

Best Practices

PREPARED BY: SCOTT A. MARCUS, ESQ.

NOVEMBER 6, 2017



ABOUT ASSOCIATION TITLE SERVICES

Association Title Services (ATS) is an independently owned and operated Florida based title company with a focus on residential real estate closings, title and escrow services. ATS closing operations are overseen by attorneys who have over eighty (80) years of combined real estate title and closing experience. With physical office locations throughout the State of Florida, ATS prides itself on customer service. Purchasing a home can be a time-consuming and stressful process; therefore it is our goal to make the process as convenient and as stress-free as possible for the customer. Reacting swiftly to the needs and concerns of the customer as well as our referral sources is one of the hallmarks at ATS.

Headquarters

1 East Broward Blvd., Suite 1800
Fort Lauderdale, FL 33301
Toll Free: 866-800-2878
Email: info@association-title.com





Buyers:	Buyer, Joe and Jane	Sellers:	Seller, Paul and Peter	Today's Date:	3/27/2017 12:00:00 AM
File Number:	382976	Closing Date:	5/5/2017	Purchase Price:	4,225,000.00
Loan No:	N/A	Loan Amount:	N/A	Deposit 1 Received:	3/16/2017
				Contract Date:	3/16/2017
				Deposit 1 Amount:	422,500.00
Property Address:	1234 Snapshot Lane, Real Estate, FL 33133				
Critical Dates:	Effective Date: 3/16/2017; Deposit 1 Due: 3/16/2017; Deposit 2: N/A; Inspection Period: 3/25/2017; Loan Commitment Date: N/A; Closing Date: 5/8/2017				
Item	Ordered	Status	Comments		
Buyer Info Form	3/16/2017	3/16/2017	Received		
Seller Info Form	3/16/2017	Pending	Sent to listing agent on 3/16		
Title Commitment	3/16/2017	3/21/2017	NO OPEN MORTGAGES.		
Title Disclosure Letter	3/23/2017	3/23/2017	Sent 3/23 disclosing need for more information		
Lien Search	3/16/2017	3/23/2017	Order Number 17 368019, 2 open permits		
Lien Search Update	3/23/2017	3/23/2017	Order Number 17 368019, 2 open permits		
Lien Search Disclosure	3/23/2017	3/23/2017	2 open permits marked "HOLD" and "Expired"		
Estoppel	3/22/2017	3/23/2017	Annual dues of \$1,850.00 Quarterly dues of \$1,500.00 with a \$25,000 transfer fee.		
Estoppel #2		Pending	N/A		
Payoff		Pending	N/A		
Payoff #2		Pending	N/A		
Survey	3/16/2017	3/22/2017	Just need to confirm setback requirements.		
Survey Disclosure Letter	3/23/2017	3/23/2017	Sent 3/23		
Certificate Of Insurance		Pending	Pending from Buyer - prior to closing		
Association Approval	N/A	N/A	No application. No approval. Buyer to sign Property Owners Agreement.		



Let's talk generally about the Contract then we can discuss the changes from last version to current version.



Contract is created when 4 things occur:

1. Offer
2. Acceptance
3. Consideration
4. Delivery



Who Owns The Property? Who Has Authority to Sign?

Always verify that the parties signing the Contract include all parties listed on title, and if they are signing in a corporation, LLC or trust capacity, that they have the authority to sign.



DEFINED TERMS:

A (“Defined Term”) is a shorthand reference within a document that gives meaning (and hence a definition) to a term, sentence or group of sentences. A Defined Term is typically referenced within parenthesis and (“Double Quotes”) together with the initial letter of each word capitalized in order to create the Defined Term. Once a term has been “defined”, the Defined Term must be used each and every time its definition is called for, but without the parentheses and double quotes. Incorrect use of defined terms is one of the most common, yet easily avoidable, contract mistakes made by real estate agents and in some cases, attorneys. There are forty-four (44) defined terms in the FAR/BAR - “AS-IS” Residential Contract, version 4/17, 2017, excluding those found in addenda.

