

# REAL ESTATE LAWS

## Home Inspection Issues in Residential Real Estate Transactions

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**W**hen a house is bought, the location and aesthetics drive the transaction while the condition of the systems and components located under the hood are often just an afterthought. Conversely, in a commercial transactions, due diligence that extends way beyond a simplistic home inspection is a precondition to a meeting of the minds in the first instance. The reason for this divergence between commercial and residential transactions is likely because commercial transactions have a dollars-and-cents focus while residential transactions are more often driven from an emotional attachment to the property.

Nonetheless, at or about the time of contract execution in a residential transaction, the condition of the heating, cooling, plumbing and electrical systems coupled with that of the structural components becomes the foremost issue in the transaction and such conditions, when negative, typically give rise to contentious negotiations for adjustments to the initially accepted purchase price. In such, the home inspection not only offers lay purchasers ammunition for offsets, but when mismanaged the inspection can kill the deal completely. To save your deal while leveraging proper due diligence, it is important to understand these top five home inspection issues in residential real estate transactions.

### TIMING THE INSPECTION

There is a lot of debate on whether a home inspection should be performed before or after the execution of a contract of sale in a residential real estate

transaction. In fact, lawyers on the East End are frequently asked by our New York City clients for the standard of practice or custom in our area so that buyers save face in their purchase transaction. For starters, the fact that something is generally done a certain way should be irrelevant to a buyer's or seller's decision as to when to undertake a negotiation tactic in a transaction. Instead, a cost-benefit analysis that drives informed decision-making should be the dispositive force for timing the inspection. The risk of doing the home inspection before the signing of a contract is simple for a buyer. If the buyer waits to sign the contract while the home inspection is being performed, a better offer can be presented to the seller and the delay could cause the buyer to lose their opportunity to purchase their dream home. Conversely, a buyer who executes a contract before performing an inspection is agreeing to buy a house blindly without the requisite knowledge to assess whether the purchase price accurately reflects the condition of the home.

To illustrate, a home that needs a new roof, has a leaking oil tank, offers cracked flashing around the chimney and skylights, and has an air conditioning condenser that is about to fall over in the attic should be sold at a discount as compared to a home with pristine systems and components. Furthermore, once a buyer signs a contract their leverage to insist on setoffs to the agreed upon purchase price, based upon the poor conditions of the property first learned through the home inspection report, will be greatly diminished because the seller lacks any risk for failing to so agree. As

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an exception, should a buyer's attorney be able to convince the seller's attorney to provide contractual exculpatory clauses (i.e., escape clauses) should the post-contract home inspection not confirm the existence of a house in pristine condition, the leverage issue on a buyer can be negated, but such contractual agreements are unlikely and more so, buyers are rarely willing to pay the legal fees necessary to draft such a comprehensive agreement that covers every possible issue that can be learned from an inspection in the first instance.

So, in a standard transaction, the timing of when to have a home inspection performed should depend on how quickly inventory is moving in a given market. Within a seller's market a buyer will want to sign a contract before the inspection (i.e., gambling on the condition of the property), but in a buyer's market, where inventory does not turn over rapidly, a buyer will want to perform the home inspection before entering into a binding purchase agreement.

#### HIRING THE RIGHT PROFESSIONAL

Having a contractor friend look at your prospective purchase is not a home inspection in New York State. In fact, only licensed home inspectors are able to perform such an inspection for compensation in the State of New York pursuant to Real Property Law §444-d. The statute does exempt registered architects and licensed professional engineers from the licensing requirement and permits such professionals to perform home inspections for compensation. Nonetheless, not all professional engineers are exempt, but, instead, the Department of State's website's FAQ for home inspectors states that the exemption only applies where a "professional engineer's business entity [has] a Certificate of Authorization to provide engineering services issued by the New York State Education Department or, if a sole proprietor licensed as professional engineer, the [engineer] must qualify for such a Certificate."

