PRE-NEGOTIATED PSA: STREAMLINING THE SALE PROCESS

Published in
ACREL NEWS & NOTES
(April 2020)

By Stevens A. Carey

ACREL PRE-NEGOTIATED PSA: STREAMLINING THE SALE PROCESS

APRIL 2020 REPORT

By Stevens A. Carey*

The Acquisitions Committee of the American College of Real Estate Lawyers (ACREL)[1] is attempting to create a pre-negotiated purchase agreement to expedite the sale process for commercial real estate. The idea is to create a form that parties might be willing to accept regardless of who is the buyer and who is the seller, with the only changes being those necessary to reflect the deal terms. Of course, the form will be an approximation at best and will be based on a number of assumptions; our committee recognizes that no matter how good the form is, it may not be good for all clients or all circumstances.[2] But it could be attractive to those who value the savings in time and costs more than the marginal benefits of a stronger contract. And even if the parties do not want to be bound by all the compromise provisions in the form, it may be a useful resource for compromises (and, if done well, thoughtful drafting). If the parties agree to use it as a starting point, it may establish a more cooperative working relationship by avoiding the often costly and time-consuming (and sometimes frustrating) step of responding to an initial draft based on a lopsided document. Depending on the progress made in 2020, a draft may be ready for circulation sometime in 2021. In the meantime, this report will highlight some of the steps considered to date to create the form.

* *Stevens A. Carey is a partner with Pircher, Nichols & Meeks LLP, a real estate law firm located in Los Angeles, California.* *He is the current chair of the ACREL Acquisitions Committee and thanks all the members of the ACREL Acquisitions Committee working on the pre-negotiated PSA project for their time and effort, John Cauble of Pircher, Nichols & Meeks LLP and Art Menor of Shutts & Bowen LLP for providing comments on a prior draft of this report, and Tim Durkin for cite checking.* *This report is not intended to provide legal advice. The views expressed (which may vary depending on the context) are not necessarily those of ACREL, the ACREL Acquisitions Committee or the subcommittee working on the pre-negotiated PSA project, Pircher, Nichols & Meeks LLP, or this publication. It is important to remember that every transaction is different and what is appropriate for one transaction may not be appropriate for another. Any errors are those of the author.*

---

[1] The subcommittee working on the pre-negotiated PSA project is currently comprised of: Cary Barton of Barton Benson Jones PLLC; Peter Breckheimer of Glaser Weil LLP; Steve Carey of Pircher, Nichols & Meeks LLP; Barbara Christy of Schell Bray PLLC; Thomas Coyne of Thompson Hine; Raymond Iwamoto of Schlack Ito LLLC; Tom Kaufman of Montfort Fiduciary Advisors LLC; Lloyd Kepple of Fox Rothschild LLP; Robert Krapf of Richards, Layton & Finger, P.A.; Art Menor of Shutts & Bowen LLP; Ed Menzie of Nexsen Pruet, LLC; Thomas Muller of Manatt, Phelps & Phillips, LLP; Barry Nekritz of Lawrence Kamin, LLC; Phil Nichols of Pircher, Nichols & Meeks LLP; John Nolan of Winstead PC; Marc Painter of Holland & Hart LLP; Marty Schwartz of Bilzin Sumberg Baena Price & Axelrod LLP; Kevin Shepherd of Venable LLP; Adele Stone of Buchanan Ingersoll & Rooney PC; and Mark Yura of DLA Piper LLP. The Acquisitions Committee is still looking for volunteers to join the subcommittee because there is much work to be done (including state riders and riders to address different factual assumptions). If you are interested in participating, please contact Dina Steele at dsteele@pircher.com.

[2] The form is and will be subject to the following disclaimers: (a) it is no more than an attempt to create a document that might result from negotiations between a buyer and seller with equal bargaining power; (b) it is not a model form; (c) it may not be suitable for any particular transaction; and (d) it does not necessarily represent the views of ACREL or any member of the Acquisitions Committee.

1. General Approach: Clarity and Balance

The form is not short, but it is being crafted to streamline the sale process with two general goals in mind: (1) clarity (e.g., with a focus on organization, shorter paragraphs, and more captions) to make it easier to understand and easier to revise; and (2) balance (with pre-negotiated compromises) to make it less likely that revisions will be necessary.

