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Investigation of title of Land & Immovable Properties and subsequent legal due diligence for its Acquisition¹

➤ The general practices and process involved in conducting legal & business due diligence for acquiring land & immovable properties and checklist of various documents required to be obtained and examined have been set out in this article.

INTRODUCTION

Generally, due diligence review (DDR) refers to the care, a reasonable person should take before entering into an agreement or doing a transaction with another party. The Dictionary meaning of Due is 'Sufficient' & 'Diligence' is 'persistent effort to work.' DDR is a process whereby an individual or an organization, seeks sufficient information about a business entity to reach an informed judgment as to its value for a specific purpose.

Legal due diligence is often carried out by the potential buyer or investor on the business of the potential seller. Due diligence could be considered an in-depth review of all business documents and records in an effort to assess the health and viability of the business to be acquired. In ordinary course of business, due diligence is an investigation of a business or person prior to executing a term sheet/formal agreement/contract, or an act with a certain standard of care. It can be a legal obligation, but the term will more commonly apply

to voluntary investigations.

The term "due diligence", first came into common use as a result of the United States' Securities Act of 1933. This Act included a defence in Section 11, referred to as the "Due Diligence" defence, which could be used by broker-dealers when accused of inadequate disclosure to investors of material information with respect to the purchase of securities. As long as broker-dealers exercised "due diligence" in their investigation into the company whose equity they were selling, and disclosed to the investor what they found, they would not be held liable for non-disclosure of information that was not discovered in the process of that investigation. Originally, due diligence was limited to public offerings of equity investments, but over a period of time it has come to be associated with investigations of private mergers and acquisitions as well.

Due diligence can be further sub-divided to include an initial screening of the deal with a subsequent detailed and analytical evaluation in determining the suitability of a business deal before proceeding to the advanced stage in which the deal - valuation and deal structuring is conducted. Every investor approaches due diligence differently. Some investors or their authorised legal

¹ Some provisions of this Article have been drawn from Statutory Enactments and related practices while rest of the discussion is based on the practical exposure of the author in making various investments in few Venture Capital Undertakings of SEBI Registered Venture Capital Funds.



F Due diligence is permitted by the vendor/seller once one or more prospective buyers or investors have been identified either by the seller or Investment Banker. The identification of potential buyers is a role that can be greatly enhanced by employing an Investment/Merchant Banker or Law Firm/Legal Counsel or some other appropriate agency. Due diligence is often permitted once the prospective buyers have signed a Non-Disclosure Agreement (NDA). Due diligence documents often contain copies of the most confidential data a company possesses.

counsels may request information in a detailed manner all at once, while others may simply request information at different times or stages. Regardless of an investor's method to obtain information on a potential company, it is a proven fact that exercising thorough due diligence is indicative of prudent approach and more profitable returns.

In India the concept of due diligence closely associated with the doctrine of notice actual, constructive or imputed. Section 3 of the Transfer of Property Act, 1882 defines "notice". The definition of "notice" is critical to the proper understanding of the Indian legal concept of due diligence.

"A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it."

Explanation I -

Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired or of the property wherein a share or interest is being acquired, is situated.

Provided that -

- (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 and the rules made there under;
- (2) the instrument or memorandum has been duly entered or filed as the case may be in books kept under section 51 of that Act, and
- (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the index kept under Section 55 of that Act.

Explanation II

Any person acquiring any immovable property or any share or

interest in any such property shall be deemed to have notice of the title, if any person who is for the time being in actual possession thereof.

Explanation IIIA

A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material: Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognisant of the fraud.

It is because of these legal presumptions that Purchasers/Investors/Acquirer used to conduct investigations of the Sellers' title to the respective property. By and large, due diligence is conducted during the course of disinvestments, strategic investments by private equity funds, acquisition of an undertaking/business, acquisition of shareholding interest, overseas investments and listing of securities in overseas market. The process of due diligence is instrumental in gathering information about a seller/target company, its business; and the environment in which a target company operates. The objective is to ensure that prospective investors make an informed investment decision. The acquirer used to conduct or arrange an investigation into the affairs of a business entity prior to its acquisition, flotation, restructuring or other similar transaction.

