

Table of Contents

CHAPTER 1
ANALYZING A COMMERCIAL
REAL ESTATE INVESTMENT
by Nathan J. Wautier

- I. Scope of Chapter [§ 1.1]**
- II. Micro-Level: Importance of Understanding the Numbers and the Deal [§ 1.2]**
 - A. In General [§ 1.3]
 - B. Definitions [§ 1.4]
 - 1. Net Operating Income [§ 1.5]
 - 2. Capitalization Rate [§ 1.6]
 - 3. Cash-on-Cash Return [§ 1.7]
 - C. Putting these Concepts into Practice [§ 1.8]
 - D. Leverage [§ 1.9]
 - 1. In General [§ 1.10]
 - 2. Advantages of Leverage [§ 1.11]
 - a. In General [§ 1.12]
 - b. Increased Return on Equity [§ 1.13]
 - c. Increased Ability to Invest in Multiple Properties [§ 1.14]
 - d. Increased Depreciation Write-Offs [§ 1.15]
 - e. Increased Capital Appreciation [§ 1.16]
 - 3. Disadvantages of Leverage [§ 1.17]
 - a. In General [§ 1.18]
 - b. Default Risk [§ 1.19]
 - c. Refinance Risk [§ 1.20]
 - E. Internal Rate of Return [§ 1.21]
- III. Macro-Level: Different Types of Real Estate Investments [§ 1.22]**
 - A. In General [§ 1.23]
 - B. Passive Investments [§ 1.24]
 - 1. In General [§ 1.25]
 - 2. REITs [§ 1.26]
 - 3. Tenancies in Common [§ 1.27]

- 4. Delaware Statutory Trusts [§ 1.28]
- 5. LLCs and Limited Partnerships [§ 1.29]
- C. Active Investments [§ 1.30]
 - 1. Multifamily Residential Properties [§ 1.31]
 - 2. Nonresidential Properties, Generally [§ 1.32]
 - 3. Triple-Net-Leased Properties [§ 1.33]
 - 4. Vacant Land [§ 1.34]

CHAPTER 2

LISTING CONTRACTS

by Douglas S. Buck

- I. Scope of Chapter [§ 2.1]**
- II. Statutory Requirements of a Real Estate Agency Contract [§ 2.2]**
 - A. In General [§ 2.3]
 - B. Property Description [§ 2.4]
 - 1. In General [§ 2.5]
 - 2. Survey [§ 2.6]
 - 3. Condition of Real Estate—Listing Contracts [§ 2.7]
 - 4. Property Description—Buyer Agency Agreement [§ 2.8]
 - 5. Description of Personal Property [§ 2.9]
 - C. Price [§ 2.10]
 - 1. In General [§ 2.11]
 - 2. Purchase Price—Listing Contract [§ 2.12]
 - 3. Purchase Price—Buyer Agency Agreement [§ 2.13]
 - D. Commission to be Paid to Broker [§ 2.14]
 - 1. Listing Contracts [§ 2.15]
 - a. In General [§ 2.16]
 - b. When Is the Commission Earned? [§ 2.17]
 - (1) In General [§ 2.18]
 - (2) Suggested Changes to Form WB-5 [§ 2.19]
 - c. How Is the Commission Determined? [§ 2.20]
 - 2. Commissions to be Paid to Broker—Buyer Agency Agreements [§ 2.21]
 - a. In General [§ 2.22]

	b.	When Is the Commission Earned? [§ 2.23]
	c.	How Is the Commission Determined? [§ 2.24]
	d.	Who Pays the Commission? [§ 2.25]
	3.	Excluded Parties [§ 2.26]
	4.	Broker's Lien for Unpaid Commissions [§ 2.27]
E.		Duration of Contract [§ 2.28]
	1.	In General [§ 2.29]
	2.	Duration of Contract—Listing Contract [§ 2.30]
	3.	Duration of Contract—Buyer Agency Agreement [§ 2.31]
	4.	Marketing Considerations [§ 2.32]
F.		Signature of Party Agreeing to Contract [§ 2.33]
III.		Types of Listing Contracts [§ 2.34]
	A.	In General [§ 2.35]
	B.	Exclusive Right to Sell [§ 2.36]
	C.	Exclusive Agency [§ 2.37]
	D.	Open Listings [§ 2.38]
	E.	Single-Party Listings [§ 2.39]
	F.	Net Listings [§ 2.40]
IV.		Agency Issues Related to Real Estate Agency Contracts [§ 2.41]
	A.	In General [§ 2.42]
	B.	Duties Owed by Real Estate Brokers [§ 2.43]
	C.	Subagency [§ 2.44]
	D.	Multiple Representation [§ 2.45]
	1.	In General [§ 2.46]
	2.	Multiple Representation with Designated Agency [§ 2.47]
	3.	Multiple Representation Without Designated Agency [§ 2.48]
	4.	No Multiple Representation [§ 2.49]
V.		Appendices [§ 2.50]
	A.	Appendix 2A: Commercial Listing Contract – Exclusive Right to Sell (WB-5) (Form REA-0188) [§ 2.51]
	B.	Appendix 2B: Buyer Agency Agreement (WB-36) (Form REA-0187) [§ 2.52]

