



Special Considerations for Special Provisions

A Guide to Managing Special Transactions & Schedules

Prepared for:

Real Estate Lawyers Association of Nova Scotia
The Real Estate Transaction: From Beginning to End
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This article focuses on the standard forms published by the Nova Scotia Association of Realtors (“NSAR”) with respect to the following transactions:

- vacant land (urban/rural);
- condos;
- multi-unit residential income property; and
- new construction.

While the agreement for Turn Key New Construction stands alone, the provisions related to the other transactions are associated with the Common Clauses – Part 1 of the standard form agreement. Sample forms are attached hereto for reference purposes.

This is not intended to be a complete overview of each form and each type of transaction. Rather, the focus here is how to interpret and manage specific aspects of each deal. The issues identified are recognized as those which require further clarification or those which may become a point of contention. As well, I have identified several key factors that are not referenced in the standard forms yet, in my opinion, should be addressed given the nature of the transactions.

VACANT LAND

Conditions

The agreements for the sale of vacant land, whether urban or rural, typically include a significant number of conditions. While most deals are subject to financing, insurance, and inspection, the forms for vacant land sales may include more than thirteen additional conditions in favour of the purchaser. The general focus is to ensure that the land can be used for the purchaser’s intended purpose. In fact, we will often see such general language incorporated as “Additional Clauses”:

Subject to the Buyer, in its sole discretion, confirming that the property is suitable for the Buyer's intended use on or before...

With so many potential conditions to be satisfied, agreements may be unnecessarily complicated by incorporating a series of condition dates. Whereas the results of one investigation could easily impact another, it is recommended that all provisions share the same date for satisfaction of the conditions. This should not be limited to the conditions in Part II of the standard form, the selected date should also be used in Part I for the conditions set out in the common clauses, such a financing, tax verification, and lawyers' approval.

Post-subdivision Registrations

It is very common to receive agreements for parcels of land which have yet to be subdivided. Where bulk land must be subdivided before a conveyance, it is crucial to ensure that the agreement reflects the fact that the parcel being conveyed does not yet exist.

While the NSAR forms include provisions for title review, the standard clauses do not account for subdivision or the additional work that stems from the subdivision. Considering the extent of the required registrations following the subdivision of land, the title review provisions found in section 3(b) are not suitable. As such, additional wording may be incorporated to account for the subdivision process. Borrowing language from the standard form, the following provision has been used to address the vendor's duties and the purchaser's ability to fully investigate title:

The Seller, at the expense of the Seller, agrees to update the property title at least seven (7) days prior to closing to ensure that all applicable benefits, burdens, and textual qualifications related to the property are registered at the Land Registration Office and form part of the parcel register and the approved description for the property. The applicable benefits, burdens, and textual qualifications shall include, but not be limited to, any applicable covenants or building restrictions as well as those benefits, burdens, and textual qualifications appearing on the approved plan of subdivision.

The Seller shall notify the Buyer, as soon as practical, that the parcel register and the approved description for the property have been updated to include all applicable benefits, burdens, and textual qualifications related to the property. After notification, the Buyer is allowed five (5) business days to investigate title to the property, which the Buyer shall do at the Buyer's expense.

The key factor is to ensure that the parcel register is updated, complete, and matches the approved plan of subdivision before the title review occurs.

HST

Agreements are often created by parties without any consideration for HST. Reference to the applicability of HST is found in the common clauses of Part 1 where three options are provided:

- Exempt from HST;
- Not exempt from HST, included in purchase price; and
- Not exempt from HST, over and above purchase price.

While the sale of personal use property by an individual is generally exempt from HST, some transactions are excluded from the exemption. Factors to consider include, but are not limited to:

- The number of lots created during the subdivision;
- The original use, or uses, of the bulk lands; and
- The relationship between the vendor and purchaser;

It is possible to have a situation where multiple lots are created from a bulk parcel and while the sale of some lots would be exempt from HST, others would not and HST should be charged over and above purchase price. Considering the vendor's bottom line and the purchaser's willingness and ability to pay, the applicability of HST should be addressed as soon as possible.

CONDOMINIUMS

The NSAR form related to condominium sales is used specifically for the resale of a condominium. Agreements for new construction sales are typically prescribed by the developer and such transactions will not be addressed here.

The special considerations for condominium sales relate to the additional documentation that must be reviewed to the purchaser's satisfaction. Section 4(a) of the NSAR form identifies this documentation, when it must be provided by the vendor, and how long the purchaser has to review it. It should be noted that the following documents are typically available through the parcel register and, in my opinion, need not be copied and sent to the purchaser's lawyer:

- Seller's Deed;
- Declaration; and
- By-laws.

