



**Morgan Lewis**

# **M&A ACADEMY**

**M&A Academy – Real Estate  
Considerations in M&A Transactions**

**Speakers:**

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Kathleen Martin and Chris McAuliffe**

**February 23, 2021**

A long-exposure photograph of a highway at night, showing vibrant red and blue light trails from traffic. The trails curve from the top left towards the bottom right, creating a sense of motion and speed. The background is a dark, deep blue.

**SECTION 01**

# **A BRIEF INTRODUCTION**

# Introduction

- Almost all M&A transactions will include a real estate component.
- Companies typically own or lease real property such as office, retail, manufacturing, warehouse, laboratory, parking or other space.
- Real estate review can be a long lead item so it needs to be addressed early in the process – do not wait until closing as it can cause delays!
- M&A transactions fit into 3 main categories for real estate considerations:
  - Real estate is the main focus (i.e. REITs or a Company's largest assets are retail locations)
  - Real estate has significant value, but not all properties are significant to the deal (i.e. transaction includes an office headquarters or manufacturing plant that are essential, but other real estate may be less valuable or important to operations)
  - Real estate has smaller value to the overall deal (i.e. small office space).
- Real estate review in M&A deals includes agreement negotiation such as negotiating representations and warranties & defining the property to be included in the deal accurately, as well as the review of leases, title reports, easements and other encumbrances, surveys, zoning and environmental.
- Real estate diligence and environmental review is a significant part of M&A deals as it can affect overall deal valuation and corporate operations.





**SECTION 02**

**OWNED & LEASED  
REAL PROPERTY**

# Purchase and Sale Agreements: Real Property Representations and Warranties

## Reps & Warranties - Owned Real Property – Buyers

- Buyers typically want to start negotiations by asking for an extensive list of reps and warranties in the agreement that include the following:
  - i. Seller has good and marketable fee simple title to the Owned Real Property free and clear of all Liens, except for Permitted Liens,
  - ii. There are no leases, subleases, licenses, or other agreements entered into by Seller granting to any Person the right of use or occupancy of any portion of the Owned Real Property, except for those constituting Permitted Liens,
  - iii. Seller has not received written notice of any, violation of or default under (including any condition that with the passage of time or the giving of notice would cause such a violation or default under) any restrictive covenants or contract affecting the Owned Real Property,
  - iv. Seller has delivered to Buyer true, correct and complete copies of all vesting deeds, title insurance policies and exception documents, surveys, zoning reports and similar reports to the extent in its possession or control,
  - v. Seller is in exclusive possession of all the Owned Real Property and has all easements, licenses, permits or other rights required by applicable law for the current use and occupancy of the Owned Real Property and as are necessary for the conduct of the business of Seller thereon as currently conducted by Seller,

# Purchase and Sale Agreements: Real Property Representations and Warranties

## Reps & Warranties - Owned Real Property – Buyers (con't)

- vi. (v) the continued use, occupancy and operation of the Owned Real Property as currently used, occupied and operated, does not constitute a nonconforming use under any applicable Law (including, but not limited to building code, zoning ordinance or other law or regulation, or any covenants, conditions or restrictions) relating to, is not in violation of any applicable law (including, but not limited to building code, zoning ordinance or other law or regulation, or any covenants, conditions or restrictions) with respect to, zoning, building, subdivision and land use and does not otherwise violate or conflict with any covenants, conditions, restrictions or any contracts or applicable Permitted Liens thereon,
- vii. (vi) no portion of the Owned Real Property is subject to any pending condemnation, eminent domain, or similar proceeding or any other proceeding by any governmental entity or otherwise and, to the Knowledge of Seller, there is no threatened condemnation or similar proceeding or any other proceeding with respect thereto, and
- viii. (vii) all such Owned Real Property and any buildings, fixtures, equipment and improvements thereon have no material defects are in good operating condition and repair and have been reasonably maintained consistent with standards generally followed in the industry (given due account to the age and length of use of same, ordinary wear and tear excepted), are adequate and suitable for their present and intended uses.