CHAPTER 3

TYING UP THE PROPERTY

by Olivia M. Dunn

- I. Scope of Chapter [§ 3.1]**
- II. Letters of Intent [§ 3.2]**
- III. Purchase Agreements [§ 3.3]**
- IV. Property Description [§ 3.4]**
 - A. Real Estate [§ 3.5]
 - B. Tangible Personal Property [§ 3.6]
 - C. Intangible Personal Property [§ 3.7]
 - D. Leases and Service Contracts [§ 3.8]
 - E. Plans, Surveys, and Test Results [§ 3.9]
 - F. Excluded Items [§ 3.10]
- V. Purchase Price [§ 3.11]**
 - A. In General [§ 3.12]
 - B. Fixed Price [§ 3.13]
 - C. Formula Price [§ 3.14]
 - D. Contingent Price [§ 3.15]
 - E. Method of Payment [§ 3.16]
 - 1. In General [§ 3.17]
 - 2. Earnest Money [§ 3.18]
 - a. In General [§ 3.19]
 - b. Purpose of Earnest Money [§ 3.20]
 - c. Holders of Earnest Money [§ 3.21]
 - (1) In General [§ 3.22]
 - (2) Earnest Money Held by a Broker [§ 3.23]
 - (3) Earnest Money Held by the Title Company [§ 3.24]
 - (4) Earnest Money Held by One of the Lawyers [§ 3.25]
 - (5) Earnest Money Held by Seller [§ 3.26]
 - d. Amount of Earnest Money [§ 3.27]
 - e. Payment of Earnest Money [§ 3.28]
 - f. Other Earnest Money Issues [§ 3.29]
 - g. Some Final Observations About Earnest Money [§ 3.30]
 - 3. Payment of Cash at Closing [§ 3.31]

- 4. Assumption of Seller's Existing Mortgage Debt [§ 3.32]
- 5. Seller Financing [§ 3.33]
- F. Closing Adjustments and Prorations [§ 3.34]
 - 1. In General [§ 3.35]
 - 2. Real Estate Taxes [§ 3.36]
 - a. In General [§ 3.37]
 - b. Proration Based on Prior Year's Taxes [§ 3.38]
 - c. Proration Based on Most Recent Assessment and Most Recent Mill Rate [§ 3.39]
 - d. Conveyance of Less Than an Entire Tax Parcel [§ 3.40]
 - e. Postclosing Reconciliation [§ 3.41]
 - 3. Special Assessments [§ 3.42]
 - 4. Other Municipal Charges [§ 3.43]
 - a. Charges for Services [§ 3.44]
 - b. Development Costs [§ 3.45]
 - 5. Rents [§ 3.46]
 - a. In General [§ 3.47]
 - b. Prepaid Rents [§ 3.48]
 - c. Deferred Rents [§ 3.49]
 - d. Delinquent Rents [§ 3.50]
 - e. Proration of Percentage Rent [§ 3.51]
 - f. Operating Expense Escrows [§ 3.52]
 - g. Security Deposits [§ 3.53]
 - 6. Loan Assumptions [§ 3.54]
 - 7. Miscellaneous Closing Adjustments and Prorations [§ 3.55]
 - a. Utilities [§ 3.56]
 - b. Water Bill [§ 3.57]
 - c. Insurance Premiums [§ 3.58]
 - d. Fuel [§ 3.59]
 - e. Service Contracts [§ 3.60]
 - f. Use-Value Penalty; Farmland Conversion Fees [§ 3.61]
 - g. Closing Expenses [§ 3.62]

VI. Representations and Warranties [§ 3.63]

- A. Introduction [§ 3.64]
 - 1. In General [§ 3.65]
 - 2. Differences Between Representations and Warranties [§ 3.66]

3. The Buyer's Perspective [§ 3.67]
4. The Seller's Perspective [§ 3.68]
5. "As-Is" Clauses [§ 3.69]
6. Facts That Affect Extent of Seller's Representations [§ 3.70]
7. "No Notice or Knowledge" Representations [§ 3.71]
- B. Common Representations [§ 3.72]
 1. In General [§ 3.73]
 2. Seller's Authority [§ 3.74]
 3. Marketable Title [§ 3.75]
 4. Litigation and Municipal Orders [§ 3.76]
 - a. In General [§ 3.77]
 - b. The Seller's Position [§ 3.78]
 - c. The Buyer's Position [§ 3.79]
 5. Commitments to Governmental Authorities [§ 3.80]
 - a. In General [§ 3.81]
 - b. The Seller's Position [§ 3.82]
 - c. The Buyer's Position [§ 3.83]
 - d. Possible Compromises [§ 3.84]
 6. Tenants and Parties in Possession [§ 3.85]
 7. Physical Condition of the Property [§ 3.86]
 - a. In General [§ 3.87]
 - b. The Buyer's Position [§ 3.88]
 - c. The Seller's Position [§ 3.89]
 8. Contracts [§ 3.90]
 9. Brokerage Commissions [§ 3.91]
 - a. Commissions Arising from the Sale [§ 3.92]
 - b. Leasing Commissions [§ 3.93]
 10. Environmental Condition of the Property [§ 3.94]
 - a. The Buyer's Position [§ 3.95]
 - b. The Seller's Position [§ 3.96]
 - c. Possible Compromise Position [§ 3.97]
 11. Accuracy of Information [§ 3.98]
 12. Ingress and Egress [§ 3.99]
 - a. The Buyer's Position [§ 3.100]
 - b. The Seller's Position [§ 3.101]
 13. No Prepaid Rent [§ 3.102]
 - a. In General [§ 3.103]
 - b. The Buyer's Position [§ 3.104]
 - c. The Seller's Position [§ 3.105]