#### KNOWING WHAT YOU GET

New York's Department of State's Division of Licensing Services regulates Home Inspectors in the State. Consequently, the services offered in a home inspection are somewhat standardized. According to the Department of State's website's FAQ, a home inspection is "defined as the process by which a home inspector observes and provides a written report of the systems and components of a residential building including but not limited to: A. Heating System B. Cooling System C. Plumbing System D. Electrical System E. Structural Components— foundation, roof, masonry, structure, exterior and interior components or any other related residential building component recommended by the Home Inspection Council and implemented by the Department through the regulatory process." Further, "[a] Residential Building means a structure consisting of 1 to 4 dwelling units and their garages and carports, but shall not include any such structure newly constructed or not previously occupied as a dwelling unit." According to Real Property Law §444-g(3) the written report must be delivered within five business days.

#### UNDERSTANDING WHAT IS EXCLUDED FROM AN INSPECTION

Real Property Law §444-b(4) states that "[a] home inspection shall not include an inspection for radon or pests." However, this does not cap the limitations for a home inspection, but, instead, only requires that no home inspection can ever include such radon or pest inspections. To understand the scope of a home inspection, one should think of the home inspection like going to your general practice doctor, you still may need to go to a specialist to get the care that you really need. In fact, most commercial transactions and many high-end residential

transactions call for additional due diligence way beyond a home inspection. Remember, not buying a disaster can be the best financial decision that you ever made in your entire life. Ancillary inspections can be obtained for lead paint, mold (air quality), cesspools, fire underwriters, oil tank and/or surrounding soil, environmental testing, energy efficiency, security systems, chimney testing, wood destroying insects (termites amongst others), radon, pool/spa, water potability, asbestos, and code compliance, amongst other options.

In addition to the many inspection services that a typical home inspection excludes, a home inspector is also precluded from repairing anything contained within the inspection report prior to the closing pursuant to Real Property Law §444-g(4)(a). Therefore, one should hire a separately licensed home improvement contractor to provide an estimate for repairs in order to effectively negotiate offsets to the purchase price when obtaining a home inspection pre-contract.

#### WHO SHOULD ATTEND THE INSPECTION

Pursuant to the Code of Ethics and Regulations of Home Inspectors "[a] home inspection has a direct and vital impact on the quality of life for all home buyers." Still further, ethics rules and the Real Property Law both state that "[t]he duty of every home inspector shall be to the client." So, at first glance, it would appear that a home inspection is all about the buyer. Yet, to only have the buyer at a home inspection is probably against the best interests of both the buyer and the seller. You see, every home inspection contract in this State is required to include the following language: "Home Inspectors may only report on readily accessible and observed conditions." So, without the seller making the property accessible and advising the home inspector as to the location of conditions for observation within the home, the home inspection will likely be unproductive.

Therefore, it's suggested that a seller remains available during the home inspection to answer questions. Still further, it's recommended that a seller prepares the house for the inspection prior thereto so that the buyer doesn't need to perform a second inspection after the home inspector states that they cannot gain access to any of the systems in the garage or attic because storage boxes are blocking every system. Regardless, a seller's real estate salesperson may not be a good candidate to go to the inspection. The reason is that a seller's agent, in real estate brokerage, has an affirmative duty to buyers to "disclose all facts known to the agent materially affecting the value or desirability of property" and should the deal fall apart, based upon the findings of a home inspection, and thereafter, the same real estate broker is rehired to relist the property, now such broker will have an affirmative duty to discuss the negative features of the property with all future prospective buyers.

#### BONUS

Home inspections are available to sellers as well as to buyers. If a seller maintains their home in a flawless condition, such a seller may be well served to obtain their own home inspection, remedy any defects exposed in the report, and then proudly market the property as having a perfect inspection report when soliciting a purchaser in the first instance (i.e., before they even get an offer). In such, sellers know that a buyer will ultimately get a home inspection. So, under this tactic the seller can control the conversation. When a party controls the conversation, they typically win the negotiation. ■

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