



Establishing Site Control

Establishing an Appropriate Form of Site Control

Once an appropriate site has been identified, the next step is to secure “site control” through the negotiation of acceptable terms and conditions (e.g., price, timing on closing, deposit), and the execution of legal documents identifying those terms and conditions. The term “site control” is widely used in the development community, and simply means some form of right to acquire or lease the site. The type of site control that can be achieved depends on many factors, including the owner’s interests, the timing and stage of financing commitments, and any lenders’ requirements. It is also crucial to confirm with permanent funders what form(s) of site control will be required or acceptable within their application process. There are several potential forms of site control:

- *Offer Letter from Owner* — An offer letter simply states that the property owner is willing to sell or lease the property to the organization for a specified price or rent.
- *Letter of Intent to Sell* — A letter of intent is somewhat stronger, stating the property owner’s intent to sell or lease the property to the organization at specific terms. It usually includes a timeframe to close.
- *Option Agreement* — Still stronger, the option agreement legally binds the property owner to sell the property to the buyer within the option period — granted the purchasing organization exercises its right to buy. Usually secured with an option payment (which may be refundable), the organization is not obligated to close on the property acquisition unless it exercises its option. The option agreement may include a negotiated contract of sale form, so it is clear what the specific terms of sale are up front. This does not require further negotiation.
- *Contract of Sale* — This is the strongest form of site control, and binds the seller and buyer to specific terms of sale. Any purchase agreement or contract of sale should be prepared by an attorney and approved by the organization’s board of directors (or an empowered board committee). It must incorporate all of the organization’s requirements, and it also creates specific obligations for the organization. The purchasing organization should make sure that the closing deadline allows adequate time to secure the necessary acquisition financing and to draw down funds. Such financing may be in the form of bridge financing, possibly from CSH and/or other non-profit lenders and intermediaries.

Negotiating a Purchase Agreement

A seller may insist on using a standard Real Estate Association form of contract, using a form of its own or of the purchasing organization. In any case, it is vitally important that proper provisions and contingencies are included to protect the organization and its assets, as it evaluates whether to complete the purchase transaction. In structuring a contract of sale or purchase agreement, the following should be considered:

- *Making a Deposit* (also known as earnest money): In addition to negotiating as low a deposit as possible, the purchasing organization should try to buy as much “free” time as



possible, by putting funds into escrow that are refundable after a set period, if the organization determines the site is not viable for the planned project.

- *Staging Deposits/Extensions:* Another strategy to limit liability when entering into a purchase contract is to set timeframes for making deposits. This approach could include starting with a refundable deposit for the first 90 days, after which those funds become non-refundable (known as “going hard”), and are supplemented with another refundable deposit for the next 90 to 120 days. A key consideration is to assure that deposits are credited to the purchase price, rather than being an amount that gets added to the agreed-upon purchase price. These staged milestones are referred to as extensions to the purchase contract period.
- *Due Diligence Documents:* The purchasing organization should ensure that the seller is required to provide all pertinent information about the site such as property taxes paid, operating costs (for an existing housing development), environmental reports, information on legal actions pertaining to the site and any other documents that contain relevant information.
- *Legal Advice:* The value of an attorney in negotiating the terms of a purchase agreement cannot be underestimated. There are many risks associated with putting deposit money down, and those risks should be mitigated through contract language that protects the organization’s economic and political interest, to the greatest extent possible.
- *Timing:* Most purchase agreements include a timeline of items related to the sale. It is critical to track these, and the buyer must respond, when responsible, for an item or action. Conversely, the buyer must remind the seller of a missed deadline. Further, the purchase agreement must provide enough time to realistically carry out all of the due diligence activities, including:
 - Conducting the community acceptance process
 - Obtaining environmental report(s)
 - Obtaining an appraisal
 - Obtaining needed planning approvals
 - Determining financial feasibility