

# Closing Real Estate Deals: Blending the Skills of Your Broker, Attorney & Environmental Consultant

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When you are buying or selling a commercial or industrial property<sup>1</sup>, or seriously considering doing so, it is probable that you will retain what I call the “holy trinity” of the real estate deal: a real estate broker, a real estate attorney and an environmental consultant. Here are three professionals who are retained to represent your best interests. As the client, you ostensibly say to the professionals, “You are on my team to help me close this deal.” But each professional has a different set of rules and guidelines he must follow, so although each one is playing on your team, he may not necessarily consider the other guys his teammates. In fact, in this complicated game, some of the rules each member of the team may follow openly conflict with one another. And that can cause problems, delays, or even nullify the deal. (Members of the trinity know that deals are lost more frequently than anyone would like to admit.) One way to keep deals moving forward is to know your players—their skills and limitations—and the specialized rules that govern their behavior.

To minimize the likelihood of each professional operating at cross purposes to one another and maximize the likelihood of closing the deal, someone needs to become the project manager to monitor each professional’s actions and—perhaps even more important—to smoothly integrate findings, actions, and communications and ultimately, to facilitate the process. The project manager gathers information and suggestions from the trinity, synthesizes it, and funnels it to owner. The project manager knows that lack of information and indecision are all potential deal-killers. When the client is a major corporation or large-scale real estate developer, the project manager may be a principal, their inside corporate counsel, or their Chief Financial Officer (CFO). But when the client is a smaller company or an individual, he normally delegates management to an outside attorney. There is no one “right” person or corporate individual to serve this function, but someone should do it. This article provides

- an overview of how the environmental consultant, real estate broker, and attorney each work on a real estate transaction;
- a look at real-life examples of what can go wrong; and
- recommendations for anyone involved in real estate transactions.

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<sup>1</sup> Although this article focuses on commercial real estate, much of the advice also pertains to residential real estate transactions.

## **OVERVIEW**

Within this article, let's assume that you are selling an industrial property and have retained all three professionals. Please note that the "trinity" is presented in the order in which (under most circumstances) you would engage them.

### **The Environmental Consultant's Role**

You want to sell. You know that a prospective purchaser is going to perform due diligence prior to closing the deal. The last thing you want as a seller is for the buyer to know more about the property than you, so you engage the services of an environmental consultant to assess your property's environmental status. The big-picture question is this: are there any potential areas of concern that will raise a red flag for a purchaser and thus become a negotiating point at best or a deal-breaker at worst? Accordingly, you will want to know the environmental status of your property well before your realtor brings a deal to the table.

The ultimate goal of the environmental consultant is to issue a clean bill of health for the property while conforming to the environmental regulations of the state in which the deal is taking place. In most instances the first step in the process is due diligence. Most due diligence requires 30 days to complete. And then more time will be needed if further study or sampling is required. Therefore, as the seller you should allow at least 60 days for your consultant to perform due diligence. And of course if the sampling phase reveals actionable contaminant levels, you should expect any required remediation to take more time.

In New Jersey, when remediation is at hand or when a property owner must comply with the Industrial Site Recovery Act (ISRA), the consultant is required to enlist a Licensed Site Remediation Professional (LSRP) to review the consultant's work and issue the Response Action Outcome (RAO).<sup>2</sup> To be clear, the LSRP is a second environmental professional that must be retained. They are the responsible party's (in this context, the seller's) de facto case manager, a role formerly filled by a New Jersey Department of Environmental Protection (NJDEP) case manager. In order to issue a RAO, the LSRP is held to the most exacting certitude; LSRPs have zero room for latitude. Upon reviewing the consultant's report, the LSRP will return the report to the consultant if he finds even one deficiency, requiring that the deficiency be remedied prior to issuing the RAO. Sellers therefore should not look to the LSRP to advocate on their behalf. Almost all ideas, strategies, and conversations will issue from the consultant and other members of the project team. The LSRP remains independent.

Your environmental consultant should advocate on your behalf. This means exercising as much creativity as possible while still conforming to the regulations. As the environmental industry has matured and the regulations have changed in accordance with new facts and findings, the degree of latitude available to consultants has diminished. Environmental Strategies & Applications, Inc. (ESA) does not claim that opportunities for advocacy will be identified on each project. But ESA promises to examine the avenues for latitude on each project. And when we identify an opportunity to make a choice due to latitude, the outcome often reduces time and costs, and brings the deal to closure sooner.

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<sup>2</sup> The RAO replaced the No Further Action (NFA) letter and it is the closure mechanism issued by LSRPs.

## **The Real Estate Broker's Role**

When the property is free (or almost free) of environmental issues, you will then actively engage your real estate broker. It may sound glib, but the broker wants to close the deal and collect his commission. And while fulfilling this objective, a reputable broker strives to foster and maintain long-term client relationships. These relationships are the backbone of every real estate professional's career. Therefore, brokers will do everything possible to bring the parties together, answer questions, and resolve issues, all the while keeping their eyes on the prize: closing the deal.

