

The Missouri Bar Association “How To Series”

Real Estate Contracts

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1. **The Use of Letters of Intent.**

Any negotiation over the terms of a deal will start with the basics: an identification of the property involved, the price, when the deal will close, and what the parties’ obligations are between the time the contract is signed and the closing.

The desire to reach an agreement on the essential business terms of the deal first leads many to utilize a letter of intent before spending the time and money to embark on detailed contract negotiations and the preparation of a real estate contract. While there is nothing wrong in concept with this practice, the danger from a legal standpoint is that the parties may never get around to signing the full real estate contract, or that one or the other of them will attempt to enforce the letter of intent as a real estate contract satisfying the Statute of Frauds (Mo. Rev. Stat. §432.010). For an example of an attempt to enforce a letter of intent as a real estate contract in Missouri, see *Prenger v. Baumbhoer*, 914 S.W. 2d 413, *on appeal* 939 S.W.2d 23 (Mo. App. 1996). Such an attempt may well defeat the interests of the other party, who was counting on negotiating detailed agreements in the real estate contract which, if the letter of intent is enforced standing alone, it will have no opportunity to obtain.

Is a letter of intent sufficient to satisfy the Statute of Frauds and therefore become an enforceable real estate contract? It may be, if it supplies all of the essential terms of a real estate contract. Those terms, as listed by the courts generally, include:

- identification of the parties;
- identification of the property (*i.e.* the subject matter of the contract). *See Mueller v. Abnor*, 756 F. Supp. 551, *aff’d and rev’d in part*, 972 F.2d 931 (E.D. Mo. 1991);
- statement of the price and other essential economic terms (such as any agreement for carryback financing); and
- the time of closing.

How can an attorney guard against enforcement of a letter of intent as an enforceable real estate contract? The usual technique is to insert express language in the letter of intent specifically

disclaiming that it is to be interpreted as a binding contract. Set forth below is an example of such language:

“This letter of intent is intended only to set forth the basic economic terms of a proposed transaction between the parties, and is intended only to be a guide to the preparation of a full real estate contract containing all of the terms of the parties’ agreement, by no later than _____, 200_. The parties agree that the additional terms to be set forth in the real estate contract are essential provisions of the agreement they desire to make, and that this letter of intent is incomplete and does not contain other essential terms of the agreement they expect to reach. This letter of intent is not intended to be, and shall not be interpreted as, an enforceable real estate contract for the sale and purchase of the above property, and shall not be a legal document having any force and effect.”

The wording of this “anti-contract” clause can be important; an acceptance of an offer subject to “details to be worked out,” for example, has been held insufficient to negate the existence of a complete contract. *Koedding v. Slaughter*, 634 F.2d 1095 (8th Cir. 1980) (applying Missouri law).

Most of the remainder of the materials in this Section discuss standard real estate contracts, where the parties bargain for a deed to be exchanged at closing, which is relatively soon. For a discussion of long-term installment sales contracts and contracts for deeds, see Section 17 below.

2. The Parties; Consent of Spouses to the Contract; How Should Title be Taken?

a. Getting the Correct Names.

Of course, an accurate naming of the parties is essential to any contract. While this seems elementary, mistakes are often made as to names, particularly where corporations or other entities are given different names such as “XYZ Manufacturing Company” and “XYZ Manufacturing Co.” and “XYZ Manufacturing, Inc.” Are these three different firms, or one? If one, then two of the names are wrong. The name of the seller on the real estate contract should match the deed, so a check of the deed or the previous title insurance policy is always a good idea.

Buyers should be certain that their names are correct in the contract and in the deed. The author recently had the experience of representing a lender taking a deed of trust on two adjacent parcels of real estate supposedly owned by the same limited liability company. However, the tracts had been acquired separately and the purchaser’s name was listed differently on the two acquisition deeds. So was the property under one ownership, or two? Eventually it took a correction deed, prepared by an embarrassed lawyer, to rectify the error before the mortgage loan could be made, resulting in a delay which harmed the lawyer’s client and probably led to unpleasant words and possibly a lawyer’s loss of future business. A simple check of the accurate entity name in the first place would have avoided this problem.

b. Where the Seller is Not the Owner of the Property.

