Article

SELLING A MULTI-STATE REAL ESTATE PORTFOLIO

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There are many reasons to sell a real estate portfolio such as increasing liquidity, reducing losses, or divesting assets in a particular market. When the properties are in multiple states, the transaction becomes more complex as real estate and title insurance laws are local in nature. Although properties are bundled in a portfolio sale, each property has its own legal issues. Good planning helps streamline the transaction toward a successful closing.

INITIAL STEPS

A good first step in selling a real estate portfolio is to select a single title company to update all of the title work for the properties. Title premiums are negotiable in many states, and competitive bids can be obtained. The title work may indicate that some properties are actually owned by an affiliate of the contemplated seller. These affiliated entities will also need to execute the conveyance documentation. Some properties may be ground leased as opposed to owned in fee, and the underlying ground lease should be reviewed for required consents, notices, and form of assignment documentation.

Updated surveys for the properties should be obtained. There are national surveying companies that will coordinate the multi-state surveying work and make sure that the surveys meet agreed upon standards. The survey work should be reviewed for any major encroachments so that potential title objections can be addressed. The title work and surveys can be posted in an electronic data room for ease of review.

Local counsel should be engaged in each applicable state for guidance on statutory contract notices, deed forms and other transfer requirements. It is helpful to attach the state deed forms to the portfolio sales contract.

ALLOCATIONS

As part of the process of arriving at a portfolio purchase price, a seller will determine the value of each individual property. Sellers sometimes package less desirable properties with better ones and may have concerns about separately allocating pricing in the sales contract in order to avoid highlighting the less desirable properties. Price allocations will need to be made in states that require payment of transfer taxes and for title insurance purposes, however. The parties typically negotiate an allocation of the purchase price as part of the sales contract or prior to closing.

Allocation of closing costs for title policy premiums and endorsements, transfer taxes and recording fees is often determined by custom and practice. These practices vary from state to state, and local counsel and the title company can be helpful in determining what is customary. A chart allocating these costs on a state by state basis can be inserted into the sales contract.

CAN PROPERTIES BE EXCLUDED?

Real estate portfolio contracts typically provide the purchaser a due diligence period in which the purchaser can inspect the real estate and terminate the contract if the inspections are unsatisfactory. This can be problematic where only one or a two of the properties have significant issues and the rest of the properties are acceptable to the purchaser. The seller will want the purchaser to purchase all of the properties or none of them. The purchaser, on the other hand, will want the right to exclude properties with significant problems.

Similarly, if a material casualty or condemnation arises with respect to a property, the purchaser may want the right to exclude the property. The seller may instead prefer to require that a portfolio-wide dollar threshold with respect to casualty or condemnation be exceeded before any purchaser termination right is available. These issues are resolved by the parties' needs and leverage in the transaction.

JOINT OR SEVERAL REPRESENTATIONS

When portfolio properties are separately owned by a parent and affiliates, the parent and affiliated sellers may prefer to make representations and warranties about the real estate severally, with each seller making representations and warranties only as to the properties it owns. The purchaser will want the representations and warranties made jointly so that the credit of all entities stands behind them. If the affiliated entities are not wholly-owned by the parent seller and instead are partially-owned by different groups of outside investors, the seller may have a better argument for making representations and warranties severally.

Portfolio transactions require creativity and good communication between the parties. A strong focus on the goal of closing helps insure a successful outcome.

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