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The Commercial Listing Agreement: A Primer for Small Business Owners

A listing contract, also called a brokerage agreement, is a contract between a real estate broker and a property owner in which the owner gives the broker the right to offer the property for sale or lease. This article explores listing agreements from the perspective of the small business owner, who may be selling a property or renting it, and engaging a broker for their services.

The two main types of listing agreements are exclusive agreements and open agreements. An exclusive agreement, gives the broker the exclusive right to sell/lease your property. In most cases with this type of agreement the broker will activly market your property, however if you find your own buyer you will still owe your broker a full commission. With an open agreement, several different brokerage firms have the right to sell your property, but they may not actively market your property, because one of their competitors could potentially swoop in and get the deal.

A listing agreement is a contract composed of negotiable terms. These terms will vary from contract to contract, depending on the state, the broker's professional affiliations (which may bind them to include certain terms), and the parties' negotiating skills. Standard terms such as the date the agreement begins and ends, identification of the parties, and the listing price, are established early on. Some of the terms more likely to be negotiated between seller/landlord and broker include, for example, the broker's commission, factors that may trigger the agreement automatically terminating or extending, and expectations regarding marketing. If there is personal property in a building that you are offering for lease or for sale, make sure you and your broker have a clear understanding of what is included in the sale. A separate agreement may be necessary to address any concerns.

Leasing and purchase/sale decisions tend to take longer in commercial listings than in residential. Pay attention to how the proposed listing agreement addresses periods where the property is off the market. Often, if the listing ends while the property is under contract but closing has yet to occur, it automatically extends so that the broker is still paid at closing. If the deal falls through and the property is back on the market, the listing agreement will extend for the same period that it was off the market. For example, you could sign a six-month listing with a broker and have it go under contract in month four. The environmental inspections, zoning applications, surveys etc. begin, and the deal falls apart after three additional months. Depending on how your agreement is worded and what you negotiated, your broker could get those three additional months to take a second shot at selling your property.

Commercial transactions are often quite complex. A successful partnership with your broker depends on you to read the listing agreement, and ask questions to make sure that you understand it. Your lawyer and accountant may also prove to be valuable resources. What happens if you are trying to sell a rented property, but the lease with the current tenant gives them the option to purchase the property? If the tenant exercises this option, is your broker owed a commission? In a leasing scenario, lease renewals, the tenant's decision to expand into more square footage, to shrink into less, or simply to move into different space within a building can trigger a second lease commission owed to the original broker. This will depend on several factors, including the terms of the "renewal" or "new" lease (i.e. term, rent) and whether or not the broker performed services that played a role in the lease renewal.

Make sure that your listing agreements are reasonable and are reviewed by your attorney. Nearly all, if not all, of the terms of your agreement are up for negotiation, so think potential scenarios through, ask questions, and then ask for what you want.

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