

Five Reasons Not to Sign a Real Estate Contract (Without Consulting an Attorney First)

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Buying and selling commercial real property is expensive, starting with the price of the property and then adding the fees for inspections, insurance, recording, and commissions, if any.

Buyers and sellers might be tempted to leave attorneys out of the transaction until the last minute in an attempt to keep costs down, but such thinking can ultimately cost the parties more money in the long run. In most cases, it is best to include your real estate attorney early in the transaction, especially in North Carolina, where a licensed attorney is required for several aspects of the transaction. Ideally, buyers and sellers will bring their real estate attorneys into the transaction prior to signing a contract.

In order for a real estate contract to be binding in North Carolina, it must meet certain requirements under what is called the "statute of frauds." Under the statute of frauds, the contract must: (a) be in writing, (b) be signed by the party to be charged (i.e., the buyer and seller), (c) contain a description of the real property, and (d) contain the terms and conditions of the transaction.

It is easy for an unrepresented buyer or seller to make a misstep in the negotiation of the transaction's terms and conditions. As mentioned above, the statute of frauds requirements for the written contract are relatively simple and straightforward: parties, property, and price (or provisions), the three P's. The most important provisions of the contract are generally the purchase price, the amount of time allotted for the buyer to complete its due diligence, and the closing date. But there are many other terms and conditions in a real estate contract, and the devil is in the details

of those terms and conditions!

In many situations, a real estate attorney can still assist a buyer or seller after the contract is signed, but only based on the terms and conditions that the parties already agreed to in writing—a party will often lose bargaining power in certain instances by signing without a legal review first. Bringing an attorney in after the contract is executed will also limit the value the attorney can bring to the client.

Below, we take into consideration the statute of frauds requirements and provide several reasons why a buyer or seller should not sign a commercial real estate contract without first consulting an attorney.

The first piece of information addressed in a real estate contract is typically who the parties to the contract are; ultimately, these are the entities or individuals who execute the contract or the buyer and the seller.

Although naming the buyer and seller seems simple, care must be taken in doing so. For example, if one of the parties is an entity that does not exist because the entity has not been formed yet or the entity dissolved at the Secretary of State's office, the contract is likely void. Or, if the wrong entity is named as a party and there is a clause in the contract prohibiting assignment, the contract may need to be reformed in order to get the correct entity to the closing table. The way out of this situation can be costly. If there is no prohibition on the assignment of the contract, and the buyer decides to assign its rights in the contract to another entity, the seller will now be in a contract with an entity it may not know and may not want to be in a contract with. An attorney can draft an assignability clause that is right for the situation.

Where the seller is an individual who is married, the seller's spouse in North Carolina has certain marital rights in the property that will need to be waived in a recorded document. That is typically done by the spouse joining in the execution of the deed conveying the property to the buyer. If not, the seller's spouse will continue to have marital rights in the property even after the property is conveyed to the buyer. Although the spouse's signature is

required for the individual seller to convey good title as required by the contract, the best practice for the buyer would be to require that the spouse of the seller also execute the contract so the spouse is obligated to execute the deed. Note, however, that the seller's spouse is generally not entitled to any portion of the proceeds of the sale at closing.

From a buyer's standpoint, if the buyer is an individual person and is married, buyer's spouse does not have any rights in the contract, but once closing occurs, the buyer's spouse will have marital rights in the property, absent a recorded agreement to the contrary between the spouses.

The written contract must have a description of the property that is the subject of the transaction. There are a number of ways to meet this requirement. Among them are (i) a written legal description with metes and bounds, (ii) a map depicting the property, (iii) the parcel identification number(s) assigned by the tax office, sometimes called a "PIN number", (iv) a reference to the recording information of the seller's deed, and (v) a street address. The best is to take advantage of all those methods: the contract should describe the property by address, parcel number, and deed reference, and it should refer to exhibits that contain the legal description and a map. Your attorney will want to review the metes and bounds description in the proposed contract to ensure that it describes the subject property. Often, however, metes and bounds descriptions are not available or the contract draftsman does not know how to retrieve, or is otherwise unable to access, that description. Using just one other method for describing the property could be problematic. For example, if the draftsman uses a street address but there is a vacant adjoining lot that is supposed to be included but does not have a street address, that adjoining lot is arguably not subject to the contract. Likewise, if an incorrect PIN number is used to describe the property, there may be no enforceable agreement because there is no "meeting of the minds" as to the property being conveyed. These situations may place the parties in breach of contract, and would necessitate a contract amendment to remedy the situation, which will take time and money away from the parties. An attorney can help buyers and sellers properly identify the subject property before the contract is signed so that a costly fix is not needed later.

The contract will require the seller to deliver a deed at closing. The deed required by the contract will typically be a general warranty deed, a special warranty deed, or a non-warranty deed. Read more about deed warranties [HERE](#). If the contract calls for the seller to deliver a general warranty deed, the seller can be on the hook to the buyer and its successors in ownership for third-party claims to the property after closing, even if the claim originated prior to the seller's ownership. A special warranty deed limits that exposure to the period during which Seller owned the property. In a non-warranty deed, which is seldom used in a contract, the Seller is not warranting anything about its ownership of the property. Each form of deed has benefits and drawbacks for each party to a contract. Buyers and sellers should consult with their attorneys to determine what type of deed they should receive or deliver at closing.

The North Carolina Bar Association and Realtors Association have several standard forms for the purchase and sale of different types of property. They are effective and work well in many situations. However, any revision to these forms by a non-attorney could create unintended consequences and obligations for the buyer or the seller, and there are many circumstances of the transaction that typically need to be addressed outside of the boilerplate forms. So, while the forms are effective, they do not cover additional items such as restrictions on contract assignment, restrictions on use of the property after closing, conditions to closing that benefit either party, and the handling of current tenants or other occupants of the property.

It is important to note that only an attorney of one of the parties (or one of the parties themselves) can prepare a non-form addendum to the standard North Carolina forms; real estate brokers may not prepare any addendum that has legal ramifications for the parties. An attorney can guide you on what is important and necessary to include in any addendum that changes or supplements any terms of the form contract.

A real estate contract should give a buyer an agreed amount of time to

perform due diligence investigations on the property. In addition to conducting typical physical inspections of the property, including an environmental assessment in most cases, a buyer needs time to perform certain other examinations of the property, such as a title examination and a physical survey of the property. If the parties are using a standard North Carolina form for a commercial real estate purchase, the buyer can generally back out of the deal for "any reason or for no reason" during the due diligence period, making the contract what is generally called a "free look" agreement. If the due diligence tasks are not completed within the due diligence period, it can result in the buyer not being able to get out of the contract without penalty (namely, losing its earnest money). Finally, real estate attorneys need a certain amount of time to perform the tasks they need to perform to properly represent a buyer or a seller. If a buyer or seller waits until after the due diligence period ends to retain an attorney, it could jeopardize the timely closing of the transaction. Retain your attorney early in the game, keeping in mind that at certain times of the year, such as the end of the calendar year and the end of each quarter, quality real estate attorneys tend to be very busy with transactions.

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Avoid unintended consequences and obligations by retaining an attorney prior to signing a real estate contract. Doing so will maximize the value your attorney can provide by advising you on the terms of your contract with your goals and desires in mind. Your attorney can also help you navigate through the real estate transaction process to ensure that you are meeting your contractual obligations and that your transaction closes on time.

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