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Practice tips for commercial real estate closings

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Often “more experienced” real estate attorneys are asked to share practice tips to ensure commercial real estate closings run smoothly for “less experienced” attorneys. This article is a summary of 35 years of lessons learned by the author.

1. Checklists

Do not close a commercial transaction without using checklists. There are checklists for everything.[1] If you don’t use a checklist, chances are you will overlook something critical.

2. Deadlines

One of the first things you need to do is verify all deadlines. As soon as you are given a signed contract to close, check the due-diligence deadline, the closing deadline and any other deadlines (such as a deadline for title objections). “Tickle” these deadlines. Verify with your client sufficiently before the expiration of the due-diligence period that the client desires to proceed to close. If you don’t, and the earnest money “goes hard” after the expiration of the due-diligence period, your client will likely be unhappy at the loss of non-refundable earnest money (and, worse, maybe unhappy with you).

For each deadline, check to see if there is a “time of the essence” provision. If the due-diligence deadline and the closing deadline do not provide that “time is of the essence,” is there a catch all “time is of the essence” provision in the boiler-plate provisions? In North Carolina, a “time is of the essence” provision means the deadline is firm. Do not assume it will be waived!

If your client asks you to amend the contract to extend the due-diligence deadline and/or closing deadline, should you include a “time is of the essence” provision for each of the new dates? Make sure you consider this in drafting the amendment.

3. Documents

Before preparing any documents for closing, check to make sure the contract did not include pre-negotiated forms as exhibits. If so, you need to use those.

Also, the contract may include required terms to include in the closing documents, such as an "AS IS" clause. Make sure you comply with all custom provisions included in the contract.

In preparing documents that are "fill in the blank," beware of careless mistakes. For example, if using a form Deed of Trust to secure a Guaranty, be sure to modify the language in the form that presumes the Deed of Trust would secure a Note.

Also, remember what you learned in law school – the Rule Against Perpetuities ("RAP") is alive and well in N.C.[2] Be sure to take the RAP (both statutory and common law) into account when drafting options and rights of first refusal.

In preparing documents for recording, pay attention to the "prepared by" block required for recording.[3] First, if you are local counsel, consider adding your firm's information below out-of-state counsel's information with a notation along the lines of "[serving as N.C. local counsel]." Second, consider a notation to make it clear, where appropriate, which party you are representing. For example, if you are preparing an easement for the Grantee's benefit, consider adding the following after your firm's information: "[prepared as counsel for Grantee]." This might eliminate a claim later that you also owed a duty to the Grantor. Third, be aware of recent amendments to NCGS §47-17.1 (Session Law 2018-80 effective 6/25/18).[4]

As seller's counsel, two issues will arise before you begin drafting the Deed. First, is the deed a General Warranty Deed or a Special Warranty Deed? Second, will the exceptions be "general" (such as easements, restrictions and rights of way of record, if any) or limited to "permitted exceptions" (typically being the list from the buyer's title commitment). Hopefully, these issues have been addressed in either the purchase contract or the form Deed attached as an exhibit to the purchase contract. If not, these are issues to be discussed/negotiated with buyer's counsel prior to closing to avoid a dispute at closing. What if the parties cannot agree on the form of the Deed?

Also, as seller's counsel, it is customary to add qualifying language that "no title search was performed" on the first page of the Deed after the drafter's name. In preparing a Deed for the seller as buyer's counsel, be familiar with 2004 FEO 10.

Besides the Deed, consult a closing checklist for all other documents needed (and consult the purchase contract for all necessary and appropriate custom documents). At a minimum, you will need the applicable lien affidavit, the IRS 1099-S (and possibly the NC-1099NRS for non-resident sellers), and the FIRPTA certificate.[5] Be aware that completion of the 1099 and FIRPTA involves an inquiry as to any "disregarded entity" status.[6] Frequently, the contract provides for the seller (and maybe the buyer) to sign a certificate that the representations and warranties contained in the purchase contract are still true and correct.

On occasion, you will need a Hypothecation Agreement for a commercial closing. This is a simple, one-page form used to document consideration when applicable. For example, if a third party is pledging collateral, the Hypothecation Agreement would be used to set forth the relationship of the pledgor to the borrower to document

consideration for the pledge of collateral.

When drafting any closing document, professional courtesy dictates that you provide counsel for the other side a "redline" to call out any changes from prior drafts.[7]

Click here to access all 17 of Margaret's tips.

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[1] For a variety of checklists, see Margaret Shea Burnham and Erin Sloan Cowan, "Commercial Real Estate Purchase Agreements: Agreeing to Disagree" (NCBA, August 2016).

[2] To refresh your memory on the RAP, watch Kathleen Turner and William Hurt in the 1981 movie "Body Heat."

[3] See NCGS §47-17.1 (amended effective 6/25/18).

[4] The recent amendment to NCGS §47-17.1 provides: "For the purposes of this section, the register of deeds shall accept the written representation of the individual presenting the deed or deed of trust for registration, or any individual reasonably related to the transaction, including, but not limited to, any employee of a title insurance company or agency purporting to be involved with the transaction, that the individual or law firm listed on the first page is a validly licensed attorney or validly existing law firm in this State or another jurisdiction within the United States."

[5] For recent changes on FIRPTA regulations, see Chris Burti, "FIRPTA Requirements Changed February 16, 2016," Statewide Title Newsletter and Legal Memorandum (Vol. 22, No. 2, February 25, 2016).

[6] See 26 CFR §301.7701-3(a).

[7] See Lefever v. Taylor, No. COA08-1278, 2009 WL 2177323 (N.C. Ct. App. Jul. 21, 2009).

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