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## PURCHASE AND SALE AGREEMENTS

**Question:** Who is responsible for paying the Metro sewer capacity treatment charge when the property is sold? Is the seller required to disclose the charge?

**Answer:** The charge is not a lien on the title and transfers to the new owner. Thus, the buyers are responsible for the payments after closing. See <http://dnr.metrokc.gov/WTD/capchrg/index.htm>. The sellers are required to disclose the charge on the seller disclosure statement. RCW 64.06.020.

**Question:** The closing agent is not willing to release the keys to our buyer, even though funding and recording have occurred. The closing agent says she cannot release the keys until the possession date. I remember you telling us that the buyers were entitled to have the keys at closing, even though they could not occupy the house until the possession date. Which is correct?

**Answer:** The NWMLS Purchase and Sale Agreement form was changed in April, 2001. It now provides that the buyer is entitled to the keys on the Possession Date, if possession differs from closing. See paragraph f of the General Terms.

**Question:** A purchase and sale agreement is "subject to the seller finding suitable housing within 30 days." The listing did not state anything about this contingency. The listing agent thinks this is illegal. I told her that listing a property that way was prohibited by the MLS rules, but the parties could agree to it. The agent thinks this will never fly and wants to sue her for commission because it was not part of the listing agreement. Was I right? Is there a commission due if the seller does not find a home?

**Answer:** You are correct. Conditioning the sellers' acceptance upon their finding an acceptable replacement property is no more illegal or unenforceable than conditioning the buyers' offer on the sale of their present house. The NWMLS rules prohibit a listing broker from publishing a listing containing such a limitation, but as between the buyers and sellers, it is not improper. The brokers may be entitled to the commission, if the offer was a full price, listed terms offer and all contingencies are satisfied or waived by the buyers.

**Question:** If a purchaser is buying a piece of property from a seller, can the seller grant the purchaser an option to buy another piece of property without additional consideration?

**Answer:** Yes, the seller can grant an option or (more commonly) a right of first refusal to purchase other property owned by the seller as part of the original contract without separate or additional consideration.

**Question:** If a Buyer completes NWMLS Form 51 (Rescission of Purchase and Sale Agreement) based on the disapproval of Real Property Transfer Disclosure Statement (within the 3 business days of receipt), do both the Buyer and Seller husband and wife have to sign or does the requirement of "Notices" cover it so only one Buyer and Seller's signature is needed?

**Answer:** Because a notice of rescission under the seller disclosure law is a statutory, rather than contractual notice, the notice provision in the purchase and sale agreement arguably does not apply. Therefore, to be safe, all buyers should sign the notice.

However, because the notice is unilateral, the buyers should sign a notice of election to terminate (JLS Form 002), rather than a mutual rescission agreement. The sellers' signature is not required.

**Question:** Is separate consideration required to extend the closing date, where the purchase and sale agreement contains a sale pending contingency and, through no fault of the purchaser, the sale of the purchaser's present house did not close on time? Does it matter that the earnest money is nonrefundable, by agreement of the parties?

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**Answer:** Generally, new and independent consideration is required to modify a contract. Performance of a pre-existing obligation cannot serve as the consideration for a modification. Therefore, new consideration generally is required to modify a purchase and sale agreement. However, where there is a contingency that has not been satisfied or waiver through no fault of the purchasers, the extension of the closing date itself serves as consideration for the seller's promise to extend the agreement, because the purchasers are incurring an additional obligation that they would not otherwise have. The fact that the earnest money is nonrefundable does not change the analysis, because without the extension the purchasers would have no further obligation to buy the property after the agreed closing date.

**Question:** What is the purchasers' recourse if the sellers refuse to vacate by the agreed possession date?

**Answer:** The purchasers must bring an ejectment action, which is a special type of lawsuit limited to restoring possession to the owner. The sheriff might be willing to talk to the sellers, but will not evict them without a court order. The purchaser can also recover damages incurred as a result of the sellers' failure to surrender possession as and when agreed (e.g. temporary lodging, storage, moving expenses).

**Question:** What is the best way to notify the buyers on a back up agreement that they are now in first position?

**Answer:** The only formality required is that the notice be in writing, that it be received by or at the office of the selling licensee, and that it unequivocally inform the buyers that the first sale has failed, such that they are now in first position.

**Question:** What should the buyers do with personal property left by the sellers at the house after the buyers take possession?