On rare occasions, of course, the seller is not the owner of the property at all, but is a third party who intends to acquire title prior to the closing, such (for example) as a seller having the power

of eminent domain, or having a deed of trust which it intends to foreclose, or simply a party having a separate option or purchase and sale agreement for its own acquisition of the land. There is nothing wrong with such a transaction, for the signing of a real estate contract by a seller does not constitute a representation that the seller then has title (in the absence of a specific representation, of course), but only a promise that the seller will deliver title at closing. Nonetheless, the buyer will want to be comfortable that the seller has the power to acquire the property and has agreed to do so within a specified time period. Of course, from the seller's standpoint the contract should be contingent upon the seller obtaining title.

c. Marital Interests.

For sellers, it is important to remember that under the laws of Missouri a spouse of an individual owner of real estate has a marital interest in the property which must be addressed at the time of conveyance. See Mo. Rev. Stat. §424.150 that governs marital interests. A spouse may have a marital interest in real property even though the real property may be held in the name of the other spouse only.

Although it is common practice to address this situation by having the spouse join as a party to the real estate contract and execute the deed, the same effect can be achieved by having the spouse merely consent to the real estate contract and to the deed. Some spouses prefer this approach, so as to avoid any liability under the covenants of the real estate contract and the warranties in the deed. Actually, a disinterested spouse is impliedly relieved from warranties under a deed under Mo. Rev. Stat. §442.030, which makes the deed covenants binding on both spouses only if they own the property as tenants by the entirety.

d. Taking Title to the Property.

When representing the buyer(s), the attorney is often confronted with the question of how title to the property should be taken. In the case of a single buyer this is no problem, but where there are multiple buyers, the attorney must determine the wishes of his or her clients. If the parties are individuals and are married (to one another) title should be taken as tenants by the entirety. The ownership of tenants by the entirety is applicable in Missouri to married couples only. *See Greene v. Spitzer*, 123 S.W.2d 57 (Mo. 1989). If the buyers are not married, then the attorney should discuss with the clients the difference between holding title as joint tenants with the right of survivorship and tenancy in common. If the clients desire to hold title as tenants in common, the percentage of ownership may be other than the common 50-50 division. If two or more parties are named as the grantees in a deed without a designation as to the manner in which they take title, it is presumed that they take as tenants in common, each as to an undivided interest. Mo. Rev. Stat. §442.450. However, if the grantees are a husband and wife, then a tenancy by the entirety is presumed. *Kegan v. Haslett*, 107 S.W. 17 (Mo. Ct. App. 1908); *Nelson v. Hotchkiss*, 601 S.W.2d 14 (Mo. 1980).

3. The Purchase Price.

Another obvious clause which must appear in the real estate contract is the purchase price. Although often stated as a set number, the price sometimes depends on the size of the property (for

example, quoted as a per-acre or per-square foot amount, depending upon the land area as determined by a survey yet to be prepared) or on other factors (such as an appraised value to be determined by an independent third-party appraiser). Any formulation works, so long as the real estate contract sets out a method by which the price can be determined with precision.

a. Earnest Money; Escrow Agent; Disposition of the Earnest Money.

Almost all real estate contracts will provide for an earnest money deposit. The amount of the earnest deposit can be an important subject of the negotiation because frequently its retention is the seller's sole remedy in the event of a breach by the buyer. However, a contract does not fail for lack of consideration if no earnest money is paid by the buyer. *In re Estate of Mounte*, 39 S.W. 3d 499 (Mo. App. 2000).

The question of who holds the earnest money and how it is to be applied upon different eventualities (*e.g.*, breach by the buyer, breach by the seller, destruction or damage to the property by casualty, taking of the property by eminent domain, cancellation of the contract upon the failure of a condition precedent, etc.) should be addressed specifically in the contract. The identity of the escrow holder should be stated, for the holder should be both trustworthy and insured. If the earnest money holder is the local office or agency of a title insurance company, many buyers want an "insured closing protection letter" from the insurance underwriter, indicating that the insurance underwriter (often a nationwide company) will stand behind the actions of the local office or agent. Confiscation of earnest money deposits by agents is rare, but certainly not unheard of.

No matter how specific the instructions in the real estate contract are, almost all earnest money holders will, when demand is made upon them, require both parties to consent to the disposition of the earnest money in writing. Sometimes a very careful drafting of the instructions, designed to leave no room for any question, can avoid this result. If the parties are uncooperative at the time the earnest money is paid to one party or the other, an escrow agent's refusal to follow contract instructions can present a major problem for one or both of them. At a minimum it could cause a major delay in the return of the earnest money, and if the escrow agent chooses to file an interpleader action in the face of conflicting demands of the parties, the seller and buyer could incur substantial attorney's fees as well.

b. Carryback Financing.