# Purchase and Sale Agreements: Real Property Representations and Warranties

## Reps & Warranties - Owned Real Property – Seller

- Seller's initial agreement draft should limit the scope of reps and warranties to the following:
  - (i) the Seller has good and marketable fee simple title to the Owned Real Property free and clear of all Liens, except for Permitted Liens,
  - (ii) there are no leases, subleases, licenses, or other agreements entered into by the Seller granting to any Person the right of use or occupancy of any portion of the Owned Real Property, except for those constituting Permitted Liens, and
  - (iii) the Seller has delivered to Buyer true, correct and complete copies of all vesting deeds to the extent in its possession or control.

# Purchase and Sale Agreements: Leased Property Representations and Warranties

## Reps & Warranties - Leased Real Property – Buyer

- With respect to leased real property, Buyers typically want extensive reps and warranties including the following:
  - (i) Schedule “x” contains an accurate and complete list of all leases, subleases, licenses and other occupancy agreements to which the Company is a party as a lessee, sublessee, licensee or occupant;
  - (ii) Seller has delivered to Buyer true, correct and complete copies of each of the Real Property Leases and all amendments, modifications, supplements and memoranda thereof, and all estoppel certificates and subordination, non-disturbance and attornment or similar agreements related thereto;
  - (iii) the Company holds a good and valid leasehold interest in all Leased Real Property, free and clear of all Liens, except for Permitted Liens;
  - (iv) each of the Real Property Leases is in full force and effect, constitutes valid and binding obligations of the parties thereto, enforceable in accordance with its terms;
  - (v) the Company has neither sent nor received any written notice alleging any violation or default by the Company or any other party under, and neither the Company nor any other party are in violation or default under, and there is no event which, with the giving of notice or the passage of time or both, would result in a violation or default by the Company or any other party under, any Real Property Lease;



# Purchase and Sale Agreements: Leased Property Representations and Warranties

## Reps & Warranties - Leased Real Property – Buyer (con't)

- (vi) no party to any Real Property Lease has exercised any option or right to (a) terminate such Real Property Lease, (b) lease additional premises, (c) reduce or relocate the premises demised by such Real Property Lease or (d) purchase any real property;
- (vii) the Company has not entered into any sublease, license or other agreement granting to any party the right of use or occupancy of any portion of the Leased Real Property;
- (viii) the Company has not assigned, pledged, mortgaged or otherwise transferred any Real Property Lease or interest therein;
- (ix) no portion of the Leased Real Property is subject to any pending condemnation, eminent domain, or similar proceeding or any other proceeding by any governmental entity or otherwise and, to the Knowledge of Seller, there is no threatened condemnation or similar proceeding or any other proceeding with respect thereto; and
- (x) except as set forth on Schedule “y”, the execution, delivery and performance of the Purchase Agreement by the Company and the consummation of the transactions contemplated by the Purchase Agreement do not result in any breach or default, or require any consent or approval by or notice to any other party, under the provisions of any Real Property Lease.

# Purchase and Sale Agreements: Leased Property Representations and Warranties

## Reps & Warranties - Leased Real Property – Seller

- Seller's initial draft should limit the scope of reps to the following:
  - (i) Schedule "x" contains a list of all leases and subleases to which the Company is a party as a lessee or sublessee;
  - (ii) Seller has delivered to Buyer complete copies of each of the Real Property Leases and all amendments and modifications thereto; and
  - (iii) to Seller's actual knowledge, without inquiry or investigation, the Company is not in material default under any Real Property Lease beyond the expiration of applicable notice and cure periods.

# Purchase and Sale Agreements: Real Property Pre-Closing Covenants

- **Real Property Pre-Closing Covenants: Owned Real Property**

- Buyer will want the Seller to:
  - (i) agree conduct its business in the ordinary course and not purchase, lease or dispose of any Owned Real Property,
  - (ii) maintain all risk property insurance policies, and
  - (iii) maintain the Owned Real Property as it is currently maintained.
- Seller will want to limit pre-closing covenants in initial draft of agreement to give Seller more flexibility.