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The suggested procedure and documents which are required to be collected and examined for the purpose of Due Diligence is given in a sequential manner hereinbelow, though there can be need based deviations and modifications in the related proposed Due Diligence process as per the requirement of respective assets/business to be acquired :-

I. Due Diligence in respect of Owner of the Property



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(i) If Seller/Vendor is a Corporate/Company one needs to obtain :-

- Name of the Company
- Principal place of business
- Registered office of Company/Mailing address of the Company
- Telephone/Fax No

Documents to be collected:

- Certificate of Incorporation
- Certificate of Commencement of Business
- Memorandum & Articles of Association
- Minutes of Board & Shareholders Meetings
- Register of Directors
- Register of members/shareholders with Share Holding details
- Loan & Mortgage Documents
- Other Secretarial records and statutory books and registers
- Resolutions of the Board of Directors to sign, execute, negotiate and names of persons authorized to sign the relevant letters & documents pertaining to the property in question
- Copy of Income Tax PAN Card or PAN allotment letter
- Details of the Bank Accounts
- Audited Annual Reports for the last 3 years (Not applicable in case of New Company)

(ii) If the Seller/Vendor is a Trust one needs to obtain:

- Names of Trustees, Sponsors & Settlers
- Names and Addresses of Beneficiaries
- Names and Addresses of the Founders, Managing Trustee, the Managers/Directors
- Objective of The Trust
- Whether the Trust is Registered or Un-registered
- Names of the Authorised Signatories
- Telephone and fax numbers

Documents to be collected:

- Trust Deed or any officially valid document to identify the trustees, settlers, beneficiaries and those holding Power of Attorney, Founders/Managers/ Directors and their addresses
- Certificate of Registration of Trust Deed, if registered
- Power of Attorney granted to transact business on Trust's behalf
- Resolution of the Managing Body of the Trust/Foundation/Association
- Specimen signatures of the authorised persons signing on behalf of the Trust
- Copy of Income Tax PAN Card or PAN allotment letter
- Details of Bank Account
- Audited/Unaudited Accounts for the preceding 3 years.

(iii) If the Vendor is a Partnership Firm

- Name of Partnership firm
- Address of Firm
- Names and Addresses of all Partners
- Telephone numbers of the Firm and Partners

Documents to be collected

- Partnership Deed
- Certificate of Registration
- Power of Attorney granted to a Partner or any employee to transact business on its behalf
- Any officially valid document to identify the Partners and those holding Power of Attorney and their addresses
- Specimen signatures of the authorised persons signing on behalf of the Firm
- Copy of telephone bill - (if not available then Letter from the entity and its telephone bill, if the Firm is based in the same premises of any other entity)
- Details of Bank Account of the Partnership Firm
- Copy of PAN Number or PAN allotment letter
- Accounts for the preceding 3 years.

(iv) If the Vendor is an Individual or Group of Individuals

- Name of Individual/Individuals
- Address of Individual /Individuals
- Telephone numbers of Individual/Individuals

Documents to be collected

- Name and Address Proof of Individual/Individuals.
- Copy of PAN Number or PAN allotment letter
- Power of Attorney granted to Individual by the other Individuals
- Any officially valid document to identify the Individuals and those holding Power of Attorney and their addresses
- Specimen signatures of the authorised person/Individuals signing on behalf of the other individuals
- Details of Bank Account of the Individual/Group of Individuals
- Accounts for the relevant period



(v) For the other related Subsidiaries and other Special Purpose Vehicle Companies (SPVs)

- Name of the Company
- Principal place of business
- Registered office of Company/Mailing address of the Company
- Telephone/Fax No

Documents to be collected:

- Certificate of Incorporation
- Memorandum & Articles of Association
- Minutes of Board & Shareholders Meetings
- Register of Directors
- Share Holding details
- Register of members/shareholders
- Secretarial records and statutory books and registers
- Resolution of the Board of Directors to sign, execute, negotiate and names of persons authorized to sign the relevant letters and definitive agreements
- Copy of Income Tax PAN Number or PAN allotment letter
- Details of the Bank Accounts
- Audited Annual Reports

