

The Basic Commercial Real Estate Transaction From Start to Finish

Prepared For: Legal Education Society of Alberta
Real Estate for Legal Support Staff

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INTRODUCTION

The purpose of this paper is to provide some basic information about commercial real estate transactions for real estate conveyancers who do not normally work in the commercial area. The aim is to outline the key differences, and to provide an outline of the typical process for management of these transactions – from contract negotiation to closing.

Scope

This paper will be organized to cover the following specific topics:

1. The scope of commercial real estate transactions;
2. The involvement of the law firm with commercial transactions before the contract is signed;
3. Contractual differences;
4. Seller's closing documents;
5. Common requirements of commercial lenders;
6. Searches and related requirements;
7. Dealing with the corporate buyer or seller; and
8. Some additional tips for dealing with these transactions.

SCOPE OF COMMERCIAL REAL ESTATE TRANSACTIONS

General

Commercial real estate transactions involve the sale, purchase, or refinancing of any commercial (non-residential) property. The property involved can range from a single condominium unit in a commercial complex (a single bay of a small strip mall, for example), to bare land planned for development, to apartment buildings, to shopping malls. As might be expected accordingly, the complexity of commercial transactions can vary greatly.

This paper is focused on the simpler commercial transactions that may pass through the small firm's practice. It is similarly limited to where the law firm is acting for the seller or the buyer. That is, this paper will not be focused on transactions where the law firm is acting solely for a commercial lender in a transaction.

Further, commercial real estate transactions may form part of a larger overall business transaction (such as the sale of substantially all of the assets of a larger business). Discussion of the influence of this larger picture is outside of the scope of this paper, although passing reference is made to search requirements or documents more common in the context of a larger business transaction.

INVOLVEMENT OF THE LAW FIRM BEFORE THE CONTRACT IS SIGNED

General

Most residential real estate transactions involve realtors and the law firm's involvement with these transactions often starts at the moment that conveyancing instructions are received from the realtor's office. This is less commonly the case with commercial transactions, where the law firm is frequently involved before the contract is signed by the parties.

In commercial transactions the law firm will often be consulted about the terms of the proposed deal, and the specific contract terms, prior to an offer being made or accepted. This is frequently the case even where realtors are involved.

While every transaction or contract is different, common matters in respect of the proposed deal that lawyers will investigate, and the specific contract terms for which advice may be sought include the following (some of which are very similar to residential transactions):

1. From the Seller's perspective:
 - a. Adjustments. Identification of what matters will need to be adjusted for on closing. For example:
 - i. Deposit(s);
 - ii. Rent;
 - iii. Equipment Leases;
 - iv. Security Deposits;
 - v. Property Taxes; and
 - vi. Condo Fees.
 - b. Sufficiency of Proceeds. Whether the net sale proceeds will be sufficient to payout all registered financial encumbrances, real estate commissions, and other items to be paid out on closing (or which may require re-adjustment after closing);
 - c. Deposits. The amount of deposit(s), who holds the deposit, and whether the deposit is refundable.
 - d. Problematic Registrations. Whether there are registrations against title that are problematic and will pose challenges for discharge;
 - e. Other Registrations. Whether there are registrations against title that will need to be assigned, accepted, postponed, or

**Development Permit and Compliance Issues
Municipal Compliance and Permit Applications Basics in
Residential Real Estate Transactions**

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INTRODUCTION

The purpose of this paper is to provide some background information regarding municipal compliance and related issues and tips for dealing with the permit applications that often become necessary as a result of non-compliance in residential real estate transactions.

Scope

This paper will be organized to cover the following specific issues:

1. The terms (warranties) contained in the typical residential real estate purchase contract that are relevant to this discussion;
2. The statutory background to “municipal compliance” and “non-conformance,” and the difference between these terms;
3. A summary of typical non-compliance issues;
4. Tips for making the most common permit applications necessary to correct non-compliance issues;
5. The options available when permit applications are denied; and
6. Other problems that may be identified on a Real Property Report which relate to neighbouring landowners, and tips for addressing these issues.

RELEVANT TERMS IN THE REAL ESTATE PURCHASE CONTRACT

General

Most residential real estate transactions that pass through a lawyer’s office involve transactions arranged through realtors. To that end, there is a degree of consistency with the forms of contract involved (although there are variations for condominiums, acreages, agricultural, or commercial properties). Of course, law offices also see forms of contract that differ from these (such as the standard ComFree Contracts, stationer form contracts, or self-made contracts).

Current AREA Contract Terms

The Alberta Real Estate Association (AREA) periodically updates the forms of contract used by realtors. The AREA Residential Real Estate Purchase Contract version from

December 2010 contains the following terms (excerpts) with respect to Real Property Reports and municipal compliance.

