

TORONTO UNITED CHURCH COUNCIL

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Church Development Resources

TITLE: When Selling Church Property – Real Estate Agreements

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When congregational Trustees are selling a property, they are confronted with a process that is not a routine activity for them. This Resource Paper sets out some of the questions associated with selling a property and entering into a Real Estate Agreement.

What is the role of the congregational Trustees in selling a property?

The Trustees are responsible to attend to the sale of any property the Church Board has determined is surplus to congregational need and has directed the Trustees to sell – this includes choosing the realtor, setting the terms of the contract, and establishing the sale price. In these matters the Presbytery must be given “full information” and asked to provide consent, which is a yes or no (see United Church Manual, Section 271(b)). If consent is not granted by the Presbytery, the Trustees should be offered the reasons why.

The Trustees Handbook, 2004 (United Church) notes the following:

To avoid disappointed expectations on the part of the congregation, it is wise for some authorized representative of the congregation to inform the Presbytery of the congregation’s intentions well before they are finally determined, and to get a sense of what sort of dealing would meet with the approval of the Presbytery and what conditions, if any, might be attached to its consent. Our polity requires that consent be sought in the first instance at the preliminary planning stage, certainly at the time of listing in the case of a sale, and at such other times as the Presbytery may direct. (United Church Manual, Section 267)

When seeking the consent of Presbytery, the Trustees Handbook notes the following as the required information in order that the Presbytery can consider its consent (yes or no):

The application for such consent is to be in writing.

- *For a listing, the terms to be communicated to the Presbytery would include the agent, any exceptions, the commission rate, the asking price, and the proposed possession date.*
- *For a sale, the terms to be communicated to the Presbytery would include the purchaser, the sale price, the deposit, the balance due, the*

terms of any mortgage back, conditions, warranties, and the scheduled closing date.

Is the Presbytery an “active” participant in the selling of property?

The Trustees Handbook is clear – the answer is “no”. It goes on to say “*The Presbytery is to wait for a proposal and then give or withhold its consent.*” The Trustees, however, would be very wise to ask the Presbytery to name a contact person who could participate in the process when requested by the Trustees and be the individual to dependably receive and communicate information between the two parties.

There is one specific instance where working together is mandated. The Trustees are required to be in consultation with the Presbytery as to the preparation of “*a proposal in respect of the disposition of the [sale] proceeds after providing for the costs and payment of indebtedness of the Trustees*”. In this case, the definition of consultation is normally “to have discussions with someone before undertaking a course of action”. Following the consultation, the Trustees will confirm their proposal for the use of the sale proceeds, after which “*the Presbytery shall make a decision in respect of such proposal*”.

Does the congregation need a lawyer?

Absolutely! And it needs to be a lawyer you have confidence in. Your lawyer will be involved throughout the process and will be in partnership with the Trustees to protect the interests of the congregation. Your lawyer will be required to review various items, including, but not limited to, the following:

- the Agreement with the Presbytery on the use of assets if it is complex in nature;
- the Request for Proposal (RFP) if used to identify a realtor;
- the Listing Agreement with the Realtor;
- the Agreement of Purchase and Sale (P&S) with the buyer;
- the preparation and/or review of a vendor take-back mortgage if this financing option is chosen;

How is a realtor chosen to sell the property?

The choice of a realtor is a matter for the Trustees and significant due diligence is required. This is especially the case if the sale proceeds are anticipated to be substantial. While it is possible to choose a friend, a relative, a member of the congregation who is a realtor, evaluation and supervision in such a situation is usually difficult, not to mention issues of conflict-of-interest that will arise.

A list of realtors may be supplied by the Presbytery, but for credibility, these names must always be accompanied by full disclosure, a record of experience, and a rationale why they are on such a list.

In most cases, the prudent way to proceed is to distribute a Request for Proposal (RFP) to a selection of local, regional, and national realtors including any recommended by Presbytery. Properties sold with the anticipation of large sale proceeds will garner the successful realtor a large commission, so interest should be lively. A sample RFP is found as an **Appendix** to this resource. When responses are received, the Trustees short list the proposals to two or three of the most promising, followed by face-to-face interviews with them to answer final questions and to get a sense of the enthusiasm of the individual(s) involved.

What types of realtor contracts are possible?

There are several types of contracts (Listing Agreements) and you can find a summary of them on various real estate websites. This being said, the most commonly utilized instrument is the *Exclusive Right-to-Sell Listing Agreement*. It gives the realtor the exclusive right to earn a commission by representing the seller and bringing a qualified buyer, either directly or through a cooperating brokerage. The seller pays both the listing and selling broker fees. Once the listing agreement is signed the owner cannot sell the property on their own without paying a commission, unless an exception is noted in the contract (listing agreement).

Does the realtor's proposal for terms of a contract need to be accepted?

The answer is **"no"**. Remember, this is a contract to be negotiated; it is not a *fait accompli*. You have the right to talk with multiple agents in order to compare their listing terms and strategies (using a request for proposals, etc.); you have the right to negotiate all aspects of the agreement; you have the right to be satisfied with what you are signing.

