



GUIDE FOR ISSUANCE OF OPINION LETTERS IN REAL ESTATE FINANCE TRANSACTIONS

BEST PRACTICES, CONSIDERATIONS AND TRENDS

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INTRODUCTION MODEL OPINION LETTER ¹ REFERENCE GUIDES

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**WHAT IS AN
OPINION LETTER**

WHAT IS ITS PURPOSE

Legal opinions provide professional judgment on a variety of legal issues and are an essential part of many Real Estate Finance transactions. Legal opinions are valuable because they assist in identifying potential legal issues that may be overlooked, and, therefore, provide scrutiny and another layer of analysis, as well as an additional check to prevent mistakes.

This presentation will focus on the most common types of real estate finance opinions, including guidelines for determining when and if a specific legal opinion should be requested or given, and the nature and extent of the “diligence” necessary to render the opinion.

**BEFORE YOU BEGIN
WHAT OPINIONS ARE REQUESTED
VERIFY ALL DOCUMENTS NEEDED FOR REVIEW HAVE BEEN DELIVERED**

**IF LOAN DOCUMENTS ARE BEING NEGOTIATED, REVIEW BLACKLINES
FROM EVERY DOCUMENT TURN TO CONFIRM NO CHANGES AFFECT
OPINIONS GIVEN**

**VERIFY ALL ORGANIZATIONAL DOCUMENTS IN THE ORGANIZATIONAL
CHAIN ARE COMPLETE, HAVE BEEN EXECUTED AND ALL EXHIBITS ARE
ATTACHED**

VERIFY OPINION RECIPIENT/ADDRESSEE

DUE DILIGENCE

EACH SEPARATE OPINION INCLUDED IN THE LETTER MUST BE DILIGENCED



- **REVIEW OF LOAN DOCUMENTS**
- **REVIEW OF LOAN COMMITMENT LETTER/TERM SHEET IF AVAILABLE**
- **REVIEW OF ORGANIZATIONAL DOCUMENTS**
- **CONSIDERATIONS RELATING TO REQUIRED OPINIONS**
- **REVIEW OF AUTHORIZING RESOLUTIONS**
- **REVIEW OF OTHER TRANSACTION DOCUMENTS**

REVIEW OF LOAN DOCUMENTS

- Verify the Basics
 - Names of each of the Parties
 - Loan Amount
 - Term and Maturity
 - Interest Rate
 - Collateral Description
 - Documents Incorporated by Reference
 - Exhibits
 - Opinion Recipient
 - Verification that Terms of Deal Are Documented and Enforceable (If rendering an Enforceability Opinion)

ORGANIZATIONAL DOCUMENT REVIEW

- REVIEW OR PREPARATION OF BORROWER ORGANIZATIONAL CHART
- DILIGENCE THE CHAIN THROUGH EACH LEVEL OF THE CHART
- CONFIRM ENTITIES WERE VALIDLY FORMED
- CONFIRM APPROPRIATE POWER AND AUTHORITY
- REVIEW OF RESOLUTIONS AND CONFIRM SIGNATORY IS AUTHORIZED

DUE FORMATION

“BORROWER IS A _____, DULY ORGANIZED, VALIDLY EXISTING AND IN GOOD STANDING UNDER THE LAWS OF _____.”

- REVIEW OF GOOD STANDING CERTIFICATES
- AUTHORIZATION TO TRANSACT BUSINESS IN STATE IN WHICH THE MORTGAGED PROPERTY IS LOCATED AND IN OTHER RELEVANT JURISDICTIONS
- VERIFY DATES AND ISSUING GOVERNMENTAL AUTHORITY

POWER AND AUTHORITY

“Borrower has the [type of entity] to execute and deliver the Transaction Documents to which it is a party and to perform its obligations thereunder. ”

- Review of Articles of Incorporation/Organization/or Certificate of Limited Partnership
- Review of Bylaws/Operating Agreement/Partnership Agreement
- Authorizing Resolutions
- Incumbency Certificates

EXECUTION AND DELIVERY

“THE TRANSACTION DOCUMENTS HAVE BEEN DULY EXECUTED AND DELIVERED BY THE BORROWER”

- Witness Document Signature
- Opinion Certificate
- Assumptions

VALID SECURITY INTEREST



- Consideration in Document Review
- Collateral in which security interest attaches
 - VALID LIEN
 - PROPER FORM OF MORTGAGE FOR RECORDING
 - PROPER FORM OF UCC FINANCING STATEMENT FOR FILING

ENFORCEABILITY

“EACH OF THE TRANSACTION DOCUMENTS TO WHICH THE BORROWER IS A PARTY IS A VALID AND BINDING OBLIGATION OF THE BORROWER, ENFORCEABLE AGAINST THE BORROWER IN ACCORDANCE WITH ITS RESPECTIVE TERMS”

