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Closing the deal on commercial real estate

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When commercial real estate is being sold, there are a number of hurdles that must be cleared. The major hurdles are:

The record title. The seller is obligated to deliver to the buyer good record and marketable title. If the owner has owned the property for a while, there are any number of things that may need to be cleared up by the seller prior to the closing, including, of course, the payoff of any existing mortgage. A seller would be wise to have the seller's lawyer have the title examined prior to the closing or even before offering the property for sale to be sure that, if there are any title problems, they are resolved. Title problems generally can get resolved, but it takes time and, when a transaction is ready to close, time is of the essence.

Zoning and permitting. The buyer wants to be sure that the buyer can use the property for the buyer's intended purpose. This generally is accomplished by reviewing the records of the city or town dealing with the zoning of the property. The buyer's attorney will be required to deliver to the bank a zoning opinion, or provide a 3.1 zoning endorsement to the title insurance policy which will state that the property can be used by the buyer for the buyer's intended purpose.

Environment. While the super priority lien under the hazardous waste law in Massachusetts does not apply to buildings where the majority use is residential, most buyers and lenders will require a so-called "Phase 1 Report" on any property that has a commercial use. It is important to deal with that issue soon because if there is a problem it could be a deal breaker. If the property is serviced by a private sewerage disposal system, a Title V report by a licensed inspector will be required at the closing. If the water supply to the building is private, a test to determine that the water is potable will be required.

Leases. If a buyer is buying the building for its own use, then tenants are not a concern. If there are tenants in the building, the seller should expect that the bank attorney will require a tenant estoppel letter which basically is a letter addressed to the bank which will set forth the major provisions of the lease, any security deposit and any claims by the tenant against the landlord at the time the letter is signed. The bank will probably also require an SNDA which is a document under which the bank will agree to not disturb the tenant's use of the property in the event of a foreclosure, but that the bank's mortgage will have a priority.

Legal Entities. Most commercial properties are owned by a legal entity, generally by a limited liability company. In order for a seller to be able to sell their property, the bank's attorney will require a Secretary of State's Certificate stating that it is in good standing, and also stating who has the authority to sign real estate documents on behalf of the limited liability company. Similarly, the bank's attorney will be concerned about the borrowing entity if it is a limited liability company, or other entity, that it is in legal existence and in good standing in the Commonwealth of

Massachusetts. The lender will generally require an enforceability opinion of the borrower's attorney which is an opinion by counsel that the entity borrowing the money is legally existing and that the party executing the documents, including the mortgage, is the valid party under that organization to execute documents on behalf of the organization.

Closing Process. Once all of the foregoing issues have been resolved, the closing generally takes place at the office of the bank attorney, who will supervise the execution and delivery of documents from the seller, the borrower, and any outside party, such as the title company, and the payoffs of the seller's loans or other liens and any outstanding municipal liens. Once that process is completed, then the buyer can look forward to owning the property and a veritable life time of mortgage payments.

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