There are many areas of an exclusive listing agreement that you can and should carefully consider and negotiate. Among them are:

Length of the Listing: Most realtors want to have an exclusive listing for as long as possible and that is what they will propose. It is to their advantage to make it six months or a year. If they are "slow off the mark" in promoting your property, they have time to catch up. If the market is weak, they hold on to the listing and hope the market recovers. What is the time that best suits your needs? 60 days? 90 days? Longer?

Selling Commission: When there is a lot of inventory on the market and fewer buyers, to generate traffic, you might consider paying the selling agent a higher commission than you would in an active market where inventory is tight and many buyers are competing for a few listings. Also the seller's commission is calculated as a percentage of the sale price. Hence, the higher the sale price the higher the commission. Listing realtors are more willing to negotiate reduced commission percentage for high value properties and desirable properties likely to sell directly through the listing broker.

Co-operating Brokerage Fee: The amount of the co-operating brokerage fee and how this will be paid is to be considered carefully. The fee may be shared from the selling commission (e.g. 3% all in), it may be a separate fee over-and-above the selling commission (e.g. an additional fee of 1%), or it may be a second stated commission divided equally between the two parties (e.g. 4% divided 50/50).

Exception to the contract: Say, a neighbouring property owner, a nearby church, or some tenants have expressed an active interest in buying your property. You can negotiate a provision giving you X number of days to produce a contract with the prospective buyer(s) without owing a commission. Or you may wish to include a clause stating –

"Notwithstanding the terms of the Agreement, introductions to the property previously made by [the seller] will be excluded from the Agreement. These contacts are clearly named in Appendix A to the Agreement. We are prepared to pay [a lesser % than the selling commission] of the sale price for your follow-up of these prospective purchasers."

Commission owing after cancellation of contact: The realtor will normally include that a commission is owed them if a sale is made by anyone else within a certain period to a buyer that the realtor claims to have introduced to the property during the listing period. Again, the realtor will attempt to make this post-listing time as long as possible, but the length of time can be negotiated. You also have the right to include in the contract that, in the event the contract is cancelled, the realtor's list of introductions is to be immediately provided to you in writing or the provision is invalid. It is very one sided if only the realtor knows how the list was created and who is on it.

How is the asking price established?

Deciding what price to ask for your property is never easy. As part of their response to your RFP, each realtor should include a statement setting out the price at which the property will be marketed. Most often, the proposal will include a Comparative Market Analysis (CMA) showing the selling prices of comparable properties sold in the area and the asking prices for comparable properties currently on the market. Price will also be affected by the shape of the real estate market, interest rates, the state of the economy, and the zoning and building code requirements of the municipality. Remember some agents may suggest a strategy to under-value the property with the intention of creating bidding demand. Others will attempt to flatter you with an over-inflated estimate in order to secure your listing but later recommend a price reduction. This is why you want to get a number of CMAs through the RFP process and augment them with your own investigative work which may include a Broker's Opinion of Value and an independent Professional Appraisal.

You must also be prepared to receive a CMA that indicates your property's highest and best use may be as a vacant lot for redevelopment purposes (e.g. for retail or

residential development). This will, of course, result in the demolition of the building, so know beforehand your emotional preparedness for such a result.

What documents must be gathered?

Your prospective purchasers will undoubtedly do their own due diligence before putting in an offer, or they will make a successful due diligence a condition of sale. Either way, you and your realtor will need to gather important documents and make them available. They may include:

- the Deed including the legal description of the property;
- a current survey;
- architectural and engineering plans and specifications;
- Environmental Phase One Assessment (Carried out to determine the environmental status of the property and building. If the investigations identify a concern, a Phase Two Assessment may be required including subsurface drilling and sampling, monitoring well installation and sampling, asbestos and lead sampling, etc.);
- legal verifications as to licenses, permits, and zoning;
- copies of leases if the facility has tenants;
- fire system inspection reports;
- a detailed inventory of the fixtures, furniture, equipment, and supplies that are or may be included/excluded in the sale as set out in the listing.

How are Agreements of Purchase and Sale assessed?

Every prospective purchaser will have conditions that will be incorporated in their offer to the Trustees. Among them are many items that Trustees can and should carefully consider and freely negotiate with a prospective purchaser (either through discussion or a sign-back of the Agreement). The offer you choose needs to provide you comfort on each aspect. Among the items for consideration are:

- *Price* –What amount is being offered? Does it match or exceed your realtor’s proposed market price? Will you decline the offer or sign-back for a higher price or one that matches or exceeds your selling price?
- *Financing* – Will the sale be “all cash” or is a vendor take-back mortgage (VTB) a condition of purchase? What is your response to a VTB request? If a VTB is possible, what is the interest rate, term, and amortization period you would agree to for such financing?
- *Closing Date*: How long is the time between signing the Agreement of Purchase and Sale and the closing of the sale?
- *Terms and Conditions*: What items is the prospective purchaser including as requirements for a completed sale (e.g. acquiring zoning, arranging financing, etc.)?
- *Assignment*: Can the Agreement of Purchase and Sale be assigned (transferred) to a third party?

Your realtor will help you in assessing these and other conditions, but in the end, your most important guidance will come for your congregation’s lawyer. He/she will work with you to protect the congregation’s interests.

