



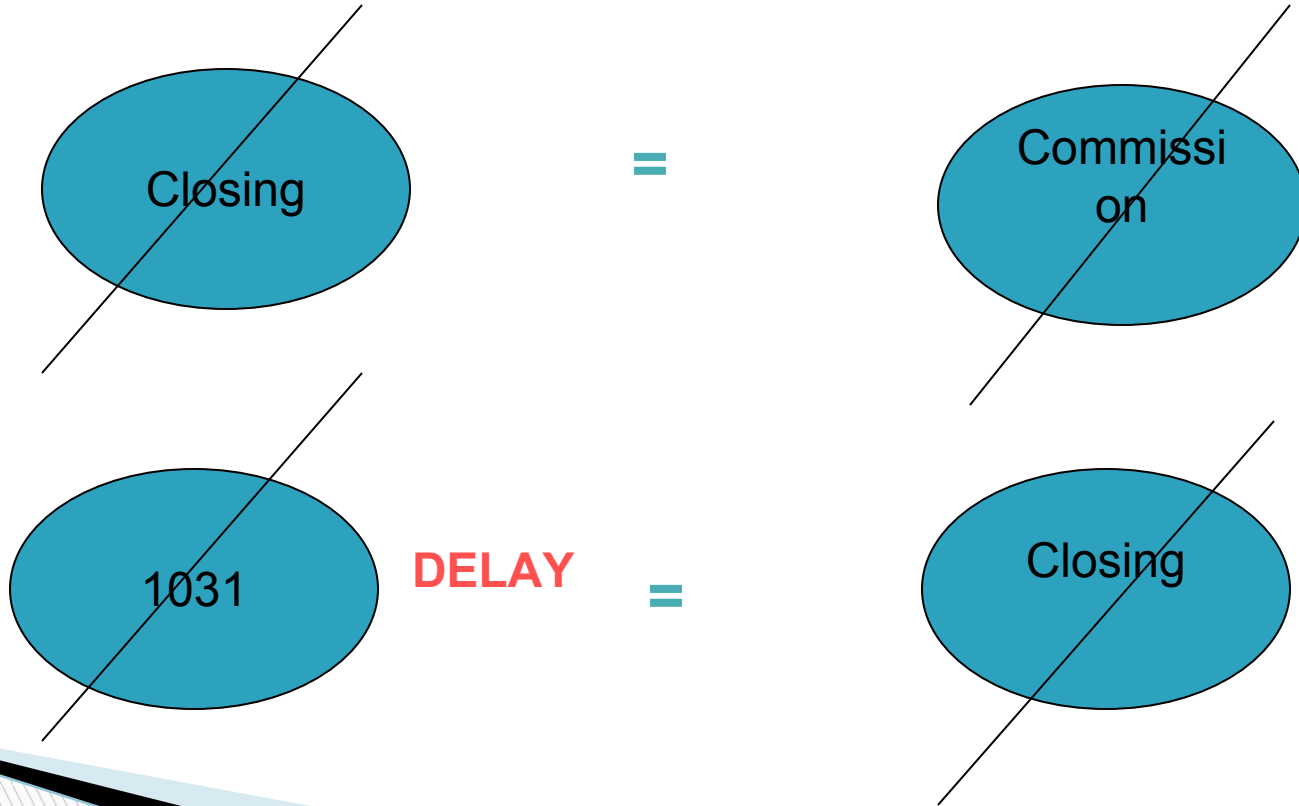
**RATHBONE
BARTON
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**Obstacles
to Closing Your Real Estate Deal**

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Your Goal... Get to Closing!

