may be used only for certain purposes. Thus, the first question to be answered is a factual one - in what zone is the property located? Ordinarily, one can look at a city’s zoning map and easily compare it to a survey of the mortgaged property. In some cases, however, answering even this seemingly simple question can pose problems.

Zoning maps are often of large scale, thus magnifying minor variations in bearing and the intrinsic inaccuracy resulting from the measurable width of boundary lines drawn on a map (a 1/16' line on a 1:400 scale map, for example, has a 25' width on the ground). In addition, metes and bounds descriptions of zoning district boundaries do not appear on zoning maps, complicating the surveying issue of relating property to zoning boundaries.

Beyond problems of measurement lie potential problems with the zoning map itself. In many instances, the official zoning map, while prepared pursuant to ordinance directive, is not part of the ordinance itself. Map makers can and do make mistakes, and if there is a discrepancy between the map and a property description in a particular zoning ordinance, the ordinance will control.

There may be maps other than the general zoning map that need to be considered, as well as *de facto* zones that do not appear on a map. For example, a city may maintain separate maps regulating structural elevations around airports in zones established under the authority of the *Airport Zoning Act*<sup>10</sup>. Over basic zoning classifications under which the regulations are uniform for all sites similarly classified, a city may lay out other zones with differing boundaries for special purposes such as the preservation of historic structures or the prevention of alcoholic beverage sales. Thus, multiple or overlay zones may apply to a single tract. In addition, off-map *de facto* zones may be created by virtue of standards in the text of the zoning ordinance or elsewhere. For example, some cities establish radius requirements for sexually oriented businesses,<sup>11</sup> or apply special standards to sites that are subject to flooding or typified by particular slopes or geological conditions.

Finally, any answer to the question of how a site is zoned needs to take into account site-specific regulations. A common example is provided by the planned development or site plan district, in which specialized standards not generally applicable to other areas are often embodied in site plan drawings and a site-specific ordinance. Similarly, conditional or specific use permits may have been authorized

by an ordinance or by action of a board of adjustment. In these cases, the relevant regulations most likely will not be a part of the general zoning ordinance, and it is possible that the existence of the site-specific regulations may not be reflected on the general zoning map.

Once the zoning classification of the property is known, one must determine whether the use of the property is permitted in the zone. Permitted uses will be listed in the text of the zoning ordinances.<sup>12</sup> Unfortunately, there are no generally available, customarily cited sources for municipal ordinances. Some cities have published codifications with official status; others make available unofficial compilations. In either case, it is often difficult to determine whether all current amendments are present, and potentially relevant special purpose ordinances (such as a planned development district ordinance covering a particular tract) are seldom included. In addition, when zoning ordinances are amended, previously legal uses and structures may no longer conform to current regulations. These non-conforming uses or structures usually are allowed to remain, but generally are subject to controls on expansion or casualty reconstruction. Protected nonconforming status may also be terminated or forfeited in some circumstances.<sup>13</sup> Thus, even the amendment history of the zoning ordinance may give rise to factual and legal issues.

Next, the range of permitted uses in the general zoning ordinances (and in any other special ordinances or use permits) must be compared to the actual uses of the property. To make this comparison, the activities taking place at the property need to be identified and classified in terms of the “uses” described in the zoning code. Most zoning ordinances establish dozens of different uses, often with little apparent rationale for the distinctions made,<sup>14</sup> and not infrequently with little or no definition of the terms used to describe each use. Thus, a statement from the borrower that his office building is used for office uses is in reality a legal conclusion about the proper classification of activities at the property. It may be substantially inaccurate, especially if the zoning code distinguishes between general offices, doctors’ offices, bank offices with or without drive-in windows, and retail stores and restaurants that might be located in our hypothetical office building. Moreover, zoning ordinances typically distinguish between the main use of a property and incidental or accessory activities that effectively do not rise to the level of a “use” for regulatory purposes. Thus, the same seemingly simple statement about the office building may ignore the issue whether a shoe shine stand in the lobby, an apartment with sleeping and sanitary facilities in the penthouse suite, or a recycling collection center in the parking lot are merely accessory or incidental activities or separate main uses that are controlled by the zoning. Finally, while many of the pertinent facts relate to a particular space or other physical element of a structure, others do not. For example, If a tenant regularly conducts classroom training for customers in a meeting room at his offices, is that a permitted office accessory use or a prohibited educational main use? How many nights may one sleep in a hotel room before the room becomes a residence? How many unrelated individuals may live in the same dwelling without violating a prohibition on multi-family use?

At best, the facts -- the activities actually occurring at the property -- and the law -- the use classifications of the zoning ordinance -- are inextricably intertwined. And even the law usually leaves something to be desired in clarity and specificity. Ordinance definitions, when they are supplied at all, are usually fairly general; and as the examples in the preceding paragraph suggest, even the most artful drafting is unlikely to encompass everything that may affect the classification of human activities into “uses” for purposes of a zoning ordinance. Out of necessity, municipalities interpret their use definitions on an *ad hoc* basis, developing unwritten precedent and interpretive nuances over time. There are few, if any, relevant judicial decisions interpreting specific zoning ordinance provisions. Rather, applicable legal principles largely serve to insulate zoning ordinance interpretations from judicial review.

The statutory zoning framework in Texas contemplates that interpretive decisions by an administrative official are appealable to the board of adjustment appointed by the city,<sup>15</sup> and indeed must be appealed to the board before relief is sought in the courts under the exhaustion of administrative remedies doctrine.<sup>16</sup> While the board has *de novo* authority to substitute its interpretation for that of the administrative official,<sup>17</sup> a 4/5th’s majority vote is required.<sup>18</sup> As a practical matter, a city board seldom overturns the decisions of its own city administrators. Reports of decisions of zoning boards of adjustment are not available in any publication. The decision of the board may be appealed to a court of record on writ of certiorari, where the only question is the legality of the board’s action.<sup>19</sup> The courts of Texas have enunciated different and occasionally inconsistent standards for measuring the legality of board of adjustment actions, sometimes characterizing their role as of upholding board decisions absent an abuse of discretion, while at other times finding any substantial evidence sufficient to support the legality of a board’s decision.<sup>20</sup> In the specific context of reviewing interpretive decisions, the majority rule appears to be that while the court may ultimately make its own judgment about the correct interpretation of the language of a zoning ordinance, it should give weight to the municipality’s interpretation of its own ordinance, particularly if there is ambiguity.<sup>21</sup> Regardless of the precise standard, one thing is clear – the interpretive context of zoning ordinances differs markedly from that of mortgage documents, where courts have provided a history of interpretations, and the attorney, not a government official, may properly be viewed as the first arbiter of the legal significance of language.

Thus, even the seemingly simple issue of determining whether the use of the mortgaged property complies with the zoning ordinance is complicated by problems of investigating on-going conduct at the mortgaged property in a legal context typified by unpublished, *ad hoc* legal interpretations by city officials, whose decisions enjoy substantial procedural and substantive protections against legal challenge.

