



Legal Update

A WRA Publication Exclusively for the Designated REALTOR®

Inside This Issue

2

Home Inspection Requirements

3

Customizing a Home Inspection

4

Provisions in the Offer to Purchase

4

Inspection Contingency

7

Buyer/Seller Strategies

8

Inspection Contingency Hotline Q&A

12-13

Home Inspection Requirements Chart

14-15

Addendum to Home Inspection Report

Home Inspections

The Inspection Contingency is one of the most important, and often one of the most frustrating, provisions in the residential offer to purchase. The Inspection Contingency permits the buyer to retain a home inspector to provide a home inspection report. Upon receipt of the report, the buyer may decide whether to ask the seller to repair some or all of the serious defects revealed in the home inspection report, or whether to accept the home in its existing condition. The seller then decides whether to proceed with the requested repairs. If the seller does not agree to cure the defects that the buyer finds objectionable, the offer may become null and void.

Buyers see the provision as an opportunity to have the seller repair the defects found in the home. Sellers, on the other hand, may see it as a hurdle to be cleared or as a chance to end the offer. Licensees must thoroughly understand the home inspection process and be prepared to assist the parties in arriving at a mutually acceptable solution to the buyer's property defect concerns.

Implementation of the Inspection Contingency requires the services of a Wisconsin registered home inspector who conducts a written home inspection and renders a home inspection report. While home inspectors have been routinely providing home inspection reports in real estate transactions for years, only recently have home inspectors become subject to regulation the by Wisconsin Department of Regulation and Licensing (DRL). Licensees, generally, are only beginning to understand

how the DRL's regulation of home inspectors impacts the provision of home inspection services.

This *Legal Update* examines the DRL regulations that dictate the parameters of the home inspection process. The *Update* reviews the services that home inspectors can and cannot perform, the home components and improvements that may be inspected, and the criteria for the home inspection report. Suggestions are offered for influencing the content of the home inspection in order to maximize utility for buyers. The need for engaging other experts and specialists is also discussed.

The *Update* then turns to an examination of the Inspection Contingency and the use of the notice and amendment forms in implementing the contingency. REALTORS® are provided with practice pointers for the negotiations that often follow the rendering of the home inspection report, and with a selection of *Legal Hotline* questions and answers about the use of the Inspection Contingency.

Home Inspection Regulations

A home inspector is required to perform a reasonably competent and diligent home inspection to detect observable conditions. "Home inspector" means an individual who, for compensation, conducts a home inspection. A "home inspection" is a process by which a home inspector examines observable systems and components of residential real estate improvements that are readily accessible. A "home inspection report" is the written opinion of a home inspector concerning the condition of residential real estate structures and

Contacts

EDITORIAL STAFF

Author

Debbi Conrad

Production

Sonja Penner
Elizabeth Hicks
Rick Staff
Debbie McNelly

ASSOCIATION MANAGEMENT

President

Dan Lee, CRS, GRI

Executive VP

William E. Malkasian, CAE

ADDRESS/PHONE

The Wisconsin
REALTORS® Association,
4801 Forest Run Road,
Suite 201, Madison,
WI 53704-7337
(608)241-2047
1-800-279-1972

LEGAL HOTLINE:

Ph (608) 242-2296

Fax (608) 242-2279

Web: [www.wra.org/
member/legalhotlineq.htm](http://www.wra.org/member/legalhotlineq.htm)

The information contained herein is believed accurate as of 10/13/99. The information is of a general nature and should not be considered by any member or subscriber as advice on a particular fact situation. Members should contact the WRA Legal Hotline with specific questions or for current developments.

Reproduction of this material may be done without further permission if it is reproduced in its entirety. Partial reproduction may be done with written permission of the Wisconsin REALTORS® Association Legal Department.



WISCONSIN
REALTORS®
ASSOCIATION © 1999



improvements, including the mechanical and structural components contained therein. The parameters of that inspection are specified in Chapters RL 131 and 134 of the Wisconsin Administrative Code (effective August 1, 1999), and in sections 440.97 - 440.979 of the Wisconsin Statutes.

Home Inspection Requirements

The home inspector is only required to inspect those improvements, installed systems, and components listed in Wis. Admin. Code § RL 134.03, and then only if they are present on the property at the time of the home inspection and readily accessible. The chart on pages 12-13 of this *Update* lists those items that a registered home inspector is required to inspect and address in the home inspection report, and those items that a home inspector is not required to inspect.

A reasonably competent and diligent home inspection is not required to be technically exhaustive. Under § RL 134.02, a home inspector is not required to:

- Offer a warranty or guarantee of any kind.
- Calculate the strength, adequacy, or efficiency of any property component or improvement.
- Enter any area or perform any procedure that may damage any property component or improvement, or enter any area or perform any procedure that may be dangerous to the home inspector or to other persons.
- Operate any property component that is inoperable.
- Operate any property component that does not respond to normal operating controls.
- Disturb insulation or move personal items, furniture, equipment, vegetation, soil, snow, ice, or debris that obstructs access to or visibility of an improvement or component.

