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THE DELICATE BALANCE OF CONTRACT CONTINGENCIES

By Lauren P. Kohl

A mentor once told me that when a buyer wants to buy and a seller wants to sell it doesn't matter if the purchase and sale contract is written in crayon with typos, mistakes and conflicting clauses. The closing will be a smooth success. On the other hand, he said if a buyer or seller wants out of the contract they can probably get out of what seemed to be an iron-clad contract.

Having said that, I take great pride in customizing purchase and sale contracts with clauses and contingencies I draft to meet the needs of my clients. Following is a sample of some of the more common contingencies found in real estate contracts:

Financing Contingency: If a buyer intends to obtain financing for the purchase of real property in Florida a contingency is drafted which allows the buyer to cancel the contract and receive a return of all escrow deposits made under the contract if the buyer fails to obtain a mortgage loan commitment from a lender during the financing period. It is important to note that the buyer is obligated to make a formal loan application within a specified number of days and to use diligence to obtain the financing. Therefore, a buyer should interview at least two potential mortgage sources before even entering into the contract to become familiar with the amount of down payment needed, the current interest rate, the financial info

be gathered, and the expected time frame. The mortgage loan approval process has recently become more complicated and lengthy in response to the mortgage foreclosure crisis so it is important to have realistic time frames in the financing contingency clause. An appropriate amount of time might be 30 days for a US Tax Payer but may be up to 60 days for a foreign national.

Inspection Contingency: There are several inspections a purchaser should have before purchasing a home in Florida. They include a WDO inspection (a/k/a termite inspection); mold inspection, general home inspection, and wind mitigation inspection. Inspection clauses come in a variety of forms. Some require a seller to make repairs up to certain agreed-upon dollar limits while others allow a buyer to cancel the contract if he or she is not satisfied with the outcomes thereof in the buyer's sole discretion (sometimes referred to as a "free-look"). Some clauses require that the buyer employ licensed professionals to conduct the inspections but clauses are sometimes drafted to allow the buyer to perform his or her own inspection. Most inspections can be completed within 2 weeks.

Document Review Contingency: Florida law provides buyers of residential condominiums a right to cancel the contract after review

of the condominium documents, rules and regulations, and financials. However, there is no built-in contingency for the review of the same documents pertaining to the documents of subdivisions with homeowner's associations. Therefore, if a buyer wishes to review the documents a provision must be added.

Sale of Existing Home: Some buyers find their dream home before they have sold their existing home. In this case, a contingency is drafted allowing the buyer to cancel the contract and receive a return of the escrow deposit if they are unable to complete the sale of their existing home within a reasonable time period. This type of contingency is more prevalent in a buyers' market but nearly non-existent in a sellers' market.

Insurance Contingency: At times the cost of homeowner's insurance and/or flood insurance can be shocking to those purchasing real property in Florida for the first time. Older homes, coastal homes and homes in low lying areas (which are not necessarily close to the coast) are of most concern. To eliminate this risk a clause can be drafted allowing the buyer to cancel the contract if he or she is unable to obtain insurance policies at a cost below an agreed upon dollar amount.

Short Sale Approval Contingency: If a seller is selling his or her home for an amount insufficient to pay-off the mortgage(s) encumbering the home then the seller's obligation to close is made contingent- upon the seller obtaining approval from seller's lender(s). The approval process can take several months. There are several pre-printed Short Sale Addenda circulating. I highly recommend that a buyer or seller consult an attorney before they sign one.

Of course there are many more contingencies that could be drafted to meet the specific needs of a buyer or seller and these should be discussed with an attorney as early as is possible in the home hunting process. Also, keep in mind that a contract with too many contingencies is less apt to be accepted by the party on the other side. Your attorney will assist in selecting the appropriate clauses under the circumstances.

Areas of Practice: Real Estate Closings, Title Insurance, Residential & Commercial Real Estate Closings, Contract Preparation, Deeds & Mortgages, Wills & Trusts

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Of The Closing Table

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