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Clauses You Might Want in your Agreement of Purchase and Sale (APS)

Despite the root word '*residential*,' buying or selling a multi-residential property is a *commercial* transaction and requires a lot more considerations than a typical house transaction.

Multi-residential also requires a different set of considerations than most other types of commercial real estate transactions, primarily because tenants' homes and the *Residential Tenancies Act* are involved, and many costs that can be passed on to a commercial tenant, cannot be passed on to a residential tenant.



The Ontario Real Estate Association (OREA) produces somewhat standardized forms of all kinds including Agreements of Purchase and Sale. Ontario Real Estate lawyers prefer that the body of the Agreement not be modified but rather all non-standard clauses be added in a Schedule A.

I have not provided the exact clause legal language for a variety of reasons but more specifically because this is the role of a real estate lawyer and, of course, I don't want the liability.

So, here are some clauses that you might want to ensure are in your Agreement of Purchase and Sale, especially if you are a buyer.

- The seller should be required to immediately provide the following , *if available*:
 - existing survey
 - zoning details
 - Environmental assessment(s)
 - Whatever due diligence documents are in the seller's possession

- The seller should provide the following within a few business days:
 - Summary of *all* expenses and backup documentation (invoices, statements, etc)
 - Contracts to be assumed
 - Chattels list
 - Warranty of actual rent rolls/leases
 - Remaining due diligence documents including rental increase applications, capital improvements completed by the Seller during its ownership and warranties, (if any), contracts, property tax assessments, leases, offers to lease, tenancy agreements, true executed copies of existing mortgages to be assumed by the Buyer (if any), engineering plans, floor plans with dimensions, soils, hydro-geological and other tests, service layouts, audits, reviews and such like
 - Tenant Confirmation (Estoppels) Letters: each tenant confirms in writing the contractual understanding that each tenant believes it has with the landlord (seller) in respect of the rental unit and services provided between the tenant and the Seller.
- Condition on financing: this is arguably the single most important clause (on a practical basis), as failure to secure financing is believed to be the number-one reason that commercial contracts do not close. And, like it or not, commercial financing does not get done in a few days, like residential mortgages do. You must allow at least 20 business days (a calendar month) or you could find yourself asking or granting extensions that could re-open negotiations. I lost a deal once because of this; during the course of financing, which took longer than the allowed-for period, hidden value was



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discovered in the property. The REIT, owner of the property, took advantage and denied the extension request, instead putting the property back on the market.

- Condition on environmental: CMHC and most lenders require a *Phase I Environmental Assessment* for commercial transactions, including multi-residential properties comprising 5 or more units. The results of a “Phase I” can be filled with surprises for everyone. For example, it might be discovered that the property was once the site for a laundromat or a garbage dump existed next door 30 years earlier.

You want the option to walk away from the offer if this situation arises. Leave yourself at the very least 10 business days for this; more if you can get it.



Don't let the clock start ticking on the buyer's conditions until the seller has met all of its conditions. Schedule the conditions in logical succession too. There's no point in paying for an environmental assessment if the financing isn't in place first.

- As a buyer, get your own building inspection done. The appraisals, assessments and inspections conducted by the Lender, CMHC and others serve their respective needs; your best interests may not be served. For example, things you ought to know may not necessarily matter to the lender. Allow yourself time for this and don't

spend the money until you are certain all the other conditions will be met first.

- Get a warranty that the buyer or seller doesn't need to rely on anyone else's permission in order to close the deal.
- The seller should turn over the property to the buyer in a reasonably 'clean and vacant' condition (eg. parking lot, storage shed, etc.).
- The seller should send a notice to all tenants advising them of the new owner and requiring all future rents to be paid as the Buyer directs.
- The seller should warrant that it has complied with all legislation while it owned the property.
- There should be no disputes outstanding of any kind.
- The seller must allow the buyer and its agents access to the property from time to time to conduct its due diligence, etc.
- The buyer should have the right to inspect the property one last time at least one week prior to the closing date.
- The seller should not renegotiate any rental agreements after the agreement becomes unconditional.
- Any pending rent review applications should be completed by the seller at the seller's expense.
- All chattels and fixtures should be in good working order and free from all liens and encumbrances.
- Outstanding work orders and Letters of Non-Compliance should all be resolved or actions agreed to between the parties before closing.





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- Make positively certain you get a Fire Retrofit letter from the local fire department.
- Get the seller's warranty (not just representation), that there is no water damage, environmental effects (hazardous substances, etc.), or pests in/on the property and that the sewage system, furnace and the like are all in good working order.
- The lands are free and clear of any local improvement charges.
- The property is not designated, or planned to be designated, a Heritage Property.
- Make certain the building is in compliance with the zoned use, or that you have it in writing that

the building is 'legal non-confirming.'

- If setting up a new company to hold the property's title, you will need an appropriate assignment clause that protects the interest of the buyer and seller.

There are a great many factors that can affect what additional clauses may be required. It is not possible to anticipate all the vagaries and variances of the multitude of influences that affect what clauses should go into a purchase agreement but the above list will give you a good starting point. **End**

I am a commercial realtor (broker), based in Toronto, Canada focused on multi-residential (rental apartment) buildings.

As an owner/operator I am also intimately aware of the issues, challenges, personal financial and estate planning considerations, rewards, and sense of accomplishment that come from managing the human relationships, business challenges and operational issues of owning a rental property.

I can help you do the same.

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(Multi-residential investing)