

Introduction to Washington State Forms

Seller Disclosure Statement - Residential Property

- Form 17
- Created by the WA Legislature
- Applies to improved residential property
 - 1 to 4 dwelling units
 - Condos (without Public Offering Statement)
 - Timeshares
 - Mobile/Manufactured Homes

Seller Disclosure Statement – Unimproved Residential Property

- Form 17C
 - New disclosure obligations for 2007
 - Applies to unimproved residential property
 - No residential dwelling on the property
 - All or a portion of the property zoned for residential use
 - Actual or intended use is irrelevant.

Seller Disclosure Statements

- Seller must deliver within 5 days of mutual acceptance unless
 - Seller is exempt
 - Personal Representatives, Bankruptcy Trustees
 - Buyer had an interest in the last 2 years
 - Leases, life estates, < fee simple
 - Gifts to next of kin/Divorce
 - Partial exemption for new construction
 - Resale of foreclosures are no longer exempt
 - Buyer waives the right to receive
 - Waiver must be knowing
 - Buyer should understand what it is he/she is giving up
 - Buyer's ability to waive now limited
 - If any answer in the Environmental Section is "yes," Buyer cannot waive that section of the form
- Once delivered, Buyer may
 - Approve and accept
 - Rescind up to 3 business days after receipt
 - Rescission must be in writing
 - Do nothing and waive the right to rescind automatically
- Seller must provide copies of documents
 - If available and
 - Not publicly recorded
- Seller has a duty to supplement if answers change
- If Seller supplements, Buyer gets a new 3-day right of rescission
- Closing
 - Seller's duty ends (but not liability)

- Buyer cannot rescind thereafter
- Must use most recent version (7/07)
- Revisions apply to NWMLS Forms
 - Form 20 – Multi-family
 - Form 21 – Residential
 - Form 23 – Mobile and Manufactured Homes
 - Form 25- Vacant Land
 - Form 28 – Condominiums
- Revisions do not apply to CBA Forms
 - Form 24 – Commercial/Investment
 - Form 30- Business Opportunity

Legal Descriptions

- Statute of Frauds – Agreement must contain legal description
- Rely only on
 - Title insurance company/prelim. Commitment
 - Last vesting deed
- Do not rely on
 - Metroscan
 - County Assessor or derivatives (e.g. Realist)
- Legal Description must be attached as Exhibit A
 - There is no place to write in a legal description
 - Do not transcribe. Photocopy!
- In order to attach it later, both parties must participate
 - Get the parties' initials
 - Time runs from execution of agreement, not attachment of the legal description

Included Items

- Items commonly included set forth in boilerplate in page 2
- Certain specific items must be selected on page 1
 - These are items that are subject to negotiation
 - “Other” for special items or items that seller indicates will be left in listing
 - Offers in listing are not binding – must include in the agreement

Default Provisions

- Parties must agree what happens if Buyer breaches
 - Forfeiture of earnest money
 - Seller remedies
 - Suit for damages
 - Specific enforcement
 - If Seller Breaches, Buyer has all remedies
 - Damages
 - Specific enforcement

Default – Safe Harbor

- Safe Harbor = Forfeiture of Earnest Money

- It is a form of liquidated damages
- Protected by statute in Washington
- Forfeiture of E/M is most popular
 - Seller may retain E/M up to 5% of purchase price
 - Up to 5% is per se reasonable
 - More than 5% is subject to common law analysis of liquidated damages

Title Insurance Company

- Homeowner's Policy of Title Insurance is the default in the purchase and sale agreement
- If Homeowner's Policy is not available, agreement provides for standard owner's policy
- Parties may select another policy in Form 22D
 - Standard (less coverage)
 - Extended (more coverage, more \$)
- Provision now encourages Seller to get a preliminary commitment early
- Provides a source of legal description
- If buyer wants another title insurance company, buyer pays cancellation fees
 - Insurance commission is cracking down on insurance company kickbacks
 - Expect insurance companies to collect cancellation fee

Title Review

- Provision in the PSA provides Buyer limited ability to terminate
- If Buyer wants a comprehensive review of title, use Form 22T (Title Contingency)
 - Makes the transaction subject to title review
 - Allows Buyer the complain about issues on title
 - Allows Seller an opportunity to remedy, if possible

Closing and Possession

- New provisions
 - Closing and possession provision of forms combined
 - Seller must maintain the property in present condition (time of mutual acceptance)
 - Requires the parties to enter into agreements for early or late possession
 - Advised parties to talk to insurance companies

Charges and Assessments

- New provision addressing charges and assessments against the property.
Examples:
 - Local improvement districts
 - Capacity charges
 - Impact charges
 - If on title or due before closing, Seller pays
 - If levied before closing, but not due until after closing, parties must agree who pays

