ARIZONA REALTORS®

FOURTH QUARTER 2021

BROKER & MANAGER

QUARTERLY

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ARIZONA REALTORS®

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FOURTH QUARTER 2021 | ARIZONA REALTORS® BROKER/MANAGER QUARTERLY

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Updated September 2021

COVENANTS, CONDITIONS AND RESTRICTIONS (CC&RS)

New content was inserted on page 3; Covenants, Conditions and Restrictions (CC&Rs):

It is the law of this state that any covenants or restrictions that are based on race, religion, color, handicap status or national origin are invalid and unenforceable. A.R.S. 32-2107.01.

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FORMS REVISION RELEASE

October 1, 2021

Three forms were revised and released in October: (i) H.O.A. Condominium / Planned Community Addendum; (ii) Multiple Counter Offer; and (iii) the Vacant Land / Lot Seller's Property Disclosure (SPDS).

H.O.A. Condominium / Planned Community Addendum

The Arizona REALTORS® H.O.A. Condominium / Planned Community Addendum identifies four fees payable upon close of escrow and allows the buyer and seller to decide who will be responsible for paying which fees. Line 31 also allows the seller to identify any other HOA fees that may be payable upon close of escrow. However, the Addendum does not currently address the possibility that additional fees may exist that are not identified by the seller on page one of the Addendum.

To cover this issue, the following two lines were added to the Addendum:

75. Any additional fees not disclosed on page 1 and payable upon close of escrow shall be paid by: ☐ Buyer ☐ Seller ☐ Other _____

76. _____

By way of these lines, the parties can now negotiate and document which party pays any fees not previously identified by the seller on page one of the Addendum.

Multiple Counter Offer

The Multiple Counter Offer evidences a substantive change to lines 40 through 42 which currently state, "Signature by Seller below and delivery to Buyer or Buyer's Broker as indicated above creates a binding agreement. Seller revokes all other counter offers by separate notice and agrees to sell the Premises to Buyer subject to the terms and conditions contained herein."

Effective October 1, 2021, the above-referenced lines under the Section titled "Seller Final Acceptance" were revised to state:

40. Signature by Seller below and delivery to Buyer or Buyer's Broker as indicated above creates a binding agreement. Seller
41. agrees to revoke all counter offers previously conveyed to other prospective buyers by separate notice and agrees to
42. sell the Premises to Buyer. Except as modified by this Multiple Counter Offer, all other terms and
43. conditions of the above referenced Offer/Counter Offer(s) shall remain unchanged and deemed accepted.

The primary reason for the revision is to help ensure that a Counter Offer not yet accepted is revoked by the seller before entering into a contract with the buyer. Otherwise, the seller can find themselves in the problematic position of having sold the Premises to more than one buyer.

Although the new verbiage achieves the same result, a secondary reason for the revision is that it emphasizes the fact that any previous terms and conditions not modified by this Multiple Counter Offer shall remain unaffected and considered to be accepted. In the event that agents currently insert verbiage into the Multiple Counter Offer stating that all other terms and conditions remain unchanged, that will no longer be warranted.

Article here: **Vacant Land/Lot Seller's Property Disclosure Statement | Arizona Association of REALTORS® (aaronline.com)**

Vacant Land/Lot Seller's Property Disclosure Statement

The Vacant Land/Lot Seller's Property Disclosure Statement was last updated in February 2008. Accordingly, the workgroup[1] chaired by President Jan Leighton had their work cut out for them.

Below is an outline summary of the revisions made to the Vacant Land/Lot Seller's Property Disclosure Statement ("VLSPDS"), followed by a list of frequently asked questions.

Vacant Land/Lot Seller Advisory

The Advisory page mirrors the Residential Seller's Property Disclosure Statement Advisory page. Why? Because it expresses the importance of seller disclosures. More importantly, the page now emphasizes that sellers are legally obligated to disclose important facts about the Property and that these disclosure obligations remain even if the parties agree that no VLSPDS will be provided.

Property and Ownership

Disclosing the name of the "Legal owner of the Property" has moved from line 4 to line 6. The new line number provides added room for the name of the legal owner.

The Internal Revenue Service's definition of a "Foreign Person" as it pertains to the Foreign Investment in Real Property includes a non-resident alien. For that reason, line 11 was updated to reflect that change.

