



NEW YORK LAWYERS'
PRACTICAL SKILLS SERIES

Real Estate Transactions— Commercial Property

2021–2022

Christina Kallas, Esq.



NEW YORK STATE BAR ASSOCIATION

New York State Bar Association publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207 or publications@nysba.org.

Copyright 2021
New York State Bar Association
All rights reserved
ISBN: 978-1-57969-054-0
Product Number: 403722

CONTENTS

Preface to the 2021 Edition: The Continuing Impact of COVID-19	1
I. Overview of Commercial Real Estate Practice	1
A. Introduction	1
B. Distinctions From Residential Real Estate Practice	1
1. Sophistication of Clients	1
2. Variety of Interests Transferred	1
3. Number of Participants	2
4. Identity of Lender and Owner	3
5. Value of Property	4
6. Compliance with Governmental Requirements	4
a. Securities Laws	4
b. Green Regulations: Federal, State and Local	4
c. Americans With Disabilities Act Compliance	6
d. Financial Services Modernization Act of 1999 (Gramm-Leach-Biley)	6
e. Market Changes	7
7. Security Concerns	8
8. Anti-Discrimination Laws	9
C. Similarities to Residential Real Estate Practice	10
1. Obtaining Information Needed to Prepare Contract of Sale	10
2. Preparing the Description	11
3. The Survey	11
4. Title Questions	12
5. Proof of Payment of Charges	12
6. Zoning	12
7. Historic Preservation Districts	13
8. Role of Local Counsel	14
9. Preparing the Documents	14
a. Use of Sample Forms	14
b. Assembling the Documents	14
(1) Using Software to Create Your Own Templates	14
(2) Document Assembly Software	14
(3) Amassing the Requisite Information	15
D. The Retainer Agreement	15
E. Ethical Practices	15
II. Types of Commercial Property	16
A. Vacant Land	16
B. Single-Tenant Properties	16
C. Office Buildings	17
D. Apartment Buildings	18
E. Shopping Centers	19
1. Tenant Mix	20
2. Zoning and Land Use Approvals	20
3. Constitutional Issues	20
4. Environmental Issues	21

F.	Hotels, Casinos and Resorts	21
1.	Financing a Resort Property	22
2.	Constitutional Issues	23
3.	Ongoing Reports.....	23
G.	Industrial Properties	24
H.	Permits	24
I.	Property Used for Charitable or Religious Purposes	24
J.	Projects for a Public Purpose	26
K.	Special Uses	26
L.	When the Character of the Use Is Not Clear	27
M.	Ownership of Property by a Sovereign Nation	27
N.	Air Rights	28
O.	Mineral Rights	28
III.	Types of Transactions and Standard Documents	28
A.	Purchase and Sale Standard Documents	29
1.	Contract of Sale	29
a.	Minimum Terms Required for Enforceability of a Contract of Sale	29
b.	Customary Provisions	32
(1)	Timing	32
(2)	Down Payment	33
(3)	Payment of Purchase Price	34
(4)	Adjustments	34
(5)	Brokers	34
(6)	Representations	35
(7)	“Boilerplate” Provisions	37
(8)	Risk of Loss	38
(9)	Conditions to Sale	39
(a)	Removal of Liens	39
(b)	Loan Contingency	39
(c)	Physical Testing	39
(d)	Environmental Issues	40
(i)	Emerging Construction Standards	40
(ii)	Environmental Due Diligence	40
(iii)	Buildings on Contaminated Properties	41
(c)	Termination of a Contract	42
(d)	Costs	42
(e)	Remedies	42
(f)	Confidential Information	43
(g)	Estoppel Certificates	44
(h)	Final Thoughts	44
(i)	Between Contract and Closing	45
(j)	Ethical Considerations	45
(1)	Misrepresentations and Failure to Make Full Disclosure	45
(2)	The Unrepresented Party	45
2.	Written Authorization of Client	45
3.	The Deed	46

a.	Form	46
b.	Writing, Acknowledgment, Seal	46
c.	Identification of Parties and Description of Property	47
d.	Consideration	47
B.	Mortgage Loan Documents	47
1.	Loan Commitment	48
2.	Promissory Note	49
3.	Permanent Mortgage	50
	a. Assignment of Leases and Rents	50
	b. Property Operation	51
	c. Waste	51
	d. Due on Sale Clause	51
	e. Escrowed Items	52
	f. Insurance Requirements Generally	52
	g. Estoppel Certificates	52
	h. Subordination, Attornment and Nondisturbance Agreements (SANDs)	53
	i. UCC Financing Statements	53
	j. Release from Mortgage Lien	54
	k. Mortgage Remedies	54
4.	Distinctions from Construction Lending	54
	a. Nature of the Risk	54
	b. Coordination with Permanent Lender	55
	c. Construction Contracts	55
	d. Construction Loan Contract	55
	e. Obtaining Required Approvals	55
5.	Second Mortgage Loans and Other Options	56
6.	Wraparound Mortgage Loans	56
7.	Mezzanine Loans and Spreader Agreements	57
8.	Sale/Lesseeback and Leasehold Mortgage Loans	58
C.	Leases	58
1.	Nature of a Lease	58
2.	Representing the Tenant	59
3.	Representing the Landlord	59
4.	Representing the Prospective Buyer of Leased Property	60
5.	Major Lease Provisions	60
	a. Premises	61
	b. Rent	61
	c. Tenant Finishing and Alterations	63
	d. Use	63
	e. Services	64
	f. Insurance	64
	g. Assignment and Subletting	65
	h. Renewal and Extension of Lease Term	67
	i. Environmental Concerns	67
	j. Oil and Gas Leases	69

