Due Diligence in Commercial Real Estate Purchase Transactions
Strategies to Identify and Mitigate Risks and Liabilities Pre-Closing

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today’s panel features:
R. Kymn Harp, Partner, Robbins Salomon & Patt, Chicago
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The conference begins at:
1 pm Eastern
12 pm Central
11 am Mountain
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REAL ESTATE LEGAL DUE DILIGENCE:

LOOK BEFORE YOU LEAP

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REAL ESTATE LEGAL DUE DILIGENCE: LOOK BEFORE YOU LEAP

"An ounce of prevention is worth a pound of cure," wrote Henry de Bracton, a thirteenth century English jurist who today is still known for his treatise on English law, as well as the aforementioned quote. He probably was not a real estate developer, even in his spare time, but perhaps he should have been. Buyers of real estate who do not thoroughly investigate the property before purchasing it are destined to get less than they bargained for or even worse to be saddled with liabilities that they did not expect. In this paper we examine the broad categories of due diligence steps a buyer should take before purchasing real estate. The discussion is divided into due diligence items that are common to all real estate transactions, items that are peculiar to purchases of improved real property, and items that are peculiar to purchases of income producing real property. Before you proceed, there is one word of warning. There is no such thing as a due diligence list that fits all situations. The items below are only broad categories of due diligence inquiries that a buyer should make. The list is not comprehensive, and it is not a substitute for proactively considering alternative and additional specific requirements of the transaction.

I. The Basics—Undeveloped Land: What Every Purchaser of Real Estate Must Examine.

A. Title to the Real Property: Are You Really Getting the Property?

In the first year of law school, soon-to-be lawyers learn to compare property rights to a bundle of sticks. The entire bundle of sticks represents all of the ownership
rights that constitute the property. Each individual stick represents one of the individual rights. The sticks in the bundle include minerals interests, surface use rights, water rights, rights to use the property however the owner determines, and many other rights. The owner of the bundle of sticks has the power to give certain individual sticks to others without giving away the whole bundle. For example, the owner of the property can give the stick representing minerals interests to another, while keeping all the other sticks or the owner can agree not to do certain things on the land and by agreement thereby give away to another part of the owner's rights to use the property. Before purchasing real estate, the buyer must know which of these sticks have already been given away by the seller or a predecessor of the seller and consequently which of these sticks the seller cannot convey to the buyer.

The most common way for a buyer to determine which rights the seller of the real property owns and which rights the seller does not own is through a commitment for title insurance. The commitment for title insurance is issued after a title examiner has reviewed the real property records on behalf of the title insurance company and lists all matters of record that affect the real property. By carefully reviewing the items referenced in the title commitment, the buyer can get understand the rights the seller will not be able to convey.

TITLE DILIGENCE ITEM:

- Obtain a commitment for title insurance to insure the buyer's title to the property.
- Understand what the seller can and cannot convey to the buyer by reading carefully both schedule B and schedule C of the commitment for title insurance.
• Read and understand all documents that are recorded against the property that will not be removed prior to the buyer acquiring the real property. Typically, these are the items that are referenced in schedule B of the commitment for title insurance.

• Confirm that the items that are supposed to be removed or satisfied as part of the sale transaction are actually removed or satisfied.

B. **Survey: Is Anyone Else Already Using the Property?**

Closely related to title review is the survey review. A thorough survey will locate the property, locate the recorded documents that affect the property, locate visible and apparent easements, locate improvements to the property, reveal encroachments by others on the property, identify portions of the property that are in the flood plain, as well as other items. There are various categories of surveys available. Generally, a buyer should obtain a "land title survey" that investigates the land for purposes of insuring title.

**SURVEY DILIGENCE ITEM:**

• Have a land title survey prepared.

• Confirm that all items listed in the title commitment are shown on the survey and that the survey certification certifies this.

• Understand the location on the property of third party rights.

• Confirm that the legal description on the survey matches the legal description on the title commitment.

• Make sure the survey is expressly certified to the buyer, buyer's lender, and the title company. Make sure the survey certification is signed and the survey is sealed.

C. **Zoning, Platting and Permitting: Can You Use the Property for the Purposes You Contemplate?**

Before purchasing the property, the buyer must be comfortable that the uses the buyer intends for the property and the improvements will be permitted. The first step toward answering these questions is to determine which governmental entities have jurisdiction over the property so that the requirements of each political subdivision can be examined.

**LAND USE DILIGENCE ITEM:**

- Determine the municipality, county, and other governmental entity with jurisdiction over the property.
- Consider obtaining a zoning letter, if the property is subject to zoning, to confirm the zoning classification.
- If the property is subject to zoning, make sure the current zoning allows the use that the buyer contemplates. If not, confirm that a variance or a change in the zoning can be obtained.
- Determine whether the property is already platted or if it will need to be replatted.
- Verify that there is adequate access to the property.
- Confirm that desired utilities are present or can be obtained.
- If the property is to be improved, consider whether a building permit can be obtained for the improvements contemplated.
D. Environmental Conditions: Will You Incur Liability for Environmental Conditions as the Owner of the Property?

There is a vast and complex body of law, both state and federal, regulating liability for environmental conditions. The first step is to "look" at the property by having a phase one environmental site assessment performed by a well-qualified environmental consultant. Federal law contemplates that a buyer will make "all appropriate inquiries" in investigating the environmental condition of the property. As the term implies, a phase one is performed to help determine what other steps need to be taken. Often the phase one will show that additional investigatory steps are not warranted. Conversely, the phase one may show that there is a likelihood of environmental contamination or other compliance issues that need further investigation. Based on the findings of a phase one, the buyer can begin to evaluate whether the buyer is willing to take on the risk of environmental liability that comes with the purchase of any real property.

Keep in mind, however, that a phase one does not cover everything that the buyer will need to consider. It does not assess the condition of improvements to the property, such as a building. As a result it will not determine such things as the existence of lead-based paint and asbestos. It does not analyze whether any features on the property have been in compliance with applicable regulations, such as whether an underground storage tank has been tested timely and reports have been timely filed. All of these items can have significant impact on the liabilities that the buyer is incurring.
ENVIRONMENTAL DILIGENCE ITEM:

- Obtain from the seller and examine all past environmental investigations and all governmental correspondence concerning environmental matters.
- Discover all past uses of the property.
- Review any compliance reports filed with respect to the property, such as, for example, with respect to any underground storage tanks, and all testing and record keeping required with respect to the property.
- Obtain a current phase one site assessment for the property.
- Consider whether additional environmental studies are required or prudent.
- Determine whether any underground storage tanks have been on the property.
- Determine whether there is a "wetlands" on the property, and, if so, determine compliance with law and the impact on development plans.
- If there are improvements on the property, investigate compliance of the improvements with environmental law also, such as for example whether there is lead-based paint or asbestos present.