- Determine the effectiveness of a component or system that was installed to control or remove suspected hazardous substances.
- Evaluate acoustic characteristics of a property component.
- Project or estimate the operating costs of a property component.
- Predict future conditions, including the failure of a property component.
- * Inspect for the presence or absence of pests, including rodents, insects, and wood-damaging organisms.
- Inspect cosmetic items, underground items, or items not permanently installed.
- Inspect for the presence of any hazardous substances.
- Disassemble any property component, except for removing an access panel that is normally removed by an occupant.

However, a home inspector may:

- Report observations or conditions in addition to those required by rule.
- Exclude a property component from the inspection, if requested by the client.
- Engage in an activity that requires another credential also held by the home inspector.

Home Inspection Report

After completing a home inspection, a home inspector must submit a written report to his or her client that lists the items that the home inspector was required to inspect, lists the items that the home inspector has inspected, describes the condition of the inspected items, describes the condition of any item that, if not repaired, will have a significant adverse effect on the life expectancy of the item, and lists any material adverse facts that a home inspector has knowledge of or has observed.

The home inspector is not required to report on the life expectancy of any items, the reason why a major repair is necessary, the method for making any repair or correction, the materials needed for any repair or correction, the cost of any repair or correction, the suitability of an improvement for a specialized use, and whether improvements comply with applicable regulatory requirements. A home inspector may not report, in writing or verbally, on the market value or marketability of a property, or advise whether a property should be purchased.

Customizing a Home Inspection

These home inspection rules seem rather limiting, and make it appear that a comprehensive home inspection is virtually unobtainable. However, the restrictions actually only state the minimum standards for a home inspection. The home inspector's client, often a homebuyer, can customize the home inspection by requesting that additional items be included in the home inspection. Where appropriate, the client may also ask the home inspector to exclude certain of the required inspection items. For example, a buyer may decide to have a furnace contractor inspect the furnace and ask the home inspector to exclude all furnace components from the home inspection to avoid duplication of services and charges. Once this potential for modifications is recognized, the home inspection rules become flexible, serving only as general guidelines for the content of the inspection.

These minimum standards serve as the base level for home inspectors with different backgrounds, different education and training, and different levels of experience. A home inspector is presumed to have general knowledge in many different areas. Home inspectors are not expected to be specialists or experts, although some may have credentials in other

fields and some may have specialized knowledge or expertise due to past job experience. For example, one home inspector may have been an electrician and another may have been a roofer or a general contractor. Thus the minimum standards are reasonable given the differences in background and prior job experience.

The services that home inspectors routinely offer will likely exceed the minimum standards. Because home inspectors have different backgrounds, some home inspectors may be stronger in some areas and have more general knowledge in others. Many home inspectors, on the other hand, may have a great deal of insight into the causes of typical problems and the ways in which the problems may be corrected, based upon the home inspector's experience. Accordingly, the customary home inspection services offered to the public may be different for each home inspector.

Although in the past this has not often been done, the buyer or other consumer may attempt to negotiate additions or exclusions from a particular home inspector's customary home inspection service, when he or she engages the home inspector. The consumer may start by asking the home inspector for his or her credentials or resumé of experience, and for a listing of the components, improvements, and other items included in the home inspector's standard home inspection. Then a list of the consumer's desired additions and exclusions may be submitted to the home inspector. If the consumer does not wait until the last minute to engage a home inspector, the consumer may be able to shop around to determine which home inspector is willing to provide the desired services at the most reasonable price.

Addendum To Home Inspection Report

Any list of desired inspection additions and exclusions would best be provided to the home inspector in writing. A written form like the Addendum to Home Inspection Report (Addendum) appearing on pages 14-15 of this *Update* may be used. Members may copy and use this form, or use it as a model for creating their own form.

For example, the home inspection rules do not require home inspectors to inspect cosmetic items. This may mean, for example, that the registered home inspector is not required to inspect the paint and the woodwork because they may be considered cosmetic. To request that these items be included in the inspection, however, the buyer may check the box for those items on the Addendum or put them on his or her own list of inspection additions. Some home inspectors may be willing to include items like the condition of the carpeting and painted walls in an overall interior appearance rating, while others may decline to evaluate the appearance of cosmetic items. While it may seem a bit strange to ask the home inspector to inspect items like paint and carpeting, the buyer otherwise will likely be left to judge these items for him or herself. It may be difficult for buyers to focus on such details when they are paying more attention to the property's major features like the number of bedrooms, room dimensions, etc.

The home inspection rules also do not require home inspectors to inspect items not permanently attached. This may mean that the home inspector will not inspect the carpet and appliances because they are not permanently attached. Buyers may find that home inspectors are willing to test basic appliance operation (e.g., do the stove burners get hot, etc.). For items like appliances, it may be important for the buyer to ascertain if the items are included in

the offer before asking the home inspector to inspect them.

For some other items like the chimney or the furnace, the buyer may wish to engage an appropriate expert, such as a chimney sweep or a furnace contractor (assuming that the inspector does not have expertise or credentials in these fields). Accordingly, the buyer would exclude the chimney or the furnace from the home inspection in order to avoid duplication of services and costs. The buyer may also want to retain specialists or other qualified service people to inspect additional items that the home inspector would prefer not to include in the home inspection. The inspection by the expert or specialist of a particular component may be indicated in the blank line at the beginning of the Inspection Contingency in the offer.