**Answer:** There is no recognized procedure for storing and disposing of items left by the seller. The most prudent approach is to follow the procedure outlined in the Residential Landlord-Tenant Act, although not directly applicable, as follows:

"In the event of such abandonment of tenancy and an accompanying default in the payment of rent by the tenant, the landlord may immediately enter and take possession of any property of the tenant found on the premises and may store the same in any reasonably secure place. A landlord shall make reasonable efforts to provide the tenant with a notice containing the name and address of the landlord and the place where the property is stored and informing the tenant that a sale or disposition of the property shall take place pursuant to this section, and the date of the sale or disposal, and further informing the tenant of the right under RCW 59.18.230 to have the property returned prior to its sale or disposal. The landlord's efforts at notice under this subsection shall be satisfied by the mailing by first class mail, postage prepaid, of such notice to the tenant's last known address and to any other address provided in writing by the tenant or actually known to the landlord where the tenant might receive the notice. The landlord shall return the property to the tenant after the tenant has paid the actual or reasonable drayage and storage costs whichever is less if the tenant makes a written request for the return of the property before the landlord has sold or disposed of the property. After forty-five days from the date the notice of such sale or disposal is mailed or personally delivered to the tenant, the landlord may sell or dispose of such property, including personal papers, family pictures, and keepsakes. The landlord may apply any income derived therefrom against moneys due the landlord, including actual or reasonable costs whichever is less of drayage and storage of the property. If the property has a cumulative value of fifty dollars or less, the landlord may sell or dispose of the property in the manner provided in this section, except for personal papers, family pictures, and keepsakes, after seven days from the date the notice of sale or disposal is mailed or personally delivered to the tenant: Provided, That the landlord shall make reasonable efforts, as defined in this section, to notify the tenant. Any excess income derived from the sale of such property under this section shall be held by the landlord for the benefit of the tenant for a period of one year from the date of sale, and if no claim is made or action commenced by the tenant for the

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recovery thereof prior to the expiration of that period of time, the balance shall be the property of the landlord, including any interest paid on the income."

RCW 59.18.310.

**Question:** When a purchase and sale agreement contains a false representation by the buyers that they have sufficient funds to close the sale and are not relying on any contingent source of funds and the buyers fail to close due to insufficient funds for the down payment and closing costs, are the buyers in default and what recourse do the sellers have?

**Answer:** If the only reason for the buyers' inability to close is insufficient funds, then the buyers are in default *and* guilty of fraud, such that the sellers could *both* keep the buyers' earnest money for breach of contract *and* sue the buyers for additional damages, if any, caused by their fraud, notwithstanding a limitation of remedies clause in the contract.

**Question:** When the purchase and sale agreement specifies a closing date that falls on a weekend or holiday, when is the sale required to be closed -- before or after the weekend or holiday?

**Answer:** The computation of time provision in the purchase and sale agreement applies only when a *period of time* is specified, rather than a *date* certain. If the Latest Closing Date falls on a weekend or holiday (not good planning!), then the sale must be closed on or before the *previous* business day. If the sale must be closed within a period of time after some other event (e.g. 30 days after final plat recordation) and the last day of the agreed period falls on a weekend or holiday, then the sale must be closed by the next *following* business day.

**Question:** What is the legal effect of an "and/or assigns" clause after the buyer's name in a purchase and sale agreement?

**Answer:** Generally, the buyer's rights under and interest in a purchase and sale agreement are freely assignable in the absence of a provision to the contrary (such as a non-assignment clause or requirement for the seller's consent to an assignment). An "and/or assigns" clause is *not* a prerequisite to the buyer's right to make an assignment. Generally, the original buyer remains personally and secondarily liable under the purchase and sale agreement for a default by the assignee, unless the seller expressly releases the buyer. However, with an "and/or assigns" clause in the agreement and upon making an assignment, the original buyer is automatically released from liability for a subsequent default by the assignee, provided that the purchase and sale agreement is in good standing at the time of the assignment (*i.e.* the buyer has performed all obligations to date) and the assignee expressly assumes the buyer's duties under the purchase and sale agreement. Use JLS Form No. 350 for a simple, outright assignment. The seller's consent to the assignment is required only if the purchase and sale agreement so provides.

**Question:** What are the legal holidays for purposes of computing time under our Purchase and Sale Agreement?

**Answer:** Most Purchase and Sale Agreements (including the NWMLS, and WAR forms) specify *state*, rather than *federal*, holidays. RCW 1.16.050 (state law) provides as follows:

"The following are legal holidays: Sunday; the first day of January, commonly called New Year's Day; the third Monday of January, being celebrated as the anniversary of the birth of Martin Luther King, Jr.; the third Monday of February to be known as Presidents' Day and to be celebrated as the anniversary of the births of Abraham Lincoln and George Washington; the last Monday of May, commonly known as Memorial Day; the fourth day of July, being the anniversary of the Declaration of Independence; the first Monday in September, to be known as Labor Day; the eleventh day of November, to be known as Veterans' Day; the fourth Thursday in November, to be known as Thanksgiving Day; the day immediately following Thanksgiving Day; and the twenty-fifth day of December, commonly called Christmas Day."

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**Question:** We have a seller who wants to back out of a signed around P&SA because he has received a better offer from another buyer. How should we advise him? What are the consequences, if the seller backs out?

**Answer:** Explain to the seller that real estate licensees cannot give him legal advice and he should consult his own attorney before taking any further action. The buyers could sue him for specific performance and/or damages, and the brokers involved could sue for their commissions. If the buyers enforce their rights, the seller will not be able to sell the property to another buyer until the first buyers' claim is resolved, because they will file a *lis pendens* against the title.

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