

Getting the Deal Done

Documentation of the Maryland Commercial Real Estate (CRE) Loan

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****A special thank you to the Maryland Financial Bank
Advisory Board for inviting us to present this on May 20, 2014.*

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Table of Contents

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By: Douglas L. Burgess and Cornelia M. Koetter, Attorneys, Nolan, Plumhoff & Williams Chtd.

1	Commitment Letter.....	Page 1
2	Agenda.....	Page 4
3	Note.....	Page 7
4	Guaranty.....	Page 10
5	Deed of Trust.....	Page 11
6	Indemnity Deed of Trust.....	Page 13
7	Closing Instruction Letter.....	Page 17
8	Information Sheet.....	Page 19

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Commitment Letter – Commercial Real Estate Loan

Checklist of Key Terms

“We are pleased to advise you that _____ (Lender) has approved your application for a loan (“Loan”) based on the terms outlined below:”

1. **Type of Loan/ Purpose of Loan:** Commercial Real Estate (CRE) loan for.....
 - a. Acquisition of.....
 - b. Acquisition, Development, Construction (ADC) of.....
 - c. Refinance of
 - i. Retail... Office... Residential (SFD or Apts.)... Industrial.... Hospitality.
(Describe and give address of specific collateral).

Borrower: (confirm precise name of legal entity) (check Maryland State Department www.dat.md.us) (use all sources to find full contact info.). Also look on the www.mdlandrec.net website for title information or www.casesearch.courts.state.md.us website for Maryland Judicial Case information.

2. **Guarantor:** Person (named principal); or “person tbd by Borrower with sufficient credit” ...
3. **Amount:** Lump sum Line of Credit Revolver Advances Draws Pay Downs
4. **Interest Rate:** Fixed Floating (prime plus basis points; LIBOR plus) Resets
5. **Term and Amortization and Monthly Payment:**
 - a. Term and Renewal Term (with renewal fee)
 - b. Due and Late Date for Monthly Payments
 - c. Late fees
 - d. Loan Year and per diem (Actual/360)
6. **Commitment Fee / Loan Fees:**
 - a. Upfront
 - b. Upfront and Credited at Closing towards.....
7. **Collateral:**
 - a. Real Estate...
 - b. Rents/Leases...
 - c. Project Docs...
 - d. Pers. Prty...
 - e. Accounts...
 - f. Life Insurance

8. Prepayment:

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- a. Prohibited ...
 - b. Or... Allowed only after Three (3) Years; If during first 3 years based on _____....
 - c. Partial prepayment
9. **Appraisal / Environmental (Phase One)/ Flood:** Ordered by Lender and costs passed through
10. **Key Financial Terms:**
- a. Loan to Value (LTV)
 - b. Debt Service Coverage Ratio (DSCR)
 - c. Net Operating Income (NOI)
11. **Non Assignable Non Assumable:**
12. **Conditional Commitment:** Lender can terminate Commitment for failure cooperate/ provide info. and docs; inaccuracies, misstatements; material adverse change (MAC); failure meet key ratio such as LTV, DSCR; Environmental, Title, Survey, Development, Zoning; or defaults that would be defaults under Lender's standard CRE loan documents.
13. **Miscellaneous Other Terms:** Deadlines/ Due Dates to...Sign and Return Commitment... Fulfill Commitment Terms ...and to Close; No other agreements (integration clause); Cross-Default with other Loans; Maryland law applies; if due date or closing is missed, expiration is automatic; any failure to meet all terms in timely manner is grounds for termination; an expired commitment is not extended or deemed binding on Lender without Lender's express written consent to extend terms. Borrower/ Guarantor to liable for all costs/fees regardless of expiration/ termination of commitment.
14. **Countersignature:** *Signature Lines for Borrower Guarantor Pledgors/ Owners of Collateral.* Include.....**Bold signature line statement:** This Commitment is deemed automatically withdrawn by Lender unless countersigned and returned on or before _____ (date).
15. **Additional Terms (often included in Addenda as Checklist or Agenda attached to Commitment Letter):**
- i. **List of Pre Closing and Closing Requirements.** A method is to give a list of pre closing and closing requirements as determined by Lender including:
 - 1. **Loan Documentation.**