Homebuyers may also opt to have a home energy audit performed by a local utility company or other provider such as Home Performance, which has an inspector information line at 800/677-8423. Those buyers may want components relating to energy efficiency deleted from the home inspection. Energy efficiency information may also be obtained online from The Energy Connection at <http://www.energy.com>.

Provisions in the Offer to Purchase

The buyer may also wish to include certain additional provisions in the offer to purchase to preserve the buyer's inspection rights and make the inspection as effective as possible. To begin with, the buyer may write into the offer to purchase that the seller will permit the buyer to accompany the home inspector, and any other inspectors or testers, as they conduct any inspections, sampling, or testing upon the property. The preprinted offer does not state that the seller must provide access to the buyer, only to the buyer's inspectors.

The preprinted offer does not include any testing provisions, so they must be written in on the blank lines or included in an addendum to the offer. A test is not the same thing as an inspection. A "test" is defined as "the taking of samples of materials such as soils, water, air or building materials from the Property and the laboratory or other analysis of these materials." Testing contingencies should specify the area or materials to be tested, the purpose of the test, any limitations on the testing, and any obligations to restore the property afterwards. Testing includes procedures such as radon testing and soil borings. Any such testing provisions may also include the buyer's right to be present, if desired.

The buyer may also require that the seller move all objects that may impede a home inspector from inspecting and observing particular items or parts of the property. For example, home inspectors often find that crawlspace or attic access is blocked. The buyer and any agents working with the buyer may want to try to note any such areas of the house during showings so that the objects that need to be moved may be specified in the offer. Alternatively, the buyer may provide in the offer that the seller must have a person present during the inspection who is capable of moving objects upon the home inspector's request. Some home inspectors prefer to have the seller available to answer questions that arise during the inspection.

If the property is going to be vacant, the buyer may want to provide that someone will turn on all utilities, including water, electricity, gas, etc. during the inspection.

☛ REALTORS® should help their clients and customers realize that home inspectors operate under minimum standards, that different home inspectors may provide different levels of service, and that consumers may request that

home inspectors add or delete items from a home inspection. Home inspectors may not be used to altering their standard home inspection services, but the consumer certainly has the right to ask. If a client or customer needs services beyond what a home inspector is comfortable providing, the client or customer may be encouraged to engage an appropriate expert in addition to the home inspector.

A special thanks goes out to Mark Jankowski from Wisconsin Inspection Consultants who provided a bit of a home inspector's perspective for these materials.

Inspection Contingency

An "inspection" is defined in the 1999 residential offer to purchase as an "observation of the property which does not include testing of the Property, other than testing for leaking carbon monoxide, or testing for leaking LP gas or natural gas used as a fuel source, which are hereby authorized." The offer provides that the seller must permit the buyer and his or her inspectors reasonable access at reasonable times for inspections necessary to satisfy contingency provisions in the offer. The buyer, in turn, must furnish copies of all inspection reports to the seller and the listing broker. The buyer must also promptly restore the seller's property to its original condition after any inspections unless the seller agrees otherwise.

Lines 298-315 of the WB-1 Residential Offer to Purchase provide as follows. Unless otherwise specified, all references to the Inspection Contingency in the following materials refer to the 1999 offer.

☐ **INSPECTION CONTINGENCY:** This Offer is contingent upon a Wisconsin registered home inspector performing a home inspection of the Property, and an inspection, by a

qualified independent inspector, of _____
_____ which discloses no defects as defined below. This contingency shall be deemed satisfied unless Buyer, within ____ days of acceptance, delivers to Seller, and to listing broker if Property is listed, a copy of the inspector's written inspection report(s) and a written notice listing the defect(s) identified in the inspection report(s) to which Buyer objects. **CAUTION: A proposed amendment will not satisfy this notice requirement.** Buyer shall order the inspection and be responsible for all costs of inspection, including any inspections required by lender or as follow-up inspections to the home inspection. **Note: This contingency only authorizes inspections, not testing. (See lines 97 - 110.)**

■ **RIGHT TO CURE:** Seller (shall) (shall not) [STRIKE ONE] have a right to cure the defects. (Seller shall have a right to cure if no choice is indicated.) If Seller has right to cure, Seller may satisfy this contingency by: (1) delivering a written notice within 10 days of receipt of Buyer's notice, of Seller's election to cure defects, (2) curing the defects in a good and workmanlike manner and (3) delivering to Buyer a written report detailing the work done no later than 3 days prior to closing. This Offer shall be null and void if Buyer makes timely delivery of the above notice and report and: (1) Seller does not have a right to cure or (2) Seller has a right to cure but: a) Seller delivers notice that Seller will not cure or b) Seller does not timely deliver the notice of election to cure.

■ **"DEFECT" DEFINED:** For the purposes of this contingency, a defect is defined as a structural, mechanical or other condition that would have a significant adverse effect on the value of the Property; that would significantly impair the health or safety of future occupants of the Property; or that if not repaired, removed or replaced would significantly shorten or have a significant adverse effect on

the expected normal life of the Property. Defects do not include structural, mechanical or other conditions the nature and extent of which Buyer had actual knowledge or written notice before signing this Offer.

Inspection Contingency Provisions

The Inspection Contingency provides for a home inspection by a Wisconsin registered home inspector. The Inspection Contingency has been designed so that the parties may also require a second concurrent inspection by a qualified inspector of a particular feature or structure, which may be designated in the blank line included in the contingency. For example, the parties may provide for an inspection of the roof by a roofing contractor, along with the home inspection by a Wisconsin registered home inspector.

