

Navigating 'As Is' Sales

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Now that the COVID-era feeding frenzy for buying properties has subsided and interest rates are on the rise, buyers and sellers are on more equal footing. This is a good time to remind buyers, sellers, and their agents how the property's condition affects the sales price at various stages of the real estate transaction.

A logical place to start is by looking at the importance of the Seller's Disclosure Notice, the meaning of "As Is," the inspection provisions of Paragraph 7 of the One to Four Family Residential Contract (Resale), and use of the option period when renegotiating the sales price following an inspection.

Seller's Disclosure Notice

Although the Seller's Disclosure Notice is a separate document from the sales contract, it's no coincidence that it's part of the contract's Paragraph 7 on Property Condition. The Seller's Disclosure Notice is required by Texas Property Code Section 5.008. That statute sets out the minimum information about a property's condition that a seller must disclose to a buyer in a residential sales transaction, including prior flooding events.

Takeaway

Understanding the mechanics of an "As Is" contract and the interplay of the option period is important for agents and their clients when negotiating the original sales price of a contract or renegotiating the sales price during an option period.

The Texas Real Estate Commission (TREC) has a Seller's Disclosure Notice that parallels the statutory provisions. Some real estate trade associations and brokerages have Seller Disclosure Notices that contain more information than is required by the statute.

Paragraph 7B of the sales contract indicates whether the buyer has received the notice before signing the contract, the buyer has not yet received the notice, or the seller is not required to give the notice under specific exemptions contained in the property code.

If the buyer has not yet received the notice, the seller has a negotiable number of days to deliver it, and the buyer has the right to terminate the contract within seven days after receiving the notice. Paragraph 7B is structured

this way because the sales contract is an “As Is” contract (more on this in a moment), and knowing information about the property’s condition prior to signing the contract will affect how much the buyer is willing to pay for the property. The seven-day period allows the buyer time to review the disclosures made by the seller and possibly renegotiate the sales price or repairs based on the new information. If the parties reach an agreement during that period, they will execute an amendment to the sales contract. If no agreement is reached, the buyer has the right to terminate the sales contract and get his earnest money back.

Not only is the Seller’s Disclosure Notice important for negotiation of the sales price of a property, but it could also affect a buyer’s decision to purchase the property at all. Knowing this, some sellers may get “selective amnesia” when filling out the notice to make their property more attractive to buyers. But sellers beware: failing to properly disclose the condition of a home can bring a lawsuit from the buyer months or years after the sale.

Keep in mind that Texas law requires sellers and real estate agents to disclose any known material defect on the property to the buyer, whether or not it is an item listed on the Seller’s Disclosure Notice. Real estate agents do not want to get drawn into a lawsuit, so here are a few best practices concerning the Seller’s Disclosure Notice:

- The seller’s disclosure is only the seller’s disclosure, and agents should never assist the seller in filling out the form. Sellers who need assistance should contact a real estate attorney or use an online program that takes them through a step-by-step program to complete the notice. Agents are certainly able to refer their clients to either.
- An agent should offer the seller every form of Seller’s Disclosure Notice available in the market area, (unless her broker has told them otherwise) and let the seller decide which one to complete.
- An agent should talk to his clients about the importance of completing the form fully and truthfully.
- If an agent knows about a material defect and the seller does not disclose it, the agent has an obligation under the law to disclose it to the buyer.

Paragraph 7D, “As Is” Provision

The language making the sale of the property “As Is” can be found in Paragraph 7D entitled “Acceptance of Property Condition.”

The contract language defines “As Is” to mean “the present condition of the Property with any and all defects and without warranty except for the warranties of title and the warranties in this contract.” Knowing the condition of the property by receiving and reviewing the Seller’s Disclosure Notice and walking through the property to observe its current, visible condition are important steps for a buyer to take before entering into a contract and will determine what price she is willing to pay for the property.

Paragraph 7D provides two options for buyers: (1) the buyer accepts the property As Is; or (2) the buyer accepts the property As Is provided the seller, at the seller’s expense, completes certain specifically named repairs and treatments.

It is important for agents and their buyer clients to understand that the blank to be filled in for Paragraph 7D(2) is not a catch-all to be used for anything found in a future inspection (more on inspections in a minute) but for specific items that may have been noted in the Seller’s Disclosure Notice as not being in working condition, or for visible items of disrepair the buyer observed when viewing the property.

Agents and their buyer clients should also understand this paragraph provides that accepting the property “As Is” under either 7D(1) or 7D(2) does not preclude them from performing any inspections under Paragraph 7A or from negotiating an amendment based on what they find.

An example of the proper use of 7D(2) would be where the Seller’s Disclosure Notice indicates that the HVAC system is not in working order. A buyer could submit a contract noting in Paragraph 7D that the seller must repair or replace the HVAC system prior to closing. Of course, because the seller noted the issue prior to the contract, she may counter at a higher price to take into account the cost of the repair.

Paragraph 7A Inspection Provision

Under Paragraph 7A of the sales contract, sellers must allow buyers and their chosen inspectors (licensed by TREC or otherwise permitted by law to make inspections, like a plumber, electrician, or termite inspector) access to the property at reasonable times to perform any inspection of the property the buyer deems necessary.

The seller is also required to keep the utilities on while the contract is in effect to facilitate inspections.

Only hydrostatic testing requires written approval by the seller.

All inspections are at the buyer's expense.

The buyer's right to have inspections performed is not tied to the option period. This right is available regardless of whether the buyer purchased an option period, or whether or not the option period has expired.

Option Period and Renegotiation of Price After an Inspection

The option period provides the buyer with some leverage to renegotiate the sales price following an inspection, so it is advisable that a buyer pay an option fee to obtain an option period under Paragraph 5 of the contract. It is also advisable that the buyer get an inspection performed during the option period with enough time left to renegotiate the sale price or have seller perform certain repairs should the inspection report reveal issues with the property *that were not noticeably visible or otherwise disclosed by the seller*. That last point is important when a buyer is asking for sales price reduction or repairs to be paid for by the seller under an "As Is" contract.

Remember that an "As Is" contract is one where the buyer is submitting an offer to the seller based on the property's current condition. Generally, the listing price set by the seller is what the seller thinks the property is worth in its present condition. The seller rightfully assumes that the offer brought by the buyer is based on what the seller has revealed about the property in the Seller's Disclosure Notice and what the buyer observed

about the property's condition during a walk-through. This is why many sellers are put off by a buyer who tries to renegotiate the contract terms based on items in an inspection report that were previously disclosed or readily observable at the property—because the seller agreed to a sales price based on the property's *present condition*.

It is important that the parties and their agents understand that under an "As Is" contract, renegotiation of the sales price or seller-paid repairs should be limited to items that were not previously disclosed or not readily observable. That is the value that an inspection report brings to the transaction.

If the buyer is still in the option period, he can try to renegotiate the contract terms based on new items found. Although the seller does not have to agree to a price reduction or repairs, he risks losing the deal if the buyer walks and gets her earnest money refunded. In a hot market, this was not such a big deal for the seller. But in a more balanced market, the seller should consider whether he will get another offer and how much longer that will take.

Also keep in mind that if the inspection report reveals material defects, and the seller is made aware of those defects, the seller is obligated to reveal those to the next buyer, and that buyer might want equal or greater price concessions. ➤

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