E. *Ad Valorem* Taxes: Will the Buyer be Taxed on the Same Basis as the Seller?

Initially, the buyer must verify that *ad valorem* taxes are currently paid. However, the inquiry does not end there. The buyer must gain an understanding of how the property has been taxed in the past and whether the buyer can continue any existing advantages after the buyer purchases the property. For example, land used for agricultural purposes may have been valued under an agricultural, special use valuation.
Once the land no longer qualifies for the special use valuation, the tax valuation will increase and the land may be subject to "roll-back taxes" that impose additional taxes.

**AD VALOREM TAX DILIGENCE ITEM:**

- Verify that taxes have been paid.
- Consider whether there is a possibility of "roll back taxes."
- Consider whether the valuation of the property or taxes on the property will be increased because of the change in the owner or because exemptions from or caps on taxes will no longer be available.

II. Improved Property: Additional Items that Must be Investigated When Improvements Have Been Made to the Property.

In this context "improvements" to real property means anything that has been constructed on the property, such as buildings, driveways, sidewalks, fences, and other similar items. The existence of improvements on the property creates additional risks and potential liabilities for the owner. For example, improvements may need to be repaired or replaced, may not comply with applicable laws, and may encroach upon property rights of third parties.

A. **Survey: Do any of the Improvements Encroach?**

As noted above, the survey should locate all improvements on the property and show whether the improvements are encroaching on property lines, building setback lines, easements or other property rights. If there are encroachments, the buyer must determine how it will resolve the matter before buying the property.
B. Condition: What is the Condition of the Improvements?

The buyer of improvements must investigate the condition of the improvements, confirming such things as the issuance of certificates of occupancy for buildings, compliance with applicable codes, particularly if the buyer intends to construct improvements for which building permits will be necessary, and compliance of the property with the Americans with Disabilities Act for properties that will be places of public accommodation.

CONDITION OF IMPROVEMENTS DILIGENCE ITEM:

- Confirm the existence of certificates of occupancy for buildings.
- Consider whether improvements are subject to the Americans with Disabilities Act and confirm compliance.
- Consider whether property is in compliance with applicable codes, particularly if additional construction is contemplated.
- Determine whether improvements are in compliance with environmental laws. Consider in particular whether lead-based paint and asbestos are in the improvements.

C. Title to Personal Property: Are You Really Getting the Personal Property?

When improvements are part of the purchase transaction, there is often personal property that is included, whether as farm or ranch equipment, furnishings, or maintenance equipment. If the transaction includes items of personal property, then the same issues concerning title arise with regard to the personal property as arise with regard to the real property. Keep in mind that the title insurance policy covers only real
property. It does not cover personal property. The buyer must confirm that the seller has title to the personal property free of any security interests of other parties. In order to determine this, the buyer should obtain a search of both the local and central Uniform Commercial Code records.

DILIGENCE ITEM: TITLE TO PERSONAL PROPERTY

- Confirm that there are no security interests in any personal property that is being acquired as part of the transaction by obtaining a search of the applicable Uniform Commercial Code records and by examining any certificated title documents.

III. Income Producing Property: You're Really Buying a Business

In many ways, when the buyer is buying income producing property with the intent to continue to use the property in the same way, the buyer is no longer merely purchasing land, but is instead buying a business that happens to be "operated" through the ownership of real estate. This is true whether the buyer is buying a fully leased apartment complex or grass lands from which the buyer will sell hay. Many times, the purchase price is not determined by the cost of the improvements or the value of the underlying land, but instead by the value of the cash flow the income producing property produces. The more the purchase price is based upon the past performance of the income producing property, the more the transaction is like the purchase of a business.

A. Leases: Will the Cash Continue to Flow?

The most common way of obtaining current cash flow from real property is through a lease. For an apartment complex, there may be hundreds of leases. For other properties, there may be very few leases. Regardless of the number of leases, the quality
of the lease and the quality of the tenant are keys in determining how likely it is that the cash flow will continue as expected.

LEASES DILIGENCE ITEM:

- Obtain a copy of all leases and information about all tenants.
- Review the form of the leases to confirm that there are no unacceptable terms.
- Determine whether security deposits have been made and obtain transfer of the security deposits from the seller to the buyer.
- Whenever possible, obtain written estoppel certificates from tenants to confirm the existence and form of the lease, absence of defaults, absence of "extra-contractual" obligations of the landlord, and other items of concern.

B. Other Contracts: Are there Other Agreements Affecting the Income Producing Property?

Income producing property often has management agreements, maintenance agreements, warranties, and other agreements that affect the property. These should be discovered and reviewed.

OTHER AGREEMENTS DILIGENCE ITEM:

- Obtain from the seller copies of all warranties, management agreements, maintenance agreements and similar agreements applicable to the property and the business being conducted on it.
- Determine whether such agreements can be terminated or assigned.
- Analyze the terms of any such agreements that are to be continued to determine acceptability.
IV. Conclusion.

Properly conducting due diligence is arguably the most important part of any real estate transaction. It is only through effective due diligence that the buyer can identify the risks and potential liabilities and properly analyze the transaction.

If you would like more information on this topic, please contact the author, Paul Johnson, at pjohnson@shannongracey.com.
10 THINGS EVERY BUYER NEEDS*
(*To Close a Commercial Real Estate Loan)

For nearly 30 years, I have represented borrowers and lenders in commercial real estate transactions. During this time it has become apparent that many Buyers do not have a clear understanding of what is required to document a commercial real estate loan. Unless the basics are understood, the likelihood of success in closing a commercial real estate transaction is greatly reduced.

Throughout the process of negotiating the sale contract, all parties must keep their eye on what the Buyer's lender will reasonably require as a condition to financing the purchase. This may not be what the parties want to focus on, but if this aspect of the transaction is ignored, the deal may not close at all.

Sellers and their agents often express the attitude that the Buyer's financing is the Buyer's problem, not theirs. Perhaps, but facilitating Buyer's financing should certainly be of interest to Sellers. How many sale transactions will close if the Buyer cannot get financing?

This is not to suggest that Sellers should intrude upon the relationship between the Buyer and its lender, or become actively involved in obtaining Buyer's financing. It does mean, however, that the Seller should understand what information concerning the property the Buyer will need to produce to its lender to obtain financing, and that Seller should be prepared to fully cooperate with the Buyer in all reasonable respects to produce that information.