- 14. Special Apartment Representations [§ 3.106]
- 15. Participation in Governmental Programs [§ 3.107]

VII. Covenants [§ 3.108]

- A. In General [§ 3.109]
- B. Specific Covenants [§ 3.110]
 - 1. In General [§ 3.111]
 - 2. Operation Pending Closing [§ 3.112]
 - 3. Compliance with Leases and Contracts [§ 3.113]
 - a. The Buyer's Position [§ 3.114]
 - b. The Seller's Position [§ 3.115]
 - c. Possible Compromise [§ 3.116]
 - d. Updating Information [§ 3.117]
 - e. No Further Liens or Encumbrances [§ 3.118]
 - f. Confidentiality [§ 3.119]
 - g. Limits on Competition [§ 3.120]

VIII. Contingencies [§ 3.121]

- A. In General [§ 3.122]
- B. Wisconsin's "Illusory Contingency" Rule [§ 3.123]
- C. Procedures for Satisfying or Waiving Contingencies [§ 3.124]
 - 1. In General [§ 3.125]
 - 2. Statement of Objective Standard [§ 3.126]
 - 3. Deadline by Which the Contingency Must Be Satisfied [§ 3.127]
 - 4. What Happens If the Contingency Is Not Satisfied? [§ 3.128]
 - 5. Whether the Contingency Is for the Buyer's or the Seller's Benefit [§ 3.129]
 - 6. Right to Cure [§ 3.130]
 - a. In General [§ 3.131]
 - b. Should the Seller Be Given the Right to Cure? [§ 3.132]
 - c. Mechanics of the Right to Cure [§ 3.133]
 - 7. Specific Contingencies [§ 3.134]
 - a. Financing Contingency [§ 3.135]
 - b. Assumption of the Seller's Existing Mortgage Financing [§ 3.136]
 - c. Document Review [§ 3.137]
 - (1) In General [§ 3.138]
 - (2) Documents to Be Reviewed [§ 3.139]

- (3) Method of Review [§ 3.140]
 - (4) Standard for Approval [§ 3.141]
 - (5) Leases and Contracts [§ 3.142]
- d. Tenant Estoppel Letters [§ 3.143]
 - (1) Purpose [§ 3.144]
 - (2) Timing of Receipt [§ 3.145]
- e. Physical and Environmental Inspection [§ 3.146]
 - (1) In General [§ 3.147]
 - (2) Relation to As-Is Clause [§ 3.148]
 - (3) Degree of Intrusion [§ 3.149]
 - (4) Indemnification for Harm Caused by Entries [§ 3.150]
 - (5) Delivery of Inspection Reports to the Seller [§ 3.151]
 - (6) Standard for Objecting [§ 3.152]
 - (7) Preclosing Inspection [§ 3.153]
- f. Review of Title Evidence [§ 3.154]
 - (1) In General [§ 3.155]
 - (2) Reviewing the Title Commitment [§ 3.156]
 - (3) Standard for Objection [§ 3.157]
 - (4) Mechanics of Objecting to Title [§ 3.158]
- g. Survey [§ 3.159]
 - (1) In General [§ 3.160]
 - (2) Standard for Objection [§ 3.161]
- h. Governmental Approvals [§ 3.162]
 - (1) In General [§ 3.163]
 - (2) Standard for Objection [§ 3.164]
 - (3) Effective Date of Governmental Approval [§ 3.165]
- i. No Material Changes [§ 3.166]
- j. Some Final Thoughts on Contingencies and Option Agreements [§ 3.167]

IX. Default Clauses [§ 3.168]

- A. Background [§ 3.169]
 - 1. The Buyer's Remedies [§ 3.170]
 - a. At Common Law [§ 3.171]
 - b. Under the WB-15 Commercial Offer to Purchase Form [§ 3.172]

2.	The Seller's Remedies [§ 3.173]
a.	At Common Law [§ 3.174]
b.	Under the WB-15 Commercial Offer to Purchase Form [§ 3.175]
B.	Notice and the Right to Cure [§ 3.176]
C.	Recovery of Costs and Attorney Fees [§ 3.177]
D.	A Suggested Approach [§ 3.178]
X.	Damage and Destruction [§ 3.179]
A.	In General [§ 3.180]
B.	Wisconsin Uniform Vendor and Purchaser Risk Act [§ 3.181]
C.	Does Wis. Stat. § 706.12 Adequately Protect the Buyer? [§ 3.182]
XI.	Option Agreements [§ 3.183]
A.	In General [§ 3.184]
B.	When Are Options Better Than Contingent Purchase Agreements? [§ 3.185]
C.	Limited-Term Option [§ 3.186]
D.	Option Mechanics [§ 3.187]
E.	Other Option Issues [§ 3.188]
XII.	Rights of First Refusal [§ 3.189]
A.	In General [§ 3.190]
B.	The Seller's Concerns [§ 3.191]
C.	The Buyer's Concerns [§ 3.192]
D.	Terms [§ 3.193]
XIII.	Right of First Offer [§ 3.194]
XIV.	Appendices [§ 3.195]
A.	Appendix 3A: Vacant Land Offer to Purchase (WB-13) (Form REA-0184) [§ 3.196]
B.	Appendix 3B: Commercial Offer to Purchase (WB-15) (Form REA-0191) [§ 3.197]
C.	Appendix 3C: Sample Customized Rider (Form REA-0008) [§ 3.198]
D.	Appendix 3D: Sample Customized Form (Form REA-0009) [§ 3.199]