In some cases, your realtor may suggest and carry out a Request for Offers strategy. With this option, prospective buyers are invited to make offers by a certain date and time through a closed bid process. The realtor will then analyse the offers, prepare a chart comparing the various aspects of the offers, and present the information to you. You do not need to accept any offer, and the right to sign-back remains (similar to an auction).

Appendix – Sample Request for Proposal (RFP)

This is a sample RFP. It is to be modified to suit your needs and purposes. You may wish to have your lawyer review the document before distributing to those real estate firms you have selected to receive the Request.

GENERAL SPECIFICATIONS FOR REAL ESTATE BROKER SERVICES

The Trustees of [Name] United Church are seeking proposals from real estate brokers/firms to sell real property owned by the congregation. It is the intent of this RFP to have the successful broker/firm enter into a Professional Services Contract with the Trustees to provide real estate services as outlined herein.

[Identify property and specifications of property]

A firm submitting this proposal is required to submit those items listed in this RFP in full as a part of the proposal package. Failure to submit any of the documents listed below with your proposal, or failure to acknowledge any addendum, or submitting your proposal with any limitation, condition or provision not requested, may be cause for rejection of your proposal. By signing your response, the authorized representative affirms that the information contained in this document is true and accurate, and that the firm is capable of providing services as described in their response to this RFP.

A. SCOPE OF SERVICES

The successful firm shall agree to contract with the Trustees to provide the following:

- developing marketing strategies for sale of the property,
- representing the Trustees in negotiations with potential buyers,
- coordinating a real estate appraisal (if required),
- coordinating real estate transaction closing, and
- handling all other customary activities and services associated with real estate transactions.

Services will include consultation with the Trustees and the lawyer for the Trustees relating to the sale of the real estate. Presentations at Trustee and congregational meetings may be required.

B. BROKER'S QUALIFICATIONS

Respondents to this RFP shall have the following qualifications:

- Must be licensed and in good standing with all governing regulatory bodies.
- Must be knowledgeable in the local real estate market and have experience with properties of a similar type.
- Must be knowledgeable in the use of required public real estate records.

C. INSURANCE REQUIREMENTS

For proposal purposes, proposers must submit copies of certificates of insurance for general liability and workers compensation.

D. LISTING PRICE

Respondents will provide their recommendation for the asking price for the property that will be used in the marketing of the property. The recommendation will be accompanied by the supporting comparative market analysis and/or all other criteria used in establishing the price.

E. FEE SCHEDULE

The proposed fee schedule shall include the following items:

- State your commission rate for the selling of the property.
- State any other costs the Trustees may anticipate relating to the real estate services to be provided.

F. TERM OF CONTRACT

The contract period for the successful broker/firm will be from date of award through [Date]. The contract may be renewed for additional terms upon satisfactory performance by the broker/firm and at the same negotiated rate unless a change is agreed to in writing by both the broker/firm and the Trustees.

G. EVALUATION AND AWARD PROCESS

Issuance of this RFP and receipt of proposals does not commit the Trustees to award a contract. The Trustees reserve the right to postpone receipt date, accepting or rejecting any or all proposals received in response to this RFP, or to negotiate with any of the brokers/firms submitting an RFP, or to cancel all or part of this RFP. Consent of the Presbytery (governing body of The United Church of Canada) is required by the Trustees to enter into the contract.

H. ORAL PRESENTATION/INTERVIEWS

Firms submitting a proposal in response to this RFP may be required to give an oral presentation of their proposal. Additional technical and/or cost information may be requested for clarification purposes, but in no way will change the original proposal submitted. Interviews are optional and may or may not be conducted.

I. SELECTION CRITERIA

Selection of a broker/firm will be made based on the following criteria:

- Ability of the contractor(s) to meet or exceed the requirements defined in the RFP, experience, qualifications and references,
- Knowledge of the local real estate market,
- Fees, and
- Completeness of response to RFP as outlined in this solicitation.

J. RFP SUBMITTAL REQUIREMENTS

By signing and submitting a proposal, you represent that you have:

1. thoroughly examined and become familiar with the scope of services outlined in this RFP, and
2. are capable of performing quality work to achieve the Trustee's objectives.

The following information must accompany your proposal:

1. List years in business, previous names of the firm, if any.
2. Description of your firm including size of firm, location, number and nature of the professional staff to be assigned to this sale; staff experience and training, including a brief resume for each key person listed.
3. Describe experience (minimum five years previous experience with proven effectiveness) your firm or organization has in pertinent real estate experience.
4. Experience in assisting similar size entities, including any and all services for other churches or not-for-profit agencies.
5. List of at least three references where and when your firm provided similar services. Please provide names and telephone numbers of contact persons for each reference.
6. Additional services offered through your firm.
7. Listing of current litigation, outstanding judgments and liens.

The information above is provided for information only. It is not intended to supply legal advice, nor meant to imply any legal responsibility or obligation on behalf of The Toronto United Church Council. Issues relating to the marketing and sale of property, together with matters involving contracts, agreements, and confidentiality are to be pursued with your congregation's legal counsel.