

Real Estate Changes Take Effect

Big changes have come to the way real estate is bought and sold in North Carolina. On January 1, 2011, the document used to purchase residential property in North Carolina, the offer to purchase and contract, changed dramatically. The myriad dates and deadlines in the old contract – for loan application and approval, inspection repair submission and negotiation, and more – have been replaced by a single “due diligence” period. During this time, a buyer must do his due diligence on the property and decide whether to move forward. This due diligence includes inspections and agreement on repairs, loan application and approval, appraisal, title search, surveys, and any questions or research necessary regarding insurability, HOA and zoning issues.

For the opportunity to conduct his diligence, a buyer pays a due diligence fee to the seller. The amount of this fee and the length of the due diligence period will both be negotiated during the offer process. How much a buyer is willing to pay, and a seller is willing to accept, may depend on the home’s length of time on market, the property’s price point, and the number of unknowns regarding both the buyer’s qualification to purchase and the status of the seller’s property.

For these reasons, it will behoove buyers to have all of their loan application ducks in a row before making an offer, and it will behoove sellers to have documents at the ready, such as all HOA-related documents, surveys, title policies, and more. In addition, in the new environment, sellers who have a home inspection before listing will have a leg up on the process and on the competition: a buyer may not feel the need to conduct their own home inspection, or at a minimum, will have greater confidence in the property.

During the due diligence period, a buyer may terminate the contract for any or no reason. Buyers can simply change their minds. If this happens, the seller keeps the due diligence fee. However, once the due diligence date passes, a buyer and seller will likely have negotiated for earnest money to be provided, earnest money that will remain with the seller if the buyer terminates after the due diligence date has passed.

Thus before the due diligence date, the risk is on sellers. They can continue to show his house, and can take back up offers, but need to wait to see if the buyer under contract moves forward. After the due diligence date passes, the risk shifts to buyers. If they terminate for any reason after this date, the seller keeps both the due diligence fee and the earnest money.

Another change with the new offer to purchase is the stipulation that the earnest money is the seller’s only remedy for breach of contract. For this reason, earnest money amounts are likely to begin to tick up from current levels. Earnest money in many areas has declined to 1 percent or even less of the offer price; it is likely that this percentage will rise, certainly when the due diligence and earnest monies are considered together, as recognition of potential compensation to the seller in the event of a termination.

Why the changes to the current way of contracting to purchase property? The N.C. Real Estate Commission is moving to a due diligence system to reduce the number of failed transactions and disputes. In states where a due diligence system is utilized, the number of failed transactions has declined. Hopefully, this will be our experience in North Carolina as well.

There are other changes to the offer to purchase and contract, but the above are the most critical ones of which buyers and sellers should be aware. There are also important changes to the Owners Association Disclosure which go into effect in 2011. Previously, this form was optional if the neighborhood is served by an HOA. Now, the form is mandatory. In addition, under the new form, a buyer can request of the seller a number of documents related to the homeowner’s association, including covenants, insurance information, architectural guidelines and more.

The above changes are significant and are merely summarized here; please contact me if you’d like to chat about the forms changes and how they will affect negotiations of home sales in the new year.



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