# ALLOCATION OF RISKS IN PURCHASE CONTRACTS FOR IMPROVED PROPERTY (RISK AVOIDANCE AND ALLOCATION PRE-CLOSING)

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## INTRODUCTION

**What Are We Talking About?** The assigned topic, "Allocation of Risks in Purchase Contracts for Improved Property", gives a great deal of latitude in what to write about and what to talk about. In many cases, I have been part of the planning committee for a seminar and heard the plans for what the topic was intended to cover and how it might fit with the broader context that is planned for the seminar. But in this case, I was handed just the title and told to do it.

So, using the license which comes with such a broad assignment, I propose to make this an exercise in recalling mistakes made and mistakes witnessed; stories of mistakes told at Bar functions and at bars. Cases that our Courts decide sometimes tell stories which are instructive of risks in purchase and sale transactions and the handling or mishandling thereof. There may be no more effective method of teaching than to read a case in which a disaster has occurred to client or lawyer and thinking: "there but for some good luck go I."

Let us approach this topic then by telling stories, weaving in some law via case recitations and statutory references, tell a weak joke or two, which attempts at humor risks offending at least some of the audience.

**An Overview of the Approach of this Paper and Talk.** Ignoring the risks that are impossible to anticipate or plan for such as global financial melt-downs and plagues (including over exposure to presidential campaign rhetoric), the risks in purchase and sale transactions are largely financial risks to the buyer or to the seller. The price to be paid in a transaction is agreed to and allocated between buyer and seller. In a broad statement, transactional risks to the buyer might be characterized as risk of losing a deal it wanted, or not getting what it paid for, or getting something unwanted with what it paid for. Likewise, transactional risks to the seller are not making an advantageous sale, not getting relieved of liabilities as it wanted, or having conveyed away more than it planned in the transaction. Both parties have risk of enforcement of the contract after default by the other.

Looking at the transactional risks and allocation of them might lead to a discussion of use of warranties and representations, use of disclaimers, use of indemnities, use of insurance, and issues of enforcement of contracts. These have all been the subject of fine presentations to this and similar seminars. Those papers looked at subjects which are largely post-closing or at least post-default matters. In order to do something that is a bit different and new, I am going to make a somewhat arbitrary distinction between post-closing risks and pre-closing risks and focus on the pre-closing risks.

And the planning committee probably wanted the speaker to look at allocations of risks between buyer and seller for the most part, with some discussion of allocation of risk to insurance policy issuers (including title companies) or to third party professionals (surveyors, inspectors, etc.). I am going to broaden the concept of "allocation of risk" to include efforts to avoid risks and the possible allocation of efforts to avoid risk between client and counsel.

## I. RISK: NOT HAVING AN ENFORCEABLE CONTRACT AT ALL -- GETTING THE BASICS WRONG.

The first risk might be the risk of not having a contract that is enforceable at all. We tend to adopt an attitude toward the first paragraph of a contract that it is "just filling in the blanks", but that might not be wise and if not done correctly, one or both parties have taken on risks.

### A. Parties:

The buyer is at risk of not getting its desired deal if the seller named is not the owner of the target property or if the person signing is not authorized to sign for the seller. This risk is addressed in most cases with a representation and warranty by the signing person that the target property is owned by the named seller and that the person signing is authorized to bind the seller. In major transactions it might be worthwhile to have some title work done during the process of negotiation of the contract so as to get third party verification that the correct seller is named. It might also be prudent to obtain a certificate of a person having status like that of a corporate secretary that the signing person is authorized to sign.

### B. Property Description

This can be a risk of failing to have in the contract a property description which satisfies the statute of frauds and so the contract fails to be binding on either buyer or seller. That failure of description is less likely in improved property transactions because in most cases the property will have been platted as a step in getting development permits. Errors are most likely to occur when the property is described by attachment of an exhibit and the exhibit is left to a junior administrator in the client's office or to a broker who types up something with only a street address or maybe a tax office property number. The case of ***Olson v. Bayland Publishing., Inc***., 781 SW 2d 659 (Tex. App. -- Hou. 1st 1989) is instructive. Someone described the property (a small office building in Houston) by its name which included a street address. The Court held that the buyer was entitled to enforce the contract as to the building, but not to the associated, but not adjacent, parking lots. Was that a victory or a defeat for the buyer???

In the case of a failed legal description, remember that Texas is one of a very few states which allow judicial reformation of the description. ***Morrow v. Shotwell***, 477 SW2d 538 (Tex. 1972).