Shelf or circulated;

Key Additional Loan Doc Terms like: Confessed Judgment (CJ), Waiver of Jury Trial, Default Rate, Acceleration, Cross Default, Financial Information, Condemnation, Casualty Loss, No Undisclosed Brokers, No Insider or Secondary Loans; Insurance Policies/ Binders with Named Mortgagee, Additional Insured (Property, Casualty, Builder's Risk, Worker's Comp, Flood); Operating Accounts placed with Lender; Rent Rolls;

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Maintenance of Development Bonds; Deliverables (project documents), Foreclosure Power of Sale and Assent to Decree, Collateral free from Tax Sales/Judgments/Mechanics Liens

2. Contact information naming: Lender Representation, Lender Counsel, Borrower, Borrower Counsel and Title Company; Title Review; Title Insurance Binder/ Policy, Permissible Exceptions, Plats, Development Plans, Zoning Letter, Easement and Access to the Property; Tax and Insurance Payments/Deposits and Escrow; Judgments; Good Standing; Insured Closing Letter, Closing Instruction Letter, Closing Costs, Certificates/ Affidavits of no Material Adverse Change (MAC), Creditors Rights /Solvency Affidavits, OFAC, IRS, Claims, Judgments, Disputes, Compliance Laws and Permits, Bankruptcy; Affidavit of Commercial Purpose under Commercial Law Article 12-103, Other Closing Certificates/ Affidavits; Borrower/Guarantor Minute Book Deliverables and Entity Authority Resolutions or Opinions of Counsel, Good Standing Certificates; Insurance Policies/ Binders with Named Mortgagee, Additional Insured (Property, Casualty, Flood); Operating Accounts placed with Lender; Rent Rolls; Maintenance of Development Bonds; Deliverables (project documents); Termite Inspection; Lead Certificate; Rental Registration; Property Management Agreements
- b. **Agenda and Due Diligence.** One method is to attach sample Agenda with similar information as in above List (the Agenda is a to do list to close *which requires Borrower's active participation and cooperation*). Reference "Borrower's active participation and cooperation is required in the pre-closing process" in the commitment letter.

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Agenda

Checklist

[Caption with Loan Identified and an as of date]

[include Names of the following including contact information:]

Lender (L)
 Lender's counsel (LC)
 Borrower*
 Guarantor
 Borrower and Guarantor's counsel (BGC)
 Title Company (TC)

<u>I. Loan and Security Documents</u>	<u>Prepared and Submitted By</u>	<u>Status</u>
Commitment Letter	L	
Note	LC	
Deed of Trust	LC	
Ex A - Legal Description	TC	
Guaranty	LC	
Etc., etc., etc.	LC	
<u>II. Pre-Closing Submissions</u>		
Phase One Environmental	L	
Lead Certificates	B/BGC	
Rental Registration	B	
Leases/ Rent Rolls	B	
Estoppel Certs/ SNDA	LC/B	
Draw Schedule Proposed	B/ L	
Appraisal	L	
Insurances	B/ BGC counsel	
Location Drawing/ Survey	TC	
Zoning Letter	BC/ LC	
Permits	B/BC	
Termite Report	B	
Flood Certificate	L	
Title Binder and Exceptions	TC / LC	
Endorsements	TC / LC	
Insured Closing Letter from TC	TC	
Judgment, Tax, Chattel (UCC) Searches	TC	
Entity Information and Docs	B/ BC	
Good Standing Certificate	BC	

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Entity Resolution	LC/ BC
Creditor's Rights Certificate	LC

**Agenda requires Borrower's active participation and cooperation*

III. Miscellaneous

Property Management Agreement	B/BC
Deliverables related to Property's Develop.	B/BC
Contracts with Engineer	
Plans Specs Approvals	
Bonding	
Assignment of Life Insurance	B
[Anything else in Commitment Letter]	B/BC /LC

IV. Closing

Closing Instruction Letter	LC
Settlement Sheet	TC
Settlement	TC / LC

V. Post Closing

Signed Original Note to Lender	TC
Recording Receipts	TC
Loan Binder	TC or LC
Ticklers	L

**Agenda requires Borrower's active participation and cooperation*

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EXHIBIT "A" TO AGENDA

DETAILED DESCRIPTION OF A PORTION OF THE DOCUMENTS AND INFORMATION TO BE SUPPLIED BY BORROWER, BORROWER'S COUNSEL, AND TITLE COMPANY PRIOR TO CLOSING

[The Exhibit to the Agenda can describe in detail the particulars of the deliverables.]

