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Real Estate Issues: Easements, etc.

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Buying Real Estate



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Preliminary Considerations

- Fund balance or bond proceeds?
- Buyers with money in hand are always more attractive to Sellers. The Seller does not need to worry about whether the Buyer will get the financing they need to close the deal.



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The Parts of the Transaction

- The Earnest Money Contract
- The Title Commitment
- The Survey
- Tests and Assessments



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The Earnest Money Contract

- The agreement by which the owner of the real estate is selling the real estate to the buyer.
- Executed by the buyer and the seller.

Delivered to the title company. Title company “receipts” the contract by signing it and stating the date they received it and the earnest money.



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The Earnest Money Contract

- Referred to as an “earnest money contract”.
- The “earnest money” is a deposit made by the buyer to show that they are “earnest” in their interest in purchasing the property.



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The Transaction

Generally, the transaction is structured like this:

- 1) Seller agrees to sell, and Buyer agrees to buy, the real estate.
- 2) Buyer must deposit the earnest money (typically within 3 days of signing the contract).
- 3) Seller is required to provide a title commitment and a survey.



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Title Commitment

A commitment by the title insurance company that they will (they “commit” to) issue a policy insuring title in the Buyer with the exceptions noted in the commitment.



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Survey

A map showing the boundary lines, any structures on the property, any encroachments, etc., prepared by a registered surveyor.



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The Transaction

Generally, the transaction is structured like this:

- 4) Buyer has a certain amount of time to object to matters reflected on the survey or in the title commitment.
- 5) Seller can either “cure” the matters to which Buyer objected or refuse to do so and Buyer can walk away.
- 6) At closing the Buyer pays the purchase price and Seller provides a deed to Buyer.

Typically, Buyer obtains possession of the property at Closing.



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The Contract-Issues to Consider

- The “sufficient legal description.”
- Texas law requires that a description be such that you can, either by reference to the description or by reference to some other document, locate the property on the ground.



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Closing

- If there is no “time is of the essence” clause relating to the closing, failing to close by the closing date is not a material breach.
- If your contract does not state that time is of the essence with regard to the closing date, you must send a demand that the other party close in order to make time of the essence with regard to the closing date.



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Due Diligence/Inspection Period

- Typically a buyer negotiates for a period of time during which the buyer can perform due diligence on the property to see if the buyer wants to purchase it.
- This can be called the “due diligence” period or “inspection” period.
- Typically, buyer can cancel the entire deal and get their earnest money back if they do so within this period.
- The seller is usually required to cooperate (at no cost) by providing access to the property, turning on utilities to the extent necessary, etc.
- This due diligence can include environmental assessments, review of financial information (if the property is income-producing), and other items.



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Option Period

- Buyer might pay a nominal amount for the absolute right to terminate the contract and get its earnest money back within a set period of time.
- To the extent possible, a Buyer will try to get inspections done during this time period so they can negotiate for repairs, etc., during the option period, with the implied threat that they will terminate the contract pursuant to their option if an acceptable agreement on repairs is not reached.



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Date to Make Objections

- Buyer will typically have a few days after receiving the title commitment and documents and the survey to object to things on the survey or in the commitment.
- Typically there is a short time for the Buyer to object to things on the Survey or in the Title Commitment.



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Seller Discretion to Cure

- The Seller has the right, but no obligation, to cure the items Buyer has objected to on the Survey or in the Title Commitment.
- If the Seller does not cure the objections, Buyer has the right to terminate the contract, get their earnest money back, and walk away.
- Issue—what to do with the earnest money if the Buyer decides to walk away because Seller refused to cure?
- **ADDRESS IT IN THE CONTRACT!**



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The Title Commitment

Schedule A

- Information regarding the transaction such as the identity of the Buyer, Seller, the type of title policy (owner, lender), etc.

Schedule B

- Things the title insurance will not cover

Schedule C

- Things that must be cleared up prior to closing in order to have the title policy issued

Schedule D

- Information on the title company



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Schedule B

- If it is not on this schedule of exceptions, it is covered by the title insurance policy.
- Most people utilize Schedule B rather than an abstract of title.
- An abstract of title is a listing (and copy) of the documents that impact title to the particular tract of land.
- Rather than pay an attorney to review an abstract of title and provide a title opinion, most parties are content with obtaining title that is “insurable.”
- Thus, they rely on the title commitment.
- The title company has now assumed the risk for all encumbrances on your title that are not on Schedule B.



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The Survey

- A map showing the boundary lines, any structures on the property, any encroachments, etc., prepared by a registered surveyor.
- Many times surveys will reveal encroachments such as a fence that was not built on the boundary line but into the property.



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Buyer will want to object to:

- Encroachments
- Boundary line issues
- Pipelines
- Power lines

If they are going to interfere with buyer's use.



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If buyer timely objects to items on the survey, seller must cure those items.

- It's not a breach to fail to cure. Rather, it gives the buyer an opportunity to cancel the transaction.



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Tests and Assessments

During the due diligence/inspection period, buyer will want to perform tests and assessments.



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Tests and Assessments

What tests and assessments are appropriate depends upon many factors:

- the condition of the property (developed property or raw land);
- history of the site (previous use of the property);
- Buyer's intended use



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Tests and Assessments

- Phase I Environmental Site Assessment
- Records-based
- Maybe interviews
- Site visit



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Tests and Assessments

- Phase II Environmental Site Assessment
- When the Phase I indicates a potential environmental issue
- Screening for potential contamination or hazardous materials.
- Use of geotechnical resources for finding underground objects and suitable boring locations.



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Feasibility Study

Typically looking at whether the proposed project for the property can be accomplished.