The Inspection Contingency indicates that "Buyer shall order the inspection and be responsible for all costs of inspection, including any inspections required by lender or as follow-up inspections to the home inspection." This statement clearly specifies that the buyer orders and pays for all inspections under this contingency.

The seller will have a right to cure if the parties fail to make a choice in the Right to Cure subsection of the Inspection Contingency provision. This is a much needed fail-safe measure because of the number of parties who do not make this selection in their offers. The seller will always have the right to cure unless the parties indicate otherwise in the offer. Upon receipt of a notice of defects from the buyer, the seller has 10 days to decide whether the seller will cure the defects to which the buyer objects. However, the seller is permitted to give the buyer notice that the seller will not cure. The result of the giving of this notice is that the

offer will be null and void. Thus the seller can unilaterally and quickly end the offer if given a notice of defects that the seller does not wish to repair.

The Inspection Contingency only authorizes inspections, not testing. Buyers who want, for example, a radon test, need to insert a separate radon testing contingency.

WB-41 Notice Relating to Offer to Purchase & WB-40 Amendment to Offer to Purchase

The notice form and the amendment form are instrumental in the implementation of the Inspection Contingency. The WB-43 Amendment to Contract of Sale/Notice Relating to Contract of Sale has been split into two separate forms with two separate functions: the top portion of the WB-43 has become the WB-40 Amendment to Offer to Purchase and the bottom portion of the WB-43 has become the WB-41 Notice Relating to Offer to Purchase. These two forms have a mandatory use date of January 1, 2000, but are available now.

WB-40 Amendment to Offer to Purchase

As is stated in the caution at the top of the form, licensees are to use a WB-40 Amendment if both parties will be agreeing to modify the terms of an accepted offer. An amendment should be used, for instance, to document any new agreement made by both parties to have the seller repair or cure only some of the items that appeared on the buyer's notice of defects instead of following the "all or nothing" procedure in the Inspection Contingency. Or the WB-40 may be used to specify the method or manner the seller will use to cure a defect, in lieu of the "good and workmanlike manner" standard stated in the Inspection Contingency.

Instead of giving a notice of defects, some buyers may wish to instead pro-

pose an amendment to the contract that suggests an alternate resolution rather than requiring the seller to cure the defects revealed in the inspection report(s). For example, the buyer may propose an amendment to have the seller replace the furnace (instead of having the seller “cure the defect,” i.e. repair the defective furnace) on the WB-40 Amendment. This may be done instead of giving a notice of defects. Such an amendment may state that “This is not a notice of defects. Seller agrees to (cure the following defects in the specified manner) (give the following credit at closing) (establish the following repair escrow): give details, time frames, etc. The Inspection Contingency at lines 298 — 315 of the offer is hereby deleted.” An attachment may be required for this. The seller then has the option to accept or reject the buyer’s proposed amendment or propose a different amendment.

The buyer’s proposal must go on the amendment form because the buyer is trying to get the seller to change the terms of the accepted offer by eliminating the procedures for a notice of defects/election to cure or election to not cure and substituting a different provision dealing with the inspection report defects. This change has no effect unless the seller agrees and signs the amendment that was proposed by and signed by the buyer. If the seller declines to sign, this has no effect on the accepted offer. All that has happened is that a change was proposed and there was no mutual agreement so the offer remains as it was before.

Because this proposed amendment is not a notice of defects, it does not trigger the seller’s right to cure provisions. REALTORS® must be aware that if a proposed amendment is given instead of a notice of defects, the deadline for giving a notice of defects may pass. If no notice of defects is given and the seller does

not accept the proposed amendment, the buyer will have accepted the property as is.

WB-41 Notice Relating to Offer to Purchase

As is stated in the caution at the top of the form, licensees are to use the WB-41 Notice if one party is giving a notice which does not require the other party’s agreement. A notice should be used, for instance, to give a notice of defects, a seller’s notice that he or she has elected to cure the defects stated in the buyer’s notice of defects, or a seller’s notice to the buyer that the seller will not cure.

A notice of defects may be prepared on the WB-41 Notice. This is a unilateral notice that does not require the agreement of the seller. The Inspection Contingency specifically cautions that “A proposed amendment will not satisfy this notice requirement.” Accordingly, REALTORS® must use the right form (the WB-41 or the bottom of the WB-43) and use clear language when they are giving a notice of defects.

The WB-41 should specify that “This is a notice of defects. The buyer objects to the following defects listed in the attached copy of the inspection report.” The defects to which the buyer objects are then listed in the notice. The notice of defects must be accompanied by a copy of the inspection report and must be delivered to the seller and the listing broker by the specified deadline.

The seller will also use the WB-41 Notice if the seller has the right to cure and gives the buyer a notice of the seller’s election to cure (or to not cure) the defects.

Inspection Contingency Practice Pointers

Licensees working with a buyer involved with an Inspection Contingency should keep the following points in mind:

1. Optional contingency.

The Inspection Contingency in the residential offer is an optional contingency provision. If a licensee has a different Inspection Contingency provision that better suits the needs of the parties or better fits the transaction, the licensee drafting the offer should not use the Inspection Contingency on the offer. Instead the licensee may attach an addendum which includes the alternate Inspection Contingency.

