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Commercial Real Estate Listing Agreements - Seven Things for a Seller to Consider [Ober|Kaler]

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Most sales of commercial real estate begin when the seller retains a broker. The seller's choice of the broker can depend upon a number of factors, such as past relationship, the broker's background and capabilities with respect to the particular property and the amount of the commission. The next step after selection of the broker is the execution of a listing agreement, which the broker typically prepares by adapting its standard form to the proposed transaction. Listing agreements vary substantially from state to state and from broker to broker. Most listing agreements, however, address similar issues, and many of those issues are potentially very important for the seller. Some of those issues are obvious and some are not. Almost all are negotiable. Below are seven of the most important issues that the seller can negotiate in the broker's listing agreement.

Trigger for Payment of Commission

For good reason, brokers have been able to prevail upon many state legislatures and some courts to provide legislation or case law to protect the broker's right to receive a commission. This protection is often afforded by conditioning the broker's right to receive a commission not upon closing of a sale, but merely upon producing a ready and able buyer willing to meet the seller's price. Whether or not this result is mandated by legislation or case law, the listing agreement often provides for it as a matter of contract. While providing for payment of a commission under these circumstances protects a broker, it creates the possibility that the seller may owe the broker a commission even if the seller does not sell its property, a result clearly not anticipated by nor acceptable to the seller.

Most brokers will not object to adding language to the listing agreement requiring that the sale close before the broker has earned its commission. Further, it is in the seller's interest to expand upon this concept so that, except for specific carve outs, no other fee, compensation or reimbursement is due to the broker unless the sale closes. For instance, the seller would not want to pay the broker all or a portion of a forfeited deposit. Nor would the seller want to reimburse the broker for costs or expenses, unless the broker and the seller have specifically negotiated an expense reimbursement or “set-up” provision, to reimburse the broker for certain expenses such as preparation of a brochure and advertising. If the seller agrees to such a reimbursement provision, the seller will want to consider: limiting the kinds of expenses that qualify to be reimbursed, requiring that reimbursable expenses be paid only to parties that are not affiliated with or employed by the broker and providing a cap on the seller's maximum reimbursement obligation.

Alternative Transaction

While a broker will ordinarily agree that closing is a condition to payment of its commission, the broker may want additional protection by providing in the listing agreement that the broker will be entitled to a commission if the seller, rather than selling its property, enters into an “alternative transaction”, which goes to closing. Language relating to alternative transactions can be very broad, but at a minimum is intended to protect a broker if the seller enters into: a sale of the ownership interest in the entity which owns the property; a ground or other lease of the property; an option to sell the property; or a joint venture to develop the property.

Alternative transaction provisions can be complicated and difficult to negotiate, largely because they are intended to cover many possible eventualities, without addressing any of them in detail. For instance, while a seller may not object to paying a commission if the seller enters into a long term lease of the property, rather than a sale, the seller will want to know how the broker's commission will be calculated on a lease and when it will be payable (e.g., upon lease execution or occupancy or in multiple payments). If the listing agreement addresses alternative transactions, the seller and the broker may need to spend some time thinking through and expanding upon the most likely alternatives and the applicable commission arrangements.

The Tail

Brokers are often concerned that an unscrupulous seller may try and avoid paying a commission by waiting until after the expiration of the listing before entering into a contract with a prospective buyer that was introduced to the property during the term of the listing. For this reason, most listing agreements provide that the seller will be required to pay the broker its commission if the seller, after the expiration of the listing, enters into a contract with a buyer who was introduced to the property while the listing was in effect. While such a provision is reasonable in concept, the seller needs to be sure it will be reasonable if applied.

First, the seller must know the prospective buyers with respect to which the broker will claim a commission (knowing this may allow the seller to carve out those buyers from a subsequent listing with a different broker and avoid paying a double commission). The seller can do this by limiting the applicability of this provision to buyers whose names are on a written prospect list delivered by the broker to the seller within a specified period of time, perhaps on the order of ten days, after the expiration of the listing. The seller should go further, however, and limit the names that may be placed on the prospect list. For instance, if the broker sent out an email blast to thousands of potential buyers, the seller would not want to receive a prospect list with thousands of names. The seller should require that as a condition to being on the prospect list, the prospect has submitted a letter of intent or a contract or that the broker has either personally taken the prospect or the prospect's agent to the property or personally spoken with the prospect or the prospect's agent. The seller should also require that the prospect list be timely submitted and that time is of the essence with respect to submission of the list. (Indeed, the seller should require that time is of the essence of all of the provisions of the listing.) Of course, the seller should make sure that the “tail” terminates within a specified period of time after the listing expires (three to six months would seem to be reasonable).