Examples:

Property and Casualty Insurance Requirements

Title Commitment and Insured Closing Letter Requirements
Permitted Exceptions
Access to the Property, both legal and practical

Endorsement to the Phase One Environmental Report Requirements

Survey and Development Approval Requirements
Parking Spaces
Permitted Uses under Zoning and Development

Tips and Comments on the Agenda

- Broken Down into categories such as pre closing, closing and post-closing to dos
- Broken Down into due diligence items and loan documents and pre closing, closing, and post-closing
- Have columns for responsibility for each item // emphasize facilitation not road blocks
- Mission creep and the disorganized borrower // you will have to weed through it but try to turn frustration into an opportunity – survey your customers and if there is interest develop and have a business loan seminar series at the branches, etc.
- Opportunity - market yourself to the customer's accountant and attorney
- Other discussion points.... For a more detailed presentation.... The presenter can go through.... What are the key issues in a zoning letter, subdivision development agreement, phase one, appraisal, title, survey, insurance, rent roll, snda, estoppel
- When you do a live settlement....follow the agenda, insured closing letter // preset the settlement table
- Who is at the table? Driver's license and borrower guarantor resolution, first things first

**Agenda requires Borrower's active participation and cooperation*

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Note

Checklist of Key Terms

- **Promise to pay to order**
- What your Borrower wants to know - *Towards the front of the Note*
 - **Term and Interest Rate//**
 - **actual /360**
 - **First Payment and Subsequent Payments**
 - **Amortization**
- **Events of Default, Remedies, Collection - Towards the back:**
 - Cross Default Provisions with other loan documents
 - Financial Covenants and Ratios: Debt Service Coverage Ratio (DSCR) based on Net Operating Income (NOI); Loan to Value Ratio (LTV); *alternatively – in loan agreement*
 - **Notice and cure periods**
 - Suntrust case and use of the **newer form of atty's fees clauses//** hourly // survives judgment by non merger into judgment language / includes costs and attorneys fees post judgment
 - Waiver of Jury Trial
 - Acceleration/ Confession Judgment Clause/ Other remedies under loan docs
 - Maryland Code Recitals – business purpose
 - **Double Check** – commitment letter terms for inclusion of terms in Note
 - *Example – prepayment - lockout period; yield spread premium formula*
 - Miscellaneous
 - Maryland law and jurisdiction
 - Commercial loan recitation - Title 12 Commercial Law Article MD Code (seek advice on other Code recitations)
 - Notice Provisions with addresses

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- Subsequent Holders – not subject to defenses maker has against prior holder
 - “Seal”
 - Including the words “Witness the hands and seals of the Signer(s)” above the signature line and placing (SEAL) after the line like this _____(SEAL) creates an instrument that is a “specialty” and as a general rule extends the time allowed to sue under the Note to twelve (12) years. The time to sue is called the statute of limitations or time period in which you can sue. The general rule is three (3) years in Maryland unless you are dealing with an exception. A document under seal is one such exception. Seek advice because there are exceptions to the exception.
 - Signature and witness
 - Does the maker have authority?
 - Is the maker on page one the same as the signature page?
- **Style and Drafting of your Note**

Style and drafting and appearance // These are nonverbal clues to market your next loan and make it easier for the borrower, guarantor, examiner, auditor, accountant, Judge, bankruptcy trustee, the collection department to read your loan document.

