

# Welcome!

## Real Estate Issues in Mergers and Acquisitions

Practical Tips for Buyers, Sellers, Real  
Estate Lawyers and M&A Lawyers

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Presented by Brad Daves and Brian Meacham





- The **largest business and litigation law firm** headquartered in the Research Triangle area and one of the largest in North Carolina
- We provide a **full range of legal services** to a diverse and dynamic group of **regional, national and international clients**, ranging in size from **large public companies** to **emerging growth businesses**
- Dedicated to furthering clients' interests by providing **intelligent guidance, strategic counsel, solid advice** and **excellent results**



## OVERVIEW

- Real estate issues in M&A Transactions can cause delays, increase costs, and threaten the overall deal
  - Due diligence concerns
  - Risk allocation
  - Transaction timing
- Today's agenda:
  - Common Issues
  - The Transaction Agreement
  - Best Practices

## COMMON ISSUES

- Owned Property vs. Leased Property
  - Owned Property
    - Title/Survey
    - Environmental
    - Taxes & Fees
  - Leased Property
    - Change of Control / Assignment
    - Landlord Waivers
    - Unusual Lease Terms

# COMMON ISSUES: OWNED PROPERTY

- Title/Survey
- Environmental
- Taxes

## COMMON ISSUES: OWNED PROPERTY – TITLE/SURVEY

- Encumbrances on title
  - Financial encumbrances (e.g., mortgages)
  - Non-financial encumbrances (e.g., easements)
- Property defects
  - Encroachments
  - Setback violations
  - Wetlands / flood zones

## COMMON ISSUES: OWNED PROPERTY – ENVIRONMENTAL LIABILITY

- Recognized Environmental Conditions
  - Presence of existing storage tanks
  - History of storage tanks removed
  - Off-site contamination
- Presence of Contamination or Hazardous Material

## COMMON ISSUES: OWNED PROPERTY – TAXES & FEES

- Transfer Taxes
- Property Taxes
- Mortgage Recording Taxes
- Title Company and Escrow Fees; Recording fees



## COMMON ISSUES: LEASED PROPERTY

- Change of Control
- Landlord Waivers
- Unusual lease terms

## COMMON ISSUES: LEASED PROPERTY- CHANGE OF CONTROL & LANDLORD WAIVERS

- Does assignment of the lease require the landlord's consent? Does a "change of control"?
  - "Change of Control" definitions can vary
- Is the transferee subject to any requirements under the lease?
- Do any landlord waivers need to be obtained?

## COMMON ISSUES: LEASED PROPERTY- UNUSUAL LEASE TERMS

- Non-market terms
- Tenant or landlord termination options
- Tenant purchase options
- Related party leases

# THE TRANSACTION AGREEMENT

- Simultaneous Sign and Close *or* Deferred Closing?
- Reps and Warranties / Disclosure Schedules
- Covenants
- Closing Conditions

# THE TRANSACTION AGREEMENT- REPS AND WARRANTIES

- Identity and location of the owned and leased property
- Unencumbered fee simple title (for owned property)
- The enforceability of the lease and existence of any breaches under the leases (for leased property)
- Condition of any improvements
- Representation that all property described represents all material used or intended to be used in the business
- Absence of environmental conditions

# THE TRANSACTION AGREEMENT- COVENANTS

- Consider the general covenants in the Transaction Agreement and assess how material the real estate is to the transaction
- If the real estate is material to the transaction, think about seller covenants to:
  - Maintain property
  - Not sell or encumber the property
  - Provide access to the property for inspection
  - Permitted scope of inspections
  - Use best efforts to assist buyer in obtaining title commitments, title insurance policies and surveys
  - Cure title and survey defects before closing

## THE TRANSACTION AGREEMENT- CLOSING CONDITIONS

- Require all instruments required to transfer the real estate be delivered to buyer at closing (i.e. deeds, assignment and assumption of leases)
- List the real estate-related loan documents
- Require the real property not be damaged or destroyed or experience any other material adverse effects

## THE TRANSACTION AGREEMENT- CLOSING CONDITIONS

- Any items that title company may require to issue title insurance policy (i.e. seller's affidavit, transfer tax returns, payoff letter from seller's lender, etc.)
- Landlord consents / Waivers / SNDAs
- Closing Statement
- FIRPTA certificate
- Any other unique requirements (i.e. termination of certain leases, transfer of certain property before closing)



## PRACTICE TIPS FOR THE M&A LAWYER

- Get the real estate attorney involved early
- Understand and explain the corporate structure of the parties
- Explain the deal structure
- Frequent communication regarding deal progress, deadlines, and target signing and closing dates

# PRACTICE TIPS FOR THE REAL ESTATE LAWYER

- “Turn-key” comments
- Advise of the various timing pressures presented by the real estate (due diligence and closing logistics)
- Be the point of contact for third parties such as title companies and surveyors
- Communicate the potential real estate-related costs
- Provide a checklist of required documents and make sure they are included in signature packets

# ***THANK YOU FOR ATTENDING!***

- Don't forget... today's presentation and recording will be available on [www.SmithLaw.com/Webinar](http://www.SmithLaw.com/Webinar)
- All past recorded webinars are available to view and download too.

## **CONTACT US**

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