

A PRIMER ON SHORT SALES

When the sale price of a home is not enough to cover the mortgage(s) on the home, the sale can only close if one of two things happen: either the sellers bring money to the closing or the sellers' lender agrees to take less than the amount owed. While in both situations, the sale price is "short," it is the second situation that is commonly referred to as a "short sale."

Perhaps the most important thing to keep in mind with respect to short sales is that a lender is not required to take less than the balance owed. Moreover, when the lender receives a request to consent to a short sale, the lender is not required to respond quickly or even at all. Because the approval of a short sale is wholly discretionary, a lender can ignore the request, reject the request, or approve the request subject to a whole list of conditions. If the lender approves the sale, in order for the transaction to proceed, the sellers and the buyers must agree to any conditions imposed by the lender.

Sellers and buyers frequently ask under what circumstances a lender will approve a short sale. There is no correct answer to that question. Different lenders apply different rules. Employees within the same lending institution may look at the same rule differently. Lenders themselves often change their own rules from month-to-month or even week-to-week.

In a perfectly rational world, lenders would always approve a short sale in those instances where the proceeds that the lender will receive from the short sale exceed the amount that the lender would receive if it foreclosed the home and pursued the sellers for the shortfall. But even in this rational world, in order to make such an analysis, a lender must be

comfortable that it has accurate information both as to the value of the home and the sellers' financial condition. Typically, much of the short sale process is focused on convincing a lender that it has accurate information and that based on this information, the short sale should be approved.

In some cases, a seller may accept multiple offers to purchase, making them all contingent upon approval by the seller's lender and the seller's approval of the lender's terms. While this practice is discouraged because of potential inherent risks to the seller in accepting multiple offers, it does occur. The buyer making the highest-cash offer or what that buyer may view as the best offer, may believe they are entitled by law to purchase the property. That is not the case. The lender can approve any offer based on numerous factors other than the offering price. There is no law requiring the lender to accept the highest or best offer in the eyes of a buyer.

In the real world, a lender will never simply approve a short sale; instead, the lender will approve the short sale subject to a whole list of conditions. Often the document setting forth the lender's "conditions" is longer than the purchase agreement itself. Keep in mind that this lender approval document is not "boilerplate" and should be read carefully by both the buyer and the seller. While these "conditions" are seldom negotiable, buyers and sellers are well-advised to seek the assistance of counsel in order to clearly understand their rights and obligations should they choose to accept the lender's conditions.

Remember, there are few laws that regulate the terms of a home sale transaction; rather, the transaction is governed by the terms of the sales contract. Over the years, many terms have become so standard that many people assume that they are dictated

by law, when in fact they are nothing more than typical contract terms for the purchase of a home. Often times the “conditions” that a lender imposes when it approves a short sale expressly alter some of these typical contract terms. It is therefore critical that these “conditions” be reviewed very carefully. Again, it is unlikely that a party will be able to get a lender to change any of these provisions; nonetheless, a party needs to understand these “conditions” when analyzing the transaction. For example, a buyer who has negotiated what he believes to be a great short sale price on a home should take into account the seller’s expenses that he is being required to assume when comparing that transaction to a standard home purchase.

It is also likely that a short sale buyer will be purchasing a home that may need numerous repairs. A lender’s conditions for approving a short sale typically provide that the buyer has no recourse in the event that there were misrepresentations made as to the condition of the home and/or material defects that the sellers did not disclose. Moreover, sellers who have been facing foreclosure for many months typically have not had the funds (or the desire) to properly maintain the property. A short sale buyer is well-advised to have the home carefully inspected.

Finally, the lender’s approval of a short sale typically includes a provision which states that the lender can terminate the transaction for any number of reasons right up until the time of closing. For this reason, a short sale buyer is well-advised to keep his options open until the transaction is finally closed. A buyer with a moving truck in the driveway the day before closing will be in a very difficult position if the transaction fails to close.

Attached to this Article are two contract addendums for use in short sale situations. The first, a Short Sale Addendum to Listing Contract, is attached as Exhibit A. The second, a Short Sale Addendum to a Buy and Sell Agreement, is attached as Exhibit B.

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EXHIBIT A

SHORT SALE ADDENDUM TO LISTING CONTRACT

PROPERTY

THIS ADDENDUM is to be part of and incorporated into a Listing contract between _____ as Listing REALTOR®/Broker and _____ as Seller, dated _____, 20____, regarding the above-captioned Property.

It is acknowledged by the parties hereto that the sale price may not be sufficient to pay the balance(s) owed on all debt secured by the Property and, accordingly, it may be necessary to attempt to negotiate a short sale with Seller's mortgagee(s) and other lienholder(s) (hereafter "mortgagee(s)").

Seller acknowledges that while agents of REALTOR®/Broker may, at the direction of the Seller, assist Seller in such negotiations, Seller understands that neither REALTOR®/Broker nor any agent of REALTOR®/Broker can provide legal advice or financial advice. Seller acknowledges that REALTOR®/Broker has advised Seller to consult with an attorney as to any such transaction and specifically as to any continued liability on any existing mortgage that may be owed to Seller's mortgagee(s) after such transaction. Seller should not assume that the mortgagee(s) approval of the short sale, acceptance of a lesser amount and the granting of a discharge of mortgage will release the Seller from any obligation to pay the mortgagee(s) for any deficiency or difference between the amounts owed to the mortgagee(s) and the amount paid to the mortgagee(s) at closing.

Listed by: _____
Agent

Seller

Agent for: _____
REALTOR®/Broker

Date: _____

Seller

Date: _____

EXHIBIT B

SHORT SALE ADDENDUM TO BUY AND SELL AGREEMENT

Date: _____, covering Property located at _____
_____ between _____

Seller and _____ Buyer for the Property commonly
known as _____, this
Addendum to be deemed part of the attached Buy and Sell Agreement (the "Agreement").

1. The sale of the Property is subject to and contingent upon the written agreement of the Seller's mortgagee(s) and any other lienholder(s) (hereafter "mortgagee(s)") to accept less than the amount(s) owed. Moreover, this sale of the Property is contingent upon the Seller's acceptance of any conditions imposed by such mortgagee(s). The parties acknowledge that neither Seller nor Seller's agent can compel any mortgagee or lienholder to agree to accept less than the amount owed or even to respond to such a request.
2. In the event all mortgagee(s) do not consent to the short sale or Seller is unwilling to agree to the conditions imposed by any mortgagee(s), Seller reserves the right to terminate the Agreement, in which event the earnest money shall be refunded to Buyer and neither party shall have any further rights or obligations hereunder.
3. Buyer reserves the right to terminate this Agreement at any time if all mortgagee(s) have not consented to this transaction, in writing, within __ days from the acceptance of the Agreement by Buyer and Seller, in which event the earnest money deposit shall be refunded to Buyer and neither party shall have any further rights or obligations hereunder.
4. In the event of termination of the Agreement pursuant to Paragraph 2 or 3 above, neither party will have any liability to the other party for any expenses incurred by that party in anticipation of closing.
5. All timeframes referenced in the inspection clause in the Agreement shall commence upon:
(select one) receipt of all mortgagee(s)' written consent.
 acceptance of the Agreement by Buyer and Seller.
6. The Property shall be reported with the local multiple listing service as a "pending sale" upon acceptance of the Agreement by Buyer and Seller.

