



## Is it time to sell?

### Part 7: During escrow

By James Kilpatrick of Kilpatrick & Company

A short time ago, I wrote about the process of offer, counteroffer and acceptance, which are the steps involved in getting into contract. In this installment I will visit the escrow process, which can be particularly crucial in Berkeley.

In a rent controlled market the books and records process is more tedious because all leases must be thoroughly reviewed and more and more lenders and buyers are requiring “estoppels”. *An estoppel documents the current status of a rental or other property-related situation.* When, for example, a tenant attests that the agreed rent is at a stated amount, or that there are no outstanding disputes with the landlord, the tenant is for practical purposes disabled from arguing something different following the closing.

An example of where an estoppel can be essential is where a tenant has been parking in a space not specifically designated for his/her use. Despite the fact that the lease doesn't address any parking agreement, tenants may be able to make the case that they are entitled to park there forever because they have been doing it for a certain number years without objection by the landlord. If the buyers find this out 3 days before closing, they might be very upset and jeopardize the transaction. If the dispute is discovered early on, the Buyer and Seller may be able to negotiate a mutually agreeable solution, or the buyer can cancel and go find another property to buy. This is true of most issues that arise. If they are disclosed early they are likely to be handled with far less headache.

Typically in a rent-controlled market, a tenant cannot be forced to sign an estoppel unless there is a clause specifically requiring it in their lease. This is a reason to put an estoppel provision in all of your leases

The estoppel is of course one part of the job of disclosing everything to a potential buyer. Despite the myth that a Seller can sell a property “as-is, where -is” without supplying information or without worry of the buyer relying on that information, it is never safe to withhold or misrepresent material information (a disclaimer won't change this). The general rule is: when in doubt—disclose. Anything that you could possibly see a buyer “wishing I had known” later should be disclosed up front or as soon as it comes to the Seller's attention.

While full and complete disclosure is paramount, inspections are almost as important. For example, the owner should consider the hassle to tenants whenever there are multiple, intrusive inspections. Should the sale not go through, the last thing you want are upset tenants going forward. You and your agent should also investigate the reputation of any inspectors prior to their inspection. An overstated (or “buyer-friendly”) inspection may exaggerate problems with the property. Yet most attorneys will tell you that the results should still be passed on to other potential buyers once they become known to the Seller. . If you think you are being set up by a Buyer who may be looking for an aggressive inspector in order to “bargain down” the sales price, you may wish to reconsider you initial decision to deal with the Buyer in the first place.

It is important that your agent continue to follow up with interested parties even after the property is in escrow. This is particularly important if the current buyer says he wants to cancel or renegotiate the transaction. Indeed, one of the reasons for backup offers and prospects is to “keep the buyer honest”. It is human nature to give in to a buyer’s sometimes-unreasonable requests when there are no backup alternatives. Having other options will allow you and your agent to negotiate more effectively. Getting into escrow is essentially giving up control of your property for a limited period of time. It is critical that your contract with the buyer have provisions (“contingencies”) which allow you to cancel the escrow in the event the buyer does not perform fully and on time. Without properly worded contingencies you may find yourself with a cloud on the title to your property which leaves you without any effective way of selling the property to a third party. This being the case it is essential that your listing agent not only oversee the proper accumulation and dissemination of seller disclosures, inspection reports and other due diligence material, but that he or she also monitor compliance with clearly defined timelines in order to keep a tight rope on a potential buyer.

*Please keep in mind that my area of expertise is Real Estate Brokerage. The tax consequences, exchange validity, accounting rules and legality of various strategies are best discussed with the appropriate professional. I have several that I will be happy to recommend. If you missed last month’s installment, you may contact me for a copy of the last issue.*

*James Kilpatrick: Direct: 510-844-3647 or Cell: 510-290-9647*

*Email: James@JamesKilpatrick.com*