

**The Top Ten Things a Lender's Counsel Thinks About
Regarding a Commercial Real Estate Transaction – Part I**
(or *Insights for the Broker in Getting the Deal Closed*)

In today's competitive environment, having information and knowledge may often mean having a tremendous advantage over the competition, the difference in closing a transaction quickly, or even closing it at all. If the idea is to be as prepared as one can, thus making the Closing as good an experience as possible for the Broker and the Buyer (*aka Borrower*), then one sure way is to know what to expect from the Lender and its counsel. With that in mind, and using my over 20 years of experience representing Buyers, Sellers and Lenders, I present ***The Top Ten Things a Lender's Counsel Thinks About Regarding a Commercial Real Estate Transaction***. I hope that these nuggets of information, *in no particular order*, help you close your deals.....and earn your fees. Part II of this article will follow in next month's issue of the **Realtors® Commercial Alliance** issue of *Alliance News*.

1. ***Whose on first, What's on Second, and I Dunno's on Third*** - It may seem obvious, but the loan will NOT fund - and the deal will NOT close - without establishing in detail and delivering to Lender and its counsel critical, current and complete information about the Borrower, the Seller and, when applicable, the Guarantor(s). That means all of the names of the parties and, where entities are involved, the formation and governing documents of the applicable entities. As simple as this seems, it is often one of the biggest areas of breakdown in getting the loan ready to close as the parties (usually the Buyer, but often the Guarantors) may form a new entity to be the Buyer or to be the Guarantor(s); may assign the Contract to a previously unknown or unformed entity; may change the owners, principals or managers of a critical entity; or may modify the governing documents of a vital entity. To avoid delays in Closing, always make sure that the most current information and documents, and all amendments or modifications, are timely delivered to Lender and its counsel.

2. ***Life begins at Contract-ception***. – In every deal I have been a part of as counsel for buyer, seller or lender, there has been a written Contract executed by the necessary parties to the deal. Lender's counsel must have a complete and legible copy of the Contract (including any and all Exhibits thereto, amendments thereof, and other related documentation), and will use the Contract in preparing the Lender's Closing Checklist, a document that provides what materials, conditions, and data that must be delivered, satisfied and/or prepared prior to Closing. Also, any changes to the Contract after it is delivered to Lender's counsel must also be received by such counsel or the closing can be delayed.

3. ***Show me the Money***. – If the Contract calls for a Deposit, or a number of Deposits, then make sure each has been delivered to the applicable escrow agent and evidence of each Deposit made is given to Lender and its counsel.

4. ***Now, show me the Survey***. – In most commercial real estate transactions, unless the subject property is a condominium unit, it is in the best interests of the Buyer to have a current survey of the subject property prepared, and it should show and label all applicable title matters. With the survey, Buyer and Lender can make an informed decision about the Property, its condition and matters that affect title to it. Lender's counsel will need to have sufficient time to review the Survey and related matters that affect the subject property, *PLUS* the Survey must be certified correctly (usually to the Lender, the title insurance company, the Buyer, and the closing agent).

5. ***He said, She said***. – Effective communication among the essential parties is critical having a smooth Closing. Therefore, Lender's counsel must receive, early in the process, the names and contact information of all parties and their representatives (i.e., lawyers) in the transaction. Often the Broker can be a tremendous asset in this area.

6. ***What's mine is mine and what's your is mine***. – In a commercial real estate deal and the loan that funds it, the Buyer's "status of title" is what is most important to the Lender and its counsel. The Lender decides to make its loan, and determines what the loan terms will be, based upon a number of factors, one of the most significant being the priority of its lien on the subject property, the Lender's primary collateral. While searching a status of title has become easier over the years, depending on several factors, it still may take some time. Reviewing title matters can be quite complex, requiring Lender's counsel to read and analyze many documents, some of which may be very old and hard to read. It is not uncommon to include the services of a surveyor or other professional in determining the applicability of some title documents. Title review can be challenging and take quite a bit of time, so do not delay in having a title search performed and, where applicable, a title insurance commitment issued, then delivered to Lender's counsel. Lender's counsel will not advise its client to close a loan unless it is certain that Lender's lien will be in the position Lender requires as to the Loan.

