

Today's Buyers Need Flexible Agreements

With the credit crunch impacting financial markets, buyers of commercial real estate assets may find that their leverage in negotiating purchase and sale agreements has improved. Previously, sellers were able to demand top dollar and execute seller-oriented agreements. In the current

environment, buyers are sensitive to prices, but to reduce liabilities, they should look beyond the cost of a property and consider the following provisions in purchase agreements:

Feasibility Period. With securitized loans on hold, investment banks writing down the value of their loans and banks imposing stringent underwriting standards, it's difficult to obtain financing. Unfortunately, the commercial real estate market has yet to feel the full impact of the credit squeeze. Due to these uncertainties, buyers should extend the feasibility period to allow time to secure financing and to see if the tightening credit market causes a reduction in property values, perhaps allowing them to re-negotiate the price.

Conditions Precedent. Buyers should seek additional conditions to closing. Oftentimes, sellers are reluctant to provide financing contingencies, but buyers can improve their internal underwriting, as well as that of a lender, by requiring conditions such as: estoppel certificates from all of the building's tenants; the use of a buyer's or lender's form estoppel certificate; and limiting the use of seller certificates (used in lieu of an estoppel certificate) to only smaller tenants. Additionally, contingencies requiring the issuance of a title policy, the truth of the seller's representations, performance by the seller and a contingency prohibiting changes to the property during the escrow period should also be sought.

Seller Covenants. Buyers should ensure that sellers maintain the property value during escrow. One way to do this is through covenants in the agreements

requiring sellers to insure and maintain the property in compliance with laws and leases. Buyers can also negotiate provisions granting them approval rights with respect to new leases, modifications to leases and alterations to the property.

Seller Representations. Buyers enter into agreements in part based upon assurances from sellers. In today's environment, buyers are able to obtain representations (such as environmental, compliance with law and no litigation with respect to the property) from sellers that frequently would not have been provided prior to the onset of the credit crunch. However, buyers should also attempt to require the representations be made by the seller, as well as its affiliates, rather than just one individual selling entity.

Post-Closing Obligations. Before the credit crunch, buyers occasionally discovered problems with the property post-closing, only to learn that the agreement precluded recovery. Typically this was the result of the seller's form agreement merging, or terminating, the seller's obligations and representations at closing or only allowing the buyer a limited survival period in which a claim against the seller could be filed. From a buyer's perspective, these provisions undercut the assurances made by the seller and increase the risk of inheriting an unknown problem. Nowadays, buyers are able to require longer survival periods for the sellers' obligations and representations.

Remedies. It is increasingly likely that a buyer may need to terminate a transaction because of a lack of financing or declining property values. Therefore, it is crucial that buyers limit liability to the deposit and that they not be responsible for sellers' lost profits or consequential damages, which can be accomplished by including a liquidated damages provision in the agreement.

By carefully considering and negotiating such provisions as described above, buyers can reduce potential liabilities and afford themselves greater flexibility in this uncertain market.—SOCAL

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Damon M. Juha is an associate with Freeman, Freeman & Smiley LLP in Los Angeles. He can be reached at 310-255-6191.



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