2. Deal Points

The specific deal points (e.g., purchase price, deposit, due diligence period, scheduled closing date, cap and threshold) are set forth at the beginning of the document. This approach allows the parties' business representatives to review and confirm all the important business points in one place – which can save time for those representatives who intend to focus only on those points.

3. Schedules and Exhibits

With the exception of the schedule of certain defined terms, all the schedules are to be completed by the business team and all the exhibits are to be completed by the legal team. This clear allocation of responsibility (rather than having only some of the exhibits completed by the business team, which can get confusing, especially as exhibits change) should save time and make finalization of the document easier to manage.

4. Compromises

Here are ten examples of the compromises incorporated into the form to create balance:

4.1. **Additional Deposit**. Time is often wasted arguing about what happens to the initial deposit when the additional deposit is not delivered on time.[3] The discussion may go something like this:

- the seller may start by providing that the contract automatically terminates if the additional deposit is not delivered by the expiration of due diligence;

- the buyer may object, saying that this approach effectively reduces the due diligence period because the buyer needs time to initiate the wire and may not be ready to make a decision before the end of the due diligence period (at which time, it may be difficult enough to send a timely notice but too late to send a wire);

- the seller may then agree to give the buyer additional time after the due diligence period (e.g., one or two business days) to fund the additional

[3] The form contemplates that the buyer must make a deposit within a fixed number of days (to be agreed upon as one of the specific deal points) after the effective date of the purchase agreement. The form also contains optional provisions to address the relatively common arrangement in which the buyer must make an additional deposit if the buyer does not terminate the purchase agreement during due diligence.

deposit but provide that if the additional deposit is not funded on time, then the seller may terminate the contract and take the initial deposit;

- the buyer may then say that (x) forfeiture of the deposit is too drastic a remedy for what may be a simple error in conveying wiring instructions, and (y) the buyer should instead get its money back if the seller wants to terminate; and

- the seller may then say that the buyer is effectively extending the due diligence period.

The form short-circuits this needless negotiation by providing that if the buyer does not fund its additional deposit on time, then at any time prior to delivery of the additional deposit, the seller has two options: (1) the seller may give a written *refund* termination notice that terminates the contract and gives the deposit back to the buyer; or (2) the seller may give a *default* notice giving the buyer additional time (e.g., one or two business days) to fund the additional deposit, and if the buyer fails to fund the additional deposit before the additional time expires (and before a refund termination notice is given), then the agreement will automatically terminate and the seller will take the initial deposit.[4]

4.2. **Due Diligence Termination Right**. Both buyer and seller purchase agreement forms typically give the buyer the right to terminate during the due diligence period.[5] But there is often a difference of opinion as to how this termination may occur: must the buyer give a notice of *termination* or simply fail to give a notice to *proceed* during the due diligence period? Sometimes sellers are adamant that the contract should stay in place unless affirmative action is taken to terminate it during the due diligence period. After all, the parties signed the purchase agreement with the expectation that the sale would occur, so termination should be the exception rather than the rule. But does the seller really want to sell to a buyer who mistakenly fails to send a termination notice on time? Real estate deals are all about relationships and taking advantage of the buyer’s mistake is likely to sour the applicable seller/buyer relationship and may harm the seller’s reputation. The form allows the buyer to give either a termination notice or a notice to proceed, but if it forgets to do either, then the contract automatically terminates. This solution also makes it easier for the buyer to accept (and more difficult for the buyer to object to) the risk of losing its initial deposit under the previous compromise provision: the buyer will have

---

4 The seller may wonder whether this solution effectively extends the buyer’s due diligence termination right. It does not. It merely adds a notice and cure right. Consequently, it might extend the time for delivering the additional deposit, but that is all it does. Once the due diligence period expires, the buyer no longer has a right to terminate (whether by giving notice or failing to fund the additional deposit). Moreover, it is possible that there is no meaningful extension of time. For example, if the seller was originally willing to give the buyer three business days to fund the additional deposit, then the contract might provide for an initial one-business-day period to fund and then an additional two-business-day cure period to fund after a default notice. If the seller has time to deliver the default notice after the wire deadline on the first business day, then it may preserve the initial three-business-day period. If notices must be given during business hours and the wire deadline ends at the close of business, then to preserve the seller’s original three-business-day period, the seller could either impose an earlier wire deadline (to allow time to give a default notice on the same day) or reduce the cure period to one business day.