- b. *Development and Performance Standards.* Similar issues are presented by the development and performance standards included in zoning ordinances, and to a lesser degree in subdivision regulations. Zoning development standards typically include the following: minimum lot size; minimum setbacks, maximum surface

coverage or minimum open space; maximum height; maximum floor area or density; requirements for the size, layout, and number of parking and loading spaces; and rules governing landscaping, fences, and signs. These standards may often include performance elements - affirmative requirements relating to on-going activity, such as maintenance and replacement of landscaping, maintenance of night-time lighting of parking lots at specified levels of illumination, prevention of excessive noise, or control of emissions into the environment.<sup>22</sup>

It is readily apparent that evaluating compliance with development standards is a matter requiring the expertise of architects and engineers to measure dimensions, areas, and other design parameters. These measurements cannot properly be characterized as purely factual determinations any more than the question about how property is actually used can be viewed as entirely factual. For example, assume that a zoning ordinance specifies a maximum floor area and states that “floor area” is the area bounded by the intersection of the plane of the floor and the planes of the exterior surfaces of the structure at the lines of intersection with the plane of the floor. The definition of floor area states “law” applicable to the “facts” presented by a particular structure. Even a simple statement that a structure contains a certain number of square feet necessarily embodies the “legal” conclusion that the area measured is “floor area” within the meaning of the zoning ordinance.

The same Interpretive concerns noted in the discussion of use compliance also apply when considering compliance with development and performance standards. For example, zoning ordinances typically establish building lines or setbacks requiring that the area within a certain distance of the property line be kept “open and unobstructed.” The survey of the property may show a driveway, curbs, and a sign in the setback area. In most cities, the responsible administrative official will construe this potentially ambiguous language as permitting these types of improvements. No written interpretive guidance may exist. Yet, this interpretation no doubt will be consistently followed by the city in applying the ordinance, and if challenged in a board of adjustment or court hearing, will almost certainly be upheld.

Finally, compliance with development and performance standards is not a static matter fixed by the physical dimensions of structures on the mortgaged property. Performance standards calling for the maintenance of landscaping or requiring that parking lots be kept lighted at night provide obvious examples of how changing human behavior can affect compliance. More significantly, however, development standards -- particularly those relating to parking and loading -- may be based on the use of the property. For example, under many zoning ordinances, an office building that is leased to doctors and dentists may require significantly more parking than an office building leased for general office purposes because medical and general offices are classified as different uses with differing parking standards. Thus, to a significant degree, factual and interpretive issues about use classification directly affect development standards applicable to structures.

- c. *Permit Requirements.* Most zoning ordinances include permit requirements. In issuing permits, abstract use controls and development standards in the zoning

ordinance are interpreted and applied by city administrative officials to the specific facts presented by a particular property. Thus, zoning permit requirements play a pivotal role in evaluating compliance.

The principal permit required by zoning ordinances is the certificate of occupancy.<sup>23</sup> That a certificate of occupancy has been issued is not, however, an absolute guarantee that there are no compliance issues. Often zoning ordinances simply require a certificate of occupancy as a condition to the use of land with no inference that issuance of the certificate indicates compliance with the ordinance.<sup>24</sup> As a practical matter, of course, a city operating under such an ordinance will still not issue a certificate of occupancy without being satisfied about compliance. Even if the zoning ordinance indicates that issuance of the certificate of occupancy is predicated on compliance,<sup>25</sup> one still needs to determine or assume that the permit was validly issued before one can attempt to equate issuance with compliance.<sup>26</sup> While administrative officials enjoy considerable interpretive powers, they lack the power to change or ignore the requirements of a city ordinance: and a city will seldom be estopped by actions of its officials in improperly issuing permits.<sup>27</sup>

Zoning ordinances may also require several certificates of occupancy for a single building, as well as other permits in addition to the certificate of occupancy. In multi-tenant buildings, for example, a certificate of occupancy is often issued only for the “shell” building, not for specific tenant occupancies, which are then individually permitted as occupancy occurs. Often this type of administrative practice is unwritten and unexpressed even inferentially in the zoning ordinance.<sup>28</sup> Typical examples of other permits or regulatory approvals include specific or conditional use permits for particular uses, site plan approvals, special approvals for the alteration or demolition of historic structures, flood plain fill permits, and special authorizations for development in environmentally sensitive areas. Evaluating the need for these additional permits and approvals may involve interpretive and factual issues similar to those encountered with use controls or development standards. For example, the need for a specific use permit involves use classification issues, while the need for a flood plain fill permit turns on complex factual and engineering issues related to susceptibility to flooding.

- d. *Subdivision Plats.* The need to plat or replat property may have important consequences for the owner or a mortgagee who views himself as a potential owner. Cities often use the subdivision process to ensure that needed streets and utilities have been dedicated and constructed by the developer, to exact fees relating to the impact of the subdivision on public infrastructure,<sup>29</sup> or to trigger detailed site plan review processes that may limit or alter development options. Subdivision plats may independently establish building lines or other development standards. The subdivision plat may also define the official lot or building site to which set-back, coverage, density, and other development standards in the zoning ordinance are applied. Thus, the subdivision plat also plays an important role in zoning compliance.



Although cities and counties have their own platting regulations, the framework for those regulations is dictated by state statutes. If the contents of the plat meet applicable legal requirements of the city or county, the plat must be approved by official action, and in the case of municipalities, the plat must be endorsed with a certificate of approval.<sup>30</sup> Thus, if the plat also meets applicable formal requisites and is properly recorded,<sup>31</sup> it can be presumed to comply with legal requirements. Usually that is not the issue. On occasion, the lot lines of the platted lot do not correspond with the boundaries of the land to be encumbered by the mortgage. In addition, mortgagees may sometimes inquire whether the creation of a mortgage requires platting or replatting. Both the statutory language and relevant judicial decisions addressing the issue of when a plat is required are quite broad and more than a little ambiguous.<sup>32</sup> Fortunately, recent amendments<sup>33</sup> make it clear that cities have the power to determine when a plat or replat is required, and provide a process for obtaining a certificate answering the question whether a plat or replat is required.<sup>34</sup> Thus, a definitive answer to questions about whether a plat or replat is currently required should generally be obtainable through the statutory certificate process.

4. Practical, Ethical, and Policy Considerations. The preceding overview of zoning and subdivision regulation reflects the existence of potentially complex factual and legal compliance issues. Indeed, one might be tempted to conclude that the very complexity of these regulations necessitates an opinion letter from counsel. Certainly counsel have a role to play. For a variety of practical, ethical, and policy reasons, however, that role should normally not be one of issuing a formal opinion letter to verify compliance.<sup>35</sup>
  - a. *Opinion Statements.* To this point, the discussion has focused on zoning and subdivision compliance in a generic sense. The specific types of statements that might be included in an opinion letter bear closer analysis.<sup>36</sup>

The simplest zoning opinion commonly encountered is a statement about what uses are permitted in a particular district. For example, an opinion might state, “the zoning ordinance will permit office uses.”<sup>37</sup> From a practical standpoint, such an opinion tells a mortgagee little that he needs to know, for it begs the more serious compliance question of how the mortgaged property is actually used. The list of permitted uses in a particular zoning classification can normally be ascertained amply by reading the text of the zoning ordinance without going to the time and expense of a formal opinion letter.

