

## FACILITATION SERVICES

**Summary: Facilitation services are provided by real estate industry members when they are acting in accordance with a transaction brokerage agreement. These include services by which the interests of the buyer and seller are met in an even handed, objective and impartial manner without providing confidential advice, advocating on behalf of either the buyer or seller, or using discretion or judgment that benefits the buyer or seller to the prejudice of the other. [See: *Real Estate Act Rules*, s.1(1)(n.1), s.59]**

Transaction brokerage is a model of concurrent representation, which allows an industry member to work with a seller and buyer in the same transaction. In transaction brokerage, a common law brokerage or a designated agent, as the case may be, becomes a facilitator and treats the buyer and seller in an even-handed, objective and impartial manner. For the purposes of this Information Bulletin, whenever the term “transaction facilitator” is used, it is referring to one or more individual industry member(s) of a common law brokerage when the brokerage represents both the buyer and seller in the same transaction or when a designated agent within a designated agency brokerage represents both the buyer and seller in the same transaction.

Transaction brokerage has clarified the responsibilities, duties and obligations for real estate industry members when acting as a transaction facilitator.

### Acting as a transaction facilitator

In transaction brokerage, the transaction facilitator will provide facilitation services to assist the parties in reaching a mutually acceptable agreement.

Section 1(1)(n.1) of the *Real Estate Act Rules* defines “facilitation services” as:

Services by which the interests of the buyer and seller are met in an even-handed, objective and impartial manner without providing confidential advice, advocating on behalf of either the buyer or seller, or using discretion or judgment that benefits the buyer or seller to the prejudice of the other, and will include:

- (i) assisting the buyer and the seller in negotiating a mutually acceptable agreement;
- (ii) providing real estate statistics and information on property including comparable property information available through listing services or other local databases;
- (iii) providing standard form agreements of purchase and sale, lease and other relevant documents;
- (iv) preparing all necessary documents in accordance with the instructions of the client(s);
- (v) providing the names of real estate appraisers, mortgage brokers, surveyors, building inspectors, lenders, insurance agents, architects, engineers and the like, but will not recommend any particular professional to the client(s);
- (vi) presenting in a timely manner, all offers and counter-offers to and from the client(s) regardless of whether the property is already the subject of a contract;

- (vii) conveying to the client(s) in a timely manner all information that either wishes to have communicated to the other;
- (viii) keeping the client(s) informed regarding the progress of the transaction; and
- (ix) complying with the provisions of the *Real Estate Act* and its regulations and the rules and bylaws of the Real Estate Council of Alberta.

### **Even handed, objective and impartial**

Whether a transaction facilitator has remained even handed, objective or impartial in a real estate transaction will always be a question of fact and can only be determined on a subsequent review of the facts of the case. If you become a transaction facilitator, consider asking yourself these six questions.

- How did I conduct myself?
- Did I provide the same information to both clients?
- Did I treat all clients honestly and with reasonable care and skill?
- Did I demonstrate impartiality or did I show favour for one client over the other?
- Did I provide the same advice to both clients? Or did I provide confidential advice to one client that was not shared with the other?
- Would an outside observer conclude that I remained neutral throughout the process?

### **Writing offers with buyers as a transaction facilitator**

Writing offers (Purchase Contracts) with buyers is part of transaction facilitation. Numerous Purchase Contract clauses will require a discussion between the buyer and the transaction facilitator in order to write the offer and probing questions can be helpful here. The transaction facilitator must encourage the buyer to make informed decisions, but not advocate for a particular decision.

Below are some examples of relevant information about the property that may be known by the transaction facilitator and should be disclosed to the buyer:

- Have you disclosed all known material latent defects to the buyer?
- How have you documented these disclosures to the buyer?
- Is there a lack of appropriate municipal building permits or inspections (e.g. unpermitted home business, un-permitted building development, un-permitted or un-inspected plumbing and heating installations, etc.)?
- Are there any environmental issues with the building(s) or the land?
- Have you reviewed the marketing and property information with the buyer?
- Is the buyer concerned about property dimensions or measurements?
- Have you reviewed the property title with the buyer and answered any questions?
- Have you reviewed the Real Property Report with the buyer questions?
- Is the buyer aware of any easements, caveats and utility rights of way?
- Are there any encroachment issues? If so, how are those dealt with in the offer?
- Is there unauthorized land use or building use that does not conform to the land use district (zoning) for the property (e.g. unauthorized rental suite, etc.)?
- Are there any proposals to construct or expand existing roadways that might affect use or enjoyment of the subject property?
- Are there any proposals to amend land use that might affect use or enjoyment of the subject property?

- Are there potential expropriations that might affect use or enjoyment of the subject property?

## Writing counter offers with sellers as a transaction facilitator

Writing counter offers (Purchase Contracts) with sellers is part of transaction facilitation. Numerous Purchase Contract clauses will require a discussion between the seller and the transaction facilitator in order to write the counter offer and probing questions can be helpful here. The transaction facilitator must encourage the seller to make informed decisions, but not advocate for a particular decision. Consider the following questions that relate to working with seller clients in discussing a counter offer or acceptance.

Below are some examples of relevant information about the seller/industry member relationship that must be shared with all parties (buyer and seller):

- Is any industry member involved the transaction (e.g. personal trade)?
- If so, was the industry member's involvement disclosed to the seller?
- Is there any strong relationship with the buyer (relative, business associate, long time friend, other associate in the same brokerage, etc.)?
- If so, has this been disclosed to the seller?
- Has the seller reviewed and signed the *Transaction Brokerage Agreement*?
- Was the appropriate *Transaction Brokerage Agreement* used (e.g. common law or designated agency)?

Below are some examples of relevant information about the property that may be known by the transaction facilitator and should be shared with all parties (buyer and seller):

- Has the seller disclosed any material latent defects with the property to you?
- Did you disclose all material latent defects known to you for the subject property?
- If so, how has that disclosure been documented for the benefit of all parties?
- Is there a lack of appropriate municipal building permits or inspections (e.g. unpermitted home business, un-permitted building development, un-permitted or un-inspected plumbing and heating installations, etc.)?
- Are there any environmental issues with the building(s) or the land?
- Did you review the marketing and property information with the seller?
- Have you reviewed property title with the seller and dealt with any questions?
- Have all the sellers signed the Seller Brokerage Agreement?
- Is dower consent an issue? If so, can the missing signature(s) be secured?
- Are all of the sellers involved in reviewing of the offer to purchase?
- Have you reviewed the Real Property Report with the seller? Is it current?
- Are there easements, encroachments, caveats and utility rights of way?
- Will any items impact the sale (e.g. lis pendens)? Is this disclosed to the buyer?
- If there are encroachment issues, how will this be handled in the offer?
- Is there unauthorized land use or building use that does not conform to the land use district (zoning) for the property (e.g. unauthorized rental suite, etc.)?
- Are there any proposals to construct or expand existing roadways that might affect use or enjoyment of the subject property?
- Are there proposed land use changes that may affect property use or enjoyment?
- Are there potential expropriations that might affect property's use or enjoyment?
- If the property is a condominium, does the seller have all the documentation?
- If it is a condo, is it a conventional or bare land? If it is a bareland condo, does the seller have a current Real Property Report?

- Did you disclose to the seller any issues regarding the buyer's ability to complete the transaction?

### More information

For more information about transaction brokerage, please see RECA Information Bulletins: *Transaction Brokerage – Parties do not Agree* and *Transaction Brokerage – Not Always Appropriate*, and the *Transaction Brokerage Practice Guide for Industry Members*.