Basic Lending Criteria

Lenders actively involved in making loans secured by commercial real estate typically have the same or similar documentation requirements. Unless these requirements can be satisfied, the loan will not be funded. If the loan is not funded, the sale transaction will not likely close.

For Lenders, the object, always, is to establish two basic lending criteria:

1. The ability of the borrower to repay the loan; and

2. The ability of the lender to recover the full amount of the loan, including outstanding principal, accrued and unpaid interest, and all reasonable costs of collection, in the event the borrower fails to repay the loan.

In nearly every loan of every type, these two lending criteria form the basis of the lender's willingness to make the loan. Virtually all documentation in the loan closing process points to satisfying these two criteria. There are other legal requirements and

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regulations requiring lender compliance, but these two basic lending criteria represent, for the lender, what the loan closing process seeks to establish. They are also a primary focus of bank regulators, such as the FDIC in verifying that the lender is following safe and sound lending practices.

Great ability to repay may allow for the borrower to obtain a greater loan to value ratio on a particular loan, or may allow a borrower to obtain a tighter debt coverage ratio for a particular project, and may even result in a lower interest rate on a loan because of a lower perceived risk of default, but it will seldom result in lender accepting inadequate collateral resulting in a loan which is even partially unsecured. This may not be always true, but it is usually true.

Few lenders engaged in commercial real estate lending are interested in making loans without collateral sufficient to assure repayment of the entire loan, including outstanding principal, accrued and unpaid interest, and all reasonable costs of collection, even where the borrower's independent ability to repay is substantial. As we have seen time and again, changes in economic conditions, whether occurring from ordinary economic cycles, changes in technology, natural disasters, divorce, death, and even terrorist attack or war, can change the "ability" of a borrower to pay. Prudent lending practices require adequate security for any loan of substance.

**Documenting the Loan**

There is no magic to documenting a commercial real estate loan. There are issues to resolve and documents to draft, but all can be managed efficiently and effectively if all parties to the transaction recognize the legitimate needs of the lender and plan the transaction and the contract requirements with a view toward satisfying those needs within the framework of the sale transaction.

While the credit decision to issue a loan commitment focuses primarily on the ability of the borrower to repay the loan; the loan closing process focuses primarily on verification and documentation of the second stated criteria: confirmation that the collateral is sufficient to assure repayment of the loan, including all principal, accrued and unpaid interest, late fees, attorneys fees and other costs of collection, in the event the borrower fails to voluntarily repay the loan.

With this in mind, most commercial real estate lenders approach commercial real estate closings by viewing themselves as potential "back-up buyers". They are always testing their collateral position against the possibility that the Buyer/Borrower will default, with the lender being forced to foreclose and become the owner of the property. Their documentation requirements are designed to place the lender, after foreclosure, in as good a position as they would require at closing if they were a sophisticated direct buyer of the property; with the expectation that the lender may need to sell the property to a future sophisticated buyer to recover repayment of their loan.

**Top 10 Lender Deliveries**

In documenting a commercial real estate loan, the parties must recognize that virtually all commercial real estate lenders will require, among other things, delivery of the following "property documents":

1. Operating Statements for the past 3 years reflecting income and expenses of operations, including cost and timing of scheduled capital improvements;

2. Certified copies of all Leases;

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3. A Certified Rent Roll as of the date of the Purchase Contract, and again as of a date within 2 or 3 days prior to closing;

4. Estoppel Certificates signed by each tenant (or, typically, tenants representing 90% of the leased GLA in the project) dated within 15 days prior to closing;

5. Subordination, Non-Disturbance and Attornment ("SNDA") Agreements signed by each tenant;

6. An ALTA lender's title insurance policy with required endorsements, including, among others, an ALTA 3.1 Zoning Endorsement (modified to include parking), ALTA Endorsement No. 4 (Contiguity Endorsement insuring the mortgaged property constitutes a single parcel with no gaps or gores), and ALTA Access Endorsement No. 17 (insuring that the mortgaged property has access to public streets and ways for vehicular and pedestrian traffic);

7. Copies of all documents of record which are to remain as encumbrances following closing, including all easements, restrictions, party wall agreements and other similar items;

8. A current Plat of Survey prepared in accordance with 2005 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys certified to the lender, Buyer and the title insurer, including items 1 through 4, 6, 7(a), 7(b)(1), 8 through 11(a) and 14 from the Surveyor's "Optional Survey Responsibilities and Specifications" referred to as "Table A";

9. A satisfactory Environmental Site Evaluation Report (Phase I Audit) and, if appropriate under the circumstances, a Phase 2 Audit, to demonstrate the property is not burdened with any recognized environmental defect; and

10. A Site Improvements Inspection Report to evaluate the structural integrity of improvements.

To be sure, there will be other requirements and deliveries the Buyer will be expected to satisfy as a condition to obtaining funding of the purchase money loan, but the items listed above are virtually universal. If the parties do not draft the purchase contract to accommodate timely delivery of these items to lender, the chances of closing the transaction are greatly reduced.

Planning for Closing Costs

The closing process for commercial real estate transactions can be expensive. In addition to drafting the Purchase Contract to accommodate the documentary requirements of the Buyer's lender, the Buyer and his advisors need to consider and adequately plan for the high cost of bringing a commercial real estate transaction from contract to closing.

If competent Buyer's counsel and competent lender's counsel work together, each understanding what is required to be done to get the transaction closed, the cost of closing can be kept to a minimum, though it will undoubtedly remain substantial. It is not unusual for closing costs for a commercial real estate transaction with even typical closing issues to run thousands of dollars. Buyers must understand this and be prepared to accept it as a cost of doing business.

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Sophisticated Buyers understand the costs involved in documenting and closing a commercial real estate transaction and factor them into the overall cost of the transaction, just as they do costs such as the agreed upon purchase price, real estate brokerage commissions, loan brokerage fees, loan commitment fees and the like.

Closing costs can constitute significant transaction expenses and must be factored into the Buyer's business decision-making process in determining whether to proceed with a commercial real estate transaction. They are inescapable expenditures that add to Buyer's cost of acquiring commercial real estate. They must be taken into account to determine the "true purchase price" to be paid by the Buyer to acquire any given project and to accurately calculate the anticipated yield on investment.

Some closing costs may be shifted to the Seller through custom or effective contract negotiation, but many will unavoidably fall on the Buyer. These can easily total tens of thousands of dollars in an even moderately sized commercial real estate transaction in the $1,000,000 to $5,000,000 price range.