Another type of zoning opinion that is occasionally requested states, “the zoning ordinance will permit the intended uses of the property.” But what uses are intended and by whom? Conceivably, one could furnish the owner a list of permitted uses from the zoning ordinance and ask him which he intends to operate. Such an approach, of course, turns the so-called legal opinion into the more than an expression of the owner’s judgment about the proper legal classification of his intended activities.

Yet another common zoning opinion statement is, “the mortgaged property complies with the zoning ordinance.” While this statement is relevant for evaluating compliance of the static physical elements of structures, it ignores the fact that zoning also regulates use, imposes standards of performance, and that even compliance with apparently static development standards may change based on how the property is used.

A mortgagee’s counsel who accepts such opinion statements from the borrower’s counsel without conducting additional inquiries into zoning issues exhibits a lack of understanding about the scope of zoning ordinances. On the other hand, if the mortgagee or his counsel has conducted his own independent zoning investigation, one may question the purpose or need for any opinion letter from opposing counsel. In either case, the mortgagee, who has a legitimate interest in avoiding risks (or in at least being informed by counsel about known or unavoidable legal risks), and the borrower, who has a legitimate interest in avoiding unnecessary legal expense, are not well served. Thus, the Committee declines to recommend or consider a zoning opinion letter that if given, would fall short of providing reasonable assurance to a mortgagee of actual zoning compliance. While the Committee has concluded that a formal opinion letter from the borrower’s counsel is normally not the best way to provide such assurance, it has reached that conclusion by evaluating what statements the borrower’s counsel would need to make in a formal opinion letter to provide meaningful assurance of compliance.

A meaningful zoning opinion needs to address the dynamic elements of zoning regulation by considering not only the physical elements of the mortgaged property, but the uses and other relevant conduct occurring at the mortgaged property. In addressing the use and operation of the property (and to some degree, even the physical elements of the property itself), opinions need to be limited in time to the point at which relevant facts and laws were investigated. The lawyer cannot properly be expected to be a guarantor of future conduct by others, and cities may change zoning classifications, regulations, or interpretations from time to time. In addition, opinions about use need to consider whose use is relevant. In addition to the borrower, there will often be tenants or licensees whose activities on the property are authorized or approved by the borrower, and for which the borrower (or the mortgagee as the potential successor to the borrower) may potentially be responsible. Finally, a meaningful zoning compliance opinion needs to address the issuance of necessary permits and the absence of any need to obtain additional permits. Thus, the Committee believes that a meaningful zoning opinion would state in substance that:

At the time of our investigation, the use and operation of the mortgaged property being conducted by the borrower or by others under the terms of leases or other agreements permitting occupancy of the mortgaged property complied with the zoning ordinance. As so used and operated at that time, the mortgaged property as then constructed complied with the zoning ordinance.

The permits listed in [describe] were the only permits required under the zoning ordinance for the mortgaged property as so used, operated, and constructed at that time.

- b. *Ethical Conflicts.* The zoning opinion statements discussed above require an investigation of the activities taking place at the mortgaged property, of the design of structures at the property, and of the underlying conditions and criteria for governmental permitting decisions. When the opinion letter is provided by the borrower's counsel to the mortgage lender, there is a significant potential for ethical conflicts.

Disciplinary Rule 2.02 provides that:

A lawyer shall not undertake an evaluation of a matter affecting a client for the use of someone other than the client unless:

- (a) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
- (b) the client consents after consultation.<sup>38</sup>

It is important to note that more than informed client consent is required. A compliance investigation could result in the discovery of violations. Municipalities may enforce zoning ordinances through civil and criminal (misdemeanor) fines, as well as by injunctions to prevent or correct violations.<sup>39</sup> Thus, unlike existence, execution, and enforceability opinion investigations, compliance investigations may have consequences to the borrower significantly different from the consequences of a change in the mortgage documents to correct a usury problem or the filing of a certificate to correct an organizational defect. Ethical considerations require more than full disclosure to the client of potential risks and conflicts; they require a judgment by the borrower's lawyer after consultation with his client that the client's response to the discovery of a violation will not place the lawyer in a position incompatible with his duty to uphold the law or his duty to deliver a truthful opinion.

- c. *Scope of the Lawyer's Services.* The review and negotiation of mortgage documents is the central purpose for which a mortgage borrower employs counsel for a mortgage loan transaction. The same lawyer often has been previously engaged to create the partnership, corporation, or other entity that will act as borrower, and in any case he will have ready access to the borrower's organizational documents by virtue of his employment. Thus, a lender's request that the borrower's counsel provide an opinion letter about such matters often does little more than formalize the review of mortgage and organizational documents for which the lawyer has already been employed.

The practical realities attendant on a zoning compliance investigation and opinion are quite different. Borrowers do not routinely consult with counsel about zoning

compliance in developing or operating real estate. Zoning is usually viewed as part of the construction process, and architects, not lawyers, are frequently the professionals of choice to address zoning compliance among real estate developers and owners in Texas. When a lawyer is employed at all, it is usually to assist in obtaining a change in zoning classification, a variance, or a specialized permit, or to respond to specific enforcement activities. Lawyers practicing in this arena often have considerably different experiences and skills than do those who routinely deal with closing mortgage loan transactions.

As a result, when a lender (or his attorney) insists that the lawyer selected by the borrower to negotiate and close the mortgage transaction should also evaluate zoning compliance, the lender is in effect requiring an expansion of the normal scope of services provided by the borrower's counsel. All too often, the borrower's reaction is to treat this requirement as one more inconvenience from the lawyers; under pressure to close and have access to loan proceeds, he insists that the lender be satisfied as quickly and as cheaply as possible, giving at best superficial attention to the ethical, cost, and capability considerations urged by his counsel. Not infrequently, the result is an opinion letter and an investigation so limited in scope or so heavily dependent on unverified assumptions as to be of little benefit in actually revealing the status of zoning compliance.

Instead, lawyers and clients on both sides of the mortgage transaction would appear to be better served if at the inception, informed decisions and agreements were reached about the degree of certainty or risk that the lender is willing to accept, alternatives to achieving that level of certainty, the role of counsel, architects, and other professionals, the potential need to employ special counsel with specialized skill and experience, and cost and timing implications to the parties.<sup>40</sup>

- d. *Reliance on Certificates from the Borrower and Design Professionals.* Since an attorney in a mortgage loan transaction will seldom have first-hand knowledge of activities and conditions at the mortgaged property, he will usually turn to the borrower for certificates about uses, operational activities, and other information bearing on use controls, performance and development standards, and permit criteria. Likewise, an attorney will generally have no knowledge of any kind about dimensions, areas, measurements, or other elements involved in evaluating zoning development standards. Indeed, the attorney is usually not licensed or competent as an architect or engineer, and must take care not to transgress the ethical prohibition against knowingly providing representation in a matter beyond his competence.<sup>41</sup> The usual expedient in attempting a compliance opinion is to turn to certifications from the borrower and architects, engineers, or other design professionals employed by the borrower.