CHAPTER 4

DUE DILIGENCE

by Melanie S. Lee

- I. Scope of Chapter [§ 4.1]**
- II. Introduction [§ 4.2]**
- III. Use of Third-Party Experts [§ 4.3]**
- IV. Specific Types of Due Diligence [§ 4.4]**
 - A. All Properties [§ 4.5]
 - 1. Title Review and Insurance [§ 4.6]
 - 2. Survey [§ 4.7]
 - a. Purpose [§ 4.8]
 - b. What Standards Should the Survey Meet? [§ 4.9]
 - (1) In General [§ 4.10]
 - (2) Survey Substitutes [§ 4.11]
 - (3) Wisconsin Minimum Standards [§ 4.12]
 - (4) ALTA Standards [§ 4.13]
 - c. Who Pays? [§ 4.14]
 - d. Who Sets the Standard? [§ 4.15]
 - 3. Seller's Authority [§ 4.16]
 - 4. Appraisals [§ 4.17]
 - 5. Burial Sites [§ 4.18]
 - B. Completed, Operating Properties [§ 4.19]
 - 1. Economic Due Diligence [§ 4.20]
 - a. Economic Feasibility [§ 4.21]
 - b. Leasing Information [§ 4.22]
 - c. Contract Review [§ 4.23]
 - d. Personal Property [§ 4.24]
 - e. Property and Liability Insurance [§ 4.25]
 - 2. Physical Due Diligence [§ 4.26]
 - a. Building Inspection [§ 4.27]
 - b. Environmental [§ 4.28]
 - c. Utilities [§ 4.29]
 - d. Governmental Approvals [§ 4.30]
 - C. Properties Purchased for Development [§ 4.31]
 - 1. Economic Due Diligence [§ 4.32]
 - 2. Governmental Approvals [§ 4.33]
 - a. In General [§ 4.34]

- b. Annexation [§ 4.35]
 - c. Land Division [§ 4.36]
 - d. Rezoning [§ 4.37]
- 3. Physical Due Diligence [§ 4.38]
 - a. Property Inspection [§ 4.39]
 - b. Visual Inspection [§ 4.40]
 - c. Utilities [§ 4.41]

CHAPTER 5

ENVIRONMENTAL CONSIDERATIONS

by Lauren R. Grahovac Harpke

- I. Scope of Chapter [§ 5.1]**
- II. Landowner Liability Issues in Wisconsin [§ 5.2]**
- III. CERCLA All Appropriate Inquiry and Phase I Environmental Site Assessments In General [§ 5.3]**
- IV. The ASTM Standard for a Phase I Environmental Assessment Components [§ 5.4]**
 - A. In General [§ 5.5]
 - B. Gathering Preliminary Information [§ 5.6]
 - C. Reviewing Regulatory Records [§ 5.7]
 - D. Identifying Current and Past Owners [§ 5.8]
 - E. Examining Neighboring Properties [§ 5.9]
 - F. Conducting Site Reconnaissance [§ 5.10]
 - G. Vapor Intrusion [§ 5.11]
 - 1. ASTM Standards Review [§ 5.12]
 - 2. EPA and WDNR Vapor Intrusion Guidance [§ 5.13]
 - H. Case Closure and Continuing Obligations [§ 5.14]
- V. Non-Scope Considerations [§ 5.15]**
- VI. Site's Regulatory Compliance History [§ 5.16]**
 - A. In General [§ 5.17]
 - B. Environmental Permits and Licenses [§ 5.18]
 - C. Environmental Equipment Transfer [§ 5.19]
 - D. Prior Enforcement Actions [§ 5.20]

- E. Prior Environmental Assessments, Investigations, and Audits [§ 5.21]

VII. Post-Phase I ESA Considerations [§ 5.22]

VIII. CERCLA [§ 5.23]

- A. History [§ 5.24]
- B. Superfund Process and the Environmental Protection Agency [§ 5.25]
 - 1. In General [§ 5.26]
 - 2. Requirements for Hazardous Waste Sites [§ 5.27]
 - 3. Liability Scheme [§ 5.28]
 - 4. Superfund Trust Fund and Site-Cleanup Costs [§ 5.29]
- C. CERCLA Section 104—EPA Response Authority, Information Gathering, and Site Access [§ 5.30]
 - 1. In General [§ 5.31]
 - 2. Removal and Remedial Actions [§ 5.32]
 - 3. Information Requests and Site Access [§ 5.33]
- D. CERCLA Section 106—Abatement Actions [§ 5.34]
- E. CERCLA Section 107—Liability [§ 5.35]
- F. CERCLA Section 113—Contribution Protection Through Settlement [§ 5.36]
- G. CERCLA Section 122—Specific Settlement Provisions [§ 5.37]
- H. Liability Provisions [§ 5.38]
 - 1. In General [§ 5.39]
 - 2. Current Owners and Operators [§ 5.40]
 - 3. Past Owners and Operators [§ 5.41]
 - 4. Generators or Arrangers [§ 5.42]
 - 5. Transporters [§ 5.43]
- I. Derivative Liability [§ 5.44]
 - 1. Parent Corporations and Shareholders [§ 5.45]
 - 2. Successor Corporations [§ 5.46]
 - 3. Directors and Officers [§ 5.47]
- J. Liability Defenses and Exemptions [§ 5.48]
 - 1. Lenders [§ 5.49]
 - 2. “Innocent” Landowners [§ 5.50]
 - 3. Bona Fide Purchasers [§ 5.51]
 - 4. Off-Site Source Exemption [§ 5.52]
 - 5. Recyclers [§ 5.53]
- K. Brownfields Redevelopment [§ 5.54]

