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Focus On New Jersey

Tackling Complexities In New Jersey's Tough Real Estate Market

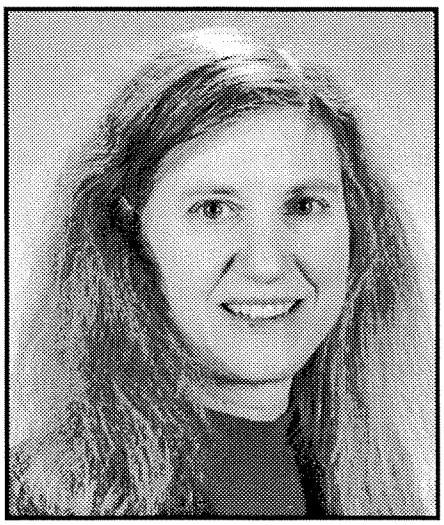
The Editor interviews ***Victoria A. Morrison,*** *a Partner at Riker, Danzig, Scherer, Hyland & Perretti LLP. Questions can be addressed to her at vmorrison@riker.com.*

Editor: What legal issues are getting a lot of attention in typical real estate transactions today?

Morrison: All the usual issues arise. In essence, when a company considers entering into a real estate transaction, whether to buy, sell, finance or lease property or to sublease excess space, the first thing it needs to do is to get a lawyer well versed in real estate law involved to help the business team understand the legal complexities of the market.

For example, when a client wants to sublease excess space, the attorney will want to determine what process must be followed with the overlandlord and, when appropriate, get that process underway so that the sublet can be accomplished efficiently. No client wants to spend a lot of time and effort on a deal that cannot be approved, nor does a client want to hear that a deal is held up because the approval process was not followed. When we represent the overlandlord, we make sure the process is followed and overlandlord receives the legal protections it is entitled to under its lease.

When a client leases space, whether as landlord or tenant, it is important that there is an understanding of what costs and risks are being assumed by the client. As a tenant, you do not want to enter into a lease that has a fixed rent, of, for example, $25 a square foot, but allocates other items so that there could be additional rent that, in any year, could make your actual cost three or four times that amount unless you know it and understand the risks upfront. As a landlord, you want to understand what costs will and will not be reimbursed by your tenant and what repair and maintenance obligations you are undertaking.



Victoria A. Morrison

In a sale, except as the parties may expressly agree, the seller wants to make sure that the buyer relies on its own due diligence so that the seller does not assume contingent liability because of representations. If you are the buyer, you want to make sure that, to the extent you are relying on representations and not solely on due diligence, you have obtained the representations that you need from the seller and have sufficient survival of those representations to make them meaningful. As the buyer, you also need to confirm that you have, in fact, done your due diligence and are satisfied that the property meets you needs.

Editor: Why is involving a lawyer with real estate expertise important?

Morrison: The real estate lawyer can help you determine what it is that you need to do. The lawyer does not perform the due diligence: for example, he or she does not do the environmental assessment. The lawyer does, however, give advice as to what should be in the assessment.

After you have performed the due diligence, the lawyer can help you to evaluate it. For example, with environmental studies, the attorney makes sure that your report meets the technical requirements that allow you to qualify for an innocent purchaser defense, which is a very important protection under New Jersey law for a purchaser of property against liability for pre-existing environmental hazards.

It is helpful to have a lawyer remind a client of the problems that come from agreeing to agree. Too often you see contracts of sale which, for example, provide that the parties will enter into an ancillary agreement, but fail to attach the form to the contract of sale. Sometimes there are good business reasons for proceeding in that fashion. Too often, however, there can be trouble bringing the contract to closing smoothly because the deal was not worked through up front. To avoid such last minute conflicts, the real estate lawyer can remind the parties of what needs to be done and have the ancillary agreements attached to the contract in their agreed final form – this process lets the parties know up front, before they sign the contract, if there are issues on

these documents that need to be resolved. If there are valid reasons not to negotiate these agreements up front, as there sometimes are, the real estate lawyer can help to make sure that the parties are going into the deal with their eyes open and are aware that the open issues could produce a major problem going forward.