5 The form gives the buyer the right to terminate during the due diligence period *for any or no reason*.

already sent a notice to proceed so should be on alert to get its deposit in on time and will have the benefit of an additional notice and cure period if needed.

4.3. **Due Diligence Disclosure Deadline**. Online due diligence data sites have been a blessing and a curse. On the positive side, they are a useful way to organize and make readily available due diligence data. On the negative side, they are very easy to change and it can be difficult to review due diligence materials that may change on a daily basis. And many buyers claim it happens far too often. Not surprisingly, buyers want the changes to stop a few days before the due diligence period expires so they have time to review the last-minute changes and take them into account in determining whether to terminate during the due diligence period. Rather than spend time discussing this issue, the form contemplates, as part of the deal terms, a "**DD Disclosure Deadline**" at 5:00 p.m. local time on a date that is a specified number of business days prior to the last day of the due diligence period. When such a compromise is negotiated during a deal, there are numerous conforming changes that are required (e.g., in the title review provisions, the tenant estoppel provisions and the anti-sandbag provisions). The form includes conforming changes. The only related open point is how far before the end of due diligence the disclosures should stop (i.e., whether to fill in the blank in the definition with one, two or some other number).[6]

4.4. **Initial Title Review**. The form eliminates any title review procedure for the initial title review. It is generally not worth the time and effort to craft mutually acceptable time periods for review, objection, response and termination when the buyer may terminate *for any or no reason* during due diligence. And, in many if not most deals, the lawyers go through the same motions: the buyer's counsel delivers a title objection letter and then (with rare exception) the seller's counsel tells the buyer to pound sand; but the parties inevitably work it out during due diligence. That is what the form contemplates. If the buyer does not terminate the agreement during due diligence, it must either approve the initial title package (and other title information that is delivered in writing to the buyer prior to the DD Disclosure Deadline) or work out something different with the seller or the title company (or both). If the buyer is not satisfied with title, then presumably the buyer will fail to give a notice to proceed, in which event the agreement will automatically terminate.

4.5. **Post Diligence Title Review**. Should there be any limits on the buyer's right to disapprove title exceptions (not caused by one of the parties) that are first disclosed to it in writing after the DD Disclosure Deadline? Many sellers expect the buyer to be subject to a *reasonableness* standard, while many buyers feel that the same standard that applies during due diligence should apply. However, if the buyer can reject title for any or no reason, then this approval right may indirectly extend the due diligence period if any new title matter comes up, no matter how benign. The current compromise proposal uses a subjective good faith standard – basically requiring that, as a condition to rejection, the buyer must honestly believe that there is an

---

[6] Some members of our committee have expressed concern that, even with the disclosure deadline, the process of reviewing constantly changing due diligence data sites can be unnecessarily time-consuming and costly. They have questioned whether it is advisable to address how changes are made to an online data site to make this process more efficient (e.g., to require a separate log of all changes and when they are made). To determine whether the imposition of such requirements is practical may require a better understanding of the software that is currently in use and available. I am told that at least one company providing online data services, RCM LightBox, has sophisticated software that allows a user to check everything that is new or changed since the user's last visit. *See, e.g.*, https://www.rcm1.com/sell/marketing-toolkit/.

adverse effect on the property in any material respect. The buyer need not be correct (or even reasonable). But the buyer must be honest and cannot use its title objection to get out of the deal for other reasons; and, as discussed in the next point, the buyer must be reasonable in rejecting affirmative title insurance proposed by the seller as a cure. Like many compromises, this one is not perfect for either party. A binding title commitment from a good title company may help reduce the relevance of this issue.