Sometimes a portion of the purchase price is to be paid through financing documents executed by the buyer at closing in favor of the seller. In such a case the best practice is to negotiate and prepare the promissory note and deed of trust, and any other security documents such as an assignment of leases or personal property security agreement, at the same time as the real estate contract, and attach forms of the documents to the real estate contract as exhibits. When this is not possible a careful description of their basic terms should be included in the contract. This description would include not only the amount, interest rate, payment schedule, maturity date and the like, but would also address such issues as whether the loan can be prepaid without penalty, whether the note is to be recourse or nonrecourse, whether any guarantors will be required, whether the deed of trust will be a first deed of trust or in some other priority position, what sorts of

covenants will be required for insurance, rebuilding upon casualty, split of the award in the case of eminent domain, etc.

There are many terms of financing documents which should be negotiated in today's sometimes complex world of commercial real estate financing, and a real estate contract which fails to delve into the details may be a vehicle for confusion, or even grounds for termination, if the parties later disagree on some of these secondary but still-important provisions.

c. Balance of the Purchase Price; How Paid.

Of course, whatever remains to be paid in cash at the closing should be paid by cashier's check, wire transfer or some other method of immediately available funds specified in the real estate contract. The timing and method of payment is important and should be detailed. This amount is almost always subject to prorations and adjustments, as explained in Section 8 below.

4. Description of the Premises.

a. General Rule.

For deeds and instruments of conveyance the general rule on the sufficiency of legal descriptions is that the description must be sufficient to enable a capable third party, such as an engineer or surveyor, to ascertain the precise property which is intended to be conveyed without referring to any matters other than those of public record. *Weber v. Johannes*, 673 S.W.2d 454 (Mo. App. 1984).

Notwithstanding this general statement of law, Missouri takes a somewhat liberal view of property descriptions in deeds. A description is sufficient unless, after considering extrinsic or external evidence, that which was intended by the instrument remains a matter of conjecture. *Hoelscher v. Simmerock*, 921 S.W.2d 676, 679 (Mo. App. 1996). In other words, outside evidence is available to explain latent defects in a legal description. *Warren v. Tom*, 946 S.W.2d 754, 758 (Mo. App. 1997). Of course, it is far better if the legal description is clear in the first instance, to save the expense of later litigation.

Must the legal description in a real estate contract have the same degree of formality as that in a deed? No, because it is not an instrument of conveyance. "A description may be sufficient for the contract if by its terms or by reference thereto the property can be identified." Friedman, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* (6th ed.), §1.3 at 138 (1998). Often, in fact, the parties use an informal description such as a street address or a rough legal description taken from a tax bill or an appraisal in the contract. However, this must be clarified by an accurate legal description at the time the conveyance takes place. For a Missouri case holding a description insufficient (in an option contract), see *Cochran v. DeShazo*, 579 S.W.2d 408 (Mo. App. 1979). One Missouri case held that a contract describing "seller's farm" was sufficient because parol evidence showed that the seller owned only one property and a memorandum showed the acreage. *Seabaugh v. Sailer*, 679 S.W.2d 924 (Mo. App. 1984). Generally, see Annot., *Specificity of Description of Premises as Affecting Enforceability of Contracts to Convey Real Property*, 73 A.L.R. 4th 135 (1989).

From the buyer's standpoint, at least, it is important to have as accurate a legal description as possible even at the contract stage. Then, if the seller reneges on the contract and the buyer seeks specific performance, the court will have an easier time with the case if the legal description is precise and leaves no room for interpretation as to what property the court should order to be conveyed.

b. Survey Legal Descriptions.

Unless the property is in a platted lot or block, a survey to establish the precise description is always a good idea. Such a survey, when it does not involve a platted legal description is called a metes and bounds description.

The “bounds” are the boundaries or the corners of the tract to be described. Many methods exist for marking boundaries in order to identify one’s particular piece of property. The most frequently used early method consisted of marking boundary corners with physical objects such as posts, rocks, pipes, or iron rods. The lines between these points were often designated with fences, ditches, roadways or tree lines. The modern practice is to use surveyor’s pins or markers placed in the ground.

The “metes” of this system were the measurements between the boundaries. These were originally measured by paces, and later by such units as rods, chains, poles and feet.

The metes and bounds description essentially describes a tract by referring its reader to a starting point (“point of beginning”) and then leading the reader from such a point around the parcel being described.

Present-day metes and bounds descriptions consist of several separate and distinct elements, which together form the full description. A proper metes and bounds description consists of:

- a commencing point that is well known and easily found, which in modern legal descriptions is almost always a section corner from the U.S. Government Survey;
- a point of beginning as part of the property being described;
- a direction, usually a bearing, for each line;
- a distance for the line (the direction and distance of each line is referred to as a “call”;
- and
- an ending call which ties to the point of beginning.

