

INSPECTIONS AND REPAIRS

PROCEDURES AND PITFALLS

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Outline available at: <http://www.williamsparker.com/docs/default-source/presentations/inspections-and-repairs---procedures-and-pitfalls>

PowerPoint available at: <http://www.williamsparker.com/docs/default-source/presentations/inspections-amp-repairs-procedures-amp-pitfalls>

Inspection and Repair Article available at: <http://www.williamsparker.com/docs/default-source/PDFs/residential-inspections-and-repairs---procedures-and-pitfalls>

Disclaimer: This outline and the article at the end are solely for educational purposes, and contain some generalizations and opinions of the author. They are not intended as legal advice.

A. TYPES OF INSPECTIONS

1. What inspections are right for your transaction?
2. The following is a list of various types of inspections that Buyers sometimes desire. Please note that not all of these may be permitted under the Contract unless you specifically provide for them:
 - General Inspection (Paragraph 12b)
 - Wood Destroying Organism (Paragraph 12c)
 - Permits (Paragraph 12d)
 - Roof
 - HVAC
 - Septic
 - Mold (needs separate addendum)
 - Lead-Based Paint
 - Seawall/ Dock/ Lift
 - Pool/ Spa
 - Underground Oil Tank
 - Radon
 - Defective Drywall
 - Asbestos
 - Well
 - Elevator
 - Zoning (zoning opinion letter)
 - Soil
 - New Home Construction
 - Others

B. REPAIR LIMITS

1. Paragraph 9(a): Covers General Repair Limit, WDO Repair Limit and Permit Limit.

>> *Permit inspections are beyond the scope of this talk*

2. Repair Limits are expressed in either a dollar amount or a percentage amount.
3. The default is 1.5% if left blank.
4. A \$0 amount may seem like an “As-Is” contract, but keep in mind that all provisions of Paragraph 12 still apply (e.g., the Seller is still obligated to get estimates).

C. TEN-STEP INSPECTION PROCEDURE

1. Inspections and Repairs are covered in Paragraph 12 of the Contract. Typically parties fail to follow the exact procedures laid out in the Contract. Failure to follow the procedures could have adverse consequences for your client.
2. Here is my “ten-step” program.
 - **Step 1 – Inspection.** Buyer may have a General Inspection done within the Inspection Period. The Inspection Period is the earlier of 15 days after Effective Date or 5 days prior to Closing.
 - >> *Almost always 15 days, unless changed by addendum or initialing (or extension). Note: On the next contract revision, this may be a blank, with a 15-day default if left blank.*
 - i. The 15-day period is tied to the Effective Date, so it is important to determine the Effective Date (the last date that the Contract was signed or initialed and delivered).
 - ii. PRACTICAL POINTERS:
 1. Have your clients date their initials.
 2. Day one for counting purposes is the day after the Effective Date.
 3. Calendar important dates, such as the end of the Inspection Period.
 4. Try to get confirmation from all parties of deadlines based on the Effective Date.

- iii. If the end of the Inspection Period falls on a weekend or a Federal holiday, the last day is moved to the next business day.
 - iv. Time is of the essence under the Contract (which means deadlines are strictly enforced).
- **Step 2 – Professional Inspector.** The General Inspection must be done by a Professional Inspector.
 - i. A Professional Inspector is a person who specializes in and holds an occupational license (if required by law) to conduct home inspections or who holds a Florida license to repair and maintain the items inspected.
 - ii. This includes general home inspections, as well as roofers, electricians, plumbers, etc.
 - iii. Since 2007, general home inspectors must be licensed.
 - iv. Recommendations of Inspectors: Paragraph 14 says a broker is not responsible for recommendations or referrals, which includes inspectors. However, consider giving at least two names to your client.
 - **Step 3 – Notice of Repairs.** Buyer must notify Seller in writing within the Inspection Period of any General Repairs Items (basically, items not in Working Condition).

>> *Working Condition is covered in the next section.*

- i. The notice should be specific versus simply sending the entire report or the summary report. This is because the report often discusses items that do not qualify as General Repair Items.
- ii. If there is anything questionable, probably better to include it (after consultation with your Buyer).
- iii. Seller is entitled to receive upon request a portion of the inspection report dealing with the items requested to be repaired.
- iv. Notices may be sent to an agent or the attorney of the party. Notices may be made by mail, personal delivery, or electronic media (avoid mailing because of the delay factor).