#	Defined Term	Line Located:
1	("Seller")	1
2	("Buyer")	2
3	("Property")	4
4	("Contract")	5
5	("Real Property")	13
6	("Personal Property")	19
7	("Escrow Agent")	28
8	("Deposit")	37
9	("Loan Amount")	38
10	("Effective Date")	49
11	("Closing")	52
12	("Closing Date")	52

#	Defined Term	Line Located:
13	("CFPB Requirements")	55
14	("Loan Approval Period")	87, 88
15	("Financing")	90
16	("Loan Approval")	93
17	("Diligent Effort")	96
18	("Title Evidence Deadline")	146
19	("Title Commitment")	147-148
20	("Owner's Policy and Charges")	151
21	("Survey")	171
22	("public body")	178
23	("Special Flood Hazard Area" or "Coastal Barrier Resource Act")	205-206

#	Defined Term	Line Located:
24	("FIRPTA")	231
25	("AS IS Maintenance Requirement")	246-247
26	("Inspection Period")	250
27	("Agent")	281
28	("Indemnifying Party")	309
29	("Dispute")	340
30	("Mediation Rules")	346
31	("Standards")	356
32	("Cure Period")	377
33	("Extended Cure Period")	384
34	("Estoppel Letter(s)")	403
35	("Force Majeure")	58, 428

#	Defined Term	Line Located:
36	("Closing Agent")	442
37	("FinCEN")	453
38	("GTO")	453
39	("Casualty Loss")	493
40	("Exchange")	503
41	(COLLECTION" or "COLLECTED")	526
42	("Code")	535
43	("foreign person")	231, 233, 534, 539
44	("Broker")	609
45	("Listing Broker") **	609
46	("Cooperating Broker")**	609

** Not specifically defined, but the term is considered a defined term



Below is a List of The Main Changes Between The Former Version and The Current Version:

Financing	Modified	Section 8
Municipal Lien Search	Definition Added	Section 9(c)
Permits Disclosure	Added	Section 10b
FIRPTA	Modified	Section 10(i)
Force Majeure	Modified	Section 18(G)
Closing location	Modified	Section 18(I)(i)

FinCEN Notice	Added	Section 18(I)(iii)
Proration's; credits	Modified	Section 10(k)
Loan Commitment	Deleted	Section 18(T)
FIRPTA Tax Withholding	Modified	Section 18(v)

FINANCING



FINANCING

8. FINANCING:

(a) Buyer will pay cash for the purchase of the Property at Closing. There is no financing contingency to Buyer's obligation to close. If Buyer obtains a loan for any part of the Purchase Price of the Property, Buyer acknowledges that any terms and conditions imposed by Buyer's lender(s) or by CFPB Requirements shall not affect or extend the Buyer's obligation to close or otherwise affect any terms or conditions of this Contract.

(b) This Contract is contingent upon Buyer obtaining ~~a written loan commitment for~~ approval of a conventional FHA VA or other _____ (describe) loan ~~on the following terms~~ within _____ (if left blank, then ~~45~~30) days after Effective Date ("Loan ~~Commitment Date~~Approval Period") for **(CHECK ONE)**: fixed, adjustable, fixed or adjustable rate ~~loan~~ in the Loan Amount (See Paragraph 2(c)), at an initial interest rate not to exceed _____ % (if left blank, then prevailing rate based upon Buyer's creditworthiness), and for a term of _____ (if left blank, then 30) years ("Financing").

(i) Buyer shall make mortgage loan application for the Financing within _____ (if left blank, then 5) days after Effective Date and use good faith and diligent effort to obtain approval of a ~~written loan commitment for meeting~~ the Financing terms ("Loan ~~Commitment~~Approval") and thereafter to close this Contract. Loan Approval which requires a condition related to the sale by Buyer of other property shall not be deemed Loan Approval for purposes of this subparagraph.

Buyer's failure to use diligent effort to obtain Loan Approval during the Loan Approval Period shall be considered a default under the terms of this Contract. For purposes of this provision, "diligent effort" includes, but is not limited to, timely furnishing all documents and information and paying of all fees and charges requested by Buyer's mortgage broker and lender in connection with Buyer's mortgage loan application.

(ii) Buyer shall keep Seller and Broker fully informed about the status of Buyer's mortgage loan application ~~and~~ Loan ~~Commitment~~Approval, and loan processing and authorizes Buyer's mortgage broker ~~and Buyer's~~ lender, and Closing Agent to disclose such status and progress, and release preliminary and finally-executed closing disclosures and settlement statements, to Seller and Broker.

~~(iii) Upon Buyer's receipt of obtaining Loan Commitment, Buyer shall provide written notice of same to Seller. If Buyer does not receive Loan Commitment by Loan Commitment Date, then thereafter either party may cancel this Contract up to the earlier of:~~

~~(i-) Buyer's delivery of written notice to Seller that Buyer has either received Loan Commitment or elected to waive the financing contingency of Approval, Buyer shall promptly deliver written notice of such approval to Seller.~~

(iv) If Buyer is unable to obtain Loan Approval after the exercise of diligent effort, then at any time prior to expiration of the Loan Approval Period, Buyer may provide written notice to Seller stating that Buyer has been unable to obtain Loan Approval and has elected to either:

(1) waive Loan Approval, in which event this Contract will continue as if Loan Approval had been obtained;

or

(2) terminate this Contract.