2. Right to Cure Selection.

If the Inspection Contingency on the offer is used, a licensee should be sure to indicate whether the seller shall or shall not have the right to cure. If no selection is indicated, the Inspection Contingency default provision gives the seller the right to cure.

3. Notice of Defects May Lose the Contract.

If the buyer wants to give a notice of defects to the seller after the inspection report is received, the buyer must understand that this is a serious step that may cause the buyer to lose the house. The Inspection Contingency process is basically a “drop dead” procedure. If there is no right to cure, the notice of defects will cause the offer to become null and void unless something else is done to resurrect the deal. Once the seller receives the notice of defects, the buyer cannot withdraw it without the consent of the seller. In other words, an amendment to the offer will generally be required to undo a notice of defects.

If there is a right to cure, the seller then has the choice of whether to cure the listed defects or let the offer

die. In other words, the seller has the control. Licensees can assume the seller will let the offer die if a more desirable offer is in the picture. Accordingly, a buyer generally may not wish to give seller notice of defects unless the defects are, in essence, “deal breakers” which must be fixed before the buyer will proceed with the offer.

4. Preparing Notice of Defects.

A notice of defects is prepared on lines 39 through 69 of the WB-43, or on the new WB-41 Notice Relating to Offer to Purchase. This notice should specify that “This is a notice of defects. The buyer objects to the following defects identified in the attached copy of the inspection report: [list of defects to which buyer objects].” The notice must be accompanied by a copy of the inspection report and must be delivered to the seller and the listing broker by the deadline specified in the Inspection Contingency. Language to the effect that “Buyers request sellers to repair the broken windows” does not sound like a notice of defects; rather it sounds like a proposed amendment.

5. Amendment Alternative.

If the buyer does not wish to play hardball and give a notice of defects, they may wish instead to propose an amendment that suggests a different resolution of the Inspection Contingency. For example, an amendment could propose that the seller cure or repair only some of the defects to which the buyer objects or specify the manner in which certain defects will be remedied. An amendment alternative is prepared on lines 1 through 37 of the WB-43 Amendment /Notice Relating to Offer to Purchase, or on the new WB-40 Amendment to Offer to Purchase. The amendment may state that “This is not a notice of defects. The Right to Cure provisions at lines 306-310 of the Offer [lines 261-265 of the 1994 Offer] are deleted. In its place, Seller agrees to (perform the following repairs)(give the following

credit at closing)(establish the following repair escrow): [give details, time frames, etc.]”

The deadline for acceptance of the amendment ideally should be earlier than the deadline for the buyer giving a notice of defects. This will give the buyer the option of still giving a notice of defects if the seller does not agree to the amendment proposal.

6. Inspection Contingency Time Frame.

Licensees should be sure to give an adequate time period when completing line 301 of the residential offer for the implementation of the Inspection Contingency. A buyer may wish to have enough time to have the inspection done, propose an amendment alternative, and still have enough time to consider whether or not to give a notice of defects should the seller fail to accept the amendment by the amendment acceptance deadline (line 35 of the WB-40).

Buyer and Seller Inspection Contingency Strategies

While it is impossible to anticipate every possible scenario arising in the context of the Inspection Contingency, the following are some of the basic strategies available to the parties working through the Inspection Contingency process.

Buyer Strategies

How the buyer reacts during the inspection process is driven by what the buyer wants to accomplish.

Buyer Wants Out.

If the buyer has decided that he or she no longer wants to buy the house, the buyer can tender a notice of defects and/or a Cancellation Agreement and Mutual Release. The notice of defects will make the offer null and void if the seller does not have a right to cure, or if the seller has a right to cure and does not want to cure the defects listed in the notice of defects. The seller will sign the

Cancellation Agreement and Mutual Release if the seller wants to end the offer. This will expedite the process and provide a quick end to the offer.

Buyer Wants In, No Matter What.

If the buyer definitely wants to proceed with the purchase of the house, the buyer should not give the seller a notice of defects — that will permit the seller to make the offer become null and void. Instead, the buyer may want to simply take the home in its current condition, that is, “as is.” The buyer may also want to try proposing an amendment that asks the seller to make certain repairs, or asks for a price reduction, a credit at closing, or an escrow for doing certain work on the property. By proposing an amendment the buyer has nothing to lose because if the seller does not accept it, nothing will have changed. If the seller is motivated and does not want to lose the offer, the seller may agree to the amendment.

Buyer Wants In, But Only If Certain Work Is Done.

If the buyer wants to buy the home only if the seller has certain work done, a notice of defects alone may not do the trick. The notice of defects will force the seller to either cure the listed defect or let the offer become null and void. This may be an acceptable outcome for the buyer and may work if the seller is motivated and does not want to lose the offer. However, a different strategy will bring more pressure to bear upon the seller to do the desired work.

If the buyer has some time to work with before the deadline for giving a notice of defects, the buyer may start out proposing an amendment to the seller. The amendment on the WB-40 proposes that the seller do the work that the buyer wants to have done. The acceptance deadline on the amendment should be a date that precedes the deadline for a notice of defects. That way, if the seller does not accept the amendment, the buyer

can still give the seller a notice of defects. This gives the seller a second chance to think about performing the desired work and lets the seller know that the buyer is really serious about having the work done.