- **Step 4 – No Notice = Waiver of Repairs.** If the Buyer fails to timely deliver notice to Seller prior to the expiration of the Inspection Period, then Buyer waives Seller’s obligation to make any repairs.
- **Step 5 – Estimates of Repairs.** Seller must have the General Repair Items estimated by an appropriately licensed person, and a copy delivered to Buyer, within 10 days after receiving Buyer’s repair notice.
 - i. This is typically where the procedure breaks down because Seller fails to get estimates (which may be a breach of the Contract).
 - ii. Part of the problem is that estimates are sometimes difficult or costly to obtain (e.g., may incur a service charge).
 - iii. The agent can (should) assist in helping Seller get estimates.
 - iv. If there are any items on the inspection report that Seller believes are not repair items, Seller should object to those specific items ASAP. This would be especially true if the whole inspection report is submitted.
 - v. Both agents can (should) work together to reach an agreement on the list of General Repair Items.
- **Step 6 – Second Inspection.** As an alternative to getting estimates, Seller has the option of having a second inspection done by a Professional Inspector and providing the report and estimates to Buyer (again, within 10 days of Buyer’s repair notice).
 - i. It appears the second inspection provision can be blended with the estimates provision.
 - ii. For instance, Seller could have estimates done on every item except one item that Seller believes is not in need of repair or replacement. Seller can have this item inspected by a second inspector.
 - >> *An example of this would be if the Buyer’s inspector said the roof needs to be replaced.*

- **Step 7 – Third Inspector.** If Buyer’s inspection report and Seller’s inspection report differ, and the parties can’t resolve the differences, Buyer and Seller choose a third inspector (cost is split), whose report is binding.
 - >> *So if the third inspector’s report says that the roof needs to be replaced (or alternatively that the roof can be patched), that opinion will be binding.*
- **Step 8 – Estimates Under Repair Limit.** If the cost to repair (based on the written estimates) is at or under the General Repair Limit, Seller must repair or replace all items.
- **Step 9 – Estimates Over Repair Limit.** If the cost to repair exceeds the General Repair limit, then within 5 days after the parties’ receipt of the last estimate, two things can happen:
 - i. Seller may notify Buyer that Seller will pay the excess (this means Buyer must close on the transaction); or
 - ii. Buyer may notify Seller which repairs to make (not to exceed the Repair Limit), and Buyer agrees to take the balance of the General Repair Items in their AS-IS condition.
- **Step 10 – Right to Terminate.** If no notice is given by Buyer or Seller within the 5 day period (see Step 9), either party may terminate the Contract, and Buyer gets the deposit back.
 - i. There is no time limit for this termination. So either party may terminate the Contract up to Closing.
 - ii. Parties sometimes use this termination provision for an unrelated reason.

D. GENERAL REPAIR ITEMS AND WORKING CONDITION

1. “General Repair Items” are those items specified in Paragraph 12(b)(ii), which Seller is obligated to repair or replace.
2. Paragraph 12(b)(ii) says: The following items shall be free of leaks, water damage or structural damage: ceiling, roof (including fascia and soffits), exterior and interior walls, doors, windows, and foundation. The above items together with pool, pool equipment, non-leased major appliances, heating, cooling, mechanical, electrical, security, sprinkler, septic and plumbing systems and machinery, seawalls, and dockage, are, and shall be maintained until Closing, in Working Condition.
3. “Working Condition” is defined as operating in a manner in which the item was designed to operate.
4. There are a few specific examples listed as General Repair Items (i.e. these are not gray areas): torn screens (including pool and patio screens), fogged windows, and missing roof tiles or shingles.
5. PRACTICE POINTER: If you are a Buyer’s agent and you know something is missing or broken and needs repair before the Contract is drafted, you can add a provision specifically requiring Seller to fix this item. If you do so, you should clarify whether the cost for this repair is or is not included in the General Repair Limit.

E. COSMETIC CONDITIONS AND GRAY AREAS

1. Seller is not required to repair or replace “Cosmetic Conditions” (unless the Cosmetic Conditions resulted from a defect in an item Seller is obligated to repair or replace).
2. Cosmetic Conditions are aesthetic imperfections that do not affect the Working Condition of the item, including, but not limited to: pitted marcite; tears, worn spots, and discoloration of floor coverings, wallpapers, or window treatments; nail holes, scrapes, scratches, dents, chips, or caulking in ceilings, walls, flooring, tile, fixtures, or mirrors; and minor cracks in

walls, floor tiles, windows, driveways, sidewalks, pool decks, and garage and patio floors.