Example: Do this:

FOR VALUE RECEIVED, the undersigned, _____ (the “Borrower”), promises unconditionally to pay to the order of _____, a _____, its successors or assigns (the “Lender”) during Lender’s regular business hours at Lender’s offices at _____, Maryland 21117, or at such other place as Lender may from time to time designate, the principal amount of Nine Hundred Thousand Dollars (\$900,000.00) (the “Principal Amount”), together with interest on the unpaid Principal Amount outstanding from time to time at the rate or rates hereafter specified and any and all other sums which may be owing to Lender by Borrower pursuant to this Note. The following terms shall apply to this Note:

1. **Term.** The Term of this Note shall be for a period of ten (10) years expiring at 2:00 p.m. on January 31, 2011.

2. **Interest Rate.** For the first five (5) years of this Note, ending on January 31, 2006, interest shall accrue and be payable on the outstanding Principal Amount at a fixed rate of interest equal to _____ percent (____%) per annum. Interest shall be calculated on the basis of a year of 360 days applied to the actual days on which there exists an unpaid balance under this Note. On January 31, 2006, the interest rate hereunder shall be adjusted on such five (5) year anniversary date to a new fixed

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interest rate equal to the Current Index Figure (as hereinafter defined) plus one and one-half (1.50) percentage points (150 basis points). As used herein, the term "Current Index Figure" means the then current per annum "Prime Rate" as published in The Wall Street Journal.

(a) **Default Interest Rate.** Upon an "Event of Default," as hereafter defined, Lender, in Lender's sole discretion and without notice or demand, may raise the rate of interest accruing on the outstanding Principal Amount by two (2) percentage points above the rate of interest otherwise applicable, independent of whether Lender elects to accelerate the unpaid principal balance as a result of such default. Such default interest rate shall continue, in Lender's sole discretion, until all defaults are cured.

3. Principal and Interest Repayments. A payment of interest only on the principal sum accruing from the date of this Note to the end of the month therein shall be paid on the first day of the first calendar month immediately following the date of this Promissory Note. On the first day of each calendar month thereafter during the first five (5) years of the term hereof, ending January 31, 2006, the unpaid principal and accrued interest hereunder shall be paid in equal monthly installments of _____ (\$ _____) each (which payments are based on a ten (10) year amortization schedule). As of the end of the initial five (5) year period, as of January 31, 2006, the required monthly payment will be adjusted and set by the Lender so that the new monthly payment will be in an amount sufficient to repay the remaining balance due on this Note on or before its maturity date as of January 31, 2011. All sums due on this Promissory Note, whether principal, interest, penalties, costs or fees, shall be paid in full, to the extent such sums are still due and owing, on January 31, 2011.

Not This:

PROMISE TO PAY

ARTICLE ONE: _____ (Borrower) agrees and promises to pay to _____ (Lender) the sum of (\$ _____) Dollars for value received, with interest at the annual rate of _____% payable after _____ (Date).

ARTICLE TWO: If this note is in default and is placed for collection, _____ (Borrower) shall pay all reasonable costs of collection and attorneys' fees.

(Borrower) (Date) By _____

(Lender) (Date) By _____

(Witness) (Date)

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Guaranty

Checklist of Key Terms

Guaranty of Payment and Performance

- Payment under the Note
- Performance under all the Loan Documents
- Consideration: Recite Consideration and Nexus of Guarantor to the Transaction
- Include similar provisions as Note and key provisions of Deed of Trust such as
 - Financial information reporting
 - Environmental Indemnity
- Modifications and Extensions of the Note – Consent language **(every time you extend or modify a Note, get the written consent of Guarantor(s))**

Waiver of Suretyship Defenses (this is a guarantor defense focusing on the lender's negligence in allowing collateral to be dissipated or impaired) (a watch out for issue especially when you have a limited guaranty of collection and or bottom loss guaranty)

- Default, Remedies, Collection, Bankruptcy; Waiver of jury trial, confession judgment, newer form of attorneys fee clause
- Signature and Witnesses
 - Under seal
 - Joint and several obligations of multiple guarantors

Carve outs

- Absolute Unconditional... versus...
- Contingent on Breach (IDOT)..... versus.....