4.6. **Affirmative Title Insurance**. What if the buyer objects to a title matter that comes to light after the DD Disclosure Deadline? Many sellers expect to have the right to cure the buyer's title objection with affirmative title insurance. However, buyers may be concerned about stepping into a title problem and relying on the title company. Affirmative insurance over a known title issue does not put the insured in the same position it would have been in if the title problem did not exist. Among other matters:

- the title company may not be able (due to future financial difficulties) to honor its obligations;

- the insured's recovery may be limited by the terms of the policy (e.g., there may be a difference of opinion as to the insured's loss);

- the problem may get worse (e.g., a potential claim could become an actual claim) in which event the title insurance company may no longer be willing to insure future owners or lenders (in many jurisdictions, it may be possible to get an endorsement committing the insurer to provide insurance to a subsequent buyer or lender, but even then, the subsequent buyer may not be able to get the same endorsement); and

- the buyer's lender may not be willing to accept affirmative title insurance.

A seller may say that the final point above should not be relevant if there is no financing contingency. But it may be the most immediate concern. What happens if at or near the closing the buyer's lender refuses to accept affirmative title insurance over the problem? If the buyer has a substantial deposit at risk under the purchase agreement, then it will have no recourse to the title company (who may be willing to honor its commitment) if the lender refuses to close, the buyer is unable to close all equity, and the seller takes the deposit. The bottom line is that affirmative title insurance may be a useful cure in some circumstances but not in others. There is not likely to be any issue for the buyer or its lender in the case of a small mechanic's lien where the title company is getting adequate protection from the seller. But if there is a potentially significant matter of unknown scope (e.g., a potential claim for an unrecorded blanket easement that could disrupt the development of the property), then even though the seller has convinced the title company to provide affirmative title coverage (e.g., because of a very strong economic relationship), the problem may give the buyer and its lender pause. In an attempt to compromise this point, the form requires that any cure by way of affirmative title insurance must be approved by the buyer, but it does not allow such approval to be unreasonably withheld.

4.7. **Title Covenant vs. Quitclaim for Real Estate**. Many seller forms use quitclaim language to define the property. When a buyer asks the seller to eliminate the quitclaim language insofar as the land and improvements are concerned, the seller's response is often, if not usually: "This is how we do it. You can analyze the title during your due diligence and get yourself a title commitment." Buyer's counsel (especially in Texas) will often cry foul arguing that it is not fair to require the buyer to incur legal and other due diligence costs only to discover that the seller does not own the property, that no commitment is available, and that the buyer's only alternative is to terminate the contract and eat its costs. In the form, the property includes the land and improvements (excluding tenant fixtures) without a limitation to the seller's "right, title and interest." But it also provides that the covenant to sell the property does not survive closing and requires the buyer to accept the title exceptions reflected in a current title commitment and the existing survey if the buyer does not terminate during due diligence. This approach does not impose much risk to a seller who has a title insurance policy: even though the title policy coverage may be much less than the current price, the form does not allow for damages due to seller's failure to close in breach of the agreement other than reimbursement of out-of-pocket costs up to a cap, which should be less than the seller's title coverage.[7] When dealing with sophisticated parties, commercial real estate, and national title companies, this issue is not likely to be relevant.

4.8. **Intangible Property – Itemization of Inclusions or Exclusions?** Buyer forms typically require that the seller transfer its right, title and interest to *all intangible property* associated with the land, improvements and tangible personal property, with few exceptions, if any. If the seller wants to carve out anything, the buyer expects the *seller* to make a list of exclusions. By contrast, seller forms often, if not usually, identify certain types of intangible property (e.g., permits, licenses, warranties and guaranties received in connection with work at the property, tenant lists, and specified leases and contracts) without any catchall generic category of *other intangible property*. If the buyer wants to add something, the seller expects the *buyer* to make a list. So *who* should make the list? Should the buyer make a list of inclusions or should the seller make a list of exclusions? The seller may argue that a list of exclusions would be too long because many of its assets relate to the property but are not part of the sale. Indeed, many if not most sellers are special purpose entities created to own the property, and *all* of their assets relate in some way to the property. But the seller is not selling, for example:

- cash in its bank accounts, even though the accounts may be filled with rents from the property; there are prorations to address the prepaid rents and accrued and unpaid operating expenses.

- contracts engaging lawyers and accountants; while it may make sense for the buyer to engage the same lawyers or accountants in some circumstances (e.g., where these professionals may be needed to continue to provide services relating to ongoing entitlement, land use, property tax or other matters associated with the property), there should be a separate engagement with conflict waivers that preserve confidentiality and privilege to the extent appropriate.

