

Georgia

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REALTOR®

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Millennial Homeowners

A CLOSER LOOK AT THE CHALLENGES FACING THIS GENERATION

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In this issue, we have back-to-back Legal Ease articles from GAR General Counsel Seth Weissman, covering two pressing issues for Georgia REALTORS®. The second article begins on page 15. We hope you enjoy the extra helping of legal knowledge.

HOW TO USE THE **Amendment to Address Concerns Form** TO YOUR CLIENT'S ADVANTAGE

Some buyers are using the Amendment to Address Concerns in ways that will not get them the best economic deal, may lead to legal disputes with their seller, may not get needed repairs done in a manner with which they are happy, or may unwittingly cost them the property. There are several important considerations in drafting a thoughtfully prepared amendment which can prevent these adverse outcomes.

First, it's a mistake for buyers to ask for a lengthy lists of repairs, particularly when the cost of making the repair is small. When buyers give sellers lengthy lists of items for the seller to repair, it is sometimes easier for sellers to negotiate based on the number of repairs the buyer is asking for rather than their value. A better strategy is to ask for a small list of the highest cost repairs. This way, the buyer communicates that these are the important repairs the buyer wants addressed. It is much harder for the seller to diminish the importance of any one of the requested repairs.

Ideally, the buyer should factor the cost of the minor repairs into the price being offered for the property. However, in a seller's market, buyers are often inclined to put forth the highest and best offer they can make and consider who is going to make repairs after the property is under contract during the due diligence period. Having paid top dollar (in their minds) for the property, buyers often then ask for every possible repair to be paid for by the seller, thinking this is only fair. While this is understandable, the better negotiating strategy is to ask for fewer significant repairs than a large number of repairs, both minor and significant.

It is also important to understand that courts will usually not allow a buyer to walk away from a contract due to the failure of the seller to make minor repairs, particularly when the cost of the repairs is minor compared to the sales price of the home. In one case, a buyer tried to rescind a contract to purchase a \$600,000 plus home when the seller did not properly repaint a bedroom door. The court refused to grant rescission and held that it was an immaterial breach by the seller on the sale of a home in this price range. The general standard to justify rescission is that the breach must be so substantial and fundamental as to defeat the object of the contract. If the breach is not material, the party is limited to a claim for damages. The point is that if a court is going to be reluctant to let a buyer walk away from a contract due to the failure of the seller to correct agreed upon minor repairs, maybe the buyer should not be asking the seller to make such minor repairs in the first place.

Buyers wanting to have the option of not closing due to even a minor breach of the contract might consider adding a special stipulation to the contract stating that, "Buyer and Seller agree that all repairs in this Amendment to Address Concerns are mate-



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rial and the failure of Seller to correct all of them in a good and workmanlike manner shall give Buyer the lawful right to terminate this Agreement due to Seller's material breach."

The second problem with how the Amendment to Address Concerns is being used is that too many buyers are attaching an inspection report to the Amendment and asking for the items in the report to simply be fixed without specifying whether or how an item is going to be repaired or replaced.

Helping buyers articulate how a repair is to be made is one of the harder jobs facing a REALTOR®. My recommendation is to try to make sure that for all major repairs, the buyer answer the following questions in drafting the Amendment to Address Concerns:

- {1} Is the defect going to be repaired or replaced?
- {2} If the defect is going to be repaired, what steps can be taken to ensure that it will match the existing item with a defect?
- {3} Is the work going to be performed by an expert (such as a plumber or an electrician), if so, what type, and does he or she need any special license to perform the work?
- {4} Is the work going to be warranted and, if so, for how long?
- {5} Is the work going to be performed in accordance with all building code requirements and a building permit obtained, if necessary?
- {6} What exactly is the work that is to be done? For example, if a new roof is going to be

installed, the buyer, in drafting the Amendment to Address Concerns, should answer not only the aforementioned questions but the following questions as well:

