

SPRING 2013

ARIZONA REALTOR®

QUARTERLY

YOUR GUIDE
TO THE 2013

VACANT LAND/LOT PURCHASE CONTRACT

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VACANT LAND/LOT PURCHASE CONTRACT

The pre-printed portion of this form has been drafted by the Arizona Association of Realtors. Any change in the pre-printed language of this form must be made in a separate addendum. No representations are made as to the legal validity, adequacy and/or effect of this form. If you desire legal, tax or other professional advice, including tax consequences thereof, if you desire legal, tax or other professional advice, consult your attorney, tax advisor or professional consultant.

If subdivided land or unsubdivided land is being sold by a subdivider, i.e., a person who is not a licensed Arizona Realtor, a separate Addendum regarding subdivided or unsubdivided land generally be required and an Addendum regarding subdivided or unsubdivided land.

1. PROPERTY

- 1a. 1. BUYER: _____
- 2. SELLER: _____
- 3. Buyer agrees to buy and Seller agrees to sell the property described in 5. or incidental thereto, if a
- 5. Property Address: _____
- 6. Assessor's #(s): _____
- 7. City: _____
- 8. Legal Description: _____
- 9. \$ _____
- 10. \$ _____
- 11. \$ _____
- 12. \$ _____
- 13. _____
- 14. Incidental Improvements: _____
- 15. thereon or incidental thereto are being transferred with the property, and their condition except as otherwise expressed or stated in this contract.
- 16. _____
- 17. Fixtures: _____
- 18. specified in 17. shall be included in the purchase price.
- 19. _____
- 20. Personal property included herein shall be included in the purchase price.
- 21. or encumbrances.
- 22. Fixtures and leased items NOT included: _____
- 23. _____
- 24. Close of Escrow: Close of Escrow ("COE") shall occur on the _____ day of _____, 2013.
- 25. office. Buyer and Seller shall comply with all applicable laws and regulations.
- 26. Company all closing documents, and perform all closing duties.
- 27. _____



A MESSAGE FROM 2013 AAR PRESIDENT SUE FLUCKE



Sue Flucke, CRB, GRI, rCRMS
2013 AAR President

March in Arizona is one of the best times of year, the weather is beautiful and the housing market is typically still at its busiest. This year, we've seen the market pick back up again with foreclosures and REOs stabilizing, short-sales getting a bit easier and even a slight uptick in housing prices. I know we're all keeping very busy!

As we look to the second quarter of 2013, I want to remind you of my theme for this year: Exceeding Expectations. This could be with your clients, by taking extra special care to properly review all aspects of the transaction. This could also be with your colleagues, by lending a helping hand when needed or even just offering a second set of eyes – it really makes a difference. Or, this could even be with yourself, by setting a goal to receive a new designation or increase your professional network. The good news is the latter can be taken care of all in one week, if you join AAR at the 2013 Spring Convention, April 7-11 in Tucson. This event takes the place of AAR's Winter Conference and will be bigger and better than ever. The full schedule is located here: www.aaronline.com/SpringConvention

Reminding ourselves to exceed expectations is a great way to keep us all ahead in the game. In a speech at AAR's Annual REALTOR® Day at the Capitol in January, Dr. Lawrence Yun said, "AAR's weather may be cold, but its housing market is on fire." Now, nearly two months after he gave that speech, Arizona REALTORS® are still helping to lead the economic recovery. We're making great progress every day, let's keep it up!

Regards, Sue Flucke

YOUR GUIDE TO THE 2013 VACANT LAND/LOT PURCHASE CONTRACT

BY SCOTT M. DRUCKER, ESQ., AAR GENERAL COUNSEL

Thanks to the diligent efforts of the Vacant Land/Lot Purchase Contract revision workgroup¹ led by Chairperson Jan Leighton, the Arizona Association of REALTORS® (AAR) [Vacant Land/Lot Purchase Contract](#) has been revised, effective February 2013. The workgroup additionally revised the following three related forms: (1) [Vacant Land/Lot Buyer's Inspection Notice and Seller's Response](#), (now titled [Vacant Land/Lot Buyer's Due Diligence Notice and Seller's Response](#)); (2) [Loan Status Update](#); and (3) [Pre-Qualification form](#).

http://www.aaronline.com/wp-content/uploads/2013/01/SAMPLE_Vacant-Land-Lot-Purchase-Contract-with-BA_02-01-2013.pdf

http://www.aaronline.com/wp-content/uploads/2013/01/SAMPLE_Vacant-Land-Lot_BDDNSR_02-2013.pdf

http://www.aaronline.com/wp-content/uploads/2013/01/SAMPLE_Loan-Status-Update_02-2013.pdf

http://www.aaronline.com/wp-content/uploads/2013/01/SAMPLE_Pre-Qualification-form_02-2013.pdf

This collection of forms is intended to facilitate a wide spectrum of vacant land transactions throughout Arizona and be utilized in conjunction with the purchase and sale of raw land parcels, agricultural land, and parcels of land planned for residential, commercial or industrial development, including, but not limited to, vacant subdivision lots. Although the majority of changes to the contract pertain to the Financing and Due Diligence sections, this article will highlight several of the more significant revisions made throughout the entire document.²

PROPERTY SECTION

While the Property section of the contract was only minimally revised, line 6 was altered to accommodate multiple parcel numbers, each with their own assessor's

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Subscriptions will still be available for sales agents at the \$28 rate. Subscriptions for 2013 are available now at www.aaronline.com/azq.



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number. This section was also changed to reflect that all existing fixtures on the property and any existing personal property shall convey free and clear of all liens and encumbrances. If it is the intention of the parties that a specific fixture or leased item not convey, that item must now be expressly identified on line 23 of the contract.

The property section was additionally amended to address the potential inclusion of new Addenda,

including the Market Conditions Advisory, Short Sale Addendum and Vacant Land/Lot Purchase Contract Addendum Regarding Subdivided or Un-subdivided Land. Finally, section 1i was added and requires the buyer in an all-cash sale to provide the seller, within five days after contract acceptance, either a letter of credit or source of funds letter. If the parties wish to alter this five day time-frame, they can do so on line 39.

FINANCING

The bulk of the changes implemented by the workgroup to the contract pertain to the Financing section. Pursuant to this portion of the contract, and in the event that the sale is contingent upon the buyer obtaining financing, the buyer has the length of the due diligence period to obtain a financing commitment, including satisfying themselves as to the property's appraised value.

First and foremost, the buyer must now identify on line 42 the type of financing being pursued. If an AAR Pre-Qualification form is submitted with the buyer's offer, that fact is to be set forth on lines 53 and 54 of the contract, and Section 2i requires the buyer to immediately notify the seller of changes in the buyer's loan program, financing terms or lender as described in the Pre-Qualification form or Loan Status Update (LSU). Notably, Section 2e now mandates that the buyer shall deliver an LSU to the seller within five days after contract acceptance and, at a minimum, lines 1 through 40 of the LSU are to be completed. Prior references to the AAR Vacant Land/Lot Loan Status Report (LSR) have been removed as that form has been replaced by the LSU.

Section 2 of the contract additionally requires the buyer to work "diligently" to obtain the loan and execute all loan documents no later than three days prior to the close of escrow date. It also enables the buyer and seller to identify which party will pay lender required appraisal fees and whether such fees are or are not included in seller concessions.