Notices

- All notices must be in writing
- Delivery is effective if to
 - Seller or Buyer
 - Listing Agent or Selling Agent (personally!!!)
 - Offices of Agents (fail safe)
 - Includes Form 17, Lead-Based Paint, Public Offering Statement, Resale Certificate, preliminary commitment, homeowners' association docs
- Notices may be signed by only one party

Computation of Time

- Applies to time measured in days (not hours)
- Start counting the next day
- Time periods expire at 9:00 p.m.
- If the last day is a weekend or holiday, do not count it (except for Possession Date)
- 5 days or less = business days
- More than 5 days = calendar days
- What happens if legal description is attached later?
 - Agreement allows the parties to count time from "mutual acceptance"
 - Date the accepted offer or counteroffer is delivered, even if no legal
 - Time is not delayed until legal description is attached
 - Provision = expectations of parties and agents

Offer/Counteroffer

- Offers and counteroffers expire at 9:00 p.m. on the date indicated
 - If no date, they expire 2 days (business) after delivery
- Page 1: Counteroffer expiration date provision deleted
 - Why? Confusion when making an offer
- Use the Counteroffer Addendum, Form 36

Information Verification Period

- Provision allows the Buyer 10 days to verify all information provided by Seller/Listing Agent
 - Information in listing
 - Information in flyers
 - Information in advertisements
- Automatically waives after 10 days
- If Buyer identifies discrepancy, agreement terminates

Alejandro v. Bull

- New decision from the Washington Supreme Court
- Decision deals with the remedies available to parties to a contract
 - Buyers can no longer sue the Seller in contract for negligent misrepresentation
 - The decision reiterates the longstanding separation between contract and tort
 - It returns Washington law to its roots
- The facts:
 - Bad septic system case

- Seller (Bull) notices soggy ground a year before listing
 - She had the tank pumped (1st inspector) and a pipe repaired (2nd inspector)
- She then listed the property; Buyers inspect tank
 - Form 17: no defects in the operation of the system
 - Buyer used the 2nd inspector to inspect and pump
 - Inspector: no obvious malfunctions although back baffle could not be inspected
- Buyers accepted Form 17 and waived the right to revoke the offer
- Lender's inspection: Septic works as intended
- Buyer's move in December
- In January:
 - Four odor inside the home
 - Gurgling noises
 - Foul odor outside and soggy ground
- Buyers hire the 1st inspector: "Drainfields not working; connect to sewer"
- Buyers hire contractor to connect to sewer
 - Back Baffle is missing
 - Sludge plugged the drainfields
- Buyers sue for fraud and misrepresentation
 - \$30,000 in damages
- The Law
 - This claim is for negligent misrepresentation, not fraud
 - Tort law: protects society's interest in freedom from harm to person or property
 - Addresses obligations imposed by law
 - Contract law: protects parties' interest in performance of promises and economic losses
 - Addresses obligation imposed to contract
 - Economic Loss Rule: "The purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses."
 - "Tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement."
 - Rule maintains the fundamental differences between contract and tort
Contracts allow the parties to allocate risk by agreement
- The Decision
 - Failed septic system = purely economic loss
 - Parties' relationship is governed by contract
 - Parties could have/should have allocated the risk of loss in the contract
 - Warranties
 - Insurance
 - Pricing
 - Express provisions allocating the risk
- "In this case involving the sale of a residence with a defective septic system, we hold that the economic loss rule applies and forecloses the buyers' claim that the seller negligently misrepresented the condition of the septic system (in Form 17)."

- The Impact:
 - The parties now must negotiate who will bear the risk of loss
 - New provision added to purchase and sale agreement
 - Parties must select on page one who will bear the risk of loss for negligent misrepresentation in Form 17
 - New explanatory provision on last page
 - This decision does not affect claims for fraud!!

Other Revisions

- Simple 1031 Exchange provision added
- Advisory provision on legal and accounting advice
- Commission provision added to clarify that licensees are 3rd party beneficiaries

Financing Addendum

- Establishes a contingency period for Buyer to get financing
- Seller cannot bother Buyer during the contingency period
- After it ends, Seller has right to give notice of termination
- Buyer can stop termination by waiving
- Seller's decision to terminate is based on information provided by Buyer
- Buyer must make application within 5 days for the subject property
- NEW: If Buyer wants to change lender/loan after the 5 day period, Buyer must seek Seller's consent
- No other changes!

Optional Clauses

- Three important changes
 - Provision on utilities has been broadened to include other types of utilities
 - Selling office commission moved to its own form (Form 41C)
 - New provision that requires Seller to produce homeowners' association documents

Inspection Addendum – Form 35

- Three revisions
 - Revisions to bring form into compliance with new Seller Disclosure law
 - Addition of provision advising Buyer to include a contingency for septic systems, where necessary
 - Return of the Neighborhood Review
 - Form 35N is still available

Seller Occupancy After Closing

- New form for use when seller remains in possession after closing
 - Buyer becomes landlord
 - Seller becomes tenant
 - The Form is a short form of lease agreement
 - It will be numbered Form 65B