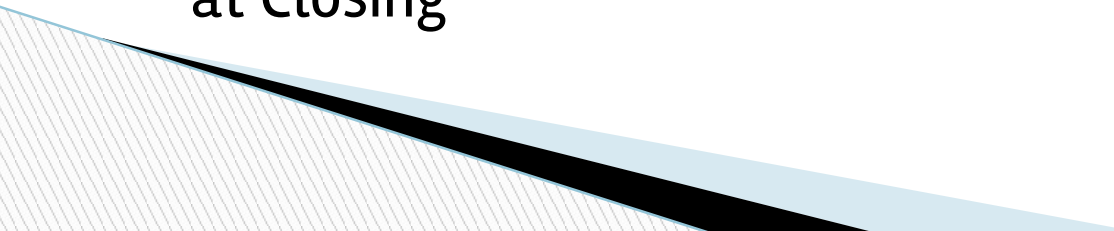
Why?



Obstacles Can Be Broken Into Four Main Categories

1. Negotiations
 2. Timing
 3. Due Diligence/Title
 4. Financial
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NEGOTIATION OBSTACLES

- Avoiding confronting the hard issues until Closing
 - Non-Meeting of the minds on key business issues
 - Holding out final issues for leverage at Closing
 - Lawyers who push deals to the breaking point
 - Party feeling abused in negotiations will become immovable at Closing
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Avoid Confronting the Hard Issues until Closing

- “Leave it to the lawyers to work out the details.”

OR

- “We’ll figure it out at Closing.”

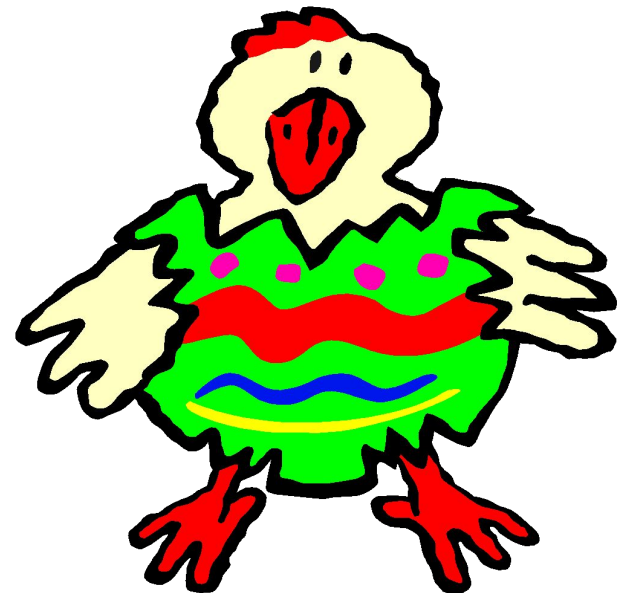
Code for “We’re too chicken to talk about the hard stuff!”

Example:

Earn Out Terms

How to determine Net
Profits going forward

Estoppel Certificates



Non-Meeting of the Minds on Key Business Issues

- Inadequate documentation, issues pop up in Closing statement or last minute schedules
- Schedules are a Big Issue Often Missed
 - i.e., What liabilities will the buyer assume
 - i.e., What assets are included in deal
 - Try to anticipate issues in advance, i.e., don't have survey, do we know what will be on it, boundary issues

Holding Out Final Issues for Leverage at Closing

Example: One side knows there is no agreement on an issue but also knows that other side will be in a bind at Closing, so hold out.

RISKY!!

Example: Demand for price decrease for minor environmental issue.

