



# COLORADO REAL ESTATE JOURNAL

THE COMMUNICATION CHANNEL OF THE COMMERCIAL REAL ESTATE COMMUNITY

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## Law & Accounting

### Expediting commercial property sales

*EDITOR'S NOTE: This is the first of a two-part article on expediting commercial property sales.*

Sellers who spend time and money preparing their property for sale can reap the rewards of shorter due diligence periods, fewer negotiated reductions in the sales price and quicker closings. This article outlines practical steps sellers should consider taking prior to marketing their properties for sale. Of course, since every property is different in size, function, improvements, type of construction and number of tenants, etc., what follows may not be universally applicable.

■ **Property information.** The seller should collect and organize all available information and documentation on the property, such as financial information (rent rolls, tax bills and other expense information), operating statements, leases, environmental reports, soil reports, physical inspection reports, termite reports, surveys, plans, permits and warranties. By delivering this documentation to the buyer all at once, in an organized manner and as early as possible, the seller can shorten the buyer's due diligence period.

When presenting these documents to a buyer, the seller should consider including an express provision in the sales contract stating that: 1) the documents were provided as an accommodation to buyer to assist with its due diligence investigation of the property; 2) the documents were prepared



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for seller for its own use, and may contain inaccuracies and may not be relied upon by third parties; and 3) the information contained in the documents should not be construed as a representation or warranty by seller, as representations and warranties are limited to those expressly set forth in the sales contract. It may also be advisable to obtain the buyer's agreement to hold all of the information contained in the documents in confidence and to return all documents to the seller if the buyer does not close on the property.

■ **Title.** Colorado is considered a title policy state, which means that buyers and sellers of real property typically rely on whether a title company will insure title to the property to prove that title is marketable. Therefore, sellers should obtain a title commitment to make sure that they can timely provide a satisfactory owner's policy of title insurance to buyer at the closing. If the title commitment contains any title exceptions that a reasonable buyer would find objectionable, the seller can work to have them removed or negotiate with the title insurance company to provide acceptable endorsements to the title policy.

Consider obtaining an American Land Title Association survey, which will disclose the encroachment of improvements across property lines or over existing easements. An ALTA survey may be necessary in order to obtain extended coverage protections that will be required by most buyers, depending upon their sophistication and the type of property at issue. In some cases, a less costly land survey plat or improvement survey plat may be adequate to obtain extended coverage. Extended coverage generally provides additional protection against 1) rights or claims of parties in possession of the land not shown in public records; 2) easements not shown in public records; 3) conflicts in boundary lines, shortages in area, encroachments and any facts that a correct survey and inspection of the property would disclose which are not shown in public records; and 4) liens for services or labor imposed by law and not shown in the public records.

Although buyers bear the expense of a survey in most transactions, if the seller does not have an existing survey in its possession, it may be beneficial for the seller to incur this expense in advance of a sale since having a survey can save time in the due diligence process, and the cost may be insignificant when compared to the sales price.

■ **Leases.** To confirm the rent, term and other aspects of the

property's leases, a prudent buyer will ask for estoppel certificates from the property's tenants. To make sure that seller can quickly deliver "clean" estoppel certificates, seller should be certain that seller has performed all of its obligations under the leases, and that there are no outstanding disputes with tenants.

For properties with numerous tenants, sellers should consider preparing a rent roll and lease summaries for all tenants. This may allow seller to negotiate a shorter due diligence and contingency period. Summaries should contain a recitation of 1) operative lease documents, including amendments; 2) legal name of tenant and any guarantors; 3) material deviations from the property's standard lease form if one exists; and 4) material lease terms, such as term commencement and expiration, useable and rentable square footage, rent, free rent (if any), rent escalations, percentage rent (if any), expense pass-through obligations, security deposits, options to extend and/or terminate the lease, options to expand, options/rights of first refusal to purchase the property, permitted uses and exclusive uses, signage rights, and parking rights.