Costs often overlooked, but ever present, include title insurance with required lender endorsements, an ALTA Survey, environmental site assessment(s), a Site Improvements Inspection Report and, somewhat surprisingly, Buyers attorney's fees.

For reasons that escape me, inexperienced Buyers of commercial real estate, and even some experienced Buyers, nearly always underestimate attorneys fees required in any given transaction. This is not because they are unpredictable, since the combined fees a Buyer must pay to its own attorney and to the Lender's attorney typically aggregate around 1% of the Purchase Price.

This 1% figure consistently rings true, even though attorney's fees in commercial real estate transactions are typically billed hourly, rather than on a percentage basis. In the hundreds of commercial real estate transactions I have been involved in, I have found that hourly based attorneys fees payable by the Buyer/Borrower at closing typically range between .80% and 1.10% of the Purchase price, depending on complexity of the transaction involved. For commercial real estate transactions with a purchase price smaller than $1,000,000, the percentage is typically higher. When the purchase price is higher than about $8,000,000, the percentage is typically smaller. The percentage usually breaks down as follows: Lender's attorney's fees (which the Borrower must typically pay) average between .25% and .30% of the loan amount. Fees for Buyer's attorney usually average between .65% and .85% of the Purchase Price.

Perhaps it stems from wishful thinking associated with the customarily low attorneys’ fees charged by attorneys handling residential real estate closings. In reality, the level of sophistication and the amount of specialized work required to fully investigate and document a transaction for a Buyer of commercial real estate makes comparisons with residential real estate transactions inappropriate. Sophisticated commercial real estate investors understand this. Less sophisticated commercial real estate buyers must learn how to properly budget this cost.

**Conclusion**

Concluding negotiations for the sale/purchase of a substantial commercial real estate project is a thrilling experience but, until the transaction closes, it is only ink on paper. To get to closing, the contract must anticipate the documentation the Buyer will be required to deliver to its lender to obtain purchase money financing. The Buyer must also be aware of the substantial costs to be incurred in preparing for closing so that Buyer may reasonably plan its cash requirements for closing. With a clear understanding of what is required, and advanced planning to satisfy those requirements, the likelihood of successfully closing will be greatly enhanced.
DUE DILIGENCE CHECKLISTS
FOR
COMMERCIAL REAL ESTATE TRANSACTIONS

Are you planning to purchase, finance or develop any of the following types of Commercial or Industrial Real Estate?

- Shopping Center?
- Office Building?
- Restaurant/Banquet property?
- Parking Lot/Parking garage?
- Retail Store?
- Gas Station?
- Manufacturing facility?
- Distribution Center?
- Logistics Terminal?
- Medical Building?
- Nursing Home?
- Hotel/Motel?
- Mixed-Use?
- Pharmacy?
- Special Use facility?
- Other?

A KEY element to successfully investing in commercial or industrial real estate is performing an adequate Due Diligence Investigation prior to becoming legally bound to acquire the property. An adequate Due Diligence Investigation will assure awareness of all material facts relevant to the intended use or disposition of the property after closing.

The following checklists will help you conduct a focused and meaningful Due Diligence Investigation.

BASIC DUE DILIGENCE CONCEPTS

Caveat Emptor: Let the Buyer beware.

Consumer protection laws applicable to home purchases seldom apply to commercial real estate transactions. The rule that a Buyer must examine, judge, and test for himself, applies to the purchase of commercial real estate.

Due Diligence: “Such a measure of prudence, activity, or assiduity, as is proper to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending upon the relative facts of the special case.” Black’s Law Dictionary: West Publishing Company.

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Contractual representations and warranties are NOT a substitute for Due Diligence. Breach of representations and warranties = Litigation, time and $$$$$.

The point of commercial real estate due diligence is to avoid transaction surprises and confirm the Property can be used as intended.

* * *

WHAT DILIGENCE IS DUE?

The scope, intensity and focus of any Due Diligence Investigation of commercial or industrial real estate depends upon the objectives of the party for whom the investigation is conducted. These objectives may vary depending upon whether the investigation is conducted for the benefit of: (i) a Strategic Buyer (or long-term lessee); (ii) a Financial Buyer; (iii) a Developer; or (iv) a Lender.

If you are a Seller, understand that to close the transaction your Buyer and its Lender must address all issues material to their respective objectives – some of which require information only you, as Owner, can adequately provide.

GENERAL OBJECTIVES:

(i) A “Strategic Buyer” (or long-term lessee) is acquiring the property for its own use and must verify that the property is suitable for that intended use.

(ii) A “Financial Buyer” is acquiring the property for the expected return on investment generated by the property’s anticipated revenue stream, and must determine the amount, velocity and durability of the revenue stream. A sophisticated Financial Buyer will likely calculate its yield based upon discounted cash-flows rather than the much less precise capitalization rate (“Cap. Rate”), and will need adequate financial information to do so.

(iii) A “Developer” is seeking to add value by changing the character or use of the property – usually with a short-term to intermediate-term exit strategy to dispose of the property; although, a Developer might plan to hold the property long term as a Financial Buyer after development or redevelopment. The Developer must focus on whether the planned change in character or use can be accomplished in a cost-effective manner.

(iv) A “Lender” is seeking to establish two basic lending criteria:

(1) “Ability to Repay” - The ability of the property to generate sufficient revenue to repay the loan on a timely basis; and

(2) “Sufficiency of Collateral” - The objective disposal value of the collateral in the event of a loan default, to assure adequate funds to repay the loan, carrying costs and costs of collection in the event forced collection becomes necessary.

The amount of diligent inquiry due to be expended (i.e. “Due Diligence”) to investigate any particular commercial or industrial real estate project is the amount of inquiry required to answer each of the following questions to the extent relevant to the objectives of the party conducting the investigation:

(Continued on page 3)
I. **THE PROPERTY:**

1. Exactly what PROPERTY does Purchaser believe it is acquiring?
   - Land?
   - Building?
   - Fixtures?
   - Other Improvements?
   - Other Rights?
   - The entire fee title interest including all air rights and subterranean rights?
   - All development rights?

2. What is Purchaser’s planned use of the Property?

3. Does the physical condition of the Property permit use as planned?
   - Commercially adequate access to public streets and ways?
   - Sufficient parking?
   - Structural condition of improvements?
   - Environmental contamination?
     - Innocent Purchaser defense vs. exemption from liability
     - All Appropriate Inquiry

4. Is there any legal restriction to Purchaser’s use of the Property as planned?
   - Zoning?
   - Private land use controls?
   - Americans with Disabilities Act?
   - Availability of licenses?
   - Liquor license?
   - Entertainment license?
   - Outdoor dining license?
   - Drive through windows permitted?
   - Other impediments?

