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What Is Your BATNA?

One of the most important talents of a successful real estate developer or investor is the ability to negotiate successfully. Whether it involves a purchase agreement, a lease, municipal and neighborhood approvals or other matters, a successful negotiation can make or break a project. Many people believe that negotiators are born with the talent and that learning to negotiate is a futile effort. Undeniably, certain people are better negotiators than others. Even those who are not born with the talent, however, can learn to improve their negotiating skills. Particularly in today's environment, where many real estate investors are called upon to negotiate with their lender, taking advantage of whatever negotiating tools are available is critically important.

An important question in all negotiations is how hard to push the other side. One way to evaluate that question is to ask the following two questions. First, what is your best alternative to a negotiated agreement. Second, what is the other party's best alternative to a negotiated agreement? In other words, what is each party's BATNA?

In some situations, determining your BATNA (Best Alternative To Negotiated Agreement) can be relatively easy. For example, if you are a tenant negotiating a lease and you have the choice of two very similarly situated buildings with similar amenities, and if each landlord is equally reputable, your alternatives are strong.

However, before deciding how aggressive an approach to take, you need to also consider the landlord's BATNA. For example, if you know that each landlord is seriously negotiating with other parties, their BATNA may also be strong. Of course, throughout a negotiation, BATNAs can change. If one of the landlords leases its available space while you are negotiating with the other landlord, your BATNA has likely changed. You must always continue to analyze the strength of both of your position and that of the other party.

In today's environment, one of the most important negotiations (and one in which we are frequently engaged) is that between a borrower whose loan is soon coming due and its lender. For example, assume that the borrower has a loan that currently has a principal balance equal to 80% of the property's value. In preparing for your negotiations with the lender, determining a BATNA for both you and the lender may help you analyze the strength of your position.

To determine your BATNA, you may ask yourself the following:

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- Could you refinance the loan with another lender for at least the same principal balance? With an 80% loan to value, you may conclude that doing so would be difficult.
- Do you have available cash to pay down principal on the loan so that you might attract other interested lenders?
- If you do not have available cash to pay down the loan, what type of access do you have to other funds?

In looking at the lender's BATNA, you could consider the following:

- What kind of property is the subject of the loan and how bad would it be for the lender if it had to foreclose? For example, a construction loan involving a half-completed building might be more difficult for a lender to deal with than a fully occupied office building.
- Is the loan recourse or nonrecourse and, if recourse, how strong is the guarantor's financial statement?
- What are the lender's goals? Would it prefer to "extend and pretend" or would it prefer to foreclose now and rid itself of a potentially bad loan?

From the borrower's perspective, the borrower must adequately prepare for the negotiations. Determining each party's BATNA may be a good place to start. In doing so, the borrower needs to evaluate its own options and the lender's options, and should investigate what the lender has done in other similar situations. The borrower should also focus on whether the same people are negotiating on behalf of the lender as have negotiated other similar situations or whether the lender has brought new people on board.

Finally, as negotiations begin, the borrower has to carefully listen to what the lender is saying to determine whether the lender's BATNA is what the borrower considers it to be. While using the BATNA approach can be very helpful in preparing for the negotiation process, it should not be used as a party's sole analysis in deciding how to negotiate. BATNA assumes that parties act rationally and reasonably. Particularly in the current real estate environment, that might not be the case when borrowers and lenders negotiate. In those situations, it is more important than ever for parties to continue to listen carefully to each other and keep the big picture in mind. Hopefully, they will reach an agreement that is in both of their best interests.

Reinhart real estate attorneys are actively engaged in the negotiation process and stand ready to help you prepare and strategize for, and, at your request, participate in your negotiation.

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