- L. Release Reporting [§ 5.55]
- M. Natural Resource Damages [§ 5.56]
- N. CERCLA Bona Fide-Prospective-Purchaser Liability Defense [§ 5.57]

IX. Appendix [§ 5.58]

- A. Appendix 5A: Possible Post-Phase I Considerations [§ 5.59]

CHAPTER 6

FINANCING

by Nathan J. Wautier

I. Scope of Chapter [§ 6.1]

II. Mortgage Loans [§ 6.2]

- A. In General [§ 6.3]
- B. Risks of Construction Financing [§ 6.4]
- C. Goals of the Borrower, the Contractor, the Construction Lender, and the Permanent Lender [§ 6.5]
 - 1. In General [§ 6.6]
 - a. Introduction [§ 6.7]
 - b. The Borrower [§ 6.8]
 - c. The General Contractor [§ 6.9]
 - d. The Construction Lender [§ 6.10]
 - e. The Permanent Lender [§ 6.11]
- D. Lender's Due Diligence [§ 6.12]
- E. The Key Documents [§ 6.13]
 - 1. In General [§ 6.14]
 - 2. Loan Commitment Letter [§ 6.15]
 - 3. Promissory Note [§ 6.16]
 - a. In General [§ 6.17]
 - b. Interest Rate [§ 6.18]
 - c. Interest Rate Calculation Methods [§ 6.19]
 - d. Prepayment Limitations and Penalties [§ 6.20]
 - 4. Loan Agreements [§ 6.21]
 - a. In General [§ 6.22]
 - b. Initial Period (Preadvance) [§ 6.23]
 - c. Construction Period (Including Final Advance) [§ 6.24]
 - d. Permanent Loan Phase [§ 6.25]

- 5. The Mortgage [§ 6.26]
- 6. Guaranties [§ 6.27]
- 7. Personal-Property Security Agreement [§ 6.28]
- 8. Assignment of Leases and Rents [§ 6.29]
- 9. Collateral Assignment of Other Agreements [§ 6.30]
- 10. Subordination, Non-Disturbance, and Attornment Agreement (SNDA) [§ 6.31]
- F. Default and Remedies [§ 6.32]

III. Tax Incremental Financing [§ 6.33]

- A. In General [§ 6.34]
- B. How Tax Incremental Financing Works Generally [§ 6.35]
 - 1. Establishment of District [§ 6.36]
 - 2. Expenditure of Project Costs [§ 6.37]
 - 3. Capture of Tax Increment [§ 6.38]
 - 4. “But For” Test [§ 6.39]
 - a. “But For” Test as Applied to the Creation of the District [§ 6.40]
 - b. “But For” Test as Applied to the Individual Project [§ 6.41]
 - c. The “But For” Test in Action: Some Examples [§ 6.42]
 - 5. Environmental Remediation Tax Incremental Financing [§ 6.43]
- C. Methods of Paying for Tax Increment Projects [§ 6.44]
 - 1. In General [§ 6.45]
 - 2. Build It and They Will Come [§ 6.46]
 - 3. Lump-Sum Project Costs [§ 6.47]
 - a. In General [§ 6.48]
 - b. The Municipality’s Underwriting [§ 6.49]
 - c. The Municipality’s Ability to Borrow [§ 6.50]
 - d. Example of How Lump-Sum Tax Incremental Financing Works [§ 6.51]
 - 4. Developer-Financed Tax Incremental Financing [§ 6.52]
 - a. In General [§ 6.53]
 - b. Advantages of Developer-Financed TIF to the Municipality [§ 6.54]
 - c. Advantages of Developer-Financed TIF to the Developer [§ 6.55]

- d. Application of the “But For” Test [§ 6.56]

IV. Appendices [§ 6.57]

- A. Appendix 6A: Sample Collateral Assignment of Contracts (Form REA-0010) [§ 6.58]
- B. Appendix 6B: Sample Subordination, Non-Disturbance and Attornment Agreement (Form REA-0011) [§ 6.59]

CHAPTER 7

TITLE INSURANCE AND

CLOSING PROTECTION LETTERS

by Richard W. Donner

I. Scope of Chapter [§ 7.1]

II. Ordering and Reviewing the Title Insurance Commitment [§ 7.2]

- A. Ordering the Commitment [§ 7.3]
- B. Reviewing the Commitment [§ 7.4]
 - 1. Commitment Schedules and Conditions [§ 7.5]
 - 2. Schedule A [§ 7.6]
 - a. In General [§ 7.7]
 - b. The Proposed Insured [§ 7.8]
 - c. Legal Description [§ 7.9]
 - 3. Schedule B-I Requirements [§ 7.10]
 - 4. Schedule B-II [§ 7.11]
 - a. Standard Exceptions [§ 7.12]
 - (1) In General [§ 7.13]
 - (2) Recording-Gap Exception [§ 7.14]
 - (3) Special Assessment Exception [§ 7.15]
 - (4) Exceptions for Deferred Charges and Similar Development Charges [§ 7.16]
 - (5) Inchoate Construction-Lien Rights [§ 7.17]
 - (6) Parties in Possession [§ 7.18]
 - (7) Survey Matters [§ 7.19]
 - b. Special Exceptions [§ 7.20]
 - 5. Informational Notes [§ 7.21]