Line 27 now allows for the seller to disclose whether the association governing the Property is subject to mandatory or voluntary membership in an association. Lines 28-30 expand on this information by requesting the seller to disclose the association's name, contact person, and phone number. Finally, because there could be more than one association, line 31 has been added for disclosure of a second association's fees and how often those fees are paid.

Lines 50-51 ask the seller if they are aware if the Property is located within the boundaries of a Community Facilities District (CFD). CFDs serve as special taxing districts that developers and municipalities can use to finance the cost of infrastructure improvements, which are ultimately paid by property owners within the district. If the Property is subject to a CFD, the seller is asked to identify the name of the CFD so that the buyer can research their obligations, if any, via the repayment of bonds in the form of an addition to their annual property tax bill.

Access

The yes / no questions previously asked regarding access to the Property, have been replaced with the first four questions addressing access to the Property as shown on the Affidavit of Disclosure. Included with those questions are lines for the seller to provide any explanation they would like to share regarding access to the Property.

A box has been added to lines 65-66 advising the buyer that roads not publicly maintained are the responsibility of the Property owner. Furthermore, roads that are not improved to county standards and accepted for maintenance are not the county's responsibility.

Use

A property's zoning is important information for a buyer. Accordingly, line 70 has been added for the seller to provide an explanation of the seller's knowledge regarding whether the current use of the Property conforms with current zoning.

Utilities

If the Property receives internet service, the seller is now asked on line 83 to disclose that fact and identify the name of the internet provider.

Line 87 now asks the seller to identify whether irrigation is available to the Property.

With an increase in the number of alternate power systems serving properties, lines 91-96 were added to ask whether the seller is aware of any problems with an alternate power system and whether any alternate power systems serving the Property are leased. If so, the seller is asked to provide the name and phone number of the leasing company and attach a copy of the lease, if available. The buyer is further provided with a "Notice to Buyer" advising the buyer that if the Property is served by a solar system, they should read all pertinent documents and review the cost, insurability, operation, and value of the system, among other items.

Water

Lines 116-118 contain a new "Notice to Buyer." The notice advises the buyer that the Arizona Department of Water Resources may not have made a water supply determination if the property is served by a well, private water company, or municipal water provider. If the buyer would like more information about water supply or any of the water services, the buyer should contact the provider.

Sewer/Wastewater Treatment

Should a buyer purchase vacant property and wish to build later, the buyer needs to know whether sewer/wastewater treatment is available and the type of facility, if any. If the Property is not served by a conventional septic system or alternative system, the seller may disclose another type of system on line 124.

Additionally, two "Notice[s] to Buyer" have been added. The first notice, located on lines 125-126, advise the buyer to contact the appropriate governmental or private provider regarding the availability and cost of sewer connection. The second notice, on lines 140-142, warns the buyer about cesspools.

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Environmental Information

A "Notice to Buyer" has been added on lines 160-161 that advises the buyer that the Arizona Department of Real Estate provides earth fissure maps to the public in printed or electronic format upon request. A box to disclose any past or present problems with fissures on the Property has also been added to line 164.

Flood insurance premiums may increase and, in some instances, may be substantially higher than premiums paid for flood insurance prior to the time of sale. As a result, a flood insurance "Notice to Buyer" has been added to lines 187-200 advising buyers not to rely on the premiums previously paid for flood insurance as an indicator of the premiums that will apply after completion of the purchase.

(VLSPDS FAQs)

Frequently Asked Questions

Q1 **Does Arizona law require sellers to deliver to buyers a completed VLSPDS?**

A1 *No. Although the seller is legally obligated to disclose all material facts to the buyer, the seller is not required by Arizona law to make these disclosures via the VLSPDS. Note: If the parties are using the Arizona REALTORS® Vacant Land/Lot Purchase Contract, the seller is required to deliver a completed VLSPDS to buyer within five (5) days after Contract acceptance.*

Q2 **Why was a box added for "voluntary" membership in an association?**

A2 *Not all associations are mandatory. Because some associations are voluntary, the workgroup thought it pertinent to disclose whether the association is voluntary or mandatory.*

Q3 **Why were the access questions changed to mirror the Affidavit of Disclosure?**

A3 *Although the Affidavit of Disclosure is statutorily required only when a seller sells five or fewer parcels of land, other than subdivided land, in an unincorporated area of a county, the workgroup thought that the questions on the Affidavit of Disclosure addressed the access questions better by providing additional lines for the seller to explain their knowledge of access to the Property.*

