

## **Counsel For Sellers And Buyers** **May 18, 2014**

Representation is very important for sellers and buyers. Before you jump into the Real Estate arena, be sure to have a good coach.

Sellers and Buyers are not enemies, but they do have completely separate interests and goals. You wouldn't go to court with the same Attorney as your opponent, and you shouldn't play real estate without a well qualified representative.

The standard MLS Purchase and Sale Agreement is drafted, with the assistance of Attorneys, to reflect a reasonably neutral position between buyer and seller, but here are a couple of 'for instance' issues that you may want to add to a contract depending on your status as seller or buyer.

Sellers should have access, through their licensee, to more information about the buyer's financial qualifications than is provided in a standard 90% letter. In these uncertain times, sellers should ask their Realtor to obtain the buyer's specific release for the lender to disclose the buyer's credit score and debt to income ratios to determine just how likely a loan approval will be forthcoming.

Lenders will often issue 90% letters for marginal buyers and wrestle later with the details, because they are not liable for any failure to approve the loan. Particularly now, with underwriting requirements tightening, sellers need to know the odds of a successful transaction, as opposed to waiting 6 weeks for a loan to be processed only to fall through at the last minute.

Now, here's one for Buyers. Always insist on a Home Inspection, even if the Seller provides a Pre-Sale Inspection report conducted by a licensed Home Inspector. The fact is that the inspector works for his client and will have a bias depending on who is paying for the job. The degree of influence is subtle, and perhaps not intentional, but does exist!

I have received complaints from buyers who, when wisely counseled by their Realtor to perform their own independent inspections, found deficiencies absent from the pre-sale seller's inspection. This is absolutely not to suggest that inspectors are dishonest, but they can have a more passive or aggressive attitude depending on whom they work for.

The same applies to a Pre-Sale Appraisal done for the seller which may be used to enhance the perceived value of a property. The bias exists because of the relationship of the appraiser to the client. This is why, in the normal course of a loan process, appraisers are obligated to represent the Lender as opposed to either Buyer or Seller. The Lender has, in effect, hired a valuation 'expert' to reassure them that any loan granted is safely indemnified by the asset offered for security. In this case, the bias is towards the lender.

Sellers and Buyers should protect their own individual interests in a real estate transaction, and this is why you should talk to your Realtor about the nature of their relationship to you. Licensees are, in fact, required to provide you with a State of Alaska Disclosure regarding this

relationship, and to explain how they plan to support your side of the transaction. If you are in any doubt about the legal aspects of your contract, spend a few hundred dollars on a legal review of the agreement with an Attorney. Alternatively, be sure, at a minimum, that your real estate licensee makes you feel confident that you are in good hands.

**Dear Dave:** We have been following your comments regarding Owner Occupancy rates at Condominium Developments and their affect on financing. As a board member of my particular association I am wondering what minimum rate of owner occupants you recommend that will protect our owners for the purposes of selling in the future.

**Answer:** This is a good question. Some Associations have already changed By-Laws to set minimum standards in this regard. Whilst this is an opinion and not legal advice, I suggest that a 51% owner/occupancy rate is a reasonable goal to ensure that most all types of financing are available to potential buyers of condominiums.

Here's why - Owner Occupancy Rates (OOR's) are fluid amongst banking institutions and what is required today can change tomorrow. We are not talking here about new construction condos which have their own separate "Presale" rates required for start-up financing of buyers. We are talking here strictly of "Resale" condos in existing projects.

**FHA:** Current requirement of 50% O.O.R. and must be verified for each loan. FHA used to have a 60% requirement but this changed after the 2008 financial crash.

**VA:** Once a development is on the VA approved list, O.O.R. is no longer an issue or question for new buyers. If your Condo project is not on the VA list, and a buyer wishes to use VA, it will be fine if FHA has previously approved the project.

**AHFC:** 50% O.O.R. required to get on the list but not an issue for recurring buyers.

**FNMA/FHLMC (Conventional):** There is no existing O.O.R. requirement for a new buyer, even though penetrating questions of the association, on a lengthy questionnaire, are asked for each individual new loan.

**OVERLAYS:** The fact is that, irrespective of the basic owner/occupancy rate, the Investor (i.e. Source of the Cash) can "Overlay" and override all the general rules. For example, after the 2008 financial crash many banks, including Wells Fargo (who do a ton of business in Alaska), insisted on a 75% O.O.R. for Conventional loans until recently relaxing this overlay.

All this is to say that (1) The rules change all the time, and (2) Individual Investors (banks and other institutions) can overlay the basic rules. This is important to know if the buyer is seeing a mortgage broker and not a Bank directly.

So what is the ideal O.O.R.? - In order to be reasonably certain that, now and in the future, your members can sell their condo FHA, VA, AHFC or Conventional, 51% would in my view be a good target.

