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Maylie & Grayson is a full service law firm providing representation to real estate brokerages, licensees, local Realtor® organizations, developers, builders, lenders and investors, providing services in all aspects of real estate including transaction review, land use planning, licensing, mediation, arbitration and court matters.

Operating Outside of Your Expertise

We frequently receive calls from clients regarding business transactions in the context of a real estate sale. Although our clients may be real estate brokers, they have agreed to represent buyers or sellers in a real estate transaction which also involves the sale of a business. This article will address risks brokers face when representing a party in a joint real estate and business sale.

Business sales involve techniques, documents, and advice that are distinct from those relating to real estate transactions. While real estate brokers are certainly well qualified in the listing and sale of real estate, they may not have the background or training which may be necessary to participate in a business transaction. Accordingly, brokers may face additional significant risks in representing a business buyer or seller.

First, in business sales, the parties must address tax and liability issues and decide early on how the transaction is to be structured, what form it will take, what assets are included in the sale, and how the sale will be enforced. For example, business sales may include non-competition agreements. Business sales may also include a right to use the business's original name, address, phone number, email address, logo and website. We have been involved in real estate disputes in which a business was sold with real estate, but the parties disagreed as to whether the sale included the business name and logo. Unfortunately, neither the parties nor the real estate brokers had provided for the sale of the business name and logo in transaction documentation.

Risks inherent in a business transaction may differ based on how the business transaction is structured. For instance, a business may be sold either as an entity or as a collection of business assets, such as equipment and inventory. If sold as an entity, the parties to a business transaction must determine who will be responsible for past and future liabilities of the business. Determining how liabilities will be allocated is very important, as the buyer may not expect to be liable for obligations arising from an IRS audit of prior year tax returns of the business.

Second, business sales often require a particular set of documents which may be unique to the transaction. For instance, some business sales may involve asset purchase agreements or bills of sale, whereas others may necessitate a business sale contract or other form of agreement. Regardless of the form these sales may take, the decision is frequently made by the parties with the advice of a qualified attorney or accountant. Brokers should not rely upon standard real estate forms or a title company in effecting a business sale. Many title companies will not provide title and escrow services for a business sale due to various complexities involved, and they may be hesitant to provide such services for a joint real estate and business transaction for the same reason.

Third, business sales require that specific research be completed prior to closing. Most simply, research may involve determining ownership of assets, akin to brokers determining who holds title to real property, and approval of business and tax records. However, research can also include Uniform Commercial Code and judgment searches, which may be more complex. In addition, if liens or judgments against the business seller exist, the buyer and seller may have to agree on how such liabilities will be addressed in the sale, due to the fact that the seller may not own the assets free and clear.

Fourth, business sales may have serious tax implications based on how they are structured. Brokers may be liable to their clients if they provide improper guidance as to how a business sale should be structured with the real estate sale. For instance, parties to a joint real estate and business transaction must determine how to allocate the sale price between the business assets or entity and the real estate. Such allocations have significant impacts on taxes, and will likely impact the buyer's future sale of the real estate and business.

Conclusion

As you can see, there are numerous risks involved in representing parties in joint real estate and business transactions. If your client asks for representation in such a transaction, you are well advised to speak with your principal broker first. In addition, you should counsel your client to engage tax, business or legal advisors for specialized advice on the transaction.

This column contains general information only and must not be construed as legal advice. Questions may be submitted directly to Maylie & Grayson by fax at (503) 775-1765, by email at joelgrayson@mayliegrayson.com or by mail at 7959 SE Foster Road, Portland, Oregon 97206.