Q4 **Why was line 70 added for the seller to provide an explanation of the seller's knowledge regarding whether the current use of the Property conforms with current zoning?**

A4 *There are times when the current use of the Property does not conform with current zoning, but the use is considered legal because the land is grandfathered in. Including an explanation line will allow the seller to provide additional information to the buyer in this regard.*

Q5 **Why does the form contain so many questions about alternate power systems?**

A5 *If there are not any alternate power systems serving the Property, the seller should check no on line 88 and skip to line 99. However, if there are any alternate power systems serving the Property, whether the alternate power system is leased is important information as the system may not convey to the buyer. Moreover, if the leased system is to convey, the conveyance will likely need to be approved by the company that owns the system, meaning that the company can require the buyer to meet its credit standards. If the buyer cannot qualify to assume the lease, they may not wish to complete the purchase.*

Q6 **Why are there so many new "Notice[s] to Buyer"?**

A6 *Buyers should understand the types of items they may wish to investigate in conjunction with their contemplated purchase of the Property. Accordingly, the notices are to remind buyers of the importance of investigating those items that may impact their use and enjoyment of the property.*

ABOUT THE AUTHOR

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[1] Special thanks to the valuable contributions of workgroup members Lee Giblin, Pamelia La Paglia, Bobby Miller, Lisa Paffrath, Tom Pancrazi, Rick Sack, and Joan Wilson.

The workgroup was assisted by Arizona REALTORS® staff Scott Drucker, Jan Steward, Nikki Salgat, and Jamilla Brandt.

HOT TOPICS IN BROKER RISK REDUCTION

BY KATIE JOHNSON, GENERAL COUNSEL AND CHIEF MEMBER EXPERIENCE OFFICER

COMPETITION IN REAL ESTATE

REALTORS® help foster competition through their participation in local broker marketplaces. These marketplaces help create highly competitive real estate markets that are friendly to small businesses and new market entrants. REALTORS® work together in for the benefit of consumers, and to help ensure buyers and sellers have the greatest access, transparency and choice in their homeownership journeys. As a result, brokerages of all sizes are able to compete and provide their services to consumers, who in turn have the freedom to choose between different service models and pricing that best meet their needs.

Resource www.Competition.realtor: Learn the key points for you as members of the National Association of REALTORS® to know and share about how competitive and consumer-friendly local broker marketplaces – another name for MLSs – are, and the critical role NAR members play in advancing consumers' interest. This is followed by key questions you may have or get asked about on related topics.

SCOTT'S LEGAL SCOOPS – VIDEO SERIES

H.O.A. ADDENDUM

CLICK ARROW ABOVE TO WATCH THE VIDEO

The H.O.A Addendum has four different commonly charged fees. One is different than the others...Do you know which one and why?

Our resident legal expert and Assistant CEO Scott Drucker does, and he'll explain why you need to be aware of this fee and how to make sure your buyers don't get hornswoggled.

ARIZONA association of REALTORS®

CONTRACT CONVERSATIONS

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Have a quick question about the Arizona REALTORS® Residential Resale Purchase Contract, the Buyer's Inspection Notice & Seller's Response (BINSR) and other Arizona REALTORS® forms? Need information when you want it? Answers are just a click away.

AAR Residential Resale Contract Essentially "As Is Condition"

Seller makes no warranty to Buyer, either express or implied, as to the condition, zoning, or fitness for any particular use or purpose of the Premises. However, Seller shall maintain and repair the Premises so that at the earlier of possession or COE: (i) the Premises, including all personal property included in the sale will be in substantially the same condition as on the date of Contract acceptance; and (ii) all personal property not included in the sale and debris will be removed from the Premises. Buyer is advised to conduct independent inspections and investigations regarding the Premises within the Inspection Period as specified in Section 6a. Buyer and Seller acknowledge and understand they may, but are not obligated to, engage in negotiations for repairs/improvements to the Premises. Any/all agreed upon repairs/improvements will be addressed pursuant to Section 6j.

"Present physical condition as of the date of contract acceptance" is self-explanatory. For Instance, if the air conditioner does not work on the day the contract is accepted, the buyer agrees to purchase the property without a working air conditioner. However, if the air conditioner works at the time the contract is accepted but later quits working prior to COE, the seller agrees the buyer will have a working air conditioner at COE.

Because the property is essentially sold "as is," the buyer should conduct all desired inspections. If the buyer discovers any items it disapproves of during the Inspection Period, the buyer is entitled to cancel the contract.

