

Contracting For Real Property

When a contract for the sale and purchase of real estate is signed, a naïve or first-time participant might think that the deal is done. Actually, it is more so an early step along the way and there are any number of events that can and often do occur to unseat the sure thing in favor of an extended bargaining process and brinksmanship.

Residential real estate contracts invariably include a three day attorney review period that commences upon signing and delivery of the contract. During this period of time, either side may cancel the contract without liability. Such a rejection of the contract usually takes the form of a letter advising that the contract as written is unacceptable but will be approved if certain terms are deleted and others are included. Those contract modifications are then listed and sent to the other party's counsel who writes back and usually accepts some, rejects others and adds a few to the mix. Back and forth it goes until there is consensus or the deal falls apart.

The modifications from each side are predictable and one might ask why go through the charade of the original contract...why not just get it right the first time? That is a good question and the best answer I can give is that the contracting process commences with a form of contract developed by realtors who may not always share all the particular interests of the buyer and seller. Further, the sale of real property can be very detailed and nuanced. Each deal may be similar in almost all aspects to the ones prior, but it is where the differences are that have the potential to cause problems.

Most basic terms that are adjusted have to do with waiving the most strict and punishing terms of the contract. For example, the contract may provide that the buyer has 14 days to inspect the property and report to the seller within 5 days thereafter and if the buyer fails to do so, then rights relative to the inspection are waived. No one wants to get trapped in a deal just because a little extra time went by, so the parties most often agree to waive such strict time requirements and opt rather for a reasonable period of time that may be extended.

House inspection clauses are also often addressed, allowing for expanded opportunities in terms of time and scope of the review and greater ease in terminating the contract if the property is deemed to be unsatisfactory.

The contract adjustment that may peeve sellers most, however, is the common rejection by the buyer that the property is being sold "AS IS." Often, the seller may agree to a price that has been adjusted downward due to problems with the structure that have been identified by the buyer during the bargaining process. The seller may agree to the adjusted price but with the proviso that the sale will conclude "AS IS" and that the seller will not be asked to fix or replace anything further. Then comes the attorney review letter with language that protects the buyer's right to inspect and request further accommodations such as repairs or reduction in price if problems are discovered. Worse yet, after the inspection, the buyer may demand such adjustments, and if not given, threaten to terminate the contract.

The list of changes to the original contract can be quite lengthy and it is common for an attorney review letter to have nearly 30 or more adjusting paragraphs. This process can and often does take anywhere from a few days to a week or more to complete.

Once the contract is in place and adjustments have been agreed upon, then commences a series of activities, often each of which have the capacity to up-end the deal, resulting in a sale not concluding. Things that can and do go wrong include difficulties with the buyer securing a loan to fund the purchase and inspections that reveal problems that the seller will not remedy and the buyer will not accept.

Deals in which there is a sale contingency are often prone to falling apart. This usually occurs when a seller, perhaps desperate for a deal of any sort, agrees to sell the property contingent upon the buyer selling his or her property. In some cases, prospective sellers may wish to just avoid such a contingency and instead, opt to wait for a buyer that is ready, willing and able to purchase. When a sale contingency is included, however, it may be accompanied by what is often referred to as a "kick-out" clause that states the seller may continue to market the property and if a contract is offered by another buyer, then the original buyer is noticed of same and has perhaps 3 days to waive the sale contingency and proceed to closing.

If the deal stays together, a closing of title will occur, but don't count on the date that was set in the original contract or the addendums thereto. It all depends upon the money and when the lender gets around to making it available. Regulations associated with lending and additional lender requirements make it anything but a predictable affair. It is not uncommon for the parties to be waiting around through the morning of the closing date and even later in the day before it is certain that the money will arrive and the closing will occur.