If a survey is being required, the real estate contract should specify the type of survey. A full and proper survey, of the type sufficient to remove the survey exceptions in an owner’s policy of title insurance, is quite different from a common but informal “residential survey” done in many home sale transaction. In a commercial transaction the most desirable type of survey is an ALTA/ACSM survey, the initials standing for the American Land Title Association and American Congress on Surveying and Mapping, the two organizations which have jointly produced the ALTA/ACSM “minimum detail standards” which are in nearly universal use around the country for commercial surveys. You can find these standards at <http://www.acsm.net/alta.html>.

5. Personal Property Included.

Personal property located on the real estate is not included in a real estate sale by implication, so it is up to the purchaser to make sure that such items are expressly included if that is the intent. M. Friedman, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* (6th ed.), § 1.2(f) at 32 (1998).

In many real estate transactions there may be significant items of personal property to be included in the sale. Items such as buildings, outbuildings, fences, utility equipment installed on the premises, and the like are generally considered fixtures and are included as part of the real estate. However, any removable items are personal property and, if they are to stay, must be specified in the real estate contract. This can be particularly important in hotel, motel, and nursing home transactions where inventories of linens, food, furniture, appliances, various items for repair and maintenance, and the like can be essential to the operation of the property.

The best approach is to have the parties prepare a detailed list of these items (the seller might have this easily available as part of its operational records) and attach it as an exhibit to the real estate contract. If a significant time will lapse between the execution of the contract and the closing, it is not unusual for the buyer to permit the seller to sell or otherwise dispose of items in the ordinary course of its business so long as they are replaced with other items of similar value.

6. Due Diligence and Inspections.

In almost all commercial transactions, other than purchases at foreclosure or auction sales, the “due diligence” or “kick the tires” clauses are among the most important in the real estate contract. Typically a buyer is only willing to invest a certain amount of time, energy and funds in inspecting the property prior to signing the contract. While the buyer typically does not expect a closer inspection to reveal anything unfortunate, it also wants the opportunity to conduct a thorough investigation.

a. Inspection Provisions.

The real estate contract will typically set forth a clause giving the buyer the right to examine a number of items respecting the property, within a certain limited time period often called the “Due Diligence Period” or some similar term. From the buyer’s standpoint this clause should be broadly drawn to permit whatever type of inspections the buyer might possibly need, such as investigations regarding zoning, building codes and other governmental regulations, architectural inspections, hazardous materials investigations, engineering tests, and soils, seismic and geological reports with respect to the property, inspections of all or any portions of the improvements (including structural, mechanical and electrical systems, roofs, pavement, landscaping and public utilities), and any other physical inspections and/or investigations as Buyer may elect to make or obtain. The buyer will want a right to cancel the contract prior to the expiration or the Due Diligence Period for any reason it uncovers during the inspection.

It is important that the seller give the buyer and its agents a specific license or permission to enter the property for purpose of performing these inspections. The seller should keep in mind whether it should insert any special provisions for prior notice to tenants or others whose activities might be affected by the inspections.

Keep in mind that when it comes to an environmental investigation, the seller may want to be cautious if the buyer determines a necessity to conduct anything other than a routine Phase I investigation.

b. Indemnities for Inspection Activities.

What if the buyer, in the course of its inspections, causes some damage to the property or persons, or to a tenant or its property, subjecting the owner of the premises to liability? Most commercial sellers have at least once in their business lives run across a “bull in the china shop” buyer who conducts its inspections roughly with no regard for the property, its tenants or occupants. To hopefully guard against this kind of activity, many sellers want the buyer to indemnify them from liability incurred as a result of the inspections, and will want the buyer to carry liability insurance to boot.

7. Title Insurance and Endorsements.

Another important clause in the real estate contract is the one requiring a title insurance commitment and, later, an owner’s policy of title insurance. The title insurance commitment is not only important for the buyer’s own inspection, but is necessary in order for the surveyor to correctly reflect all easements and other matters on the survey.

This is the time to decide upon the precise kind of title insurance coverage that is going to be required. What title insurance company does the buyer prefer? What form of policy does the buyer want (there are several ALTA forms available, the most recent promulgated in 2006)? Who should it show as the insured, and in what amount? What standard exceptions, if any, does the buyer want removed? What special endorsements does the buyer require? These are important issues, and the next section of this seminar, by Richard Byrum, addresses them in detail.