TITLE AND ESCROW

Pursuant to the workgroup's revisions, the subject's escrow company is now instructed to deliver directly to each party copies of all documents that constitute exceptions to the buyer's title insurance policy, including, but not limited to, conditions, covenants and restrictions, deed restrictions and easements. These documents are to be conveyed within 15 days after contract acceptance following which the buyer is provided with an opportunity, prior to expiration of the due diligence period, to provide written notice of disapproval. Unlike the 2007 version of the contract, which required the seller to convey title by "general warranty deed", lines 94-95 of the 2013 version

require the seller to convey title by "warranty deed", subject to existing taxes, assessments, covenants, restrictions, rights of way, easements and all other matters of record." If the parties desire to convey title in another manner, a blank space is provided on line 95 for them to detail the alternative deed pursuant to which the seller shall convey title.

DISCLOSURES

As was previously the case, this section requires the seller to deliver to the buyer, within five days after contract acceptance, a completed AAR Vacant Land/Lot Seller's Property Disclosure Statement. Similarly, the seller remains obligated to immediately notify the buyer of any changes in the property or prior disclosures. However, pursuant to the 2013 contract, the buyer is now allowed prior to the expiration of the due diligence period or five days after delivery of such notice, whichever is later, to provide the seller with notice of disapproval.

WARRANTIES

The sole change to Section 5 is that the term "conventional septic or alternative" now reads "conventional septic tank or alternative system." This change was made to reflect the more commonly used terminology and mirror the language set forth in sections 6e and 6f of the contract. The seller remains obligated to maintain and repair the property so that at the earlier of possession or close of escrow, the property and any personal property to be conveyed will be in substantially the same condition as on the date of contract acceptance.

DUE DILIGENCE

Section 6 is titled Due Diligence and, as a result, Section 6a is now captioned "Due Diligence Period" as opposed to "Inspection Period". Pursuant to this section, the buyer is now provided a 30-day due diligence and inspection period to perform any/all inspections and investigations they deem necessary to satisfy themselves as to the property's physical condition, appraised value, condition of title and feasibility and suitability of the buyer's intended use. Should the parties wish to expand or contract the

GUIDE TO THE 2013 VACANT/LAND LOT PURCHASE CONTRACT – CONTINUED

length of the due diligence period, a blank space is provided on line 188 of the contract on which they can memorialize this change.

Section 6d, titled Insurance, was added to the Due Diligence section and requires the buyer to confirm the cost and availability of insurance for the property during the due diligence period, if the issue of insurance is of importance to the buyer. Similarly, pursuant to Section 6f, if the suitability of the property for installation of a conventional septic tank or alternative system is material to the buyer, the buyer is required to complete any/all site/soil inspections, including cost inquiries, within the due diligence period. Section 6f additionally notifies the buyer of the important fact that the results of their site/soil inspection(s) are not binding on any state-delegated county agency in conjunction with future permitting requests.

Finally, Section 6m makes reference to the newly revised Vacant Land/Lot Buyer's Due Diligence Notice and Seller's Response and requires the buyer to deliver to the seller, prior to expiration of the due diligence period, a copy of the signed notice specifying any items disapproved of by the buyer including any aspect of the property, financing, title or other matter. As was previously the case, the buyer's failure to provide notice of disapproval shall be deemed buyer's election to proceed without correction of any disapproved items.

REMEDIES

Pursuant to the Remedies section, a party is provided the opportunity to cure a potential breach of contract. Reflecting this policy, an additional sentence was added to the end of Section 7b. By way of this newly inserted sentence, the parties acknowledge that their failure to comply with Section 1f and allow escrow to close on the agreed upon date will constitute a breach of contract if not timely cured following the issuance of a cure period notice. Specifying this fact is intended to further encourage the parties to timely comply with their obligations regarding close of escrow.

ADDITIONAL TERMS AND CONDITIONS

Section 8 is intended to address a variety of important terms not previously identified in the contract. Section 8n, "earnest money", was revised to have the buyer acknowledge that a failure to pay the required funds by the scheduled date for close of escrow shall constitute a material breach of contract if not timely cured following the issuance of a cure period notice.

Section 8o was also supplemented to provide a release of claims against brokers pertaining to damages incurred by either party resulting from the price and terms of sale and/or the return on their investment. Unlike the 2007 version of the contract, this section is to be initialed by both the buyer and seller, as the release binds all parties to the contract.

PRE-QUALIFICATION FORM

Each of these three forms was minimally revised to reflect the aforementioned changes made to the contract. The term "Inspection Period" was replaced with "Due Diligence Period" where applicable, including in the new title of the former Vacant Land/Lot BINSR. The Due Diligence Notice, like the contract, was altered to accommodate multiple parcel numbers, each with their own assessor's number. Additional language was added to clarify those items a buyer should investigate during the due diligence period to ensure that the property is suitable for the buyer's intended purpose.

The LSU and Pre-Qualification forms were revised to include "Vacant Land/Lot" as a selection of property types. Finally, references to housing payments and "homeowners" insurance were removed from both forms, so as to render them applicable to vacant land transactions.

¹ AAR would like to thank all of the workgroup members: Chairperson Jan Leighton, Jim Amdahl, Deems Dickinson, Lowell Fagen, Tony Femicola, Tom Marchant, Phil Richardson, Rick Sack, Tom Traw and Karla Walters. The workgroup was assisted by AAR CEO Michelle Lind and Risk Management Director Christina Smalls. As General Counsel, the author was also involved in the revision process.

² Substantive changes were also made to Sections 3 and 6 of the Buyer Attachment, which acts as a cover page to the contract.

FREQUENTLY ASKED QUESTIONS (FAQs)

While real estate licensees will inevitably become more familiar and comfortable with the revisions to the 2013 contract, use of the form will also result in questions regarding the contract's implementation. In anticipation of these questions, below is a list of FAQs pertaining to the contract and its revisions, along with answers, intended to provide additional guidance.

QUESTION 1: Line 17 of the Vacant Land/Lot Purchase Contract now addresses fixtures. What exactly constitutes a fixture?

ANSWER 1: A fixture is an item affixed to real estate in such a manner so as to become a part of the real property. Arizona employs a three-part test for determining whether an item constitutes a fixture: (1) annexation to the realty; (2) adaptability or application as affixed to the use of real estate; and (3) an intention of the party to make the object a permanent part of the realty.

QUESTION 2: If the buyer is financing the purchase of vacant land, what other AAR forms should be utilized in the transaction that would not otherwise be utilized in an all cash sale?

ANSWER 2: When financing their purchase, the buyer is required to submit to the seller within five days after contract acceptance a Loan Status Update. Lines 1-40 of the Loan Status Update, at a minimum, are to be completed. In conjunction with their purchase offer, the buyer may also wish to submit to the seller a completed Pre-Qualification Form.

QUESTION 3: What steps should a seller take if, despite having obtained loan approval, the buyer fails to sign all loan documents no later than three days prior to the close of escrow date as required by Section 2f of the Vacant Land/Lot Purchase Contract?

ANSWER 3: The seller should deliver a three-day cure period notice to the buyer in compliance with Section 7a

of the Vacant Land/Lot Purchase Contract. If the non-compliance is not cured within three days after the issuance of the cure period notice, the seller may declare the buyer in breach, cancel the contract and seek to obtain the earnest money deposit. Alternatively, the seller may pursue any viable claim in law or equity, subject to the contract's Alternative Dispute Resolution provision.