In some cases, the Common Element Rules and Regulations may also be available on-line. However, the reserve fund study, financial statements, and meeting minutes must be assembled and delivered to the purchaser within five days of acceptance. Unfortunately, vendors regularly miss this deadline. Knowing that the materials will be needed immediately, it is recommended that they be collected and prepared for a purchaser in advance of receiving an offer.

The above-noted documents may be meaningless without a point of reference. In many cases, the key document is called for by Section 4(b) of the standard form – the **estoppel certificate**. This document is essentially a snapshot of the corporation's legal and financial position. In addition to outlining who holds the board and officer positions, information about the corporation's insurance, and an overview of any debt being serviced by the corporation, it will also speak to significant factors such as:

- Confirmation of the fees payable with respect to a unit;
- Any pending or anticipated law suits;
- Any pending or anticipated special assessments; and
- Amounts held in the corporation's bank accounts for operating expenses, contingency fees, and reserve funds.

Considering the significance of the estoppel certificate, a purchaser may not be in a position to waive the conditions set out in Section 4(a) within 5 days of receiving the documents. For example, a purchaser may not be able to complete a satisfactory review of the reserve fund study without knowing the status of the reserve funds.

While many will consider a deal firm once the financing, inspection, and insurance provisions are satisfied, resulting in a "sold" sign being posted on the property, a condominium deal is not truly firm until the estoppel certificate has been reviewed to the purchaser's satisfaction. However, the timing prescribed by the NSAR form may not be practical. The forms call for the estoppel certificate to be delivered "not less than ten (10) days prior to the closing date" and that the purchaser then has five (5) days to review and find the certificate to their satisfaction. As such, a condominium transaction could conceivably be terminated five days before closing. This could greatly disrupt both the vendor and the purchaser's plans and cause a significant amount of stress if moving plans have been made and other transactions are reliant on the condominium sale being completed.

The early delivery of an estoppel certificate benefits the vendor. However, the purchaser may want to see the corporation's "snap shot" leading up to the closing. The following are common issues that should be considered with respect to the delivery of the estoppel certificate:

- Vendor's lawyers should ensure that the document is ordered on time and that the corporation, or its representative, is aware of when it is due. Unfortunately, it is very common for estoppel certificates to be delivered less than ten days prior to the closing date.

- In the case of quick closings, the negotiated timing proposed by the parties may not coincide with the timing prescribed by Section 4(b). Where the parties aim to complete a transaction quickly, they should amend the provisions with respect to the delivery and review of the estoppel certificate. It is very common to find vendors immediately in breach of their obligations if an estoppel certificate can't be prepared and delivered soon enough.
- In the case of extended closing dates, it is common for purchasers to request multiple estoppel certificates, including one to be delivered shortly after acceptance and an updated certificate shortly before the closing date. This is a practical approach as the purchasers may be able to quickly determine if the condominium documentation is to their satisfaction, or if the deal should be cancelled. This helps avoid an inevitable termination. However, the cost of the additional certificate is always a matter of negotiation and many vendors will not agree to be responsible for the extra charge.

MULTI-UNIT RESIDENTIAL INCOME PROPERTY

The complexity of a deal involving a multi-unit residential income property will vary depending on the extent and nature of the financing. The treatment of the deal as “commercial” vs “residential” will often depend on several factors including, but not limited to, the number of units in the building and the selected lender. Designating the deal as commercial or residential early in the transaction can create great benefits and ensure that the process runs smoothly.

A key consideration is the deadline for satisfaction of conditions. The due diligence date on commercial transactions should typically be longer than that of a residential deal. It is not uncommon to see multiple extensions from the original dates as purchasers underestimate the time involved with completing all investigations and satisfying all conditions. As well, parties should ensure that the closing date is extended in the event that the condition dates are extended. It may not be practical, or even possible, to close a deal within a week of all conditions, especially financing, being satisfied.

In addition, it is important to ensure that the conditions outlined in an agreement of purchase and sale adequately reflect the conditions prescribed by the lender or CMHC. For example, many lenders will require a structural engineer's report, however, this may not be adequately covered by the general terms of the inspection provision found in Section 2 of the standard form. Further, the lender or CMHC special conditions may not be prescribed until after the condition deadline in Section 2. As such, it is advisable to avoid staggered deadlines.