---

[7] However, the committee has not reached a final conclusion as to whether the form will allow for greater damages if a seller conveys the property to a third party on or before the scheduled closing date in bad faith violation of the agreement.

- claims it may have against it officers, directors and others within the seller organization who did work related to the property, or claims against tenants who are no longer at the property.

The buyer may then say that it does not know enough about the property to know what is being left out; the seller is in a better position to make a list. The form takes the buyer's position in this argument but also includes an extensive list of exclusions.

4.9. **Closing Wire Deadline**. Not surprisingly, the seller expects to receive the purchase price on the date of closing in time to invest the funds. More importantly: in many if not most commercial real estate sales, the property is subject to financing; and the seller wants to receive the purchase price in time to pay off the existing financing by the lender's wiring deadline so there is no additional interest to pay. Consequently, the seller often imposes a funding deadline as of a certain time on the scheduled closing date. But the buyer does not want to lose its deposit (as liquidated damages) if the funds of the buyer (or the funds of its lender) arrive a few minutes (or even a few hours) late on the scheduled closing date. As a compromise, the form provides that if the purchase price arrives late on the scheduled closing date but all other conditions to closing are satisfied or waived, then the scheduled closing date is deferred for one business day. Assuming the property is generating positive cash flow and the seller's financing allows for prepayment the following day without additional charge (other than interest for an additional business day and any intervening non-business days), this solution provides the seller with one or more days of positive cash flow.

4.10. **Exceptions to Cap and Threshold**. The form includes, among the specific deal points to be completed by the parties, a threshold and a cap on post-closing claims against the seller under the agreement or any certificates delivered by the seller. Seller forms in many jurisdictions will include such limits, but many such forms do not have any exclusions. When the buyer requests, sellers will often agree to exclusions for closing costs and prorations because they are part of the bargained-for economics; and the form so provides. The seller might also agree to an exclusion for brokerage indemnification claims (which may be viewed as a modest extension of the closing cost argument); and the form excludes these as well. But that might not be enough to satisfy the buyer. What if the buyer incurs attorneys' fees and other collection costs to get the seller to pay what the buyer is owed as a result of the seller's breach? And what if the seller puts up such a fight that it costs the buyer $X to collect from the seller a claim for $X? Would the cap on the seller's liability leave the buyer with a net recovery of $0? The form concedes this point in favor of the buyer as long as the buyer is entitled to the costs under the prevailing party clause in the agreement. The buyer may also argue that there should be no cap or threshold for *fraud*. The seller, however, may be concerned about the breadth of a *fraud* carve-out because it may encompass negligent or reckless misrepresentations or extraneous promises. *See, e.g.*, Glenn D. West, *That Pesky Little Thing Called Fraud: An Examination of Buyers' Insistence Upon (and Sellers' Too Ready Acceptance of) Undefined "Fraud Carve-Outs" in Acquisition Agreements*, 69 BUS. LAW. 1049, 1052 (text at n.10) (Aug. 2014). The form allows for a carve-out for a *Fraudulent Seller Breach* not known to the buyer at the closing. "Fraudulent Seller Breach" is defined to include (x) a breach of the seller's closing representations (i.e., the representations and warranties in the seller closing certificate that down-dates the seller's representations and warranties in the agreement) not disclosed in the due diligence materials and made with an intent to deceive the buyer and (y) the seller's withholding of material information from the due diligence materials with an intent to deceive the buyer.

5. REDUCING EXCESS VERBIAGE AND CONFUSION

Less wording means less time to review and is therefore a laudable goal. But, as intimated above, the form is long as a result of an effort to create clarity (e.g., with additional paragraph breaks and headings) and balance (with additional language to address the concerns of both sides). Here are a few steps taken to shorten or clarify the form:

5.1. **No Recitals**.

5.1.1. ***No Background Recitals***. The form does not include recitals of background facts. While such recitals may be useful in some transactions, they are usually unnecessary in a straightforward sale of commercial real property. Earlier drafts of the form had only one recital, as many real estate purchase agreements do, stating that "Seller desires to sell, and Buyer desires to buy, the 'Property' (as hereinafter defined), on the terms and conditions hereinafter set forth." But this statement goes without saying. The essence of the deal may be gleaned instead from the deal specific terms at the outset of the form.