QUESTION 4: The buyers, uncertain as to whether they wish to obtain title pursuant to a general warranty deed or a special warranty deed, ask their agent for advice in this regard. How should the agent respond?

ANSWER 4: The agent should advise the buyers to seek appropriate legal counsel. Answering a question of this nature likely falls beyond the agent's area of expertise and could even be deemed the unauthorized practice of law.

QUESTION 5: On the day prior to close of escrow, the buyers learn that they are unable to obtain casualty insurance. Can the buyers cancel the Vacant Land/Lot Purchase Contract on this basis and obtain a return of their earnest money deposit?

ANSWER 5: No. Section 6d of the Vacant Land/Lot Purchase Contract requires buyers seeking insurance to apply for and obtain confirmation of the availability of insurance for the property during the due diligence period.

QUESTION 6: Following execution of the Vacant Land/Lot Purchase Contract, the property floods, at which point the seller properly notifies the buyer of this change in the property condition. Can the buyer cancel their purchase of the property on this basis?

ANSWER 6: Yes. In the event of a change in property condition during escrow, the buyer is allowed until prior to the expiration of the due diligence period or five days after delivery of the notice, whichever is later, to provide notice of disapproval to the seller.

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QUESTION 7: During the due diligence period, the buyer concludes that the property is not worth the agreed upon price. Although the buyer would still like to purchase the property, they now desire a price reduction. Is it appropriate for the buyer to address this issue in the Vacant Land/Lot Buyer's Due Diligence Notice and Seller's Response form?

ANSWER 7: No. The Vacant Land/Lot Buyer's Due Diligence Notice and Seller's Response form is not a tool to renegotiate the purchase price. Rather, it is designed to give the seller an opportunity to correct or repair property issues disapproved of by the buyer during the due diligence process.

QUESTION 8: If the buyer elects to cancel the Vacant Land/Lot Purchase Contract, must the buyer give written notice of those items the buyer disapproves?

ANSWER 8: Yes. Pursuant to Section 6m, if the buyer disapproves of an item, the buyer must deliver to the seller signed, written notice of the item(s) disapproved and state in the notice that the buyer elects to cancel.

QUESTION 9: What if the buyer does not give written notice to the seller prior to expiration of the inspection period?

ANSWER 9: Pursuant to Section 6n, the buyer's failure to give the seller written notice of items disapproved during the due diligence period is deemed to be the buyer's election to proceed with the transaction and close escrow without the correction of any property items (except for warranted items).

QUESTION 10: What happens if the seller fails to respond to the buyer's written notice of items disapproved?

ANSWER 10: The seller's failure to respond is deemed a refusal to correct any of the items disapproved.

QUESTION 11: Does a buyer's failure to pay the required closing funds by the scheduled close of escrow place the buyer in breach of contract?

ANSWER 11: No. The buyer's failure to timely pay the required closing funds constitutes a breach of contract only if the buyer fails to cure the non-compliance within three days after the seller's delivery of a cure notice.

QUESTION 12: Line 188 of the Vacant Land/Lot Purchase Contract defaults to a 30-day due diligence period, but the buyer's desire to reduce their due diligence period to 15 days. Can they do so?

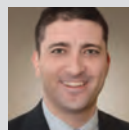
ANSWER 12: Yes. A blank line is provided on line 188, which allows the parties to expand or contract the length of the buyer's due diligence period.

Keep in mind that pursuant to Section 2c, the buyer has the due diligence period to obtain a financing commitment. Therefore, reducing the due diligence period from 30 to 15 days similarly reduces the time buyer has to obtain a financing commitment.

QUESTION 13: During the due diligence period, the buyer orders a site/soil evaluation. What are the buyer's obligations regarding the property after completion of this evaluation?

ANSWER 13: Section 6a of the Vacant Land/Lot Purchase Contract requires the buyer to "repair all damages arising from the inspections." As such, in the event that equipment operators dig trenches and test holes in conjunction with a site/soil evaluation, the buyer is required to fill any such excavations upon completion of the evaluation.

ABOUT THE AUTHOR



Scott M. Drucker, a licensed Arizona attorney, is General Counsel for the Arizona Association of REALTORS® serving as the primary legal advisor to the association. This article is of a general nature and reflects only the opinion of the author at the time it was drafted. It is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

REO REALITY CHECK –

10 TIPS TO GET YOUR REO OFFERS ACCEPTED AND CLOSED

BY JAN O'BRIEN

As a broker/manager of a large real estate office (291 licensees as of July 2008) in a city (Las Vegas) that is dealing with 70 percent+ of monthly closed transactions being short sales and REOs, I've written this post with the intention of educating and spreading the word to as many people as possible that there is a stress-free way of accepting the market, adapting and enjoying success.

Avoid the inevitable frustration and stress so many real estate agents and buyers are currently experiencing by educating yourself and your buyers about the REO (Real Estate Owned) buying process! Here are 10 REO tips to help you get your offers accepted and closed:

1 Know the market. Do a thorough comparative market analysis on the subject property prior to writing the offer. Look for trends — is the market steady, declining? Look at the last two to three months' sales as well as the current pending sales. Many banks are using a tactic that results in a lot of activity and multiple offers. They get two appraisal values (market and liquidation). Then they have the REO listing agent list the property at the lower appraised value which attracts multiple offers and ultimately drives the final sales price up and sometimes over the market value.

2 Verify availability and multiple offers. Obviously it is important to determine whether or not the property is still available or if there are multiple offers before writing the offer. Counsel the buyer accordingly and let them determine if they want to compete for the sale. Read any agent-to-agent remarks in the MLS for any specific instructions when writing and presenting your offer.

3 The actual offer package. Legibly write the offer — or better yet, use typed or online forms. Ensure your offer is complete and spells out in clear, concise language the terms and closing costs. Consider scanning and emailing your offer vs. faxing it for the better readability factor.

4 Seller concessions and closing costs. Encourage the buyer to write his/her best offer first. It really is all about the final net to the bank. If the buyer is requesting closing costs, prepare the buyer that to compete with multiple offers she may need to write an at list price or above offer. Some banks are only willing to pay certain closing costs and are countering with the buyer to pay for what would normally be considered customary seller costs.

5 Inspections and repair costs. Write the offer with a reasonable due diligence period (five to seven days but no more than 10 days). The bank may limit or counter repair costs. We recommend including this clause or something to the same effect: "Seller to make, at their expense, any lender-required repairs as a result of the inspection or appraisal."

6 Earnest money. Have the buyer write the EM check for at least what is requested in the MLS. Ensure you have a current (not stale-dated) check if you have been writing a lot of offers and in the REO game for a while.

7 Buyer pre-approved for financing. Pre-Approval (not pre-qualification) of the buyer is a must and proof of funds letter can also strengthen your offer. Don't waste everyone's time if the buyer is not willing to get the financing in place and approved first.

8 Seller/bank addendum. REO properties are sold as-is, no warranties or guarantees. You may be able to get the seller to pay for a home warranty — it depends on all other concessions, costs and net to the bank. We are finding many banks will not complete disclosures required by Nevada statutes: Seller's Real Property Disclosure for example. Be prepared to carefully review all of this with your buyer and other language in the bank's addendum to the purchase agreement.

