

## Beware of potential property pitfalls

A look at the top five reasons why real estate transactions can run into trouble at closing time



### LEGAL EASE

Thomas Smith and  
Monique Lee Hawthorne

Timing is everything, especially in real estate transactions. Following are the top five reasons why deals do not close on time. Avoid falling into these traps.

#### 1. Poor drafting of original contract

This seems like a no-brainer, right? However, parties often in a hurry to get a deal signed will fail to do the simplest things.

Missing dates, incomplete timelines for due diligence, failure to attach legal descriptions or exhibits to documents for later execution (like the deed form), failure to specify prorations, and failure to put in clear notice provisions can hold up closing and cause parties to start pointing fingers. Take time to make sure these often overlooked issues are addressed in contracts.

#### 2. Extensions for contingencies

Agreements typically provide parties the right to conduct a due diligence inspection within a set time frame, and the really important contingencies regularly include an option to extend the time for review if there is any delay.

These contingencies often include review of a title report, survey, environmental inspections, zoning and permits, and physical inspections. One common element of these contingencies is the required retention of a third party to perform the particular inspection.

It is important that parties anticipate that there will be factors outside their control. These factors may cause delays in the delivery and review of these items. In order to avoid delays in closing, each party should evaluate the risk of running out of time for satisfaction of contingencies and make sure that the contract provides for extensions for problematic or time-consuming investigations like environmental inspections.

#### 3. Corporate or organizational documents

Corporate or other organizational documents, such as those for corporations, LLCs and trusts, are almost compulsory. They validate that an entity actually “exists” in a state and that such an entity is authorized to enter into the proposed transaction.

Most title companies require these materials before issuing title insurance, and lenders will also require them to complete funding obligations. Any standard closing checklist should include these items. These documents include good standing certificates, certificates of corporate authority, certified board minutes or resolution authorizing the transaction, incumbency certificates and copies of operating agreements and amendments.

#### 4. 1031 exchange documentation

Section 1031 of the Internal Revenue Code allows for a tax-free

**These days, credit is harder to come by and many people completing deals are independently wealthy. For us common folk, lender delays often are outside our control, but parties need to do everything possible to minimize any potential delays.**

exchange of “like-kind” property held for investment purposes. A party expecting to take advantage of this tax benefit has 45 days to identify the new property to be exchanged and 180 days to close on that property.

The exchanging party will need to have separate agreements that govern the exchange, the assignment and closing instructions to make sure that the transaction complies with all Section 1031 requirements to avoid any unwanted tax consequences. This documentation and the exchange itself take time to assemble, require participation by neutral third parties and can complicate what might have been a simple sale transaction.

#### 5. Lender delays

These days, credit is harder to come by and many people completing deals are independently wealthy. For us common folk, lender delays often are outside our control, but parties need to do everything possible to minimize any potential delays.

First, make sure that the lender has approved all forms, including the loan agreement, promissory note, deed or trust and assignment of rents, security agreement for control accounts, spousal consents, environmental indemnity agreements, subordination agreements and the like. And keep in mind that returning to a particular lender does not guarantee the forms will be the same as before.

Second, make sure that the timing of any of the lender’s contingencies is factored into the agreement. Lenders often want their own ability to sign off on all due diligence inspections.

And finally, the escrow instructions must be tailored to dovetail with lender escrow instructions. The buyer will need the lender funds to close, so make sure the title company stays on top of the closing processes necessary for the loan to fund.

The foregoing highlights the common closing traps. Take time to carefully address these issues and close deals on time.

*Thomas Smith is a partner in the Portland office of Davis Wright Tremaine LLP. He focuses on real estate and general business law. Contact him at 503-241-2300 or at [thomassmith@dwt.com](mailto:thomassmith@dwt.com).*

*Monique Lee Hawthorne is an associate in the Portland office of Davis Wright Tremaine LLP and a LEED Accredited Professional. Her practice focuses on real estate, land use and environmental law. Contact her at 503-241-2300 or [monique-hawthorne@dwt.com](mailto:monique-hawthorne@dwt.com).*