

Here's How to Play the Inspection Game on Both Sides of a Residential Transaction

A common strategy for winning a bidding war — and I'm seeing more bidding wars nowadays, including on our own listings — is to "waive inspection." Another strategy is to waive appraisal objection, but I'll deal with that in a future column.

There are three inspection deadlines in the state-mandated contract to buy and sell a home: inspection **termination**, inspection **objection** and inspection **resolution**.

In composing a contract to purchase a home, the buyer might decide to sweeten his or her offer by eliminating the inspection contingency. This is obviously attractive to the **seller**, but "buyer beware!"

For starters, the contract states that the buyer can exercise one or the other — inspection **objection** or inspection **termination**, but not both. As stated in Section 10.3.1, "Buyer's Right to Terminate... expires upon delivery of an Inspection Objection to Seller."

1) Let's say a buyer submits an inspection **objection** with a list of requested repairs. If the seller replies with an inspection **resolution** document agreeing to every demand on the list, the buyer is bound to sign it (I believe) as a matter of good faith, and once both parties have signed it, they are effectively "past inspection."

2) Now let's say a buyer submitted a contract that only provides for inspection **termination**. The buyer still has the right to inspect every conceivable component or feature of the property — even whether there's an externality such as a noisy neighbor or construction project nearby. If he finds that there's a major problem (such as a sewer line collapse), the buyer's agent, before submitting a Notice to Terminate, should notify the listing agent that the buyer intends to terminate because of it and, guess what? The listing agent will explain to the seller that this issue exists and must be disclosed to a future buyer, likely convincing the seller to say, "I'll fix that problem if you don't terminate."

Voila! You **voiced** an objection, and the seller agreed to a solution, which would be embodied in an amendment to the contract rather than an inspection resolution.

The good faith provision of the contract (Section 28) says that both buyer and seller must act in good

faith with regards to sections, including inspection, which have termination provisions, and the Colorado Real Estate Commission has instructed us that a buyer must use any opportunity to terminate within the contract only for the reason stated in that section of the contract.

In other words, while you can terminate for **any** reason (including buyer's remorse) under the inspection provision, which merely states that the buyer has found the property's condition unsatisfactory "in Buyer's sole subjective discretion," the buyer cannot use other termination deadlines (such as for title, HOA documents, insurability, etc.) to terminate for an inspection issue identified later on.

In case you're wondering, a buyer doesn't have to physically inspect the listing to terminate under the inspection provision. The contract can be terminated "due to any unsatisfactory condition."

Upon receiving a purchase contract which waives inspection objection but not termination, a good listing agent will warn his seller that a objection could still be voiced, and a good buyer's agent might advise the buyer that waiving objection isn't as final as it may sound.

One way to make a contract which waives inspection objection but not termination more attractive to the seller is one that was included in the winning contract on our own Arvada listing featured a couple weeks ago. The buyer included an earnest money deposit that was higher than the minimum specified in the MLS **and** stated under additional provisions that \$10,000 of it would be non-refundable upon acceptance of the contract by the seller. I wouldn't advise this strategy without a detailed inspection (perhaps with a professional inspector) during a scheduled showing prior to submitting a contract with this provision. The buyer could still terminate but would be out \$10,000, and it might reduce the incentive for the seller to say, "Hey, I'll fix that!"

Another common provision in a competitive bidding situation is for the contract to limit the extent of demands to be included in buyer's inspection objection. For example, "health and safety items only," or "only issues requiring over \$2,000 to mitigate or repair."

In responding to a list of inspection objections, it's increasingly common, especially among elderly sellers, to offer a financial concession or a price reduction instead of fixing certain items. One drawback to this approach, however, is that if the buyer is financing the purchase with a mortgage, the lender won't want to see that a serious problem is not being addressed prior to closing. This is completely understandable. And it's hard to keep that information from the lender without being guilty of mortgage fraud, which is a federal offense.

A strategy I favor in that case is to have the seller pre-pay for the repair at closing, with the title company writing a check payable to a vendor for the repair out of the seller's proceeds from the transaction. Alternatively, the title company might escrow the money for said repair, giving the buyer an opportunity to shop for the best vendor.

Sometimes not all inspections can be completed by the deadline for submitting an inspection objection. The buyer could ask for an amendment to the contract extending the objection deadline, but there's a simpler solution that I have employed. Let's say you don't have the radon results prior to the objection deadline. I would insert in my buyer's inspection objection the following sentence: "In the event that radon is determined by the inspector to be above the EPA action level, seller shall mitigate it using a licensed radon mitigation company."

The purpose of inspections is to discover "hidden defects," but sometimes a buyer will ask for repair of something that wasn't hidden at all, such as a cracked driveway or old carpeting. My suggestion as the seller's agent is to deny those demands outright, since they should have been (and probably were) taken into consideration when the buyer chose to submit their contract.

Now let's say the seller submits an inspection resolution that ignores

too many of the buyer's demands. If both parties don't sign a resolution prior to the resolution deadline, the contract automatically expires. Remember, this is a negotiation, just like the negotiation which got the home under contract. Either party, not just the seller, can submit an inspection resolution, so the procedure for "countering" an unacceptable inspection resolution is to write another one, back and forth if necessary.

Getting a backup contract from another buyer can play a role in handling inspection demands. With a backup contract in place, my seller can share the buyer's demands (plus the full inspection report) with the backup buyer and ask if they would accept the house as-is without those demands for repairs. This creates a no-lose situation for my seller. I can tell the buyer that our backup buyer will accept the house as-is if they terminate. The buyer will then likely withdraw their inspection objection, but if they decide to terminate, that has the same effect. Either way, it's a win for my seller, which is what being his "agent" requires of me.

This column reflects over two decades of experience dealing with inspection issues on both sides of a real estate transaction — and I have not covered all the scenarios one might encounter.

If nothing else, I hope you come away from reading this week's column with the idea that having an experienced agent, such as those of us at Golden Real Estate, on your side in a real estate transaction is the best way to achieve the optimal outcome. Our contact info is below.

Inspection Is Buyer's Responsibility

Now and then I see an inspection objection which calls for the seller to hire a specialist, such as an engineer or electrician, to inspect this-or-that and to fix any problem discovered, but the contract specifically says that inspection is the responsibility and expense of the buyer.



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