



Buyers need to know that tax appeals are pending on property listed for sale

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Attorneys handling commercial and residential transactions instinctively know what issues require due diligence on the part of the purchaser. Reviewing leases, checking potential environmental issues, home inspections, title issues, and testing underground oil tanks are necessary and routine. Whether a tax appeal is pending on the property listed for sale is rarely on the menu. It is a commonly overlooked issue.

Purchasers may find out months or years after closing that the seller settled a tax appeal for a higher value than the purchase price, or that a refund was issued which should have been apportioned between the parties. Worse, the seller may have agreed to discontinue the appeal because they have no interest in the outcome, or because their counsel wasn't provided with a forwarding address, lost contact with the seller, and closed their file. For commercial property owners, such issues could involve thousands of dollars in lost refunds. Purchasers may find out that an appeal had been recently resolved that would foreclose further appeals on the same property for up to three years. Purchasers can be foreclosed from renewing appeals from one to three years after settlement under a Statewide tax provision that freezes assessments and appeals after a case is resolved (although not applicable to appeals in New York City and Nassau County, except incorporated villages).

Title review will not disclose the existence of pending appeals. There are no services available that will provide this information. It is possible to contact an attorney that handles tax assessment litigation in the town that the property is located in to inquire if they can perform a search of available records. Since such a search is informal at best, the results may not be reliable, depending on the jurisdiction, but it is a good start. Nassau County, for example, maintains a public record of appeals pending that is about a year behind.

Purchaser's counsel should demand disclosure of tax appeals commenced by the seller when negotiating contract terms. Disclosure should include a letter from seller's tax certiorari counsel with the tax years pending in court or subject to administrative review, the merits of the case, and an estimate of the time required to conclusion. A copy of the retainer agreement with seller should be produced to establish the contingency fee arrangement. In turn, purchaser's counsel should notify seller's tax certiorari counsel that they represent the purchaser and provide the date of closing. The letter should also request that future correspondence about the case should be sent to purchaser's counsel. It might also be appropriate to negotiate a separate contingency fee arrangement going forward in time to cover the purchaser's interest in the tax appeals pending and to be filed in the future.

It is possible for purchaser to retain new counsel to represent its interest in appeals to be filed after the tax year that is subject to apportionment as of the date of sale.

It is appropriate for purchaser's counsel to demand that no disposition of the appeal be made for a tax year in which taxes were apportioned without purchaser's consent; that tax refunds should be apportioned as of the date of sale. These procedures protect the purchaser and, at the end of litigation, may result in unexpected tax refund and prospective tax savings to the purchasers.

As attorneys become comfortable with these issues, it is expected that the real estate bar will develop standard language for commercial and residential contracts that counsel for both sides of the transaction agree on and that disclosure of pending tax appeals will become a standard and customary matter of transactional disclosure.

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