KEY POINT TO REMEMBER:

- An "as is" clause does not negate a seller's duty to disclose all known latent material defects.

Excerpt from: Arizona Real Estate A Professional's Guide to Law and Practice (Third Edition)

Ref. pages 136-137

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

ABOUT THE AUTHOR

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Legislature Makes Major Changes to Arizona's Homestead Laws

BY SCOTT A. MALM, ESQ., GUST & ROSENFELD

Recently, the Arizona Legislature increased the homestead protection to $250,000 and changed Arizona's homestead laws so that a recorded money judgment also becomes a lien against the homeowner's primary residence. HB 2617 was signed by the Governor on May 19, 2021 and becomes effective January 1, 2022.

Since before statehood, Arizona's homestead laws allowed homeowners to hold their primary residence free and clear of a recorded money judgment. If the creditor wanted to pursue the homeowner's equity in the residence above the homestead allowance, the creditor had to follow a judicial process ending in a sheriff's sale. If the homeowner sold the residence prior to the sheriff's sale, the new buyer obtained the property free from the creditor's claim. The Arizona Court of Appeals confirmed that scenario in Pacific Western Bank v. Castleton, 246 Ariz. 108 (App. 2018).

Because of the Castleton decision, creditors pushed for a change in the homestead laws so that a recorded money judgment also becomes a lien against the homeowner's primary residence. Gust Rosenfeld attorney Scott Malm participated in the drafting of the legislation on behalf of the title companies.

The good news for the homeowner: the homestead exemption amount is increased to $250,000, which means that the homeowner's equity in the residence is protected from the judgment lien up to $250,000. And if the homeowner will receive less than 80% of the $250,000 homestead allowance from a sale, then a title company may unilaterally release the judgment lien against the residence as part of the sale.

The bad news for the homeowner: a potential delay in close of escrow is possible if the homeowner is expected to receive more than 80% of the $250,000 homestead allowance. In such a situation, a notice of the pending sale must be sent to the creditor. If the creditor objects to the close of escrow within 21 days of the notice, then the title company may not release the judgment lien even if the homeowner's sale proceeds are less than $250,000. The homeowner must get court approval to obtain a release of the judgment lien over such an objection. To discourage unreasonable objections, the court may award damages, attorney's fees and costs against the objecting creditor.

For refinances, different rules apply to a cash-out and no cash-out scenario. If the homeowner wants to receive cash from a refinance, then the creditor's lien must first be satisfied. If the homeowner will not receive any cash from a refinance, then the title company is authorized to record a notice of subordination of the judgment lien, meaning the judgment lien is junior to the new lender's deed of trust.

For more information or for any questions about the homestead laws, please contact any member of our Real Estate or Creditors' Rights practice groups.

Real Estate Group:

Laura Blanco	Mark Collins	Craig Keller	Mina O'Boyle	Frank Tomkins
Kent Cammack	Thomas Halter	Scott Malm	Gerard O'Meara	Michael Woodlock
Tom Chauncey	Thomas Hickey	Christopher Mcnichol	Barbara Pashkowski	

Creditors' Rights Group:

Kent Cammack	Christopher McNichol	Séan O'Brien	Gerard O'Meara	Robert Williams

{PROFESSIONALS... THAT'S WHO WE R REALTOR®

As a Broker, Manager, REALTOR, we hold ourselves to a higher standard of performance and professionals. The Professionalism Workgroup chaired by Sindy Ready, under the Arizona REALTORS Professional & Business Development Committee, honed in on 10 attributes of professionalism. Each attribute is accompanied by a video. Consider including this in your new agent orientation, office meetings and/or newsletters. These would be a great conversation starter with your agents.

Let's all work together to raise the bar in our profession. https://www.aaronline.com/professionalsthats-who-we-r/

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POSITIVE PERSPECTIVE	Guide the transaction or activity to closing with what the client wants in the forefront.
PROBLEM SOLVER	Win-win attitude and actions; proactive and anticipates potential issues and solutions.
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KNOWLEDGEABLE	Exhibits knowledge, insight, and understanding; well-informed.
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RESPECTFUL	Listen. Affirm. Be kind. Be polite. Be thankful.
ETHICAL	Conduct yourself and your business in accordance with the REALTORS® Code of Ethics.
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REALTOR SAFETY

Agent Safety Alert Program (ASAP)

ASAP is a program to alert REALTORS® of critical safety issues. Members may submit reports of incidents they see or know about using the link below. A response team will evaluate the report and may take action, up to and including issuing a text alert to all affected members.