Example: Engineering issue

Example: Supplemental Title Report

Lawyers who push deals to the breaking point ... and

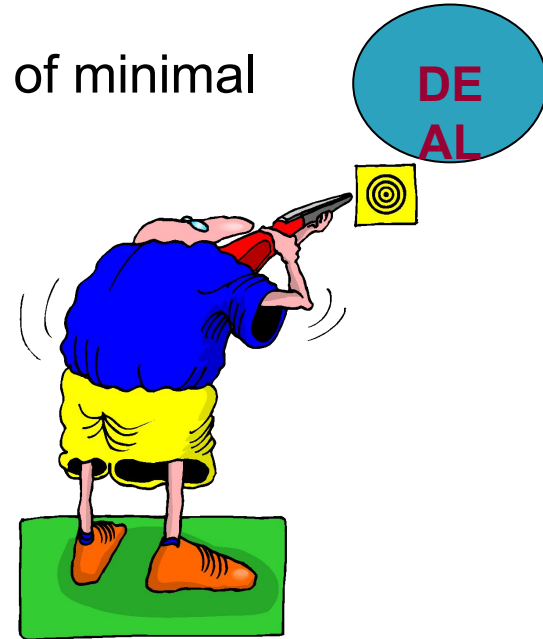
– Sometimes over the cliff by arguing about language of minimal importance

- If you “win” every point, watch your back later on!

- Need a Deal Making Lawyer, Not a Deal Killing Lawyer

– No risk to the Lawyer – he gets paid in any event!

- Inexperienced or outmatched party digging in heels.



Every lawyer thinks they can do Real Estate

Party Feeling Abused in Negotiations will Become Immovable at Closing

DEAL



Don't want your deal to crater over a dispute about escrow proration.

Proration based on 365 day year or 360

“Not One Penny More”

Example: Doctors v. Hospital Transaction

Example: “Big Gorilla” Buyer v. “Little Guy” Seller

TIMING OBSTACLES

TIME KILLS DEALS

- Absence of clear timelines in Purchase Agreement
- Last minute Schedules and Exhibits
- Intervening new Decision-Maker

Absence of clear timelines in Purchase Agreement

When is end of feasibility period? Dates certain vs. 30 days from (when)

When is deadline to object to title?

When is closing Date?

Any extensions? How documented?

Any additional consideration?

CAR Forms, fill in the blanks

- Title, Survey, Feasibility
- New PTR include new period
- Conditional waiver of objections

Example: Closing 10 days after contingencies satisfied but no clear date for satisfaction of contingencies

Example: ODOT approval

Suggestion: Outline Key Dates when signing to make sure they work

Suggestion: Include obligation to affirmatively do something at the end of due diligence period

Suggestion: If you blow it, don't ignore it! Even if you miss a deadline, still analyze the issue before closing

Last Minute Schedules and Exhibits

Assets Lists

Disagreement as to what is and is not included.

i.e. industrial business sale: are all three of those pickups that seller & sons are driving included?

Liabilities Assumed

What contracts are going with Buyer.

Environmental (indemnity)

ADA compliance (who responsible)

Exhibit Documents

i.e. Covenant Not to Compete

- Form of lease or assignment of lease not attached
- Form of deed – is it bargain or sale or warranty
- Estoppel Certificates

Permitted Exceptions

Leasing Prorates

Equipment List

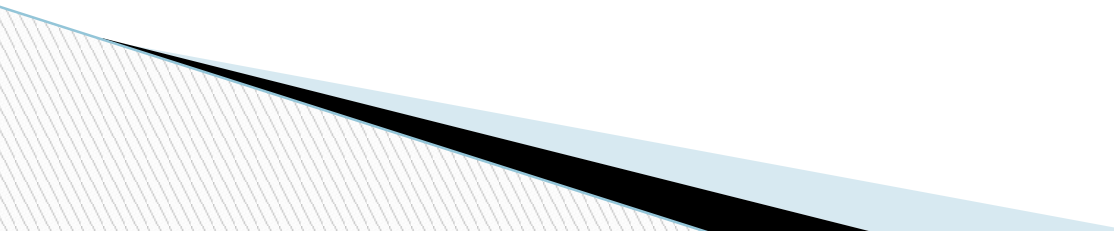
Note: If you haven't attached Exhibit documents, be prepared to compromise on terms

Intervening Decision-Maker

- New corporate president says NO to deal at the last minute so parties have to renegotiate
 - Example: Hillsboro Lease Option Subdivision
- Silent partner speaks up
- Agent (or officer) negotiates – board won't approve
 - SAI example

Suggestion: Find out early on if negotiating party has authority. Non-Profits or Directors.