# Purchase and Sale Agreements: Real Property Pre-Closing Covenants

- **Real Property Pre-Closing Covenants: Leased Real Property**

- Buyer will want the Company to agree to
  - (i) not enter into any lease, sublease, license or occupancy agreement with respect any real property,
  - (ii) not terminate, assign, relinquish any rights under, grant any waiver or consent under, or amend or modify, any Real Property Lease,
  - (iii) pay and perform all obligations of the Company under each Real Property Lease,
  - (iv) not make any alterations to any Leased Real Property, except as necessary to conduct the Company's business in the ordinary course consistent with past practice, and
  - (v) not exercise any expansion, extension or renewal option under any Real Property Lease without Buyer's prior written consent.
- Seller initial draft will want to limit the pre-closing covenants to give Seller the right to operate the Company with the most flexibility and least restrictions.



# Purchase and Sale Agreements: Real Property Closing Deliverables

## Closing Deliverables - Owned Real Property

- Buyer will want the following closing deliverables from the Seller:
  - (i) special warranty deed(s) in the form and substance agreed to by the parties and in accordance with the state form (if asset deal);
  - (ii) bill of sale (if asset deal);
  - (iii) any documents, affidavits or other instruments [reasonably] requested by the Buyer's title insurance company in the event the Buyer is purchasing a title insurance policy;
  - (iv) a fee owner's title insurance policy issued by a nationally recognized reputable insurance company acceptable to the Buyer in form and substance reasonably satisfactory to the Buyer in an amount determined by the Buyer and
  - (v) a certified ALTA/ACSM Land Title Survey for Owned Real Property, in form and substance [reasonably] satisfactory to Buyer.

# Purchase and Sale Agreements: Real Property Closing Deliverables

## Closing Deliverables - Owned Real Property

- In stock deals, Buyer's may want a Non-imputation endorsement. Non-imputation coverage" involves an endorsement to an owner's policy insuring an entity against imputation by operation of law of knowledge of its partner, officer, director, or employee about unrecorded items affecting the title.
- Seller initial draft will want to limit closing deliverables to the deed for the Owned Real Property. A Seller will want to push back on Buyer's request for a Non-imputation endorsement because the title company will require an indemnity from the Seller

# Purchase and Sale Agreements: Real Property Closing Deliverables

## Closing Deliverables - Leased Real Property

- Buyer will want the following closing deliverables from the Seller:
  - (i) assignments of lease (if asset deal);
  - (ii) any required landlord (and possibly landlord's lender) consents;
  - (iii) clean landlord estoppel certificates (if the Real Property Lease requires a landlord to provide one, if the landlord under the Real Property Lease is affiliated with Seller, or if the Real Property Lease is material to the business);
  - (iv) non-disturbance agreements (if the Company is entitled to one under the Real Property Lease); and
  - (v) possibly amendments to Real Property Leases (especially if the landlord under the Real Property Lease is affiliated with Seller and the terms of the lease are not market).
- Seller initial draft will want to limit closing deliverables to assignments of leases (if asset deal).

# Purchase and Sale Agreements: Other Key Provisions to Consider

## Risk of Loss Provision

- **Owned Real Property**

- In the event the Owned Real Property is important to the overall operation of the acquired companies' business or is an essential element of the acquisition, you may consider adding a "Risk of Loss" provision to the agreement.
- A risk of loss provision is typically included in sale contracts for real property and allocates liability for any casualty loss or condemnation that affects the real property between the time of signing the contract and closing. It should be noted that this clause is unnecessary in a "sign and close" transaction.