8. Closing and Deliveries.

At the closing, the seller and buyer will each be obligated to provide certain documents to close the transaction. A carefully drafted real estate contract will set these out to avoid any possible confusion.

a. Conveyance Documents.

The seller should be obligated to provide a deed (it is a good idea to describe the type of deed: general warranty, special warranty, or – only in the rarest of instances – a quit-claim deed), any certificates of value or real estate assessment reports which might be required by local recording offices to be filed at the time the deed is recorded, a bill of sale for any personal property included within the transaction, and an assignment of any leases or contracts which are to go along with the property.

The buyer typically is not required to execute the deed unless the buyer is assuming any obligations under the leases or contracts, in which case its countersignature is a good idea in order to remove any question that it has assumed the obligations and is bound.¹

¹ The City of St. Louis, however, does require the grantor and grantee to execute a deed which conveys property within the city limits of the City of St. Louis. The author is not aware of any other recording office in Missouri which imposes this requirement.

b. Payment of Purchase Price.

The buyer must, of course, pay the purchase price, as adjusted by any closing prorations or adjustments upon which the parties have agreed. The typical prorations relate to real estate taxes and assessments and rents under leases or payments under any ongoing contracts. The adjustments typically include various debits and credits to the parties for closing costs such as title insurance premiums, recording fees, escrow fees, survey costs, costs of environmental audits and other inspections, attorney's fees and the like. Although it was formerly a common practice to include a general clause that such deductions would be done in accordance with "local custom," such clauses are now disfavored because negotiation over these items is so common that there no longer is a standard custom.

c. Documents to be Delivered Jointly.

The closing or settlement statement, usually prepared by the title insurance company or other closing agent, is typically signed by both parties. There may be other documents which are signed by both parties also, such as assignments of contracts or leases which the buyer assumes (see above), escrow agreements to cover post-closing repairs or other such items, or joint escrow instructions.

9. Taxes and Other Closing Adjustments.

Almost all real estate contracts will contain a proration clause by which the seller and buyer agree to prorate the real estate taxes and assessments for the year of closing between them as of the closing date.

10. Casualty Destruction.

a. Common Law Equitable Conversion

In the absence of a contract clause to the contrary, under the common law of most states the risk of loss during the period between the date the contract is signed and the closing of the sale lies with the purchaser. See the cases collected in Annot., *Risk of Loss by Casualty Pending Contract for Conveyance of Real Property*, 85 A.L.R. 4th 233 (1991); 77 Am. Jur. 2d *Vendor and Purchaser* §363 (1997). The purchaser is still responsible for payment of the full purchase price. The reasoning of these cases derives from the old common law theory of "equitable conversion" under which the title to the property is "converted" in equity to the buyer at the signing of the real estate contract even though the actual legal title does not transfer until the closing. This is the case even though the seller may (and usually does) remain in possession prior to the closing.

Interestingly, Missouri is one of the minority of states which has adopted the opposite rule – that where the contract says nothing about who bears the risk of loss from a casualty before the closing, and where the improvements constitute a substantial portion of the property value, the contract is no longer binding upon the parties if such a loss occurs. *Skelly Oil Co. v. Ashmore*, 365

S.W.2d 582 (Mo. 1963). This is the so-called “Massachusetts rule” which is enforced in a minority of the states.²

Even in states following the majority rule, the buyer is usually given the benefit of the seller’s insurance proceeds. This is true in Missouri, *McBee v. Gustaaf Vandercnocke Revocable Trust*, 986 S.W.2d 170, 173-75 (Mo. 1999), in a case involving a contract which specifically allocated the risk of loss to the seller. However, this is little consolation to the buyer who wished to receive a functioning parcel of real estate rather than smoldering embers and a check for some insurance proceeds which may not cover the cost of rebuilding.

b. Contractual Provisions.

Of course, almost all real estate contracts for improved real estate contain a casualty destruction clause which states that if the improvements on the property are damaged by fire or other casualty prior to the closing, the buyer can either (a) cancel the contract and walk from the transaction (receiving a refund of its earnest money), or (b) agree to purchase anyway and receive an assignment of the seller’s insurance proceeds. The wise seller’s lawyer will include a payment from the seller of an amount equal to the deductible amount in the insurance policy, and will also give the buyer the chance to adjust the claim with the insurer, rather than leave this in the hands of a seller who make have little incentive to maximize the insurance recovery.

