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## 10 Pitfalls in Commercial Real Estate Transactions

By Simon Bloom & Shannan Oliver

You've heard the old adage: A verbal contract isn't worth the paper it's written on. This is particularly accurate when it comes to real estate transactions. Taking the time to prepare a foolproof contract can save you time, money, and sanity. Make sure you consider the following potential pitfalls.

### **Indefiniteness**

Be precise – a contract that lacks certainty is not enforceable. In other words, draft your contract so that there is no doubt as to the subject matter, the time for performance, or the essential terms of the deal.

### **Ambiguity**

Choose your words carefully. If portions of the contract can be interpreted in different ways, then you risk being exposed to provisions different than what you intended. In fact, if a court finds that the document is ambiguous, it is free to determine the meaning by applying the "rules of construction," which allows for such considerations as business custom or other documents. This is particularly problematic, for example, if the deal is meant to tailor to unique circumstances or changed substantially between prior negotiations and the final agreement.

### **Merger Clauses**

Look for language about the "entire agreement;" if the language is not there, insist upon it. A merger clause states that the parties' agreement is fully stated in the written document and protects the parties against claims of fraud. In other words, a party cannot claim that you promised anything other than what the contract states. While a merger clause cannot completely insulate you from liability for misrepresentations or fraudulent conduct, it goes a long way toward defining the parties' obligations.

### **Form Documents**

Take precaution when working with real estate contracts that use form documents. Provisions that seem innocuous can change the face of a deal and create liability where there should be none. For example, a boilerplate provision that "time is of the essence" could cause problems in a transaction

where the time of performance cannot be assured.

### **Title Defects**

Allow time to thoroughly review the property title. Far more complex than residential property, commercial property is subject to easements, restrictions, regulations, and even leases. Know what you are purchasing and address any contingencies in the contract.

### **Zoning & Permitting**

With commercial property in particular, the parties must be clear about the intended use. If the buyer requires a zoning change or a special use permit, then the parties should decide who bears the risk that the requests will be granted. If the zoning or permit request is a true contingency, then it should be included in the contract along with any conditions regarding the timing or scope of the request.

### **Environmental Concerns**

Never underestimate the potential for environmental issues. Every contract should address any environmental conditions that might affect the property. At a minimum, a buyer should insist upon an environmental report. Outline the acceptable parameters and the related course of action should any issues arise.

### **Escrow**

What if the deal falls through? Where is the money, and who controls it? The answers to these questions should be addressed by the contract.

### **Foreclosures & Deficiencies**

When lenders are involved, know your rights in the event of a default. Should the lender foreclose on the property, its rights to pursue you for any deficiency, either as the borrower or a guarantor, depend upon the foreclosure laws in your jurisdiction. Waivers of your rights to confirmation proceedings may or may not be enforceable, and this alone could be the difference between zero liability and bankruptcy.

### **Debt Service**

In addition to knowing your rights in the event of a default, know your obligations even when the loan is performing. Many lenders require regular reports and accountings, and failure to abide by these provisions could be used as an excuse to call the loan.

With any project, negotiating a great deal is only half of the battle. Arm yourself with a solid contract and you'll improve the odds of emerging a winner.

*Simon Bloom and Shannan Oliver are litigators with a combined 25 years of experience in residential and commercial real estate matters. Attorneys with the Atlanta law firm Bloom Sugarman, they can be reached at 404-577-7710 or [www.bloomsugarman.com](http://www.bloomsugarman.com).*