5. How much does Purchaser expect to pay for the property?

6. Is there any condition on or within the Property that is likely to increase Purchaser’s effective cost to acquire or use the Property?
   - Property owner’s assessments?
   - Real estate tax in line with value?
   - Special Assessment?
   - Required user fees for necessary amenities?
   - Drainage?
   - Access?
   - Parking?
   - Other?

7. Any encroachments onto the Property, or from the Property onto other lands?

8. Are there any encumbrances on the Property that will not be cleared at Closing?
   - Easements?
   - Covenants Running with the Land?
   - Liens or other financial servitudes?
   - Leases?

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9. If the Property is subject to any Leases, are there any:
   • Security Deposits?
   • Options to Extend Term?
   • Options to Purchase?
   • Rights of First Refusal?
   • Rights of First Offer?
   • Maintenance Obligations?
   • Duty of Landlord to provide utilities?
   • Real estate tax or CAM escrows?
   • Delinquent rent?
   • Pre-Paid rent?
   • Tenant mix/use controls?
   • Tenant exclusives?
   • Tenant parking requirements?
   • Automatic subordination of Lease to future mortgages?
   • Other material Lease terms?

10. New Construction?
    • Availability of construction permits?
    • Soil conditions?
    • Utilities?
    • NPDES (National Pollutant Discharge Elimination System) Permit?
        • Phase II effective March 2003 – Permit required if earth is disturbed on one acre
          or more of land.
        • If applicable, Storm Water Pollution Prevention Plan (SWPPP) is required.

II. THE SELLER:

1. Who is the Seller?
   • Individual?
   • Trust?
   • Partnership?
   • Corporation?
   • Limited Liability Company?
   • Other legally existing entity?

2. If other than natural person, does Seller validly exist and is Seller in good standing?

3. Does the Seller own the Property?

4. Does Seller have authority to convey the Property?
   • Board of Director Approvals?
   • Shareholder or Member approval?
   • Other consents?
   • If foreign individual or entity, are any special requirements applicable?
     • Qualification to do business in jurisdiction of Property?
     • Federal Tax Withholding?
     • US Patriot Act compliance?

5. Who has authority to bind Seller?

6. Are sale proceeds sufficient to pay off all liens?

(Continued on page 5)
III. THE PURCHASER:

1. Who is the Purchaser?

2. What is the Purchaser/Grantee’s exact legal name?

3. If Purchaser/Grantee is an entity, has it been validly created and is it in good standing?
   • Articles or Incorporation - Articles of Organization
   • Certificate of Good Standing

4. Is Purchaser/Grantee authorized to own and operate the Property and, if applicable, finance acquisition of the Property?
   • Board of Director Approvals?
   • Shareholder or Member approval?
   • If foreign individual or entity, are any special requirements applicable?
     • Qualification to do business in jurisdiction of the Property?
     • US Patriot Act compliance?
     • Bank Secrecy Act/Anti-Money Laundering compliance?

5. Who is authorized to bind the Purchaser/Grantee?

IV. PURCHASER FINANCING:

A. BUSINESS TERMS OF THE LOAN:

1. What loan terms have the Borrower and its Lender agreed to?
   • What is the amount of the loan?
   • What is the interest rate?
   • What are the repayment terms?
   • What is the collateral?
     • Commercial real estate only?
     • Real estate and personal property together?
     • First lien?
     • A junior lien?
   • Is it a single advance loan?
   • A multiple advance loan?
   • A construction loan?
   • If it is a multiple advance loan, can the principal be re-borrowed once repaid prior to maturity of the loan; making it, in effect, a revolving line of credit?
   • Are there reserve requirements?
     • Interest reserves?
     • Repair reserves?
     • Real estate tax reserves?
     • Insurance reserves?
     • Environmental remediation reserves?
     • Other reserves?

2. Are there requirements for Borrower to open business operating accounts with the Lender? If so, is the Borrower obligated to maintain minimum compensating balances?

3. Is the Borrower required to pledge business accounts as additional collateral?

(Continued on page 6)
4. Are there early repayment fees or yield maintenance requirements (each sometimes referred to as “pre-payment penalties”)?

5. Are there repayment blackout periods during which Borrower is not permitted to repay the loan?

6. Is a profit participation payment to Lender required upon disposition?

7. Is there a Loan Commitment fee or “good faith deposit” due upon Borrower’s acceptance of the Loan Commitment?

8. Is there a loan funding fee or loan brokerage fee or other loan fee due Lender or a loan broker at closing?

9. What are the Borrower’s expense reimbursement obligations to Lender? When are they due? What is the Borrower’s obligation to pay Lender’s expenses if the loan does not close?

**B. DOCUMENTING THE COMMERCIAL REAL ESTATE LOAN**

Does Purchaser have all information necessary to comply with the Lender’s loan closing requirements?

Not all loan documentation requirements may be known at the outset of a transaction, although most commercial real estate loan documentation requirements are fairly typical. Some required information can be obtained only from the Seller. Production of that information to Purchaser for delivery to its lender must be required in the purchase contract.

As guidance to what a commercial real estate lender may require, the following sets forth a typical Closing Checklist for a loan secured by commercial real estate.

**Commercial Real Estate Loan Closing Checklist**

1. Promissory Note

2. Personal Guaranties (which may be full, partial, secured, unsecured, payment guaranties, collection guaranties or a variety of other types of guarantees as may be required by Lender)

3. Loan Agreement (often incorporated into the Promissory Note and/or Mortgage in lieu of being a separate document)

4. Mortgage (sometimes expanded to be a Mortgage, Security Agreement and Fixture Filing)

5. Assignment of Rents and Leases.

6. Security Agreement

7. Financing Statement (sometimes referred to as a “UCC-1”, or “Initial Filing”).

8. Evidence of Borrower’s Existence In Good Standing; including :

   (a) Certified copy of organizational documents of borrowing entity (including Articles of Incorporation, if Borrower is a corporation; Articles of Organization and written Operating Agreement, if Borrower is a limited liability company; certified copy of trust agreement with all amendments, if Borrower is a land trust or other trust; etc.)

