

Episode 3. Responsibilities After the Purchase Agreement is Signed

For this episode of the Letter of the Law, we wanted to start with a story that unfortunately reflects poorly on our licensed profession. Understand that this is one seller's story, but that is a powerful reminder of how important a Realtor® is to each transaction...from the beginning, throughout the process, and especially at the end.

In this story, our Seller owned a condominium unit in a large complex. Units in this project were not currently selling, primarily because of upcoming special assessments needed to cover a shortage of funds for neglected maintenance. Seller's experienced real estate agent came up with an idea for addressing this issue upfront with potential buyers. Seller had a binding purchase agreement in place within three weeks—at a price higher than the listed price. Seller was thrilled that they had chosen such a competent agent.

After the purchase agreement was signed, the relationship quickly soured. The deadline for the buyer's inspection came and went without any word from the listing agent. When the seller reached out to the listing agent to inquire, the listing agent took several days to respond and then seemed uncertain as to how the inspection contingency worked and whether it could be deemed waived. Listing agent was similarly evasive when asked about the status of the buyer's financing contingency. Seller became increasingly anxious as the purchase agreement required them to move out prior to closing and they were unclear as to whether they still had a deal.

Eventually the listing agent notified Seller that all contingencies had been satisfied or waived and that the closing would occur within a week. The listing agent forwarded closing documents to the Seller late afternoon before the morning of the closing. The closing documents had numerous obvious errors. For example, the Seller's name was misspelled, and the address of the property was incorrect. The Seller-husband and given the Seller-wife a power of attorney, but the documents were set up for the husband to sign on the wife's behalf. Clearly the listing agent had not done even a cursory review of the closing document before forwarding them on to the Seller. The Seller was worried that documents might contain other errors that were not obvious to them.

The Seller found a lawyer to review the documents, which were revised and the sale closed. Unfortunately for the listing agent, what the Seller remembers (and talks about to anybody who will listen) is not the listing agent's expertise in putting together a difficult deal, but the listing agent's inattention after the purchase agreement was signed.

The Occupational Code

Obviously, we all know that a real estate agent's job is not done once the purchase agreement is signed. The Occupational Code expressly provides that after a purchase agreement is signed, a licensee must provide "assistance as necessary to complete the transaction under the terms specified in the purchase agreement." (Unless the client has waived such service in a written limited-service agreement.) Real estate brokerages need procedures in place for moving the transaction forward in accordance with the purchase agreement. To that end, will be discussing some of the various pre-closing responsibilities primarily from the seller's perspective.

Contingency Deadlines

After the purchase agreement is signed, the buyer typically has a number of contingencies that must be satisfied or waived before the buyer is required to close. Purchase agreement forms handle contingency deadlines differently. Sometimes, if a buyer does not respond within the allotted time period, the contingency is deemed waived and the transaction proceeds forward. Other times, silence can result in the automatic termination of the purchase agreement. Different contingency clauses within the same purchase agreement make work differently. A listing agents need to understand the significance of "silence" as it relates to each contingency within the purchase agreement.

As an aside, while buyers typically look for longer contingency periods to make sure they have sufficient time to get things done, the closer the contingency deadlines are to the closing deadline, the more difficult it can be for a seller. This is particularly true if possession transfers at closing. A typical seller is going to want to know that they have "a deal" (*i.e.* that all contingencies are waived) in sufficient time for them to finalize moving arrangements. Listing agents should make certain that their seller is comfortable with the window between the contingency deadlines and the agreed upon closing date.

Inspections

Inspection contingency clauses in purchase agreements vary significantly. Listing agents should make certain that they understand the intricacies of the particular inspection contingency clause so that they can advise their seller appropriately. Examples of such differences:

1. Some inspection contingency clauses allow the seller to terminate the purchase agreement if the buyer submits any request for concessions; other clauses say that if the seller does not agree, the buyer then has an opportunity to withdraw their objection(s) and close.
2. Some inspection contingency clauses allow a buyer to terminate by simply providing a notification that the inspection is unacceptable; other clauses require the buyer to be specific as to their objections and/or provide the seller with written evidence as to the defect(s).
3. Some inspection contingency clauses provide that the buyer may only terminate the purchase agreement if a particular defect is material and/or the combination of defects is material.
4. Some inspection contingency clauses provide that if the buyer objects to a particular defect, the buyer must close if the seller is willing to repair that defect.

Thoughtfully discussing and understanding the operation of a specific inspection clause is an important variable for both buyers and sellers.

Personal Property/Fixtures

The general rule is that fixtures are automatically included in the sale of a home, while personal property is not. If the sale includes any personal property, then the closing documents must include a bill of sale. The legal test for determining whether something is a fixture (and thus included in the sale) or personal property, is whether the item was intended to be permanently attached to the real estate. The nature of this legal test is such that there is often disagreement. This is particularly true when there are various components not all of which are “attached”—think garage door opener and controls or ceiling fans and remote-control devices.

While all residential purchase agreements attempt to address this issue by including a boiler plate list of “included” property, a home may contain “unique” items that are not mentioned in the boilerplate clause and that may be considered either a fixture or personal property. If the seller has any items that they intend to remove which are even arguably fixtures, the listing agent should include a provision excluding such items in the purchase agreement.

Post-closing Occupancy

If the seller is going to remain in the home after closing, the specific details of that arrangement should be spelled out in the purchase agreement. The parties should agree on the daily charge, and whether the seller is entitled to a partial refund if the seller vacates early. The parties should agree on the parties’ respective maintenance/repair obligations and whether utilities will remain in the seller’s name during the seller’s occupancy period. Both parties should be encouraged to discuss this arrangement with their insurance agent. These terms should be reviewed/memorialized at closing. To avoid any misunderstanding, at closing, the parties should spell out in writing the specific day and time when the seller’s occupancy rights terminate –*e.g.* “June 6th at 12;00 noon” rather than “within 30 days.”

Closing Documents

It is true that the Occupational Code provides that a broker need not sign the closing statement if the closing is conducted by a title company. However, the Occupational Code also provides that a licensee shall not close a transaction on any terms or conditions that are contrary to the terms of the purchase agreement. Failure to do so is not only an Occupational Code violation but could also result in a negligence claim. Obviously, a licensee cannot know if the transaction is being closed consistent with the purchase agreement without reviewing the closing documents. If the parties change their minds on any previously agreed-upon terms, a licensee should make certain that they sign an addendum to the purchase agreement even if the change happens at closing.

(One strategy to assist in document review is to highlight the deal-specific terms on the purchase agreement immediately after it is signed when the details are still fresh in your mind. You can then refer to this marked up document when reviewing the closing documents.)

Closing Thoughts

As the seller's story we began with clearly indicates, careful post purchase agreement follow up is not only statutorily required, but also good business practice. The more communication during the stressful period between when the purchase agreement is signed and the closing, the more confident the seller will be that their listing agent knows what they are doing and that they are paying close attention. Ok, that's all for today. Please send those questions or comments to the email below! Thank you so much tuning in and we'll see you next time.