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Over 30 Years of Handling Buy/Sells for New Car Dealers

Considerations in Real Estate Transactions

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Whenever you buy or sell an auto dealership, you either need to buy, sell or lease land. There are several things to consider when buying, selling or leasing land. How real estate fits in to a buy/sell depends on the nature of the buy/sell. There are three different types of buy/sells: Asset transfers, stock transfers and owners' agreements (shareholders' agreement, operating agreement or partnership agreement). This article will discuss how real estate fits into all three types of buy/sell agreements and some considerations for buyers and sellers.

Asset Transfers

In an asset transfer, the buyer is buying assets only, rather than an entity. Except with respect to certain types of obligations, a buyer will generally take only obligations of the seller that the buyer specifically agrees to assume. A lease would have to be specifically assigned and assumed or it would not be included in the transaction. Leasing or purchasing land will always be part of an asset purchase, unless the buyer has an existing location that has been approved by the manufacturer, to which the dealership is going to be moved.

If the lease requires consent to assign or sublease, as most do, the landlord will have to consent to any assignment to the buyer. Leases for auto dealerships are typically "triple" net or "net" leases, meaning the tenant pays for insurance, maintenance and taxes. Greater obligations are often negotiated. If the length of the lease is the typical 10 to 20 years, the tenant will often be required to assume more than just maintenance, insurance and taxes. Sometimes tenants accept all responsibility for any repairs or replacements as well as maintenance. In other cases, the cost of major repairs or replacements will be prorated over the life of whatever has been repaired or replaced so the tenant just pays a prorated portion each month over the life of the lease.

Sometimes a buyer who is leasing land will prefer a purchase, but can't get the seller to agree to sell. In those cases, the seller will sometimes agree to give the buyer a right of first refusal to buy the land if the seller decides to sell, or an option to purchase the land at a later date. If the buyer has an option to purchase the land,

or a 20- to 30-year lease, the seller will often be able to negotiate into the lease a tenant obligation to make all repairs and replacements, including rebuilding the building if it comes down for any reason, thus treating the land as if it is owned by the tenant.

The land will not be treated as being owned by the tenant for tax purposes unless the tenant has a lease with options to renew the lease, which gives the tenant the right to possess the property for 35 years or more. In that case, if the assessor knows of the long term lease, the land can be, and typically will be, reassessed for tax purposes based on its then fair market value, as if it had been sold. This is completely avoidable by keeping the length of the lease term plus options to less than 35 years. In the alternative, a buyer might also be able to buy the land as part of the transaction.

Stock Purchase

In a stock purchase agreement, no lease assignment is required. If the entity, the corporation, limited liability company, or partnership has a lease, when the entity is transferred to the buyer, the entity continues to be the tenant and no assignment is needed. This means there will be less opportunity to negotiate changes to the lease.

Regardless of whether the stock is purchased or assets are purchased, the land should never be purchased in a corporation. Purchasing in a corporation will end up being much more costly from a tax standpoint. It should always be purchased in a limited liability company, preferably one that is separate and apart from the dealership.

Whether or not the land is purchased, any tenant needs to know what liens and encumbrances exist against the property and what covenants, conditions and restrictions exist on the property. A buyer will take subject to them all, whether the buyer knows about them or not, because the buyer is deemed to have notice of anything that is recorded in the county recorder's office. For this reason, it is important to review documents that are recorded against the real property. A preliminary title report will list all these liens and encumbrances. They are usually linked to the documents. Your attorney can typically order one for you at a relatively low cost.

Sometimes liens can be removed from the title, and sometimes information is discovered that will send a buyer back to the negotiating table or cause them to decide not to buy the property at all. Covenants, conditions and restrictions list things a landowner cannot do on or with the property. If a buyer discovers that there are liens and encumbrances, but the buyer is only leasing the property, the buyer will still want to be diligent about understanding the liens and encumbrances. It is important to know what restrictions exist to make sure responsibility for any liability under the CC&Rs is properly allocated between the landlord and the tenant – or to make sure it is imposed only on the person who is willing to be responsible for the obligations. For example, if the CC&Rs prohibit certain uses, then they cannot be permitted under the lease and the tenant needs to indemnify the landlord for unpermitted uses and give the landlord the right to terminate the lease if the tenant

violates the CC&Rs. If, on the other hand, the lease permits something that is prohibited by the CC&Rs the landlord may have liability to the tenant. Because the encumbrances are in the public record, everyone is deemed to know of them. Therefore, a landlord could argue that the tenant knew or should have known of the content of the CC&Rs and signed the lease anyway and is therefore bound by it. There are arguments to the contrary as well. Since avoiding litigation is a good investment, spending the time and money to make sure CC&Rs are understood is a good investment.

The tenant will also need to be protected in case the landlord fails to pay a lien or encumbrance against the property. This is easily accomplished by recording a Subordination, Nondisturbance and Attornment Agreement ("SNDA"). This document needs to be signed by landlord, tenant and lender. It benefits all three. It benefits the landlord because the lender agrees to accept rent directly from the tenant and apply it against any amounts owed if the landlord can't make the payments. It benefits the tenant because it prevents the lender from evicting the tenant upon foreclosure. It protects the lender because the lender makes sure it gets any money that comes in on the property from tenants. All parties are typically more than willing to sign a SNDA.

Owners' Agreement

When a minority owner is buying out a dealership over time, as is often provided for in an owners' agreement, the minority owner may want to negotiate rights with respect to the land, since it will be needed to continue operating the business long term. If the land is left to the heir of the owner, they may decide to sell it to a third party who may not want to renew the lease, or may insist on unreasonable terms to renew. Negotiating an option to purchase the land may not seem practical for a minority owner who has little leverage, but starting a conversation about it is a good idea. If the majority owner wants the business to continue, they will understand the concern and share it.

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