

MAKING SPECIAL PROVISIONS WORK FOR YOU

presented by

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The purpose of this presentation is to examine selected special provisions in real estate earnest money contracts. The examples herein are meant to assist brokers and agents in identifying and providing for special situations; no attempt is made to cover all scenarios that could arise. Before drafting any contract, the particular circumstances of the parties should be considered and analyzed.

I. Offer and acceptance

Initial offer and counteroffers

“This offer is open for acceptance until 5:00 p.m., on Friday, June 25, 1999. It may be accepted by fax or hand delivery.”

II. Septic System & Wells

Basic Septic provision

“At the time of closing, Seller, at his expense, shall transfer a licensed septic system to Buyer. The septic system shall be licensed to accommodate _____ (i.e. a family of six). All costs to bring system in compliance for Buyer’s use shall be borne by Seller.”

Water well provision

“Within five business days after the effective date of this contract, Seller shall deliver to Buyer the well logs, if any, and a water quality assessment performed by the Upper Guadalupe River Authority, current within 30 days, for the well located on the property. Buyer may terminate this contract if, in its sole discretion, it determines the water quality is not within acceptable parameters.”

III. Property Condition

As Is Disclaimer - inserted in contract in 10-point bold face type*

“As a material part of the consideration for this Agreement, Seller and Buyer agree that Buyer is taking the property “AS IS” with any and all latent and patent defects and that there is no warranty by Seller that the Property is fit for a particular purpose. Buyer acknowledges that it is not relying upon any representations, statements, assertions or non-assertions by the Seller with respect to the Property condition, but is relying solely upon its examination of the Property. Purchaser takes the Property under the express understanding there are no express or implied warranties (except for limited warranties of title set forth in the closing documents). Provisions of this section shall survive the closing.”

“As Is” Provision - in amendment to contract after inspections and with price reduction.

“After careful inspection of the house, and based solely on that inspection, Buyers feel the house will need repairs or on-going maintenance as indicated by the attached inspection report. In consideration of Seller’s agreement to reduce the sales price, Buyers agree to take the home AS IS, WITH ALL CONTINGENCIES REMOVED.”

* See attached edition of “Letter of the Law”

Oak Wilt / Oak Decline

“Buyer acknowledges that Oak Wilt and Oak Decline are prevalent in Kerr County, Texas, and that the property may be affected. Buyer waives any recourse against Seller for the effects of oak wilt and/or oak decline on the property. This provision shall survive closing.”

IV. Personal Property

Requiring Bill of Sale

“At the time of closing, Seller shall deliver to Buyer a Bill of Sale conveying and warranting title to the _____ (describe property) located on the real property described herein.

Bill of Sale in FHA contract.

Add to the paragraph above, “Buyer shall pay Seller additional consideration of \$_____ for the property, at the time of closing.”

V. Recourse for Breach

Limiting Recourse for Seller

“In the event of default by Buyer, Seller’s only recourse for breach of this contract shall be to cancel this contract and retain the earnest money, notwithstanding anything herein to the contrary.”

VI. Buyer and Seller Representations

Seller representations

“Seller represents and warrants that the property (choose as applicable: 1) is not located in the 100 year flood plain, as designated by the most recent maps of the Federal Emergency Management Association; 2) is properly zoned for its current use; 3) is/is not platted; 4) is free of encroachments not otherwise allowed by variance.

Buyer representations

“Buyer acknowledges that the property (choose as applicable: 1) is located in the 100 year flood plain; 2) will have to be platted prior to closing at Seller’s/Buyer’s expense; 3) is not zoned for Buyer’s intended use and that this contract may be terminated by Buyer, and the earnest money refunded to him, if prior to closing Buyer is unable to obtain permission from the City of Kerrville to use the property as Buyer intends.

VII. Title Commitment issues

Accepting Utility Easements

“The list of permissible exceptions in paragraph 6A of this contract shall include easements for distribution of utilities.”

Accepting visible and apparent easements

“The list of permissible exceptions in paragraph 6A of this contract shall include visible and/or apparent roadways or easements across the property, provided, however, that encroachments are not waived.”

Receipt of commitment and survey

“The commitment and survey required herein shall be considered delivered to Buyer upon actual delivery to him, his agent or his attorney.”

OR

“The commitment and survey required herein shall be delivered to Buyer by the title company named herein, and shall be considered delivered to Buyer upon his actual receipt.”

“The title company named herein shall provide Buyer with copies of all matters appearing in Schedule B of the commitment, at the time the commitment is delivered. Costs of copies, if any, shall be borne by _____.”

VIII. Miscellaneous Suggestions

Time is of the essence

“Time is of the essence in this contract”

For a provision to survive closing

“This provisions shall survive closing”

Appraisal condition

“Buyer reserves the right to terminate this contract and receive a full refund of the earnest money if the property fails to appraise for an amount acceptable to Buyer’s lender.”

Limiting seller liability

“In the event Buyer terminates this contract under the provisions provided herein, the return of the earnest money deposited by Buyer shall release Seller from any and all claims arising under this contract.”

Walk-through contingency

“Within 48 hours prior to closing, Seller shall provide access to the property in order to allow Buyer to inspect to determine if contingencies required by this contract have been met.”

Contracts contingent on Buyer’s sale of other property

“Notwithstanding anything herein to the contrary, the effective date of this contract for purposes of the time frames stated herein shall be either 1) the date a contract on Buyer’s property, described in the attached addendum, has been escrowed (Buyer’s receipt of a contract on his property does not waive the contingency described in the attached addendum); or 2) the date the contingency for sale of other property by Buyer is waived; whichever occurs first. Buyer shall notify Seller in writing within 2 business days of escrowing an earnest money contract on Buyer’s property.”

NOTE: Do not set the closing for a specific date. Instead make it 30, 45, etc. days from the effective date.

- Reject offer on its face and request counter offer on specific terms
- Revise offer but do not sign it. Return to offeror. If offeror agrees with changes, sign and return to offeree for his acceptance. This course of events allows the offeree to remain free from obligation until he gets a contract he finds acceptable.
- Get deed before completing a listing agreement.
- Always use seller financing addendum when there is an owner finance.
- Requesting a response to an offer may not make it void after the stated time. Instead, say when the offer will expire.
- Define closing costs, especially when one party is paying another’s. In the alternative, state a dollar limit.
- Make sure your time frames don’t work against each other. (i.e. loan approval within 30 days, closing in 31 days.
- Do not set closing date on weekends or holidays.
- Instead of marking up contract each time the terms change, consider creating new contracts, or using an addendum that supersedes contrary clauses in the contract.
- Be definite in any requirement as to what it is?, when is it due?, who is responsible?, to whom is it to be delivered?, what is the recourse if it is not done? (i.e. Prior to closing (when is it due), Seller (responsible party) shall purchase and deliver to Buyer (delivery) an American Homeshield Home Warranty (what). Seller’s failure to do so shall be a breach of this contract).