k. Option to Purchase and Right of First Refusal	69
l. Remedies	70
m. Guarantees	70
n. Security Deposit	71
o. Damage to the Leased Space	71
p. Changes Over Time	72
q. Waiver of Tenant Rights	72
r. Impact of COVID on Leasing.....	72
s. Leases With the United States Government	73
6. Memorandum of Lease	74
7. Taxes on Leases	74
8. Negotiating and Numbers	74
9. Changes to Lease Remedies	75
a. Limitations on Evictions	75
b. Defenses to Default Actions	76
c. Insurance Coverage.....	77
10. Solving Title Problems Involving Leases	77
11. Cell Tower Leases	78
D. Section 1031 Exchange Transactions	78
E. Pop-Up Stores	79
IV. Role of Title Insurance	80
A. Marketable Title and Insurable Title	80
B. Timing of Determination of State of Title	80
C. Title Report	80
D. Recording Statutes	81
E. Typical Title Encumbrances	82
F. Incorporeal Interests in Real Property	82
1. Restrictive Covenants	82
2. Easements	83
a. Creation of an Easement	84
b. Easements Not in Writing	84
3. Additional Searches	85
G. Possession Issues	85
H. Zoning and Building Ordinances	86
I. Liability of Title Insurer	87
J. Extent of Title Insurance Coverage	88
K. Title Agents	88
L. Working with the Title Insurer	89
M. Title Insurance Costs	89
V. Closing	89
A. Organization	89
B. Closing Statements	90
C. Adjustments	90
D. Acceptable Funds	91
E. Insurance	92
F. Documents to Be Recorded and Filed	92

VI.	1. Deed and RP-5217 Form	92
	2. Mortgage Satisfaction and New Mortgage	93
	3. Assignment of Mortgage, Consolidation and Extension Agreement	93
	4. Assignment of Leases	94
	5. Memorandum of Lease	94
	6. Power of Attorney	94
	G. Documents Executed but Not Recorded in the Land Records	95
	1. FIRPTA Affidavit	96
	2. IRS Form 1099-S Filing	96
	3. New York City Real Property Transfer Tax Return (NYC-RPT)	96
	4. Owner's Registration	98
	5. New York State Transfer Tax Return—TP-584	98
	6. Mortgage Tax	99
	7. Mortgage Recording Tax Return MT-15	99
	8. Bill of Sale for Personal Property Being Conveyed	99
	9. Opinion of Counsel	99
	H. Impact of Technology on Real Estate Practice	100
	1. MERS	100
	2. Electronic Document Filing	100
	3. E-Filing	101
	I. Closing Costs	101
	Post-Closing	102
	A. Reporting Requirements	102
	B. Final Considerations	102
	C. USA Patriot Act of 2001	102
	D. Electronic Tax Payments	103
	E. Privacy Concerns: Impact on Land Records	103
	Commercial Real Estate Forms Index	107
	Table of Authorities	445
	About the Author	451

CHRISTINA KALLAS, ESQ.

Currently in private practice in New York City, Ms. Kallas has devoted a great deal of her career to commercial real estate, representing clients from individuals to businesses to commercial, investment and savings banks, and mortgage and insurance companies, and handling the sale, lease and financing of all types of commercial properties, including hotels, multi-family apartment complexes, shopping centers, restaurants, and garages, and Industrial Development Agency projects. On Wall Street, Ms. Kallas was instrumental in developing the new practice area resulting from the private sale of whole mortgage loans among different types of lenders and governmental agencies. For one investment banking client, long before the sub-prime mortgage crisis of 2008, she uncovered a mortgage sale fraud involving hundreds of institutions and \$1 billion in loan sales, and helped assure the conviction of the perpetrator. Ms. Kallas also has been a Vice President at Smith Barney, Harris Upham & Co. Inc., where she obtained her Series 7 and Series 63 licenses and sat on the trading desk.

Active for many years in the New York Women's Bar Association, www.nywba.org, Ms. Kallas is a past President and former Executive Director, as well as former Chair of the Real Estate, Technology and ADR committees. Ms. Kallas served for many years as co-chair of the Committee on International Women's Rights for the Women's Bar Association of the State of New York. She continues to serve on the Board of the Foundation of the NYWBA.

In keeping with her interest in helping those with mental illness, Ms. Kallas has been a facilitator of the Family Connections Program of the National Educational Alliance for Borderline Personality Disorder since 2003. She is the Public Member of the Dialectical Behavior Therapy Linehan Board of Certification.