~~(ii-) 7 days prior to the Closing Date specified in Paragraph 4, which date, for purposes of this Paragraph 8(b) (ii), shall not be modified by Paragraph 5(a).~~

(v) If Buyer fails to timely deliver either notice provided in (iii) or (iv) above to Seller prior to expiration of the Loan Approval Period, then Loan Approval shall be deemed waived, in which event this Contract will continue as if Loan Approval had been obtained, provided however, Seller may elect to terminate this Contract by delivering written notice to Buyer within three (3) days after expiration of the Loan Approval Period.

(vi) If either party timely cancels this Contract pursuant to this Paragraph 8 is timely terminated as provided by (iv) (2) or (v) above, and Buyer is not in default under the terms of this Contract, Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract. If neither party has timely canceled this Contract pursuant to this Paragraph 8, then this financing contingency shall be deemed waived by Buyer.

(vii) If Buyer delivers written notice of receipt of Loan Commitment to Seller and this Contract does not thereafter close, Loan Approval has been obtained, or deemed to have been obtained, as provided above, and Buyer fails to close this Contract, then the Deposit shall be paid to Seller unless failure to close is due to: (1) Seller's default or inability to satisfy other contingencies of this Contract; (2) Property related conditions of the Loan Commitment Approval have not been met (except when such conditions are waived by other provisions of this Contract); or (3) appraisal of the Property obtained by Buyer's lender is insufficient to meet terms of the Loan Commitment; or (4) the loan is not funded due to financial failure of Buyer's lender Approval, in which event(s) the Deposit Buyer shall be returned to Buyer refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

(c) Assumption of existing mortgage (see rider for terms).

(d) Purchase money note and mortgage to Seller (see riders; addenda; or special clauses for terms).



What Has Changed?

- Buyers will now be required to obtain a “Loan Approval” within 30 days from the Effective Date, unless otherwise stated. The default used to be 45 days.
- The newly defined term “Loan Approval” is a change from the old defined term, “Loan Commitment.”
 - The issue with the newly defined term is that it is loosely defined in the contract as “*approval of loan meeting the Financing terms*”. It is not unreasonable for one to interpret the term Loan Approval to mean “an unconditional approval”, however the contract does not define the term as such.
 - Moreover, by virtue of the conditional language in Section 8(b)(vii), Loan Approval may be conditioned on, at a minimum, property related conditions as well as the appraisal. I anticipate that this issue will need to be clarified – and as the new version makes its rounds – it will.

What Has Changed? (Con't)

- Buyer's failure to use diligent effort to obtain Loan Approval is a default.
- Loan Approval or unable to obtain Loan Approval must occur by the expiration of the Loan Approval Period. There is no longer the requirement to provide notice of inability to obtain Loan Approval seven (7) days prior to closing.

Let's Break Down What Happens When a Buyer Obtains a Loan Approval or is "Deemed to have Obtained a Loan Approval"

The FINANCING section of the FAR/BAR Contract states:

"If Loan Approval has been obtained, or deemed to have been obtained, as provided above, and Buyer fails to close this Contract, then the Deposit shall be paid to Seller unless failure to close is due to: (1) Seller's default or inability to satisfy other contingencies of this Contract; (2) Property related conditions of the Loan Approval have not been met (except when such conditions are waived by other provisions of this Contract); or (3) appraisal of the Property obtained by Buyer's Lender is insufficient to meet terms of the Loan Approval, in which event(s) the Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract."



What is the Takeaway?

