

REAL ESTATE INVESTING – BUYER’S PERSPECTIVE

There are many attractive opportunities for investment in real estate, particularly triple net properties. However, there are several complexities to such investments, and an informed buyer can minimize his or her risks by being prepared. The comments below present an overview of the most common considerations that a buyer should focus on, when considering an investment in triple net properties:

Basic Documents

1. Letter of Intent. Most transactions will begin with a letter of intent (“LOI”), summarizing the basic terms such as price, time allowed for investigation (“due diligence”), contingencies, and target closing date.
2. Purchase and Sale Agreement. This comprehensive document spells out the details of the entire transaction, including all issues covered in the LOI, and numerous additional provisions.

Due Diligence

1. Start by obtaining complete copies of all pertinent documents pertaining to the property, including all exhibits mentioned in those documents; this list may include:
 - a. Lease or ground lease under which the tenant occupies the property;
 - b. Short form of lease as recorded;
 - c. Property Description (must be sure it matches property description in Purchase Agreement, and in title report);
 - d. Site Plan;
 - e. Environmental Survey Report;
 - f. Environmental Questionnaire;
 - g. Declaration of Protective Covenants (must review for possible assessment of CAM charges);
 - h. Instruction manuals and warranties for any equipment located on the property;
 - i. Boundary survey;
 - j. Occupancy permit; and
 - k. Zoning letter.

2. Confirm that parcel is separately assessed and taxed; obtain current tax statement.
3. Check with local authorities regarding pending special assessments or impact fees.
4. Confirm tenant has not given mortgage or assignment of tenant's interest under the lease.
5. Review title report to confirm seller is in title, and there are no unexpected encumbrances; promptly issue a written objection to Seller regarding any unacceptable title conditions.
6. Obtain tenant's estoppel certificate, confirming that tenant acknowledges the lease is in full force and effect, that there are no modifications to the lease, and that no party is in default under the lease. This document should require tenant to make diligent investigation of matters certified by tenant, and not be stated merely as "to the best knowledge of the signer". Start the process of obtaining the estoppel certificate early, as many leases require significant advance notice to tenant, in order to obtain the certificate from tenant.
7. Study the Lease to ensure it addresses all pertinent issues, especially the tenant's responsibility for certain matters which are normally tenant's obligation:
 - a. Payment of utilities – If tenant will not sign addendum to lease, should still insist on letter from tenant, confirming tenant's duty to pay all utility bills. If any amounts remain unpaid, local government can lien the property, effectively forcing Seller to pay;
 - b. Comply with all government regulations – There's no telling what new requirements may be imposed by the government (i.e., supplemental ADA requirements or new building code provisions), but they are nearly always enforceable by the government against the property owner, so there should be a lease addendum confirming tenant's responsibility, or at least a confirming letter from tenant;
 - c. Payment of property taxes and assessments;
 - d. Maintenance of all aspects of building;
 - e. Payment of premiums for property and casualty insurance; and
 - f. Provide proof of liability insurance.
8. Check for local taxes, which could include a transfer tax based on the purchase price, a property owner "privilege tax", commercial rent tax, sales tax, state or local income tax, and personal property taxes which may be billed to property owner even though assessed based on value of business equipment owned by tenant (must confirm such taxes are separately billed).
9. Find document governing property access and review for maintenance authority and maintenance obligation.

10. Review whatever environmental info is available from Seller, and explore environmental contamination insurance; some leases expressly make Landlord liable to tenant for ANY contamination, now and in the future, unless Landlord can establish the contamination was due solely to the acts of Tenant or any party other than Landlord. Proving who caused contamination is often impossible, and the “default” responsible party may be Landlord.
11. Arrange for professional inspection of all buildings and other improvements, and carefully review inspector’s report.

Buyer’s Additional Tasks

1. Buyer should proceed with formation of a business entity to purchase and own the property. Typically, this would be a limited liability company (“LLC”), which affords pass through tax treatment, and limitation of the owner’s liability. See the article by Keith Shepherd, “[Types of Business Entities](#)”. The Buyer will need to provide copies of Buyer’s completed company formation documents to the escrow agent who handles the closing of the purchase transaction, as well as to any lenders.
2. Lender financing may require numerous documents and execution of forms. Buyer’s legal counsel should be provided with copies of all loan documents, well in advance of closing, to ensure that all intended terms of the loan are actually reflected in the loan documents. It is not uncommon to request several clarifications and corrections to these documents.
3. Buyer’s insurance coverage should be arranged and confirmed, with the coverages specified by Buyer’s lender, if any.

Closing Preparation

1. Obtain and review critical closing documents:
 - a. Assignment of Lease. This must strictly comply with requirements set forth in the lease, including notice to tenant; otherwise tenant could withhold rent payments until proper notice is given;
 - b. Title company’s proposed form of escrow instructions; in many transactions, your attorney will need to supplement the form instructions with specific instructions addressing particular issues unique to your transaction; and
 - c. Title company’s preliminary closing statement.
2. Confirm no change in conditions of property by conducting an informal re-inspection.
3. Buyer must provide to the tenant, IRS form W-9; otherwise tenant could withhold rent payments.

4. Get proof of tenant's insurance, and arrange for Buyer to be named as an additional insured.
5. Confirm availability of funds from whatever source you are relying on, whether that is your bank, your 1031 facilitator, or your lender.
6. Confirm arrangements for Buyer's own insurance, usually consisting of general liability coverage.

Post-Closing

1. Verify title insurance issued in name of Buyer, with no exceptions to title (except as approved).
2. Assemble and organize all transaction documents for easy future reference.
3. Confirm that notice was given to tenant regarding the Landlord name and address for rent payments and notices given under the lease.
4. Establish separate files and calendar reminders for annual property tax payments and insurance renewal.

Conclusion

A prospective Buyer is often represented by a broker who specializes in real estate investment. A competent broker is an invaluable source of additional information and advice. Of course, it is critical for the Buyer to consult with a qualified attorney experienced in real estate investment transactions, before any documents are signed.



For more information or questions, please contact Steven R. Bennett at 503-228-8588 or by email at srb@pmbllaw.com. Email inquiries are welcome; Initial consultations are provided at no charge and no obligation.

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