



DOES “AS-IS” REALLY MEAN “AS-IS?” PART: II

2020 has been quite the year. In addition to a pandemic that temporarily ground the real estate industry to a halt, the latter half of the year presented the exact opposite: multiple offers, wide-spread use of the escalation addendum, and sales within hours of hitting the market. A lack of inventory has shifted leverage into the seller’s favor, with many buyers making offers sight-unseen and waiving inspections and other normal contingencies. As a result, the hotline has been flooded with calls regarding how a seller can truly sell a property in “as-is” condition. To be clear, **the law requires disclosure of material defects. Nothing in the following article is meant to encourage a Seller or real estate professional from avoiding, ignoring, or trying to circumvent the requirements of the law.**

As an initial matter, recall paragraph 25(B) of the PAR form ASR: “Unless otherwise stated in this Agreement, **Buyer has inspected the Property** (including fixtures and any personal property specifically listed herein) **before signing this Agreement or has waived the right to do so, and agrees to purchase the Property IN ITS PRESENT CONDITION**, subject to inspection contingencies elected in this Agreement.” The capital letters and boldface font are in the original and not simply added for effect.

While this language seems reassuring to a Seller, any person with experience knows that in practice, the exception at the very end of the clause often has far reaching implications. A Buyer’s right to terminate as the result of an unsatisfactory inspection report can be abused, providing a Buyer an absolute right not just to get out of the agreement and get back his or her deposit, but to keep a property off the market for a few weeks or months while the report and reply process plays out.

Based on the foregoing, the Seller’s options to sell a property “as-is” really boil down to two (2): 1) not allowing a Buyer to complete inspections; or 2) allowing a Buyer to complete inspections, but only for that Buyer’s information and not for the purposes of requesting repairs or completing a BRI/CTA. The former option is really not feasible nor advisable due to potential liability. After all, if a Seller will not allow a Buyer to complete an inspection, even if the Seller is not trying to hide something, it feels that way. The latter option is likely the best option, but does come with some caveats.

Remember that paragraph 13(B) requires a Buyer to present all inspection reports in their entirety in any scenario when they are performed, whether the Buyer is taking the property as-is, terminating as a result thereof, or requesting repairs. If the Seller receives those inspections, the Seller must now disclose all of those known defects to the next potential Buyer if the first purchase and sale does not occur. In that instance, if the reports contained a material defect, presenting the reports to a new Buyer would be



required whether or not the Seller is exempt from disclosure under the Pennsylvania Seller's Disclosure Law. A Seller could consider language stating that the Buyer's inspections are for Buyer's knowledge and information only, that Buyer will not request any repairs nor complete a BRI/CTA as a result of the inspections, and that notwithstanding the provisions of paragraph 13(B) or any other term of the Agreement, under no circumstance will Buyer present a copy of the inspection report(s) to Seller.

One very important thing to remember is that whether or not a Seller receives copies of the inspection report(s), that Seller must complete a Seller's Disclosure (form SPD) if they are selling 1-4 residential units and don't fit within any of the exceptions. This is required by law and nothing a Seller does or tries to do will absolve them of their obligation to complete this form, or protect them from liability if they fail to complete it. Even if a Buyer is waiving inspections, the SPD is required. In other words, "as-is" does not mean "no Seller's Disclosure."

As a final note, you may recall a prior newflash about a 2017 Pennsylvania Superior Court case involving a man who after leasing a property for six (6) months, closed on the "as-is" purchase and immediately thereafter filed suit against the seller for failure to disclose issues with the property's roof, structure, and septic and electrical systems. What may seem like an astonishing outcome, this case helps to underscore two (2) things: 1) the fact that a Seller's best defense against an allegation they failed to disclose a material defect is the proper completion of the SPD; and 2) even a true "as-is" sale requires completion of the SPD unless an exception applies.

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