- STATE WHAT ENFORCEABILITY OPINION ACTUALLY MEANS.
- “THE OPINIONS SET FORTH HEREIN...MAY BE SUBJECT TO AND AFFECTED BY: (A) APPLICABLE BANKRUPTCY, INSOLVENCY, RECEIVERSHIP, REORGANIZATION, AND OTHER LAWS AFFECTING THE RIGHTS AND REMEDIES OF CREDITORS AND SECURED PARTIES GENERALLY, (B) GENERAL PRINCIPLES OF EQUITY; AND (C) APPLICABLE STATE AND FEDERAL LAWS RELATING TO FRAUDULENT CONVEYANCES OR FRAUDULENT TRANSFERS”
- QUALIFICATIONS REGARDING REMEDIES AND PRACTICAL REALIZATION.

PERFECTION

- CONSTRUCTIVE NOTICE
- “The Mortgage is effective to create a valid lien in favor of the Lender in the Real Property Collateral. Upon _____, proper recording of the Mortgage in the Local Recording Office, the Mortgage will provide constructive notice of the lien against the Real Property Collateral.”

UCC OPINION



SECURITY AGREEMENT

ATTACHMENT

PERFECTION

- Type of Collateral
- Personal Property Collateral State Filing Office
- Fixture Filing Local Recording Office
- Accounts
- Timber
- Minerals

NON-CONTRAVENTION



- Knowledge Qualifier
- Opinion Certificate

SPECIALIZED OPINIONS



- Zoning and Land Use
- Non-consolidation
- Sale/Leaseback and Synthetic Leases
- Promissory Note and Mortgage Taxes
- Choice of Laws
- Reasoned Opinions
- “Market” Opinions

LOCAL COUNSEL OPINIONS

- State if opinion giver is acting only as local counsel or if there is any other limited role or engagement
- Consider referring to deal counsel opinion
- State that the “Borrower” or “Borrower Parties” have requested the opinion giver to render the opinion or the opinion is being given with the consent of the Borrower

USURY

- “The Transaction Documents do not and will not violate applicable [insert state] usury laws provided that the Lender has not and does not reserve, charge, take or receive, directly or indirectly, at any time, interest or other sums deemed to be in the nature of interest (however labeled) in an amount exceeding the equivalent of the rate of _____% per annum, simple interest, calculated on a basis of a year of 365 days (or 366 days as applicable) and the actual number of days elapsed.
- Applicable State Law
- Review of loan documents regarding interest rate
- Review of fees
- Any other sums payable to Lender other than principal
- Is there compounding

EXAMPLES OF OPINIONS TO AVOID



- Usury
- Litigation
- Mortgage and Note Taxes
- Required Fees have been Paid
- Other Factual Matters

Assumptions Not an Exhaustive List

- Legal capacity
- Legal existence of parties other than Borrower
- Power and authority of parties other than the Borrower
- Due Authorization of parties other than the Borrower
- Due execution and delivery of parties other than the Borrower
- The enforceability of Loan Documents against parties other than the Borrower
- No undisclosed modification and no undisclosed prior waiver
- Genuineness of signatures and authenticity of copies
- Truthfulness of statements as to factual matters
- Documents issued by public authority are accurate, complete, and authentic
- Recipient of opinion has acted in good faith
- Compliance with requirements of fair dealing, good faith, and conscionability
- Agreements will be enforced as written
- No action will be taken in the future that might result in a violation of law or a default
- No agreements, written or oral, and no usage or course of trade that would alter or modify Loan Documents

Assumptions

Not an Exhaustive List (cont.)

- The payment of all required recording fees, note and mortgage taxes, and other fees
- No mutual mistake of fact or undue influence and no fraud or duress
- Fair and adequate consideration has been given and received
- Parties have complied with all applicable law
- All statutes, judicial and administrative decisions are published in a generally accessible manner
- Borrower possesses all required licenses and permits
- All Transaction Documents will be recorded or filed as necessary

EXCLUDED LAWS AND WHAT IS EXCLUDED FROM THE OPINIONS

- Securities laws
- Federal Reserve Board margin regulations
- Pension and employee benefits laws and regulations
- Labor laws
- Antitrust and unfair competition laws
- Laws regarding fiduciary requirements
- Tax laws
- Bankruptcy, fraudulent conveyance and other insolvency laws
- Environmental laws and regulations
- Patents, trademark and other intellectual property laws
- Local laws and ordinances such as zoning, planning, building and occupancy
- Criminal laws
- Terrorism and money laundering laws
- Laws concerning local and national emergencies

QUALIFICATIONS



- Remedies
- Practical Realization
- Status of title to any real or personal property.

RELIANCE



- Addressee
- Administrative Agent and Lender
- Rating Agencies
- Assignees

OPINION CERTIFICATE

MEMORANDUM OF OPINION FOR ATTORNEY FILE