Limited Guaranty

- Top Loss / Bottom Loss
- Percentage
- Maximum Amount
- Burn Off (expires after x years)
- / Pro Rata (not joint and several)
- Guaranty of Collection rather than payment and performance (back end guaranty) (watch out for suretyship defenses)
- Nonprofit and church lending + no guaranties
- Should be viewing in context of the changing world of asset protection
- Defenses and gotchas are increasing

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Deed of Trust

Checklist of Key Terms

- **Grantor** - Does the title deed and the title policy match the grantor on the deed of trust
- **Grant** language - Grantor *grants and conveys* property to Trustees for Lender
- **Assignment of Rents** and Leases and Contracts
- **Natural persons as Trustees** substitute trustee language
- **Covenants, Representations** e.g. pay debt when due, first lien title position
- Maintenance, Insurance, Environmental, Non waste of collateral
 - Environmental Indemnity
- Inspection Rights
- **Property Insurance and Real Property Taxes** –obligations to pay
 - Casualty and Restoration
- **Default and Remedies**
 - **Default**
 - Due on Default Loan Docs, Sale, Transfer, Bankruptcy
 - Cross Default
 - Notice and Cure
 - Acceleration and Notice
 - **Remedies**
 - Remedies under Note or Guaranty available - Confessed Judgment (CJ)
 - Advance funds / negative escrow and charge Borrower
 - Broad foreclosure provisions including recapture of costs attorney's fees expense / UCC rights including *paired auction* with foreclosure auction
 - **Power of Sale and Assent to Decree** Foreclosure Language
 - *Side Note:* "Deed in Lieu of Foreclosure" is not a favored remedy and it clogs equity of redemption
 - Watch out do not trip into the defense 'Clogging the Equity of Redemption' so do not put deed in lieu language in your loan documentation

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- Lenders Title Insurance provisions – matches the Deed of Trust
- Signature and Notary – signature page matches the Grantor on page one; authorized
- Exhibit A – Legal Description - Does the title deed and the title policy match the legal description
- Other Issues to note:
 - Maryland tends to be a deed of trust state – Deed of Trust are generally used in lieu of a mortgage
- **Recordation Tax Issues** – is it the tail wagging the dog or is there still an opportunity?
 - In a Purchase transaction, use a purchase money deed of trust – no recordation taxes on the purchase money deed of trust

Refinancing Recordation Tax – Ways to Limit, Defer, Minimize

- Purchase and Modify an Existing Loan
- IDOT – Indemnity Deed of Trust see next checklist in the handout

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Indemnity Deed of Trust

Checklist of Key Terms

A Deed of Trust is a recordable security instrument which creates a lien on Property to secure a debt. It is subject to recordation tax when presented for recording. Maryland recordation taxes are high and can be prohibitive to getting the deal done.

An alternate loan structure for commercial transactions that legally avoids recordation tax is the Indemnity Deed of Trust (“IDOT”).

1. **Structure** – The Maryland Code provides legal exemption from recordation tax for IDOT’s. This loan structure is *not for purchase transactions*, since a purchase money mortgage or deed of trust is already exempt from recordation tax up to the face amount of the Deed. To qualify for the recordation tax exemption, the IDOT structured loan must be less than three million dollars (\$3,000,000.00). In an IDOT structure, the loan is made to the Borrower, but guaranteed by a third party. The third party secures its obligations under the Guaranty with its Property. The Borrower is primarily liable on the Note, however, the Guarantor has only secondary liability for the debt. The Guarantor’s liability is contingent on the non-payment of the loan by the Borrower, therefore exempt from recordation tax. (Note: if the Borrower defaults on the loan, the Guarantor’s liability becomes primary and recordation tax is due.)
2. **“BACK INTO” the IDOT Structure:** To set up an IDOT loan, **figure out who or what entity owns the Property. The Property owner will sign the IDOT and guaranty the loan.** Then figure out who will be the Borrower under the Note. Often in commercial loans, the Property is owned by an LLC or other entity, and the principals of the entity act as the Borrower. A new LLC can also be created to act as the Borrower.
3. **Consideration:** In order for the “indemnity” structure to work, consideration must flow between the parties. The money lent to the Borrower from the Lender is “re-loaned” by the Borrower to the Guarantor, which uses the loan proceeds to refinance or payoff existing loans on the Property or uses the proceeds as working capital for rehabilitation or improvements to the Property.
4. **Indemnity Deed of Trust:** The IDOT recitals must set forth the structure of the loan, the parties, the Property address, and, most important, that the Grantor under the IDOT does NOT have primary liability on the Note.
5. **Recording:** The various Maryland jurisdictions review IDOTs submitted for recording very carefully. A copy of the Promissory Note, Guaranty and Settlement Sheet must be submitted with the IDOT recording package. In addition, most jurisdictions have an IDOT Affidavit form that must be executed by either the Guarantor, Lender or title attorney certifying to the terms of the IDOT. A copy of the Baltimore County IDOT affidavit is attached in your materials.
6. **Recent Changes to IDOT laws:** Changes to the Maryland Code in 2013 explicitly permit amendments of IDOTs filed prior to July 1, 2012, without triggering payment of recordation tax (so long as the principal amount secured is not increased to \$3,000,000.00 or greater). An amendment that increases the amount of the loan guaranteed above \$3,000,000.00 will be subject to recordation tax on the new