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Feasibility Study

This can include:

- Technical feasibility
- Financial feasibility
- Scheduling feasibility
- Others



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Selling Real Estate



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The General Rule

LOCAL GOVERNMENT CODE CHAPTER 272

- Sec. 272.001. NOTICE OF SALE OR EXCHANGE OF LAND BY POLITICAL SUBDIVISION; EXCEPTIONS. (a) Except for the types of land and interests covered by Subsection (b), (g), (h), (i), (j), or (l), and except as provided by Section 253.008, before land owned by a political subdivision of the state may be sold or exchanged for other land, notice to the general public of the offer of the land for sale or exchange must be published in a newspaper of general circulation



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The Exceptions

- If an exception applies, then the notice and bidding requirements in Subsection (a) do not apply.
- But the property may not be conveyed, sold, or exchanged for less than fair market value
- (unless the conveyance, sale, or exchange is with one or more abutting property owners who own the underlying fee simple).



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(b)

- A real property interest conveyed to a governmental entity that has the power of eminent domain
 - We see this in situations where TxDOT wants to expand a road and seeks additional Right-of-way from the district. The district can convey that additional Right-of-way without complying with the advertising and bidding requirements.



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(d)

- This section does not require the governing body of a political subdivision to accept any bid or offer or to complete a sale or exchange.



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(j)

- A political subdivision may donate, exchange, convey, sell, or lease land, improvements, or any other interest in real property to an institution of higher education, as that term is defined by Section 61.003, Education Code, to promote a public purpose related to higher education.
- A political subdivision may donate, exchange, convey, sell, or lease the real property interest for less than its fair market value and without complying with the notice and bidding requirements of Subsection (a).



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(l)

A political subdivision may donate or sell for less than fair market value a designated parcel of land or an interest in real property to another political subdivision if:

- 1) the land or interest will be used by the political subdivision to which it is donated or sold in carrying out a purpose that benefits the public interest of the donating or selling political subdivision;
- 2) the donation or sale of the land or interest is made under terms that effect and maintain the public purpose for which the donation or sale is made
- 3) the title and right to possession of the land or interest revert to the donating or selling political subdivision if the acquiring political subdivision ceases to use the land or interest in carrying out the public purpose.



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Section 272.005 (Leases To Other Governmental Entities)

(a) To promote a public purpose of the political subdivision, a political subdivision may:

- (1) lease property owned by the political subdivision to another political subdivision or an agency of the state or federal government; or
- (2) make an agreement to provide office space in property owned by the political subdivision to the other political subdivision or agency.



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The Negotiations



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Understand the Other Party's Interest

- Why are they interested in this particular property?



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Understand the Other Party's Motivation

- Why do they want to buy this property or do this transaction now?



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Understand the Other Party's Timeline

- Are they under a time crunch or other pressure to get this deal done now? (1031 exchange, etc.)



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Licenses & Easements



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Licenses

- Licenses are like easements, but they are not interests in the land.



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Licenses

- A license is a contract right to do something on the property of someone else.



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Typical License Agreements:

- 1) Access across District property for a short, predetermined period of time (30 or 60 days).
- 2) Use of District facilities on a one-time or recurring basis.



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Licenses, cont.

License agreements should be treated just as seriously as if the District were renting the licensed property to someone.

- a) Incorporate Board Policy regarding grievances.
- b) Require appropriate insurance.
- c) Be very clear on the boundaries of the licensed area.
- d) Most licenses are not free. Be sure to negotiate a license payment.
- e) Be very clear on what conduct is allowed and what conduct is not allowed on the licensed area.



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Easements

An easement is a nonpossessory interest in someone else's land. It typically allows the easement holder to use the property of another for a particular purpose (ingress and egress, placement of utilities, etc.).



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Is the grantee a governmental entity or another entity with the power of eminent domain?

Your bargaining power may be reduced.



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What is the use?

Is grantee amenable to a limited use?

If so, grant for a limited use AND specifically exclude any other uses.



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The strategy, then, is to use express language to limit:

- (a) the purpose of the easement;
 - (b) the number of wires or pipelines, etc.
and
 - (c) the location and/or visibility of any easement improvements.
and then
- use express language to exclude everything that you have not just expressly granted.



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You have to avoid the temptation to just use a form that grants an easement “over, across, upon, along” etc.

Using these prepositions can lead a court to determine that the “express terms” of the easement provided for the wires, pipes, conduit, etc., to be above ground
or at least not LIMITED to below ground.



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Temporary Easements

- Typically the temporary easement is needed to do construction within another (permanent) easement.
- Be sure to include a date that the easement will end or an objective way to determine when the easement ends.
- Grantee should be required, upon request, to file a termination.
 - “Upon request by Grantor, Grantee shall upon termination of the Easement file in the Public Records of _____ County, Texas a notice of such termination.”



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Blanket Easements

- If you can avoid blanket easements, do so.
- Make sure the route is set out and the easement only covers the property along the route.
- If granting a blanket easement is absolutely necessary, then include a provision which:
 - (a) expressly limits, automatically, the easement to a certain area once the easement improvements are installed;
 - and/or
 - (b) expressly requires the easement holder to:
 - define the easement area after installation of the easement improvements;
 - and
 - provide the servient estate owner (the district) with a release of the remaining lands.



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Review

- Advertise (unless your transaction falls under an exception)
- Earnest Money Contract
- Title Commitment
- Survey
- Negotiations
- Protect the District in the Transaction
- Special Transactions (easements and licenses)



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The information in this handout was prepared by Eichelbaum Wardell
Hansen Powell & Muñoz, P.C. It is intended to be used for general
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If special legal advice is sought, consult an attorney.



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