### C. Failure to pay Consideration for the Contract if Required.

If a contract is an option contract or is treated at law as an option contract, even though the title of the document might not call it that, then for the buyer to have an enforceable contract, the buyer has to give consideration (or at least recite that consideration has been given) for the seller's obligation to perform the contract. A contract which has an unfettered right of the buyer to terminate if the buyer is unsatisfied with the property, or a contract which restricts the seller's remedy for the buyer's default solely to a liquidated damage sum will be treated at law as an option contract. ***Culbertson v. Brodsky***, 788 SW2d 156 (Tex. App.-- Ft. Worth 1990). The best practice is to provide and have the buyer pay some small consideration. But in ***1464-Eight, Ltd. v. Joppich***, 154 SW3d 101 (Tex. 2004), the Texas Supreme Court held that if the contract is on "fair terms" and calls for performance "within a reasonable time", then a recital without payment of consideration will suffice to make the contract enforceable. Reliance on that case is unwise because it requires that a buyer seeking to enforce the contract must prevail on two fact issues, which means trial and expense of trial to determine whether the contract is enforceable. There is an allocation of risk for you: The time and cost of obtaining a judicial fact finding versus the payment of maybe $100.00?

## II. RISK: THE PROPERTY IS NOT WISELY DESCRIBED (WITH WEAK JOKE WARNING)

The buyer and the buyer's lawyer have to be on guard against the risk of the buyer not getting what it thinks it is buying. This risk is due to failure to include in the description all the appurtenances and additional real and personal property which collectively goes to make up the project that the buyer thinks it is getting with its payment of the purchase price. Appurtenances (generally fixtures, landlord interests in leases, and easements appurtenant) generally come with the land described, but in an improved property transaction, there may be lots of additional things – personal property, contract rights, money deposits, phone numbers, project names, etc. – which are important to the buyer but which the seller is not obligated to convey unless those items are named in the contract document. <u>Solution</u>: Make the buyer think through what it expects to acquire in the transaction and document that expectation with precision. Conversely, the seller risks conveying away things it might want to keep. For example, a deed signed without specific reservations will convey the minerals and water rights owned by the seller. <u>Solution</u>: Make the seller think through what it is selling and document what it will convey with precision.

## III. RISK: LACK OF NEEDED PROVISIONS FOR THE DUE DILIGENCE PROCESS.

The major transactional risks to the buyer are (1) failure to get what the buyer thought it was to get (in terms of assets or cash flows) or (2) taking on burdens or obligations it did not expect as part of the deal. Those kinds of unpleasant surprises may be in the form of defects in the property, or might be unintended assumption of liabilities (obligations to pay lease commissions, obligations to provide improvements to a tenant under a lease, etc.), or might be unexpected costs of ownership (unexpected repair obligations, costs of environmental clean-ups, etc.). The best approach to avoidance of these risks is robust due diligence which includes providing in the contract for deliveries by the seller of documentation and for the ability to inspect the property, investigate its physical status and otherwise "kick the tires" prior to making a firm decision to purchase or prior to closing.

The matter of what is to be delivered by the seller and what may be inspected by the buyer is subject to negotiation. This subject is interactive with the subject of warranties and representations as well as the seller's usual desire to make the sale "as is" so as to limit its risks of being drawn back into issues about the status of the property. Issues which should be discussed by the buyer's lawyer with the client and documented would probably include the following:

### A. Verification of the Cash Flow.

The buyer will require copies of or access to records of both income and expense of operations of the improved property. Issues to be addressed will include the identity of the records to be delivered or accessed (summaries versus source documents and check or bank records), what period of time is to be covered by the records delivered or shown to the buyer, obligations to summarize categories or just to allow access to unorganized records, etc. Then the seller will be concerned about keeping the records confidential, providing for return of the records if the deal does not close, restrictions on use of the records or information from the records by the buyer for any use other than evaluation the transaction at hand. The buyer will want the right to examine lease files and leases and to contact and talk to tenants to verify the completeness of the file and the status of the seller's performance as landlord.

### B. Title.

The matters of furnishing a title commitment and survey are rarely controversial (other than whose title company to use and any financial arrangements with that title company which are beyond this paper). The issues to be negotiated often include limitations on how much effort or cost must the seller expend to cure title exceptions or whether there are exceptions from coverage which are required to be cured by the seller, regardless of cost.