# Purchase and Sale Agreements: Other Key Provisions to Consider

## Risk of Loss Provision

- **A sample risk of loss provision is as follows:**
  - “If prior to the Closing, any portion of the Real Property shall be damaged or destroyed by fire or other casualty or is subject to a taking, the Buyer shall have the right to cancel this Agreement by giving notice to the Stockholders within fifteen (15) days following receipt of notice of such fire or other casualty or taking.
  - If the Buyer shall give such notice to the Representative, this Agreement shall terminate and be deemed cancelled on the date such notice is given to the Representative and all parties to this Agreement shall be released of all obligations and liabilities hereunder, except with respect to those obligations and liabilities which are expressly stated to survive the cancellation or termination of this Agreement.
  - In the event any portion of the Real Property is damaged or destroyed by fire or other casualty or is subject to a taking prior to the Closing and the Buyer does not elect to cancel this Agreement, then the Buyer shall proceed in accordance with the terms of this Agreement without any abatement of the Per Share Purchase Price. In the event any portion of the Real Property is subject to a taking, the Buyer shall have the exclusive right to conduct all proceedings and make all agreements in connection therewith.”

# Purchase and Sale Agreements: Other Key Provisions to Consider

## Transfer Taxes

- In many jurisdictions, a transfer tax is charged by state or local governments upon a sale of real property from one owner to another or the act of recording the deed. In some jurisdictions, a transfer tax may be due upon a change of control of the owner of real property.
- The tax is typically based on the consideration paid for, or the value of, the real property. Buyers will want the Seller to pay and Sellers will want Buyers to pay. In most states, there is a custom as to which party pays the transfer tax (Seller or Buyer or a 50/50 split).
- In M&A transactions, the parties generally agree to split the cost of transfer taxes 50/50 or follow local custom.

# Purchase and Sale Agreements: Other Key Provisions to Consider

## Definitions

- **Permitted Liens** – “Permitted Liens” are Liens that the Company’s real property will remain subject to at closing (the Seller will have no obligation to remove prior to closing). A buyer-friendly form of a definition for “Permitted Liens” would be limited, such as the following:
  - (a) Liens for current real property taxes not yet due and payable [or that are being contested in good faith and for which appropriate reserves have been established to the extent required by GAAP];
  - (b) mechanics’, carriers’, workmen’s, repairmen’s or other similar Liens arising in the ordinary course of business that
    - (1) are not yet due and payable,
    - (2) do not impair the present use or value of the subject property, and
    - (3) do not impair the conduct of the Company’s business;
  - (c) zoning and building codes and other legal requirements regulating the use or occupancy of any real property or the activities currently conducted thereon that are imposed by any governmental body that do not or would not materially impair the use or occupancy of such real property in the operation of the business as currently conducted thereon; and
  - (d) easements, covenants, conditions, restrictions and other similar matters of record affecting title to any real property that do not or would not materially impair the use or occupancy of such real property in the operation of the business as currently conducted thereon or the value thereof. Sellers, however, will want a broad definition of “Permitted Liens”.

# Purchase and Sale Agreements: Other Key Provisions to Consider

## Definitions

- **Owned Real Property and Leased Real Property**
  - Both Buyer and Seller will want to make sure that the definitions of Owned Real Property and Leased Real Property correctly identifies and includes all the Owned Real Property and Leased Real Property.
- **Material Contracts**
  - Give consideration as to whether Real Property Leases should be included in the definition of “Material Contracts”.



# Purchase and Sale Agreements: Tools to Manage Environmental Liability

## Key Sections of Purchase and Sale Agreement from Environmental Perspective:

- Reps and Warranties\*
- Excluded/Assumed Liabilities\*
- Definitions
- Survival\*
- Indemnification/Indemnification Procedures
- Access to Documents and Properties\*
- Conditions to Closing
- Covenants
  - \*Discussed on following slides

# Purchase and Sale Agreements: Environmental Reps

Environmental Representations and Warranties can be very broad or narrow, depending on the transaction

- Buyer wants reps on (i) contamination at current/former sites, (ii) compliance with environmental laws and permits (current and past), (iii) possess all environmental permits, (iv) consent orders/decrees, (v) predecessor activities/liabilities, (vi) off-site disposal liabilities, (vii) hazardous substance exposure, (viii) asbestos liabilities (premises and product liability), (ix) underground storage tanks, (x) PCBs, (xi) contractual liabilities, (xii) disclosure of environmental documents, (xiii) transferability of permits, governmental consents, filings.
- Seller's initial draft may limit scope of reps to (i) compliance with environmental laws and environmental permits as of Closing; (ii) possess all necessary environmental permits; (iii) no pending written environmental claims or enforcement proceedings; (iv) environmental reps and warranties are the exclusive reps and warranties applicable to environmental health and safety matters.
- Consider the use of qualifications to reach an acceptable middle-ground: "Knowledge," "Material Adverse Effect," material, disclosure schedule, timing, actions by seller/target company or third-parties, etc