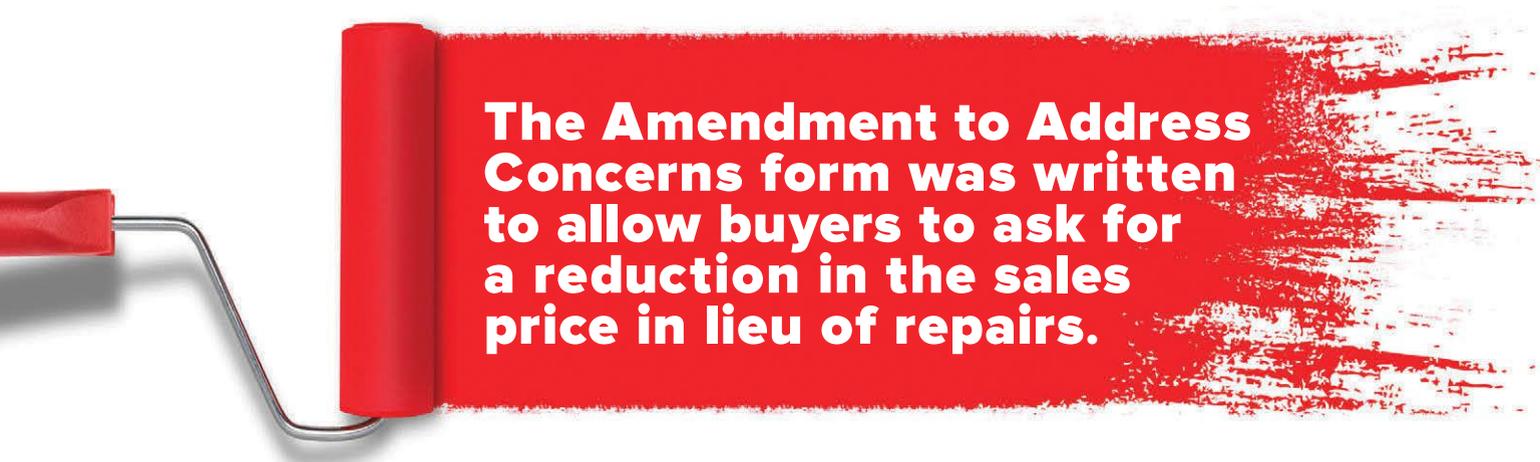
- a) Will the old roof shingles be removed in their entirety?
- b) Will all rotten decking be replaced?
- c) What kind of underlayment will be used?
- d) What kind and color of shingle will be used?
- e) What warranty will the new shingles have?

If these questions are not all addressed, buyers may find themselves with less than a satisfactory repair.

Third, some buyers, at the recommendation of their REALTORS®, are adding language to the Amendment to Address Concerns that states if the Amendment is not accepted by the Seller prior to the end of the due diligence period, then the Am-

itized what the seller was going to do. Buyers need to be better educated to understand that drawing a line in the sand by giving a conditional notice of termination means that some sellers will celebrate upon receiving such a notice because they have a back-up buyer waiting in the wings. For that matter, buyers and sellers both need to understand that every time they make a counteroffer, it may be the last time they ever hear from the party with whom they had been negotiating. This might cause some buyers and sellers to think twice before risking the loss of a contract over a couple hundred dollars.

The Amendment to Address Concerns form was written to allow buyers to ask for a reduction in the sales price in lieu of repairs. There are certainly some disadvantages in seeking a price reduction. Some buyers do not want the responsibility of getting the repairs done themselves after the closing. Others



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endment will serve as notice of the buyer's decision to terminate the contract. There is no problem with such language being added to the Amendment to Address Concerns, provided that the buyer completely understands that there are no "do-overs" once the contract is terminated and that the seller is then free to sell the property to someone else. However, in some cases the language is added by the buyer's real estate agent on a standard basis to the Amendment to Address Concerns without a clear explanation to the buyer as to the effect on the transaction.

When the seller then sells the property to a different (and almost always, a higher) bidder, some buyers have complained that they would have bought the property without any repairs had they only real-

may not have the cash to pay for repairs after closing and would prefer to essentially roll the repair costs into the price of the house. However, seeking a price reduction also has many advantages which few buyers seem to appreciate. First, when buyers do their own repairs after closing, they can be done exactly as the buyer would like them done. Second, getting a price reduction eliminates all disputes about whether the repair was done properly. Finally, it usually makes it easier for the property to appraise since the sales price of the property is being reduced in lieu of repairs.

Negotiating repairs is often a source of problems for buyers. Encouraging buyers to fill out the Amendment to Address Concerns thoughtfully can prevent many pitfalls.