Sometimes these clauses incorporate a “de minimus” concept in which the buyer cannot walk away for small amounts of damage, but only for significant damage which cannot be repaired for more than a certain dollar amount. A buyer may want a reduction in the purchase price equal to the estimated cost of repairing the small amount of damage.

11. Condemnation.

a. Total Loss: Common Law Rule

What if the property is the subject of a total condemnation, or a conveyance in lieu of condemnation, after the real estate contract is signed but prior to the closing date? If there is a total loss of title prior to the closing, the condemnation renders the seller incapable of performing the contract because it no longer has anything to sell, and therefore by law terminates the contract. This is the view of most courts, despite the fiction of “equitable conversion” discussed in the preceding section. Friedman, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY*, § 4.10 (6th ed. 1998). The reason is that the complete failure of the seller’s title is a failure of a basic precondition to closing – that the seller have marketable title – and thus nullifies the contract. See also 26 Am.Jur.2d *Eminent Domain* §§252-255 (2004), and cases collected in Annot., *Condemnation Proceedings Therefor, or Prospect Thereof, as Affecting Marketability of Title*, 21 A.L.R. 2d 792 (1952) and in Annot., *Risks*

² Missouri does not follow this rule in the case of an option to purchase, where the casualty destruction occurs before the option is exercised. *Riddle v. Elk Creek Salers, Ltd.*, 52 S.W.3d 644 (Mo. App. 2001), on the ground that no contract exists during the period before the option is exercised, and therefore if the option is thereafter exercised upon property destroyed by casualty, the contract is for the property as destroyed.

and Liabilities of Parties to an Executory Contract for Sale of Land Taken by Eminent Domain, 27 A.L.R. 3d 572 (1969). Oddly, Missouri courts have never ruled on this point.

A minority of jurisdictions, however, continue to apply the “equitable conversion” theory even to a total condemnation, and make the buyer responsible for full payment of the purchase price even though the seller has nothing to sell. Of course, no buyer’s attorney wants to take on this risk, so the contract should always provide that the buyer is relieved of the contract and receives a full earnest money refund if the property is totally, or even substantially, condemned. Essentially, the buyer should be able to get out of the contract if the buyer can no longer use the property for the originally intended purpose.

b. Incomplete Condemnation

What if the condemnation is not completed prior to the closing, or is of only a portion of the property, which is far more likely, as, for example, when the condemnation is of a strip of land to widen a road or of a portion of the land for park or flood control purposes? There is surprisingly little law indicating whether the buyer remains bound by the purchase contract, which of course reemphasizes the importance of having a contract clause which governs the situation so that the parties do not find themselves at the mercy of a court-made rule. There are cases, however, supporting the proposition that a buyer remaining bound is at least entitled to the condemnation award. 77 Am. Jur. 2d *Vendor and Purchaser* § 212 (1997).

The considerations applicable to a possible condemnation of all or a portion of the property between the date the real estate contract is executed and the date of closing are much the same as those applicable to a casualty destruction, as covered in the preceding subsection. The drafter of a condemnation clause should consider many of the same issues as are considered in the casualty destruction clause; in fact, in many real estate contracts the clauses are almost mirror images of one another.

The buyer’s lawyer should also include a warranty and representation of the seller that it knows of no pending or threatened condemnation as of the date the contract is signed, and a parallel covenant requiring the seller to notify the buyer if it learns of any such matters prior to the closing date. No buyer wants to waste its time on a potential transaction where the property is under a threat of condemnation, at least where the condemnation is material to the buyer’s intended use.

12. Conditions of Closing.

Sometimes the parties will have certain conditions which they want to ensure have been satisfied prior to the closing of the sale. Some of these are obvious, such as each party’s compliance with the terms of the real estate contract, the seller having marketable title, the buyer being satisfied with the results of its inspections, there having been no cancellation due to a casualty or condemnation, and so forth. These conditions are usually set forth in other sections of the contract and do not need to be written out again.

However, in some instances there are special other conditions, such as the buyer obtaining satisfactory financing for its purchase, obtaining certain governmental economic incentives for its

intended development of the property, obtaining certain leases for certain portions of the property, etc. The seller may also have conditions, such as approval of the contract by its board of directors, its location of substitute property (in the event it wishes to effect a Section 1031 tax-free exchange of real estate), and so forth.

In such situations these conditions must always be set forth with particularity. In the absence of written agreement, the contract is subject to no such conditions.

13. Brokers' Commissions.

The subject of real estate commissions is usually addressed in the real estate contract, for neither party wants to find itself subject to a claim by the other's broker, or worse yet an unknown broker who they did not know was involved in the transaction. This is usually handled through an exchange of representations as to the brokers involved on each side, and a specific agreement as to payment of the commissions, coupled with an indemnity by each party against claims from the other's broker.

