

# Commercial Real Estate Sellers: Hire Your Own Attorney!

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Does a seller of commercial real estate really need an attorney? I get asked this question often, and the resounding answer is "yes!"

Many sellers believe, possibly based on their experience in residential real estate transactions, that they can rely on the buyer's attorney, or a real estate broker, to "represent" them in a transaction. Although it is common for the buyer's attorney to prepare the deed and other closing documents for the seller in a residential transaction, it is

strongly recommended that commercial real estate sellers hire their own attorney. A commercial real estate transaction involves many complicated steps, and if the seller engages an attorney early in the process, the attorney can help the seller to both avoid liability from unexpected issues and protect the seller's benefits from the sale.

## **Listing the Property**

Many sellers will list their property with a real estate broker. The broker will provide the seller with a Listing Agreement. Usually, the Listing Agreement is a form that has been prepared by associations that represent brokers, so the terms of the Listing Agreement are generally very "broker-friendly."

Many sellers, even the ones that eventually hire an attorney to prepare the closing documents, fail to get an attorney involved during the listing stage. This can be detrimental to a seller at this stage because, even though Listing Agreements appear to be "standard" and written in stone, many brokers are open to negotiating the terms and conditions. For example, a form Listing Agreement provided by a broker may state that the broker's commission is earned when the seller accepts an unconditional offer from a buyer, which does not require the transaction to close for the commission to become due. In such a case, the seller may wish to negotiate so that any commission is only earned and due when, and if, a closing occurs and the seller receives the money from the sale.

## **Purchase and Sale Agreement**

Typically, the buyer will present a Purchase and Sale Agreement to the seller. Again, many times the Purchase and Sale Agreement will be a "standard form" that has been vetted and revised by members of the North Carolina Association of Realtors and, in some instances, members of the North Carolina Bar Association. If the buyer uses one of these forms, the buyer's broker will often assist the buyer in completing the blanks and presenting the offer (in North Carolina, the buyer's and seller's brokers are not allowed by law or their professional ethics to change the legal terms and conditions of a written Purchase and Sale Agreement). Alternatively, a buyer may have an attorney prepare a custom Purchase and Sale Agreement.

In either event, a seller will benefit from hiring an attorney to review the Purchase and Sale Agreement prior to signing it in order to limit the seller's risk. In North Carolina, the seller's attorney, in contrast to the seller's real estate broker, can change the terms and conditions of an offered Purchase and Sale Agreement. For example, a seller may want to limit the representations and warranties the Purchase and Sale Agreement requires the seller to give to the buyer and the remedies available to the buyer in the event of a seller default. In addition, the terms of the Purchase and Sale Agreement dictate what the seller must deliver to the buyer, including the type of deed the seller must present at closing. Some deeds contain broad title warranty language exposing the seller to liability for title issues for years even if the title problem occurred long before the seller even owned the property, the seller didn't cause the title issue, or didn't know about it. However, other forms of deeds contain limited warranties or no warranties at all. Limiting warranties can be especially important in situations where the seller has limited knowledge about the title, such as with inherited property or property on which a full title search was not done previously. An attorney representing a seller can negotiate the form of the deed for the conveyance.

The Purchase and Sale Agreement also contains a description of the property to be transferred, but usually the description is one the buyer has cobbled together, which may not be the true description of the property for sale. The seller needs to ensure that the seller is obligated to only deliver title to property the seller, in fact, owns and can sell. Also, few properties are without any title problems (called "exceptions") at all, and the Purchase and Sale Agreement should include title warranty exceptions that the parties can agree on at the time of contracting. An attorney can work through these issues with the seller during the negotiation of the Purchase and Sale Agreement to ensure that the seller does not contract to convey more than the seller owns.

## **Closing**

At Closing, a seller must deliver certain documents, including a deed, to the buyer or the buyer's attorney. It is not atypical for a buyer's attorney to prepare the seller's closing documents as an accommodation in order to get the transaction closed as quickly as possible. However, sellers should understand that a buyer's attorney will be acting in the buyer's best interests, not the seller's best interests.

For example, although Purchase and Sale Agreements often state the matters that should be exceptions to the title warranties in the deed, many times a buyer's attorney will use a form deed that may have broader warranty language. In addition, title insurance companies require affidavits from sellers associated with construction and mechanics liens. Depending on the factual circumstances, there can be various forms of required affidavits and waivers. The seller should not execute any sworn statement, such as an affidavit, that has not been approved by an attorney acting in the seller's best interest because that attorney can ensure that the correct form is used and that the form contains only accurate facts. Without legal representation, the seller risks certifying to, and assuming liability for, incorrect statements.

## **Conclusion**

Commercial real estate sellers, just like buyers, should engage their own attorney early in the process to ensure their best interests are protected throughout an entire real estate transaction.

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