

Memo

To: MAR Members
From: James A. Bowditch, Boone Karlberg P.C., Missoula, Montana¹
Date: August 27, 2019
Subject: Inspection Contingency Question and Answer for the Residential Buy-sell Agreement

In an effort to assist MAR members in better understanding the inspection contingency process as found in the MAR Residential Buy-Sell Agreement, the following commonly asked questions and answers are provided.

What is the purpose of the first inspection contingency release date (the “Notice Date”)?

A buyer who has elected to utilize the Inspection Contingency has the right to disapprove of any items from those inspections or investigations. Under the Inspection Contingency, a buyer may either terminate the transaction based on these disapproval(s), or ask the seller to remedy the items of which buyer disapproves. The “Notice Date” is the date by which the buyer or the buyer’s agent must deliver to the seller or the seller’s agent written notice, signed by the buyer, stating the buyer’s disapprovals(s) and how the buyer would like to proceed.

PLEASE NOTE: Written notice of the buyer’s disapproval must be delivered to the seller or the seller’s agent no later than 5:00 PM (Mountain Time) on the Notice Date deadline. If written notice of the buyer’s disapproval is not delivered to the seller or the seller’s agent by said deadline then per the terms of the buy-sell agreement the inspection contingency is automatically released, *and the buyer no longer has any rights under the inspection contingency.*

What is the purpose of the second inspection contingency release date (the “Resolution Date”)?

If the buyer or the buyer’s agent delivers written notice to the seller of the buyer’s disapproval by the applicable Notice Date deadline requesting that the seller remedy certain items of which the buyer disapproves, then on or before 5:00 PM (Mountain Time) of the “Resolution Date” either (i) the buyer and the seller must come to written agreement for resolution of the buyer’s disapproval(s), or (ii) the buyer must withdraw, in writing, the buyer’s disapproval of the conditions noted by the buyer in the written notice previously provided to the seller.

¹ While this Memo has been reviewed and approved by MAR legal counsel the information contained in this memo was largely put together by Ken Joiner, former Chairperson of the MAR Forms Subcommittee and appropriate attribution is hereby provided.

PLEASE NOTE: If by the Resolution Date deadline the buyer and seller have not come to written agreement for resolving the item(s) of buyer's disapproval or the buyer has not delivered to the seller or their agent a withdrawal of the buyer's requested inspection remedies, per the terms of the Buy-Sell Agreement as set forth in the inspection contingency section, *the Buy-Sell Agreement is automatically terminated and the earnest money is refunded to the buyer.* Buyer agents should therefore be mindful of any Resolution Date deadline that is approaching and discuss with the buyer what the buyer desires to do.

If a buyer has already submitted an Inspection Notice to the seller with the buyer's disapproval(s) and requested remedy(s), can the buyer submit to the seller additional Inspection Notices with modified or additional remedies?

Yes, however two criteria must be met:

1. The buyer's new Inspection Notice(s) must be delivered to the seller or the seller's agent not later than the Notice Date deadline; and
2. The new Inspection Notice(s) must be submitted prior to the buyer and seller reaching an agreement as to the conditions noted in the buyer's previous Inspection Notice. The reason for this is that once the parties have entered into a written agreement in satisfaction of the conditions noted by the buyer, pursuant to the terms of the Buy-Sell Agreement *the inspection contingency is of no further force or effect.*

In order to avoid termination of the Buy-Sell Agreement, can the buyer withdraw their Inspection Notice after it's been delivered and release the Inspection Contingency?

If the buyer has used the Inspection Notice form to request remedies of the seller (as opposed to terminating the transaction), the buyer may withdraw, in writing, the buyer's disapproval of the conditions noted by the buyer in the Inspection Notice previously provided and release the Inspection Contingency at any time prior to the Resolution Date deadline. There is a withdrawal form available for this in the MAR forms library. It's called, "Inspection Notice (Buyer's Withdrawal)". *Please be aware that by releasing the Inspection Contingency, the buyer is releasing all of their rights under the Inspection Contingency and the transaction moves forward to closing without regard to any and all previously provided Inspection Notices.*

If the seller rejects the buyer's Inspection Notice but the buyer would still like to purchase the property, what should the buyer do?

At this point, the only way the Buy-Sell Agreement can stay together and the transaction move forward is if the buyer delivers a signed "Inspection Notice (Buyer's Withdrawal)" form to the seller or the seller's agent prior to 5:00 PM (Mountain Time) of the Resolution Date deadline.

If the seller counters the buyer's proposed inspection remedies in writing with different remedies, can the seller later withdraw their proposed remedies?

Yes. Per the "Inspection Notice (Seller's Response)" form, the seller may withdraw their proposed counter-remedies to the buyer at any time prior to the seller receiving written acceptance from the buyer.

May a buyer or seller terminate a transaction during the period of time after the inspection contingency's "Notice Date" but prior to expiration of the "Resolution Date" concerning the items set forth in such notice?

No. Until the inspection contingency Notice Date has passed a buyer has two choices relating to the buyer's disapproval of the condition of the property: (i) The buyer can terminate the transaction, or (ii) the buyer can elect to attempt to renegotiate the conditions upon which the disapproval is based. If the buyer chooses the latter, the buyer and the seller then have until the Resolution Date to attempt to reach an agreement. During this time the parties are to continue to try and reach an agreement. During this period the buyer must either (i) give the seller the opportunity to consider the renegotiated terms proposed by the buyer or (ii) withdraw the buyer's disapproval of the conditions noted.