10 TIPS TO GET YOUR REO OFFERS ACCEPTED AND CLOSED — CONTINUED

9 Time frames. Allow a minimum of one to two weeks to hear back from the listing agent regarding a response from the bank. If the bank accepts your offer, expect that you may only receive a verbal or email counter and/or acceptance subject to the buyer executing the bank's addendum and accepting any other terms. Once you have approval, open up the escrow and get the buyer going on their due diligence. Also be prepared for a closing time frame of 45-60 days or more depending on whether or not there are any issues to deal with like liens, judgments, or other clouds on title.

10 Communication. Saving the best for last! Here is where your patience, tenacity, positive attitude, communication skills, knowledge of the REO process and how well you have educated your buyer will come into play. Communication, or rather the lack thereof, is the biggest complaint and issue of everyone diving into the REO market.

THE BOTTOM LINE...

If all of the above statements are true, then in the infamous words of Forrest Gump — "Life (REO) is like a box of chocolates, you never know what you are going to get." Each REO experience has the potential of being anything from a dream to a nightmare. I for one believe we can all make the experience more of a dream by the way we handle ourselves personally and professionally.

Educate yourself and your buyers and, if necessary, the other agent! Set realistic expectations — and focus on what you want, not on what you don't want.

Some REO agents are overwhelmed and may have bitten off more than they could chew too fast. Some of the seasoned REO veterans are experts on the process and working diligently to improve and expand their services as their business has grown exponentially

Still other REO agents have broken the code and have excellent systems in place to handle all the additional tasks and requirements for success

Many agents are aggressively trying to break into the REO market and may be relatively inexperienced — learning as they go or on their first batch of REO listings

Many buyers agents are not educated to the process and may be writing their first REO deal with an agent who may or may not understand the process themselves

Not everyone is equally schooled and skilled at educating the buyer on the REO process

We are all doing the best we can with what we know and what we've got... practice patience, compassion and focus on solutions.

ABOUT THE AUTHOR



Jan O'Brien is a broker-salesman in Las Vegas, NV, currently serving as general manager for Prudential Americana Group, REALTORS®.

LEGAL ANSWERS AT YOUR FINGERTIPS

The second edition of Michelle Lind's book, *Arizona Real Estate: A Professional's Guide to Law & Practice*, is now available in a searchable electronic format. Just type in the term or phrase you are seeking in the search engine on your iPad, Kindle or other mobile device and find the answer. Download the electronic book for just \$9.99! [Get the details.](#)

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SECOND
EDITION



LERNER V. DMB REALTY, LLC: UPHOLDING THE STIGMATIZED PROPERTY STATUTE

BY ROB ZELMS, MANNING & KASS, ELLROD, RAMIREZ, TRESTER, LLP

On November 27, 2012, the Arizona Court of Appeals rendered its groundbreaking opinion in the case *Lerner v. DMB Realty, LLC**, which was the first case of its kind to deal with a broker's duties under Arizona's stigmatized property statute (A.R.S. §32-2156).

Ultimately, the stigmatized property statute was upheld and continues to limit an agent's duties of disclosure in the case of a stigmatized property.

<http://www.realtor.org/field-guides/field-guide-to-dealing-with-stigmatized-properties>

The origins of this case began in February 2008 when Glen Lerner, a prominent personal injury attorney, and his wife purchased residential real property located in Scottsdale, Ariz. Both the Sellers and the Lerner chose to be represented by the same real estate broker, DMB. The Lerner entered into numerous agreements governing both their relationship with DMB and purchase of the property. The agreements documenting the Lerner's purchase of the property and retention of DMB included: (1) the Consent to Limited Representation; (2) the Real Estate Agency Disclosure and Election; (3) the Residential Resale Real Estate Purchase Agreement; and (4) the Residential Seller's Property Disclosure Statement.

In the Limited Representation Consent, the Lerner acknowledged that they understood and consented to the limitations to the duties DMB owed to them, particularly:

(3) Pursuant to A.R.S. §32-2156, Sellers, Lessors and Broker/Licensee(s) are not obligated to disclose that the Subject Property is or has been... located in the vicinity of a sex offender.

Additionally, the Real Estate Agency Disclosure and Election executed by the Lerner when they initially met with the DMB agent, contained similar language as the Limited Representation Consent and the quoted A.R.S. §32-2156 disclosure. The Residential Resale Real Estate Purchase Agreement also specifically stated that the Lerner would conduct all types of inspections, investigations and inquiries:

concerning the suitability of the [Property] and the surrounding areas...If the presence of sex offenders in the vicinity...is a material matter to [Lerner], it must be investigated by [Lerner] during the Inspection Period.

Finally, the Residential Seller's Property Disclosure Statement also included the Lerner's acknowledgment that: (i) it is the Lerner's obligation "to investigate any

2013 ARIZONA ASSOCIATION OF REALTORS® PROFESSIONAL STANDARDS WORKSHOP

BY JAN STEWARD, AAR RISK MANAGEMENT SPECIALIST

This year, AAR's Annual Professional Standards Workshop celebrated the 100 year anniversary of the NATIONAL ASSOCIATION OF REALTORS® Code of Ethics, [1913-2013].

Hosted at the Black Canyon Conference Center, more than 150 AAR members attended the 2013 Annual Professional Standards Workshop on January 23. Attending members were those who serve on Professional Standards and Grievance committees, are mediators or ombudsmen. Association Executives and leadership were also invited to share the day at the workshop. Larry Hibler, moderator for the workshop, introduced Trista Curzydlo, the speaker for the morning, is a nationally known speaker. Trista, an attorney who

previously served the Wichita Area Association of REALTORS® as Legal Counsel, worked in the District Attorney's Office for the State of Kansas and served as Assistant Legal Counsel for Kansas Governor Bill Graves, shared her "Go Forth and Sin No More" presentation. She offered an anatomy of an Ethics Complaint and Arbitration Request, highlighted ways of determining Procuring Cause, discussed case studies and concluded with Pathways to Professionalism, summarizing the three-part doctrine which details practices to increase the professionalism of the industry.

Extracted from a survey shortly after the workshop, a few of the remarks from attendees about Trista's presentation were...

material (important) facts in regard to the Property”; and (ii) “by law, Sellers, Lessors and Brokers are not obligated to disclose that the Property is or has been... located in the vicinity of a sex offender.”

The Lerners alleged that they discovered in late August or early September 2008, from an individual installing their electronics, that the Property was located in the vicinity of a Level 1 (lowest risk) sex offender. On August 3, 2010, the Lerners filed their Complaint alleging Breach of Fiduciary Duty and the Implied Covenant of Good Faith and Fair Dealing against DMB, and Breach of the Implied Covenant of Good Faith and Fair Dealing, Negligent Misrepresentation and Fraud against the Sellers; all based on DMB’s and the Sellers’ failure to disclose that the Property was located in the vicinity of a sex offender.

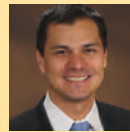
At the state Superior Court level, the Lerners argued that A.R.S. §32-2156, the stigmatized property statute, specifically as it related to disclosure of sex offenders in the vicinity of a property, violated the Arizona Constitution because it abrogated their right to sue the Seller and the Broker. The Superior Court agreed with DMB and the Sellers that the Lerners’ lawsuit should be dismissed because A.R.S. §32-2156, which regulates real estate disclosures and prevents actions against real estate transferors, brokers and agents for not disclosing certain stigmatizing facts about property being transferred, including whether the property is located in the vicinity of a sex offender, does not violate the Arizona

Constitution. The Lerners then appealed the dismissal to the Arizona Court of Appeals.