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money, i.e., the difference between the amended loan amount and the outstanding principal balance of the guaranteed loan immediately prior to the time of the amendment. The 2013 Code also clarifies that an indemnity mortgage that is recorded in multiple Counties is not subject to the recordation tax on the full value of the mortgage in each County.

7. **Refinance Exemption for Commercial Loans:** The 2013 Code changes create a commercial mortgage refinancing exemption from recordation tax similar to the exemption available for residential mortgage refinancing, and expressly includes refinancing of IDOTs. The recordation tax is only imposed on the new money being borrowed, which is the difference between the current principal balance of the loan being paid off and the new loan being borrowed.

Examples:

1. If the loan amount is under \$3,000,000.00 and not a purchase, the loan may be structured as an IDOT and is completely exempt from recordation tax.
2. If the loan amount exceeds \$3,000,000.00, it will be subject to recordation tax on the full loan amount, not just the portion that exceeds \$3,000,000.00 of consideration, therefore, there is no benefit to structuring the loan as an IDOT. It should be structured as a "regular" Deed of Trust. Determine whether the new loan is paying off an existing loan which may be eligible for the refinance exemption. Then tax would only be due on the new money being borrowed.
3. If there are several loans that are part of the same transaction, and each loan is under \$3,000,000.00, but the total of the loans exceeds \$3,000,000.00, then the transaction is subject to recordation tax on the total loan amount.
4. If an existing IDOT is refinanced as a "regular" Deed of Trust, then it may benefit from the commercial refinance exemption mentioned above and is only taxable on the "new money". If the current balance on an existing IDOT is \$250,000.00, and is refinanced with as a "regular" Deed of Trust for \$400,000.00, recordation tax is due on the new money borrowed in the amount of \$150,000.00. (In this case, it may be better to just amend the IDOT for the increased loan amount because the \$400,000.00 is under the \$3,000,000.00 threshold and therefore would not be taxable.)
5.
 - a. There is no recordation tax incurred if an existing IDOT loan is amended by a "supplemental instrument", which includes any instrument that confirms, corrects, modifies, supplements or amends and restates a previously recorded instrument regardless of whether recordation tax was paid on the existing instrument. As long as the changes do not increase the loan amount, such amendments are exempt from any recordation tax.
 - b. A "supplemental instrument" is subject to recordation tax on the new money only if the supplemental instrument provides for new consideration that exceeds the \$3,000,000.00 threshold. As a result, existing IDOTs may be amended or corrected without recordation tax consequences unless the amendment evidences new consideration that crosses the \$3,000,000.00 threshold, in which case the recordation tax will apply only to the extent of the "new money."

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c. If the IDOT balance is \$2,500,000.00 and it is amended to increase the loan to \$2,700,000.00, then no recordation tax is due because the amendment remains under the \$3,000,000.00 threshold. But if the IDOT balance is \$2,500,000.00 and amended to increase the loan to \$3,500,000.00, then it is taxable on the new money, ie., the difference from \$2,500,000.00 to \$3,500,000.00, not just on the amount exceeding \$3,000,000.00.