III. Closing Protection Letters [§ 7.22]

IV. Endorsement Coverages [§ 7.23]

- A. Choosing Endorsement Coverages [§ 7.24]
- B. Commercial Property Other Than Shopping Centers [§ 7.25]
- C. Shopping Centers [§ 7.26]
- D. Land Purchases by Developers [§ 7.27]
- E. Corporate Stock Purchases [§ 7.28]
- F. Corporate Asset Purchases [§ 7.29]
- G. Equity Investments in Real Estate Holding Entities [§ 7.30]
- H. Business Loans Secured by Real Estate [§ 7.31]
- I. Loans Secured by More Than One Parcel of Land [§ 7.32]
- J. Commonly Used Endorsements [§ 7.33]

V. Risks Covered by Title Insurance Policy [§ 7.34]

- A. Introduction: Indemnity, Not Guarantee [§ 7.35]
- B. Covered Risks—2006 and 2021 ALTA Owner’s Policies [§ 7.36]
 - 1. In General [§ 7.37]
 - 2. Title Vested Other Than as Shown in the Policy [§ 7.38]
 - 3. Defects, Liens, and Encumbrances on Title [§ 7.39]
 - a. In General [§ 7.40]
 - b. Defects [§ 7.41]
 - c. Real Estate Taxes and Assessments [§ 7.42]
 - d. Survey Coverage [§ 7.43]
 - e. Other Liens, Encumbrances, Easements, and Restrictions [§ 7.44]
 - 4. Unmarketable Title [§ 7.45]
 - 5. Lack of Access [§ 7.46]
 - 6. Enforcement Notice Covered Risks [§ 7.47]
- C. Covered Risks of ALTA Loan Policy [§ 7.48]
- D. Exclusions [§ 7.49]

CHAPTER 8
INSURANCE ISSUES

by Jim Ahearn

I. Scope of Chapter [§ 8.1]

II. Types of Insurance Coverage [§ 8.2]

- A. In General [§ 8.3]
- B. Property Insurance [§ 8.4]
 - 1. In General [§ 8.5]
 - 2. Basic Forms of Coverage [§ 8.6]
 - a. In General [§ 8.7]
 - b. Basic Form [§ 8.8]
 - c. Broad Form (Specified Perils) [§ 8.9]
 - d. Special Form [§ 8.10]
 - e. Property Not Covered [§ 8.11]
 - 3. Additional Coverage—Endorsements [§ 8.12]
 - a. In General [§ 8.13]
 - b. Business Income Endorsement [§ 8.14]
 - c. Extra Expense Endorsement [§ 8.15]
 - d. Contingent Business Income Endorsement [§ 8.16]
 - e. Extended Period of Indemnity Endorsement [§ 8.17]
 - f. Service Interruption Endorsement [§ 8.18]
 - g. Boiler and Machinery Endorsement [§ 8.19]
 - h. Leasehold Interest Endorsement [§ 8.20]
 - i. Legal Liability Endorsement [§ 8.21]
 - j. Ordinance or Law Endorsement [§ 8.22]
 - k. Water Backup Endorsement [§ 8.23]
 - l. Flood Insurance [§ 8.24]
 - m. Builder's Risk Coverage [§ 8.25]
 - n. Inflation Guard Endorsement [§ 8.26]
 - o. Vacancy Permits [§ 8.27]
 - p. Other Endorsements [§ 8.28]
 - q. Debris Removal [§ 8.29]
 - 4. Amount of Coverage [§ 8.30]
 - a. Replacement Cost [§ 8.31]
 - b. Actual Cash Value [§ 8.32]
 - c. Blanket Insurance [§ 8.33]
 - d. Specific Insurance [§ 8.34]
 - e. Coinsurance [§ 8.35]

- f. Agreed Value [§ 8.36]
 - g. Overlapping or Duplicate Coverage [§ 8.37]
 - h. Waiver of Subrogation [§ 8.38]
 - C. Liability Insurance [§ 8.39]
 - 1. In General [§ 8.40]
 - 2. Commercial General Liability Coverage [§ 8.41]
 - a. In General [§ 8.42]
 - b. Contractual Liability Coverage [§ 8.43]
 - c. “Damage to Premises Rented to You” [§ 8.44]
 - 3. Coverage Trigger [§ 8.45]
 - a. Occurrence Basis [§ 8.46]
 - b. Claims-Made Basis [§ 8.47]
 - 4. Limits of Coverage [§ 8.48]
 - D. Other Liability Insurance [§ 8.49]
 - 1. Independent Contractors [§ 8.50]
 - 2. Owners and Contractors Protective Liability (OCP) [§ 8.51]
 - 3. Liquor Liability [§ 8.52]
 - 4. Pollution Liability [§ 8.53]
 - 5. Professional Liability and Errors and Omissions Liability [§ 8.54]
 - 6. Garagekeeper’s Legal Liability [§ 8.55]
 - 7. Worker’s Compensation and Employer’s Liability [§ 8.56]

III. Insured Parties [§ 8.57]

- A. Named Insured [§ 8.58]
- B. Additional-Insured Endorsements [§ 8.59]
- C. Loss Payee and Mortgagees [§ 8.60]

IV. Insurance Documentation [§ 8.61]

- A. Policy [§ 8.62]
- B. Certificates of Insurance [§ 8.63]
 - 1. In General [§ 8.64]
 - 2. Types of Certificates of Insurance [§ 8.65]
 - a. ACORD 25 (Certificate of Liability Insurance) [§ 8.66]
 - b. ACORD 27 (Evidence of Property Insurance) [§ 8.67]
 - c. ACORD 28 (Evidence of Commercial Property Insurance) [§ 8.68]

