

Real Estate Forms & Industry Update

WLTA 2016 Education Seminar

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Lynnwood – October 15, 2016

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Agenda

- FIRPTA
- Earnest Money Statute
- Financing Forms Revisions
- Potential Form Changes
- Case Law Update
- Escrow Errors

FIRPTA

FIRPTA

- The Foreign Investment in Real Property Tax Act (“FIRPTA”) provides that the sale of U.S. real property by a foreign person is subject to income tax withholding
- Under FIRPTA, buyer is responsible for determining whether Seller is a foreign person
 - If Buyer fails to do so, could be liable for the tax

FIRPTA

- Listing Agreement includes:
 - Seller agreement to execute FIRPTA certificate at closing
 - Notice that sale of U.S. property by a foreign person is subject to income tax withholding

FIRPTA

- PSA includes:
 - Specific Term 14 – Seller warranty with regard to citizenship
 - Insertion of Seller’s citizenship not a counteroffer (General Term “s”)
 - General Term “j”
 - Seller shall prepare and execute FIRPTA certification at closing
 - Closing Agent instructed to withhold and pay the required amount

FIRPTA

- Effective February 17, 2016, FIRPTA withholding imposed at 15% (up from 10%)
 - Two exceptions
 - If amount realized does not exceed \$300,000 and the Buyer will use the property as Buyer's personal residence, no tax is withheld
 - If amount realized exceeds \$300,000, but does not exceed \$1,000,000 and Buyer will use the property as buyer's personal residence, then tax withheld is 10%

FIRPTA

- Form 22E
 - Buyer must review FIRPTA Certification (Form 22E) and decide if either exception applies
 - If one exception applies, Buyer should check the applicable box and sign the bottom of the form
 - If neither exception applies, Buyer should not sign the bottom of the form

Earnest Money Statute – RCW 64.04.220

Earnest Money Statute

New(ish) Law – RCW 64.04.220

- One party makes written demand for earnest money, “Holder” must, within 15 days:
 - Deliver demand to other party;
 - Release the earnest money; or
 - Commence an interpleader action

Earnest Money Statute

- Notice to the other party must:
 - Include a copy of the demand
 - Advise the parties that:
 - They have 20 days to object in writing to release of the earnest money; and
 - The failure to timely object in writing will result in a release of the funds to the demanding party
 - Include an address for written objections

Earnest Money Statute

- The 20-day objection period starts when the notice is placed in U.S. mail and sent via e-mail
- Holder must have evidence of mailing the notice
- Notice should be sent to last known mailing address and e-mail address
 - But holder has no obligation to search outside its own records to determine proper addresses

Earnest Money Statute

- At expiration of 20 days:
 - If no written objection, holder must deliver earnest money to demanding party within 10 days
 - If timely written objection received:
 - Must not release funds to any party
 - Must commence an interpleader action within 60 days unless the parties mutually instruct otherwise

Earnest Money Statute

- Holder who follows the statute is protected from liability
 - Unless holder simply releases earnest money following receipt of a demand from one party
- Holder may interplead the funds at any time
- If holder commences an interpleader action, the court *must* award holder its reasonable attorneys' fees and costs

Earnest Money Statute

- Application of Earnest Money Statute
 - Applies to all funds held as of July 24, 2015, even if the funds were deposited prior to that date
 - Applies only to improved and unimproved residential property

Earnest Money Statute

- Benefits for holder
 - Form interpleader and summons provided in statute
 - Allows service by mail
 - *Requires* award of reasonable attorneys' fees and costs to holder
- NWMLS forms revised to reflect new law
 - General term "b" revised to reflect new law
 - Interpleader Summons (Form 150)
 - Interpleader Complaint (Form 151)

Financing Forms Revisions

Financing Forms Revisions

- Form 22A (Financing Addendum)
- Form 22AC (Loan/Lender Change Addendum)
- Form 22AL (Request for Loan Information)
- Form 22AP (Loan Information Notice)
- Form 22AR (Financing Contingency Notice)

Financing Forms Revisions

- Financing Addendum (Form 22A) requires Buyer to timely apply for a loan
- “Application” means:
 - Submitting financial information for the purpose of obtaining extension of credit, including Buyer’s name, income, SSN, property address, purchase price, and loan amount
- If Buyer does not timely apply – Buyer automatically waives financing contingency

Financing Forms Revisions

- Lender means “either the party to whom the application was submitted or the party funding the loan”
- Buyer needs Seller’s consent to:
 - Change type of loan at any time
 - Change “lender” after the time to apply for financing expires
- Loan/Lender Change Addendum
 - Form 22AC

Financing Forms Revisions

The Financing Addendum (Form 22A) requires Buyer to secure Seller's consent to change either the type of loan at any time or the lender after the agreed upon time to apply for financing expires. If Buyer fails to do so, Buyer waives the Financing Contingency. 5
6
7

SELLER'S CONSENT TO CHANGE TYPE OF LOAN. 8

Seller consents to Buyer changing the type of loan from _____ (the type of loan 9
agreed upon in Form 22A) to _____. Buyer shall make application for 10
this new loan within _____ days (3 days if not filled in) after receiving Seller's consent. If Buyer does not timely 11
apply, Buyer waives the Financing Contingency, including Paragraph 7 (Appraisal Less Than Sales Price). 12

