

# Senior Living and Long-Term Care Blog

*Perspectives on the legal trends, regulatory policy and other issues facing the senior living and long-term care industry*



## A Purchaser's Guide for Preparing a Closing Checklist in a Skilled Nursing Home Property Acquisition

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**Below is a guide generally outlining the types of questions a purchaser should consider when planning to purchase, finance or develop a property on which a skilled nursing facility exists or will be built.**

Prior to acquiring any real estate, which will be operated as a skilled nursing facility ("SNF"), a purchaser should perform a thorough due diligence investigation as to any material facts or issues relevant to the intended use of the property and any ancillary uses. Generally, a commercial real estate seller will negotiate to limit its liability as to the property conditions in the purchase and sale agreement (the "PSA"). Accordingly, it is the purchaser's obligation during the inspection period to conduct examinations and determine whether there are any problematic facts or issues relating to the acquisition. This article is intended to guide a purchaser in preparing a checklist that will assist in conducting a meaningful due diligence investigation for a property that is intended to be used as a SNF.<sup>1</sup>

### I. Putting Together the Checklist

The first step is to create a closing checklist, which is a consolidated list of all the transaction documents. This includes the transfer, loan and title documents and delivery requirements necessary to close the deal. In drafting the initial checklist, the drafter should review (a) the PSA, which outlines the property conveyance terms and lists the documents and diligence items to be delivered by purchaser and seller and (b) the loan commitment or application, which identifies the documents and diligence items required by the lender (if any).

### II. Acquisition and Property Diligence

In preparing the list of diligence/delivery requirements, the drafter should consider the following questions:

1. What is the type of property (vacant land, improved land, etc.)? Is there an existing tenant/operator? Are there any other third parties with rights to the property? Is seller holding back any rights or restricting the transfer of the property? To

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<sup>1</sup> Please note that the scope and focus of any due diligence investigation depends upon the party for whom the investigation is being conducted, as it will vary according to the party's role in the transaction. Also, factors such as where the particular property is located, the intended use of the property, whether that use is for-profit or not-for-profit, as well as other deal specific factors, will dictate what additional due diligence should be conducted.

answer these questions, a drafter should request items such as a certified rent roll, all leases, licenses or other occupancy agreements, any management agreement(s), the certificate of occupancy or other applicable building permits and property level financial statements, tax returns and bills.

2. What is the planned use of the property? Is this a permitted use? This is a two-fold question in a SNF transaction.
  - **As to the real estate:** Is the property zoned for such use? What are the rules and restrictions? Is there appropriate street access, sufficient utilities, parking, etc.? To address these concerns a purchaser typically orders an appraisal, zoning report and engineering/architectural evaluations.
  - **As to the operations:** Is the property duly licensed or can it be duly licensed to operate as a SNF? If the existing operator will continue to operate the SNF, the operator should already be licensed and in good standing in the state in which it is located. If the operations are being transferred to a new operator, the new operator must take the appropriate steps to become duly licensed, and, as applicable, enrolled in Medicare and Medicaid through the Centers for Medicare and Medicaid (CMS). Please note that even if the operations are not being transferred, the local state licensing agency may require certain notifications or other related reports or disclosures with respect to the property transfer. In evaluating the operations, a purchaser should request items such as a standard form of residency agreement, copies of all existing state licenses, copies of all Certificates of Need (if applicable), CMS survey reports, material correspondence with government programs and/or payor intermediaries, Medicare and Medicaid Participation Letters and Provider Agreements, claims loss history, etc.
3. If there are improvements, what physical condition are they in? Are they structurally sound? Typically, a purchaser will order a Property Condition Report (including code searches) and review copies of seller's O&M plans and insurance certificates.
4. Is the property environmentally sound? Has there been any previous contamination either on the property or from neighboring properties? Are there underground storage tanks (UST's) or any recognized environmental conditions (REC's)? A purchaser will typically order a Phase I Environmental Assessment Report to address these concerns.
5. Are there any encroachments onto the property, or from the property onto other lands? Any liens or encumbrances on the property that either need to be removed or taken subject to? The property section of the checklist will usually contain items such as a Title Commitment, copies of all recorded documents/exceptions, a Pro-Forma Title Policy with endorsements and a survey.
6. Who are the parties to the PSA? If the parties are not individuals, what type of entity is involved, where was the entity formed, is it in good standing and does the individual executing documents have the necessary approvals and legal authority to enter into this transaction? These questions are answered by a review of the relevant organizational documents, including all entity formation and governing documents, resolutions authorizing the transaction, and good standing certificates.
7. What documents are required to consummate the transfer of the property? Customary requirements are a deed of real property, bill of sale of personal property, assignment and assumption of contracts, FIRPTA and applicable lease documents (if necessary).

### III. Financing Diligence

In the event the purchaser is obtaining acquisition financing, then the checklist drafter will need to include a list of lender requirements, which requires the consideration of the following questions:

1. What are the loan terms between the purchaser, as borrower and its lender? What is the collateral and loan type? Typically, a lender will issue a term sheet that sets forth the basic requirements of the loan, including customary fees to be paid and the required documents to evidence and secure its liens.

2. What other types of financing arrangements are the purchaser, the purchaser's tenant/operator or the property currently subject to? The purchaser's mortgage lender will typically require copies of loan documents for any accounts receivable financing/credit facility (a SNF operator will almost always have a credit facility in place), affiliated financing or mezzanine financing. In addition, the purchaser's mortgage lender may also require that an Intercreditor Agreement be entered into between the mortgage lender and any other secured party/financing source of purchaser or purchaser's tenant.

## IV. Conclusion

Conducting a thorough due diligence investigation can be a critical component of a real estate transaction, or the termination thereof. The contractual "due diligence period" typically provides an opportunity for the purchaser to walk away from the deal (and possibly even receive a repayment of some or all of its deposit), if a purchaser determines its intended use for the property is not possible or feasible. The above guide should provide the purchaser of a proposed SNF property with a meaningful place to start its investigation; however, every transaction is different and it is important that a purchaser tailor its due diligence review to the facts and circumstances surrounding the specific property and business that will be purchased.

If you would like further information on this topic, please contact Cynthia Mitchell at [cmitchell@seyfarth.com](mailto:cmitchell@seyfarth.com), Elizabeth Dahill at [edahill@seyfarth.com](mailto:edahill@seyfarth.com), your Seyfarth attorney, or any member of the [Senior Living & Long-Term Care Team](#).

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