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Maylie & Grayson is a full service law firm providing representation to real estate brokerages, licensees, Realtor® associations, developers, builders, lenders and investors, providing services in all aspects of real estate including transaction review, land use planning, licensing, mediation, arbitration and court matters throughout Oregon and Washington.

New Construction Warranties: Myth Becomes Reality

As part of our real estate legal practice, we frequently are asked by licensees about issues that arise during the course of a transaction. The increase in new construction over the past several years, including condo construction and conversion, resulted in many questions from licensees about disclosures, inspections and warranties.

A frequent misimpression was that builders have been required by Oregon Revised Statutes to provide buyers of new construction with a one year warranty. Historically, this was not the case – builders were not required by statute to provide buyers with a warranty. However, in 2008 the Oregon State Legislature passed a law that now requires builders to provide buyers with a warranty that covers defects in materials and workmanship.

This new requirement went into effect on July 1, 2008. Although the law is no longer “new,” per se, its requirements were added to the OREF New Construction Sale Agreement as of January 1, 2009. This article will discuss the warranty requirements, and how they have been incorporated into the OREF New Construction Sale Agreement.

New Construction Warranties

Oregon Revised Statute 701.320 requires a contractor to offer a buyer of a newly constructed residence a written warranty against defects in materials and workmanship. The buyer has the ability to accept or reject the contractor's offer of a warranty. If the buyer rejects the offer before the buyer and contractor have both signed a purchase and sale agreement or construction contract, the contractor is able to withdraw the offer to construct and sell the residence to the buyer. Although the law requires the contractor to offer a warranty, it does not require the warranty to be of any specific length or type. Accordingly, a contractor could offer a warranty that was short in duration and contained many exclusions (such as mold, mildew and water intrusion).

In response to this new statute, OREF revised its New Construction Sale Agreement to allow the parties to indicate whether the contractor/seller had already provided the buyer with a copy of its warranty, and whether the buyer “accepted” the warranty. Licensees would be well advised to protect their buyer clients by advising them to request and review any warranties offered prior to entering into agreements to purchase newly constructed residences. The checkboxes on the New Construction Sale Agreement are helpful in that they may encourage a buyer to consider whether a seller’s offered warranty is sufficient prior to actually submitting an offer to purchase.

Home Warranty Plans

In addition to including checkboxes for a buyer to indicate receipt and acceptance of a contractor/seller’s warranty, OREF also included a provision that allows for a buyer and/or seller to offer a home warranty plan that may cover repairs to or replacement of appliances and other systems of a home. Although no statute requires a seller to provide such a home warranty plan, a buyer should consider whether such a home warranty should be purchased for the new residence, and if so, whether the buyer should request the seller to pay for one as part of his or her purchase. It would be prudent for licensees to discuss whether a home warranty plan should be considered as part of a purchase or sale.

Maintenance Schedules

Another statute enacted in 2008 relates to home maintenance schedules. Oregon Revised Statutes 701.335 requires a contractor to provide a buyer of a newly constructed residence with a recommended maintenance schedule for the property. At a minimum, the schedule is required to contain the following information:

- (a) Definitions and descriptions of moisture intrusion and water damage.
- (b) An explanation of how moisture intrusion and water damage can occur.
- (c) A description and recommended schedule for maintenance to prevent moisture intrusion.
- (d) Advice on how to recognize the signs of water damage.
- (e) Appropriate steps to take when water damage is discovered.

Oregon Administrative Rule 812-012-0120 specifies the minimum information that must be included in the maintenance schedule. For instance, the maintenance schedule must define moisture intrusion and water damage, and explain how they may occur. The maintenance schedule requirements contained in the rule relate primarily to moisture intrusion and water damage, undoubtedly due to the fact that we live in a rainy climate, and are faced with the possibility of damage resulting therefrom.

A contractor is required to provide the buyer with a copy of the maintenance schedule “... no later than 60 days after substantial completion of the structure or dwelling, or occupancy of the structure or dwelling [by the buyer], whichever is later.” OAR 812-012-0120(8).

Although the maintenance schedule is not a warranty, it will provide guidance to the buyer as to how to maintain the home so as not to experience problems that could be avoided, or at least identify problems early on.

The revised OREF New Construction Sale Agreement contains a checkbox that asks whether the buyer has received a copy of the seller's maintenance schedule. Although a contractor/seller is not explicitly required to provide this schedule prior to closing the transaction, licensees would be well advised to request the maintenance schedule on behalf of their buyer clients prior to their buyers submitting offers to purchase. In addition, licensees should advise their buyer clients to review any applicable maintenance schedules prior to submitting offers to purchase so as to understand what maintenance may be recommended (or even required under the contractor/seller's warranty).

Conclusion

Although the statutory changes outlined above have been effective since July 1, 2008, it is likely that many licensees and consumers are unfamiliar with the new rules. The new 2009 OREF New Construction Sale Agreement has been amended to address these changes. Licensees should familiarize themselves with the requirements so that they can provide their clients with better service, and take measures to avoid risk in their own real estate practice. As with many other issues, licensees should not advise their clients as to the meaning or applicability of statutes, or the contents of any warranty or maintenance schedule. Instead, licensees may wish to advise their buyer clients to seek advice from other professionally-qualified individuals.

This column contains general information only and must not be construed as legal advice. Questions may be submitted directly to Maylie & Grayson by fax at (503) 775-1765, by email at joelgrayson@mayliegrayson.com or by mail at 7959 SE Foster Road, Portland, Oregon 97206.

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