

Amending the Appraisal Contingency: The Wrong Way and the Right Way

In a hot market, a buyer will sometimes make their offer more competitive by promising to purchase despite the property not fully appraising. This has led many agents to re-write the appraisal contingency in confusing ways that create liability.

The basic example of what not to do:

"Buyer will agree to pay \$10,000 above the appraised amount."

Although the language seems clear, it is in fact highly ambiguous and subject to three different meanings. Supposing the appraisal comes in at \$50,000 below the purchase price, this could mean:

- The buyer has a right to purchase the property at \$10,000 above the appraised value, meaning that the purchase price itself has actually been reduced, or
- The contingency is adjusted so that the buyer will have the right to cancel only if the property appraises at less than \$10,000 below the purchase price, or
- The provision (and contract) is unenforceable since it is merely an agreement to agree. Merely expressing a willingness to agree cannot create a binding contract.

Which is the correct interpretation? No one knows for sure. That is the point.

Right and wrong examples

Assuming the goal is to simply to lower the amount at which a cancellation right based upon the appraised value of the property can be invoked, then the language of the amendment should mirror the existing language of the standard purchase agreement.

Wrong "Buyer shall pay \$10,000 above the appraised value."

Problem: See above.

Wrong "Buyer agrees that they will cover the difference between the purchase price and the appraisal."

Problem: This does not clearly eliminate the right of the buyer to cancel based upon an appraisal that comes in at more than \$10,000 below the purchase price. This also might require the buyer to increase the down payment amount by the difference between the lower appraised value and the higher purchase price to keep the loan amount within the lender's lending parameters and enable the buyer to get the loan.

Right "This Agreement is contingent upon a written appraisal of the Property by a licensed or certified appraiser a no less than \$10,000 below the purchase price."

Lowering (or raising) the purchase price: If the buyer and seller actually intend to allow the appraisal of the property to be the purchase price, then that can be stated as follows: "Notwithstanding any other provision of this Agreement, the purchase price shall be the appraised value of the Property as determined in a written appraisal by a licensed or certified appraiser as chosen by the Seller."

Because of the risk of the appraisal coming in very low, a Seller who considers such an offer should be strongly urged to reject it. An agent may use C.A.R. Sample Letter "Acting Against Broker Advice -- Seller" which may be found in the C.A.R. Sample Letter Library on zipForm.