SELLER'S CONSENT TO CHANGE LENDER. 13

Seller consents to Buyer changing the lender from _____ (the lender to whom 14
Buyer originally applied during the time period for making the application) to _____. 15
Buyer shall make application with this new lender within _____ days (3 days if not filled in) after receiving 16
Seller's consent. If Buyer does not timely apply, Buyer waives the Financing Contingency, including Paragraph 7 17
(Appraisal Less Than Sales Price). 18

Financing Forms Revisions

- New Section 2 in Form 22A – Loan information
 - Purpose is to keep Seller informed regarding the status of Buyer's loan application
 - At any time ____ days after mutual acceptance (10 days if not filled in), Seller may give, once, a notice requesting loan information

Financing Forms Revisions

- 2. LOAN INFORMATION.** 21
- a. Seller's Request for Loan Information.** At any time _____ days (10 days if not filled in) after mutual 22
acceptance, Seller may give, once, a notice requesting information related to the status of Buyer's loan 23
application ("Request for Loan Information"). NWMLS Form 22AL may be used for this notice. 24
- b. Buyer's Loan Information Notice.** Within _____ days (3 days if not filled in) of receiving Seller's Request 25
for Loan Information, Buyer shall give notice of the status of Buyer's loan application ("Loan Information 26
Notice"). Buyer's notice shall be on NWMLS Form 22AP and shall include the date of application, the name 27
of lender, a list of the information that Buyer has provided to lender, and a warranty that Buyer has provided 28
all information requested by lender. 29
- c. Failure to Provide Loan Information Notice.** If Buyer fails to timely give to Seller a completed Loan 30
Information Notice, Seller may give the Right to Terminate Notice described in Paragraph 3 (Seller's Right to 31
Terminate) at any time after the date that the Loan Information Notice is due. 32

Financing Forms Revisions

- Seller should use request for loan information – Form 22AL

Request for Loan Information. Pursuant to Section 2 in the Financing Addendum (Form 22A), Seller requests that Buyer give notice of the status of Buyer's loan application. Buyer shall use the Loan Information Notice (Form 22AP) for that notice. 5
6
7

Seller Date 8

Seller Date

Financing Forms Revisions

- Loan Information Notice (Form 22AP)
 - Buyer must respond to Request for Loan Information by giving Seller information about the status of Buyer's loan application
 - Buyer must give Loan Information Notice (Form 22AP) within _____ days (3 days if not filled in) of receiving Seller's request

Financing Forms Revisions

- Loan Information Notice (Form 22AP)
 - Date of application and identity of lender
 - Authorization for Listing Firm and Seller to inquire with lender
 - List of information Buyer has provided to lender
 - Paystubs, tax documents, checking/savings statements, securities, proof of debts, other real property, source of down payment, drivers license, etc.
 - *Buyer has provided all requested info to date

Financing Forms Revisions

Buyer represents and warrants the following information is true and correct.	5
Buyer made loan application, which included Buyer's name, income, social security number (if required), the Property address, purchase price, and the loan amount on _____	6
_____	7
to _____ ("lender").	8

Bank/Mortgage Company	
Buyer authorizes Listing Firm, Listing Broker, and Seller to contact lender to inquire about the status of Buyer's loan approval any time before Closing. Buyer will execute an authorization form, if required by lender, to accomplish the same.	9
	10
	11
Buyer has provided the following information to lender:	12
<input type="checkbox"/> Recent paystubs (prior 30 days);	13
<input type="checkbox"/> Form W2 (Wage and Tax Statement) for prior two years;	14
<input type="checkbox"/> Form 1040 (Individual Income Tax Return) for prior two years;	15
<input type="checkbox"/> Any applicable business tax return forms for prior two years;	16
<input type="checkbox"/> Checking and savings account statements from prior two months;	17
<input type="checkbox"/> Securities account statements for prior two months, including investments, retirement funds, etc.;	18
<input type="checkbox"/> Proof of any debts, including car loans, student loans, credit card accounts, etc.;	19
<input type="checkbox"/> Mortgage statements and any home equity lines of credit related to other real property owned by Buyer;	20
<input type="checkbox"/> Lease agreements, real property tax payments, homeowner's association payments, and homeowner's insurance information related to other real property owned by Buyer;	21
	22
<input type="checkbox"/> Confirmation of source of down payment (e.g. savings, gift, sale of stock, loan, etc.);	23
<input type="checkbox"/> Copy of driver's license(s);	24
<input type="checkbox"/> Other _____; and	25
<input type="checkbox"/> Other _____.	26
Buyer has provided lender with the above information and any additional information lender has required Buyer to provide to lender before the date of this notice.	27
	28

Financing Forms Revisions

- Loan Information Notice (Form 22AP)
 - Buyer's failure to timely provide Form 22AP accelerates Seller's termination rights
 - Seller may give Right to Terminate Notice at any time after the Loan Information Notice is due
 - Three days after giving Right to Terminate Notice, assuming Buyer has not waived the financing contingency, Seller may terminate the agreement

Financing Forms Revisions

- Loan Cost Provision

4. LOAN COST PROVISIONS. Seller shall pay up to \$ _____; or _____% of the Purchase Price (\$0.00 if not filled in), which shall be applied to Buyer's Loan(s) and settlement costs, including prepaids, loan discount, loan fee, interest buy down, financing, closing or other costs allowed by lender. That amount shall include the following costs that lender is prohibited from collecting from Buyer: (a) up to \$300.00 for Buyer's Loan(s) and settlement costs for FHA/USDA/VA loans; and (b) Buyer's share of the escrow fee for a VA loan. Seller shall pay the costs for (a) and (b), even if the amount agreed upon in this Paragraph 4 is insufficient to pay for those costs.