6. **CAVEAT:** These are murky waters and confusion still exists in the various Maryland Counties. ALWAYS confirm with the County prior to settlement to verify whether recordation tax will be imposed. Some counties will agree to review your proposed documents in advance to advise whether recordation tax is due, upon request.

If you have any questions regarding taxation of IDOTs, or would like to discuss a particular situation, please feel free to contact me:

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[SAMPLE]

AFFIDAVIT FOR INDEMNITY DEED OF TRUST
[to accompany IDOT presented to Baltimore County Transfer Office]

*For Transfer Office Use Only - **NOT FOR RECORDING***

By signing below, I hereby certify, affirm, and declare, under penalty of perjury, that the accompany Indemnity Deed of Trust meets the following requirements for exclusion from Recordation Tax:

- The grantor of the IDOT is a separate and distinct entity from the maker of the note, and is not obligated under the note.
- The grantor of the IDOT has signed a guaranty of the note.
- The IDOT secures only the guaranty.
- The grantor of the IDOT is not primary liable for the indebtedness.
- The proceeds of the loan have not been used to acquire the property secured by the IDOT.
- The amount of the note referenced in the IDOT is \$ _____
- The amount of the secured debt of the IDOT or the amended and restated IDOT is \$ _____.

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- The parcel identification number is _____.

Signed this _____ day of _____

By _____

Print Name _____

Signer is (please check one choice below):

Lender's Attorney _____

Settlement Attorney _____

Party of the IDOT _____

12/01/2012

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Closing Instruction Letter

Checklist of Key Terms

The Closing Instruction Letter is included with the final closing package of Loan Documents issued by the Lender or Lender's counsel and addressed to the title company or title attorney conducting settlement. It is intended to provide clarity and specific instructions regarding which party is responsible for each step in the closing process. The inclusion of a closing instruction letter is a must even in a simple transaction. It is a contract between the Lender and the title company establishing the Lender's requirements for execution of the documents, issuance of title insurance and recording of the security instruments. It is beneficial to circulate the Closing Instruction Letter to the title company prior to closing. An authorized agent of the title company is expected to sign and return the executed Letter with the executed closing package.

Basic Terms to Include in a Closing Instruction Letter:

1. **Establish the parties and date of closing in the opening paragraph:** Borrower's and Guarantors' correct names, property address, Loan amount, Lender's name, the name of the title insurance underwriter insuring the Loan and the date of settlement.
2. **Itemize each of the Loan Documents included in the package:** Note, Deed of Trust (include lien position), Assignment of Rents, Guaranties, Flood Certifications; provides a useful checklist for both the Lender and the title company; include those documents which must be collected from the borrower such as identification, tax returns or other documentation.
3. **Title Insurance:** List the terms of the title insurance and the endorsements required by the Lender. The title should be brought to date and a "marked up commitment" and insured closing letter returned with the closing package. Establish the time frame by which the recorded instruments and final title insurance policy must be delivered to the Lender and where to send those documents. The Lender can request an "instant policy" to be provided with the final closing package. It lacks the recording references but speeds up the process of waiting for the policy on a post closing basis.
4. **Recording:** Establish the date by which the documents must be recorded and the recording receipts returned to the Lender or Lender's counsel. Provide which instruments are to be recorded and in what order. Include the correct jurisdiction for recording.
5. **Funding:** Give the title company specific figures for Lender's charges and the amount of the wire so that the title company can finalize the HUD. Include invoice for counsel fees and any other invoices to be collected on the settlement sheet. Establish the requirements for funding; ie., scan the signed HUD, Note and Guaranties to the Lender for verification before the loan proceeds will be wired; include how funds will be issued either full funds or net wire.
6. **Post Closing:** Instructions regarding to whom originals and copies of the Loan Documents are to be sent. Be very clear as to what parties receive originals versus copies and include a deadline for receipt of the final package.

The information in this presentation is of a general informational nature and is not to be relied on for any specific situation. Please engage an attorney to obtain written legal advice before proceeding.

7. **Miscellaneous Terms:** Any specifics to the transaction should be included in the Closing Instruction Letter; include terms by which the deal should be stopped or Lender contacted. Title Company authorized agent to execute the Closing Instruction Letter, preferably the attorney of record for the company.

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