Creative Solutions is a bi-monthly column offering creative solutions to unusual problems in drafting leases for retail space. Please email your questions or problems you are encountering and your Creative Solutions to Glen Cornblath, gcornblath@ksc-law.com.

Drafting the contract a developer will use to purchase land on which to build a retail center is one of the principal functions of real estate attorneys. There are many items to cover, including title, survey, environmental conditions, physical conditions and timing issues. In addition, obtaining governmental approvals of the property is a major concern of any developer. Governmental approvals include the zoning of the property, the permitted uses under that zoning, building restrictions, off-site improvements and development agreements with the municipality.

We handle most of these items as contingencies of the contract. In other words, during a specified time period negotiated by the parties, the Purchaser confirms that these items are acceptable and, with respect to governmental approvals, the Purchaser petitions the municipality or other governing body for the zoning, restrictions and development agreement it wants. The contingency clause permits the Purchaser to terminate the contract if the Purchaser can not obtain what the Purchaser needs for its development. A typical contingency clause for governmental approval is as follows:

> **Governmental Approval Period.** During the ________________ (___) day period (the "*Governmental Approval Period*") immediately following the end of the Due Diligence Period [NOTE: frequently the length of time for obtaining governmental approvals is longer than other items of due diligence], Purchaser shall act in good faith to obtain the Governmental Approvals. As used herein, the "*Governmental Approvals*" shall mean all approvals, permits, zoning changes, variations, special uses, development agreements or other code relief needed for Purchaser's use of the Property as a retail center. If Purchaser fails to obtain the Governmental Approvals prior to the end of the Governmental Approval Period, Purchaser shall have the option to terminate this Agreement by notice to Seller and in such event, this Agreement shall automatically terminate and the Earnest Money and all interest thereon shall be paid to Purchaser. If Purchaser fails to so notify Seller, then this Agreement shall continue in full force and the Earnest Money shall be non-refundable, except as provided in Article 8.
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> Purchaser shall diligently pursue the Governmental Approvals during the Due Diligence Period and the Governmental Approval Period. During the Due Diligence Period and the Governmental Approval Period, Seller shall cooperate with Purchaser in pursuing the Governmental Approvals, including, without limitation, executing all documents as reasonably required by Purchaser in order to obtain the Governmental Approvals. Purchaser shall pay the costs and expenses of pursuing the Governmental Approvals. Notwithstanding anything to the contrary contained herein, Seller shall not be obligated to incur any costs by

> cooperating with Purchaser or by executing documents reasonably required by Purchaser.

What happens if your client successfully completes its due diligence and obtains the governmental approvals it sought? As the paragraph states, if the Purchaser does not terminate the agreement, the earnest money becomes non-refundable and the parties proceed to closing. In most cases, that result works very well. With its approvals in hand, the Purchaser can close on its acquisition and construction loan (putting aside signed leases that the lender may require) and buy the property.

However, in some cases, the delay between waiving the governmental approval contingency and closing may be considerable. Sometimes the current owner or occupant needs time after the waiver of all contingencies to find a new location or shut down an existing building. Sometimes the Purchaser wants more time to pre-lease, obtain building permits or wait for weather to clear in order to start construction.

What happens if the governmental approvals previously obtained are jeopardized after the contingency period has passed? This could take several forms: a governmental entity with jurisdiction could impose a moratorium on construction, someone or some entity could challenge the governmental approvals in court, or a state authority (like a highway authority) could impose a requirement that effectively negates the local entity approval. Now the Purchaser is forced to close on property it can not develop, or lose its earnest money. What can the Purchaser do in advance to protect itself?

The Purchaser can include a provision in its contract which permits it to terminate the agreement if certain events occur, even after the expiration of the due diligence time periods. Here is a sample paragraph:

> **Conditions Precedent**. Notwithstanding any provision of this Agreement to the contrary, it shall be a condition of Purchaser's obligation to proceed with the Closing that, as of the Closing Date, (a) Seller shall have performed in accordance with this Agreement, (b) there shall not have been imposed and remain outstanding any governmental or quasi-governmental regulation, requirement, or moratorium of any kind whatsoever affecting the Premises, including, without limitation, on the issuance of building permits, occupancy permits, utility connection permits, and (c) none of the Governmental Approvals is the subject of any third party challenge. In the event the foregoing Conditions Precedent have not been satisfied or waived in writing by Purchaser, then Purchaser may, by notice given to Seller by no later than the Closing Date, terminate this Agreement and receive a refund of the Earnest Money.

Of course, the parties may negotiate the division of the earnest money so that the seller is compensated to some extent for agreeing to the conditions precedent paragraph. Most buyers will be happy to pay the seller a smaller amount to avoid the choice of losing all the earnest money or closing on property it can not develop.

Glen Cornblath is a partner in the Chicago law firm of Krasnow Saunders Cornblath, LLP, (312) 755-5700. His practice involves all aspects of real estate, including acquisition of undeveloped land, development of retail, office and industrial facilities, financing, leasing for both anchors and in-line tenants and sale of developed property.