

Open Permits
A Solution of Last Resort
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Open permits have been a constant headache for Realtors, attorneys, and closing companies since they were added to the NABOR contract in 2016. Closers were inundated with open permits, many being quite old. To make matters worse, some permits related to construction improvements that no longer existed. For example, a 15 year old open permit for an air conditioner might be superseded by a new permit, properly closed, for a newer air conditioner. The old air conditioner was replaced.

Experienced closers quickly adapted, and in most cases successfully closed the transactions. Often the seller was able to close the permit, in some cases that was not possible. What then? Many buyers closed if the open permit involved an improvement like the 15 year old air conditioner discussed earlier. Proper legal advice, context, the age of the work, and the extent of the work all played a role.

Perhaps most important for a Realtor is understanding open permits and unpermitted work are not title issues under NABOR contracts. That means permit issues must be part of the one inspection related request, for a credit for remediation, a buyer can make to a seller under NABOR contracts.

If a Realtor and buyer request a seller repair items after receiving an inspection report and does not ask the closing attorney if there are permit issues, the buyer does not get a second chance on permits. If it turns out there is a serious issue, the Realtor could have liability. Do not forget to include permits as part of any request to remedy a defective property condition!

Explaining to the buyer that an open permit is not a title issue overcome one major hurdle. Buyers want marketable title. So do their lenders.

New law added multiple methods for resolving open permits. On June 7, 2019, Governor DeSantis signed **House Bill 447 (CS/CS/HB 447)**, which revised F.S. 553.79. Those new laws became effective on October 1, 2019. Here are the highlights:

Open Permits

F.S. 553.79 (15)(a) now allows the owner to close the permit by contacting the general contractor listing on the permit or hiring a new contractor to perform any remaining work necessary to close the permit. The

new contractor is not liable for any defects in the work performed by the original contractor.

Often the owner simply calls the contractor and the work gets done. If the permit is quite old, and the contractor is out of business, the owner may then hire a new contractor. Knowing how to do permit searches or working with a closing company that includes permit searches in their routine services to any buyer, gives everyone a head start in closing the permit.

Expired Permits

Under F.S. 533.79(15)(b), if the building permit is expired and the requirements have been substantially completed as determined by the building department, the permit may be closed without obtaining a new permit, and the work required to be done may be done under the original building code that existed when the original permit was issued. This can be a significant benefit, avoiding the need to redo the entire project under a more stringent building code.

Closed Permit After 6 Years

Under F.S. 553.79(15)(c) the local governmental enforcement agency may close a permit 6 years after issuance of the permit without an inspection as long as that agency determines that no safety hazard exists.

Cannot penalize subsequent owners and contractors

Under F.S. 553.79(16)(a) a local enforcement agency cannot deny the issuance of a building permit to an arm's length purchaser solely because the permit of the prior owner was not closed. Additionally, the enforcement agency may not issue a notice of violation, fine, penalize, sanction, or assess fees against an arm's length purchaser solely because the prior permit was not closed.

Title companies and attorneys use this subsection frequently. Typically, the Buyer's Election (you only get one) includes the request that the seller close the open permit. If the seller, despite all efforts, fails to close the permit, the buyer may close anyway without worrying about possible penalties. How this problem is explained to the buyer is important. Most experienced attorneys recommend that the buyer still have a professional inspect the work, and even close the permit post-closing. Just because the

government cannot penalize the buyer, does not mean all is clear. Concern with open permits should go beyond contract rights. Years ago, a young child died playing on a boat dock with the permit still open. Supposedly there was exposed wiring. Addressing that open permit might have prevented a tragedy.

The Realtor should carefully document all that was explained to the buyer. If and when the buyer resells the property, the open permit could pop up again. The seller may not remember that all this was thoroughly discussed when he purchased the property. He may blame the original agent among others, avoiding Realtor blame is yet another benefit from having the work examined post-closing.

Use an experienced attorney. Resolving open permits requires a lot of knowledge, finesse, and experience. The 2019 legislation gave the parties several new methods of getting the deal closed. Remember to put the open permit on the Buyer's Election, and document your file. Memories can be faulty.