

Transaction and Closing Series - Part I

The Contract is signed – now what?

There is no doubt that buying or selling a hotel will usually try your patience. Once you've negotiated hard for your price and then postured for the contract language you wanted, there is a natural tendency to relax a bit. However, hotel veterans know that a variety of events must take place in order for the deal to progress to a closing. Although there are numerous hurdle points in a hotel transaction, timing and title need attention immediately. The following three points will help avoid surprises as the deal progresses.

1. Identify the Key Dates:

Once both parties sign the contract, don't celebrate too long. Take a moment and catalog the key dates contained within the contract. The following represents a partial list of timed events that are commonly performed under a contract:

- Delivery of Due Diligence items to Buyer
- Buyer's Inspection/Due Diligence Period
- Seller's Delivery of Title Commitment
- Buyer's Delivery of Title Objections
- Seller's Response to Title Objections
- Buyer's Financing Contingency
- Franchise Application
- Franchise PIP Inspection and PIP Review
- Inventory
- Seller's Delivery and Buyer's Approval of Operations Settlement
- Delivery of required closing documents into escrow
- Closing Date

By acknowledging these events and corresponding dates early in the transaction, the parties are aware of their responsibilities and the time constraints they face. When both parties comply with their respective time requirements, the transaction **always** proceeds smoother than those that don't. Identifying the key dates will help everyone focus on the task at hand.

2. Pay Attention to the Title Commitment/Title Insurance –Part A:

Purchase and sale agreements will call for the seller to deliver, within a specific period of time, a commitment to insure title (or an abstract, depending on the state). Many times the contents of the title commitment are merely set aside, only to emerge, with vengeance, several days before closing. In most contracts, the buyer has a specified amount of time to object to any exceptions contained in the commitment.

Both parties should review the commitment as soon as it is available. The legal description should be verified, together with confirmation of the buying and selling entities. The commitment will contain a “Conditions and Stipulations” section as well as a list of exclusions from coverage. These exclusions are found in Schedule B of the commitment. The conditions and stipulations section, together with each “exception to coverage” should be reviewed in order to evaluate the impact on the property. Remember, title insurance is an indemnity insurance policy, **not** an all-inclusive guarantee. Those items, that are shown as exceptions are **excluded**, from the insurance coverage. As a seller, it is tempting to ignore the contents of the title commitment, especially if the buyer neglects his/her duty to respond or object to any aspect of the commitment. Even if the buyer forgets about the title commitment, the lender won't..... and you can't close without the lender.

As a buyer, your attorney should review the policy and issue a timely written objection to those exceptions, which he/she wishes to object. After all, every exception shown on the commitment is an encumbrance on the seller's property. Some exceptions are of no consequence, however, those that are require investigation. In some instances, we have closed transactions without an ALTA survey, but the occurrence is becoming more rare. The ALTA survey is expensive compared to a boundary or an as-built survey, but is essential in determining the impact of the exceptions shown as the title commitment. Financial responsibility for the ALTA survey may be negotiable, but its delivery is important to the timing of a closing. Be sure and ask your lender for its ALTA specifications **before** you order the survey.

If the buyer and seller ignore the title commitment and the ALTA survey, it could haunt the transaction later. I have seen closings delayed or deals unravel, simply because the title commitment suddenly became important to the lender or to the buyer's attorney. By working with the seller, buyer, lender and the title company, the requirements to insure title can be met in a timely and acceptable fashion.

3. Pay Attention to the Title Commitment/Title Insurance – Part B

In order to close the transaction, the Title Company will require the buyer and seller to deliver a variety of documents into escrow. These closing requirements will be listed in the Contract and in Schedule B of the Title Commitment. If buyer and seller are corporations, the following are examples of the documents required by the Title Company:

- Certificates of Good Standing (Secretary of State)
- Corporate Resolution to Sell or Member Consent to Sell
- Articles of Incorporation
- Operating Agreements or Bylaws
- Affidavits of all types, which will be described in the Title Commitment

Attention to these items, prior to closing, is important simply from the fact that it takes time to gain corporate approvals (signatures) and for the title company to review the documents. The lender will often request additional policy endorsements that may require additional

research by the underwriter. The buyer, the seller, the attorneys and lender should be in direct contact with the closing agent in order to insure timely delivery of the required affidavits and forms. It is not reasonable to deliver these items on the day of closing and expect the title agent to comply.