It should also be noted that financing letters may not be as reliable in the commercial context. This stems from the fact that the letters are usually accompanied by a commitment containing further conditions. As such, a deal should not be treated as “firm” based on a financing letter alone. The deal should be treated as conditional until all lender and CMHC requirements have been satisfied.

While the NSAR form requires a vendor to provide certain documents on closing, the form does not reference several key agreements that purchasers should demand when buying a multi-unit residential income property. It is recommended that the following be incorporated into the agreement and delivered by the vendor on closing:

- Bill of Sale
 - This relates to all personal property, such as appliances, being transferred on closing.
- General Assignment of Leases
 - This agreement will formally transfer all of the vendor’s right, title and interest in any tenancy documents, such as leases, applications, and notices, and the right to enforce the performance of the tenancy documents.
- Assignment of Guarantees, Warranties, Licences And Permits
 - This agreement will formally transfer all of the vendor’s right in specific and non-specific guarantees, warranties, indemnities, licences and permits in connection with the land, building, materials and equipment.
- Assignment of Service Contracts (where applicable)
 - In the event that the purchaser is assuming service contracts, this agreement will formally transfer all of the vendor’s right, benefits, and obligations pursuant to any service and maintenance contracts.
- Statutory Declaration with respect to Tenancy Matters
 - The declaration provides an overview of the status of all tenancies and the rental information that the purchaser is relying on to complete the transaction.
- Undertaking To Readjust
 - The Vendor and Purchaser agree to readjust all those amounts set out in the Agreement of Purchase and Sale which may be discovered or arise after closing, but should have been accounted for on closing.

TURN KEY NEW CONSTRUCTION (HOUSE AND LAND)

Standard Forms vs Builder's Form of Contract

As with new condominium sales, many developers will use customized forms as opposed to the standard form agreement prescribed by the NSAR. In such cases, it is crucial to compare the developer's form to the NSAR document and assess the differences. While the NSAR form typically favours purchasers, developers' forms may skew the terms in favour of the seller.

Despite the fact that a developer may prefer its own contract, one should not overlook the fact that it is ultimately the purchaser's offer. As such, purchasers should ensure that all desirable terms and conditions are included. This can be achieved by adding additional provisions to the developer's contract or simply using the NSAR form.

One notable difference relates to the treatment of holdbacks with respect to occupancy permits. Section 19 of the NSAR form calls for two separate holdback amounts. However, many builders will agree to only one holdback, that being the requisite builders' lien amount. Further, builders will try to separate the lien issue from the delivery of a permit and demand that the holdback be released whether or not an unconditional occupancy permit has been issued.

Many builders will not be in a position to provide an occupancy permit on closing and will complete the transaction based on a satisfactory final building inspection. While this is sufficient for a purchaser to take possession and occupy the dwelling, it is crucial to understand why a permit remains outstanding. A permit may not be available for a number of reasons and could stem from issues related to the subject property, such as incomplete landscaping, to issues related to the entire project. For example, a lack of compliance with a development agreement could also delay the permit. Therefore, in negotiating the establishment and release of a holdback, it is critical to identify what remains outstanding and then assess the risk that the purchaser would be exposed to upon release of the funds.

HST and rebates

Most new construction sales involve a price which includes HST, subject to the applicable GST/HST New Housing Rebate being assigned to the vendor on closing. As such, one must immediately determine if the purchaser will in fact qualify for the rebate. In the event that the purchaser does not qualify, the purchase price is typically increased on closing by an amount equal to the anticipated rebate.

The First-Time Home Buyers Rebate available from the province of Nova Scotia was initially administered by the Canada Revenue Agency. However, since July 1, 2010, Service Nova Scotia and Municipal Relations has been administering the rebate. Since then, the First-Time Home Buyers Rebate is no longer assignable to the vendor. Any agreements which reference such an assignment should be amended.

Whereas prices typically include HST, it is crucial to recognize that allowance and credit amounts are also inclusive of HST. Overlooking this matter often results in purchasers exceeding their budgets. Retailers display their prices exclusive of HST and many buyers do not account for this discrepancy when selecting items such as lighting, flooring, and cabinetry. Another common oversight is the fact that cabinet allowances are not limited to kitchens. Many purchasers select their kitchen and believe that they are within their budget only to learn that they still have select cabinets for their bathrooms.

Those who are purchasing a dwelling for investment purposes will not qualify for the GST/HST New Housing Rebate. However, they may be eligible to claim a New Residential Rental Property Rebate for a portion of the HST. While the purchaser may qualify for the rebate, it can't be assigned in favour of a builder. As such, the rebate must be applied for after closing.