A different technique may also be used if the buyer wants to put more pressure on the seller from the outset. Again, if the buyer has some time to work with before the deadline for giving a notice of defects, the buyer may start out proposing an amendment to the seller. The amendment on the WB-40 proposes that the seller do the work that the buyer wants to have done. The acceptance deadline on the amendment should be a date that precedes or coincides with the deadline for a notice of defects. At the same time, the buyer gives the seller a notice of defects on the WB-41 that states: "This notice of defects is effective only if the seller does not accept the buyer's amendment dated ____ on or before ____."

Using this "automatic trigger" technique is helpful if the buyer does not have much time remaining before the deadline for the notice of defects. It streamlines the process because the buyer does not have to go back and prepare a notice of defects if the seller does not accept the buyer's proposed amendment. The seller gets the message right away that the buyer is serious, but the seller also gets a second chance to perform under the notice of defects if the seller does not accept the amendment.

Seller Strategies

The seller's reaction during the Inspection Contingency process may depend on how badly the seller wants to sell the home to a particular buyer. The presence of a more desirable secondary offer can play a significant role.

Seller Wants Out.

If the seller does not want to proceed with a given offer to purchase, or does not or cannot do any work on

the house, the seller will not accept any proposed amendments and will not agree to cure any defects listed in notice of defects. The seller should tender notice that he or she will not cure the defects. This is best accompanied by a Cancellation Agreement and Mutual Release.

Seller Wants In, No Matter What.

The seller in this position will likely want to accept any proposed amendments. This seller will also have to agree to cure any listed defects if the seller receives a notice of defects.

Seller Wants In, Only if Seller Does Not Have To Do Certain Work.

Instead of blindly agreeing to any proposed amendments and agreeing to cure any defects listed in a notice of defects, this seller may want to propose an amendment indicating what work the seller is willing to do and what work the seller will not do. This may be a response to an amendment proposal from the buyer, or in response to a notice of defects.

Negotiation Alternative

Either party can usually take advantage of the option of negotiating a resolution to the buyer's concerns with certain features of the home. The parties can negotiate back and forth by tendering amendments back and forth in response to the previous amendment. This is a bit like negotiating a "mini offer" with the parties being free to propose whatever works best for them. Negotiation takes the parties out of the severe, "drop dead" measures built into the Inspection Contingency process. Hopefully this will lead to a mutually acceptable resolution tailored by the parties, instead of the harsh result sometimes imposed by the Inspection Contingency provisions.

Inspection Contingency Questions and Answers

The following questions concerning the Inspection Contingency were recently asked of the WRA **Legal Hotline**:

On line 303 of the 1999 WB-11 Residential Offer to Purchase, it states: "Caution: A proposed amendment will not satisfy this notice requirement." What does this mean?

To give a notice of defects, a buyer must use the WB-41 Notice Relating to Offer to Purchase (or the bottom portion of the WB-43). A proposed amendment on the WB-40 Amendment to Offer to Purchase (or the top portion of the WB-43) is not considered to be a notice.

A home inspection revealed some safety issues. Is the cost of correcting safety issues automatically the seller's responsibility?

This is not automatic. The parties must work through the inspection process. If the deadline for the notice of defects in the Inspection Contingency has passed, the buyer takes the property "as is." However, the parties may amend the contract if the seller is willing.

The buyer has a home inspection done as part of the Inspection Contingency process. The home inspector reports that the "furnace is suspect." The offer calls for the buyer to pay for any inspections. The buyer comes to the seller and asks the seller to have a "furnace man" inspect the furnace. Is the seller obligated to pay for any furnace inspection?

The 1999 WB-11 Residential Offer to Purchase standard Inspection Contingency language states: "Buyer shall order the inspection and be responsible for all costs of inspection, including any inspections required by lender or as follow-up inspections to the home inspection." Therefore, unless the parties amend the terms of

the offer, the buyer is responsible for all inspection costs.

The Inspection Contingency deadline was extended once, but now it has expired. The parties are dealing with a basement problem. If the notice of defects is not given by the deadline, should the owner just proceed and go to closing?

If an offer to purchase is subject to an Inspection Contingency, the buyer must submit proper notice of defects, in a timely manner, to be protected by the Inspection Contingency. The contingency will be deemed satisfied if the buyer does not timely deliver to the seller and listing broker a copy of the inspection report and written notice listing the defects to which the buyer objects. Therefore, if notice is not delivered per the terms of the contract, the buyer has waived the right to submit a notice of defects and has agreed to purchase the property in the current condition. Unless the parties agree to amend the terms and conditions in the offer to purchase, the parties can expect to proceed to closing.

The buyer wants to give the seller an amendment, but not a notice regarding the inspection. Does the buyer need to give a notice?

No, the buyer may employ different strategies for addressing the Inspection Contingency and may attempt to negotiate an amendment instead of giving a notice of defects.

In front of the house there are broken concrete sidewalks. The home inspector said that could be a problem because the city could tag it and make the owner pay for the repair of 10-12 sidewalk squares. The buyer wants the seller to pay for the sidewalk to be fixed. The sidewalks were like this when the seller bought the home. Could this be a reason for the buyer to back out, even though the city has not ordered the repair of the sidewalks?