The Seller's Absolute Discretion

The seller does not want to get into a dispute with the broker over whether or not the seller thwarted the broker's effort to sell the property because the seller arbitrarily rejected a particular buyer or offer. To avoid such a dispute the listing agreement should expressly provide that the seller retains absolute control over the process of picking a prospective buyer, negotiating with that buyer and consummating or not consummating closing (subject, of course, to state and federal anti-discrimination laws and the like). Some listing agreements contain language which might be read to create an implied obligation for the seller to accept an offer if it meets the listing price or to otherwise proceed during the sale process in a commercially reasonable manner. The seller should resist this type of language and should provide in the listing agreement that the seller is free to accept or reject any buyer, accept or reject any terms, terminate or continue a contract, close or not close and otherwise act with respect to the sale of the property in any manner as the seller may desire in its sole and absolute discretion.

Information and Warranties

Many listing agreements require the seller to provide written information regarding the property and some provide for the seller to give disclosures or representations or warranties regarding the condition of the property. Both provisions could present problems for the seller. For instance, language to the effect that the seller will provide “all documentation relating to the property” is overly broad and could give rise to potential liability on the seller's part if the seller inadvertently fails to disclose documents in its possession. Such language could also be interpreted to require the seller to deliver documents in the possession of the seller's attorneys, engineers or management company. And, in the absence of an express qualification, the seller could be subject to liability if some of the documents, including those prepared by third parties, contain false or incorrect statements or information. If the broker will not agree to remove entirely any requirement for the seller to provide documents, then the seller should limit the requirement to the use of the seller's “good faith efforts” to deliver documents and should provide that the seller's obligation relates only to documents “in the seller's possession”. The listing agreement should also provide that the broker must rely upon all such documents and their contents at its own risk.

Similarly, language relating to disclosures, particularly broad language, is always a concern. Often the requested disclosures relate to matters such as “defects” in improvements, zoning matters, environmental matters or compliance of the property with applicable laws. The seller should avoid making any such disclosures. It is enough that the seller, in the sale contract, will carefully negotiate with the prospective buyer representations and warranties which relate to these matters. The seller should not have to take part in similar negotiations simply to enter into a listing agreement. Moreover, most sale contracts contain protective “AS-IS” language which provides a counter balance to any express representations and warranties. Most sale contracts also provide that any representations or warranties relating to the property survive closing only for a limited period of time. These limitations are typically not addressed in the listing agreement. So, to the extent that the seller makes specific disclosures, representations or warranties in the listing agreement, the seller may end up with having a liability to the broker which is more expansive than the seller's liability to the buyer.

Duration of Listing/Termination

Listing agreements typically are (and certainly should be) for a set period of time, often on the order of six months or a year. While this is reasonable in and of itself, there could be circumstances where a seller is unhappy with the broker's marketing efforts or with other actions of the broker. Under such circumstances, the seller would not want to wait until the expiration of the listing in order to find a different broker. Therefore, the seller should provide a mechanism for early termination of the listing. Ideally, the seller would want the right to terminate the listing for any reason or for no reason after a relatively short period of prior notification. Similarly, the seller would want the right to terminate the listing immediately for good cause. A broker will often be amenable to reasonable provisions of this nature, especially if the broker is protected with respect to prospective buyers on a prospect list and can recoup its out of pocket expenses, if the termination was without good cause.

Indemnification

Perhaps, the most difficult provision to negotiate in a listing agreement is the indemnification provision. The broker doesn't want to incur any liability to anyone in connection with its efforts to market the seller's property. Accordingly, many listing agreements contain a very broad indemnification provision, requiring that the seller indemnify the broker in the event that any claim is made against the broker in any way related to the property or the broker's efforts to market the property. While this is understandable from the broker's perspective, the seller will not want to be responsible for anyone's conduct except its own and the seller will want only to be

responsible for its conduct which is negligent or contrary to or constitutes a default of its obligations in the listing agreement.

In addition, the seller will want cross-indemnification from the broker. The seller will want the broker's cross-indemnification to cover the broker's default of its obligations under the listing agreement as well as any claims resulting from the broker's actions beyond the broker's scope of authority set forth in the listing agreement. And, there is another issue that the seller needs to consider. The broker may negotiate with or cooperate with a different broker representing a prospective buyer. Unless a co-broker arrangement is specifically addressed in the listing agreement, the seller likely will be under the impression that the prospective buyer's broker will be compensated out of the commission that the seller is paying to the seller's broker. The seller will not want to be in a position where it is sued by a broker representing the buyer, particularly if that broker is upset because of a disagreement as to the sharing of the commission between that broker and the seller's broker. The seller, therefore, would want the broker's indemnification provision to require the broker to indemnify the seller if a claim is made against the seller by another broker, provided such claim does not result from the seller's actions.

As noted above, there is substantial variation in the form and content of listing agreements. Although most listing agreements address similar issues, those issues are often treated in very different ways. A seller who intends to deal reasonably with its broker will likely not have a problem regardless of what is contained in the listing agreement. Nevertheless, the seller cannot predict the future and cannot predict how its relationship with the broker will develop if the transaction hits unexpected bumps in the road. For this reason, the seller should carefully consider all of the issues implicated by the listing agreement, including those seven issues addressed above.

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