

## An ounce of prevention is worth a pound of cure: Overcoming legal obstacles to get your commercial real estate deal done

By Joseph P. Heins

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After weeks of haggling over price and terms, you've finally shaken hands to purchase a prime piece of commercial property. The hard part is over, right? All that's left is the closing.

The reality is that the path from handshake to closing can be fraught with obstacles that could potentially sink your deal before it even gets started.

A common mistake is rushing through the due diligence and closing process without much effort or attention to detail. This can create unnecessary risks for a buyer and result in a deal that is much different from the buyer's original understanding. Ultimately, there's a good chance that rushing through due diligence will actually make the closing process longer.

Instead, by spending a little bit of time and effort to create a proper plan and roadmap, a buyer can avoid preventable pitfalls, minimize risk and ensure that the property is consistent with expectations.

First and foremost, a buyer should start with a proper purchase and sale agreement. While residential deals can (for the most part) use a standardized form, each commercial real estate transaction is unique and therefore requires a unique contract. A well-drafted contract, and the drafting process itself, will identify potentially fatal issues before a buyer has put real money into the deal that they cannot get back. For example, by asking a seller to represent in the contract that there are no environmental issues on the property, a buyer may discover there are, in fact, problems they cannot live with, and they didn't need to pay for a Phase I to find out.

However, a buyer cannot simply take the seller at their word. The purchase and sale agreement should allow sufficient time for a buyer to get a "free look" at the property — i.e., to perform sufficient due diligence to know whether the condition of the property (both legal and physical) matches their expectations. Due diligence must include a physical inspection of the conditions on the property, including obtaining a Phase I Environmental Report to identify any adverse environmental conditions and to allow the buyer to avail themselves of the innocent landowner defense. It should also include legal due diligence — title and survey review, zoning analysis and a review of any restrictions against the site. A thorough legal review allows a buyer to determine whether there are any legal impediments that would preclude



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them from operating the property in the manner they were expecting to after the closing.

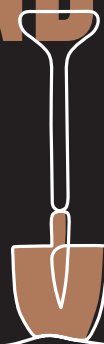
Finally, a buyer must engage (and trust) competent experts to assist. This can include surveyors, title insurance companies, environmental consultants — and yes, even lawyers.

Obviously, the ultimate goal of the contracting, due diligence and closing process for a property is to ensure the buyer obtains proper ownership but also must ensure the property meets the buyer's expectations when they first penciled out a pro forma for the deal. A proactive approach will minimize unnecessary risk and when the deal

closes, your property will be properly positioned for your project to succeed.

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