As discussed above in the context of seller delivering property information to buyer, making appropriate disclaimers can alleviate concerns about lease summaries becoming seller representations and warranties.▲



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■ **Condition of property.** The seller should conduct a presale inspection of the property with "fresh" eyes, as if the seller were seeing the property for the first time. This will enable the seller to determine if any defects require repair or if portions of the property should be spruced up for sale. Seemingly small repairs or cosmetic improvements may enhance the marketability of the property and disproportionately increase offer prices.

■ **Sale contract.** Prepare a purchase and sale contract or appropriate modifications and addenda to a standard form of contract for use once the basic deal terms have been negotiated. To expedite the execution of the sale agreement, however, the seller should resist the temptation of preparing an overly seller-biased document. The seller should anticipate the buyer's reasonable concerns, and include responses in the draft agreements that are acceptable to seller.

■ **Price.** List the property at a price that is consistent with today's market values, and not based on inflated expectations from the property's worth at the peak of the market. Consider retaining a broker who is an expert in the area to help set a realistic price, effectively market the property, and identify potential buyers.

■ **Financing.** Obtain a copy of



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the seller's existing loan documentation to determine what, if any, prepayment penalties exist. Also, if applicable to the transaction, determine if the loan is assignable and under what conditions and at what expense. Review of existing loan documents prevents surprises that can arise late in a transaction and will enable the seller to determine what financing options may be available for buyers.

Depending on the existing loan(s) encumbering the property and seller's financial position, the seller should consider offering seller financing. When there is a lack of available financing from traditional sources, such as banks, savings and loans and insurance companies, the seller financing offers a viable alternative solution. It also offers certain advantages that may make the property attractive to a larger pool of buyers. For example, seller financing may be at a lower interest rate than traditional financing sources (attractive to buyers, yet still at a higher rate than the seller may be able to obtain in an otherwise secure investments). Additionally, sellers usually do not charge any points, origination fees or other similar costs

customarily charged by institutional lenders. Finally, the seller may be able to treat the payments under installment sale tax rules, allowing the seller to defer a portion of gains over the term of the note.

■ **Environmental.** Generally, most sophisticated buyers (or buyers' lenders) will require a Phase I environmental investigation of the property to determine the presence of contaminants, such as asbestos and lead paint in the structures and myriad other substances that could impact soils and ground water. If the seller does not have an existing environmental report, instead of waiting for potential buyers to conduct an environmental investigation, the seller may consider hiring, at its expense, a competent and reputable environmental engineer to prepare a Phase I environmental report. This could save up to a month in the due diligence process and if the report is "clean," the buyer may agree to waive any further environmental investigation and testing.

In considering this approach, be aware that the environmental engineer chosen by the seller may not be on the "approved" list of buyer's lender. If this is the case, then the buyer's lender may require a second Phase I report to be conducted by an approved environmental engineer at the buyer's expense. Notwithstanding the possibility of this redundancy, there may still be benefits to a seller who would be able to market the property with a clean Phase I

report.

If the property has environmental problems, it may be more advantageous for the seller to remediate the contamination before selling the property, versus selling the property subject to environmental problems. Generally, a seller can remediate the property for less than the reduction in price a buyer will demand to cover the estimated and uncertain costs of remediation. By performing the remediation, the seller can be sure that the remediation has been properly completed, and eliminate further liability after the property is sold.

Alternatively, the seller can obtain bids for the remediation, which can serve as the basis for negotiating a price reduction to cover the cost of remediation for contamination that is to remain in place after the closing.

■ **Selling Less than Full Fee Title.** Prior to marketing the property, the seller should determine if it is desirable to retain any rights, such as mineral or water rights, to the property. Or, if the seller is the owner of property adjacent to the property being sold, then consideration should also be given to: 1) creating and retaining for seller beneficial rights for such matters as ingress and egress, light and air, utility hookups, etc.; and 2) establishing covenants, conditions, and restrictions regulating type, design or number of improvements on the conveyed property.▲