II. Due Diligence in respect of Title of the Property

i) Documents required for Acquisition of Land at Metro Cities /Towns/ Municipal areas

1. Property Registered Card
2. Coastal Survey /City Survey Plan
3. Development Plan Remarks
4. Town Planning Remarks
5. Assistant Engineers Survey Remarks
6. Approved Plans of the Property
7. Assessment/Inspection Extract
8. Category of Building Certificate
9. Repair Cess Bill of Municipal corporation
10. Search Report of Title for the last 30 years or more from an Advocate
11. Title Certificate from an Advocate

ii) Documents required for Title Investigation of Agricultural Land/Non Agricultural land/Check List for the title verification of the property

1. Latest 7/12 Extract & Mutation Entries: This informs about the type of ownership, total number of owners (and their share in property) of the property, loan on the property, tenant in the property (if any), cultivable and non cultivable areas in the property, source of irrigation (if any), assessment for the property. Mutations are the entries made by the Revenue Department in respect of any change in ownership of the property due to death of the owner, loan obtained by any owner etc.

2. Maps: To check Gu-book maps provided by the government agencies, that will give a better idea about the exact location of the property and access to the property.

3. Village Form No. 6 /mutation entry :(Record of Rights)

This form is also called register of mutation. Mutation means

substitution of the names of a person in the Record of Right. This is a record of changes in the record of right. Transfer may be by Will, Sale, Mortgage, Lease, Exchange, Gift or Inheritance. This is very useful record as one can find out history of land.

4. 6 C Certificates: 6 C Certificates is a document which gives information about the names of all legal heirs of deceased occupant or the name of the deceased "other right holder." Names of the heirs with whom land is in actual possession. ("Occupant") This document is very important as, it is noticed that sometimes names of female legal heirs are not appearing on revenue documents, to avoid such ambiguities it is advisable to check 6C Certificate.

5. Village Form No. 8: This Form gives account details of the holder of land in respect of various lands held by him in the said village.

6. 8 A Extract Khate (Utara of Gat Scheme) & Ceiling Limit: As per the type of the property there is a limit provided for the holding of the Land, the Purchaser must check that the Land which he is going to purchase will not cross his limit as well as they also have to check the present owner is also not holding it as excess land. 8 A Extract is a document which gives an idea about the exact holding of the owner; therefore it is advisable to check that document for calculation of the total holding of the present owner.

7. Village Form No. 12: This Form gives a record of crops cultivated on the land including the area covered, names and numbers of the fruit trees and fuel trees, source of water for irrigation such as wells, tube wells and rivers etc and areas: under grass, under building, roads and other non agricultural used.

8. Reservation on property: The purchaser should also check reservation on property. An enquiry should be made with the Local Authority to ascertain, whether the property: affected by Land Acquisition Act, Notification, Set-back, reserved for public purpose under the Development Plan etc. Sometimes Government may by notification reserve land for purposes such as (i) Rehabilitation of Dam Affected Public, (ii) Play Ground, (iii) School etc. Therefore any development in such land is not permissible, and it is necessary for the purchaser to check such reservation on the property.

The Purchaser should also collect and verify the following documents:

- (i) Documents pertaining to the layout/construction put up on the Property, if any, including all consents and approvals obtained from appropriate statutory authorities;
- (ii) Latest Title deeds, Conveyance/ Sale Deeds, and previous title deeds covering a period of at least 30 years plus property tax and other statutory outgoing cess/tax paid receipts for the past 30 years, including the current year;
- (iii) Details/ documents pertaining to any mortgage (including equitable mortgage); encumbrance or charge created in respect of the Property, including those that have been satisfied as on date;



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- (iv) Certificate, if any, issued by the concerned District Collector for transfer of the said property;
- (v) Documents pertaining to approvals, filings and intimations obtained or made under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 If any;
- (vi) Zone Clearance Certificate from appropriate statutory authorities;
- (vii) Non Agricultural Permission, if any;
- (viii) Non Agricultural Layout;
- (ix) If any litigation pending in respect of property then details of the same;
- (x) Various tax bills from Governmental Agencies;
- (xi) NOC from revenue authority for the sale of the said land;

The Purchaser must also do/consider the following aspects before entering into an agreement for Purchase of the property.