# Excluded/Assumed Liabilities – Environmental

- Seller may agree to retain liability for former/retained facilities, off-site waste disposal liabilities and/or certain known environmental liabilities and require Buyer to assume all other environmental liabilities associated with the business and transferred assets.
- Buyer will want Seller to retain all pre-closing environmental liabilities.
- A Buyer may achieve a competitive advantage in a bid by agreeing to assume all or some of the environmental liabilities.
- Understand from a practical perspective how a “my watch/your watch” structure will work.
- Assign responsibility for compliance with state transfer laws, where applicable (e.g., ISRA)

# Purchase and Sale Agreement: Other Environmental Important Provisions

- Survival: Environmental reps typically survive longer than general reps (Seller: 3-5 yrs, Buyer: 6-10 yrs)
- Exclusive Remedy: Contractual remedies exclusive remedy; all other rights/remedies waived
- Pre-Closing Access to Properties: Seller: no invasive sampling; Buyer: unrestricted investigation
- Environmental Indemnity: Buyer wants an indemnity for environmental liabilities in addition to an indemnity for breaches of reps.
- “No Dig”/ “No Look” Provisions: Seller wants no indemnity obligation for voluntary invasive work or voluntary disclosures to the government
- Exacerbation: Seller wants post-closing exacerbation of contamination to void the indemnity
- How Clean is Clean: Seller wants least stringent, most cost-effective standard acceptable under environmental laws consistent with industrial / commercial use of property including institutional and engineering controls; Buyer wants control and management of the remediation including determination of the cleanup standard.
- Insurance: PLL, cost-cap, Reps & Warranty Insurance

**SECTION 03**

# **DUE DILIGENCE REVIEW**

The background of the slide features a dynamic, abstract composition of light trails. On the left, numerous bright red and orange streaks radiate outwards, suggesting speed and energy. On the right, a series of parallel blue and white streaks create a sense of motion and depth. The overall effect is a high-tech, futuristic aesthetic with a dark blue gradient background.

# Real Estate Due Diligence Areas

- **Lease Review**

- Limited scope, typically focused upon:
  - Term and Renewal Options
  - Change in Control Analysis
  - Assignment Rights
  - Termination Rights

- **Title**

- Generally 3-4 weeks to obtain through outside title company vendors.
- Title can range from general summary to full mark-up of commitment and obtaining title policies
- Title review address encumbrances on the property that could affect use, access and ownership rights.

- **Survey**

- Generally follows 5-10 days after title commitment is issued. Typically obtained through national vendors who contract with local surveyors.
- Survey review addresses confirmation of total property, highlights gaps, access or encroachment issues.

- **Zoning**

- Timing varies based on municipalities. Draft zoning reports generally take 30 days.
- Zoning reports confirm uses permitted, violations & permits that are obtained/outstanding for the property.

# Leased Property

- **Diligence Memoranda**

- Diligence Memoranda are provided outlining overall deal diligence matters, including real estate matters.
- The due diligence reviewed is summarized in such memo – outlining material issues only from the real estate summaries.

