

LAW

Navigating the legal landscape within commercial real estate acquisitions



**ANTHONY
BARONCI**

Investing in commercial real estate can be a lucrative opportunity, potentially generating an annual return, as well as appreciation of your investment. Whether you are an experienced real estate investor or a first-time purchaser, the decision to acquire commercial property requires an understanding of the legal intricacies that come with it. In this basic guide, I will review the steps with respect to some of the essential legal considerations to keep in mind when acquiring commercial real estate.

Letter of intent

Once you've identified a potential investment property, the next step is to negotiate with the property owner a letter of intent, which outlines the business terms and serves as the roadmap for the basic framework of the deal, including, (without limitation) purchase price, down payment, due diligence period, (if any), closing date and allocation of closing costs among the parties. The LOI also reflects any contingencies, such as financing, environmental and/or permit approvals that must be satisfied prior to closing.

It is highly recommended that you include your attorney during the negotiation of the LOI, which is typically handled by the broker(s).

Purchase and sale agreement

Upon reaching an agreement with respect to the LOI, seller's attorney will,

customarily, prepare the initial draft of the purchase and sale agreement. In addition to confirming that the PSA accurately reflects all of the business terms of the LOI, your attorney must be proficient in negotiating and drafting provisions that reflect the general concerns of a purchaser as well your specific needs, the local customs and practices as they pertain to the property, and the applicability of any transfer taxes and/or bulk sales tax. Your attorney must also be able to identify and define the scope of investigations and/or tests that a purchaser of this type of property should perform as part of their due diligence.

Due diligence

It cannot be stressed how important it is to conduct a thorough investigation of the property before you complete your acquisition: **Do your due diligence.** This is a critical step to make an informed decision and to mitigate potential pitfalls associated with the property. Your investigations should include, without limitation: performing title and municipal searches; obtaining a survey or updating an existing survey; reviewing applicable zoning and building laws and performing environmental investigations and/or physical inspections of the improvements, including structure and all building systems. Your investigations should also include a high-level review of leases or other occupancy agreements, if any, affecting the property.

Financing

If financing is being pursued to complete the acquisition, preferably a mortgage contingency clause should be included in the PSA. Such a clause conditions the transaction upon your



receipt of a loan commitment, which like an LOI, outlines the preliminary terms and conditions of the loan the lender is willing to make. Be sure to share any loan commitment with your attorney before accepting it. In addition to helping you understand the terms of the loan commitment letter, your attorney can be instrumental in identifying any conditions that may present practical challenges and offering alternative approaches to your lender.

Following your acceptance of a loan commitment, your attorney will need to work closely with lender's counsel to ensure that all of lender's requirements are satisfied in a timely manner so as not to delay your closing under the PSA. For properties with existing commercial leases, your attorney will also need to facilitate the delivery of tenant estoppels

and, for leases that are not automatically subordinate to the lien of a future mortgage, a subordination and non-disturbance agreement satisfactory to your lender.

Legal representation: a necessity within commercial real estate

In the complex world of commercial real estate, having legal representation is not an option—it is a necessity. An experienced real estate attorney who specializes in the type of property you are considering acquiring and who is familiar with the laws of the State in which the property is located can guide you through the legal maze, protect your interests and help you avoid costly mistakes.

Anthony Baronci is a partner at Ruskin Moscou Faltischek, where he is a member of the Real Estate Department.