Buyer’s Contingencies in
Real Estate Transactions:
Navigating the Road to Closing

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In a Seller’s perfect real estate world, the signing of the purchase agreement would be the end of negotiation and the end of Seller’s concern with the property. Indeed, the time period (if any) between signing and closing would be nothing more than a waiting period to transfer ownership. Ultimately, a Seller of real estate has only one interest in the transaction—the money promised in exchange for its transferring the property. But, complication to the process enters with the Buyer, whose interest in and commitment to the transaction is dependent on numerous external factors. Accordingly, Buyer’s perfect real estate world, boasting a purchase agreement peppered with contingencies and always coming with a full array of “strings attached,” stands in stark contrast to Seller’s much simpler ideal.

Most agreements to purchase real estate ultimately end up fitting in somewhere between the unrealistic ideals of both Buyer and Seller. The parties typically agree to something that can roughly be described as a firm commitment from the purchaser to follow through with the closing of the sale, but never without some significant contingencies protecting the purchaser and its ability to carry out its intended use of the property.
With terms agreed upon and both parties’ signatures affixed, the purchase agreement is really more the starting point than the end goal in a real estate transaction. Indeed, the purchase agreement sets the process in motion, but the road to closing remains filled with disagreements, negotiation, expenses and potentially dead-ends. This article explores Buyer’s justified interest in carving out as many “escape clauses” as possible while counterbalancing Seller’s desire to keep Buyer committed to closing and moving the process towards completion. This “contingency period,” between the signing of the purchase agreement and the closing of the transaction, is critically important to both Buyer and Seller.

**Financing Contingency**

**OVERVIEW:** A financing contingency is probably the most common type of buyer’s contingency. As one might expect, a financing contingency dictates that the purchaser’s obligation to close on the transaction is contingent on their ability to acquire appropriate (and/or desirable) financing of the purchase price. Both residential and commercial transactions routinely include a financing contingency for the Buyer. Financing contingencies are generally relatively short and simple in their language.

**SUGGESTED LANGUAGE (BUYER):** A Buyer should always include a financing contingency in a purchase agreement unless they are paying with cash already sitting in their bank account. Even when a Purchaser has obtained a firm loan commitment prior to the execution of the purchase contract, some form of financing contingency should still be included. Furthermore, it advised that the purchaser’s obligation to close the sale be predicated on detailed financing specifications. Example language could read as follows:

“Purchaser’s obligations under this Agreement are contingent upon its securing adequate financing from a financial institution, upon terms acceptable to Purchaser in Purchaser’s sole discretion, within a reasonable period of time, which shall be no less than ___ days from the execution of this Agreement. Nothing contained herein shall obligate Purchaser to make any specific efforts or to make any particular inquiries or applications with respect to financing. In the event Purchaser fails to obtain adequate financing, Purchaser may provide notice to Seller within this ___ day period and terminate this Agreement.”
“Purchaser’s obligations under this Agreement are contingent upon its securing adequate financing from a financial institution, upon the following terms: $____; ___ year term; ____% rate of annual interest; ____ closing fees. The financing must be obtained within a reasonable time period, which shall be no less than ___ days from the execution of this Agreement. Nothing contained herein shall obligate Purchaser to make any specific effort or to make any particular inquiries or applications with respect to financing. In the event Purchaser fails to obtain adequate financing, Purchaser may provide notice to Seller within this ___ day period and terminate this Agreement.”

**Suggested Language (Seller):** If a financing contingency is going to be included in the purchase agreement, a Seller should press for the broadest language possible, focusing on Buyer’s ability to receive a general financing commitment with “commercially reasonable terms,” while also requiring Purchaser to exert due diligence in pursuing and obtaining such a commitment. For example:

“Purchaser’s obligations under this Agreement are contingent upon its securing a general financing commitment from a financial institution or any other party, upon commercially reasonable terms, within ___ days of the execution of this Agreement. Purchaser shall exert due diligence in pursuing, applying for and obtaining such a commitment. In the event that Purchaser does not provide notice of its election to exercise its rights pursuant to this paragraph within this ___ day period, this financing contingency shall be deemed waived by Purchaser.”

