

Modifying or Extending Commercial Loans

situation

Billions of dollars in commercial mortgages will mature this year. With no new money in sight, there's little room for extensions or modifications.

in-house counsel challenge

With lenders under increased regulatory scrutiny, inside counsel may achieve better outcomes by making the lender's job easier by ensuring that a project looks good on paper for the loan committee.

approach adopted

• **Begin extension discussions and/or the search for new debt at least six to 12 months in advance of maturity.** If applicable,

include your plan to attract new investors and make sure all aspects of the request make good business sense for the bank too.

- **Optimize the property value.** If the property was originally valued at \$1 million and the original loan was for \$800,000, you may only be able to refinance at 50 to 60 percent of the current property value. Assuming the property is now valued at \$800,000, offer improvements worth \$100,000 so the property is worth \$900,000. Unlike principal reductions or interest reserves which hedge lender risk, the dollars add immediate and enduring value for the borrower.
- **Think like a bank.** Ask the loan officer about regulatory limits. Will regulators balk if you ask them to waive or accrue interest? Will 5 percent interest, versus 4, avoid a "Troubled Debt Restructure" label and regulatory red flags? Asking sends a message that you understand and care about the bank's challenges. If you don't resolve the bank's challenges, the bank certainly won't help resolve yours.
- **Check the bank's financial status.** The FDIC is taking over banks, and regulations are changing daily, especially for banks that accepted TARP money. Is the bank on the FDIC watch list? If so, expect much more conservative decision making and have a "Plan B" in case the bank is taken over before your loan closes.
- **Determine how your asset stacks up against the competition.** If your site is a fully occupied retail site and five competitor sites are averaging use of only 60 percent of capacity, take photos. Show the bank that you're a safe bet. Even though retail occupancy rates are down, you are still at a solid 100 percent.

A bad appraisal is like a bad credit report card. And in the current economic environment, inappropriately low lender valuation methods have become front page news.

Be proactive. Establish a ballpark appraisal beforehand. Then check an appraiser's references to be sure they are familiar with your area. If possible, go with them and point out the property's features. They will listen if you can show you know what you're talking about.

implementation steps

- Start your search for new debt at least six to 12 months in advance of maturity.
- Optimize the value of the property.
- Know how it compares to others.
- Choose your appraiser carefully.
- Determine the bank's financial standing and regulatory constraints.
- Explore all the viable litigation alternatives including mediation.

If you and the lender reach an impasse and foreclosure is a foregone conclusion, consider all the alternatives including mediation, not just at the beginning but by revisiting them throughout the litigation process. Even if a bank is legally required to initiate foreclosure proceedings, it may give you time to improve the property and/or find an investor if doing so makes sense and there is a realistic chance that you will succeed.

Remember, foreclosure defense litigators are excellent fighters, but to work out a more amicable solution, you may have to insist on trying the mediation process. Be involved in selecting the mediator. Consider also bringing a transaction attorney along to the mediation. These attorneys are sometimes more sensitive to the other side's needs and are used to trying to secure a deal that's amicable to both parties, whereas a litigator may view it as a win/lose situation.

measuring success

Today's lenders are already on the hook. Notifying the bank well in advance, upgrading the property to increase its value, choosing the right appraiser and understanding the bank's needs and limitations reduces the lending risk, sends a positive message and gives you the best possible chance of keeping the property in your company's name.



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