Financing Forms Revisions

- Loan Cost Provision
 - Agreed upon amount now *includes* FHA/USDA/VA costs and the full escrow fee for VA loans
 - If amount is insufficient to cover those costs – Seller still obligated to pay up to \$300 for Buyer's loan and settlement costs for FHA/USDA/VA loans and the full escrow fee for VA loans

Financing Forms Revisions

- Buyer entitled to earnest money after written confirmation from “lender” confirming:
 - Date of application, including copy of loan estimate
 - Buyer possessed sufficient funds to close
 - Reasons Buyer was unable to obtain financing *by closing*
- If Seller terminates, earnest money returned to Buyer

Financing Forms Revisions

- Extension of closing
- Lender required to give *revised* closing disclosure at least 3 days before consummation for:
 - Last minute changes to APR;
 - Addition of pre-payment penalty; or
 - Change in loan product
- Automatic extension of closing for up to 4 days to accommodate these requirements
- This provision survives waiver of financing contingency

Potential Form Changes

Potential Form Changes

- Optional Clauses Addendum (Form 22D)
 - Add provision to give Buyer the right to a “walk-through” to determine if Seller has maintained the property as required by the PSA
 - Add a provision requiring Seller to remove all personal property

Potential Form Changes

- Financing Addendum (Form 22A)
 - In the event of a low appraisal:
 - Create an option for parties to negotiate a new price
 - Add separate addendum that would require additional down payment
 - Create process to negotiate work items requested by appraiser

Potential Form Changes

- Purchase and Sale Agreements
 - Change “Closing Agent” to “Closing Firm”
 - Clarify insertion *or change* to Seller’s name or citizenship status is not a counteroffer

Potential Form Changes

- Back-Up Addendum (Form 38A)
 - Revise default for closing from 60 days to 45 days
 - Clarify that the closing date in the addendum supersedes the closing date in the PSA

Potential Form Changes

- Identification of Utilities Addendum (Form 22K)
 - Add cable, satellite, and internet provider?
 - List all utilities and put it on escrow to determine which are lien-able?

Potential Form Changes

- Condominium Resale Certificate (Form 27)
 - Revise form to harmonize with RCW 64.34.425

Potential Form Changes

- Other suggestions?

Case Law Update

Case Law Update

- *Douglas v. Visser*, 173 Wn. App. 823 (2013)
 - When discover evidence of a defect have a duty to make further inquiries
 - Consistent with *Puget Sound Building Corp v. Dalarna*

- *Dunphy v. Watts*, 2013 WL 8359779
 - Maybe not

Case Law Update

- *Mustoe v. Ma/Jordan*, 193 Wn. App. 161 (2016)
 - Encroaching trees, roots, or branches can be cut at the property line
 - No reasonable care required

- *LeBlue v. Aalgaard*, 193 Wn. App. 66 (2016)
 - Adverse possession even when neighbor agrees to use?

Case Law Update

- *Guest v. Lange*, 2016 WL 4126366
 - Lis pendens stays in place on appeal

- *Jordan v. Nationstar Mortgage*, 185 Wn.2d 876 (2016)
 - Even with authorizing language in a DOT, lender cannot enter a property and change locks on default prior to foreclosure

Case Law Update

- *Centurion Properties v. Chicago Title*, 375 P.3d 651 (2016)
 - Title companies do not owe a duty of care to third parties in the recording of legal instruments

- *Pendergrast v. Matichuk*, Washington State Supreme Court Case No. 92324-8
 - Common grantor's location of a boundary line can be binding on subsequent purchasers
 - Timber trespass statute allowing for treble damages includes emotional distress damages

Escrow Errors

Escrow Errors

- Failure to get signature on instructions
 - Instructions not signed in advance of closing
- Not documenting important telephone calls
- Forgery
 - Accepting signatures not affixed in presence of agent
 - Signatures not in front of approved notary
- Not communicating with title regarding legal description
- Legal description different from that in PSA (or adding a description)
- Fibbing to DFI or LPB

Escrow Errors

- Preparing instruments not authorized to prepare
 - Indemnities, subordination agreements, amendments to PSA
- Releasing EM without joint instructions
- Paying loan payoff without proper payoff confirmation
 - Use loan number without property specific data
- May take partial payment \$ and then quibble over balance due
- Need to disclose if you know? Suspect?
 - E.g. Seller impresses easement at last minute

Questions?

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