DUE DILIGENCE/TITLE OBSTACLES

- Survey – Not ordered in time/Lender last minute extended coverage demand
 - Faulty Legal Description
 - Title Exceptions
 - Phase I Environmental Discoveries
 - Zoning Letters/Endorsements
 - Opinion Letters
- 

Survey

Not ordered in time

Lender last minute extended coverage demand

Surveys take time/Surveys raise issues

i.e., ROW under building

i.e., Montana Boundary line road not located on easement, property on other side of the road but no easement

Suggestion: If you don't get the survey in time, reject contingency and be prepared to cancel deals OR get written extension.

Suggestion: Buyer should walk the property

Don't Ignore It!

Faulty Legal Description

- Read the Legal Description early on!
- Corners don't meet!
- “Dueling surveys”
 - Discrepancy between vesting deed and survey and PTR
 - Discrepancy between surveys
 - Bristol Example

Suggestion: Ask title company for help



Title Exception “Pop Ups”

Everyone has experienced last minute title exceptions

Unrecorded or recorded leases

Mechanics Liens Endorsement
Required?

Judgment liens (may change structure,
i.e. land sale contract vs. sale & trust
deed)

i.e., Tillamook Restaurant Example



Phase I Environmental Discoveries (during or after feasibility period)

Everyone progresses based on finding nothing

Examples:

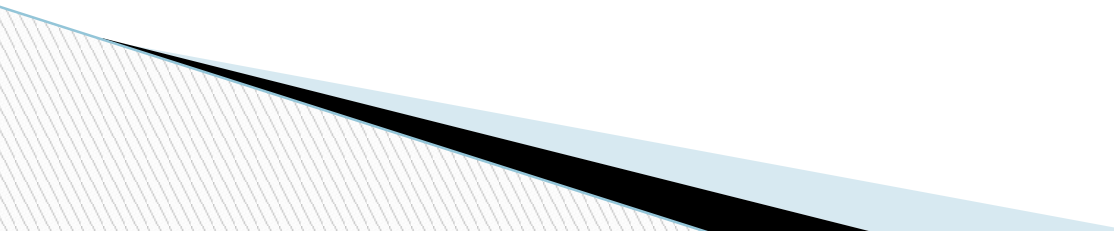
Farm UST

Buried Garbage

Gas Station or Dry Cleaner in vicinity?

Zoning Letters/Endorsements

These take time, ask well in advance of closing whether any will be required.



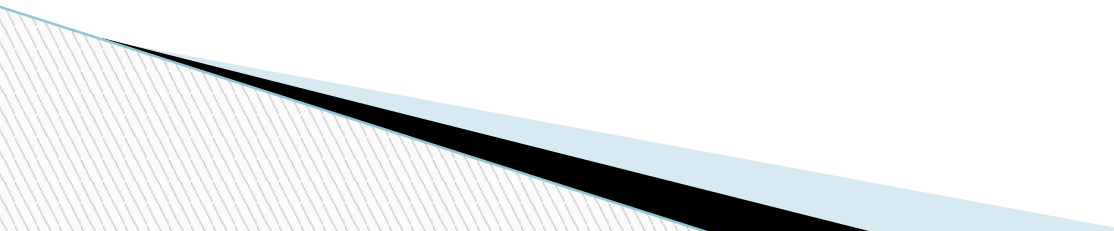
Opinion Letters

Very common closing delay is lawyers haggling over opinion letter

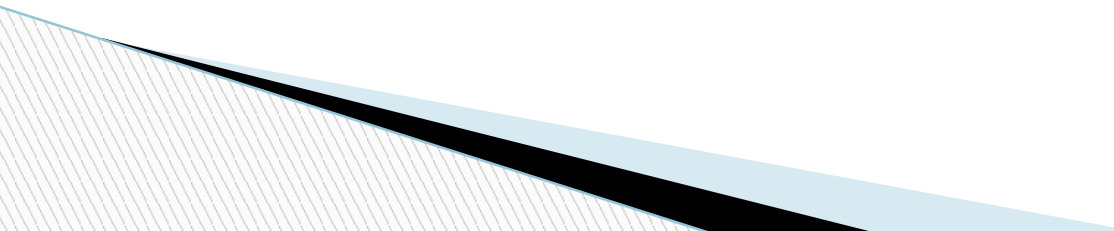
Suggestion: Ask for a draft to be attached to Purchase and Sale Agreement negotiated early on...