V. Other Insurance Issues in Leasing [§ 8.69]

- A. Rent Abatement [§ 8.70]
- B. Indemnification and Defense [§ 8.71]
 - 1. Insurance Coverage [§ 8.72]
 - 2. Parties [§ 8.73]
 - 3. Conducting the Defense [§ 8.74]
 - 4. Limitations to Extent of Insurance Proceeds [§ 8.75]
 - 5. Negligence [§ 8.76]
 - a. Indemnity [§ 8.77]
 - b. No-Fault Approach [§ 8.78]
 - (1) In General [§ 8.79]
 - (2) How to Implement the No-Fault Approach in a Lease [§ 8.80]
- C. Waiver of Subrogation [§ 8.81]
- D. Self-Insurance [§ 8.82]
- E. Insurer Ratings [§ 8.83]

CHAPTER 9

TAX STRATEGIES

by Douglas S. Buck

I. Scope of Chapter [§ 9.1]

II. Overview of Tax Aspects [§ 9.2]

III. Choice of Entity [§ 9.3]

- A. Introduction [§ 9.4]
 - 1. In General [§ 9.5]
 - 2. Limited Liability Companies [§ 9.6]
 - 3. Limited Partnerships [§ 9.7]
 - 4. Corporations [§ 9.8]
- B. Income Tax Classification of Entities [§ 9.9]
 - 1. In General [§ 9.10]
 - 2. C Corporation [§ 9.11]
 - 3. S Corporation [§ 9.12]
 - 4. Partnership [§ 9.13]
 - 5. Disregarded Entity [§ 9.14]
- C. Advantages and Disadvantages of Tax Classification of Entities [§ 9.15]
 - 1. In General [§ 9.16]

2. Single Versus Double Tax Regime [§ 9.17]
 - a. C Corporation Subject to Double Income Tax Regime [§ 9.18]
 - b. S Corporation and Partnership Subject to Single Tax Regime [§ 9.19]
 - c. Disregarded Entity Subject to Single Tax [§ 9.20]
3. Flow-Through Net Operating Losses [§ 9.21]
 - a. C Corporation [§ 9.22]
 - b. S Corporation [§ 9.23]
 - c. Partnership [§ 9.24]
4. Shareholder Eligibility Restrictions and Capital Structure Flexibility [§ 9.25]
 - a. C Corporation [§ 9.26]
 - b. S Corporation [§ 9.27]
 - c. Partnership [§ 9.28]
 - d. Disregarded Entity [§ 9.29]
5. Tax Issues Relating to Entity Formation and Future Distribution [§ 9.30]
 - a. In General [§ 9.31]
 - b. C Corporation [§ 9.32]
 - c. S Corporation [§ 9.33]
 - d. Partnership [§ 9.34]
 - e. Disregarded Entities [§ 9.35]
6. Tax-Basis Adjustments on Disposition of Equity Interest [§ 9.36]
 - a. In General [§ 9.37]
 - b. C Corporation [§ 9.38]
 - c. S Corporation [§ 9.39]
 - d. Partnership [§ 9.40]
 - e. Disregarded Entity [§ 9.41]
7. Self-Employment Taxes [§ 9.42]
 - a. In General [§ 9.43]
 - b. C Corporation [§ 9.44]
 - c. S Corporation [§ 9.45]
 - d. Partnership [§ 9.46]
 - e. Disregarded Entity [§ 9.47]
8. Other Factors [§ 9.48]
 - a. Equity Issued in Exchange for Services [§ 9.49]
 - b. Future Initial Public Offering, Reorganization, or Flow-Through-Sensitive Investor [§ 9.50]

	c.	I.R.C. § 199A Deductions and Safe Harbor [§ 9.51]
	d.	Tax Classification Changes [§ 9.52]
	9.	Summary [§ 9.53]
D.		Special Concern for Tax Incremental Financing Projects [§ 9.54]
IV.		Issuing LLC Profits Interests to Developers [§ 9.55]
	A.	In General [§ 9.56]
	B.	Capital Interest [§ 9.57]
	C.	Profits Interest [§ 9.58]
	D.	Example of a Capital Interest [§ 9.59]
	E.	Example of a Profits Interest [§ 9.60]
	F.	Taxation of Capital and Profits Interests [§ 9.61]
V.		Taxable Dispositions of Real Estate [§ 9.62]
	A.	Asset Sales [§ 9.63]
	1.	In General [§ 9.64]
	2.	Amount Realized [§ 9.65]
	3.	Tax Basis [§ 9.66]
	4.	Gain or Loss Realized [§ 9.67]
	5.	Gain or Loss Recognized [§ 9.68]
	B.	Equity Sales [§ 9.69]
	1.	In General [§ 9.70]
	2.	C Corporation Stock Sales [§ 9.71]
	3.	S Corporation Stock Sales [§ 9.72]
	4.	Partnership Unit Sales [§ 9.73]
	5.	Sales of Disregarded Entities [§ 9.74]
	C.	Characterization of Gain Recognized [§ 9.75]
	1.	In General [§ 9.76]
	2.	Capital Assets [§ 9.77]
	3.	I.R.C. § 1231 Assets [§ 9.78]
	4.	Special I.R.C. § 1237 Provision [§ 9.79]
	5.	I.R.C. § 1245 Recapture [§ 9.80]
	6.	I.R.C. § 1250 Recapture [§ 9.81]
	7.	Illustration of I.R.C. § 1245 and I.R.C. § 1250 Depreciation Recapture Rules [§ 9.82]
	8.	Special Issues Involving Sales to Related Parties [§ 9.83]
	D.	Installment Sales [§ 9.84]
	1.	In General [§ 9.85]
	2.	Example [§ 9.86]