**Environmental Conditions Contingency**

**Overview:** An environmental conditions contingency specifies that Buyer’s obligation to close on the sale of the property is subject to a satisfactory report with respect to the environmental conditions affecting the property. Relevant information is typically obtained through a Phase I Environmental Assessment performed by a licensed and qualified environmental testing specialist. Environmental contingencies are important in any type of purchase, but understandably increase in their relevance when there is a history of an environmentally disfavored use of the property (ex: service station with an underground storage tank) or when the intended future use of the property is environmentally sensitive. It should be noted that the importance of and need for this contingency is tied to potential liability for environmental contamination, even if such contamination occurred prior to a purchaser’s ownership of the property.
SUGGESTED LANGUAGE (BUYER): It is advised that most buyers should include some form of an environmental contingency in a purchase agreement, although its relevance may be substantially reduced in some settings. It should be noted that a purchaser must anticipate the cost of (and be willing to pay for) the Phase I Assessment or the contingency serves no apparent purpose. Furthermore, a purchase agreement should require Seller to provide all prior environmental reports with respect to the property, a review of which may aid Buyer in determining the need for another report and this contingency. Suggested language of an environmental contingency might read as follows:

“Purchaser’s obligations under this Agreement are contingent upon its receipt of a satisfactory report regarding the environmental conditions directly and/or indirectly affecting the Property. The satisfactory nature of any such report shall be determined in the sole discretion of Purchaser. Purchaser shall have no less than ___ days following the execution of this Agreement to obtain and review this report. In the event Purchaser determines that the report is not satisfactory, Purchaser may provide notice to Seller within this ___ day period and terminate this Agreement.”

SUGGESTED LANGUAGE (SELLER): If an environmental conditions contingency is demanded by the purchaser, Seller should seek to limit Buyer’s discretion in determining the satisfactory nature of the Phase I report. Furthermore, it would be beneficial to disclaim any known environmental conditions. For example:

“Purchaser’s obligations under this Agreement are contingent upon its receipt of a satisfactory report regarding the environmental conditions directly affecting the Property. The satisfactory nature of any such report shall be determined in the reasonable judgment of Purchaser and in consideration of similarly situated properties. The following conditions shall not be considered in Purchaser’s determination of the satisfactory nature of the report and/or property: ______, ______, _______. Purchaser shall immediately obtain such report and in the event that Purchaser does not provide notice to Seller of its election to exercise its rights pursuant to this paragraph within ___ days from the execution of this Agreement, this contingency shall be deemed waived by Purchaser.”

Zoning / Land Use Contingency

OVERVIEW: Any purchaser understands that their valuation of the property is largely dependent on their ability to use the property as intended. When the future use of the property is identical to the prior use, there is often little reason for concern. However, when the use is going to be changed in any degree, a diligent purchaser must be satisfied that their intended use is permitted by local zoning ordinances. Buyer will want to be assured the opportunity to obtain any required approvals and permits from the
local governing body before they will close on the deal. It should be noted that even where use is unchanged, a purchaser should obtain a zoning letter from the local planning commission assuring them that the use is indeed permitted.

**SUGGESTED LANGUAGE (BUYER):** When the future use of the property will require any type of local government approval (such as a special use permit, lot consolidation, lot split or variance) Buyer should include a relevant contingency in the purchase agreement. An example of such language might read as follows:

“Purchaser’s obligations under this Agreement are contingent upon its securing the required permits, lot changes, zoning changes and any and all other land use approvals (the “Approvals”) necessary to use and operate the Property according to its intended plans as a _______. Purchaser shall have a reasonable amount of time to obtain the Approvals from the appropriate entities, which shall be no less than ___ days from the execution of this Agreement. In the event Purchaser fails to obtain the Approvals, Purchaser may provide notice to Seller within this ___ day period and terminate this Agreement.”

**SUGGESTED LANGUAGE (SELLER):** If Buyer demands that a zoning and land use contingency be included in the purchase agreement, Seller must be careful to specify the desired change / approval and require buyer to take diligent and timely effort to pursue these approvals. Suggested language could read as follows:

“Purchaser’s obligations under this Agreement are contingent upon its securing the following approvals from __________: __________ (the “Approvals”) with respect to the Property. Purchaser shall have ___ days from the execution of this Agreement to obtain the Approvals from the appropriate entities. Purchaser shall exert due diligence to obtain the Approvals and in the event that Purchaser does not provide notice to Seller of its election to exercise its rights pursuant to this paragraph within ___ days from the execution of this Agreement, this contingency shall be deemed waived by Purchaser.”

**Title and Survey Contingency**

**OVERVIEW:** At the center of any real estate transaction is the assumption that that the Buyer is getting what they think they are getting, with respect to the property. Accordingly, every buyer entering into a purchase agreement must make some provision to address potential title and survey concerns. While prior or outdated title policies can provide some peace of mind, these are not adequate to protect
Buyer’s interest in the property. Buyer needs to obtain an updated title commitment and preferably an updated survey of the property. To this end, the sale agreement should contain a provision clearly specifying that Buyer’s obligation to close on the transaction is contingent upon their approval of a title and survey report or commitment dated after the date of the agreement. On Seller’s end, while you cannot expect to bypass this contingency, Seller can and should seek language in the contingency that is limited in its application and very clear in its specifics.

