



# Commercial Transactions and Lender Instructions

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*First American  
Title Company of Oregon*

# Commercial Transactions

Would you underwrite and close the purchase of these two properties the same way?



# Commercial Transactions

## Takes More Time

- Participants are generally experienced and used to good service
- Often more participants involved – more requests and more parties to keep informed
  - Parties (more representatives), brokers, lender(s), and attorneys for parties and lenders



# Commercial Transactions

## Not Cookie Cutter

- Each transaction is different so you have to understand the specific transaction
- Not likely to use a form purchase agreement
- Must review the purchase agreement and other open order information
  - Nature of transaction and time-frames
  - Are any **off-record** title matters identified (e.g., existing leases, lack of current access, encroachments, etc.)
  - Will any title matters be created at closing (e.g., seller financing, creation of easements or covenants, etc.)



# Commercial Transactions

## Attorney Involvement

- Seller, buyer and lender are generally represented by attorneys
- Likely to see **title objection letter** and requests to remove specific title exceptions and for specific endorsements
- Likely requests for **pro-forma title insurance policies** to go with **attorney prepared escrow instructions**
- Attorneys will generally prepare more of the closing documents (**deed, bill of sale, assignment of leases, easement agreement, etc.**)



# Commercial Transactions

## Personal Property

- Transaction may include the conveyance of personal property
- May get a request to provide a UCC search of the Secretary of State's records
- Title insurance may be requested for personal property – which means some form of UCC policy (e.g., **Eagle9 Policy**)
- **Bill of Sale** is commonly used to convey personal property
- Lender may want a **UCC-1 Fixture Filing** recorded with the Oregon Secretary of State at closing





# Commercial Transactions

## Leasehold Policy

- Generally only requested with a *ground lease* where the tenant will construct major improvements
- Need to make changes to title report/policy, should add a leasehold endorsement, and need to record lease or a memorandum of lease
  - Talk with your underwriter about specific requirements



# Commercial Transactions

## Existing Leases

- There are often existing leases
- Existing leases are assigned to the buyer using an **assignment of leases**
- New lender will often require tenants to enter into **subordination, non-disturbance and attornment agreements (SNDA)**
  - Move leases from Part I to Part II of loan policy
- May want the general exception for unrecorded leases or periodic tenancies limited to the **specific leases** of existing tenants or state there are **no ROFRs or options to purchase**





# Commercial Transactions

## Larger Policy Amounts

- Greater risk to the company so more due diligence and underwriting is required
- More likely to require corporate underwriting approval



# Commercial Transactions

## Extended Coverage and Endorsements

- Often want extended coverage and endorsements on the **owner's policy**
  - This requires *real* underwriting
- Pay attention to the **owner's affidavit** for disclosure of items that should be made special exceptions
- Need a **survey** (not necessarily an ALTA survey) certified to the insurer to remove the survey exceptions



# Commercial Transactions

## Entity Authority Issues

- Almost always dealing with an entity seller and an entity buyer/borrower

**COMPANY:**

**CLOCK TOWER BORROWER LLC**, a Delaware limited liability company

By: Clock Tower Venture LLC, a Delaware limited liability company, its sole member

By: SP Clock Tower LLC, a Washington limited liability company, its Manager

By: SP Apartment Communities III LLC, a Washington limited liability company, its Manager

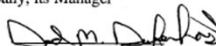
By: SP Fund Managing Member II LLC, a Washington limited liability company, its Manager

By: SPAC IV LLC, a Washington limited liability company, its Manager


By: SP Investments III LLC, a Washington limited liability company, its Manager

By: Security Properties Management LLC, a Washington limited liability company, its Manager

By: DD SP Investments LLC, a Washington limited liability company, its Manager

By:   
David M. Dufenhors  
its Manager

By: TO SP Investments LLC, a Washington limited liability company, its Manager

By:   
Timothy E. Overland,  
its Manager

Required review of organizational docs for 10 different layered entities before we could establish who could sign on behalf of our borrower.



# Commercial Transactions

## Entity Authority Issues (continued)

- Must make sure that:
  - *Entity is authorized* to enter into the transaction(s)
    - In good standing with Secretary of State
    - Vetted organizational documents or resolutions
  - The *individual* signing on behalf of the entity is *authorized*
- Watch for entity fraud!
  - Review documents filed with the Secretary of State and signatures on recorded documents



# Commercial Transactions

## Attorney Prepared Escrow Instructions

- Attorneys often demand use of their escrow instructions *in lieu of* insurer/agent form escrow instructions
- **Must** read escrow instructions for *expectations* and *unacceptable language*



# Commercial Transactions

## Pro-forma Title Insurance Policy

- A pro-forma title insurance policy is a “mock-up” of the final title insurance policy (*including endorsements*)
- Use the “*Pro-Forma*” watermark and appropriate *disclaimers* so as not to issue an actual policy
- Recommend preparation for **all** commercial transactions – even if not requested
  - Attach to escrow instructions in lieu of detailed title policy requirements in body of escrow instructions



# Commercial Transactions

Questions?





