

Key Components of Due Diligence in Commercial Real Estate Transactions

Regina E. Schneller

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A critical aspect of a commercial real estate purchase is the evaluation of various matters, conditions and risks associated with the property during a contractual due diligence period. The customary timeframe for due diligence is sixty days, during which time several investigations are often directed by the purchaser's lawyer and performed by various professionals. These may include the following:

- Review of a current title insurance commitment, together with the seller's vesting deed, mortgages, liens and encumbrances, flood and tidelands searches, declarations, covenants, easements, restrictions of record, environmental deed notices, probate records and all endorsements to the commitment requested by the purchaser or the mortgage lender, including a survey endorsement.
- Examination of a current accurate survey that confirms direct access to the property from a public road, provides a metes and bounds description of the property, plots all easements and other items set forth in the title commitment, depicts all buildings and other improvements, includes a zoning table, the number of parking spaces, building setbacks and how items such as easements may impact the property, and is certified to the purchaser, the title company, the mortgage lender and the purchaser's lawyer.
- Evaluation, with the assistance of a trusted and reputable environmental consultant, of any and all information relating to the property's environmental condition (obtained from the seller or developed by the environmental consultant during a thorough assessment of the property) to determine whether the seller has received any notices of violations from any governmental authority including the New Jersey Department of Environmental Protection,

Attorneys

Regina E. Schneller

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and examination of the historical uses and business operations at the property to determine if the proposed sale will trigger the Industrial Site Recovery Act.

- Review of all land use applications, planning board and/or board of adjustment resolutions which may include variances, building permits, certificates of occupancy, certificates of continued occupancy, fire inspection certificates and any notices of violations, and examination of pertinent local zoning ordinances to confirm that the uses at the property are permitted and that all buildings and other improvements at the property are conforming.
- Review of all available financial information relating to the property, including, without limitation, real estate taxes, operating costs, rent roll and utility bills, copies of all lease agreements and correspondence between the seller and tenants at the property with particular emphasis on the amount of rents, additional rents, security deposits and rent concessions, any defaults, options to renew or purchase, rights of first refusal, brokerage provisions and tenants' payment histories.
- Review of all service contracts for snow removal, building maintenance, lawn care and other similar and customary property services to determine whether such contracts are terminable or binding on the purchaser and whether they are assumable, and all brokerage agreements regarding the sale or leasing of the property.

The above due diligence tasks are not intended to serve as a comprehensive list. As is often the case in complex real estate transactions, the unique characteristics of some properties, and the initial results of the basic investigations, may necessitate additional due diligence in order to achieve the comfort level that the client seeks prior to closing of title. The nature and extent of the lawyers's role in conducting due diligence should be specified clearly at the outset of any purchase transaction.