Title matters may not be just matters of encumbrances but may be matters of cash flow and value. The title exceptions may contain reference to agreements which call for payments by the owner of the property or may refer to agreements which allow income producing uses of the property by third parties, diverting income that the buyer assumes will come to it after the purchase is complete. An example is the washing machine room lease in apartment projects. It is apparently common for an owner of the project to get a big up-front payment of rent from a washing machine provider but little or no ongoing rent payments. An example of this kind of arrangement and the litigation over it by an unhappy buyer is ***Woodmark Austin Limited Partnership v. Coinmatic, Inc***., 2007 WL 4339724 (Tex. App. – Amarillo 2007 (not reported in SW3d).

### C. Physical Inspections.

The buyer should be allowed to go on and into the property to do physical and operational inspections. Issues may be limitations on when such inspections may be made so as to not disturb the operations of tenants, requirements that the buyer or its inspectors must be accompanied by representatives of seller, limitations on sampling of flooring, insulation, flooring or the like and fixing any damage caused by sampling. Does the matter of investigation of physical operation and condition require the seller to turn over maintenance and service records?

### D. Environmental matters.

The issue of sampling and testing may become even more complicated if the investigation or sampling is aimed at asbestos or environmental matters. The seller may not want to have sampling or testing done which would reveal problems that the seller does not really want to know about or have to deal with. If the sampling or testing is done, to whom are the reports given and can the seller limit any obligation of the professional doing the sampling or testing to turn over reports to governmental agencies? These are fair issues to deal with and may require the participation of lawyers with special expertise.

### E. Taking over the Financing – Assumption and Subject to.

If the proposed transaction involves the possibility that the buyer will take over the financing of the property that is in place with one or more lenders, another area of due diligence is called into play. The buyer must be able to contact the lenders to verify the status of the seller's performance, the completeness of the lender obligations which will be assumed or taken subject to and to obtain any needed consent to the transaction.

Conversely, the seller may have a great deal of interest in getting itself and its individual parties released from liability for the financing. The seller will also want the buyer to provide the lender with adequate support for its application to assume such that the seller is novated from the loan obligations (and particularly the "bad boy clause") and any needed consent is given so no due-on-sale clause is triggered.

## IV. RISK: ACCIDENTS ON SITE OR DAMAGE TO THE PROPERTY DURING DUE DILIGENCE.

The seller will be concerned about the risk of damage being done to the property in the process of the buyer's due diligence activities and liabilities which might be incurred from the activities of the inspectors. Problems might include leaving holes open for tenants to fall into or running over someone in the parking lot on the way in or out of the property. These risks can and should be dealt with by indemnities from the buyer to the seller and by insurance policies provided by the buyer or its inspectors which name the seller as additional insured as to events on the property during the contract term.

## V. RISK: EMINENT DOMAIN OR CASUALTY DURING TERM -- PROPERTY CODE 5.007 AND ITS SHORTCOMINGS

What are the rights and obligations of buyer and seller if there is a casualty event involving the property during the term of the contract or if a governmental entity announces a possible taking of all or part of the property during the contract term? Old common law doctrines create problems in dealing with these risks. Does anyone want to discuss the "doctrine of equitable conversion" and its impact on the risks of casualty during the contract term? The Texas legislature has made an attempt to deal with these issues by adopting its version of the **Uniform Vendor and Purchaser Risk Act**, codified as **Section 5.007 of the Property Code**. That provision does not resolve all the issues that a buyer and seller might have. The parties might prefer to have a right to terminate the contract rather than deal with the allocation of damages, or might want to define better than the statute what is a "material" damage or taking. Other papers have provided samples of provisions allocating the risks of casualty or condemnation during the contract term and I refer you to them. Also, see a sample provision attached as an exhibit to this paper.

## VI. RISK: A PLANNED ASSIGNMENT CAN'T BE DONE WITHOUT SELLER CONSENT.

The buyer's business plan for the property might include the possibility that the named buyer will want to transfer and assign the buyer's contract rights and obligations to a special purpose entity for the acquisition and ownership of the property. The common law might, however, create a risk that this assignment might not be possible unless specifically provided for in the contract. The common law generally allows assignment of a buyer's rights and obligations without seller consent if the consideration for the property is to be paid in cash. But if the consideration is vendor financed or maybe if the consideration includes gaining consent by a lender to an assumption of the existing financing, the consent of the seller might be required. The buyer should not take the risk of a refusal of the seller to allow such an assignment by getting a consent into the contract when signed. A seller, on the other hand, might have a risk that the required releases of liability on the assumed financing might not be gotten if the buyer has a free right to assign.