- **Lease Summary Considerations**

- Landlord/Tenant Entity (confirm matches deal entities)
- Term and Renewals (is length acceptable?)
- Termination Rights (can you terminate early or pay to terminate early if lease not needed after transaction closes?)
- Use (confirm permitted use allowed and if any restrictions that would affect transaction)
- Assignment/Subletting Rights (is there an affiliate assignment right without consent? Subleasing permitted?)
- Change of Control (will the transaction trigger consent by Landlord?)
- Financial Covenants (net worth tests/LOCs/security deposits)
- If retail property, address lease use restrictions, radius clauses, fuel stations, and sublease restrictions.
- Address general requirements needed after close such as insurance (self-insurance vs CGL required limits)

# Title Review for Owned Real Property

- **Title**

- Ownership
- Liens (Monetary vs Non-Monetary)
- Restrictive Covenants

- **Survey**

- Encroachments
- Access
- Location of Title Commitment Documents

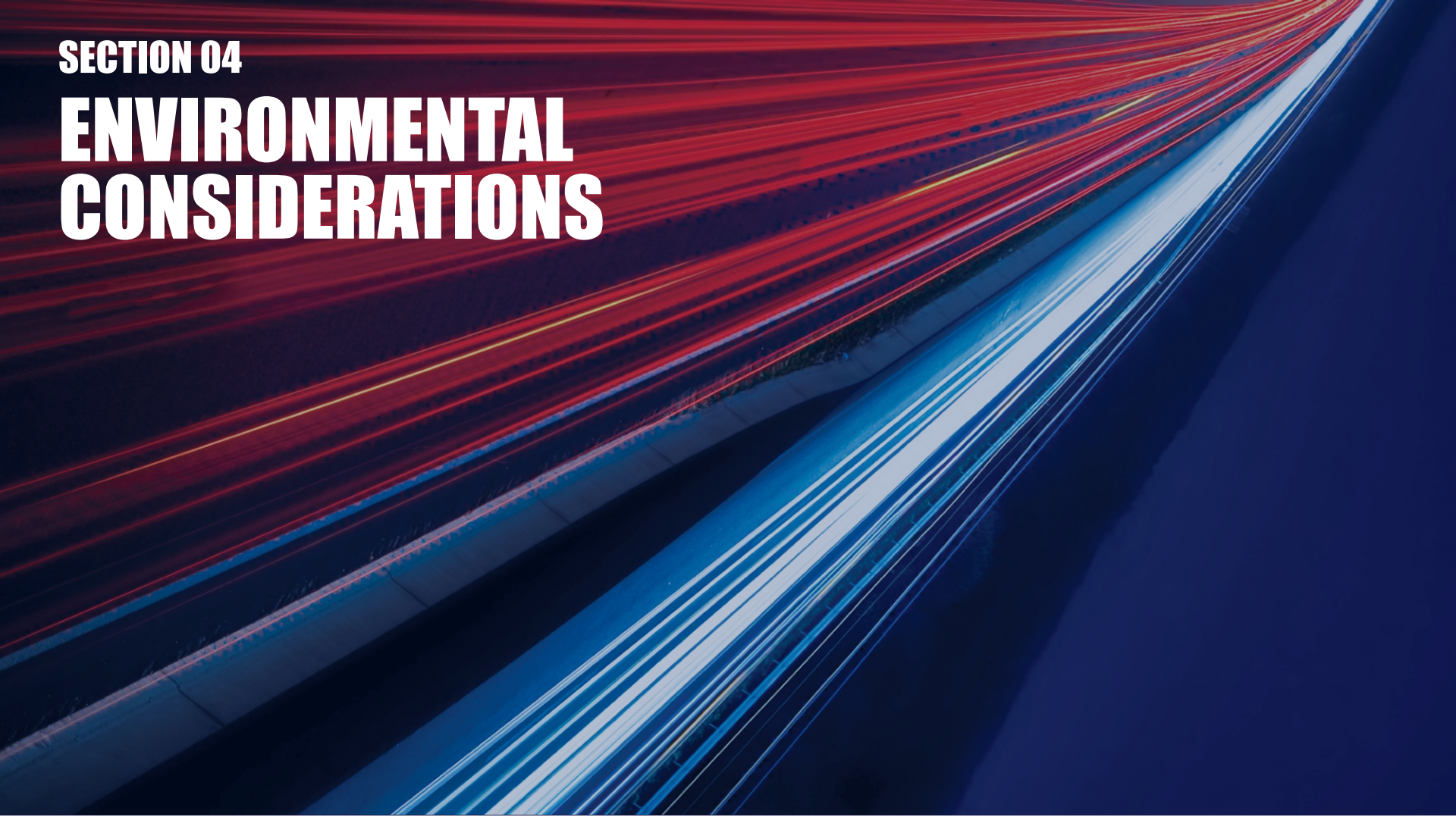
- **Zoning**

- Is current or contemplated future use permitted?
- Any zoning violations listed (i.e. parking) and permits up to date.