   (b) Certificate of Good Standing (if a corporation) or Certificate of Existence (if a limited partnership) or Certificate of Qualification to Transact Business (if Borrower is an entity doing business in a State other than its State of formation)
9. Evidence of Borrower’s Authority to Borrow; including:
   (a) Borrower’s Certificate
   (b) Certified Resolutions
   (c) Incumbency Certificate

10. Satisfactory Commitment for Title Insurance (which will typically require, for analysis by the Lender, copies of all documents of record appearing on Schedule B of the title commitment which are to remain after closing), with required commercial title insurance endorsements, often including:
   (a) Affirmative Creditors Rights Endorsement (extending coverage over policy exclusion 7 and policy exclusions 3(a) and 3(d) as they relate to creditor’s rights matters) [if available]
   (b) ALTA 3.1 Zoning Endorsement modified to include parking [although if the property is a multi-user property, such as a retail shopping center, an ALTA 3.0 Zoning Endorsement may be appropriate]
   (c) ALTA Comprehensive Endorsement 1
   (d) Location Endorsement (street address)
   (e) Access Endorsement (vehicular access to public streets and ways)
   (f) Contiguity Endorsement (the insured land comprises a single parcel with no gaps or gores)
   (g) PIN Endorsement (insuring that the identified real estate tax permanent index numbers are the only applicable PIN numbers affecting the collateral and that they relate solely to the real property comprising the collateral)
   (h) Usury Endorsement (insuring that the loan does not violate any prohibitions against excessive interest charges)
   (i) other title insurance endorsements applicable to protect the intended use and value of the collateral, as may be determined upon review of the Commitment for Title Insurance and Survey or arising from the existence of special issues pertaining to the transaction or the Borrower.

11. Current ALTA/ACSM Land Title Survey (3 sets), prepared in accordance with the 2005 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys including items 1 through 4, 6, 7(a), 7(b)(1), 8 through 11(a) and 14 from “TABLE A: Optional Survey Responsibilities and Specifications” [generally referred to simply as “Table A”]

12. Current Rent Roll

13. Certified copy of all Leases (4 sets – 1 each for Buyer, Buyer’s attorney, Title Company and Lender)

14. Lessee Estoppel Certificates

15. Lessee Subordination, Non-Disturbance and Attornment Agreements [sometimes referred to simply as “SNDAs”]
16. UCC, Judgment, Pending Litigation, Bankruptcy and Tax Lien Search Report

17. Appraisal - complying with Title XI of FIRREA (Financial Institutions Reform, Recovery and Enforcement Act of 1989, as amended)

18. Environmental Site Assessment Report (sometimes referred to as Environmental Phase I and/or Phase 2 Audit Reports)

19. Environmental Indemnity Agreement (signed by Borrower and guarantors)

20. Site Improvements Inspection Report

21. Evidence of Hazard Insurance naming Lender as the Mortgagee/Lender Loss Payee; and Liability Insurance naming Lender as an “additional insured” (sometimes listed as simply “Acord 27 and Acord 25, respectively)

22. Legal Opinion of Borrower’s Attorney

23. Credit Underwriting documents, such as signed tax returns, property operating statements, etc. as may be specified by Lender

24. Compliance Agreement (sometimes also called an Errors and Omissions Agreement), whereby the Borrower agrees to correct, after closing, errors or omissions in loan documentation.

* * * * *

It is useful to become familiar with the Lender’s loan documentation requirements as early in the transaction as practical. The requirements will likely be set forth with some detail in the lender’s Loan Commitment – which is typically much more detailed than most loan commitments issued in residential transactions.

Conducting the Due Diligence Investigation in a commercial real estate transaction can be time consuming and expensive in all events.

If the loan requirements cannot be satisfied, it is better to make that determination during the contractual “due diligence period” – which typically provides for a so-called “free out” – rather than at a later date when the earnest money may be at risk of forfeiture or when other liability for failure to close may attach.

CONCLUSION

Conducting an effective Due Diligence Investigation in a commercial or industrial real estate transaction to discover all material facts and conditions affecting the Property and the transaction is of critical importance.

Unlike owner occupied residential real estate, when a house can nearly always be occupied as the purchaser’s home, commercial and industrial real estate acquired for business use or for investment is impacted by numerous factors that may limit its use and value.

The existence of these factors and their impact on a Purchaser’s ability to use the Property as intended can only be discovered through diligent and focused investigation and attention to detail.

Exercise Due Diligence.

If you need assistance, please ask for help.
“IT AIN’T ROCKET SCIENCE” BUT . . .
YOU DO NEED TO KNOW WHAT YOU’RE DOING

Albert Einstein: “Everything should be made as simple as possible, but not simpler.”

R. Kymn Harp: \[ D^2 = I + F\eta \]

[Due diligence = Insight + Focused Investigation]

I’m a big fan of Albert Einstein. He’s one of my intellectual heroes. He could see and understand what others could barely imagine. His greatest gift, I believe, was his ability to find answers to questions others didn’t even know existed.

Real estate due diligence requires insight as well. To find the answers, you must know the questions.

Of course, I’m no Albert Einstein but, then, real estate due diligence is not inter-galactic science.

The term itself is confusing. “Due diligence” is used grammatically like it’s a thing or a process. “We need to complete our due diligence”; or “Let me review your due diligence”; or “due diligence is expensive”. I admit, I use it the same way.

In fact, however, “due diligence” is a standard of conduct. Due diligence refers to the degree of diligence we should exercise to investigate and analyze all important issues facing a particular transaction. That is to say, the degree of diligence that is “due” under the circumstances.

This definition has two important components:

1. a focus on “important issues”; and
2. the degree of diligence appropriate under the circumstances of the particular transaction.

The art of the deal, so to speak, is in understanding what is “important” and what degree of investigation is due.

Failure to accurately identify these two threshold considerations will lead to one of two outcomes. The due diligence investigation will either be: (1) incomplete – and therefore ineffective to discover and resolve the important transaction risks it is intended to protect (Continued on page 2)
against; or (2) overly broad – in which case it will be more time consuming and expensive than it needs to be. Either way, its value is diminished.

Due diligence can be expensive. We need to avoid making it more expensive than necessary.

So, how do we make sure we get full value for our due diligence dollars? By making sure we know the right questions to ask, and then answering them.

This requires two preliminary sets of questions:

First: What is the vision for this property? Why is it being acquired, and how will it be used?

Second: What is necessary to be known in order to confirm the vision can be fulfilled?

To be sure, we must know the first to answer the second. It is in answering the second that due diligence must be exercised.

For guidance, ask for a copy of my article: “Due Diligence Checklists for Commercial Real Estate Transactions”.