## VII. RISK: CLOSING DELIVERIES ARE NOT PROPERLY PROVIDED FOR.

Both buyer and seller are at risk of not getting all the needed documents at closing. The risk to the seller is not getting released from liabilities it thought would transfer to the buyer along with the property. This might be lease commission obligations, loan guaranty obligations, obligations to tenants under leases, etc. The best approach to avoidance of this risk is to carefully document what must be released and not only what must be assumed by the buyer as conditions to the seller's obligation to close but also what documents must be delivered at closing to evidence the desired releases. The buyer is at risk of not getting properly documented all elements or parts of the property that it thinks it is to get for the purchase price. A risk avoidance technique might be to make a pro forma closing document list as the contract is drafted to be sure that these issues are thought through carefully and the list of required document deliveries is put into the contract document.

### A. Lease Commissions.

One area of documentation that needs careful attention is the matter of assignment of responsibility for future lease commissions. In ***Regency Advantage Limited Partnership v. Bingo Idea-Watauga***, 936 SW2d 275 (Tex. 1997*)*, a bank (acting probably as a lender liquidating a property after foreclosure) sold a building to a group which planned to operate it as a bingo establishment. The case speaks mostly to the obligations of a landlord for defaults of a prior landlord, but also discusses the obligations of the buyer for lease commissions to be paid in the future. The conveyance documents contained a general assignment of leases but no specific assumption of the commission obligations by the buyer. The Court held that the buyer would not be liable for the commission absent express assumption of the commission by the buyer. The commission agreement said it was binding on successors but the specific documentation between the bank as seller and the buyer disclaimed assumption of the obligation.

### B. Tenant Security Deposits.

**Section 92.105** (for residential leases) and **Section 93.007** (for commercial leases) of the **Property Code** provide that the seller of leased property remains liable to return security deposits it has received from tenants even after the sale of the property unless notices of the sale and contact info for the new owner are delivered to the tenants. Closing documentation for compliance with these statutes needs to be included in the contract provisions in order for the seller to be relieved of obligations it surely thinks it is passing along to the buyer but may not if the paperwork is not completed as required by the laws.

## VIII. RISK: SELLER'S LOSSES DUE TO DEAL FAILURE

What happens if the deal does not close? Sometimes the failure to close is a breach of the contract by the buyer, and sometimes the failure to close is due to some condition or contingency not being satisfied. The seller may have invested time and effort and perhaps considerable expense in negotiating the contract and in dealing with due diligence, only to have no sale and no money from the sale. Is there something the seller can do to deal with that risk?

The answer depends first on the reason why the sale did not close and secondly on the terms of the contract. Not all failures to close are defaults under the contract or breaches of the contract.

A default or breach is just failure of the buyer to perform without a contract provision which allows termination. For default and breach, the law gives remedies and those remedies can be limited by contract. Typically, in commercial property transactions, the seller will have agreed to accept the buyer's deposit of earnest money as its sole remedy for the breach and that sum will serve to some degree as an offset to the seller's expenses. The law concerning liquidated damages requires that the amount not be a "penalty". See, ***Stewart v, Basey***, 245 SW2d 484 (Tex. 1952).

In some cases, the buyer may have had the benefit of a condition or contingency which, if not satisfied, results in the ability of the buyer to terminate the contract. These contingencies might be such things as curing title exceptions, getting approval for an assumption from a lender, obtaining a new loan for the transaction, or the like. Failure to obtain satisfaction of a contingency generally allows the buyer to terminate the contract and get back any earnest money deposited by the buyer. This generally means that the seller has no recovery of its losses if the deal fails to close.

If the failure to close is due to failure of a condition or contingency favorable to buyer to be satisfied, it is typical for the buyer to have to give notice to the seller within designated time periods in order to terminate the contract and end the buyer's liability to perform. Might it also be possible for a contract to provide that as a condition to exercise the right of termination, the buyer must pay some amount to offset the seller's out-of-pocket costs due to failure of the deal? It can be argued that such a payment is not a liquidated damage provision but only a condition to exercise of an option, for which the law does not apply the "penalty" analysis, and so the parties could be free to negotiate a remedy and de facto allocation between them for this risk.

## IX. RISK: BUYER'S LOSSES DUE TO DEAL FAILURE – PURSUIT COSTS

The question can also be asked when the deal does not close and it is the buyer which has expended time and effort that is lost. The initial analysis is again the reason for the failure to close and the distinction between breach, on the one hand, and failure of condition on the other. If the failure to close is due to breach by the seller, the law gives remedies, including the remedy of specific performance. And again, the parties may have by contract limited the remedy so that the seller is only obligated to pay damages.