The parties to the transaction must work through the Inspection Contingency provisions. If the home

inspector includes the broken sidewalk squares in the inspection report, the buyer will have to decide if they will give notice of defects based on the report. If the notice is given, the seller may then decide if the seller believes that the broken sidewalk is a defect as defined by the contract. If it is a defect, the seller must decide whether the seller will fix the problem under the right to cure provisions in the contract. The parties may at any-time agree to amend the terms and conditions of the offer. If the parties cannot reach a solution, they should be referred to legal counsel.

The buyer wants to ask the seller to correct defects revealed during the home inspection. The buyer chooses not to give the seller the right to cure and is going to ask for money for repairs. The home is 102 years old and there are some major flaws, particularly electrical items. If the buyer gives notice on the lower part of the amendment form and requests the money, at that point may the seller sell the home to someone else? The buyer does not want to lose the house but wants to make a strong statement about the dangerous wiring conditions. How can this be done without jeopardizing the transaction?

This buyer may start out proposing an amendment to the seller. If the buyer is asking for money to repair the electrical wiring, this needs to be done on an amendment because having the seller pay for repairs is not one of the options within the preprinted Inspection Contingency. A notice is used only if the buyer is giving a notice of defects, and wants the seller to cure the listed defects. This buyer is asking for a different solution.

The buyer's amendment on the WB-40 should propose that the seller provide the funds the buyer is seeking (hopefully based upon cost estimates the buyer has received). If the seller does not accept the amendment, the buyer may still be able to give the seller a notice of defects.

A buyer purchases a property with the knowledge that the property has 60-amp electric service. The buyer has a home inspection conducted. The buyer asks the seller to install 100-amp service on a notice of defects. The 60-amp service was something the buyer was made aware of even before buyer wrote the offer. Is this something the seller must address?

The seller has no duty to install 100-amp service. The seller can either challenge the notice as not identifying a defect (the buyer had written notice of the nature and extent of this condition), accept the notice and allow the offer to become null and void, or elect to cure (if the offer provides a right to cure).

Note that in this situation, a request to install 100-amp service is more properly made on a proposed amendment because it is setting forth a specific remedy that the buyer wants to have implemented. When 60-amp service is listed on a notice of defects, the seller is left with deciding how to cure this defect in a good and workmanlike manner.

The property has a primary and secondary offer. The primary offer is \$4,000 less than the secondary offer, and the primary buyers and the seller have had a personality conflict. When the home inspection was done, the seller received a list of defects to be cured. If the seller chooses not to cure, the primary offer will immediately be null and void. Is this correct?

After an inspection is conducted, the buyer may consider giving a notice of defects with respect to those items that are defects. The buyer must understand, however, that this is a serious step. If the seller has the right to cure, the seller may choose, in his or her discretion, whether to cure the listed defects or let the offer become null and void. If the seller has another more desirable offer, one may assume that the seller will let the primary offer die. Therefore, giving the

seller a notice of defects puts the power to decide the fate of the offer in the seller's hands.

To make the primary offer null and void, the seller may give notice that he will not cure, or simply give no notice to cure within 10 days of the seller's receipt of the buyer's notice of defects. A notice that seller will not cure may be prepared on the WB-41 notice form. A Cancellation Agreement and Mutual Release may be submitted with the notice to authorize disbursement of the earnest money.

There is an accepted offer on a property. After the inspection, the buyers came back with an amendment asking the seller to repair some items. The sellers are not willing to do this. What happens to the original offer if the sellers do not sign the amendment? Does the accepted offer become null and void, or are the buyers still responsible for performance?

The offer stands "as is" if the seller rejects the amendment.

Re: Notice of defects vs. buyer's request for an amendment. When can a secondary offer be elevated to primary position?

After an inspection has been completed, the buyer may propose an amendment or submit a notice of defects. It is important for members to clearly draft any proposal to avoid ambiguity and misunderstanding of the buyer's intent. Generally it is recommended to state either that "This is a notice of defects" or "This is not a notice of defects" to clarify the parties' intent. If there is a question as to the buyer's intent, a new proposal may be drafted to clarify the language or the parties may be referred to legal counsel.

Although it may seem clear that the primary offer is no longer enforceable, the seller needs to be sure that the first buyer does not retain some sort of claim with respect to the first offer based on failure to follow pro-

cedure or some other event that has happened during the offer process. This assurance can best be obtained if the parties execute a Cancellation Agreement and Mutual Release. If the parties refuse to sign a cancellation agreement, the seller may obtain an attorney's opinion that the primary offer has terminated before moving another offer into primary position.

What if the inspection is conducted by a qualified independent inspector who is not a Wisconsin registered home inspector, and defects of significance are found? Can the buyer deliver a notice of defects to the seller?

Per the requirements of the Inspection Contingency, the buyer agrees to have a Wisconsin registered home inspector conduct the inspection. If the buyer submits a notice of defects from an inspector who is not a Wisconsin registered home inspector, the seller may refuse to accept the notice of defects. The buyer is working outside of the parameters of the Inspection Contingency and cannot expect to enjoy the benefits of that process if the buyer is not following the designated procedure. The parties in this transaction may be referred to legal counsel.

