

SHOPPING CENTERS

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Buying the shopping center – The Race is On: A few points on protecting yourself

If there is one thing for sure, we are in the proverbial "seller's market". For various reasons, there are many more shopping center and mall buyers in the market than there are projects to be had. As a result, sellers are asking, and getting, very favorable terms, from price to timing of the deals. The norm has become 30-day due diligence and 15 to 30 day closings. Deposits are enormous and contingencies, such as estoppel thresholds, are shrinking.

How does a buyer, who is not content to sit on the sidelines and wait until the market swings back towards the middle, protect itself in this climate? Its not easy, but there are several points on which it may be worth holding the line. The following are just a few.

Given the timing of deals, perhaps the single most important item of due diligence is the tenant estoppel. It is criti-



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cal to require, as a condition of closing, the buyer's receipt of a high percentage of estoppels. If there are anchors or other tenants whose size or credit are essential to the deal, then the agreement should require the receipt of estoppels from those named tenants, along with the percentage of other tenants. To be worthwhile, the estoppels must disclose no defaults and list no agreements/amendments other than those originally listed on the rent

roll attached to the agreement. The estoppels must be dated within a reasonable time before closing, typically not more than 30 or 45 days. It is also desirable to agree upon a form of estoppel that you know your lender will accept, because there is nothing worse than having to go back to tenants and sellers when the closing clock is ticking.

An important point that affects the closing statement, and beyond, is the issue of prorations. Many agreements briefly address the proration and reconciliation of CAM, taxes and insurance, and simply state that if there are any post-closing adjustments to be made, the parties agree to cooperate with each other after closing. Unfortunately, many sellers intend to distribute their assets soon after closing, so if a large credit is due to the seller, a buyer could find itself chasing the money. The problem is that, in most centers, CAM, taxes and insurance are billed in estimated monthly installments.

If a seller overcollected during the year, and closing occurs deep into the fiscal year, the buyer could find itself owing the tenants a large credit due to the overpayments. There are 2 ways to combat this. The first is the post-closing true-up, in which the parties agree to compare their records after the fiscal year, and adjust between them. The better way, however, is to require a "mini-reconciliation" as of closing, in which the seller reconciles its expenses and income as of closing, and the credits are done at closing. This obviates the need to do a post-closing true-up, or at least reduces the exposure so that, if the seller disappears, the risk is minimized.

Another issue that affects the bottom line are tenant inducements (i.e. free rent, tenant improvement allowances and other similar payments), and the question is who is responsible for these items, and for what period of time. Generally speaking, the seller should be responsible for all inducements and leasing commissions for the current terms of leases, since the buyer assumed those leases are in place and is essentially paying those

costs in the purchase price. However, the buyer is not assuming or pricing the benefits of new deals or renewals of existing deals.

In those instances, the buyer should be responsible for the inducements and the commissions. However, it is important to determine how the buyer priced the deal. Many "books" used by sellers in marketing their properties assume certain new deals and/or renewals, so the buyer should consider shifting the burden of those costs to the seller. Otherwise, the buyer should not assume those deals are in place in calculating its purchase price.

In the current market, the pace is fast and the stakes are high, so a little protection could go a long way towards making the acquisition live up to its potential.

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