The use by the borrower's counsel of certificates from the borrower gives rise to a number of policy concerns. The borrower's attorney will generally draft the certificate and assume the accuracy of the representations in the certificate in reaching his conclusions. The lawyer's interest in minimizing his own liability creates an incentive to shift risks to his own client by making the representations in

the certificate as broad as possible. The lender, of course, will wish to see and rely directly on the certificates since the credibility of the opinion is directly dependent on the underlying certificates. This entire process of crafting representations for one's own client for reliance by an adverse party may be seen as inconsistent with the lawyer's normal role as an advocate who seeks to limit his client's risks. Moreover, requiring the borrower's counsel to design and draft these representations may place him in the unenviable position of balancing the degree of risk he is willing to accept for his own liability as an opinion's author against the degree of risk he should be advocating for his client. Finally, it would seem that this inherent conflict in roles might also be of concern to the lender, who may well wonder about the quality of a compliance investigation when basic questions about content and scope are left to the design of counsel for an adverse party. Any zoning compliance investigation, no matter by whom conducted, involves an economic choice between the cost and the degree of accuracy of the investigation. Answering basic questions may involve relatively little time and expense, while eliminating all doubts and risks will test the skills of most attorneys and the pocketbooks of most clients. To leave the balancing of risks and costs to the borrower's counsel and his judgments about his own liability risks would seldom appear to be in the best interests of the lender.

Another problem presented by third-party certificates is their use in "conduit" opinions. Occasionally, an architect may be willing to provide an opinion or certificate concluding that the improvements he has designed comply with zoning regulations, or a borrower may be willing to state that the building he owns is used in compliance with zoning constraints. The attorney then purports to rely exclusively on these certificates to render a compliance opinion. To the extent that the underlying certificates essentially state the conclusion of the opinion, the "opinion" itself appears to serve no useful purpose. For example, if the zoning ordinance says, "office uses are permitted in this district," and the certificate from the borrower says only that "office uses are the only uses at the property," what does the opinion add that could not be deduced from allowing the lender's lawyer to read the certificate and the zoning ordinance? In the acute hindsight of litigation, however, the opinion's author may find that his "opinion" did in fact add something to the underlying certificates notwithstanding disclaimers about exclusive reliance. An attorney who has actual knowledge of errors or omissions in underlying certificates has an ethical duty to disclose that knowledge or withdraw from the representation.<sup>42</sup> One speculates that notwithstanding any disclaimer to the contrary, the lawyer's duty of due care from a liability perspective will be at least as broad as his ethical duty. A great deal of gamesmanship and expense could be avoided by the direct submission of the underlying certificates to the lender accompanied by the factual representation from the borrower's counsel that he has no actual knowledge of errors or omissions in the certificates.

A final difficulty with an opinion letter that is rendered in reliance on certificates from the borrower or design professionals is that in many critical respects, it offers the conclusions of a non-lawyer as an opinion of law. For example, a statement from an architect that a building has been constructed in compliance with the zoning ordinance obviously involves legal conclusions. Thus, in order to separate legal

conclusions from facts, it is often suggested that the attorney prepare a “questionnaire” for the borrower and the design professionals. The questionnaire would, in theory, identify only the pertinent facts needed to reach the legal conclusions. This superficially attractive suggestion proceeds from the assumption that a meaningful line can be drawn between facts and law. On the contrary, legal conclusions are inextricably imbedded in the very measurements at the core of the architect’s or engineer’s work. Similarly, any statement from the borrower about what uses occur necessarily involves the legal conclusion that what the borrower considers to be a particular use is in fact legally so classified under the zoning ordinance. While in theory it might be possible for the attorney to review every element of the measurements and calculations performed by an architect or to visit the property to inspect all the activities typically taking place, such an approach improperly extends the role of the attorney so that he effectively becomes both supervising architect and municipal building inspector. In any case, to avoid claims of having misled the mortgagee, the borrower’s attorney should disclose the circumstance that he is relying on statements by non-lawyers that contain legal conclusions and that he is assuming the accuracy of both the factual statements and the legal conclusions in the underlying certificates. Note also that this assumption of accuracy raises much the same disclosure and liability issues as does a qualification that the opinion is rendered in exclusive reliance on third-party certificates.

- e. *Interpretive Qualifications.* Whatever the source of the underlying facts, any zoning opinion letter relying wholly on the lawyer’s interpretation of zoning ordinance provisions as applied to those facts would need to be appropriately qualified to disclose the significant legal limitations that apply. First, the opinion should note the substantial absence of judicial interpretations of specific ordinance provisions. Second, the opinion should note the absence of published administrative interpretations and the potentially *ad hoc* character of administrative interpretations. Third, the opinion should describe the role of administrative officials in the interpretive process, procedural limitations on challenging administrative interpretations, and the extent to which a reviewing court may be limited to the administrative record or defer to the interpretive decisions of administrative officials. In short, a zoning compliance opinion should avoid turning reasonable interpretations by an attorney into a guarantee of the interpretive results of the administrative process. If the mortgagee is less than enthusiastic about accepting an opinion that is so qualified, he should be reminded that the attorney’s role is to disclose the law, not to assume liability for the property or the mortgage.
- f. *Reliance on Permits and Other Public Certificates.* Because cities are the authors, the principal interpreters, and the enforcers of zoning ordinances, the best source to determine whether there is a zoning compliance problem will generally be the city itself. One obvious way to avoid the interpretive qualifications suggested in the preceding paragraph is to rely on the issuance of certificates of occupancy, interpretive letters, or other written statements from city officials. Once again, however, one questions what reliance on an opinion letter adds to the mortgagee’s own direct reliance. Certainly, permits or other public statements may be invalidly

issued, and the city will in all likelihood not be estopped by an official's erroneous written statement. Yet, the careful opinion writer will normally seek to include assumptions that all certificates of occupancy are valid and that all other statements of public officials are accurate. Since one principal objective of reliance on city materials is to avoid the expense and generally fruitless exercise of having an attorney examine underlying factual conditions about which he lacks any special knowledge or expertise, such assumptions generally would not appear to be inappropriate. As a practical matter, cities are not likely to question the validity of their own permits, and indeed will often go out of their way to uphold past actions and interpretations or to support variances or other hardship relief resulting from administrative error. Thus, while there is a possibility for error on the part of a city or its administrators, the risks seem less than the risks of relying primarily on an attorney's unofficial interpretation. Unless the city action appears erroneous on its face or a party or his counsel has actual knowledge of a specific circumstance that would call into question the propriety of a city's permitting decisions or statements, it would seem most appropriate for the mortgagee to rely directly on these materials.

- g. *Necessity for Additional Permits and Subdivision Approvals.* The identification of needed zoning permits and subdivision approvals is also part of the compliance investigation. This is particularly true for construction mortgages when few if any of the steps needed to achieve zoning and subdivision compliance have been completed. At this stage, the potential uses of the property lie in the future and the range of permissible use options can readily be ascertained by the expedient of verifying the zoning district classification and reading the ordinance. Thus, particularly in construction loan transactions, significant attention should be paid to identifying what permits and approvals will be required.

