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Selecting The Real Estate Mediator

By Michael L. Lapin, Esq.

The following scenario is far from an unlikely depiction of circumstances that can arise in the world of commercial real estate. In fact, it represents an actual case that involved me as a partner in the entity that owned the shopping center. I have set it out in full so that the various interests of the parties can be appreciated.

As the owner of a 250,000 square foot neighborhood shopping center, your client is attempting to refinance the property. His lender has required your client to use a specific firm to conduct an environmental inspection of the property. The firm found contamination in the dry cleaning establishment, and the calculations done by the firm indicated astonishing level of toxic residue that will cost an enormous amount of money and time to remediate.

The lender has told your client that as a result of this finding it will not make the loan. However, the contamination has been reported and the state is requiring a clean up. Your client hired its own environmental consultant who, in reviewing the reports of the lender's firm, discovered a mathematical error in the calculations that determined the level of contamination. Your client's firm tells him that the original tests, if correctly calculated, show an almost negligible amount of toxic residue, requiring virtually no significant remediation.

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Your client has not only paid the lender for all the preliminary reviews, including the environmental testing, but has paid a significant application fee as well. However, the lender has denied the refinancing based on the environmental issue at the dry cleaners. Although the rejection was based on faulty calculations by the lender's designated environmental firm, the lender does not want to wait for the uncertain and lengthy process of obtaining a no-action letter from the state's environmental agency, and no longer wants to consider this particular refinancing application. Further, the lender believes it has earned the application fee and will not consider a refund.

Your first reaction may be to threaten the lender with a lawsuit in light of the unfairness and arbitrariness of its decision. However, your client has a long-standing relationship with this lender, and in fact is working with the lender on financing and refinancing a number of other commercial properties.

The situation seems to you ripe for mediation. While the client wants at minimum a return of his loan application fee, he does not want to end the relationship with the lender over this one transaction. For its part, the lender also values the relationship with your client, but believes it has fully earned its application fee and does not want to act inconsistent with its company policy.

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Although mediation is an attractive alternative in this instance, its potential usefulness will be greatly enhanced by the careful selection of the mediator.

A successful mediation between an experienced and sophisticated commercial property owner and an established lending institution will be the work of the mediator who can gain the respect of the parties not only for credentials as a mediator but because of his own background, knowledge and experience in the subject matter of the dispute.

While a “neutral” is defined as not taking part in either side of a dispute, this neutrality does not, nor should it, necessarily limit the resources that the mediator can avail himself of in identifying with the parties, their goals, and the parameters of the industry in which they work. The mediator that “has been there” and can communicate that identification to the parties, is going to be way ahead in garnering the credibility that is so essential in assessing the problems and alternative solutions that will be forged in the back-and-forth mediation negotiations.

Mediation of real estate disputes requires the dexterous use of both evaluative and facilitative mediation techniques. However, the degree of evaluation and facilitation that is called for in any particular dispute will be affected by the mediator’s knowledge of the realities of the real estate world in which the parties will have to function when implementing the details of their mediated agreement. Indeed, the parties will quickly understand the practical implications of the various proposals, and the mediator whose experience is lacking in this area will be of little use to them and to the mediation process.

In my early years as a “dirt lawyer” I never documented a real estate deal or a loan transaction without “experiencing” the property involved. My many years in real estate - developing, managing, leasing and always negotiating - have taught me that experience builds exponentially. The first deal is a learning experience, the second is more than the sum of one plus one. It is only experience that educates you to the potential ramifications of the elements in any transaction.

If your physician recommends a particular surgical procedure and you want a second (or third) opinion, whose will you seek – the doctor who has done one or two, or the doctor who has done a hundred? An NFL owner does not hire as his head coach last year’s Heisman Trophy winner. He may be a talented player, but the judgment, vision and pool of working knowledge that make an effective head coach will require many football seasons.

That shopping center, office building, industrial park, apartment building, residential development, title company, lending institution, mortgage company, leasing agency and management company are as important and inviolate to their owners as is any NFL franchise to its owner. The mediator that is going to be called upon to mediate disputes affecting their world will only be as effective as his understanding and experience with that world. While you want your Neutral to be impartial as to the outcome of mediation, you certainly don’t want him “neutered” when it comes to drawing on his experience and understanding of industry norms and his guidance as to the real-world viability of solutions that are being considered by the parties.

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Mediating the case with which we started this article is more likely to be effective with the mediator that understands and has had experience in dealing with commercial property, lenders and loan applications, and the nuances that affect on-going relationships among the players that are involved in the world of commercial real estate financing. The "neutral" side of real estate mediation should be thought of only in terms of impartiality towards the parties. It should not inhibit the mediator from drawing upon his experience and knowledge in guiding the parties to a workable, lasting agreement.

Michael L. Lapin, a member of the bars of California and Illinois for over thirty-five years, is a full-time mediator, serving the real estate and business communities. He has owned/managed as general partner 1.5 million square feet of retail/commercial property, overseeing development, leasing, financial and operational management. He is also a licensed real estate broker.

A twelve-year member of the Orange County Airport Commission (twice chairman) and three-year member of the Orange County Public Finance Advisory Committee (chairman), he was retained by the County of Orange during 1999-2000 in a consultant capacity of Program Manager of the Orange County MCAS El Toro Master Development Program, administering a $10 million annual budget.

In the course of a professional career spanning the practice of law, real estate development and public service, Mr. Lapin has negotiated and resolved hundreds of disputes. More information about him may be found at **www.lapinmediation.com** or by emailing him directly at: **mlapin@lapinmediation.com**