14. Assignment.

Like other contracts, real estate contracts for the transfer of real estate are assignable by the buyer without restriction unless the contract provides otherwise. If the sale is a cash sale where the buyer has no particular obligations other than to pay cash for the property at the closing, the seller may not care and thus may permit a free assignment. Where the sale is one which includes carryback financing, however, the buyer's creditworthiness is an important part of the transaction and thus the seller will usually want to prohibit assignment without its consent, usually for the purpose of verifying the credit standing of any proposed assignee before approving the assignment.

If the carryback financing clause specifies that the financing will be nonrecourse, the buyer will sometimes argue that the seller's insistence on the right to consent to an assignment is unreasonable because the seller's sole recourse will be against the property anyway. However, even in nonrecourse cases the seller will often want the right to consent, because creditworthiness is still an issue: the seller would rather have a borrower of good credit standing who is likely to pay the loan, than have to rely upon recovering the property value upon resale after foreclosure.

The issue of assignment is relevant also to the question of any other buyer obligations under the contract, or contingencies which may apply to the sale. For example, if the sale is of vacant land for development purposes and contains various contingencies relating to the buyer obtaining certain governmental approvals, tax incentives and outside financing, the seller may be relying in large part upon the particular buyer's experience and track record in obtaining such approvals and financing in similar developments. An assignment to a novice in the real estate development field may well be cause for a seller objection, even though no carryback financing is involved.

In recent years many buyers, even if they are generally willing to agree to restrictions on assignments, want the right to assign the contract to a special-purpose entity or other related business if they decide to hold the title to the property in some other name. A seller will likely consent to

such a clause if it can be assured that the assignee is truly related to or controlled by the original seller, and so long as it can still hold the original seller liable under the contract.

The seller should also consider a clause requiring the assignee to be free of any judgment or tax liens against it, because in some jurisdictions such a lien may attach to the assignee buyer's rights under the contract and potentially cause problems for a conveyance.

Generally, an assignment of the contract without an express release of the original buyer does not release the original buyer from liability. See cases collected in 77 Am. Jur. 2d *Vendor and Purchaser* § 393 (1997). Similarly, an assignment without an assumption of the contract by the assignee does not render the assignee liable to the seller for breach. *Hahn v. Earth City Corp.*, 625 S.W.2d 640 (Mo. App. 1981).

15. Other Clauses.

Many real estate contracts contain additional clauses, such as representations and warranties of the parties, provisions for disposition of the earnest money (and other remedies) upon default (see further discussion below), governing law, amendment, notices, severability, signatures in counterparts and the like.

16. Special Provisions in Residential real estate contracts.

Residential real estate contracts contain most of the same concerns that commercial real estate contracts do, except that they are usually set forth in preprinted forms prescribed by local real estate boards or by prominent residential real estate companies. The principal differences between the commercial residential real estate contract and the residential real estate contract are:

- Fixtures and personal property are usually more important in the residential contract and should be spelled out carefully if they are to be included (for example, window treatments, appliances, lighting fixtures, etc.).
- The financing contingency is usually important to a residential buyer and is spelled out in some detail, such as the time period allowed for obtaining a loan commitment, the amount of the anticipated loan, the loan terms, and making the contract subject to an appraisal supporting the loan amount.
- A residential contract may contain a home warranty provision if the buyer elects to purchase such a warranty.
- A residential Contract may contain disclosure clauses on items such as radon, lead based paint and termites, and permit special inspections for these items.
- Residential real estate brokers are more likely than commercial brokers to attach specific disclosure clauses as required by the brokerage regulations.

Generally, a preprinted residential real estate contract form is one prepared by a residential real estate brokerage company, meaning that the form is designed to favor the company's client, *i.e.* the seller. Thus, in representing a buyer it is important to read through the contract carefully. There are many provisions in such contracts that may require changes. For example, the "subject to" clause in the title provision often is overbroad in favor of the seller, giving the buyer little chance to

object if some unacceptable title matter crops up in the title insurance commitment. A buyer should have the right to object to any matter in the title insurance commitment which would impact the buyer's plans for using the property. Similarly, the buyer often has few chances to object to survey defects or property defects found during an inspection.