The need for many types of zoning permits and subdivision approvals is often commonly known or readily ascertainable from reading a zoning ordinance. Certainly the necessity for building permits and certificates of occupancy falls in this category. Official city approval must be endorsed on subdivision plats, and by statute, a certificate may be obtained indicating whether a plat or replat is required. Thus, there appears to be little utility in obtaining an opinion letter from the borrower's counsel about these common requirements.

At the other extreme lie permit requirements that typically involve all the other specialized facts and interpretive issues that so greatly complicate zoning compliance opinion letters. For example, the need for a special use permit may turn on use classification issues, while the necessity for a floodplain fill permit involves factual and technical issues relative to floodplain identification and the finished grade elevations of improvements at the property. Particularly in the context of a construction mortgage, it would seem foolhardy for either party to rely primarily on an opinion of counsel concerning any interpretative issue that a permit is not required. City officials will ultimately have to review the design documents, and it is they who will make interpretations as part of issuing or refusing to issue permits. Thus, there generally appears to be little merit in seeking an opinion letter from the borrower's counsel about the need for such permits.

5. Conclusion. The foregoing discussion has led the Committee to conclude that a zoning compliance opinion letter not only involves significantly different issues from existence, due authorization, and enforceability opinion letters, but that ethical, practical, and policy considerations should normally combine to produce a different approach to answering a mortgagee's legitimate questions about zoning and subdivision compliance. The Committee believes that these questions are best addressed by an investigative process that combines factual disclosure from the borrower, certificates from design professionals, and an interactive process with city administrators. Such a process is described in the practice suggestions that form the final section of this paper.

## VII. PRACTICE SUGGESTIONS

The following procedures are intended to provide assistance to counsel in mortgage loan transactions. They are not, however, a substitute for informed judgment and should be adapted as needed to fit the circumstances of particular transactions. Although an effort has been made to point out circumstances where additional review procedures may be necessary, it is impossible to point out all such circumstances.

1. If possible, review an as-built survey of the property and physically visit the property.
2. Determine whether the property is located in a municipality or in an unincorporated area of a county. If the latter, determine whether the property is located in any of the special purpose county areas identified in Chapter 231 of the *Texas Local Government Code*. [Note that the balance of this section assumes that the property is subject to municipal zoning and platting jurisdiction. If this is not the case, some of the following practice suggestions may not apply or may need to be modified. For county property, it is suggested that the attorney carefully review the practice suggestions in light of Chapters 231 & 232 of the *Texas Local Government Code*.]
3. Determine who exercises plat approval authority. Normally, this will be the city in which the property is located. If located outside of city boundaries, a nearby city may have extraterritorial platting jurisdiction, and the possible impact of county platting requirements will need to be considered.
4. Obtain a copy of the most current code of zoning ordinances for the city, including any subdivision regulations.
5. Determine the zoning history of the property known to the borrower through interviews or discussions. Items to look for are zoning classification changes, special or conditional use permits, variances, special exceptions, floodplain fill permits, platting history, and the like.

### *Developed Property.*

6. The property should normally have been platted. Obtain a copy of the recorded subdivision plat from the title company. Review the plat to determine whether it has been signed and acknowledged and whether it meets the other formal filing requisites in Sections 212.004(b) - (e) of the *Texas Local Government Code*. Review the plat to determine whether it bears the



endorsement of approval by the city plat approval authority (the city plan commission or the city council depending on the city code). Review the survey to determine whether the boundaries of the property coincide with the boundaries of a lot shown on the plat. Obtain surveyor confirmation as appropriate.

7. Unless the property received utility service before September 1, 1987, all approvals and filing requisites appear on the plat, and the boundaries of the property coincide with a platted lot, obtain the certificate of platting determination contemplated by Section 212.0115 of the *Texas Local Government Code*.
8. Determine from a review of city codes and discussions with city officials whether there are significant regulatory programs in addition to the general zoning ordinances that could have material consequences. Examples include airport zoning regulations (height and noise compatibility), thoroughfare plans or ordinances (dedication and building line requirements), and sign ordinances. [Specific procedures for dealing with these types of requirements are not included. It is suggested, however, that if any of these types of requirements appear material, the attorney might do well to follow steps roughly analogous to those described in the following paragraphs or to obtain the assistance of an attorney specializing in zoning matters.]
9. Obtain a copy of the zoning map that includes the property. If the city provides letters verifying the zoning district classification, obtain such a letter. If there is any apparent question about the zoning district boundary in relation to the property, additional surveying or review of city records may be in order.
10. If the zoning map reflects zoning under any special purpose ordinances, obtain copies of the ordinances and any site plan drawings that are part of the ordinance. Typical items in this category are planned development or site plan zoning districts, special or conditional use approvals, zoning deed restrictions, and historic preservation designations.
11. Interview city planning officials and attempt to determine whether any variances, special exceptions, or other special permits or proceedings have taken place. Secure any relevant documentation (minutes of proceedings, notices, permits, ordinances, etc.). Attempt to obtain a confirmatory letter from the city, particularly in regard to the issuance or need for permits in addition to certificates of occupancy.
12. Review any items in the preceding two paragraphs to determine whether there are any special permit or approval requirements, time limitations or permit renewal requirements, conditions to continued occupancy, property dedication or infrastructure development requirements, or other items that go beyond normal standards (i.e., use restrictions, development standards, and a certificate of occupancy as the required permit).
13. Interview city building inspection officials to determine whether there is any history of enforcement activity at the property. Attempt to obtain a confirmatory letter from the city.

14. Obtain copies of all certificates of occupancy. For multi-tenant buildings, determine from city administrative officials whether one certificate is issued for all occupancies or whether separate certificates are issued for individual occupancies.
15. Obtain a certified rent roll from the borrower indicating all tenancies and occupancies. Compare the rent roll with the certificates of occupancy to determine any discrepancies. If the certificate of occupancy reflects a particular use, compare the use so reflected to the use indicated on the rent roll or in the lease or occupancy agreement to note any apparent discrepancies.
16. Review the zoning code and other relevant special purpose ordinances to determine if potentially relevant amendments have occurred since the date of initial construction of the property -- e.g., elimination or creation of conditions to particular uses for which certificates of occupancy have been issued, adverse changes in development standards (reduced maxima or increased minima) or similar matters. If there are grounds to believe that the property includes nonconforming uses or nonconforming structures, it may be desirable to secure the services of an attorney specializing in zoning matters.
17. As an optional item, the practical assurance of compliance provided by the issuance of certificates of occupancy may be supplemented by certifications from appropriate architects and engineers that the improvements comply with zoning development standards and any development restrictions on the plat. Use of such certifications especially should be considered if the zoning ordinance does not indicate that zoning compliance is a condition to issuance of certificates of occupancy, or if there is a potential for structural nonconformity.
18. Obtain a certificate from the borrower regarding his lack of knowledge of zoning or platting violations and confirm any disclosures from the borrower material to the zoning investigation.