5.1.2. ***No Consideration Recitals***. The form also does not include recitals of consideration. While such recitals may sometimes be important (e.g., in the context of an option), they serve little purpose in the context of most sales of commercial real estate. *See, e.g.*, Kenneth A. Adams, *Outside Counsel Expert Analysis – Reconsidering the Recital of Consideration*, 254 N.Y. L.J. (Dec. 9, 2015), ***available at*** https://www.adamsdrafting.com/wp/wp-content/uploads/2015/12/Reconsidering-the-Recital-of-Consideration.pdf. The form includes independent consideration to address illusory contract claims by reason of the buyer's right to terminate for any or no reason during the due diligence period.

5.2. **Defined Terms Index vs. Glossary: Eliminating Cross-References**. The form includes a machine-generated single-spaced index of all defined terms, indicating the page where each definition appears. The form also includes a schedule containing a glossary of some general (or frequently used) defined terms. But the glossary does not attempt to include all definitions (most definitions appearing instead in context to foster a greater understanding). And the glossary does not include terms defined elsewhere in the agreement (with a cross-reference to the appropriate section where the definition appears) for the following reasons: (x) it would make the document longer; and (y) it would likely be more time-consuming to maintain a comprehensive glossary than a comprehensive defined terms index, which is more user-friendly when searching for definitions.

5.3. **Avoiding Repetition**.

5.3.1. ***Saying the Parties "Agree" Only Once***. In light of the fact that the agreement begins with the words "who agree as follows:", it is not necessary to repeatedly precede provisions with the words "agrees to," "covenants and agrees to," "hereby covenants and agrees to" or similar verbiage. It is common to see such excess verbiage inserted in some places and not in others and when it appears, the wording often varies (using slightly different words, as illustrated above). Yet there is presumably no intent to create any distinction by the inconsistencies. The form eliminates most of this unnecessary text. *See, e.g.*, David T. Daly, *Top 10 Phrases Not to Use in a Contract—A Lesson from Dr. Frankenstein*, 78 MICH. B.J. 186 (Feb. 1999).

5.3.2. ***Avoiding Separate Definitions for Singular and Plural Cases***. The definitions in many agreements address both the singular and plural cases. For example, an agreement might include the following definition:

> "**Party**" means Seller or Buyer, individually, and "**Parties**" means Seller and Buyer, collectively.

And when this approach is taken, it is often not taken consistently. The form does not take this approach at all because it is unnecessarily verbose. In case there is any doubt, the form states generally what most readers may take for granted: "When a singular defined term is used in the plural or a plural defined term is used in the singular, it will have a corresponding meaning (e.g., if 'Box' were a defined term, then 'Boxes' would mean all of the same, collectively, and if 'Boxes' were a defined term, then 'Box' would mean any one of them, individually)."

5.3.3. ***Avoiding Numerical Doublets***. The form does not state numbers twice (first as words and second as Arabic numerals in parentheses). Several lawyers resisted this change arguing that numerical doublets require what is in effect a *double-check* that is worth the extra space. *See, e.g.*, David Gentry, *Writing Out Numbers in Contracts: Does It Make Sense?*, GENTRY LAW GROUP, LLC (Aug. 22, 2016), *available at* https://www.gentrylawgroup.com/writing-out-numbers-in-contracts/. However, most of our committee members (who communicated with me about this subject) find numerical doublets to be a cumbersome anachronism that can be particularly awkward with large numbers and, as Bryan Garner points out, create an opportunity for inconsistencies. *See* BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH § 39, at 136–39 (2d ed. 2013). With some exceptions (e.g., a percentage is always an Arabic numeral and a percentage sign), the form uses Arabic numerals for numbers higher than ten and spells out in text the numbers one through ten. *See, e.g.*, GARNER, *supra*, at 136.