Another example occurs in a case where a seller is making representations that will be relied upon by a buyer. If a seller is being asked to make representations, a good real estate attorney can ask the right questions to help the seller to make sure that the representations are true and complete. I have had situations where clients have sent me a draft they have done without involving a real estate expert. When I go through my questioning process about the representations, it is discovered that there are exceptions that should be disclosed. These exceptions rarely involve real issues and rarely change the underlying truth of the representation – in the vast majority of cases they involve making full and complete disclosure of all relevant facts so that there can be no question later that the representation was, in fact, true. The most common examples in this category are disclosure of closed environmental matters that resulted in No Further Action letters and the disclosure of old environmental reports.

Editor: Please give us an example of why real estate expertise is helpful.

Morrison: In addition to the traditional title and environmental concerns, one of the big constraints in New Jersey for a client seeking to develop property is the requirement for governmental approvals. Some of these approvals are well-known. Some are less known. For example, if you are going to be building on a property and that property has frontage on a state highway, you may need to obtain New Jersey Department of Transportation approvals. Certain development constraints may result from this process that differ from the constraints resulting from the municipal and county approval process. A real estate attorney will be very aware of the DOT process and can guide the client through it and help the client understand how to comply with these requirements.

Once the client determines it wants to enter into a transaction as a business matter, we talk and determine the best way to achieve the client's objectives. We then begin drafting the documents and negotiating with the other party. The negotiation has to be done in a way that accomplishes the client's objectives while keeping the other party in the deal.

These are consensual deals. They are not litigation. The judge is not making you show up. There is a different tenor to contract negotiations than there is to litigation, and it is important to keep that difference in mind. You have to zealously represent your client and fight for every point, but do it in a way that keeps the other party at the table and makes a deal.

An attorney with real estate expertise can quickly identify the issues, give you a sense of what other people in similar situations have done in the past and provide creative ideas to make your deal work.

Timing is often critical in a real estate transaction. A lawyer with real estate expertise can help you to make sure that closing does not occur until after all the contingencies in the deal have been met and does occur as soon as possible thereafter. After the contingencies have been met, counsel will see that the documents are prepared and any ancillary documents that were not pre-negotiated are completed in acceptable form, or that any dispute is addressed immediately. Counsel will also see that you get your executed documents, with all the attachments, as soon as possible after closing. In addition, counsel will maintain the file for reference any time it is needed, even years later. This can be particularly helpful in an era of corporate restructurings and downsizing. Just today, I received a call from an attorney for a company who was looking for an executed copy of an assignment of lease that was signed in 1991. I was able to provide it.

Editor: Do lenders often throw wrenches into real estate transactions?

Morrison: I represent lenders as well as borrowers. Most lenders are there to do their job of making money available under terms that are designed to do as much as possible to assure that it will be repaid. About 95 percent of the lenders do not present impediments to a deal, except sometimes they do not move as quickly as the borrowers would hope. You have about five percent of the lenders who simply come down with requirements that do not make sense to parties and hold up the deal. For example, the lender may want the seller, who is not the borrower and has no relationship with the lender, to enter into some kind of document under which the seller would have some liability to the lender in certain instances. A log jam occurs when the seller says, very logically, that it has nothing to do with the lender and will not undertake that liability. In another example, the lender may have unreasonable requirements for closing in terms of timing that the seller cannot accommodate. Most often, however, lenders are helpful or neutral in moving the deal forward.

Editor: What practical tips do you have for a corporate counsel working with a real estate lawyer?

Morrison: The main thing is to make sure that the outside counsel has all the relevant facts and is aware of your business concerns. The most disconcerting thing for outside counsel is to find out that there is a major business policy internally at that particular company that was not discussed with outside counsel. For example, you may have a strong corporate policy that certain issues are always handled in one prescribed way. Educating your outside counsel about your corporate culture and your own internal needs is the best way to get the best performance at the lowest price. You will be able to use outside counsel most efficiently because outside counsel will not be spinning wheels in fighting for issues that are not important to you or not fighting hard for something that you need, but other people in your position may not find essential.