On November 27, 2012, the Arizona Court of Appeals upheld the dismissal and upheld the constitutionality of the stigmatized property statute. The Arizona Court of Appeals specifically held A.R.S. § 32-2156 barred the Lerners’ claims against DMB and the Sellers for failing to disclose the presence of the sex offender and rejected the Lerners’ contention that the statute unconstitutionally abrogated their right to sue for damages. The Court also held the representation agreement the Lerners signed barred their claim for Breach of Fiduciary Duty against DMB. In effect, the Arizona Court of Appeals upheld both a statutory protection for brokers, as well as terms limiting a broker’s duties in a representation agreement.

**DMB Realty, LLC was represented by Robert Zelms and Anthony Vitagliano of the Scottsdale Office of Manning & Kass, Ellrod, Ramirez, Trester, LLP.*

ABOUT THE AUTHOR



Robert B. Zelms is managing partner of the Scottsdale office of Manning & Kass, Ellrod, Ramirez, Trester, LLP. Mr. Zelms received his Bachelor of Arts from the University of Arizona in 1993, and Juris Doctor from Arizona State University College of Law in 1997.

Mr. Zelms practices primarily in the area of Professional Liability Defense Litigation, including Real Estate Errors & Omissions and Miscellaneous Professional Liability. He is an author and editor of Manning & Kass’ Arizona Professional Liability and Arizona Real Estate Newsletters. He has completed more than 25 jury trials in the State of Arizona. Mr. Zelms is frequently retained by insurance carriers and brokers to conduct Risk Management Audits and Peer Review Assessments related to E&O insurance renewals. Additionally, Mr. Zelms is an instructor for the Arizona Association of REALTORS® rCRMS Risk Management Certification Program. Mr. Zelms is also a frequent lecturer on risk management/claims issues and has conducted seminars for numerous insurance carriers and companies nationwide.

“The morning speaker was excellent and really got her points across.”

“[The] guest speaker was entertaining and informative.”

“Her hands on experience add substance to the whole presentation.”

“The speaker was great; I appreciated her back ground on the code.”

“Fantastic speaker, bring her back!”

In the afternoon, Larry [Hibler], introduced AAR’s new General Counsel, Scott Drucker, who conferred with those in the audience helping them dissect two case studies from complaint to hearing. A panel, consisting of Larry Hibler, Ed Hume and Mary Francis Coleman, discussed with the members, issues related to the complaints while Scott interacted with the members and evaluated with the panelists, various components in the cases, discussing arbitration issues and possible violations of the Code of Ethics.

The day concluded with a presentation on Mandatory Mediation from Scott Drucker and Jan Steward, Risk Management Specialist at AAR. A newly adopted policy at AAR, mandatory mediation became effective January 1, 2013 as a process to resolve matters that are otherwise arbitrable. Carole Ridley, professional standards administrator, fielded closing questions from the members.

ABOUT THE AUTHOR



Jan Steward brings a wealth of experience to the Arizona Association of REALTORS® as the Risk Management Specialist. She is a former title company manager and escrow officer with paralegal training. As a REALTOR® and broker, Jan served the Northern Arizona Association of REALTORS® (NAAR) as board president, vice-president, director, MLS chair, delegate to NAR’s national convention and a member of the Professional Standards and Grievance Committees. Jan was honored as REALTOR® of the Year by NAAR. She also has served on AAR’s Professional Standards Committee and a variety of ad hoc committees.

<http://blog.aaronline.com/2013/02/2013-arizona-association-of-realtors-professional-standards-workshop/>

LAST LOOK

BUYER PRE-CLOSING WALKTHROUGH

The Arizona Association of REALTORS®, by way of a workgroup chaired by Martha Appel,¹ drafted a [Buyer Pre-Closing Walkthrough](#) form, effective February 2013. The form is intended to encourage buyers to conduct a pre-closing walkthrough of the premises to be purchased and document their findings in a manner easily conveyed to the seller. Should the buyer conduct a pre-closing walkthrough, the new form enables them to inform the seller that the premises is in acceptable condition, or give evidence that the agreed upon corrections or repairs to the premises have not been completed or the premises is not in substantially the same condition. Should a buyer mark box two, delivery of the form serves as the issuance of a cure period notice providing the seller with three days after delivery to cure their non-compliance.

http://www.aaronline.com/wp-content/uploads/2013/01/SAMPLE_Buyer-Pre-Closing-Walkthrough.pdf

Below is a list of frequently asked questions (FAQs) regarding implementation of the Buyer Pre-Closing Walkthrough form.

QUESTION 1: Is the buyer required to conduct a pre-closing walkthrough and what are the consequences of a buyer's decision to forego a pre-closing walkthrough?

ANSWER 1: Section 6m of the [AAR Residential Resale Real Estate Purchase Contract](#) grants the buyer and buyer's inspector(s) reasonable access to conduct pre-closing walkthrough(s) should the buyer so choose. Although the buyer is not contractually obligated to conduct a pre-closing walkthrough,

they should be encouraged to do so. Section 6m further states that "If a buyer does not conduct such walkthrough(s), buyer releases seller and broker(s) from liability for any defects that could have been discovered."

<http://www.aaronline.com/wp-content/uploads/2013/01/sample-residential-purchase-contract.pdf>

QUESTION 2: When is the best time for the buyer to conduct a pre-closing walkthrough?

ANSWER 2: A prudent buyer should conduct their pre-closing walkthrough at least three days prior to the scheduled date for close of escrow. Doing so will enable the buyer to mark box number two, thereby issuing a three-day cure notice in enough time to allow the seller to make the necessary correction(s) or repair(s) by the close of escrow date.

QUESTION 3: What are the seller's obligations in regard to the buyer's pre-closing walkthrough?

ANSWER 3: The seller is obligated to make the premises available for all walkthroughs upon reasonable notice. The seller is also obligated to have all utilities on, including propane.

QUESTION 4: What action should a buyer take after completing a Buyer Pre-Closing Walkthrough form on which the buyer marked box number two?

BUYER PRE-CLOSING WALKTHROUGH – CONTINUED

ANSWER 4: The buyer, through their agent, should schedule a follow-up walkthrough to occur three days after delivery of the Buyer Pre-Closing Walkthrough form. If at the time of the second walkthrough all required corrections or repairs have been made, the buyer should then execute a second Buyer Pre-Closing Walkthrough form on which box number one is marked.

QUESTION 5: What action can a buyer take if they conduct their pre-closing walkthrough on the day of close of escrow and learn at that time that the agreed upon correction(s) or repair(s) has not been made by the seller?

ANSWER 5: The buyer should complete the Buyer Pre-Closing Walkthrough form and mark box number two. The buyer may then delay closing for up to three days to allow the seller an opportunity to complete all required corrections or repairs. Alternatively, the buyer may close escrow and if the seller fails to complete all required corrections or repairs within three days, pursue the seller for the breach and recover the cost of the correction(s)/repair(s), subject to the Alternative Dispute Resolution obligations set forth in the Contract. AAR's Buyer-Seller Dispute Resolution Information Packet can be found [here](http://www.aaronline.com/wp-content/uploads/2013/02/REVISED-2013-DR5-packet-02-2013.pdf).