(i) Purchases of Land for Bonafide Industrial Purpose in Maharashtra: Non- Agriculturists can purchase any property for bonafide industrial purpose up to a limit of 10 hectares, but to purchase land more than 10 Hectares it is necessary to take permission from Industrial Commissioner.

(ii) Coastal Regulation Zone (CRZ) and other zones: As no development is allowed in CRZ, it is necessary for the purchaser to check whether the land in question falls under such zones or not.

(iii) Possession of the present owner: It is very important and the purchaser should check possession of the present owner by personal visit to the property.

(iv) Search in Office of Sub-Registrar: To conduct a search in the Office of Sub- Registrar in whose jurisdiction the property is located. It is advisable for the purchaser to hire a Local Lawyer to do this activity. This search will give information about all recorded transactions of the property for the respective period.

(v) Public Notice: Few Property transactions are un-registered or for some Property transactions which could be disputed and not in the Public Domain, it is advisable for the Purchaser to check or cross-verify such transaction through Public Notice at least in two Local News papers and ask/invite for objections for their proposed property transaction. This publication of Public Notice will help the Purchaser to satisfy them about the title of the property.

iii) Additional Steps for Acquisition of Agricultural/Non Agricultural Land/Immovable Property

- 1) **Check List:** Prepare detailed check list of documents required from Seller.
- 2) **Examine the Relevant Documents:** The document determines the rights and powers of the particular person, duties and liabilities, contractual obligations and/or fulfilment etc. Documents give the idea and intention of the parties at the time of entering into contract.
- 3) **Adjudication:** If the parties to the agreement are not sure about the stamp duty to be payable, they can make an application to the Collector for determination of the duty payable under the Act on such document. The process of

making application made to Collector for his opinion regarding the stamp duty chargeable on the document is called adjudication.

- 4) **Board Resolution:** Before signing the final agreements, the Seller and Purchaser's Company are required to identify Authorised Signatories to execute the required documents by passing an appropriate Board Resolution.
- 5) **Stamp duty, Registration:** Stamp Duty is payable on the agreement value of the property or the market value whichever is higher. If a document creates a third party right in respect of an immovable property then it requires compulsory registration.
- 6) **Execution of Documents:** The term "execution" means signing of the document. Before a document is registered, proper stamp duty as may be applicable to the nature of the instrument is paid.

III. Drafting of Title Documents

On the completion of satisfactory business and legal due diligence, the Purchaser should plan for drafting of required Definitive Agreement in consultation with their Legal Counsels.

Title Documents could be Agreement for Sale, Sale Deed, Deed of Conveyance, Deed of Transfer, Possession Letter, Joint Venture Agreements, Undertakings, Affidavits, Indemnity Bond, Declarations etc. These Documents are the most important part of the property purchase activity. The Purchaser must also include the following Indemnity/Guarantees/representation & warranties in the proposed Title Documents from the present owner :-

- (a) about his title over the property in question;
- (b) about his possession over property;
- (c) about non reservation of the property;
- (d) the said property does not relate to any public activity;
- (e) the said property is not a Trust Property;
- (f) the said property is not a Government Granted Land;
- (g) that no-one has any right (road/ parking) over said property;
- (h) points about the existing structure on property
- (i) If the said property is ancestral one then it is necessary to make all members of the family as consenting parties for the deed;
- (j) about Non Litigant nature of property in question. Normally, there is a view that any transaction in respect of a property which is under litigation is null and void in the eyes of law;
- (k) boundaries of the property gives clear idea about the exact location of the property. Therefore it is necessary to mention it clearly in the Title-Deed, apart from this, it is advisable to attach a map showing exact location of the property;

IV. Execution of Definitive documents and preparing checklist for execution Activities Before Execution of Definitive Documents

- i. To obtain Internal Approvals from Investment/ Management Committee/ Board of Directors/ Managing Director;



» Due Diligence Process is an essential step for minimising business risks and avoiding reliance on the Seller's untested warranties in relation to the Assets to be acquired. With this due diligence process, companies are better able to grow through mergers and acquisitions, spin-offs, and alliances. Due diligence process adds power to the corporate decision maker adding to the existing strengths of management and staff, creating more value for a unit or division, as well as improving its abilities and success rate when acquiring or merging with new business entities.

