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NEWSLETTER

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Also, if you have a topic you would like me to analyze and discuss, please email me and I would be glad to consider it in a future Newsletter

June 2016: The Physical Inspection Contingency Paragraph

This Newsletter will discuss Paragraph 8 of the Greater New Haven Board Real Estate Contract—the Physical Inspection Contingency paragraph.

There has been a great deal of confusion as to the interpretation of this paragraph and its operation and function during the physical inspection contingency period.

Let me state at the outset that Paragraph 8 is confusing and should be clarified by the Bar Association and the Board. However, until that is accomplished, we all must live with it as written. My purpose will be to shed light on the paragraph in order to render it understandable and workable.

An important general rule of law relating to the interpretation of a contract is that a court will interpret a contractual clause to give it a logical and reasonable construction in order to carry out its intent. Also, if there is an apparent conflict in meaning within the terms of a contract, a court will attempt to reconcile the conflict so that the intent of the contract may be carried out. My purpose in this Newsletter is to offer a logical, fair and reasonable interpretation of the words of Paragraph 8.

Paragraph 8(a).

This is the easy clause. It merely states that the Buyers must complete their inspections and report the results to the Sellers on or before a specific date and time, let's say **5:00pm on June 20, 2016**. Although it appears that a literal reading of this clause requires the Buyers to send the entire inspection report to the Sellers, the common practice of most realtors is to send to the Sellers the results of the report that involve the property's deficiencies.

If the Buyers are satisfied with the results of the inspection, then there is no need to analyze the remainder of Paragraph 8 and logic dictates there is no need to give the inspection report to the Sellers since the Buyers are satisfied with its conclusions. What happens, however, if the buyers are not satisfied with results of the inspection? In such cases, Paragraph **8(b)** becomes very important.

Paragraph 8(b).

Customarily, a realtor inserts a date 2-3 days after the date in paragraph **8(a)**. Therefore, if the date in **8(a)** is June 20, 2016, the date is **8(b)** would be June 22 or 23, 2016.

If the Buyers are not satisfied with the results of the physical inspection, the operation and interpretation of **8(b)** becomes critical. There are five sentences in Paragraph **8(b)**. Let's look at each one of them and see how each operates in conjunction with the others.

- A. Sentence 1: *Seller agrees to permit Buyer's designees.....* This sentence allows the Buyers to have access to the property to conduct the inspection up to and including the date and time specified in **8(a)**.
- B. Sentence 2: *If Buyer is not satisfied with the physical condition....* I interpret this clause to mean that if the buyers are so dissatisfied with the results of the physical inspection that they wish to terminate the contract without negotiating a compromise with the Sellers, the Buyers must notify the Sellers in writing on or prior to the **8(a)** date that they are not satisfied with the physical condition of the property and are terminating the contract. **I CALL THIS OPTION TO TERMINATE: THE DISSATISFACTION TERMINATION. This option to terminate must be exercised by the 8(a) date.**
- C. Sentence 3: *Buyer may give Seller the option to correct.....* If the Buyers are dissatisfied with the results of the inspection, they may, instead of terminating the contract, give the Sellers the opportunity to correct the conditions or provide a monetary credit for the deficiencies.
- D. Sentence 4. *Should Buyers elect to terminate this Agreement or Seller is unwilling* I believe the confusion concerning Paragraph **8(b)** among lawyers and realtors is the attempt to reconcile the meaning of this sentence with the wording of Sentence 2. Both sentences 2 and 4 contain Buyer Options to Terminate which may be exercised at different times!
The culprit is the 8th word in the 4th sentence: "OR".
If we change "OR" to "IF" then the sentence makes perfect sense. The Buyers would then have the right to..... "terminate the Agreement **if** the Sellers are unwilling to correct any unsatisfactory conditions". That right to terminate must be exercised by the **8(b)** date. **I CALL THIS OPTION TO TERMINATE: THE UNWILLING TO CORRECT TERMINATION. This option to terminate must be exercised by the 8(b) date.**
This sentence presupposes that the Buyers have given the Sellers notification of the results of the inspection within the time frame of **8(a)** and have set forth in a letter or other mode of communication what corrective conditions the Buyers wish the Sellers to make to the property.
- E. Sentence 5. *If Buyers fail to notify Sellers.....* The contingency is waived if the Buyers fail to notify the Sellers of their exercise of either option to terminate.

Practical considerations:

1. The contract form anticipates that dates will be inserted in **8(a)** and **8(b)**. However, as a practical consideration, realtors often put in words such as "**ten calendar days after the date Sellers sign the contract**". If the realtor prefers to follow this practice, I believe it is advisable to use "calendar days" to avoid the potential confusion of what is a business day or holiday. Also, use the word "after" in the phrase to ensure that the countdown begins the day after the Sellers sign the contract
2. If the Buyers send a letter to the Sellers setting forth the physical conditions they wish corrected and there is either no response to the letter or an unsatisfactory response to the letter, the Buyers, to protect the deposit, must thereafter elect in writing to terminate the contract by the **8(b)** date. If on the other hand there are serious negotiations regarding the corrective actions, the Buyers and Sellers should agree in writing to extend the **8(b)** date.
3. The failure of the Sellers to respond to a letter to correct conditions does not obligate the Sellers to correct those conditions.