Additionally; the seller would not have to give the non-registered home inspector access to the property. The WB-11 requires access if the inspection is reasonably necessary to carry out the terms of the offer. Because an inspection not conducted by a Wisconsin registered home inspector will not meet the conditions of the Inspection Contingency, the seller could prohibit the inspector from entering the home.

Why does the seller have 10 days to respond to the buyer's notice of defects since there is nothing that the buyer can do to legally compel the voiding of the offer before the 10-day period has run? Can this be crossed out and changed to 2 days? Once notice is given by buyer,

can it be withdrawn prior to seller's written response?

The 10 days gives the seller time to investigate the problems listed in the buyer's notice of defects, obtain estimates for having the work done, and ultimately decide whether the seller wants to undertake the requested work. The Inspection Contingency may be modified to allow the seller only 2 days to respond to the notice of defects if that is the intent of the parties. Furthermore, the buyer may use a different Inspection Contingency altogether since the Inspection Contingency in the WB-11 is an optional provision. If using the 1999 WB-11, the buyer cannot withdraw the notice of defects without the seller's consent.

If the buyer gives the seller a notice of defects and the seller elects not to cure, does the buyer have the right to then waive the Inspection Contingency and accept the home "as is"?

Provided the buyer has given a notice of defects and not an amendment, the seller, who has a right to cure, may choose to cure or to let the offer become null and void. The offer shall be null and void if buyer timely delivers the notice of defects and inspection report and the seller elects not to cure. The buyer cannot withdraw the notice without the consent of the seller.

On an offer, there was an Inspection Contingency and the deadline for the buyer to give a notice of defects was 9/19. That date passed, and the seller assumed that the inspection was fine. Now buyer has done an amendment dated 9/22, asking the seller to have a pest inspection performed per recommendation of the home inspector, at no charge to the owner. If the seller signs the amendment stating that a problem was found, how would this affect the contract?

The parties may allow an inspection for informational purposes only. If the seller does not want to extend the Inspection Contingency deadline, the

amendment must be clear that this inspection does not reopen contingency. The buyer may submit an amendment based upon the results of the pest inspection requesting that the seller provide some type of remedy, but the seller is not obligated to accept such an amendment.

The buyer provided a notice of defects and a copy of the inspection report to the seller. The seller has the right to cure. The seller responded within two days of the seller's receipt of the notice with an amendment proposing that the seller would correct some, but not all, of the identified defects. The buyer became uncomfortable with the situation and submitted a Cancellation Agreement and Mutual Release to the seller. What is the status of this offer? What are the different steps these parties could take?

In the described transaction, the buyer has given a notice of defects. Since the seller has the right to cure, the seller may choose, in his or her discretion, whether to cure the listed defects, let the offer become null and void, or propose an alternate solution. Giving the seller a notice of defects puts the power to decide the fate of the offer in the seller's hands.

Luckily for this buyer, however, the seller responded by proposing an amendment whereby the seller would cure some of the defects listed in the notice of defects. The buyer did not find this to be acceptable so the buyer did not accept the amendment. The seller, on the other hand, has not signed the Cancellation Agreement and Mutual Release. This leaves the transaction as it was before the seller proposed the amendment - the buyer has given a notice of defects and the seller still has eight days to work with.

Within these eight days, the seller could propose another amendment to the offer. The seller could deliver a written notice to the buyer stating the seller's election to cure the defects identified in the buyer's

notice of defects. The seller could also deliver a written notice to the buyer advising the buyer that the seller will not cure, or the seller could let the remaining eight days lapse. These last two actions (notice to not cure and letting the time run out) would have the result of making the offer null and void.

Within these eight days the buyer could propose an amendment to try to find a common ground where both parties feel comfortable. As long as the seller does not sign the Cancellation Agreement and Mutual Release, there is nothing that the buyer can do to legally compel the voiding of the offer. The offer will not become null and void until either the seller gives notice that he will not cure or the ten days run out.

Conclusion

REALTORS® can help consumers more closely scrutinize the home inspection services that they employ to help ensure the consumers are receiving the information that they need. Members involved in the home inspection process must keep the party's desires in focus and be willing to negotiate to a mutually beneficial solution of property defect issues.

Note pdf viewers:

The chart and addendum form referred to in this *Legal Update* are not included in this pdf version of the publication. If you wish to view the chart and/or addendum form, please go to your mailed *Legal Update* publication.

Subscribe

This *Legal Update* and other *Updates* beginning with 92.01 can be found in the members' section of the WRA Web site at:
<http://www.wra.org/realtor>.

A subscription to the *Legal Update* is included in all Association designated REALTOR® dues. Designated REALTORS® receive a monthly publication package including the *Legal Update*, and other industry-related materials.

REALTORS® and Affiliate members may subscribe to the Designated REALTOR® publication package for \$30 annually. Non-member subscription rate for the package is \$130 annually. Member subscription price for the *Legal Update* is \$25, non-member price is \$75. Each subscription includes 12 monthly issues.

Contact the Wisconsin REALTORS® Association to subscribe:

4801 Forest Run Road,
Suite 201, Madison,
WI, 53704-7337

(608) 241-2047
1-800-279-1972

www.wra.org



WISCONSIN
REALTORS®
ASSOCIATION © 1999