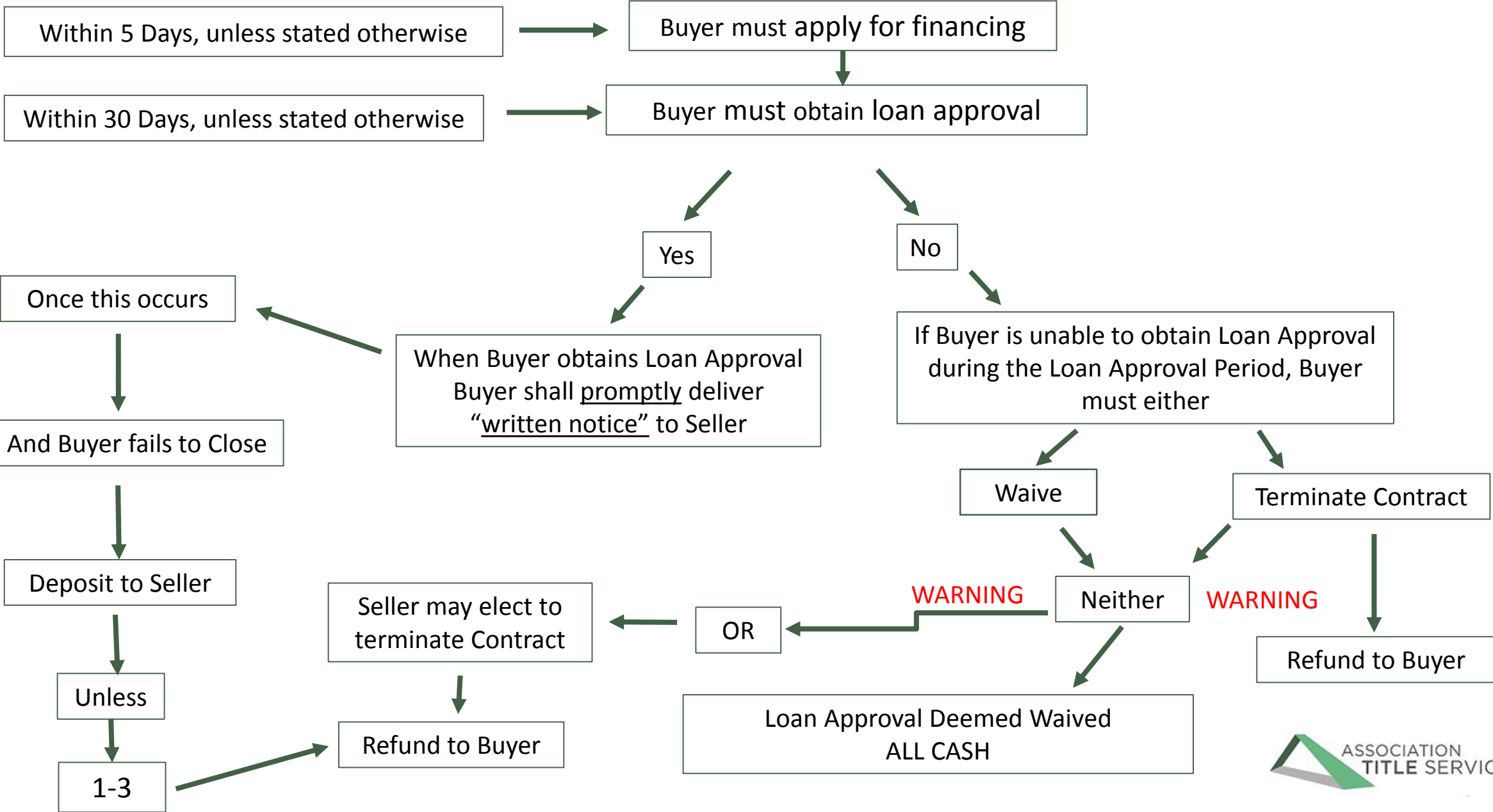
- The takeaway here is that, regardless how the term is defined (Loan Approval or Loan Commitment) the **buyer should have a candid discussion with their lender prior to the issuance of document which remotely resembles a Loan Approval.**
 - The discussion should be centered around the fact that once the Loan Approval is obtained “**or deemed to have been obtained**”, as the new version of the contract provides, and the buyer then fails to close, the buyer’s deposit **could be at risk**. Real estate agents and lenders should proceed cautiously with regard to this section of the contract and call upon real estate attorneys for counsel.

Is the Buyer Required to Give the Loan Approval to Seller?

- The Buyer is not required to turn over the Loan Approval to the Seller. Rather, Buyer shall promptly deliver **written notice** of such approval to the Seller;
- Providing written notice of receipt of the Loan Approval to Seller serves to waive Buyer's financing contingency, unless any of the above items 1-3 come into play.

TIP: Therefore, it is **NEVER advisable** to provide the written notice of receipt of the Loan Approval to the Seller without the Buyer authorizing your doing so and after Buyer has been advised to review the Loan Approval and make certain that there are no conditions which cannot be met at or prior to Closing. Buyer needs to be aware that providing the written notice of receipt of the Loan Approval removes the financing contingency. You do not want to be responsible for this.

