

# Amendment to Commercial Purchase and Sale Agreement

## Amendment to Purchase and Sale Agreement

THIS AMENDMENT TO PURCHASE AND SALE AGREEMENT (this "Amendment"), dated as of [month] [day], [year], is entered into by and between [seller name], a [state of formation] [entity type] ("Seller"), and [buyer name], a [state of formation] [entity type] ("Buyer").

### Recitals

WHEREAS, Seller and Buyer entered into that certain Purchase and Sale Agreement, dated as of [month] [day], [year] (the "Agreement"), for the purchase and sale of that certain parcel of real property located at [property address], as more particularly set forth in the Agreement; and

WHEREAS, due to conditions arising from the novel coronavirus (COVID-19) pandemic, the parties have mutually agreed to modify certain of Seller's obligations with respect to the operation of the Property under the Agreement.

NOW, THEREFORE, for good and valuable consideration, the adequacy of which is acknowledged by the parties, Buyer and Seller hereby agree as follows:

1. The parties hereby acknowledge that, due to conditions arising from the novel coronavirus (COVID-19) pandemic, Seller may be unable to perform certain of its obligations under the Agreement, including, without limitation, with respect to operating the Property in a manner consistent with past practice. Notwithstanding anything to the contrary contained in the Agreement, the parties hereby acknowledge and agree that Seller shall not be liable, and shall not be deemed to be in default under the terms of the Agreement, for failure or delay in the performance of its obligations under the Agreement, if and to the extent such failure or delay is the result of conditions beyond Seller's control arising from the novel coronavirus (COVID-19) pandemic.
2. Buyer hereby acknowledges that Buyer shall derive substantial direct and indirect benefits from Seller's execution and retention of Leases at the Property. Accordingly, the parties hereby agree that, notwithstanding anything to the contrary contained in the Agreement, Seller may grant concessions and/or deferrals of base rent and additional rent under Leases at the Property, as deemed necessary or desirable by Seller in its sole and absolute discretion.
3. In the event of a conflict between the provisions of this Amendment and the provisions of the Agreement, the provisions of this Amendment shall control. Except as expressly set forth in this Amendment, the provisions of the Agreement remain in full force and effect without modification. Capitalized terms used herein and not otherwise defined shall have the meanings given to them in the Agreement.
4. This Amendment and the Agreement together constitute the entire agreement between Buyer and Seller pertaining to the subject matter dealt with in this Amendment. The Agreement, as altered by this Amendment, may be further modified only by an instrument in writing executed by Buyer and Seller.
5. This Amendment may be executed by electronic mail or facsimile and in multiple counterparts which, when signed by Buyer and Seller, shall constitute a single binding agreement.

*[Signature Page Follows]*

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the date first above written.

**BUYER:**

[Name of Buyer]

By: \_\_\_\_\_

Name: [name of signatory]

Title: [title of signatory]

**SELLER:**

[Name of Seller]

By: \_\_\_\_\_

Name: [name of signatory]

Title: [title of signatory]

## Summary of Form Edits

Amendment to Commercial Purchase and Sale Agreement

**No content available.**

## Drafting Notes & Alternate Clauses

### Amendment to Commercial Purchase and Sale Agreement

#### Drafting Notes

##### Drafting Note to Section 1.

When representing a seller, use this section to protect your client from default if the COVID-19 pandemic might prevent your client from meeting certain contractual obligations. For example, your purchase and sale agreement might require the seller to maintain a specific physical or economic occupancy percentage at the property. Physical occupancy refers to the percentage of units at a property that are subject to leases, while economic occupancy refers to the percentage of gross potential rents that are actually collected at a property. COVID-19 may affect both metrics for reasons outside of the seller's reasonable control. Additionally, the purchase and sale agreement might require the seller to give the buyer and the buyer's agents access to the property and individual units for inspection purposes, and to deliver diligence documents to the buyer prior to a specified deadline. When representing a seller, you will want to ensure that your client will not be called in default if performance is not reasonably feasible due to the pandemic.

When representing a buyer, however, you should ensure that the seller is not excused from performing its contractual obligations for any conditions that are either within the seller's reasonable control or unrelated to the pandemic. Further, consider stating that the seller is excused from performance only for so long as the condition delaying performance exists. The buyer's attorney should push for a similar provision in the buyer's favor. Additionally, depending on the anticipated condition (physical or financial) of the property at closing and the status of the buyer's financing and equity raise, consider requesting a purchase price reduction or an extension of contingency periods in exchange for agreeing to this seller-friendly provision. For further information on a variety of issues related to COVID-19, see Coronavirus (COVID-19) Resource Kit. For further guidance on force majeure clauses, see Force Majeure Clause Drafting. For further guidance on negotiating commercial purchase and sale agreements generally, see Purchasing and Selling Commercial Real Estate Resource Kit.

##### Drafting Note to Section 2.

Use this section to modify the seller's leasing obligations during the pendency of the purchase and sale agreement. Purchase and sale agreements commonly include a covenant requiring the seller to continue operating the property in the ordinary course of business and consistent with past practice. If there are leases at the property, this type of covenant may limit the seller's ability to deviate from its standard lease terms or from a lease form pre-approved by the buyer. Given that tenants at the property may be unable to pay rent as and when required under their leases due to the COVID-19 pandemic, the seller may want the flexibility to amend its leases, or temporarily modify its leasing requirements, to accommodate tenant needs. This section allows the seller to grant its tenants rent concessions or rent deferrals if necessary. Landlords often grant rent concessions at the start of lease terms in order to attract tenants and stay competitive. Here, however, the seller may find it necessary to modify its existing leases and grant concessions mid-term to address its tenants' cash flow concerns.

When representing a buyer, consider placing limits on the seller's ability to grant concessions and deferrals. For example, you may wish to limit the length of the concession period; allow concessions of only base rent or additional rent (but not both); cap the percentage of leases under which the seller may offer concessions; and require evidence from the tenants supporting the need for the concessions. Additionally, in the case of a deferral, the buyer and seller should agree in advance upon the repayment terms. Furthermore, the parties should consider modifying the closing adjustment provision in the purchase and sale agreement to account for the concessions and deferrals. At closing, the parties typically adjust based on the amount of

rent actually collected for the month of closing. If the tenants are obligated to pay the deferred amounts to the buyer post-closing, the seller should consider pushing for a closing adjustment based on both collected rent and deferred rent attributable to the month of closing. When representing a buyer, however, you should argue that deferred rents must be treated the same as uncollected rents for adjustment purposes; the buyer should not be in the position of guaranteeing rents for the seller when there is a chance that tenants fail to repay deferred amounts when due. For further information on rent concessions, see [Rent Abatement Clauses \(Commercial Lease\) \(Pro-Tenant\)](#). For further information on closing adjustments, see [Commercial Purchase and Sale Agreements](#).