<http://www.aaronline.com/wp-content/uploads/2013/02/REVISED-2013-DR5-packet-02-2013.pdf>

“ *The new form enables [the buyer] to inform the seller that the premises is in acceptable condition, or ...repairs to the premises have not been completed.* ”

QUESTION 6: What happens if the seller fails to make the required correction(s) or repair(s) within three days after delivery of the Buyer Pre-Closing Walkthrough form on which the buyer has marked box number two?

ANSWER 6: If the seller fails to timely make the required correction(s) or repair(s), the seller is in breach of contract at which point the buyer may pursue all legal remedies, subject to the Alternative Dispute Resolution obligations set forth in the contract. Alternatively, the

buyer may elect to cancel the contract as permitted by Section 7b of the Residential Resale Real Estate Purchase Contract.

QUESTION 7: Does the Pre-Closing Walkthrough form act as a second “Inspection Period” as that term is used on line 185 of the Residential Resale Real Estate Purchase Contract?

ANSWER 7: Absolutely not. The pre-closing walkthrough is for the limited purpose of ensuring that: (1) the agreed upon corrections or repairs, if any, have been completed; and (2) the premises are in substantially the same condition as of the date of contract acceptance.

QUESTION 8: What should an agent do if asked by their buyer to conduct a pre-closing walkthrough on the buyer's behalf?

ANSWER 8: The agent should discuss the buyer's request with their broker and determine whether the broker has a policy in place prohibiting such activity. Even if no such prohibition exists, it is recommended that the agent avoid conducting the pre-closing walkthrough on the buyer's behalf, as doing so subjects the agent to risk and liability. While the agent should always encourage the buyer to personally conduct the walkthrough, if the buyer cannot do so, the agent can recommend in writing that the buyer have a friend, family member or home inspector act on their behalf.

QUESTION 9: What should the buyer's agent do if the buyer chooses to allow a third party to conduct a pre-closing walkthrough on the buyer's behalf?

ANSWER 9: Prior to allowing a third party to conduct a pre-closing walkthrough, the buyer's agent should have signed and dated written permission from the buyer authorizing the third-party. Even under these circumstances, the buyer, not the third party, is required to execute the Buyer Pre-Closing Walkthrough form.

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CONTINUED

QUESTION 10: Under what circumstances should the buyer's agent sign the Buyer Pre-Closing Walkthrough form?

ANSWER 10: The buyer, not the buyer's agent, should in all instances execute the form.

QUESTION 11: Can the buyer change their election after having completed the Buyer Pre-Closing Walkthrough form?

ANSWER 11: If the buyer completes the Buyer Pre-Closing Walkthrough form by marking either box one or three, the buyer is likely bound by their election. For this reason, an agent should make every effort to ensure that the buyer has taken the time allotted to conduct a pre-closing walkthrough and has thoroughly considered their options before making an election. If the buyer completes the Buyer Pre-Closing Walkthrough form by marking box two, the buyer can nonetheless subsequently elect to waive the previously agreed-upon correction(s) or repair(s).

QUESTION 12: Is it appropriate for the Buyer Pre-Closing Walkthrough form to be submitted to the title company?

ANSWER 12: Once executed by the buyer, the form is intended to be conveyed by the buyer's agent to the listing agent. Unless using a separate cure period notice, the form must be conveyed to the listing agent in the event the buyer marks box number two. It is similarly appropriate for an executed Buyer Pre-Closing Walkthrough form to be submitted to the applicable title company to keep it apprised as to the status of close of escrow and on those occasions in which the form may impact the disposition of the earnest money deposit.

¹ Additionally included in the workgroup were Armando Contla, Deems Dickinson, Holly Eslinger, Jerome King, Laura Mance, Heidi Quigley and Jim Sexton. The workgroup was assisted by AAR CEO Michelle Lind and Risk Management Director Christina Smalls.

THE GREAT "AS IS" DEBATE

BY K. MICHELLE LIND, ESQ.,
AAR CHIEF EXECUTIVE OFFICER

The AAR "As Is" Addendum is intended for use when the seller is selling a home in its existing condition ("As Is"). The Addendum was first developed in 2005 and underwent minor revisions for clarity in 2009. Recently, some questions have been raised about the buyer's rights pursuant to Section 6j of the AAR Residential Resale Purchase Contract (2/11) ("Buyer Disapproval") when the "As Is" Addendum is incorporated into the contract.

<http://www.aaronline.com/wp-content/uploads/2012/11/a144.pdf>

QUESTION:
Does the buyer retain the right to request repairs?

ANSWER: Yes, the Addendum was always intended to allow the buyer the opportunity to request repairs. When first developed in 2005, line 16 of the Addendum read "Buyer retains the right to cancel the Contract pursuant to Section 6j." This line was revised in 2009 to "Buyer retains the rights pursuant to Section 6j" to clarify that the buyer retains both options in Section 6j of the residential contract: (i) cancel immediately or (ii) allow the seller the opportunity to correct any of the items disapproved. Section 6j of the residential contract provides:

If Buyer, in Buyer's sole discretion, disapproves of items as allowed herein, Buyer shall deliver to Seller notice of the items disapproved and state in the notice that Buyer elects to either:

1. immediately cancel this Contract and all Earnest Money shall be released to Buyer, or

2. provide the Seller an opportunity to correct the items disapproved, in which case:

1. Seller shall respond in writing within five (5) days or ____ days after delivery to Seller of Buyer's notice of items disapproved. Seller's

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THE GREAT "AS IS" DEBATE — CONTINUED

failure to respond to Buyer in writing within the specified time period shall conclusively be deemed Seller's refusal to correct any of the items disapproved.

2. If Seller agrees in writing to correct items disapproved, Seller shall correct the items, complete any repairs in a workmanlike manner and deliver any paid receipts evidencing the corrections and repairs to Buyer three (3) days or _____ days prior to COE Date.
3. If Seller is unwilling or unable to correct any of the items disapproved, Buyer may cancel this Contract within five (5) days after delivery of Seller's response or after expiration of the time for Seller's response, whichever occurs first, and all Earnest Money shall be released to Buyer. If Buyer does not cancel this Contract within the five (5) days as provided, Buyer shall close escrow without correction of those items that Seller has not agreed in writing to correct.



repairs to ensure that heating, cooling, mechanical, plumbing, and electrical systems (including swimming pool and/or spa, motors, filter systems, cleaning systems, and heaters, if any), free-standing range/oven, and built-in appliances are in working condition at the earlier of possession or close of escrow. However, the seller is obligated to maintain and repair the premises so that the premises is in substantially the same condition as on the date of contract acceptance, and all personal property not included in the sale and all debris will be removed. For example, if the swimming pool motor is not in working condition at the time of contract acceptance, the Addendum releases the seller from the obligation to repair it pursuant to Section 5a of the residential contract. If the swimming pool motor was in working condition at the time of contract acceptance, but malfunctions during escrow, the seller is obligated to make repairs so that the pool motor is in substantially the same condition at close of escrow.