Click here to submit an Incident Report **(must be an active REALTOR®)**

To ensure that your cell phone is in our system for alerts, please contact your local association or edit your own information at NAR's site. For details about the ASAP program, here is a list of FAQs.

Predators: The True Nature of Crimes Against REALTORS®

It's a misconception that crimes against real estate agents are random and opportunistic. In fact, most are predatory in nature.

CLICK ARROW ABOVE TO WATCH THE VIDEO

Arizona REALTORS® Legal Hotline

A RESOURCE FOR BROKERS NEEDING LEGAL INFORMATION

The Arizona REALTOR® Legal Hotline is designed...

* As a member benefit for Designated REALTORS® (Designated Brokers) to have direct access to a qualified attorney who can provide information on real estate law and related matters.
* To answer legally related questions about the many diversified areas of today's real estate industry.

The Hotline is provided by the attorneys at Zelms, Erlich & Mack

Primary access to the Hotline is for Designated Brokers, who may also give access to one REALTOR® or REALTOR-ASSOCIATE® member per office and/or branch.

For More Information

Please contact Jamilla Brandt,
Arizona REALTORS® Risk Management Coordinator,
at jamillabrandt@aaronline.com
or 602-248-7787

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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.

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.

The HOA cannot charge fee for disclosure documents until close of escrow

FACTS: The HOA is demanding payment from the seller for the work it performed in gathering and providing resale disclosure documents to the buyer for the pending sale of the property. The property is not scheduled to close escrow for another two weeks.

ISSUE: Upon delivery of the documents, does the homeowner have to pay the HOA?

ANSWER: No. See Discussion.

DISCUSSION: Pursuant to A.R.S. § 33-1806, an association may charge a homeowner a fee "to compensate the association for the costs incurred in the preparation of a statement or other documents furnished by the association for the purposes of resale disclosure, lien estoppels or any other services related to the transfer or use of the property." The statute further provides that the fees "shall be collected no earlier than at the close of escrow." Id. Accordingly, an association may charge a homeowner fees for providing the documents prior to close of escrow but the homeowner does not have to pay the fees until escrow successfully closes.

Note: In the event the pending sale does not close escrow, the association may not charge its fees to the homeowner.

No recording of lis pendens based on earnest money dispute

FACTS: The buyer has cancelled the transaction and is demanding the return of the $10,000 earnest money. The buyer is also stating that if the $10,000 earnest money is not returned to the buyer, the buyer will record a lis pendens to prevent a sale of the property by the seller to another buyer. Can the buyer record a lis pendens?

ANSWER: No. First, a lis pendens (Latin for "pending litigation") cannot be recorded without a lawsuit being filed, such as a lawsuit demanding specific performance of the contract. Second, unless there is a dispute as to title (or ownership) of the property, the buyer is not even entitled to file a lawsuit and record a Notice of Lis Pendens. The penalty for wrongfully recording a lis pendens can be $5,000 or treble damages, whichever is greater. A.R.S. §33-420(A).

Purchaser of leased property is obligated to honor the rights of tenants in possession

FACTS: The buyer closed escrow on a single-family residence that was leased to a tenant. Upon closing, the tenant refused to vacate the premises insisting instead that the buyer was obligated to honor the seven months remaining on the lease term.

ISSUE: Was the tenancy terminated upon the sale of the property to the buyer?

ANSWER: No.

DISCUSSION: A buyer acquires title subject to tenants in possession. Neal v Hunt, 112 Ariz. 307, 541 P. 2d 559(1975); See also Martinesi vs. Tidmore, 158 Ariz. 53, 760 P. 2d 1102, (App. 1988). (Purchaser of real property takes title "subject to" existing option agreement.) In other words, a tenancy is not terminated in connection with a traditional sale of real property. The buyer is therefore legally obligated to honor the lease as written. Here, provided that the tenant meets his/her obligations under the lease, the tenant is entitled to occupy property for the seven months remaining on the lease term.

Seller cannot immediately cancel based on bounced earnest money check

FACTS: The buyer and seller executed an Arizona REALTOR® Residential Resale Real Estate Purchase Contract, which required a $25,000 earnest money deposit. The buyer delivered a check for $25,000 to escrow but it was returned NSF. The seller received another offer for more money and wants to immediately cancel the existing contract based on the failure to deposit the earnest money as required.