If can't get opinion, can't get loan, can't close!

FINANCIAL OBSTACLES

- Lender Issues
 - Lender Delay
 - Failure to obtain necessary releases from prior lenders, releases of collateral and substitutions of collateral
 - Prepayment Penalties
 - Defeasance
 - Financing Sources
- 

Lender Issues

- Conventional Lenders Back
 - LTV's Require Very Large Equity Positions
 - It's About Borrower's Liquidity
- 

New “Normal” World of Commercial Real Estate Finance

Lenders:

- ✓ Greater Regulatory Oversight
- ✓ Lower LTV's
- ✓ Real Cash-In/Equity
- ✓ Underwriting Scrutiny

Solutions

- Equity, Equity, Equity
- Hope Note
- EB-5 Investment
- Life Insurance Companies
- Angels
- Retirement Plans
- Newly Formed Opportunity Funds



Lender Delay

Loan Documents

- Some lenders won't start them until all title and due diligence complete
- Suggestion: Determine what info lender (whether new or releasing) needs and gather it early on

Big One These Days

- Lender participating loan

Failure to Obtain Necessary Releases from Prior Lenders, Releases of Collateral

The most common example is last minute UCC releases from an old blanket security interest

Prepayment Penalties

Purchasers: Don't calculate them into New Loan Balance

Purchasers: Negotiate it upfront

Suggestion: include windows to pay down principal; be sure commitment letter, note and trust deed are consistent

Sellers: People Forget

Sellers: Review your old loan documents prior to signing
Purchase Agreement

Example: Can be more significant that interest rate.

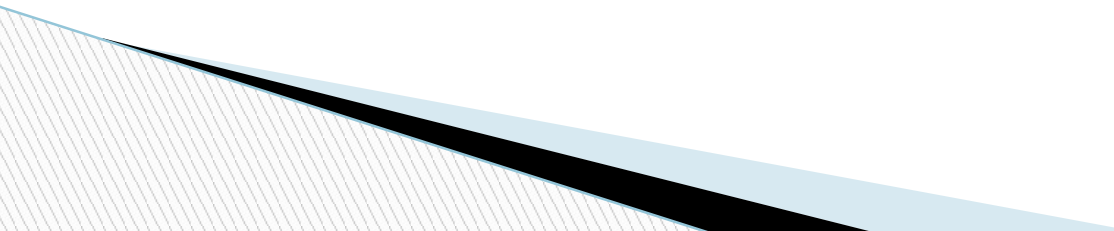
Sellers: Communicate New Plans to Old Lender waivers can often be negotiated if
early on