For commercial real estate, there are four areas of concern:

1. Market Demand
2. Access
3. Use
4. Finances

Once the vision is clear, addressing these four areas of concern will determine whether that vision can be fulfilled. Within these four areas of concern we will find all the questions that need to be asked and answered to determine the feasibility of any commercial real estate transaction or project. How straightforward is that?

So what do these areas of concern entail? In simple terms, they can be summarized by a description of the inquiry they present.

1. Market Demand

“Market demand” asks this question: Is the proposed project needed or wanted by target consumers in the geographic area within which the property is located?

Market demand is the most fundamental of the four aspects of commercial real estate. If there is no market demand, the transaction or project should not go forward. If you are developing, financing or investing in a real estate project, make sure there is market demand for what is being offered. If you are a strategic user intending to occupy and use the property yourself, market demand may be satisfied by your own business needs. If you are investing on speculation, be sure you know the demand of your intended market.

(Continued on page 3)
Determining market demand seldom involves a legal question. No attorney time is necessary. [See? I’m saving you money already.]

2. **Access**

“Access” asks this question: Assuming adequate market demand to justify the proposed transaction or project, can target consumers seeking the goods or services to be offered at or from the property get to it with ease? This aspect includes evaluation of:

   a. existing or proposed highways, streets, and drives that will serve the site;
   b. availability of in-and-out curb cuts for consumers and for delivery trucks and vans;
   c. vehicular traffic flow to, from, and within the project site;
   d. volume and convenience of pedestrian traffic;
   e. ability of the project to accommodate the needs of the disabled in a manner compliant with Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §12181, et seq.;
   f. adequacy of available parking (which, for business reasons, may need to be greater than the minimum required for zoning);
   g. availability of public transportation; and
   h. all other factors that may affect the flow of consumers and users to and from the site.

3. **Use**

“Use” asks this question: Can the property be used as intended? This aspect includes an inquiry into:

   a. applicable zoning and private land use controls;
   b. availability of utilities;
   c. site topography;
   d. quality of soil compaction to enable improvement using cost-effective methods of construction;
   e. evaluation of the environmental condition of the property to determine whether environmental impediments exist that would prevent use of the property as intended absent remediation, institutional controls or environmental impact mitigation; and
   f. all other factors that may prevent the site from being used as intended.

4. **Finances**

“Finances” asks these questions: (a) Can funds be obtained to acquire, construct, and operate the project? and (b) Will the investor receive an adequate return on investment to justify proceeding with the transaction or project?

To answer these questions we must know the cost of acquisition or development and the net operating income and capital recovery expected to be generated by the project.

We must determine whether costly environmental remediation or institutional controls will be required; the amount of applicable user fees; environmental impact mitigation costs, if any; real

(Continued on page 4)
estate taxes; special assessments; tenant allowance or build-out requirements; and all other factors having an economic impact.

Although finances are primarily a business concern, certain aspects of project finance do fall within the realm of legal due diligence. Thus the reference to one-half of the Finances concern being within the realm of attorney conducted due diligence.

Documentation of equity investments and project loans, as well as hybrids such as mezzanine financing, demand the attention of legal counsel.

If the property is leased, an evaluation of the amount, velocity and durability of the revenue stream and any financial commitments of the owner/landlord are often considered by counsel.

Certainly, if public money is sought to reduce the net cost of development, legal counsel is required.

[For more information on obtaining government money for your project, particularly if it has environmental concerns, ask for a copy of my free booklet: “BROWNFIELD DEVELOPMENT: PUBLIC MONEY FOR PRIVATE DEVELOPMENT”.

Other Due Diligence Concerns

The four areas of concern described above pertain to the “real estate” aspects of the transaction. If you are dealing with commercial real estate, your due diligence must focus on these issues.

Every capital transaction has other due diligence concerns as well. These other concerns are beyond the scope of this article, but may include issues pertaining to entity structure, authority of the parties, income and capital gains taxation and tax deferments, securities, and the overall structure of the transaction, to name just a few.

Commercial real estate due diligence is not rocket science but . . .

. . . it certainly helps if you know what you’re looking for.

Thanks for listening,

Kymn
KEYS TO CLOSING
A Commercial Real Estate Closing

Anyone who thinks Closing a commercial real estate transaction is a clean, easy, stress-free undertaking has never closed a commercial real estate transaction. Expect the unexpected, and be prepared to deal with it.

I may not be particularly good at warm and fuzzy small talk, and I may not charm your socks off with my charisma, but give me a complex commercial real estate deal to close and I'll get it done.

I've been closing commercial real estate transactions for nearly 30 years. I grew up in the commercial real estate business.

My father was a “land guy”. He assembled land, put in infrastructure and sold it for a profit. His mantra: “Buy by the acre, sell by the square foot.” From an early age, he drilled into my head the need to “be a deal maker; not a deal breaker.” This was always coupled with the admonition: “If the deal doesn’t close, no one is happy.” His theory was that attorneys sometimes “kill tough deals” simply because they don’t want to be blamed if something goes wrong.

A key point to understand is that commercial real estate Closings do not “just happen”; they are made to happen. There is a time-proven method for successfully Closing commercial real estate transactions. That method requires adherence to the four KEYS TO CLOSING outlined below:

KEYS TO CLOSING

1. HAVE A PLAN: This sounds obvious, but it is remarkable how many times no specific Plan for Closing is developed. It is not a sufficient Plan to merely say: “I like a particular piece of property; I want to own it.” That is not a Plan. That may be a goal, but that is not a Plan.

A Plan requires a clear and detailed vision of what, specifically, you want to accomplish, and how you intend to accomplish it. For instance, if the objective is to acquire a large warehouse/light manufacturing facility with the intent to convert it to a mixed use development with first floor retail, a multi-deck parking garage and upper level condominiums or apartments, the transaction Plan must include all steps necessary to get from where you are today to where you need to be to fulfill your objective. If the

(Continued on page 2)
intent, instead, is to demolish the building and build a strip shopping center, the Plan will require a different approach. If the intent is to simply continue to use the facility for warehousing and light manufacturing, a Plan is still required, but it may be substantially less complex.

In each case, developing the transaction Plan should begin when the transaction is first conceived and should focus on the requirements for successfully Closing upon conditions that will achieve the Plan objective. The Plan must guide contract negotiations, so that the Purchase Agreement reflects the Plan and the steps necessary for Closing and post-Closing use. If Plan implementation requires particular zoning requirements, or creation of easements, or termination of party wall rights, or confirmation of structural elements of a building, or availability of utilities, or availability of municipal entitlements, or environmental remediation and regulatory clearance, or other identifiable requirements, the Plan and the Purchase Agreement must address those issues and include those requirements as conditions to Closing.