**SUGGESTED LANGUAGE (BUYER):** A purchaser’s title and survey language should be detailed and somewhat extensive in order to adequately protect the buyer against a variety of potential title and survey concerns. A properly drafted contingency should include the following provisions:

(a) Purchaser may purchase survey and title reports
(b) Purchaser to notify seller of objectionable or problematic title/survey matters
(c) Seller should have a period to investigate/correct
(d) Purchaser may elect to proceed regardless of the problem or may terminate the agreement
(e) Satisfaction of reports determined solely by Purchaser

**SUGGESTED LANGUAGE (SELLER):** Seller cannot expect to eliminate a title and survey contingency. However, a Seller should be diligent in not giving the Buyer an absolute right to terminate the agreement for reasons that are not overly burdensome. A Seller should consider implementing the following provisions:

(a) Purchaser should be obligated to immediately notify Seller of title/survey objections
(b) Purchaser’s satisfaction of reports should be held to a standard of reasonableness
(c) If Seller cures the problems, Purchaser should be obligated to proceed to closing
(d) Purchaser should have a limited timeframe in which to raise title objections

**General Suitability Contingency**

**OVERVIEW:** A purchaser should include a “catch-all” contingency giving them the right to terminate the purchase agreement in the event of their dissatisfaction with the physical condition or economic feasibility and/or suitability of the property. Without limiting its rights, such a provision should specifically reference such matters as:

(i) Adequate utility service
(ii) Adequate access to public roads
(iii) Satisfactory condition of any improvements on the Property

Seller should be sure any such contingency contains clear definitions, specifics and standards,
so as to limit the effectiveness of the contingency and prevent Buyer from having an unduly easy exit from the agreement.

**Other Considerations**

As discussed previously, purchase agreement contingencies are all about a buyer carving out “escape clauses” in the event some key component of the transaction or future use of the property falls through. This should be readily apparent in our discussion of some of the commonly-used contingencies discussed above. Accordingly, a buyer should analyze a transaction and determine what other prerequisite assumptions it is making in its determination of the value of the purchase. In other words, a buyer needs to identify components of the transaction, the absence of which would be a “deal-breaker.” These deal-breakers should be warded against by appropriate contingency language. For example, some additional considerations which might require purchase agreement contingencies in a particular transaction could include the following:

(i) ongoing cooperation of key business partners or joint-venture participants  
(ii) obtaining tax abatement or other financial incentives with respect to the property  
(iii) ability to acquire necessary insurance coverage  
(iv) ability to reach agreements with necessary lessees, vendors or other parties

**Making Contingencies Work**

While the above discussion of contingencies together with the extensive suggested language provides a meaningful framework for how to approach buyer’s contingencies, each transaction and each purchase agreement is unique. While a Buyer must look at the potential deal-breakers to determine what sort of contingencies they will push for (or demand), a Seller must have an understanding of how far it is willing to bend to make the deal happen. Ultimately, the substance of the purchase agreement contingencies and the substance of the ensuing contingency period will be determined by the priorities of the parties in each transaction.

The contingences discussed above may not each be needed in some transactions, and conversely, some additional contingencies may be absolutely necessary to other transactions. Furthermore, simpler agreements generally call for simpler language, even where a contingency is required. For example, the basic components of several contingencies could be included
in one paragraph—which may come off less daunting and a little more palatable to a Seller. Furthermore, each contingency negotiation is overlaid by a discussion of the refund or forfeiture of any earnest money deposits. With each of these considerations, the author cannot emphasize enough the unique nature of each transaction and the pertinence of molding the specifics of a contingency provision to match that unique nature.

While adding complexity to the transaction, buyer’s contingencies are ultimately what make deals happen. Without them, most buyers and sellers would be unable to find the common ground necessary to mutually commit to the transaction. Indeed, it is the ability of the Buyer to carve out these “escape clauses” that will give them enough comfort to commit to the purchase while retaining enough skin in the game to keep Seller satisfied that closing will more than likely occur. Somewhere between Seller’s simplistic ideal and Buyer’s unduly contingent ideal must be found enough common ground to keep both parties committed, satisfied and confident in the terms of the transaction.

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This article is for informational purposes only and should not be construed as legal advice with respect to any particular party, property, transaction or circumstances. For additional information, please contact Jim Schleiffarth, Schleiffarth Law Firm LLC, St. Louis, MO, (314) 315-4117, jks@sch-law.com.