

# Avoid Post-Closing Problems

Joe Serafin  
Owner & Principal Broker  
Serafin Real Estate

Commercial real estate investors, whether sellers or buyers, want to avoid post-closing problems. This article discusses common problems and how to avoid them.

## Commercial Real Estate Buyers and Sellers

Experienced commercial real estate buyers are usually aware of potential post-closing problems. First-time commercial investors may not be so aware. To take a simple example, a business owner who has previously rented their property decides to buy one to meet [new market opportunities](#) or to expand their current operation. They are successful business owners, but they may not be so aware of how commercial real estate transactions are negotiated, constructed, and taken to closing. It is also possible they will not fully understand their post-closing obligations or what future obstacles they may meet if they are not protected from them.

If the client is the property owner and wants to sell or relinquish [\(if it is a 1031 Exchange\)](#) a piece of property, their goal is to achieve the best price, on the best terms, in the required timescale, and a smooth closing.

In either case – experienced or inexperienced buyer or seller– the entire project will reach the best conclusion when they work with, and are guided by, a real estate broker with a lot of on-the-ground experience and a first-class local track record.

## The Simple Basics to Avoid CRE Post-Closing Problems

Truly successful CRE investing depends on:

- Having a clear goal against which each action can be tested.
- Accurate and comprehensive planning.
- Preparing the right PSA (purchase and sale agreement) to act as the basis for negotiating, clarifying responsibilities, and agreeing timeframes.
- Choosing appropriate professionals to ensure title searches, surveys, property inspections, contract negotiation, etc. are all fully in the interests of the client.
- Continuous due diligence.

Many common post-closing problems are legal in nature, but have a direct practical and financial impact. When a buyer takes title, they also take the post-closing authority, responsibilities and limitations which come with it. When an owner sells or relinquishes the property, they do not want any unexpected contact or demands from the new owner. Every detail must be clear and agreed. This is one reason why CRE sellers and buyers should select their real estate brokerage carefully.

## **Buyer Intent and Potential Problems**

These three examples indicate buyer intent and, therefore, imply potential issues they should consider. Does the buyer want to acquire:

- Vacant land for future development, either for their own use or to rent out?
- Improved property to be used as is or to be modified for adaptive re-use?
- Existing property for NNN lease passive investment?

The business purpose, and whether the client is selling or purchasing the property, determines which post-closing issues they will specifically want to avoid, how they will avoid them, and on whose expert advice they will rely. It is easier for sellers than for buyers, so for buyers commercial due diligence is paramount. A seller, however, has to be confident that their listing agent has marketed the property appropriately and has assessed a potential buyer as being a good fit before considering a PSA.

## **Avoiding Post-Closing Legal Problems**

Avoiding potential problems requires detailed knowledge of the property itself, the purchase and closing process, how the commercial property title will be transferred, and who the other parties to the transaction are.

## **A Comprehensive PSA**

The PSA should ensure that all appropriate information is delivered in time for due diligence to be completed. These items include (but are not limited to) seller warranties, liability assignments, existing encumbrances, lease assumptions, tenant estoppel certificates, existing and proposed zoning disclosures, surveys, easements, property mineral rights, etc.

The more the seller discloses, the less there is to discover. The more the potential buyer knows, the greater their confidence in progressing to the closing or the quicker they can decide there is an immovable obstacle that would limit their future plans.

## **Title Search**

The title search clarifies the clear chain of title and if there are any gray areas as far as past or present ownership is concerned. It is common for a new legal entity to be created as the selling or buying party. Signatories, etc. for the new entity must be known and pre-authorized.

The title search exposes current and previously satisfied liens. Existing liens must be paid off at closing, unless the buyer agrees to take them over. The title commitment clarifies what will be included or excluded. Mechanics' liens must be excluded, for example.

## **Seller Affidavit**

The seller should prepare a legally binding statement which confirms there are no new encumbrances such as unpaid contractor invoices, utility expenses, etc. and that all signatories are qualified to sign. Unauthorized signatories can negate the sale, no matter how much post-closing expenditure the new owner has incurred.

## **Avoiding Post-Closing Practical Problems**

If the buyer intends to develop, redevelop, or modify the property, they must be clear about what they may and may not be allowed to do. While the solution to avoiding a post-closing problem is to pursue the due diligence process, some legal requirements result in practical problems.

### **Zoning Problems**

The buyer must know that current and any proposed future zoning for the property and surrounding areas will not negatively impact planned construction or adaptive alterations. The buyer will also want to be certain that something as basic as their proposed signage will be permitted.

### **Easements**

Utility companies and local authorities may have easements in place which would limit or prevent new construction or extensions. Neighboring owners may also have rights of way over the subject property, which could also affect intended changes. They may impact things as simple as commercial vehicle access, the number and location of parking spaces or signage positioning.

Relying on an existing survey may not be good enough. If there are any post-survey encroachments, the buyer must know about them pre-closing or become potentially liable for their correction post-closing. Contracting with an experienced local surveyor will remove any uncertainty and maximize confidence that intended use will not be inhibited.

### **Environmental Problems**

As well as a building inspection to ensure everything is functional, safe, and was done to code, an environmental inspection would expose any contamination from dumping, underground storage, etc. which would need to be corrected.

## **Avoiding Post-Closing Loss of Revenue Problems**

### **Legal and Practical Problems Impact Revenue**

Some potential problems already listed could impact revenue, either temporarily or permanently. A childcare facility or Montessori school, for example, must have enough parking space for staff and clients. Not being able to advertise because of a signage limitation may be temporary, but it will still impact how the potential market sees (or doesn't see) the new facility.

The new owner must also be confident that zoning and other regulations will not limit their plans to attract new tenants from the target market.

### **Tenancy Agreements**

Any buyer who wants a passive NNN investment must be confident that existing tenants will generate the intended revenue. As part of due diligence, the new owner must be clear about tenant payment histories, existing rental agreements, renewal options, and previously-agreed rent increases.

## **Choosing Your CRE Broker**

A local real estate broker with in-depth knowledge of Fairfax, Loudoun, and Prince William Counties, is more than a professional who knows how to market property or work with buyers. A seasoned professional has their "ear to the ground" and knows what is happening or may happen in a particular area.

They also know the history of properties – who owned them, what they were used for, how that history could positively or negatively impact a new owner's plans. This sort of knowledge helps both sellers and buyers because marketing will be properly targeted, and interested buyers are assured that they are considering appropriate investments to satisfy their goals.