*Undeveloped Property.*

19. Perform the plat review steps in items 6-7 if the property has been platted.
20. If the property has not been platted, review the platting ordinances to determine whether dedications of property may be required, on-site infrastructure improvements may have to be constructed, or impact fees paid. There may be significant, complex budgetary and timing issues that need to be addressed with legal and other professionals experienced with the platting process. The specifics are beyond the scope of this paper.
21. Repeat items 8-13. The focus of the review is not on whether everything has been done, but on what remains to be done. Possible uses should be compared to the borrower's plans. Permits beyond normal building permits and certificates of occupancy should be identified, and requirements should be addressed in the loan documentation. Particular attention should be paid to discretionary approvals such as changes in zoning classification, variances, and the like. The involvement of zoning specialists should be considered if discretionary approvals are required.

22. Obtain certificates from design professionals that improvements constructed in accordance with the design documents will comply with zoning and platting requirements.
23. Obtain a certificate from the borrower regarding his lack of knowledge of zoning or platting violations, and confirm any disclosures from the borrower material to the zoning investigation.

If the review process discloses issues or problems, it is suggested that contact be made with appropriate city officials in an attempt to clarify or resolve these issues. Such contacts should be coordinated with the borrower and his counsel, and consideration may need to be given to the employment of special counsel with significant zoning experience.

ENDNOTES

1. State Bar of Texas committee on Lawyers' Opinion Letters in Mortgage Loan Transactions, *Preliminary Draft of a Statement of Policy Regarding Lawyers' Opinion Letters in Mortgage Loan Transactions* (1985) [the "Statement of Policy"], reprinted in REAL ESTATE OPINION LETTERS at p. 301 (PLI No. N4-4536 1990, Thompson R., Chairman). Other bar associations have also addressed opinion letters in mortgage or other real property transactions. See Attorney Opinion Letter Committee of the Real Property Law Section of the New York State Bar Association, *Mortgage Loan Opinion Report* (Nov. 8, 1989) [the "New York Report"] reprinted in *id.* at p. 49; Maryland State Bar Association, Inc. & The Bar Association of Baltimore City, *Report of the Special Joint Committee on Lawyers' Opinion Letters in Commercial Transactions* (Jan. 18, 1989) [the "Maryland Report"], reprinted in *id.* at p. 91; Joint Committee of the Real Property Law Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association, *Legal Opinions in California Real Estate Transactions* (1987) [the "California Report"], reprinted in *id.* at p. 199. The Massachusetts Bar developed an opinion letter format for use in loan transactions generally. Massachusetts Bar Association Committee on Corporate, Banking and Business Law, *Omnibus Opinion for Use in Loan Transactions* (1975), reprinted in *id.* at p. 317. Subsequent citations will be to the reprinted text appearing in the Practising Law Institute publication cited above, with page references indicated as "PLI at p. \_\_."

2. "We have no current actual knowledge that the Property, including the improvements constructed thereon, and the use thereof by Borrower fail to comply with an applicable restrictive covenants or Applicable Laws." *Statement of Policy*, PLI at p. 314. A similar statement was provided to address future improvements under construction mortgage loans. The *Statement of Policy* also recommended a statement that "[w]e have no current actual knowledge that the Loan Documents violate, conflict with, result in the breach of, or constitute a default under any Applicable Laws . . ." *Id.*

3. There are a wide variety of other land use and development controls. For example, laws principally concerned with conservation of natural resources (such as wetlands, coastal zones, or floodplains) may affect land use and development in a particular locale. See, e.g., U.S. Clean Water Act §404, 33 U.S.C.A. §1344 (1986) (dredge or fill permits in wetlands or other jurisdictional waters of the United States); TEX. NAT. RES. CODE ANN. ch. 63 (Vernon Supp. 1990) (county power to establish dune protection lines and prohibit removal of vegetation or excavation); Antiquities Code of Texas, *id.* ch. 191 (regulation of excavation and other activities affecting designated landmarks); TEX. WATER CODE ANN. §§26.046-.0461 (Vernon 1988) and regulations at 31 TEX. ADMIN. CODE ch. 313 (West 1990) water pollution abatement plans for development on land within the area of the Edward's Aquifer); TEX. REV. CIV. STAT. ANN. art. 1182o (Vernon supp. 1990) (requiring home-rule municipalities regulating the use and development of watersheds to file a map of the regulated area with the county clerk).

Pollution discharge regulation may also include land use regulatory elements. Some of these environmental laws affect only very specialized land uses. See, e.g. Texas Solid Waste Disposal Act,

TEX. HEALTH & SAFETY CODE ANN, §§361.097-.104 (Vernon Supp. 1990) (site location standards for hazardous waste management facilities). Others, however, are of sufficient breadth to have potential consequences for a wide variety of land uses. For example, the Texas Clean Air Act, *id.* ch. 382, requires construction and operation permits from the Texas Air Control Board for any stationary source discharging “air contaminants,” a term defined so broadly as to include virtually every substance released into the air by other than natural means. Residential and commercial buildings usually do not require permits because most common air contaminant sources or activities, such as comfort air conditioning units, restaurant food preparation, vacuuming carpets, *etc.*, are included on a list of standard exemptions established by the Texas Air Control Board. *See* 31 TEX. ADMIN. CODE §116.6 (West 1990).

Even laws focused primarily on issues one would not normally associate with real estate use or development may include elements that can be considered land use and property development regulations. For example, the Fair Housing Act Amendments of 1988, 42 U.S.C.A. §§3602-14a (Supp. 1990), enjoin restrictions on occupancy based on family status and require design standards to accommodate the handicapped, and buried in a statute governing the management of property owned or occupied by the State of Texas and its agencies, lie statutory handicapped accessibility design standards that are applicable to a wide variety of buildings that are open to the public. *See* TEX. REV CIV. STAT. ANN. art. 601 b, §§7.01-.05 (Vernon Supp. 1990).

Finally, land use and development regulation is also frequently accomplished through private covenants running with the land. This circumstance is particularly true in modern industrial and office parks, where an architectural control committee often reviews development plans to ensure compliance with private design and quality standards, And indeed, in the City of Houston where there is no zoning, land use regulation has been left largely to private control through covenants.

4. The ability of the lender to successfully assert a claim against the borrower’s counsel is open to question. *See Continental Sav. Ass’n v. Sneed, Vine, Wilerson, Selman & Perry*, No. A-88-CA-844 (Civ. No. A-88-CA-844, W.D. Tex. May 16, 1989) (borrowers’s lawyer, who had specifically addressed a formal opinion to the lender knowing that reliance was intended, nonetheless owed no duty of care to that lender because the lender was outside the privity of the attorney-client relationship); *see also Dickey v. Jansen*, 731 S.W.2d 581 (Tex. App. -- Houston [1st. Dist.] 1987, writ ref’d n.r.e.) (beneficiaries of a will are not third party beneficiaries or in privity for purposes of tort claims against the testator’s counsel); *Berry v. Dodson, Nunley & Taylor, P.C.*, 717 S.W.2d 716 (Tex. App. -- San Antonio 1986, writ dism’d by agr.) (beneficiaries of a will have no privity for purposes of tort claims against the testator’s counsel); *First Municipal Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart*, 648 S.W.2d 410 (Tex. App. -- Dallas 1983, writ ref’d n.r.e.) (lender lacks privity to rely on opinion letter given to the borrower by the borrower’s counsel).