ISSUE: May the seller immediately cancel the contract based on the NSF check for the earnest money?

ANSWER: No.

DISCUSSION: Section 7a of the Arizona REALTOR® Residential Resale Purchase Contract provides, in part: "A party shall have an opportunity to cure a potential breach of this Contract. If a party fails to comply with any provision of this Contract, the other party shall deliver a notice to the non-complying party specifying the non-compliance." Delivering an earnest money check that was returned NSF constitutes the buyer failing to comply with the agreed upon terms. As such, the seller must first issue a three day cure notice. The seller may cancel the contract only if the buyer does not remedy the potential breach by providing good funds within the three-day cure period.

Use the unfulfilled loan contingency notice when a loan is denied

FACTS: Buyer entered into a contract with seller. Buyer disclosed to seller via the Pre-Qualification Form that he needed to refinance a VA loan on another property in order to close on the subject property by July.

Buyer was subsequently notified by the lender that the VA refinance would not be completed by July, and therefore, the lender was denying the loan.

ISSUE: Should buyer deliver notice of cancellation because he now cannot qualify for the loan as described in the Pre-Qualification Form via the Buyer Inspection Notice Seller's Response ("BINSR"), or via the Unfulfilled Loan Contingency Notice?

ANSWER: The Unfulfilled Loan Contingency Notice.

DISCUSSION: The BINSR is a document utilized to give notice to a seller of disapproved items relating to the property.

Here, the buyer is not disapproving of the property. He is no longer going to qualify for the loan described in the Pre-Qualification Form. Therefore, the proper form for cancellation would be the Unfulfilled Loan Contingency Notice.

Appraisal contingency may begin again

FACTS: A buyer and seller entered into a Residential Resale Real Estate Purchase Contract (the "Contract"). During the escrow process, the buyer received notice from her lender that the property appraised for the contract price. The buyer therefore notified the seller that the property had appraised for the contract price.

However, ten (10) days before close of escrow, the underwriter notified the buyer that the appraisal had been flagged for review. Within three (3) days, the buyer was notified that the appraisal value had been decreased during the review. The buyer now notifies the seller that she cannot qualify and, pursuant to section 2I of the Contract, is electing to cancel based on the appraisal contingency.

ISSUE: Can the buyer cancel based on section 2I of the Contract during an appraisal review?

ANSWER: Probably.

DISCUSSION: Section 2I of the contract reads: "If the Premises fail to appraise for the purchase price in any appraisal required by lender, Buyer has five (5) days after notice of the appraised value to cancel this Contract and receive a refund of the Earnest Money or the appraisal contingency shall be waived, unless otherwise prohibited by federal law."

During an appraisal review, the buyer received a new notice of value, therefore, the buyer likely had five (5) days from the notice of the new value to cancel or waive the contingency. If the buyer fails to cancel within five (5) days, then the buyer must proceed with the Contract.

Advertising of two-year builder warranty is misleading

ISSUE: In the MLS listing of a new home the listing broker under "Remarks" section, stated "two-year builder warranty." There is, however, no specific two-year builder warranty by the builder. The Registrar of Contractors ("ROC") does require, however, that any construction defects be corrected by the builder within two years after completion of the home, or the builder's license can be revoked or suspended. A.R.S. § 32-1155. Is the advertising in the MLS of a "two-year builder warranty" misleading?

ANSWER: Probably. A.A.C. R4-28-502(C) states that a real estate licensee "....shall not misrepresent the facts or create misleading impressions." The right to file a claim with the ROC against a contractor within two years after completion of the home is not technically a warranty, and the builder is not warranting anything not otherwise required by law. A builder can expressly furnish to the buyer a warranty, typically one or two years, which is similar to an express warranty by a manufacturer of automobile tires or batteries. In addition, by law there is an implied warranty of proper construction by the builder for up to eight years after completion of the home. A.R.S. § 12-552(A). Therefore, unless the builder is actually giving an express warranty of two years, the advertising in MLS of a "two-year builder warranty" is probably misleading.

Buyer cannot unilaterally change financing terms in a contract to the detriment of seller

FACTS: The buyer and seller executed an Arizona REALTOR® Residential Resale Real Estate Purchase Contract (Contract). The buyer waived the appraisal contingency but was going to obtain a conventional loan. While escrow was pending, the buyer switched to an FHA loan which now requires that an appraisal be conducted as part of PTD conditions.