Solution: Private Financing



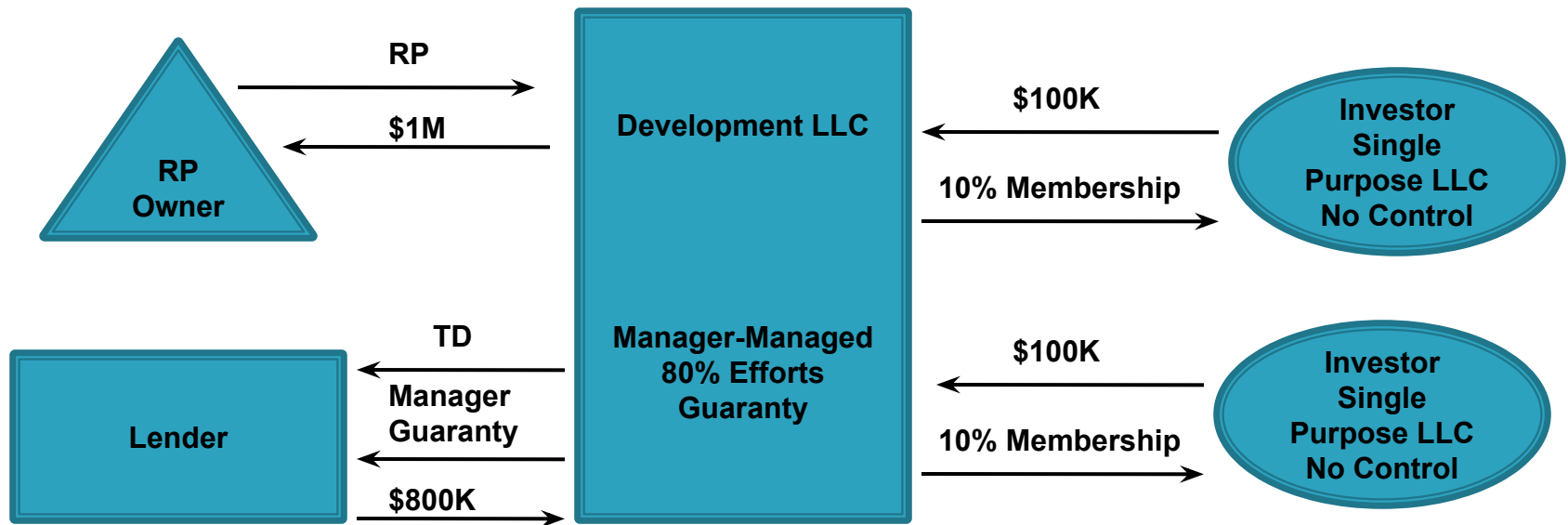
- Buy Property
- Buy Note (anticipating foreclosure or cram down of owner)
- Jobs Act Make Easier

What is a Security?