What if the failure to close is due to some failure to satisfy a condition? If the condition is a condition which favors the seller (such as novation from a loan obligation or release from a loan guaranty) then it is logical that the buyer might expect that the seller would be obligated to pay something toward the buyer's costs. This kind of provision is common enough that it has gotten a name in the literature – "pursuit costs". But what if the failure of condition is a failure of a condition that favors the buyer. Should the buyer be able to terminate its obligation to purchase and also get from the seller some "pursuit costs"? I have not seen any law on the subject. And in either case, (failure of buyer's condition or of seller's condition) the definition of "pursuit costs" needs to tell us what costs, for what activities, and perhaps within what limitations. For a discussion of pursuit costs, see Ken Mills' article, Top Ten Issues When negotiating Earnest Money Contracts, presented at the **Advanced Real Estate Law Course in 2015** (Chapter 22).

## X. OTHER RISKS, ALLOCATIONS OF RISKS, AND REFERENCES TO MATERIALS ABOUT THOSE

Neither time available nor our attention spans allow us to get into the many other risks that might be dealt with in a contract for purchase and sale of commercial property.

Cary Barton and Sara Dysart have written about and given forms for contract provisions for risk allocation about termination of property service contracts and the unexpected costs of such terminations, problem of allocation and proration of ad valorem taxation if the property is not a single (or at least whole number of) tax parcels, and changes of property operations or leasing during contract term in Scar Tissue Often Beats Brains: Lessons Learned from Busted (or Almost Busted ) Sale Contracts and Loan Documents, at the **Mortgage Lending Institute, 2011**.

## XII. MATERIALS FOR WARRANTIES AND REPRESENTATIONS AS RISK ALLOCATION

For a very good point-counterpoint comparison about the use and abuse of warranties and representations as risk allocations in purchase and sale contracts, see:

> Negotiating Representations and Warranties in a Commercial Real Estate Transaction, Douglas A. Yeager, **Advanced Real Estate Drafting Course, 2007**, Chapter 14;

and

> From Ridiculous "Asks" to Meaningful Compromise: Drafting and Negotiating Selected Aspects of Earnest Money Contracts for Income-Producing Commercial Properties, David Tomek, **Advanced Real Estate Strategies, 2015**, Chapter 1.14 (Presented by Sara Dysart). This article has extensive forms of (ridiculous) warranties and representations and state of the art "as is" disclaimer language.

# EXHIBIT

## Section 15

## DESTRUCTION OR DAMAGE

15.1. Risk of Loss. Until Closing, Seller alone shall bear the risk of loss should there be any damage to any of the Improvements and/or Personal Property by fire or other casualty.

15.2. Damage and Destruction. In the event of any Casualty between the Effective Date and the Closing Date, Seller shall take all action necessary to preserve and protect the Improvements from further loss or damage, and within seven (7) Business Days after such loss, deliver to Purchaser written notice of such damage ("Damage Notice"). As used herein, the Improvements shall be "Materially Damaged" if the cost of restoring the same to their condition prior to the fire or other casualty in full compliance with all applicable building and zoning laws, ordinances and regulations will exceed $100,000 but will not exceed $500,000 whether or not such damage is covered by insurance. As used herein, the Improvements shall be "Substantially Damaged" if the cost of restoring the same to their condition prior to the fire or other casualty in full compliance with all applicable building and zoning laws, ordinances and regulations will equal or exceed $500,000, whether or not such damage is covered by insurance. If the Improvements are Materially Damaged, Purchaser (but not Seller) may terminate this Contract by delivering written notice to Seller within ten (10) Business Days following Seller's delivery of the Damage Notice (said period hereinafter called