4.4 The Seller or the Seller's Lawyer will deliver normal closing documents including, where applicable, a real property report pursuant to clause 4.11, to the Buyer or the Buyer's lawyer upon reasonable conditions consistent with the terms of this Contract. The Buyer or the Buyer's Lawyer must have an opportunity to review the real property report, where applicable, prior to submitting the transfer documents to the Land Titles Office and a reasonable period of time before the Completion Day to confirm registration of documents at the Land Titles Office and to obtain the advance of proceeds for any New Financing and Other Value.

4.5 If the Seller fails to deliver the closing documents according to clause 4.4, then payment of the Purchase Price and Interest will be postponed until the Buyer has received the closing documents and has a reasonable period of time to register them and to obtain the advance of proceeds for any New Financing and Other Value...

4.11 As part of normal closing documents, the Seller will provide the Buyer, regarding the matters described in clause 6.1, a real property report reflecting the current state of improvements on the Property, according to the Alberta Land Surveyors' Manual of Standard Practice, with evidence of municipal compliance or non-conformance. This obligation will not apply to any transaction where there are no structures on the land.

6.1 The Seller represents and warrants to the Buyer that:

...

(d) the current use of the Land and Buildings complies with the existing municipal land use bylaw;

(e) the Buildings and other improvements on the Land are not placed partly or wholly on any easement or utility right of way and are entirely on the Land and do not encroach on neighbouring lands, except where an encroachment agreement is registered on title, or in the case of an encroachment into municipal lands or a right of way, the municipality has endorsed

Closing Issues in Real Estate Transactions: What Can You do When Things Go Wrong?

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1. BACKGROUND

INTRODUCTION

Commercial and residential real estate transactions have at least one element in common: both involve the transfer of title and possession at the **closing date**, when the buyer hands over the purchase price and the seller hands over the property. Typically there is a third party (the bank) lurking in the background to provide the buyer with enough money to pay the seller what is owed. Generally commercial transactions involve a careful consideration of the things that have to happen on or before the closing date to make sure that the transaction can close on time. This paper will focus on problems encountered in closing residential transactions.

WHO'S TO BLAME?

Closing problems can come up on either the buyer or the seller's side or, in truly special cases, on both sides. The closing problem can be caused by someone that the buyer or seller has involved in the transaction: a realtor, a mortgage broker, a bank, a surveyor or the lawyer or a lawyer's assistant, or they can be caused by the buyer or seller themselves. There are also those special clients who announce that they will be travelling and unavailable to sign documents until after the Closing Date. We have a special place where we keep the names of such clients.

2. SELLER'S CLOSING PROBLEMS

SELLER'S PROBLEMS

We tend to think that sales are easier to do than purchases, mostly because you don't have a lender whose conditions need to be satisfied, but there are really more ways a seller can cause problems that crop up at the closing date. Here is an incomplete list of things that can happen on the seller's side to delay closing:

1. Failing to move out;
2. Failing to fix things or to finish things that they've agreed to do;
3. Failing to provide real property report or compliance certificate, or both;
4. Providing a compliance certificate which discloses non-complying improvements;
5. Unable to clear title: private mortgages, lines of credit, underwater properties, uncontrollable non-permitted encumbrances;
6. Lack of authority to sell: corporate authority, power of attorney, grants of probate or administration.

7. Delivery of damaged or non-functioning property (hail, fire, water damage, mechanical breakdown).

Vacating – Paragraph 4.1 of the AREA contract says:

“Unless otherwise agreed in writing ... vacant possession will be available on the 20th day of October, 2011 (the “Completion Day”), subject to the rights of tenant.”

The seller can violate this term by forgetting to move out (really!) or more often by leaving things behind, sometimes things they intend to come back and get, and sometimes just garbage.

Failing to Fix or Finish Things – These are normally terms that have been added to the contract (or construction contracts) which require something to be repaired or completed before the closing date, which sellers don't always accomplish. This becomes a closing problem when the purchaser learns that the work isn't done, or isn't going to be done before the Closing Date either because of a walk through or inspection, or because they've learned of the problem indirectly (from a realtor, inspector, or someone else with knowledge of the property).

Failing to Provide Real Property Report or Compliance Certificate, or Both – This typically happens when the seller isn't aware of the obligation to provide these documents until it's too late, or because someone (the realtor) has told them the 15 year old RPR they have from when they bought the place, before the garage and the deck were built, is sufficient.

Providing a Compliance Certificate for a Property That Doesn't Comply – The property doesn't comply because there are encroachments identified or because the location of the buildings/improvements on the property don't comply with the set back requirements of the Land Use Bylaw or because the improvements themselves don't comply with the Land Use Bylaw – the property isn't zoned for the kind of improvements that are built there or no development permits for the improvements that have been constructed. The most common example of this problem is the deck which has been built or expanded without a permit.

Unable to Clear Title – Paragraph 1.5(b) of the Contract says:

“Unless otherwise agreed in writing, title will be free and clear of all encumbrances, registrations and obligations except ... non-financial obligations now on title such as easements, utility rights-of-way, covenants and conditions that are normally found registered against property of this nature and which do not affect the saleability of the Property.”