3. Treatment of Contingent Payments [§ 9.87]

VI. Tax-Deferred Exchanges of Real Property [§ 9.88]

- A. In General [§ 9.89]
- B. Productive Use in Trade or Business Requirement or for Investment [§ 9.90]
- C. Exchange Requirement [§ 9.91]
- D. Like-Kind Requirement [§ 9.92]
- E. Requirement That Exchange Property Be Held for Productive Use in Trade or Business or for Investment [§ 9.93]
- F. Multiple-Party Exchanges [§ 9.94]
- G. Involuntary Conversions: Requisition or Condemnation and I.R.C. § 1033 [§ 9.95]

CHAPTER 10

CLOSING ISSUES AND DOCUMENTS

by Ryan Seib

I. Scope of Chapter [§ 10.1]

II. Closing Issues [§ 10.2]

- A. Closing Checklist [§ 10.3]
- B. Leasing [§ 10.4]
 - 1. In General [§ 10.5]
 - 2. Assignment, Amendment, and Termination of Leases [§ 10.6]
 - a. In General [§ 10.7]
 - b. Assignment [§ 10.8]
 - c. Amendment [§ 10.9]
 - d. Termination [§ 10.10]
 - 3. Rent Prorations [§ 10.11]
 - 4. Tenant Estoppel Certificates [§ 10.12]
 - 5. Certified Rent Roll [§ 10.13]
 - 6. Notice of Assignment to Existing Tenants [§ 10.14]
 - 7. Rental Weatherization Standards [§ 10.15]
- C. Local Code Compliance [§ 10.16]
- D. Use-Value Penalty [§ 10.17]

III. Closing Mechanics [§ 10.18]

- A. Date and Location of Closing [§ 10.19]
 - 1. In General [§ 10.20]
 - 2. In-Person Closings [§ 10.21]
 - 3. Escrowed Closings [§ 10.22]
 - 4. Remote Closings [§ 10.23]
- B. Transfer of Funds [§ 10.24]
- C. Conveyance of Title [§ 10.25]
 - 1. Effectiveness of Transfer [§ 10.26]
 - 2. Recording of Documents [§ 10.27]
 - a. Purpose of Recording [§ 10.28]
 - b. Form of Recorded Documents [§ 10.29]
 - c. Electronic Recording [§ 10.30]
 - d. Emerging Technologies [§ 10.31]
 - 3. Authorized Parties for Business Entities [§ 10.32]
- D. Payoff and Satisfaction of Existing Liens [§ 10.33]
 - 1. In General [§ 10.34]
 - 2. Mortgages [§ 10.35]
 - a. In General [§ 10.36]
 - b. Existing Debt [§ 10.37]
 - c. Previously Repaid Debt with Unreleased Mortgage [§ 10.38]
 - 3. Tax Liens [§ 10.39]
 - a. In General [§ 10.40]
 - b. Real Property Tax Liens [§ 10.41]
 - c. Other Tax Liens [§ 10.42]
 - 4. Judgment Liens [§ 10.43]
 - 5. Pending Litigation [§ 10.44]
 - 6. Construction Liens [§ 10.45]
 - 7. Condominium Liens [§ 10.46]
- E. Transfer of Keys and Codes [§ 10.47]

IV. Closing Documents [§ 10.48]

- A. Deeds and Land Contracts [§ 10.49]
 - 1. Deeds [§ 10.50]
 - a. Types of Deeds [§ 10.51]
 - (1) In General [§ 10.52]
 - (2) General Warranty Deed [§ 10.53]
 - (3) Special Warranty Deed [§ 10.54]
 - (4) Quitclaim Deed [§ 10.55]
 - (5) Other Types of Deeds [§ 10.56]

(6) Reviewing Exceptions to Warranties
[§ 10.57]

2. Land Contracts [§ 10.58]
 - a. In General [§ 10.59]
 - b. Basic Terms [§ 10.60]
 - c. Selling by Land Contract [§ 10.61]
 - d. Purchasing by Land Contract [§ 10.62]
 - e. Land Contract Titling [§ 10.63]
- B. Real Estate Transfer Return [§ 10.64]
- C. Title Commitment Markup [§ 10.65]
- D. Bill of Sale for Personal Property [§ 10.66]
- E. Assignment and Assumption Documents [§ 10.67]
- F. Foreign Investment in Real Property Tax Act of 1980
[§ 10.68]
- G. 1099-S Reporting [§ 10.69]
- H. Closing Statement [§ 10.70]
- I. Preclosing and Postclosing Occupancy Agreements
[§ 10.71]
- J. Postclosing Escrow Agreement [§ 10.72]
- K. Memoranda of Leases, Options, and Rights of First
Refusal [§ 10.73]

V. Postclosing Issues [§ 10.74]

VI. Appendices [§ 10.75]

- A. Appendix 10A: Sample Closing Checklist
(Form REA-0012) [§ 10.76]
- B. Appendix 10B: Land Contract (State Bar of Wisconsin
Form 11) (Form REA-0202) [§ 10.77]
- C. Appendix 10C: Sample Assignment of Leases and
Contracts (Form REA-0014) [§ 10.78]

INDEX