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## Buy/Sells - Part V: The Role of Real Property in Buy/Sells

By [Erin K. Tenner](#), Partner, Gray-Duffy, LLP

This is Part V in a series of articles on Buy/Sells. The first four articles discussed the three different types of buy/sell agreements: asset sale and purchase agreements, stock sale and purchase agreements and shareholder agreements. These articles can be viewed at: <http://grayduffylaw.com/news/newsletters/>

What role does the real property play in a buy/sell? How is it transferred in each of the different types of buy/sells?

### **ASSET PURCHASE**

In an asset purchase, the assets are purchased and the land can either be 1) leased by the buyer, 2) purchased, 3) leased with an option to purchase, or 4) the assets can be moved to a new location. If leased, the lease term will typically be a minimum of 5 - 10 years with 2-3 options to renew the lease term for additional five year periods. The lease should always be less than 35 years, including options to renew. A lease that is 35 years or more, even if part of that term is the options to renew, can result in a reassessment of the real property because it is treated like a transfer for tax purposes. The lease will either be an assignment of an existing lease, or negotiated as part of the transaction. If it is negotiated, ideally it will be done at the same time the asset purchase agreement

is negotiated. If it is not completed and attached to the asset purchase agreement as an exhibit, the asset purchase agreement may not be enforceable. Negotiation of the lease will have to be a condition to closing. If terms are not agreed upon, the purchase agreement will not close.

If land is purchased, a separate purchase agreement is drafted for the purchase. The purchase agreement for the land will include a condition to closing that requires the asset purchase agreement to close at the same time as the closing on the land purchase. The asset purchase agreement will, likewise, include a condition for the closing of the real property purchase at the same time as the closing of the asset purchase. Like a lease, if the real property purchase agreement is not drafted at the same time as the asset purchase agreement, it could render the asset purchase agreement unenforceable. If instead it is attached to the asset purchase agreement as an exhibit with an agreement to sign it at closing, no argument can be made that the parties never agreed on the terms.

## **STOCK PURCHASE**

The land is treated differently if stock is purchased, than it is treated in an asset purchase. A lease does not need to be assigned as part of a stock purchase, because when the stock is sold, everything that is owned by the corporation is transferred with the stock. Since the tenant on a lease will be the corporation, its rights under the lease do not change and the new owner of the corporation can enforce the corporation's rights under the lease without the need for an assignment. The same is true when a limited liability company is purchased, since it is a separate legal entity. However, if the lease term is short, a new lease, or option to renew may be required.

## **SHAREHOLDERS AGREEMENT**

In a shareholders' agreement, again stock is being transferred, so the same logic applies to the purchase of a minority interest of an entity as applies to a stock purchase. The buyer who buys 25% of the shares of a corporation or limited liability company, does not own 25% of all the assets of the business. The entity owns all the assets of the business and the new stockholder or member owns instead, a 25% interest in the entity.

## **LAND PURCHASE**

In any stock or asset transfer, if land is being purchased rather than leased, a new entity will typically be set up to buy the land. The new entity should be a corporation except when owned by a publicly-traded company, because holding land in a corporation has adverse tax consequences. A limited liability company is typically used to hold land.

Whether land is purchased or leased, due diligence needs to be done in any buy/sell to make sure there are no liens or encumbrances that could adversely affect the rights of the tenant or new owner, environmental issues that could expose the tenant or new owner to liability, building defects or legal compliance

issues that could be costly after closing. Whether a buyer is buying all of a business, or only a minority interest, the value of the interest purchased will depend in part on exposure to liability after purchase. This article only touches on a few issues that affect a lease or purchase. It is not intended to be comprehensive or legal advice on any particular issue.

To learn more, watch for our upcoming webinar on ***Real Property in Buy/Sell Transactions, Part V*** in our webinar series.

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(818) 907-4071

[etenner@grayduffylaw.com](mailto:etenner@grayduffylaw.com)