The "As Is" Addendum also requires the seller to acknowledge that selling the home "As Is" does not relieve the seller of the legal obligation to disclose all known material latent defects to the buyer. Additionally, the buyer acknowledges that the buyer has been advised to seek appropriate counsel regarding the risks of buying a home in "As Is" condition. Both buyers and sellers should be educated about the provisions of the AAR "As Is" Addendum prior to its execution and counseled as to their rights and obligations in an "As Is" transaction.

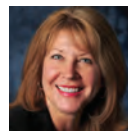
Arizona REALTOR® Magazine — December 2012

QUESTION:**Why does the buyer retain the right to request repairs?**

ANSWER: The forms committee discussed this issue and ultimately determined that in most transactions, the seller would prefer to retain the opportunity to respond to a buyer's repair requests (notice of items disapproved), even though the seller is not obligated to make any repairs or correct any defects that existed at the time of contract acceptance.

QUESTION:**What rights does the buyer waive pursuant to the Addendum?**

ANSWER: The buyer waives the seller warranties pursuant to Section 5a of the residential contract. Therefore, the seller has no obligation to make any

ABOUT THE AUTHOR

K. Michelle Lind, Esq., AAR Chief Executive Officer, is a State Bar of Arizona board-certified real estate specialist and the author of *Arizona Real Estate: A Professional's Guide to Law & Practice*. This article is of a general nature and may not be updated or revised for accuracy as statutory or case law changes following the date of first publication. Further, this article reflects only the opinion of the author, is not intended as definitive legal advice, and you should not act upon it without seeking independent legal counsel.

LEGAL HOTLINE

The following is for informational purposes only and is not intended as definitive legal or tax advice. You should not act upon this information without seeking independent legal counsel. If you desire legal, tax or other professional advice, please contact your attorney, tax advisor or other professional consultant.

CONTRACTS

<http://www.aaronline.com/legal-hotline-q-a-contracts>

Buyer's Inspections Must Be Reasonable

FACTS:

The parties entered into an AAR Vacant Land/Lot Purchase Contract. The buyer is demanding the right to perform soil testing through the use of a backhoe in the Hassayampa River, which runs through the property. The seller has intimated such usage will disturb local saguaro. The seller is objecting to the inspection.

ISSUE:

Is the seller required to allow buyer to perform these actions as part of the buyer's inspections?

ANSWER:

No.

DISCUSSION:

Pursuant to Section 6(n) of the Contract, the buyer need only be given "reasonable" access to the property for purposes of inspection. The buyer apparently intends to destroy the topography of the property, which could result in decreased value of the property. Additionally, disturbing a saguaro without a permit subjects the parties to potential criminal and civil penalties. See Ariz. Rev. Stat. §§ 3-932, 3-933. Finally, the Hassayampa River is regulated by multiple local, State and Federal agencies, including the United States Department of the Interior, as well as the Army Corp of Engineers. Any action that would disturb the Hassayampa River would require at a minimum an application to the Department of the Interior for a Finding of No Significant Impact ("FONSI"), and an application to the Army Corp of Engineers for a permit pursuant to Section 404 of the Clean Water Act. In absence of such applications, the buyer would be subjecting both the buyer and seller to multiple potential State and Federal offenses, which would also be unreasonable.

Category: *Contracts*

Arizona REALTOR® Magazine — December 2012

Q&As are not "black and white,"

so experienced attorneys and brokers may disagree. Agents are advised to talk to their brokers/managers when they have questions.

Waiver of Appraisal Contingency May Deprive Buyer of Earnest Deposit

ISSUE:

Is a desk that is screwed directly into the wall of a residence without any mounting device considered a fixture?

ANSWER:

In the absence of an agreement between the parties, for chattel to become a fixture, three requisites must unite: (i) annexation to the realty or something appurtenant thereto, (ii) adaptability or application as affixed to use for which real estate is appropriated, and (iii) intention of annexer to make permanent accession to freehold. *Gomez v. Dykes*, 89 Ariz. 171, 359 P.2d 760 (1961). Assuming the desk was not already specifically identified in the Purchase Contract, if the buyer can meet all three elements, the desk will be deemed to be a fixture. However, element (iii) requires proof that the seller intended the desk to be a permanent accession. As the court stated in *Voight v. Ott*, 86 Ariz. 128, 134, 341 P.2d 923, 927 (1959), "the modern tendency is to place less emphasis on the method or mode of annexation of the chattel and to give greater consideration to the intention of the parties as respects the use and adaptability thereof." As such, the intent of the seller is likely the determining factor.

Note: The best practice is to address items of personal property in the purchase contract (Section 1(g) in the AAR Residential Resale Purchase Contract).

Category: *Contracts*

Arizona REALTOR® Magazine — December 2012

Seller May Issue A Cure Notice If Buyer Does Not Timely Close

FACTS:

The buyer and the seller agree via an addendum to move closing up one week. Thereafter, the buyer is unable to timely close escrow and submits a second addendum to extend closing to a date which is still before the original closing date. There is no response from the seller to the addendum. On the day set for closing in the first addendum, the seller leaves the title company without signing the closing documents or executing the buyer's proposed addendum. Thereafter, the seller issues to the buyer a Cure Notice for failure to close escrow on the contractually mandated date.

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ISSUE:

1. Is the seller entitled to issue a Cure Notice to the buyer for failure to close when the seller never signed their half of the documents to allow for the transaction to close?
2. Can the buyer issue a Cure Notice to the seller for failing to sign on or before the new close of escrow date since there was no extension granted?

ANSWER:

See Discussion.

DISCUSSION:

Only a non-breaching party is entitled to issue a Cure Notice. In this instance, it appears that the seller was ready, willing and able to tender performance on the date set forth in the applicable addendum. Since the buyer was unable to timely perform, the seller was within his rights to issue a Cure Notice. Furthermore, this scenario would render the buyer unable to similarly issue a Cure Notice because, unlike the seller, the buyer was not ready, willing and able to timely close escrow.

Category: *Contracts*
Arizona REALTOR® Magazine – January 2013

Seller's Bankruptcy Should Be Disclosed Prior To Execution of Purchase Contract

FACTS:

Prior to the parties entering into the purchase contract, the seller failed to disclose that she had recently filed for bankruptcy relief, and as such, the residence remains the subject of the automatic stay.

ISSUE:

Was the seller obligated to disclose her bankruptcy prior to the parties entering into the purchase contract?

ANSWER:

Yes.

DISCUSSION:

In Arizona, a seller has a duty to disclose known facts materially affecting the consideration to be paid not known to the buyer, including that the seller may be unable to perform. See A.A.C. R4-28-1101(B)(1). Here, the seller's ability to sell the property and the seller's interest in the property is likely to be deemed material. Therefore, assuming the seller knew the residence was subject to the bankruptcy, the seller was obligated to disclose this fact to the buyer.

Category: *Contracts*
Arizona REALTOR® Magazine – January 2013

Buyer Is Entitled To Occupy the Residence When the Deed Is Recorded

FACTS:

The transaction closed and recorded on Friday. The buyer intended to move over the weekend but the seller did not release the keys to the buyer until Monday. Now, the buyer has to wait until the following weekend to move and will incur additional expenses as a result.

ISSUE:

Does the buyer have any recourse against the seller?

DISCUSSION:

Under the purchase contract, the buyer is entitled to possession of the home at the time of closing, which is defined in the contract as the recording of the deed. Therefore, if the transaction closed and recorded on Friday, the buyer was entitled to possession of the property when the deed recorded. If the buyer sustained damages as a result of the seller's failure to release the keys to the buyer on Friday, then the seller could be liable for those damages.