5. Municipalities are authorized to establish zoning and subdivision regulations. TEX. LOC. GOVT. CODE ANN. chs. 211-12 (Vernon supp. 1990). Counties, on the other hand, have no general zoning power outside of specific geographical area, but do have the power to establish subdivision regulations. *Id.* chs. 231-32. In the City of Houston, no zoning ordinances have been

adopted, but general municipal subdivision powers have been expanded to allow some regulation of property development, *id.* §§212.041-.050, and special statutes allow public enforcement of the private land use and development restrictions that abound in that city. *See id.* §§230.001-.004 & 230.011-.018. Thus to some extent, land use regulation in Houston follows a different path to many of the same ends reached elsewhere by the more conventional expedient of zoning.

6. Most of the provisions of the general zoning enabling statute address zoning commissions, procedures for notices and hearings in adopting or amending ordinances, the creation of a board of adjustment and the scope of its powers, and enforcement options. *See id.* §§211.006-.013. Similarly, the general subdivisions statute is concerned largely with matters such as extraterritorial jurisdiction, recording requirements, who approves plats, rules for amending or vacating plats, and enforcement options. *See id.* §§212.003-.009 & .0105.018.

7. Zoning regulations must be adopted in accordance with a city's comprehensive plan, must be uniform for each class or kind of building within a particular zoning district (but may vary from district to district), and must be reasonably related to the character or purpose of each zoning district. *Id.* §§211.004 & .005 (b). Likewise, subdivision regulations need only assure that plats conform to the general plan of the municipality. *Id.* §212.010. Obviously, zoning and subdivision regulations must also comply with substantive constitutional requirements concerning taking of property without just compensation, free speech, equal protection, and similar matters. Particular elements of zoning or subdivision ordinances, such as requirements for certain types of fees or controls of vertical obstructions to flight, may also be governed by other state statutes. *See, e.g., id.* ch. 395 (capital improvements impact fees); *id.* ch. 241 (airport zoning).

8. The Texas Constitution authorizes cities having more than 5,000 people to adopt their own charters. TEX. CONST. art. 11. §5. So-called "home-rule" cities have very broad powers, and are not limited to zoning and subdivision ordinances in their efforts to regulate specific land uses and development activities. *See Unger v. State of Texas*, 629 S.W.2d 811 (Tex. App. -- Ft. Worth 1982, no writ); *White v. City of Dallas*, 517 S.W.2d 344 (Tex. Civ. App. -- Dallas 1974, no writ).

General law municipalities have the same powers as do home-rule cities under the authority specifically granted in the zoning and subdivision enabling statutes. TEX. LOC. GOVT. CODE ANN. §1.005 (Vernon 1988) (defines the term "municipality," which is used in those statutes, to include home-rule and special-law municipalities). Likewise counties, which have only those powers specifically delegated by the state, operate under enabling statutes that are largely procedural, affording the counties considerable flexibility in shaping their delegated powers to local conditions. *See generally id.* chs. 231-32.

9. Statement of Policy, PLI at p. 313-14. Factual statements about the lawyer's knowledge of legal proceedings, consent requirements, conflicts with other obligations, and compliance with laws and restrictive covenants were also included. *Id.*

10. TEX. LOC. GOVT. CODE ANN. ch. 241 (Vernon 1988).

11. Other radius requirements may be imposed by statute, such as the one-half mile spacing requirements for community homes for disabled persons. TEX. REV. CIV. STAT. ANN. art. 1011n, §3 (e) (Vernon supp. 1990).
12. The zoning ordinance may or may not be valid. Zoning ordinances may be challenged on many theories -- improper notification, illegal "spot" zoning, and invalid regulatory taking without compensation, to name a few. Courts accord ordinances a strong presumption of validity. *E.g.*, *Lombardo v. City of Dallas*, 47 S.W.2d 495 (Tex. Civ. App. -- Dallas 1932), *aff'd* 73 S.W.2d 475 (Tex. 1934). Procedural, but not constitutional, defects in adopting ordinances may be cured by legislative acts. *E.g.*, *Murmur Corp. v. board of Adjustment of Dallas*, 718 S.W.2d 790 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.); see TEX. REV. CIV. STAT. ANN. arts. 974d-37 (Vernon Supp. 1990). Thus, validity generally may be assumed without undue risk, although attorneys should, of course, be alert for potential validity problems.
13. For example, in Dallas the right to operate a nonconforming use is terminable by order of the board of adjustment following an amortization period, and is forfeited if any ordinance related to the operation of the nonconforming use is violated. DALLAS CITY CODE §51A-4.704.
14. For example, one ordinance distinguished four different types of cleaning operations -- "custom cleaning shop," commercial cleaning shop," "self-service laundry or dry cleaning," and "laundry or cleaning pick-up and receiving station." The same ordinance also found it important to distinguish a "game court center," a "private recreation club or area," and a "health studio."
15. See TEX. LOC. GOVT. CODE §211.009(a) (1) (Vernon 1988). Boards of adjustment also issue discretionary hardship variances and special exceptions. *Id.* §§211.009 ((a) (2) & (3)). In many cities, the board of adjustment also makes decisions relating to the protected "nonconforming" status that typically ensues when a previously legal or unregulated use or structure confronts new or changed zoning regulations with which it no longer complies.
16. See *city of Dallas v. Gaechter*, 524 S.W.2d 400 (Tex. Civ. App. -- Dallas 1975, writ dismiss'd), *Thomas v. City Of San Marcos*, 477 S.W.2d 322 (Tex. Civ. App. -- Austin 1972. no writ).
17. TEX. LOC. GOVT. CODE ANN. §211.009(b) (Vernon 1988).
18. See *id.* §§211.008(b) & .009(c).
19. *Id.* 211.011(a). See *City of San Angelo v. Boehme Bakery Co.*, 144 Tex. 281. 190 S.W.2d 67 (1954), for a description of the certiorari process. Note that while the review is based on the record before the board of adjustment, the court may hear additional evidence. The certiorari process is the exclusive means of seeking judicial review of an interpretive decision.
20. See generally J. MIXON, TEXAS MUNICIPAL ZONING LAW, ch. 11 (1990).

21. See *Heard v. City of Dallas*, 456 S.W.2d 440 (Tex. Civ. App. -- Dallas 1970, writ ref'd n.r.e.); *Rosenthal v. City of Dallas*, 211 S.W.2d 279 (Tex. Civ. App. -- Dallas 1948, writ ref'd n.r.e.); cf. *Texas to Save the Capitol v. Board of Adjustment of Austin*, 647 S.W.2d 773 (Tex. App. -- Austin 1983, writ ref'd n.r.e.) (abuse of discretion test). But see *Board of Adjustment v. Underwood*, 332 S.W.2d 583 (Tex. Civ. App. -- San Antonio 1960, writ ref'd n.r.e.).

22. Subdivision plats may also independently dictate design standards by establishing setback lines, fire lanes, the location of curb or median openings, and other standards.