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The buyer now claims that the contract has an appraisal contingency based on the new loan program.

ISSUE: Is the buyer unilaterally entitled to include an appraisal contingency since the loan program has changed?

ANSWER: See discussion.

DISCUSSION: Section 2k of the Contract states, "Buyer shall immediately notify Seller of any changes…and shall only make any such changes without the prior written consent of Seller if such changes do not adversely affect Buyer's ability to obtain loan approval without PTD conditions, increase Seller's closing costs, or delay COE." In other words, a buyer must provide notice to the seller of any change to buyer's financing terms and if the change affects the buyer's ability to obtain financing, the seller must consent. Here, the seller's consent is required because the change in the loan program affects the buyer's ability get the required financing.

Because the seller has not consented, the original contract terms still apply. In other words, the appraisal is still waived. As a result, any loan denial based on the appraised value of the property will not provide the buyer a legal justification to cancel and receive the return of the earnest money.

Cancellation under 6J remains in effect once given

FACTS: The buyer sent a BINSR to the seller with the following language, "Seller shall agree to extend the inspection period for five (5) more days. If the seller does not agree to extend the inspection period by five (5) days, then Buyer elects to cancel the contract." The Seller did not extend the inspection period.

The buyer now wants to proceed with the purchase of the house.

ISSUE: Is the contract cancelled?

ANSWER: Yes.

DISCUSSION: Although the BINSR did not meet the requirements of Section 6j, since the Seller did not extend the inspection period, the buyer's cancellation shall remain in effect. However, if seller would like to proceed with the sale, the parties can mutually agree in writing to do so.

Best practice tip: Use an addendum to extend the inspection period, not the BINSR.

An HOA can restrict a landlord's duty to mitigate damages

FACTS: After only two months of occupancy, a tenant breached his 12-month lease. The landlord, following A.R.S. §33-1305, attempted to mitigate the tenant's damages but the only applicant that applied wanted a six-month lease. However, the HOA rule is that leases must be for one-year or longer.

ISSUES: Do the HOA's CC&Rs override the duty to mitigate?

ANSWER: Probably.

DISCUSSION: A.R.S. §33-1305(A): The remedies provided by this chapter shall be so administered that the aggrieved party may recover appropriate damages. The aggrieved party has a duty to mitigate damages.

Although the landlord is trying to follow the law and mitigate the tenant's damages, the landlord is bound by the HOA's CC&Rs, which only allow one-year leases. As such, the landlord cannot rent to the six-month applicant.

As a best business practice, the landlord should note in every lease entered into on properties within this particular HOA, that mitigation is limited to one-year leases pursuant to the CC&Rs.

Independent legal counsel should be consulted.

ABOUT THE AUTHOR

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Richard V. Mack is a partner at Zelms, Erlich & Mack, which provides the Arizona REALTORS® Legal Hotline service. He is a State Bar of Arizona Board Certified Real Estate Specialist and AV rated by Martindale Hubbell. He has also been designated as a Southwest Super Lawyer. Mr. Mack practices commercial litigation with an emphasis on real estate litigation. He is admitted to practice in the state and federal courts of Arizona and before the 9th Circuit Court of Appeals. Mr. Mack graduated Magna Cum Laude from Southwestern College in Winfield, Kansas with a Bachelor of Business Administration, with an emphasis in economics, and received his Juris Doctor from the University of Arizona.

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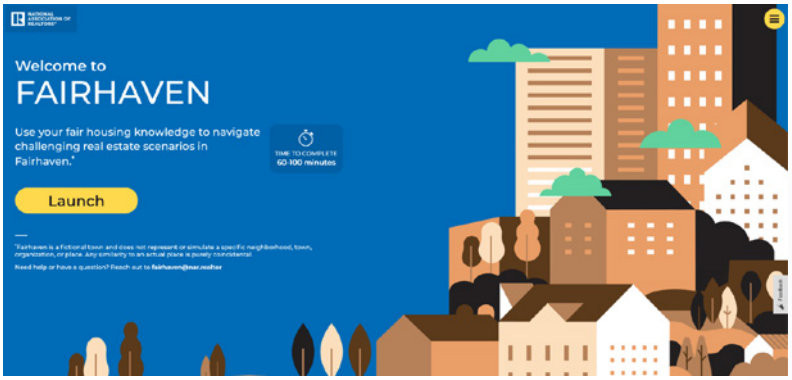

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