- ii. To arrange vetting / obtain Approval of Draft Agreements to be executed from the Solicitors /Advocates
- iii. To obtain updated Title Search Report or Certificate
- iv. To arrange Original/Copy of Public Notice (English+ Regional).
- v. To ascertain if any structure on the said property.
- vi. To find any supportive document is required/copies of various permissions/NOCs.
- vii. To complete the Adjudication of the said Agreement for the stamp duty purpose.
- viii. To arrange all the Annexures to the Agreement.
- ix. To arrange Stamp Duty, Registration amount.
- x. To arrange Common Seal/Rubber Stamp of Seller and Purchaser, Photographs of signatories, xerox copies of Income Tax PAN card of Seller and Purchaser.
- xi. To check the mode of Payment of the stamp duty and registration charges.
- xii. To arrange Bank Account details of Sellers/Vendors.
- xiii. To decide the mode of payment of Consideration amount to the Owner/Vendor.
- xiv. To check the details of payment by electronic transfer/RTGS.
- xv. To check the Procedure for Registration of Agreement (Time required, Authorised Persons presence of Sellers & Purchasers required for registration, Timings of Registration, Documents for Registration, Copies of necessary Document).
- xvi. To take token for registration and arrange the registration of documents at Sub-Registrar's office.
- xvii. To arrange the execution of Documents and Registration at Sub-Registrar Office.
- xviii. Execution of Letter of possession of the property.
- xix. Collect all original documents from Owners/Sellers as agreed.

xx. Collect the Original Sale deed from the office of Sub Registrar.

V. Check list after the execution of Definitive Documents & Safe keeping of Original documents.

- (i) Prepare Original File: Original documents are valuable and most important hence have to be kept in safe custody with some key Legal Official or Company Secretary or alternatively in locker of some Bank or Safe Vault of some reputed Operating Agency.
- (ii) Prepare Office File: The xerox of Original documents should be kept in an additional file for day to day reference and any other necessary action thereto.
- (iii) Register of Original Documents: Particulars/List of Original Documents (kept in safe custody as above) should be entered in some Register.

VI. Check list of the compliances to be done after the execution of Agreement After complying with all the necessary requirements, the Legal Department should have a joint meeting with the concerned departments for the following essential activities:

- 1 Application for change or revenue record, Property Card in the name of the Purchaser/Acquirer to The City Survey Officer/Collector/Tehsildar.
- 2 Obtain copy of Index II or 7/12 extract , record of rights etc. in the name of Purchaser /Acquirer.
- 3 Application for change of name to Assessment Department/ Municipal record.
- 4 Application for the change of name to Electricity Board or concerned authority.
- 5 Application for the change of name in other concerned authority/Govt. department.

Conclusion :

The above stated Legal due diligence process may be suitably modified depending on the need of the relevant business transactions. The Acquirer's Due Diligence Team viz. Legal Counsels/Investment Bankers etc. should also have healthy amount of scepticism about the claims of the Seller Company's Management. Sometime, Seller's managerial executives do not tell the truth, sometimes unintentionally or due to negligence they fail to discuss the important facts. During the course of due diligence process, in addition to the simply trusting the statements of management, the Buyer must also verify management's statements. Due Diligence Process is an essential step for minimising business risks and avoiding reliance on the Seller's untested warranties in relation to the Assets to be acquired. With this due diligence process, companies are better able to grow through mergers and acquisitions, spin-offs, and alliances. Due diligence process adds power to the corporate decision maker adding to the existing strengths of management and staff, creating more value for a unit or division, as well as improving its abilities and success rate when acquiring or merging with new business entities.