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Last month, we covered the first 6 of the **Top Ten** things a Lender's counsel thinks about regarding a commercial loan transaction. This month's article provides the final items in the **Top Ten**. Thanks for tuning in again!

7. **Show me where the dead bodies are buried.** - Except for a commercial condominium, it is almost the rule that some form of environmental questionnaire, analysis, study, or report will be required by the Lender. If you think Buyer's don't like surprises, then you'll not be surprised to learn that Lenders dislike them even more. You should know that there are *very few exceptions* to the Lender's requirement that this pre-closing condition meet Lender's and its counsel's satisfaction. Quite simply, the Lender will not fund the loan without it. Plus, while an environmental questionnaire is relatively quick to prepare, an environmental study (i.e., a Phase 1 Report) frequently is not. And, if any further analysis is required, that **WILL** take time. Therefore the best advice is, when the Contract is fully executed, and if the Lender requires an environmental analysis: *don't delay, order it today!*

8. **How'd they do that?** - Ah, the appraisal. One of life's great mysteries. Some how, some way, the property is given a value by those all-knowing, all-powerful prognosticators of worth: the appraisers. This may be one of the toughest jobs in the commercial real estate industry. It takes experience and study and is critical to the loan process. Which means that the appraiser (like the surveyor) must meet the Lender's qualifications and the Bank will (or will not) make its loan based upon the value the approved appraiser gives to the subject property. The lender's counsel will have this item as a high priority item on its Closing Checklist as the loan itself will not be done without the appraisal meeting Lender's criteria.

9. **The Kitchen Sink** – Each commercial real estate transaction is unique and there are times when there are other important facts, terms, or conditions that are critical to disclose to Lender and its counsel very early in the process. The list is endless - virtually a kitchen sink of scenarios. For example, franchises and gas stations have very specific agreements that affect the use of the subject Property and, therefore, are subject to the Lender's review and approval. Other commercial properties may have tenants of all different sizes and leases of varied terms; there may be cross-access easements, deed or other use restrictions, property owner associations, zoning or code violation matters. **ALL** of these are important to Lender's counsel and must be addressed in the initial pre-Closing phases of the transaction. A delay in getting Lender's counsel information on any of these items may result in a delay of the Closing, or perhaps no Closing at all, thus frustrating the Buyer's and the Broker's objectives and creating unwanted consequences.

10. **I've got you covered.** - If you have lived in Florida for 5 minutes you know that property insurance is a very hot topic now and likely will be for some time to come. It one of the essential ingredients in "baking the Closing cake". It is extremely unlikely that Buyer's lender will close without Buyer obtaining insurance coverage acceptable to the Lender, so have Buyer determine what are the Lender's insurance requirements as soon as possible, then diligently pursue satisfying them. Insurance will most certainly be a *pre-Closing item* on the Lender's counsel's Closing Checklist, so get evidence of such insurance coverage - paid for in advance by Buyer - to Lender's counsel; as we have all seen, the insurance market changes like the weather so do not wait until the last minute on this matter.

10 (again). **Show me the Money (Again).** – While all of the pre-closing conditions are getting satisfied, keep your eye on the one of the last, but certainly not least important, ones: Buyer's Closing funds requirement. Generally, the Buyer shall be required to come to the Closing with funds sufficient to close the transaction, and such funds are usually in the form of a bank or cashier's check, an attorney's trust account check, or sent by wire transfer. It is not uncommon for Borrowers to lose track of this requirement, then have to scramble to come up with sufficient closing funds, thereby causing myriad of issues on the eve of the big day!

For those of you that have dozed off by now, you may have missed that I stretched the truth a bit – the list really is a **Top Eleven!** That's my prerogative as a lawyer - it's what we do! And, while this article is written from the perspective of Lender's counsel, you may notice that several of the **Top Ten** items are very important, even critical, to Buyer and its counsel also; accordingly, make sure that these items are delivered to such parties concurrently with the delivery thereof to Lender and its counsel. If the Broker can provide this information thoroughly and quickly, it can and most often does make the pre-Closing part of the transaction proceed, and the Closing occur, more quickly and efficiently. And that, as we all know, is the main objective. I hope this helps; however, please contact me with any questions, comments or insights.

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