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Dealing with Home Inspections in the CBR Purchase Contract



Dealing with Home Inspections in the CBR Purchase Contract

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Home inspection. Two words that can make some sellers and agents tremble with fear and loathing. Section 4 of the CBR/CBA Residential Real Estate Purchase Contract provides very detailed and specific rights concerning inspections and tests. But before I get into my guide through Section 4, I think it is important to understand the law of Ohio as it concerns a purchaser of real property.

In 1988, the Supreme Court of Ohio decided the case of *Layman v. Binns* (1988), 35 Ohio St.3d 176. It states that, "the doctrine of caveat emptor precludes recovery in an action by the purchaser for a structural defect in real estate where (1) the condition complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser had the unimpeded opportunity to examine the premises, and (3) there is no fraud on the part of the vendor." As proving fraud is very difficult, for all practical purposes, once a deal is closed, the buyer will be responsible for the property.

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Therefore, purchasers need to inspect property and, if not satisfied, have a way to terminate the deal. That is why Section 4 is so detailed. That is not to say that the seller does not have rights under Section 4, because sellers do have significant rights as well. There is a balance; one just needs to know how to understand what is contained in the contract. Now, before you read another word, go get a copy of the contract so that you can read it along with the rest of this article. I will wait for you right here?

. . . Nice to have you back, now turn to the bottom of page 2 and let's get started.

Paragraph 4.1 advises buyers to get the property inspected and that if the inspections cause damage to the property, the buyers are responsible to repair the damages.

Paragraph 4.2 states that sellers "shall cooperate in making the premises reasonably available for inspections and/or tests." Unless specified and agreed to in the contract, sellers cannot prohibit a buyer from using a particular inspector. I had the call where the agent was standing in front of the home telling the inspector, who she knew, that he could not do the inspection. A call to the attorney for the brokerage cleared the way for the inspection.

Paragraph 4.3 provides a space to write in the number of days for the **Specified Inspection Period**. It is during these days that a buyer, at the buyer's expense, can inspect the property and conduct any tests desired. It is also during this period of time that all requests to remedy must be submitted. Time is of the essence, if more time is needed be sure to get an extension in writing signed by all of the parties. I suggest about 10 days for inspections. Any less can cause timing issues. Remember, you have to have the reports in order to submit a request to remedy.

Drafting requests for remedy is a topic for another article, (see the July/August 2005 *In Contract*) but I think the general rule should be that requests for remedy should concern material conditions.

If the inspections do not reveal any condition which necessitates a request to remedy, there is nothing to do but to proceed to closing.

Paragraph 4.4 provides the procedures and rights of the parties in the event that the inspections and/or tests reveal conditions which are not, in good faith, satisfactory to the buyer. In that event, a request for remedy or a notice of termination may be submitted.

Paragraph 4.4(a) defines the **Agreement to Remedy** period by inserting a number for the days requested by the buyer. As with everything else in our world, the days in 4.3 and 4.4(a) are subject to negotiation. Once agreed, they are set in stone and can only be modified by a written agreement signed by all parties.

The Agreement to Remedy period starts after the end of the Specified Inspection Period, not necessarily when the request to remedy is submitted. It is possible that a buyer could submit more than one request to remedy during the Specified Inspection Period, and perhaps on different days.

The idea behind the Agreement to Remedy period is to allow the parties some time in which they can negotiate the request to remedy. It is foreseeable that the parties may need to get more information, such as estimates for work, in order to make intelligent decisions.

Once a request to remedy is submitted, the seller can agree to the request, provide a counter proposal, or do nothing. The contract specifically states that "the commencement of the Agreement to Remedy Period does not obligate the Seller to reach an agreement with the Buyer." If the seller has other buyers in the wings, and the request to remedy is onerous, the seller may decide not to respond at all. "In the event the Buyer and Seller do not reach a written agreement regarding remedying the unsatisfactory conditions within the Agreement to Remedy Period, and the Buyer and Seller have not executed a written extension of the Agreement to Remedy Period, this contract shall terminate."

Also listed in 4.4(a) is the right of the buyer to submit a **notice of termination** prior to the end of the Agreement to Remedy period in the event that there has been no agreement and no waiver. As is required in 4.4(b) of the contract, the reason for the termination must be a material condition. I think about it this way, if the roof functions (doesn't leak) but is 15 years old, that is not a reason to terminate. However, if the roof leaks, that is a material condition which would justify a termination.

Paragraph 4.4(b) is the **right to terminate** the contract. In the event that the inspections and/or tests reveal unsatisfactory material conditions, prior to the end of the Specified Inspection Period, the buyer can terminate the contract. The reports must accompany the notice of termination and must specify the unsatisfactory condition(s).

Remember to watch the days. It is not by accident that the words "time is of the essence in completing any of the inspections, tests and/or reports" appear in this section of the contract. Furthermore, "the number of days cannot be modified or waived except by a written agreement signed by both parties." It is not in compliance with the contract to write in a different date and time that the request to remedy shall be open for acceptance, as that is an attempt by the buyer to modify the already agreed upon number of days.

I think sellers and their agents fear home inspections for a couple of reasons. Fear of the unknown is one. The fear of having to disclose problems is another. The fear of losing the deal or having to renegotiate are a couple more. The only way to combat fear is with knowledge. I always suggest that sellers get a good, thorough home inspection before putting their home on the market. That way the seller can deal with known issues.

But then doesn't the seller have to disclose what they discovered? Yes, but an astute buyer would find the issues anyway and then wonder why the seller did not disclose what the inspector said "the seller should have known." Or did the seller know and just not disclose? And if that is the case, what else does the seller know that is not being disclosed?

I think that if all the cards are face up on the table, the seller has the opportunity to build some trust with the buyer. The seller can use the report as a sales tool to show what was discovered and what was repaired. There may be items that a seller may decide that the buyer should have an opportunity to have some input as to who or how the repairs are made.

While it may be OK for an ostrich, sticking one's head in the sand is probably not good for a seller. Be proactive. Understand that no house is perfect, new or old. Realize that buyers are probably out of luck if they decide to complain after the closing about conditions that were identifiable by inspecting the premises. Even if a buyer does not inspect the property, they are deemed to have the knowledge they would have had if they had inspected the property. *Kramer v. Raterman*, 161 Ohio App.3d 363,368.

When recommending a home inspector, think about what is in the best interest of the client. A good report is one that is legible, preferably computer printed, and is clear in identifying exactly what the issues are. I like to get photos of specific problem areas as well. It is only with a good report that the issues can be addressed.

Of course, the report is only as good as the person doing the inspection. The inspector needs to be qualified and experienced. Look for professional association memberships. Talk to other agents and brokers to get referrals. The best inspector is not necessarily the one that never finds a problem so all of the deals close.

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