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COMMERCIAL INVESTOR

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CLAUSES YOU MIGHT WANT IN YOUR AGREEMENT OF PURCHASE AND SALE (APS)

By Chris Seepe, Broker of Record, Aztech Realty Inc. Brokerage

Buying or selling a multi-residential property is a commercial transaction and requires many more considerations than a typical house transaction. It 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 produces many standardized forms including an Agreement of Purchase and Sale (APS). The standard body of text in the APS should not be modified. All non-standard clauses should be placed in a Schedule A. The APS has a standard clause that establishes that Schedule A clauses take precedence over standard body clauses.

Here are some topics of clauses that you might want to ensure are in your APS.

- Require the seller to immediately provide, if available:
 - Existing survey
 - Zoning and permitted uses
 - Environmental assessment
 - All due diligence documents 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
 - Insert the rent roll into the APS and have the seller warrant its accuracy
 - Due diligence documents including rental increase applications, capital improvements completed by the Seller during its ownership and related warranties, contracts, property tax assessments, leases, offers to lease, tenancy agreements, true executed copies of existing mortgages to be assumed by the Buyer, engineering plans, floor plans with dimensions, soils, hydro-geological and other tests, service layouts, audits, reviews, etc.
 - 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 landlord.
- Condition on financing: this is arguably the single most important clause as failure to secure financing is the number-one reason commercial contracts fail to close. Unlike residential mortgages, commercial financing never gets done in a few days. Allow at least 20 business days or you could find yourself asking for, or granting, extensions that could re-open negotiations. I once lost a deal once because of this. During finance negotiations, which took longer than the allowed-for period, hidden value was discovered in the property. The REIT, owner of the property, took advantage and denied the extension request, and instead put 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 example, it might be discovered that the property was the site for a laundromat or garbage dump long ago. Leave yourself at the very least 10 business days for this.

Don't let the clock start ticking on the buyer's conditions until the seller has met all of their 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 needs. Your best interests may not be served.

Things you ought to know may not necessarily matter to the lender. Allow time for this and don't spend the money until you're certain all other conditions are met first. Make certain your chosen appraiser and environmental assessment specialist are on your lender's approved list before you award the work.

- Ensure the buyer or seller doesn't need to rely on anyone else's permission in order to close.

The seller should:

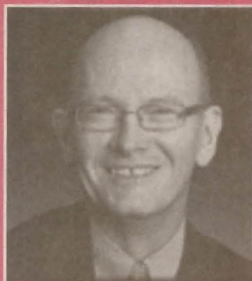
- Turn over the property in a reasonably 'clean and vacant' condition (eg. parking lot, storage shed, etc.)
- Send a notice to all tenants advising them of the new owner and requiring all future rents to be paid as the Buyer directs.
- Warrant that they have complied with all legislation while it owned the property
- Allow the buyer and their agents access to the property from time to time to conduct its due diligence, etc.
- Allow the buyer to inspect the property one last time at least one week prior to closing
- Not renegotiate any rental/lease agreements after the APS becomes unconditional.
- There should be no disputes outstanding between the seller and others (tenants, suppliers, etc.).
- Any pending rent review applications should be completed by the seller at the seller's expense.
- Chattels and fixtures should be in good working order and free from liens and encumbrances.
- Outstanding work orders and Letters of Non-Compliance should all be resolved or actions agreed to between the parties before closing.
- As buyer, make certain you obtain a Fire Retrofit letter from the local fire department.
- Obtain 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, insert an assignment clause to transfer title from the buyer to the seller upon closing.

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 an APS but the above list is a good starting point.

Chris Seepe is a commercial real estate broker and broker of record at Aztech Realty in Toronto, specializing in income-generating and multi-residential investment properties, retail plazas, science and technology-related specialty uses (laboratories, data centres, call centres) and tenants mandates. (416) 525-1558, cseepe@aztechrealty.com, www.aztechrealty.com.

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Please say you saw it in *The Commercial Investor*



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BROKER OF RECORD

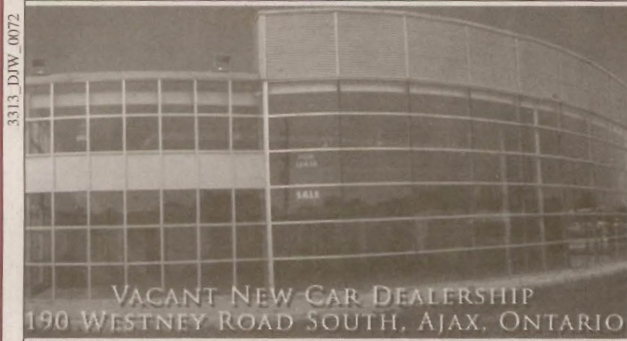
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Ontario, L4K 2J1

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FOR SALE/LEASE \$2,500,000
Net: \$18.00/sq ft. Bldg: 8116 sq ft.

- Vacant new car dealership.
- Corner lot.
- 105 ft frontage.
- Drive-thru possible.
- Showroom for 6-8 cars.
- Many permitted uses.
- Close to Hwy 401 and GO Train.
- 28 parking spaces.
- Signalized intersection.
- 2 built-out offices.
- 3 washrooms. Kitchen.
- 5 service bays (4 hoists not included).



FOR SALE/LEASE \$439,995
Net: \$25.00/sq ft. Lot: 1.3 acres

- 1.3 acre vacant lot.
- Estimate 12,000 sq ft building possible.
- 122' frontage on Bath Rd (main thoroughfare).
- Many uses including retail with drive-thru, and automotive.
- Tenant can build to suit (with tenant allowance from LL).
- 80+ parking.
- Existing transformer.
- Transit buses stop in front.
- Phase 2 Env. - Feb. 2012.



FOR SALE \$1,200,000
Bldg: 21,000 sq ft

- SUPERB UPSIDE potential.
- 3 floors, about 7,000 sf/ floor.
- Lot about 0.87 acre.
- Ample parking.
- Transit bus stops in front.
- Many permitted uses.
- NO heritage designation.
- LLBO license transferable.
- High traffic count.
- Pylon signage.
- 20+ year iconic restaurant.
- Price includes land, building, chattels, fixtures, business.



FOR SALE \$1,750,000

- GREAT UPSIDE potential.
- Lot 166 acres.
- 2,717 sq ft banquet hall (many extras).
- 2,368 sf 4-br house with sep. 2 storey 2-br apt.
- 5,500 ft frontage.
- In-ground pool & spring fed pond.
- Landscaped gardens.
- Many corporate event amenities.
- Price includes buildings, land, chattels, fixtures & long-established business.

Greater Toronto Area