- Investment Contract
 - Registration Requirements
 - ✓ Exemptions
 - Anti-Fraud Provisions
 - ✓ Disclosure
 - Who Can Sell?
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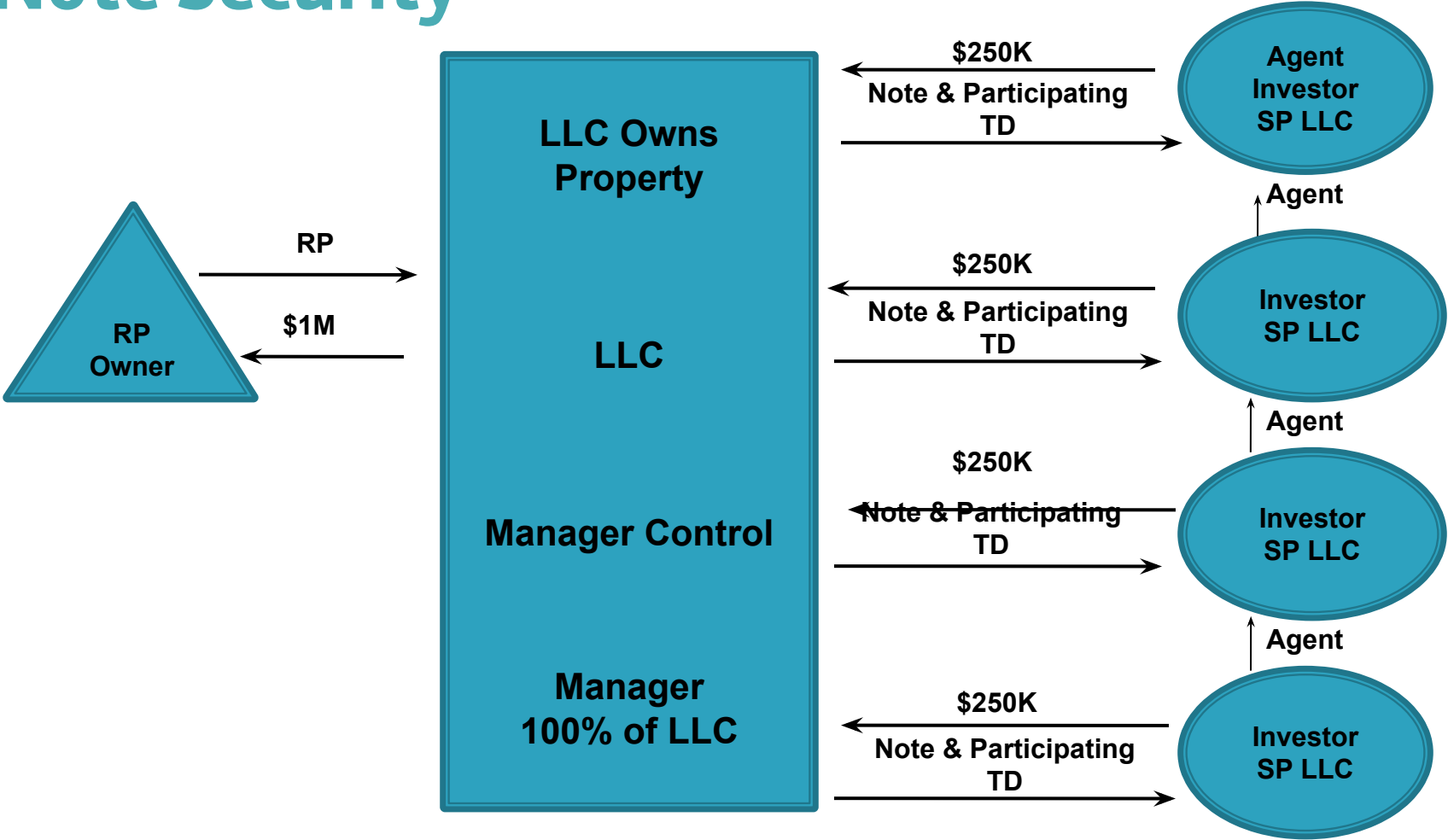
Most Common Structure of Development Fund

- ▶ LLC Interest Security
- ▶ Combination Investor/Financing



Investors provide required equity
Investors prioritize return
Manager control over development

Note Security



Fixed Rate of Return for Investors Plus Upside
Security Through Participating Trust Deed
Manager Total Control of Development

TO SUMMARIZE

Four Main Categories of Obstacles

1. **Negotiations**
 2. **Timing**
 3. **Due Diligence/Title**
 4. **Financial**
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1. NEGOTIATIONS

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2. TIMING

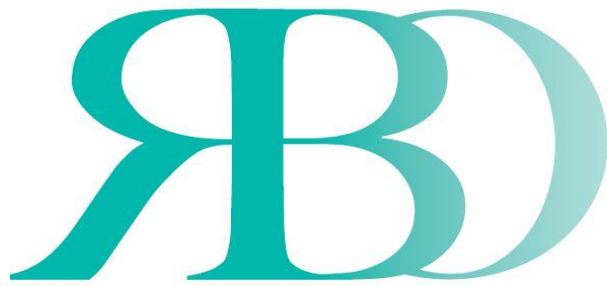
- Absence of clear timelines in purchase agreement
- Last minute schedules and exhibits
- Intervening new decision-maker

3. DUE DILIGENCE/TITLE OBSTACLES

- Survey not ordered in time/lender last minute extended coverage demand
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- Title Exceptions
- Phase I Environmental Discoveries
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4. FINANCIAL OBSTACLES

- Lender Issues
- Lender Delay
- Failure to obtain necessary releases from prior lenders, releases of collateral and substitutions of collateral
- Prepayment Penalties
- Solution: Private Financing



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