**SECTION 04**

# **ENVIRONMENTAL CONSIDERATIONS**



# Environmental Considerations for M&A Transactions

- Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA” or “Superfund”) imposes strict, joint and several liability on (i) current owners and operators of contaminated sites, (ii) owners and operators of contaminated sites at the time of disposal, (iii) entities that arrange for disposal of hazardous substances, and (iv) transporters of hazardous substances.
- State laws impose CERCLA-like liability and impose obligations on transfers (e.g., New Jersey and Connecticut)
- Environmental liabilities follow the stock, including with respect to current or formerly owned or operated properties and sites to which hazardous substances were sent for disposal.
- When a company acquires all or a portion of the assets of another company, the acquiring company typically is not responsible for the liabilities of the selling company except (i) when a buyer agrees to assume the liabilities; (ii) when a transaction is a de facto merger or consolidation; (iii) when the buyer is a mere continuation of the seller; (iv) fraud; (v) “substantial continuity” (limited applicability).

# Environmental Due Diligence Areas

Due diligence should be tailored to transaction, but generally includes:

- Contamination at owned, leased and operated sites
- Regulatory compliance matters (current and future)
- Off-site liabilities associated with waste disposal activities
- Legacy liabilities associated with formerly owned, leased and operated sites or divested operations/companies
- Toxic tort and asbestos liabilities

# Environmental Due Diligence Documents

Documents subject environmental due diligence include:

- Phase I Environmental Site Assessment (for due diligence and bona fide prospective buyer defense where applicable);
- Phase IIs (sampling); cleanup and sampling reports/data; underground storage tank closure reports; asbestos surveys; manifests; monitoring and emissions data; PRP notices; settlement agreements; litigation documents; permits; NOVs; consent decrees; inspections; settlement agreements; compliance plans; EH&S audits; regulatory correspondence; etc.

# Jeannine T. Bishop



**Partner**

Philadelphia

Jeannine T. Bishop advises corporate and real estate clients on the acquisition, development, financing, and leasing of commercial properties that include offices, storage facilities, retail and convenience stores, medical buildings, properties leased to financial institutions, shopping centers, gas stations, and development parcels. In addition, she has represented clients on the real estate aspects of pipeline projects and acts as local counsel for real estate financing matters. She also serves as the real estate lead on the firm's retail and ecommerce industry initiative and as leader of ML Women Philadelphia.

# Eric J. Marcuson



**Of Counsel**  
Philadelphia

Eric J. Marcuson advises clients on issues related to their ownership, use, and financing of real estate. Companies, large and small, including real estate investment trusts (REITS), Fortune 500 companies, privately held estate companies, and energy and utility companies, turn to Eric to help negotiate the real estate transactions most important to their business success. He also represents institutional investors in multimillion dollar real estate joint venture transactions.

# Kathleen M. Martin



## **Of Counsel**

New York

Kathleen M. Martin advises clients on commercial real estate transactions, particularly real estate acquisitions, acquisition finance, refinance, dispositions, sale-leasebacks and leasing. With a client roster composed of real estate investment trusts (REITs), equity sponsors, lending institutions, hotels, restaurant chains, supermarket chains, independent fiduciaries and manufacturing companies, Kathleen's practice ensures companies are able to navigate complicated agreements relating to the acquisition, sale, leasing and financing of real estate bulk portfolios, including multibillion dollar financing agreements and multibillion dollar acquisitions.

# Christopher J. McAuliffe



**Of Counsel**  
Princeton

Christopher J. McAuliffe counsels clients on obtaining environmental approvals for new development, climate change laws, and compliance with water pollution control and air pollution control requirements. He also advises clients on solid and hazardous waste, site remediation, brownfields, natural resource damages, and environmental cleanup cost recovery matters. Chris brings to his practice experience gained while working as vice president of environmental, litigation, and employment in the law department of a large energy company.