The best brokers know their markets. They know how to present and market the property. They know what other properties are available, the going prices, loan options, and other service vendors whom they can call upon to facilitate the process. The best and most successful real estate brokers possess a unique blend of knowledge, a coterie of coveted relationships, and savvy wrought through years of deal-making. In the end, the best brokers truly earn their commissions and enjoy special relationships with some of the largest and most influential property owners and deal-makers.

## **The Attorney's Role**

Attorneys are central to every real estate deal, period. Think back more than 40 years to a time before environmental regulations. Attorneys helped their clients negotiate deals on a regular basis when environmental issues were not a factor. Most real estate attorneys possessed all the requisite skill and knowledge to negotiate almost any commercial or industrial deal. But that is no longer necessarily true.

And regardless of your attorney's relative degree of environmental savvy, each attorney has a mission that is anchored by a few simple principles. First and foremost, she must identify and mitigate legal risk for her client. When she negotiates the client's contract she should negotiate a deal with terms that favor the client to the fullest extent practicable. And she must ensure compliance with applicable laws and regulations. While your attorney knows that you long to close the deal, she may advise you to not close the deal if she feels that inappropriate or inordinate risk exists. Unresolved environmental issues are often viewed as inordinate risk. That's a powerful reason to resolve those issues early in the sale process.

## **Cautionary Tales or, What Can Go Wrong**

While the project manager is busy managing the trinity, perhaps their greatest challenge is to manage time. The importance of timely, informed decisions cannot be overemphasized. As stated earlier, the project manager gathers, distills, and synthesizes information, ideas, and suggestions so the client can make informed and timely decisions. A deal moving forward tends to keep moving forward. Deals at rest tend to die.

Environmental issues scare people and routinely ruin deals, especially among those clients who are not environmentally sophisticated. Suppose a seller puts her commercial property on the market for \$1.5 million, and then learns of an environmental issue. If she and her attorney are fearful or misinformed, they may decide to let the buyer handle the cleanup and reduce the price of the property far below the cost of remediation.

As stated before, deals can be lost when sellers fail to perform due diligence. Deals often blow up when buyers discover environmental problems via the due diligence process that had been

previously unknown to the seller. At this point, the broker scrambles and the attorney may act defensively instead of strongly negotiating terms. This is a precarious position for any seller.

## **Recommendations**

**Determine who will manage the deal process.** Large corporations and developers employ CFOs and they often have in-house counsel. Either individual could assume the role of project manager. Just be certain that the selected individual is familiar with real estate issues. Do they know what it takes to bring a deal to fruition? Do they have clear and ready access to the property owner? Decisions must be made in a timely fashion.

**Stay well informed throughout the process.** Some real estate deals are complex and have a bewildering array of moving parts. Property owners or buyers who have to address environmental issues are relegated to use a disparate collection of professionals to organize those moving parts. Recognize that these professionals may be working at cross purposes and it is the project manager that must coordinate those efforts.

**Explore using “Other People’s Money” (OPM).** Why use your money to fund remediation? ESA suggests using OPM to pay for cleanups. There are three common sources of OPM that can pay all or part of your environmental costs: old insurance policies, tax appeals based upon a diminution of value due to environmental impacts, and state loans and grants. See [http://www.asksesa.com/enewsletters/enewsletter\\_0912.pdf](http://www.asksesa.com/enewsletters/enewsletter_0912.pdf) for more information.

Most real estate deals occur among companies too small to have CFOs or in-house counsel. **Delegate authority, if that’s the case, to an outside attorney who will ultimately negotiate the contract of sale, and quantify/qualify the various forms and degrees of legal risk posed by the deal.** This attorney will distill, interpret and present information so you can make risk-based business decisions. Most of the sellers that ESA works with retain outside attorneys to whom they delegate project manager authority. In addition, attorneys who know environmental and real estate law do the best job of representation and contract negotiation.

**If your real estate attorney isn’t well-versed in environmental law, retain an environmental attorney as co-counsel to help your real estate attorney strategize and negotiate those parts of the deal that address complex environmental issues.**<sup>3</sup> Again, from ESA’s perspective, many environmental attorneys also understand real estate and are involved in such deals on a continual basis. Well-versed attorneys will funnel information toward the seller. Armed with this collection of information, the seller can then make educated business decisions.

**Know that the dynamic among the trinity exists regardless of the party being represented: a seller, a buyer, a landlord, or a tenant.** And regardless of the nature of the deal, all parties must communicate via a project manager who will coordinate their efforts.

**Ultimately it is better for the deal and the seller if environmental issues are resolved early in the process.** By doing so the deal could become routine and can even resemble deals that occurred in the days before environmental concerns became de rigueur.

**Project delays kill deals.** Know what constitutes normal timing for a given task or issue. The project manager should shepherd the trinity, as needed, to keep the deal moving forward.

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<sup>3</sup> The author also believes this is true if the client is a prospective purchaser.

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This topic is very complicated, and many topics and scenarios were, by choice, omitted. I encourage people with questions or comments to call me at 732-469-8888 x201 or send me an email at [sfauer@askesa.com](mailto:sfauer@askesa.com).

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