5.3.4. ***Avoiding Other Doublets***. An attempt has been made to avoid other doublets and in some cases to make clear that they would otherwise be coupled synonyms. Do we really mean two different things when we refer to *approvals* and *consents*, *breaches* and *defaults*, *costs* and *expenses*, and *true* and *correct*? The miscellaneous provisions contain the following statement: "(d) the two words in each of the following pairs of words (whether used in the singular or the plural) will be deemed to have the same meanings, which will encompass each example encompassed by the meaning of either word: 'approval' and 'consent'; 'breach' and 'default'; 'cost' and 'expense'; and 'true' and 'correct'; . . . ." *See* GARNER, *supra*, § 16, at 55–56.

5.3.5. ***Stating Writing Requirement Once***. At least one commentator suggests that a contract say once that notices must be in writing to be effective, and then written notice be replaced by notice throughout the contract. *See* Daly, *supra*, at 187. The same argument may be made regarding consents and requests. The form adopts this approach, except in the case of notices, consents and requests *to or from third parties* (e.g., a representation that seller has not received a written default notice *from a tenant*).

5.4. **Uniformity, Clarity and Less Wording**.

5.4.1. ***Clarifying Meaning of "Including"***. The form does not repeatedly use the words *without limitation* or *but not limited to* after *include*, *includes* and *including*. The form has a general provision (in the miscellaneous section) that effectively adds *without limitation* automatically. If a different meaning is intended, different words should be used. For example, if *include* is intended to be completely restrictive, then use *means*, *i.e.*, or something similar. For a discussion of alternative meanings of *include*, *see, e.g.*, Stevens A. Carey, *Legal Writing: Confusing Abbreviations, Words, and Phrases*, 33 REAL EST. FIN. J. 31, 34–37 (Fall 2017).

5.4.2. ***Clarifying and Not Repeating Discretion Standards***.

- *Sole and Absolute Discretion*. The form does not repeatedly refer to *sole and absolute discretion* for consents and provides instead in the miscellaneous provisions that this standard applies in the absence of a reasonable discretion or other standard that is expressly stated. Our committee did not have uniform agreement on this point: some members objected that a general provision governing "silent" consent clauses might be overlooked; they recommended that we be transparent and state the relevant standard in each place where it appears. However, the general approach was adopted (1) to reduce the length of the document, (2) to make it easier to avoid unintended inconsistencies with the use of *sole discretion* in some places and *sole and absolute discretion* in other places (which terms may not mean the same thing), and (3) to clarify that *sole and absolute discretion* is unfettered. For a discussion of alternative meanings of *sole discretion*, *see, e.g.*, Carey, *supra*, at 42–43.

- *Reasonable Discretion*. In those instances when consent may not be *unreasonably withheld*, the form does not repeatedly say *unreasonably withheld, conditioned or delayed* and provides instead in the miscellaneous provisions that *unreasonably withheld* means *unreasonably withheld, conditioned or delayed*.

5.5. **Herein, Hereunder, Hereof and Hereby**. Our committee struggled with the question of whether to eliminate *herein*, *hereunder*, *hereof* and *hereby* from the form because these words are (1) archaic legalese and (2) often ambiguous. *See, e.g.*, Carey, *supra*, at 40–41. In most instances, for example, *herein* may be replaced by *in this Agreement* and *hereunder* may be replaced by *under this Agreement*. Although each such replacement adds 11 additional characters and spaces, and more than 100 replacements would be required (in the current draft of the form), most members of our committee do not appear to view the extra space alone as too high a price to pay for the resulting clarity. The problem is that some if not many drafters may not be dissuaded from using these words in the provisions that are changed or added. We concluded that rather than taking the time to be grammar and style police, we would retain these words, save the space, and add general rules governing their interpretation.

6. FINAL NOTE

If you have contrary thoughts about any of the features of the form described in this report, or if you have suggestions for (1) other time-saving compromise positions that are likely to be accepted by both a buyer and a seller, (2) space-saving ideas that would not compromise meaning or understanding, (3) alternative or additional language that would eliminate ambiguities or otherwise clarify the form, or (4) other steps to create a more useful form, please send them to me at scarey@pircher.com. And if you are interested in seeing the current draft, all you need to do is join our subcommittee. We are still looking for volunteers for, among other matters, state riders and riders for alternative factual assumptions (e.g., different property types). If you want to volunteer, please contact Dina Steele at dsteele@pircher.com.

* * *