Another clause in preprinted residential real estate brokerage forms worth examining from the buyer's standpoint is the one dealing with inspections and the rights of the buyer if the inspections reveal an unsatisfactory condition. Sometimes these do not give the buyer the type of "outs" that a residential buyer will typically want if the property is in objectionable condition. Also be sure to examine the default clause carefully, on behalf of a buyer, to verify that the buyer will be able to obtain back the earnest money without undue problems if the buyer terminates the contract for reason of (for example) a title deficiency or physical problem with the property. Many residential contracts, worded to protect the escrow agent, virtually guaranty a lawsuit in the event an upset seller refuses to consent to release of the earnest money.

With regard to the property condition, a common practice of residential real estate brokers is to attach a specific property disclosure addendum completed by the seller relating to the condition of the property. The real purpose of this addendum, which is not required by law, is to protect the broker against any buyer claims of misrepresentation. However, it is also useful to give the buyer some pertinent information about the property, so long as the seller takes it seriously and lists all defects of which the seller knows. The key thing for the buyer is to make sure that the seller is in fact liable for misrepresentation for omissions or mis-statements made on the disclosure addendum.

17. Special Provisions for Cooperatives and Condominium Apartments.

a. Cooperative Apartment Units.

Cooperatives are still relatively unusual in Missouri although they are a longstanding form of home ownership in large Eastern cities. A cooperative is a corporation which owns a residential (apartment-style) building in which the owner of each share of stock in the corporation has an exclusive license to use a certain apartment. Thus, ownership of stock in the corporation is equivalent to ownership of an apartment in the building.

From a legal standpoint, the buyer of a cooperative unit will want to ascertain that the cooperative corporation was validly formed, is in good standing, has the authority to issue the stock, that the appropriate corporate officers are signing the contract, and that the corporation will properly issue the stock certificate. The buyer will also want to know about any debts to which the corporation is subject. In this sense, the attorney representing the buyer should remember that this is essentially a corporate transaction and that it should be treated such as any other purchase of corporate stock. On top of that, however, the transaction is also a real estate one, and therefore the real estate contract for the purchase of a cooperative residential unit will want to contain the same sorts of inspection clauses, title provisions (except here the title company is checking the title which is held by the cooperative corporation itself rather than individual owners) and so on.

The attorney for the buyer may want to consider representations and warranties of the seller concerning the stock which is being sold and the financial condition of the corporation itself, in addition to any representations and warranties relating to the apartment unit itself.

b. Condominium Units.

A condominium is a different form of ownership, also applicable to apartment-style residences (although condominiums can also govern row houses, townhomes, and even separate villa-style homes) in which the individual units are owned in fee simple by their occupants. However, the unit owners also own an undivided percentage interest in the common areas of the condominium, *i.e.* those portions of the building or development which are not dedicated to the use of a particular owner (parking areas, access drives, lobby areas, elevators, hallways, service areas, etc.).

The owner of a condominium unit is also automatically a member of the condominium association which governs the condominium (consisting of all unit owners) and is subject, usually, to annual condominium association assessments to pay the common expenses of the building such as building maintenance, repair and upkeep and replacement of capital items such as common roofs, HVAC systems, plumbing, etc.

The real estate contract for the purchase of a condominium unit will be much like that for a single-family home, but will contain additional provisions relating to the Declaration of Condominium (which should be reviewed by the buyer's attorney), any unpaid condominium assessments, etc. From the buyer's attorney's standpoint the key issue here is to make sure that the buyer will encounter no surprises after purchasing the unit, by way of unusual Condominium Declaration restrictions and unpaid assessments which may constitute continuing liens on the unit.

For a developer of new condominiums, the Missouri Condominium Act requires that an Original Sale Certificate be prepared by the seller and delivered to the buyer and that the buyer acknowledge receipt of it. R. S. Mo. §448.4-103. This document is in the nature of a disclosure document about material facts relating to the condominium regime. If the condominium is subject to future development rights of the developer, additional information must be included. R. S. Mo. §448.4-104. If the ownership or occupancy of the units may be in time shares, there are yet more disclosures which are required. R. S. Mo. §448.4-105. The same is true if an existing building has been converted into condominiums. R. S. Mo. §448.4-106.

The Original Sale Certificate must be provided to the buyer before conveyance of the unit and not later than the date of the real estate contract. If the Original Sale Certificate is given fewer than eleven days before the real estate contract is executed, then the buyer has a cancellation right under certain circumstances.

Where the condominium unit is not being sold by the original developer, but is being marketed by a subsequent purchaser of the unit, the Original Sale Certificate is not required, but the owner is still obligated to provide a Resale Certificate to the purchaser under R. S. Mo. §448.4-109(1), containing the information spelled out in that section. Some of this information must be