

Member Advisory:

NEW LAW BARS WAIVER OF INSPECTIONS

Tucked into the recently-enacted housing bond bill was a provision apparently designed to preserve a residential buyer's ability to conduct a home inspection. The text of the section reads as follows:

The executive office of housing and livable communities shall promulgate regulations to ensure that no seller of a residential structure or a residential condominium unit, or an agent thereof, shall: (i) condition the acceptance of an offer to purchase on the prospective purchaser's agreement to waive, limit, restrict or otherwise forgo any prospective purchaser's right to have the structure or unit inspected, except when the sale of the structure or unit is to occur at an auction conducted by an auctioneer licensed under chapter 100; or (ii) accept an offer to purchase from a prospective purchaser, or an agent thereof who, in advance of the seller's acceptance of an offer, informs the seller, either directly or indirectly, that the prospective purchaser intends to waive, in whole or in part, the prospective purchaser's right to inspection; provided, however, that the seller may accept such an offer without violating this section if the prospective purchaser is: (A) the spouse, sibling, child, parent, grandparent, grandchild, great-grandchild or great-grandparent of the seller; or (B) the former spouse of the seller and the sale of the structure or unit is being made pursuant to a [divorce] judgment or order under chapter 208; provided further, that other limited exceptions may be provided for by regulation.

The housing bond bill was adopted with an emergency preamble, meaning that it took effect immediately upon signing by the Governor. However, the wording used by the legislature suggests that this particular section will not become operative until implementing regulations have been issued. Hopefully, those regulations will address various confusing provisions, including the following:

- What exactly is a "residential structure"? Laws like this normally apply to one-to-four unit owner-occupied dwellings, but a "residential structure" could just as easily include a large apartment complex.
- What is meant by a prospective purchaser's "right" to an inspection? The lead paint law provides that anyone proposing to purchase residential premises constructed prior to 1978 is entitled to have a lead inspection conducted but no law requires a seller to allow an overall home inspection. Indeed, the Home Inspectors Consumer Fact Sheet, which must be given to prospective buyers, makes clear that they must negotiate for a "clause in the contract making the purchase obligation contingent upon the findings of a professional home inspection."
- What kind of inspection must be allowed? Could a buyer insist on invasive testing which might include making holes in walls or ceilings or perhaps underground exploration for hazardous materials?
- Can the seller limit the time period during which the inspection is to take place?

- Is the legislation intended to allow a buyer to cancel a transaction based upon the results of an inspection?
- Some inspection contingency clauses allow the buyer to exercise a termination option only if substantial defects are discovered. Would that be considered an impermissible limitation on the buyer's right to inspect?
- Under the new law, a seller is not supposed to accept an offer from a buyer who has expressed an intention not to have an inspection conducted. Does this mean that the buyer will now be forced to have an inspection as a condition of being allowed to purchase the property?

What would be most welcome at this time is some sort of official confirmation that the new law will not be deemed binding and enforceable until final regulations are in place. That certainly seems to be what the legislature intended; no public interest would be served by forcing sellers, buyers and brokers to take the risk of interpreting such a vague and clumsily-worded statute.

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