"First Casualty Option Period") . If the Improvements are Substantially Damaged, either party may terminate this Contract by delivering written notice to the other party within the First Casualty Option Period. If the Improvements are neither Materially Damaged nor Substantially Damaged, neither party may terminate this Contract. If this Contract does not terminate pursuant to the terms of this Section 15.2 prior to expiration of the First Casualty Option Period or, in the event the Improvements are neither Materially Damaged nor Substantially Damaged: (a) the transaction shall close in accordance with its terms notwithstanding the casualty; (b) Seller shall promptly commence and thereafter complete within a reasonable period of time the repair of the Improvements to substantially the same condition as existed prior to the loss; and (c) Seller shall deposit the insurance proceeds with the Title Company and the Title Company shall be authorized to disburse that sum: (i) to Seller in monthly installments based upon the value of the work and materials completed upon Purchaser's acceptance of the completed work, which acceptance shall not be unreasonably withheld or delayed or (ii) to Purchaser if Seller fails to complete such work within a reasonable time following Closing and Purchaser gives written notice to Seller and Title Company terminating the escrow, in which event Purchaser shall apply the escrowed funds so delivered to it to the reasonable cost of completion of such work. Any excess of such funds over the above such cost shall be remitted by Purchaser to Seller. If this transaction closes prior to the repair of any damage, the Title Policy may contain the standard exception relating to mechanic's liens and pending disbursements as provided by Rule P-8 of the Rules promulgated by the Texas Board of Insurance. Upon completion of the repairs, Seller shall cause the Title Company to remove the exception. If Closing is postponed in order for Seller to complete such repairs and Seller fails to substantially complete same not later than a date which would allow Closing to occur on or prior to ____________,198 _______ Purchaser (as its sole remedy) may either terminate this Contract by written notice to Seller or close with the establishment of the above mentioned escrow account. If Purchaser elects to terminate this Contract as provided in the foregoing sentence, the same shall be terminated as provided for in Section 17.3 hereof.

[15.2. [ALTERNATE] Damage and Destruction. In the event of any Casualty between the Effective Date and the Closing Date, if the reasonable estimated cost of restoration exceeds $25,000, Purchaser shall have the right to terminate this Contract by giving written notice to Seller, in which event this Contract shall be terminated as provided in Section 17.3. In the event that Purchaser and Seller shall be unable to agree on the reasonable estimated cost of restoration, an engineer designated by Purchaser and an engineer designated by Seller shall select an independent engineer to resolve the dispute. The cost of the independent engineer shall be shared equally by the parties. If the Purchaser does not elect to terminate this Contract, the net proceeds of any insurance collected by Seller prior to Closing and the amount of any deductible under the Insurance Policies will be paid to Purchaser at Closing, but all unpaid claims and rights of Seller under such insurance that have not been collected by the time of Closing shall be, and hereby are, assigned to Purchaser at Closing. Seller shall make no adjustment or settlement of insurance claims without Purchaser's consent.]

Section 16

CONDEMNATION

16.1. In the event of the institution of any proceedings, judicial, administrative or otherwise, relating to the taking or to a proposed taking of any portion of the Property by eminent domain, condemnation, or otherwise, prior to Closing, or in the event of the taking of any portion of the Property by eminent domain, condemnation, or otherwise prior to the Closing, Purchaser shall have the right and option to terminate this Agreement by giving Seller written notice to such effect at any time after receipt by it of notification of such occurrence or occurrences. Seller hereby agrees to furnish Purchaser with written notice in respect thereof within five (5) Business Days from Seller's receipt of knowledge or notification of such an occurrence. In the event Purchaser elects to terminate this Contract as provided in this Section 16.1, the same shall be terminated as provided for in Section 17.3.

16.2. Purchaser shall have the further option to proceed to close in accordance with the provisions of this Contract, subject to the taking by eminent domain, condemnation or otherwise as described herein, in which case the Seller shall assign to Purchaser, and Purchaser shall be entitled to receive, the entire award for damage to the Property by reason of such taking, and Seller will execute and deliver to Purchaser at Closing, or thereafter on demand, all proper instruments for the assignment to and collection by Purchaser of any such award.

[16.3. [ALTERNATE] Other than with respect to an Immaterial Taking, any taking or condemnation for any public or quasi-public purpose or use by any competent authority in appropriate proceedings or by any right of eminent domain of all or any part of the Property between the Effective Date and the Closing shall, at Purchaser's option, cause a termination of this Contract. The election to terminate provided for hereby must be exercised by Purchaser (or will be deemed to have been waived) by written notice to Seller to that effect, which notice is given by Purchaser on or before the fifteenth (15th) Business Day following Purchaser's receipt from Seller of written notice of the condemnation (but in any event prior to Closing). In the event Purchaser terminates this Contract as provided in the foregoing sentence, this Contract will be terminated as provided for in Section 17.3. If Purchaser shall not elect so to terminate, Seller shall be relieved of its duty to convey title to the portion so taken or condemned, but Purchaser will be entitled to receive all proceeds of any such taking or condemnation; provided Purchaser takes title hereunder, and, in that event, Seller will make no adjustment or settlement of such condition without Purchaser's consent and will take at Closing all action necessary to assign its entire interest in any such award to Purchaser.]