Financing Flow Chart



CONDOMINIUM LISTING



WHEN TAKING A LISTING IN A CONDOMINIUM:

**5. NON-DEVELOPER DISCLOSURE:
(CHECK ONE):**

(a) THE BUYER HEREBY ACKNOWLEDGES THAT BUYER HAS BEEN PROVIDED A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION OF THE ASSOCIATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, PRIOR TO EXECUTION OF THIS CONTRACT.

(b) THIS AGREEMENT IS VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER AND RECEIPT BY BUYER OF A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES OF INCORPORATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT IF SO REQUESTED IN WRITING. ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT. BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND

Page 2 of 3 A. CONDOMINIUM RIDER

CR-4 Rev. 9/15 © 2015 Florida Realtors® and The Florida Bar. All rights reserved.

(SEE CONTINUATION)

LEGAL HOLIDAYS, AFTER THE BUYER RECEIVES THE DECLARATION, ARTICLES OF INCORPORATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT IF REQUESTED IN WRITING. BUYER'S RIGHT TO VOID THIS AGREEMENT SHALL TERMINATE AT CLOSING.



Must provide ALL OF the following in order to start the 3-day right of rescission:

- Current Copy of the Declaration of Condominium;
- Articles of Incorporation;
- Bylaws and Rules of the Association;
- Copy of the Most Recent Year-End Financials;
- Frequently Asked Questions and Answers.

GENERAL LISTING



REQUEST THESE ITEMS AT YOUR LISTING APPOINTMENT AND SEPARATE YOURSELF FROM THE COMPETITION:

Best Practice Tip:

In order to have the most efficient sale, the following should be requested from the Seller after the Seller has signed your Exclusive Listing Contract.

- Copy of the Owner's Title Insurance Policy (if they can locate this);
- Copy of the most recent mortgage loan statement(s) for the owner;
- Ask whether the owner has an Equity Line? Some owners forget or do not consider this a mortgage – it is a lien on the property
- Copy of the most recent pay stub for each association. If the pay stub is not available, please request the name and number of the management company managing each association;

Association #1

Association #2



Best Practice Tip, Con't:

- Is property owner a US Taxpayer?
 - If no, need CPA's contact information for FIRPTA
- Are there any tenants residing at the property?
 - If yes, provide a copy of the lease.
- Copy of the owner's survey;
- Are you going to be represented by an attorney?
 - If yes, need attorney's contact information.
- Will you be present at closing?
 - If no, where will you be?



OPEN PERMITS

HOW DO I AVOID ISSUES WITH THESE?



Best Practice Tip:

- The FAR/BAR Contract does not obligate the Seller to close open or expired permits. Open and expired permits are not title matters.
- The only leverage the Buyer has if the open or expired permit is discovered during the Inspection Period.
- If your customer is the **Buyer**, insert the following language into Section 20:
- “Seller shall, at Seller’s expense, close any open or expired permits on the Property prior to Closing”
- If your customer is the **Seller**, the Best Practice is to order a permit search once you have the home under an Exclusive Listing Agreement.

The Reason Permits are NOT Covered under Title Insurance Policies:

Open permits are “carved out” of all title policies. The policy does not cover the insured for damage related to municipal violations and open permits.

The Following Slide:

TIP: Gather as much information as possible for the title agent in order to ensure a smooth closing. The following slide is a list of information which should be provided by the agent to the title company at the start of the deal:

CONTRACT COVER PAGE

Date: _____ Sales Representative: _____
REO #: _____ Loan # _____ Closing Date _____
Owner Occupant _____ or Investor _____ Purchase Price \$ _____
All Cash/Other Financing _____ HomePath Mortgage financing _____ HomePath Renovation _____
Property Address: _____
Street: _____
City/State/ZIP: _____
County: _____
Complete Name(s) in which title is to be taken (must match offer screen): _____

LISTING AGENT INFORMATION

Listing Agent Name: _____ Company: _____
Email: _____
Company Address: Street: _____
City/State/ZIP: _____
Phone No. _____ Fax No.: _____

SELLING AGENT INFORMATION

Selling Agent Name: _____ Company: _____
Email: _____
Company Address: Street: _____
City/State/ZIP: _____
Phone No. _____ Fax No.: _____

BUYER'S ATTORNEY or SETTLEMENT AGENT (if applicable)

Name: _____ Company: _____
Email: _____
Company Address: Street: _____
City/State/ZIP: _____
Phone No. _____ Fax No.: _____