If it is unclear at the time of negotiating and entering into the Purchase Agreement whether all necessary conditions exists, the Plan must include a suitable period to conduct a focused and diligent investigation of all issues material to fulfilling the Plan. Not only must the Plan include a period for investigation, the investigation must actually take place with all due diligence.

NOTE: The term is “Due Diligence”; not “do diligence”. The amount of diligence required in conducting the investigation is the amount of diligence required under the circumstances of the transaction to answer in the affirmative all questions that must be answered “yes”, and to answer in the negative all questions that must be answered “no”. The transaction Plan will help focus attention on what these questions are. [Ask for a copy of my January, 2006 article: Due Diligence: Checklists for Commercial Real Estate Transactions.]

2. ASSESS AND UNDERSTAND THE ISSUES: Closely connected to the importance of having a Plan is the importance of understanding all significant issues that may arise in implementing the Plan. Some issues may represent obstacles, while others represent opportunities. One of the greatest causes of transaction failure is a lack of understanding of the issues or how to resolve them in a way that furthers the Plan.

Various risk shifting techniques are available and useful to address and mitigate transaction risks. Among them is title insurance with appropriate use of available commercial endorsements. In addressing potential risk shifting opportunities related to real estate title concerns, understanding the difference between a “real property law issue” vs. a “title insurance risk issue” is critical. Experienced commercial real estate counsel familiar with available commercial endorsements can often overcome what sometimes appear to be insurmountable title obstacles through creative draftsmanship and the assistance of a knowledgeable title underwriter.

Beyond title issues, there are numerous other transaction issues likely to arise as a commercial real estate transaction proceeds toward Closing. With commercial real estate, negotiations seldom end with execution of the Purchase Agreement.

New and unexpected issues often arise on the path toward Closing that require creative problem-solving and further negotiation. Sometimes these issues arise as a result of facts learned during the buyer’s due diligence investigation. Other times they arise because independent third-parties necessary to the transaction have interests adverse to, or at least different from, the interests of the seller, buyer or
buyer’s lender. When obstacles arise, tailor-made solutions are often required to accommodate the needs of all concerned parties so the transaction can proceed to Closing. To appropriately tailor a solution, you have to understand the issue and its impact on the legitimate needs of those affected.

3. **RECOGNIZE AND OVERCOME THIRD PARTY INERTIA**: A major source of frustration, delay and, sometimes, failure of commercial real estate transactions results from what I refer to as “third-party inertia”. Recognize that the Closing deadlines important to transaction participants are often meaningless to unrelated third parties whose participation and cooperation is vital to moving the transaction forward. Chief among third-party dawdlers are governmental agencies, but the culprit may be any third party vendor or other third party not controlled by the buyer or seller. For them, the transaction is often “just another file” on their already cluttered desk.

Experienced commercial real estate counsel is often in the best position to recognize inordinate delay by third parties and can often cajole recalcitrant third parties into action with an appropriately timed telephone call. Often, experienced commercial real estate counsel will have developed relationships with necessary vendors and third parties through prior transactions, and can use those established relationships to expedite the transaction at hand. Most importantly, however, experienced commercial real estate counsel is able to recognize when undue delay is occurring and push for a timely response when appropriate. Third party vendors are human (they claim) and typically respond to timely appeals for action. It is the old cliché at work: “The squeaky wheel gets the oil”. Care must be taken, however, to tactfully apply pressure only when necessary and appropriate. Repeated requests or demands for action when inappropriate to the circumstance runs the risk of alienating a necessary party and adding to delay instead of eliminating it. Once again, human nature at work. Experienced commercial real estate counsel will often understand when to apply pressure and when to lay off.

4. **PREPARE FOR THE CLOSING FRENZY**: Like it or not, controlled chaos leading up to Closing is the norm rather than the exception for commercial real estate transactions. It occurs because of the necessity of relying on independent third parties, the necessity of providing certifications and showings dated in close proximity to Closing, and because new issues often arise at or near Closing as a consequence of facts and information discovered through the continual exercise of due diligence on the path toward Closing.

Whether dealing with third-party lessees, lenders, appraisers, local planning, zoning or taxing authorities, public or quasi-public utilities, project surveyors, environmental consultants, title insurance companies, adjoining property owners, insurance companies, structural engineers, state or local departments of transportation, or other necessary third-party vendors or participants, it will often be the case that you must wait for them to react within their own time-frame to enable the Closing to proceed. The transaction is seldom as important to them as it is to the buyer and seller.

To the casual observer, building-in additional lead-time to allow for stragglers and dawdlers to act may seem to be an appropriate solution. The practical reality, however, is that many tasks must be completed within a narrow window of time just prior to Closing.

As much as one may wish to eliminate the last minute rush in the days just before Closing, in many instances it is just not possible. Many documents and “showings”, such as UCC searches, surveys, water department certifications, governmental notices, appraisals, property inspection reports, environmental site assessments, estoppel certificates, rent rolls, certificates of authority, and the like, must be dated near in time to the Closing, often within a few days or weeks of Closing. If prepared and dated too far in
advance, they become stale and meaningless and must be redone, resulting in additional time and expense. The reality is that commercial real estate Closings often involve big dollar amounts and evolving circumstances. Rather than complain and stress-out over the hectic pace of coordinating all Closing requirements and conditions as Closing approaches, you are wise to anticipate the fast paced frenzy leading up to Closing and should be prepared for it.

As Closing approaches, commercial real estate counsel, real estate brokers and necessary representatives of the buyer and seller should remain available and ready to respond to changing demands and circumstances. This is not a time to go on vacation or to be on an out of town business trip. It is a time to remain focused and ready for action. Recognizing that pre-Closing frenzy is the norm rather than an exception for commercial real estate transactions may help ease tension among the parties and their respective counsel and pave the way for a successful Closing.

Like it or not, this is the way it is. Prepare for the Closing frenzy and be available to respond. This is the way it works. Anyone who tells you differently is either lying to you or has had little experience in Closing commercial real estate transactions.

****

So there you have it. The four KEYS TO CLOSING a commercial real estate transaction.

1. **HAVE A PLAN**

2. **ASSESS AND UNDERSTAND THE ISSUES**

3. **RECOGNIZE AND OVERCOME THIRD PARTY INERTIA**

4. **PREPARE FOR THE CLOSING FRENZY**

Apply these Keys to Closing, and your chance of success goes up. Ignore these Keys to Closing, and your transaction may drift into oblivion.

Thanks for listening,

*R. Kymn Harp*