Category: *Contracts*
Arizona REALTOR® Magazine – February 2013

An Unsigned Addendum Does Not Alter The Enforceability Of The Underlying Contract

FACTS:

A title issue arose during a pending transaction. In an attempt to resolve the issue, an addendum to the contract was drafted. However, neither the buyer nor the seller signed the addendum. The seller is now claiming that, since an addendum was presented to him, he has a right to unilaterally cancel the contract.

ISSUE:

Does the seller have the right to cancel the contract?

ANSWER:

See Discussion.

DISCUSSION:

When the seller was presented with an addendum, the seller received an offer to amend the contract, which the seller has the right to either accept or reject. Rejection of the proposed amendment does not, however, provide the seller the opportunity to unilaterally cancel the contract. The seller's rejection of the offer to amend merely means the addendum has no legal effect on the contract and the terms and conditions of the original contract remain legally binding.

Category: *Contracts* | *Arizona REALTOR® Magazine – February 2013*

Buyer May Cancel And Receive The Earnest Money If Seller Refused To Remedy The Items Listed On The BINSR

FACTS:

The buyer completes a BINSR asking for 20 individual items to be repaired. The buyer therefore marks the box on the BINSR stating "Buyer elects to provide seller an opportunity to correct the disapproved items listed below." In response, the seller agrees to fix 18 of the 20 items and marks the box on the BINSR stating "Seller's response to buyer's notice is as follows." Thereafter, the buyer timely returns the BINSR to the seller in which a box is marked stating "Buyer elects to cancel this contract."

ISSUE:

Which party is entitled to the earnest money deposit?

ANSWER:

If the cancellation is based on the seller's refusal to repair all 20 items listed on the BINSR and notice and responses were received in the proper time frames, the earnest money deposit should be returned to the buyer.

Note: A buyer is not entitled to cancel the contract for reasons that do not relate to the property.

Category: *Contracts*
Arizona REALTOR® Magazine — February 2013

COMMISSION

<http://www.aaronline.com/legal-hotline-q-a-commissions>

Commission Agreement Must Be In Writing

FACTS:

Agent represents a buyer seeking to purchase property from a developer. The developer has not listed the property for sale through the MLS.

ISSUE:

How can the buyer's agent ensure collection of a commission?

ANSWER:

See Discussion.

DISCUSSION:

The buyer's agent can request that the buyer sign a Buyer-Broker Exclusive Employment Agreement. Pursuant to that Agreement, the buyer agrees to compensate the agent directly. If necessary, the agent can limit the scope of the Agreement to the property being sold by the developer. In addition, the buyer can submit an offer to the developer requesting that the developer pay the buyer's agent a commission.

Note: A.A.C. R4-28-1101(D) states: "A licensee shall not allow a controversy with another licensee to jeopardize, delay, or interfere with the initiation, processing, or finalizing of a transaction on behalf of the client. This prohibition does not obligate a licensee to agree or alter the terms of any employment or compensation agreement or to relinquish the right to maintain an action to resolve a controversy."

Category: *Commissions*
Arizona REALTOR® Magazine — February 2013

LANDLORD/TENANT ISSUES

<http://www.aaronline.com/legal-hotline-q-a-landlordtenant>

A Residential Tenant May Continue To Occupy The Home For A Limited Time After Foreclosure

FACTS:

A tenant resides in the property pursuant to a written lease agreement that is currently month-to-month. The lender notices a trustee's sale and forecloses on the home.

ISSUE:

What are the tenant's rights following foreclosure by the lender?

ANSWER:

See Discussion.

DISCUSSION:

The Protecting Tenants at Foreclosure Act of 2009 provides certain protections to tenants facing foreclosure by the landlord's lender. If the tenant is occupying residential property pursuant to a bona fide, written lease, the tenant is generally entitled to continue residing in the property for the duration of the lease term. An exception exists where the property is sold to an individual intending to reside in the property as a primary residence. In such circumstances, the new owner can only evict the tenant after providing a 90-day notice to vacate. Where the tenant is occupying the property on a month-to-month basis at the time of foreclosure, the new owner (whether the lender or a third-party) must similarly provide the tenant with a 90-day notice before commencing eviction proceedings. As a result, the tenant can expect to reside in the property post-foreclosure for a minimum of 90 days and maybe longer. During this time, the tenant must continue to make rental payments to the owner of the property.

Category: *Landlord/Tenant Issues*
Arizona REALTOR® Magazine — January 2013

MISCELLANEOUS

<http://www.aaronline.com/law-ethics/legal-hotline/miscellaneous.aspx>

Statutes Prohibit HOAs From Precluding "For Sale" Signs

ISSUE:

What is the Arizona Revised Statute prohibiting homeowners' associations from restricting "For Sale" signs in their development?

ANSWER:

A.R.S. § 33-1808(F) restricts the ability of homeowners' associations to regulate or prohibit the use of "For Sale" or "For Lease" signs within an association, provided that the sign is "commercially produced" and not larger than 18 by 24 inches. See also A.R.S. § 33-441.

Category: *Miscellaneous*
Arizona REALTOR® Magazine — January 2013

Property Manager Must Separate Personal Funds From Funds Held In Trust

FACTS:

The broker manages several properties, some in her capacity as a property manager and others in her personal capacity. Sometimes it becomes necessary for the broker to turn over the collection of past due rental payments to a collection agency. When the collection agency is successful in collecting past due amounts, it sends the collected funds to the broker in one check. The funds often include monies collected for the property management firm's accounts, for the broker's personal rental properties, and for closed accounts previously managed by the property management firm. Although the broker has separate accounts for her personal rental properties and the property management firm, the broker does not know how to handle the combined funds she receives from the collection agency.

ISSUE:

How does the property manager avoid commingling funds?

ANSWER:

See Discussion.

DISCUSSION:

Within three banking days after receiving monies, a property management firm shall deposit the monies in the property management firm's trust account for the benefit of the owner(s). See A.R.S. § 32-2174(D). Commingling monies belonging to others or personal monies is prohibited.

Accordingly, the broker should insist that the collection agency send separate checks; one check received in connection with personal properties and another check for money received for clients.

Category: *Miscellaneous*
Arizona REALTOR® Magazine — January 2013

SHORT SALES

<http://www.aaronline.com/legal-hotline-q-a-short-sales>

Previously Recorded Deed Of Trust Has Priority Over A Lis Pendens

FACTS:

A specific performance lawsuit was pending before and a lis pendens was recorded when the bank began the Trustee's Sale.

ISSUE:

Can the home be foreclosed by the lender prior to completion of the lawsuit?

ANSWER:

See Discussion.

DISCUSSION:

The property can be foreclosed by the lender prior to conclusion of the specific performance lawsuit. The Deed of Trust, which was recorded before the lis pendens, has priority. The buyer or seller may therefore elect to seek, through counsel, an injunction stopping the trustee's sale until completion of the underlying litigation.

Category: *Title & Interest in Property*
Arizona REALTOR® Magazine — January 2013

ABOUT THE AUTHOR



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AT THIS YEARS' CONVENTION...

- Designation / Certification Classes
- Continuing Education
- Technology Tips
- Networking Activities
- EXPO
Post-Convention (April 11):
WCR meetings
AAR Business Meetings