FINANCING LENDER INFORMATION

Contact Name: _____ Company: _____
Email: _____
Company Address: Street: _____
City/State/ZIP: _____
Phone No. _____ Fax No.: _____

HOA INFORMATION (if applicable)

Contact Name: _____ Company: _____
Email: _____
Company Address: Street: _____
City/State/ZIP: _____
Phone No. _____ Fax No.: _____

CLOSING AGENT INFORMATION

Contact Name: _____ Company: _____
Email: _____
Company Address: Street: _____
City/State/ZIP: _____
Phone No. _____ Fax No.: _____



FORCE MAJEURE AND RISK OF LOSS



There are a number of provisions within our standard real estate contracts which most buyers, sellers and real estate professionals typically give little to no thought to. In fact, most attorneys will gloss over certain provisions when making modifications to the contract. In the wake of Hurricane Irma these provisions become critical and will govern when (and in some cases if) closings will actually take place. In a typical transaction our focus tends to be on price, deposit amount as well as inspection and financing periods. If however you have a transaction which was scheduled to close in the week prior to Irma's impact on Florida or in the week or weeks thereafter, these obscure contract provisions such as "**Force Majeure**" and "**Risk of Loss**" will likely impact your transaction.

What does the term “Force Majeure” Mean?

Literally translated, the term means “superior force”. The most recent version of the FAR/BAR Contract defines the term as “hurricanes, floods, extreme weather, earthquakes, fire, or other acts of God, unusual transportation delays, or wars, insurrections, or acts of terrorism, which by exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome.” In other words, a force beyond the control of the parties that prevents performance.

My Closing Was Scheduled Two Days Prior to Irma, Am I required to Close?

The answer depends on whether your performance or the availability of a service (including insurance or required approvals essential to close) is disrupted, delayed, caused or prevented by Hurricane Irma (the Force Majeure). If you are unable to obtain insurance, wire money, obtain your association approval, receive loan documents, due to the Force Majeure, then you are not obligated to close. However, if all services are available and nothing is preventing you from closing except your unwillingness to close, that is a different story requiring a deeper analysis.

I Was Supposed to Close on September 11, 2017 and Was Unable to Due to the Impact of Irma. Do I Need a Contract Extension?

The FAR/BAR contract provides that “all time periods, including the Closing Date, will be extended a reasonable time up to 7 days after the Force Majeure no longer prevents performance under [the] Contract.” So, by way of example, if your closing date was September 11 and the bank lending you the funds is unable to deliver the documents because their offices do not have power, your closing is automatically extended up to 7 days after power is returned to those offices such that the employees can perform as they were prior to the storm. So that all parties are on the same page, it is wise that you notify the other party in writing of the reason for the delay and provide supporting documentation and further iterate that the deadline will extend automatically until such time as the performance can occur.

How Long Does this Automatic Extension Last?

The FAR/BAR contract states that if the Force Majeure prevents performance under the contract by more than 30 days, then either party may terminate the contract, so the automatic extension would last 30 days. If the delay is going to be greater than 30 days, the parties should execute an addendum agreeing to an extension timeframe, otherwise the risk of cancellation by either party exists.

I Already Performed My Inspection of the Property, Then the Hurricane Hit. Do I Get Another Inspection?

The FAR/BAR contract places the burden on the Seller to maintain the Property (including lawn, shrubbery and pool) in the condition existing as of the Effective Date. A Buyer would be entitled to reinspect the Property to ensure the condition has not changed since the original Effective Date of the Contract. Ordinary wear and tear is acceptable. Therefore, if a portion of the roof was damaged due to the hurricane, the obligation to repair that damage falls on the Seller (as limited by the risk of loss provisions in the contract, which is typically 1.5% of the Purchase Price). The post Force Majeure inspection is not an opportunity for a Buyer to find items which were present during the original inspection and negotiate a reduction to the price of the home.

I Am Selling My Home and The Storm Caused a Window to Shatter. My Contract is “As-Is”. Isn’t This the Buyer’s Responsibility?

No. As stated in the answer to the previous question, the FAR/BAR contract places the burden on the Seller to maintain the Property in the condition existing as of the Effective Date. A window damaged after the contract is effective would be the responsibility of the Seller to repair. Seller is responsible to repair damages to the Property up to 1.5% of the Purchase Price. If the cost to repair the damage exceeds 1.5% of the Purchase Price, the Buyer may elect to take the Property in “as-is” condition together with a 1.5% credit or terminate the transaction and receive a refund of the Deposit.