23. Real estate construction also requires building and other construction permits to be issued pursuant to construction codes, which are generally not part of the zoning ordinance. Zoning requirements are, however, typically reviewed as part of the construction permitting process. Although construction code compliance lies beyond the scope of this discussion, many of the observations and comments in this paper may be equally relevant.

Note also that many zoning ordinances do not require a certificate of occupancy for single-family residences, but rely instead on inspections by building officials during and after construction to verify zoning compliance.

24. E.g., DALLAS CITY CODE §51A-1.104(a) (1), which provides only that “. . . a person shall not use or change the use of a building, a portion of a building, or land without obtaining a certificate of occupancy from the building official.”

25. E.g., LAND DEVELOPMENT CODE OF THE CITY OF AUSTIN, TEXAS § 13-1904, which provides that a certificate of occupancy shall be issued on satisfaction of certain conditions, which include the condition that “. . . the development has been completed in accordance with the released site plan and complies with all ordinance and construction plan requirements . . . .”

26. One also needs to consider whether an appeal to the board of adjustment or district court has been filed, and if not, whether the time for perfecting such an appeal has lapsed.

27. See generally J. MIXON, *supra* note 20, §§7.14-.26, at pp. 7-15 through -26.

28. As an extreme example, the City of Dallas requires a certificate of occupancy for a change in tenant identity. DALLAS CITY CODE §52-306(a) (“. . . no change in the existing occupancy classification or the tenant or occupant of a building. . . shall be made until the Building Official has issued a certificate of occupancy . . .”).

29. “Impact fees” are regulated under TEX. LOC. GOVT. CODE ANN. ch. 395 (Vernon supp. 1990).

30. *Id.* §§212.009 & .010. With respect to county-approved plats, state law requires an order of approval by the commissioner’s court, but does not require endorsement of the plat. See *id.* §232.002.



31. *See id.* §§212.004 & 232.001.

32. The statutory language requires a plat when there is a division of land for certain purposes. *See id.* §§212.004(a) & 232.001(a). The statute fails to resolve what types of divisions are covered (divisions in fee versus divisions into separate leasehold or mortgage estates, for example) and the effect of the owner's intention in making the division or how that intent is to be ascertained. The courts have not helped, but have generally construed the statutory language so broadly that the mere act of drawing a line on paper or erecting a fence without any present division of ownership has been found to come within the ambit of the platting statutes. *See City of Weslaco v. Carpenter*, 694 S.W.2d 601 (Tex. App. -- Corpus Christi 1985, writ ref'd n.r.e.), holding that laying out lease lines in a mobile home park constituted a subdivision; *Cowboy Country Estates v. Ellis Co.*, 692 S.W.2d 882 (Tex. App. -- Waco 1985, no writ), holding that laying out of lease lines for a mobile home park is sufficient to constitute a subdivision; cf. *City of Lucas v. North Texas Municipal Water District*, 724 S.W.2d 811 (Tex. App. -- Dallas 1986, writ ref'd n.r.e.), holding that under TEX REV CIV STAT. ANN. art. 970a (a statute granting cities extra-territorial jurisdiction over subdivisions), the water district had subdivided its 403-acre tract and subjected itself to the jurisdiction of the city when it planned to construct a separately financed facility on part of the tract that would be fenced off and separately served by utilities.

33. Acts of 1987, 70th Legis., Reg. Sess., ch. 1102. §1. Because the formatting of this bill was inconsistent with that of the Texas Local Government Code, which had been adopted in the same session, conforming changes were made in the next regular session. Acts of 1989, 71st Legis., Reg. Sess., ch. 1, §46(b). In any event, the relevant language for cities now appears at TEX. LOC. GOVT. CODE ANN. §§212.0045 & .0115(c) (Vernon supp. 1990). Counties also have the authority to determine when a plat is required. *Id.* §232.0015.

34. *Id.* §§212.0115 (cities) & 232.0046 (certain counties). The ability to connect the property to utilities may be adversely affected if the certificate has not been obtained. *See id.* §§212.012 & 232.0047.

35. In New York, the bar did not include a zoning compliance opinion in the recommended mortgage loan opinion, but in recognition of local practice in "upstate" New York included a form of zoning opinion in an appendix without material discussion of the issues and problems involved. *New York Report*, PLI at pp. 85-90. The Maryland bar included a very limited zoning opinion about what uses might be permitted in a particular zoning district, and in its discussion expressed a number of reservations about broader opinion statements. *Maryland Report*, PLI at pp. 155-160. In a discussion that also included environmental laws, the California bar addressed compliance opinions without suggesting a recommended form, and noted many of the same concerns that lead us to a recommendation opposed to the general use of zoning compliance opinion letters. *California Report*, PLI at pp. 252-257.

36. We do not address opinion statements such as "the property and its operation and use comply with all applicable laws." Owing to the wide diversity and technical character of construction codes, zoning ordinances, environmental, tax, and other laws that bear on real estate and its operation, a

tenable argument can be made that an attorney rendering such an opinion will violate Disciplinary Rule 1.01, which provides that “[a] lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence.” TEX. GOVT. CODE ANN. tit. 2G-App., art. X, §9, rule 1.01 (Vernon supp. 1990).

37. This is essentially the opinion recommended in the *Maryland Report* and included as an example of local custom in the *New York Report*. The Maryland format included a statement that the zoning ordinance permitted a particular use in a particular district, and relying on a statement from the borrower that the property was only so used, concluded that the use of the property was permitted subject to compliance with other provisions of the zoning ordinance. *Maryland Report*, PLI at p. 155. Similarly, the New York format suggested a statement that a particular use, described as the intended use of the property, was permitted in a particular zone. *New York Report*, PLI at p. 87.

38. TEX. GOVT. CODE ANN. tit. 2G-App., art. X, §9, rule 2.02 (Vernon supp. 1990).

39. See TEX. LOC. GOVT. CODE §211.012 (Vernon 1988).

40. Other bar associations have expressed a similar conclusion. The *Maryland Report*, PLI at p. 158, notes:

In any case, the scope of the zoning opinion should be addressed and agreed upon in the early stages of the transaction. The opining lawyer and his client should discuss with the recipient of the opinion and its lawyer the particular areas in which the recipient needs comfort and any possible alternative means of providing some comfort, such as certification from the project architect or engineer, evidence afforded by permits and certificates from the local zoning, planning and/or building authorities, or affirmative title insurance endorsements which do not require supporting opinions from lawyers.

Similarly, the *California Report*, PLI at p. 254, observed:

The Joint Committee believes that controversies with respect to difficult environmental and zoning opinions may be minimized if the parties focus on the issue at the inception of the transaction. Often, the first issue is to determine whether any opinion at all is required. . . In many instances, the appropriate comfort for the lender may be obtained by including specific representations and warranties in transactional documents and by requiring, as a condition of closing, the delivery of appropriate certificates executed by the project architects, engineers, contractors, or other consultants together with copies of relevant governmental approvals and permits.

41. “A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence.” TEX. GOVT. CODE ANN. tit. 2G-App., art. X, §9, rule 1.01 (Vernon supp. 1990).

42. *Id.*, rule 4.01 & n.2 (prohibits false statements of material fact or law, including false statements by others knowingly incorporated or affirmed by an attorney).