# Lender Instructions

## Liability Under Policy v. Escrow Instructions

“If the construction lender’s escrow instructions to the title company require that the construction Deed of Trust be recorded as a first lien on the borrower’s property, and that is not done, **the construction lender may have a claim against the title company for breach of the escrow instructions and may be entitled to recover from the escrow agent all of its unpaid loan balance** (since the title company will have disbursed the loan proceeds in violation of the express escrow instructions). See, *Ruth v. Lytton Savings and Loan Association of Northern California* (1968) 266 Cal. App. 2d 831, 838; *Old West Annuity and Life Ins. Co. v. Progressive Closing & Escrows, Inc.*, (10th Cir. 2003) 74 F. Appx. 4, 5; and *Citicorp Savings of Illinois v. Stewart Title Guaranty Company* (7th Cir 1987) 840 F. 2d 526, 531. **Accordingly, escrow claims may be more valuable to the construction lender than a claim on a loan policy of title insurance which contains terms and exclusions which are favorable to the insurer and unfavorable to the construction lender.”**



# Lender Instructions

## Liability Under Policy v. Escrow Instructions

- Liability under the policy
  - Policy liability is protected by exceptions, exclusions, conditions and **policy limits**
- Liability under lender's instructions
  - No such protections, potentially **NO LIMIT** on liability



# Lender Instructions

## Liability Under Policy v. Escrow Instructions - Example Claim

- Lender instructions referenced the property as being 200 acres
- Loan goes into default, lender discovers property only 160 acres, and lender claims it would not have made the loan on 160 acres
- Claim is filed under loan policy and missing land is appraised at \$500,000 – but lender refuses check and sues for breach of escrow instructions
- Lawsuit settled for \$4,000,000



# Lender Instructions

## Unacceptable Provisions

- Provisions you cannot comply with
  - Delivery of final policy within 24 hours after the closing

3. Title Company may not transfer title simultaneously at closing or any time within six months of closing without prior express written approval from the Lender Loan Closer.

You may record the deed of trust and any related documents provided you can insure title is vested in the name of the Trustors/Borrowers and the loan documents have been properly signed by all required and authorized signators with the deed of trust as a valid lien recorded in the First position, subject only to the following items: 1, 3 PAY CURRENT, 4, 5, contained in your preliminary report dated April 6, 2016, provided all of the requirements are met for the issuance of an ALTA 2006 WITH NO EXCLUSIONS mortgagee's title policy, with endorsements as follows: 100, 116, 101 in the amount of \$1,718,750.00. Items contained in



# Lender Instructions

## Unacceptable Provisions

- Choice of law and forum selection

4. This Agreement shall be governed and construed in accordance with the laws of the State of Illinois, without regard to the conflicts of law provisions thereof. By executing this Agreement, you hereby irrevocably submit to the exclusive jurisdiction of the courts of the State of Illinois and federal courts located in Cook County, Illinois, for the purposes of any action or proceeding arising with respect to this Agreement. Furthermore, in the event of litigation, the parties agree to unconditionally waive their rights to a jury trial and this Agreement may be filed as a written consent to such waiver of a trial by jury.



# Lender Instructions

## Unacceptable Provisions

- Penalties or indemnity for non-compliance

3. By signing below, you represent and warrant that all duties and obligations described herein, and any supplemental closing instructions, have been faithfully and fully performed and satisfied by you. Should you fail to fully perform or satisfy any duties and obligations stated herein, you will be responsible for any and all liability, loss, damages or otherwise resulting from, or in any way related to, such failure. Notwithstanding the foregoing, you shall not be liable for any special, exemplary, consequential, or punitive damages. No amount of subsequent review or due diligence conducted by Guaranteed Rate, the Borrower or any other party will relieve you from your duties and obligations detailed in these, and any supplemental, closing instructions or excuse you from any liability associated with your failure to fully comply with and satisfy your duties and obligations.

You understand that any delay in returning the above-mentioned documents in the time proscribed may result in actual fees and expense imposed upon Guaranteed Rate by a third party. You acknowledge that you will be liable for all actual costs/losses incurred as a result of your failure to return the documents within the time proscribed. We require certified copies of all documents that are to be recorded. You must attach the legal description to all recordable documents.



# Lender Instructions

## Unacceptable Provisions

- “First Lien” language
  - “You may not disburse funds until you record our mortgage in a first lien position.”

### **TITLE INSURANCE REQUIREMENTS:**

You are authorized to use funds for the account of the Borrowers and to record all instruments when you comply with the following:

1. ~~THIS LOAN MUST RECORD IN 1ST LIEN POSITION ON OR PRIOR TO THE DISBURSEMENT DATE NOTED ABOVE. PROVIDE DUPLICATE ORIGINALS OF THE ALTA TITLE POLICY.~~
2. Vesting to read: ~~\_\_\_\_\_~~ WIFE AND HUSBAND

The lender will be issued a title insurance policy insuring the security instrument is a valid first lien, for the amount





# Lender Instructions

## Unacceptable Provisions

- “First Lien” language
  - Common higher priority liens:
    - Real estate taxes and assessments
    - Inchoate construction liens (i.e., lien not yet of record)
  - Want to modify language to “**insure**” first lien, subject to the “***terms of the loan policy***”



# Lender Instructions

## How to Address Issues

- Mark-up lender instructions and ask for revised lender instructions prior to closing
- If lender won't comply, **obtain guidance from your underwriter**
  - Your underwriter may want you to *sign the marked-up lender instructions -- not the original lender instructions* – and email to the lender prior to closing



# Lender Instructions

Questions?