# Kelly G. Kuschel



**Associate**  
Philadelphia

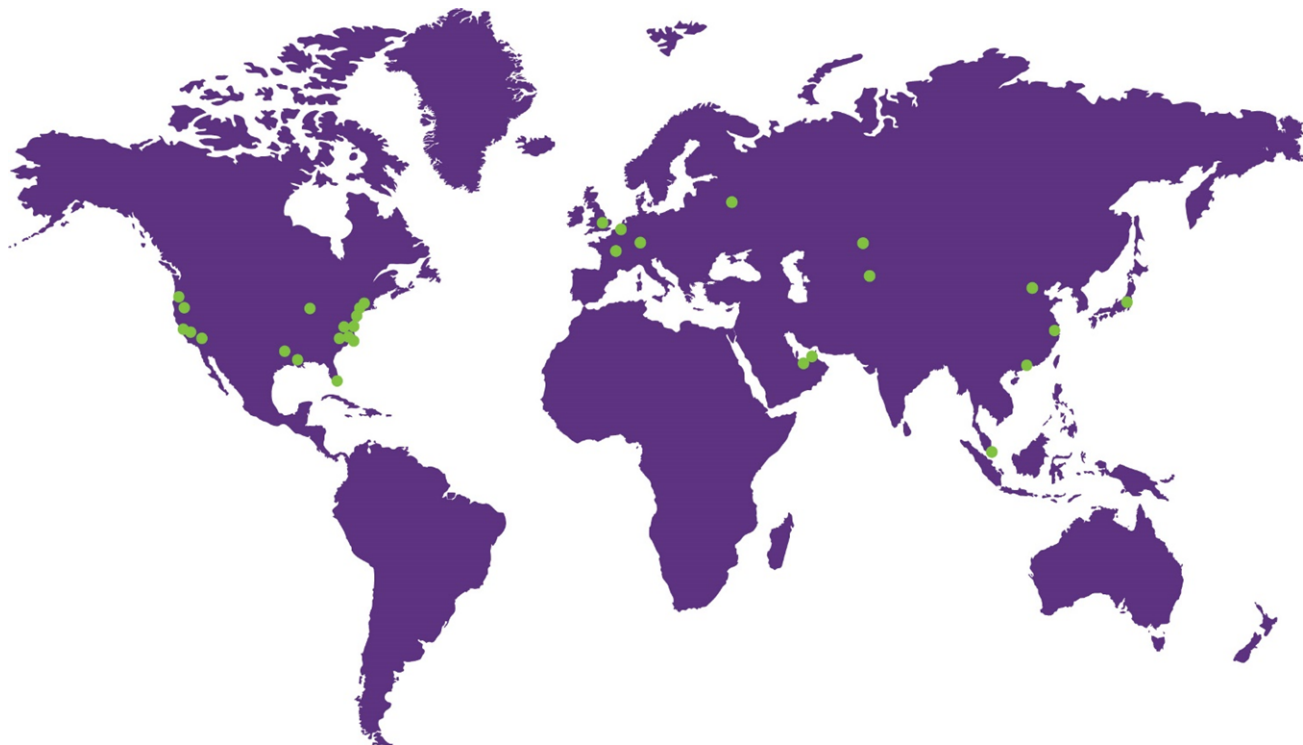
Kelly G. Kuschel is part of a team of attorneys representing real estate owners and stakeholders in connection with their ownership, use, and financing of real estate. Clients include national and international companies, real estate investment trusts (REITs), institutional lenders, private equity funds, pension funds, and advisers. Kelly is fluent in Spanish, French, and Italian.

## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

## Our Locations

Abu Dhabi  
Almaty  
Beijing\*  
Boston  
Brussels  
Century City  
Chicago  
Dallas  
Dubai  
Frankfurt  
Hartford  
Hong Kong\*  
Houston  
London  
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