Navigating a Purchase Without a Mortgage Financing Contingency

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Your client finds the perfect apartment, but it has offers from other purchasers. How do you make your purchaser's offer more attractive than the others and still protect your client?

The purchase price itself is a significant determining factor, but not always the deciding one. Purchasers willing to pay more will, as logic dictates, have their offer accepted over lower priced offers, that is, unless that higher offer was not all that it appeared. A higher offer, or even an offer of equal price, contingent upon financing may be rejected by a discerning seller because there is a chance that the purchaser will not be able to obtain financing. Failure to obtain financing for a number of reasons: the purchasers themselves do not qualify for the loan, the lender will not issue a loan for that specific building, or the project or the unit does not appraise at a value for the lender to issue the loan amount the purchaser is seeking.

One way the purchaser can differentiate their offer from the others, especially those offers contingent upon obtaining financing, is to make their offer non-contingent upon obtaining financing. A non-contingent offer allows the purchaser to apply for and obtain financing, but in the event that they are not able to procure financing, the purchaser is still obligated to proceed with the transaction (i.e. paying the balance at closing).

When your client seeks advice regarding a non-contingent offer, the first question to ask them is: "If you are unable to obtain financing, do you have the funds necessary to pay the balance of the purchase price?" A purchaser's attorney's responsibilities are to represent and protect a client's interests, one of which being to inform clients of the risks involved in the transaction. At risk is the contract down payment which is commonly 10% of the purchase price, a significant amount of money.

A way of offering protection to the purchaser, while still having a non-contingent offer, is to complete thorough due diligence prior to entering into contract. Also, ensure there are exceptions to the non-contingent offer permitting the purchaser to cancel the contract in the event of a specific issue preventing the issuance of the mortgage commitment letter, which is conditional approval of obtaining financing.

Purchaser Qualification

If a purchaser has not done so already, and in the mortgage lending climate in which we now are accustomed, financing contingency or not, a purchaser should meet with a lender prior to making any offer. The purchaser should work with their lender to obtain a pre-approval which, while not a guaranty, is confirmation from the bank that the purchaser is qualified for a financing of a certain amount based upon their income, debt and credit. Note this is different from being pre-qualified, in which case the lender does not complete an in-depth review of the purchaser. With this pre-approval in hand the purchaser can clear the issue of whether they are qualified to receive the financing.

Building/Project Approval

Even if a purchaser is financially qualified to obtain a mortgage and the property being purchased appraises for the purchase price, if the lender will not provide financing in a specific building or the lender may deny project the loan. There can be a multitude of reasons that a lender will refuse to lend due to items related to the building or project including, the lender already having provided loans in the building or project and will not provide more financing because the lender would be at too much risk if the building or project failed, the insurance the building or project maintains is not in a form or coverage amount that is acceptable to the lender or the owner occupancy rate in the building or project is not at a level acceptable to the lender. Many lenders will have a list of buildings and projects in which they have provided financing, or even more so, lists containing buildings or projects that are already on their "approved" list. A purchaser can then have some certainty that, unless there have been material, financial or structural changes to the building or projects the lender will provide financing.

Appraisal

In this market where bidding wars and "best and final" offers are commonplace, a concern becomes whether the property's appraised value is high enough to qualify for financing. A purchaser with liquidity and the intention and ability to finance less than 80% of the purchase price may make an offer that is contingent upon financing, but agree to waive the appraisal portion of the contingency. Here a purchaser must still qualify for the loan and the building must be approved by the lender, but in the event that the appraised value did not equal the purchase price, the purchaser is not permitted to cancel the contract. Another method is for the offer to be non-contingent on financing, but contingent on sufficient appraised valuation. This provides a buyer with the comfort of knowing that while the appraised value may not be for the full purchase price, if it comes in below that specified amount, the buyer has the option to cancel the contract.

All offers, whether contingent or non-contingent on financing, should be tailored to each specific transaction. When making an offer more attractive to a seller, it is most important for the purchaser to know the risks of each such offer, how they may mitigate those risks, and complete a successful purchase.

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