

## Doing your due diligence

By: Jennifer Sharpe The Journal Record November 14, 2019

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From matters involving property defects and environmental concerns to zoning, restrictions and title matters, local real estate attorneys stress the importance of due diligence.

Legal commercial real estate issues mostly stem from one party alleging the other party engaged in some sort of misrepresentation, said Vaden Bales, shareholder with Hall Estill.

The legal issues involving commercial real estate are predominantly based on contracts and pertain to either the purchase or lease of property. Meticulous due diligence and seeking the help of professionals can mitigate risk.

"It is so important to have a real estate lawyer be part of commercial real estate contract negotiation, giving feedback from the beginning," said Greg Alberty, shareholder with Hall Estill.

Due diligence consists of several components.

Physical inspection of the land, buildings and other improvements located on the property is important to determine condition.

"It is important for the buyer of a commercial property to conduct all necessary inspections of the property to be acquired during the due-diligence phase, prior to the closing and purchase of the property, because generally a seller is not liable for any defects if the seller did not know of the defect and did not actively conceal the defect," said Tina Soin, attorney with GableGotwals. "The best way to avoid issues related to physical defects to the property is by conducting a thorough inspection of the property in advance of the purchase of the property."

The property must also be tested for any environmental liabilities or issues.

"The first step is for the buyer to get a Phase I Environmental Site Assessment (ESA)," Soin said.

If results reveal any issues, then a Phase II ESA is necessary, which will examine groundwater, air and soil samples. If significant contamination is found, then the owner of the property may be required to report this information to the Environmental Protection Agency and/or other regulatory agencies.

"A Phase I ESA typically costs up to \$5,000 and a Phase II ESA can cost thousands of dollars more," Soin said. "However, environmental contamination cleanup costs can run in the hundreds of thousands of dollars, so it is a worthwhile investment. Also, an ESA can help a buyer protect its own interests when it comes to transfer of liability."

A property's zoning classification also must be considered.

"If you buy a piece of property that needs to be entitled to accommodate what you are proposing to do with it, then it ends up becoming a lot of work," Bales said.

Rezoning a property takes time, and can involve hearings with planning commissions or other government entities.

"A buyer should also check whether there are any private use restrictions affecting the property," said Soin, citing the example of shopping center parcels where tenants do not want direct competitors to be located in the same shopping center.

"A buyer of a property needs to know what uses are allowed or restricted on its parcel before it purchases the property," Soin said. "A tenant exclusive or use restriction can be dealt with by obtaining written consent from the tenant allowing the use on the buyer's specific parcel. However, if the tenant with the tenant exclusive will not consent to allow the use, then the buyer's only recourse may be terminating the purchase agreement."

It is common in Oklahoma to see various encumbrances affecting a property.

"We are covered with pipeline easements here," said Jennifer Christian, attorney with Durbin Larimore Bialick. "A buyer would have to work with the pipeline company to either make the easement reduced to what they actually need. Sometimes the developer will have the pay to relocate the pipeline, which happens quite often."

Another aspect that needs close examination is title ownership.

"In order to ensure it is receiving clear title to the property, a buyer of commercial property should always obtain title insurance from a title company," Soin said.

Lease-based legal issues in commercial real estate are also common.

"When you are negotiating the lease, there are always issues with who is going to maintain what aspects of the lease premises and in what way," said Christian. "There are often issues relating to common area maintenance expenses, how those are calculated and allocated, and whether certain types of expenses are appropriately apportioned to the tenant. Another issue is with indemnification and who is responsible if something happens on the lease premises.

Sometimes a tenant is making allowable improvements, falls behind on payments, and a lien gets filed, which the landlord can then be dragged into."

In the case of lease issue resolution, trial is unusual.

"Most leases have language built in to provide for a notice and cure period, so if one party believes that the other is in breach, to put the other side on notice and give them a period of time to discuss it and try to resolve the issue," Christian said.

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