Please Permit Me to Talk About Permits
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If you have not already encountered the issue, rest assured it is not a question of if you will but rather when you will be forced to deal with a permit related issue in a transaction. Let’s talk about some examples to illustrate the point. We recently received an email on day 15 of the Inspection Period in a transaction governed by the NABOR Residential Improved Contract (hereinafter the “Contract”) from buyer’s attorney that stated our client, seller, has three open permits on the subject Property. Buyer’s attorney includes in the email that we can expect the Inspection Notice and Buyer’s Election within a couple of days and it will include a request to rectify the open permits. So now what? We reviewed the online permit related files on Collier County’s permitting portal; the most recent version of the County’s platform is called Cityview. Thankfully these permits related to improvements done within the last six or seven years so all of the permit records were available online. For older permits there is a different data base and for really older permits only paper files or microfilm in the County archives exist. The City of Naples has a similar system where certain files will be available on line and others only through the archives. After reviewing the three permit files online we were able to determine the nature of the improvements, name and contact information for the contractor, learned that all fees were paid and that inspections were never done. The permits basically expired. After a few calls we learned the contractors were still in business and were willing to get involved to reactivate the permits and schedule inspections. We got lucky and the permits were properly closed out.

We find that the majority of the expired or open permits do relate to situations where the contractor did the right thing by pulling a permit, did the work, did it well and then just failed to call in a final inspection. If the contractor is still around the resolution is fairly straightforward as in the above example. What if the contractor is not around? A call to the County or City Permitting Department will go a long way to figure out what needs to be done to close out the permit. It may involve getting a new contractor to take over the permit. It may be the case where the owner may be able to reactivate the permit without getting a contractor. There will be fees and of course logistics of scheduling inspections.

So the above example ended up being fairly easy to straighten out, but what about much older permits? How about a 1998 pool permit? We worked on a case where the beautifully done pool has been functioning for two decades but the original contractor didn’t close out permit. We had to engage an engineer to conduct a thorough inspection of the pool and prepare a report for the County. As a result of the engineer’s report the owner had to upgrade some of the electrical components, had to include safety measures and had to upgrade the gate to the lanai area. A few thousand dollars later a perfectly functioning pool was brought up to current safety standards. Not a bad thing for sure, however, if the permit was closed out properly years ago, the Seller would not have had to do these improvements and upgrades; it would have been the Buyer’s responsibility and cost to do so.
Unpermitted improvements are more difficult and costly to deal with than open or unresolved permits. First one has to identify the possible alteration or improvement and then check for a permit. Here is an example. An enclosed lanai, a beautiful feature, but clearly not every unit in the complex had an enclosed lanai. It prompted the Buyer to check to see if the lanai was permitted and low and behold there was no permit on file. A contractor was engaged to review the improvement and an engineer was engaged to write a letter in support of a permit after the fact. Unfortunately, codes had changed so in order to open and properly close a permit the owner needed to upgrade windows, needed to have calculations performed on the hvac system to ensure the system was adequate to air condition the additional space created by the enclosed lanai. Six months and thousands of dollars later it was completed and resolved.

Open (unresolved) permits and unpermitted improvements are by definition in the Contract a defective item for which the Buyer may request remediation or a credit. Generally these are not a title issue unless it has risen to the level of a code enforcement case and lien on the property. Therefore, to have permits addressed these must be timely identified and raised as an issue through the inspection provisions of the Contract.

Here are some practical suggestions based on experience. If working with a buyer: review the seller disclosure for mention of alterations or permits; if the listing includes references to renovations or alterations get the details and find out if permits were required; make sure the closing professionals will request a permit search early in the process and during the inspection period; and talk with the home inspector about any improvement or alteration that they may have seen that should have been permitted. Remember it is an inspection issue so deal with in the proper time frame and have the buyer make proper elections. If working with a Seller: ask about improvements and permits they may have undertaken and suggest the Seller look into whether any open permits affect the property. We find many times the Seller is unaware of any issue particularly when they were not the owner of the property when the permit was originally pulled.

Some issues will take time to resolve and may not be done by the Closing. In such a case the Contract calls for an escrow. It can be difficult to come up with a reasonable amount of an escrow in permit related situations because the cost to close out the permit may be unknown. Particularly difficult to arrive at a reasonable escrow with an unpermitted improvement. Speaking with the County or City, speaking with contractors, and/or perhaps engaging a permit expediting company will assist with figuring out a reasonable amount of the escrow.

Not sure permit issues are going away anytime soon. There was proposed legislation introduced this past legislative session in Tallahassee relating to Contractor’s Licensing and permits. Part of the proposed changes included essentially grandfathering permits of a certain age provided the current owner of the property was not the owner who originally pulled the permit. That provision would have helped tremendously with the
volume of open (unresolved) permits. However, the proposed legislation didn’t pass. Maybe next year.