3. Because roofs are such a big ticket item, there is an additional sentence added that states that cracked roof tiles, curling and worn shingles, or limited roof life shall not be considered defects Seller must repair or replace, so long as there is no evidence of actual leaks, leakage or structural damage.
4. Discussion of “Near End of Useful Life” or “Limited Life.”
 - Inspectors are required to report this (per FL Statute).
 - Although the Contract only discusses this with regard to roofs, the same would apply to appliances and other house components. The test is Working Condition (i.e., operating in a manner in which the item was designed to operate).
5. PRACTICE POINTER: You may want to go over the criteria for General Repair Items, Working Conditions, and Cosmetic Conditions with your Buyer before the inspection, so your Buyer understands these criteria. The inspector will point out everything, but not everything must be repaired under the terms of the Contract.
6. Gray Areas
 - Terms like “aesthetic imperfections,” “minor cracks” and “Working Condition” are not always clear and can be somewhat subjective. There is no bright-line test. The test (what a judge would use) is a “reasonable person” standard.
 - >> *A gray area example of Working Condition might be an air conditioning unit that is not cooling well. Sometimes the issue is whether something needs to be repaired, and sometimes the issue is whether something needs to be replaced.*

- >> *Another gray area involving “minor cracks” would be roof tiles that are cracked, versus very cracked, versus crushed. At what point is a roof tile “missing”?*
- Underground oil tank.
 - i. If it’s leaking, it’s probably not in Working Condition.
 - ii. If it’s not leaking, the Seller is probably not obligated to remove it, even if it is not being used (although the Lender may require the Buyer to remove it).
 - Rodents or pests.
 - i. The Contract doesn’t specifically address rodents, nor does it address health risks.
 - ii. This is not a wood destroying organism issue.
 - iii. The best argument seems to be that the entry point for the rodents is a structural defect (i.e., not in Working Condition) and the condition (rodents) caused by a defect must be remedied. So the Seller under this rationale would be obligated to remove the rodents and patch the hole.
 - Broken, heaved, or trip hazard driveways or walkways (often the result of tree roots).
 - i. Can argue that this item is not in Working Condition.
 - ii. On the other hand, driveways and walkways are not listed in the first sentence of paragraph 12(b)(ii).
 - iii. However, driveways and walkways are mentioned under Cosmetic Conditions in the portion dealing with minor cracks. So by implication, a major crack would probably be a General Repair Item.

F. REPAIR STANDARDS

1. Paragraph 12(f): All repairs and replacements shall be completed in a good and workmanlike manner by an appropriately licensed person, in accordance with all requirements of law, and shall consist of materials or items of quality, value, capacity and performance compatible to, or better than, that existing as of the Effective Date.
2. Who is an “appropriately license person?”
 - a. Not the general home inspector because the applicable Florida statute prohibits the home inspector from making repairs.
 - b. Not a handyman, if the repair is governed by licensing requirements (such as roofer, electrician, or plumber).
 - c. Not the Seller (unless the Seller is an appropriately licensed person).
3. Replacement of appliances must comply with the criteria of same quality, value, capacity and performance.

>> Note that this requirement is distinguished from the Seller swapping out an appliance before Closing that was not a repair item. This is covered under paragraph 1(d) of the Contract dealing with personal property – the Buyer gets whatever appliances were there as of the date of the initial offer.
4. Paragraph 12(f) also covers assignment of repair warranties if requested by the Buyer.

>> Note: Warranties of repairs are not required under the Contract.
5. The only way to really prove that the repairs were made by an appropriately licensed person is to provide receipts of the repairs.

>> Contract requires Seller to provide Buyer with paid receipts (under “Closing Documents” section).

G. WDO (A/K/A TERMITE) INSPECTIONS

1. This is covered under Paragraph 12(c) of the Contract.
2. “Wood Destroying Organism” (WDO) means arthropod or plant life, including termites, powder-post beetles, oldhouse borers, and wood-decaying fungi, that damages or infests seasoned wood in a structure, excluding fences.
3. “WDO Inspection” is done to determine the existence of past or present WDO infestation and damage caused by infestation.
4. Treatment and/or Repairs.
 - a. Re-Treatment. If Seller has previously treated for WDO, Seller does not have to re-treat if there is no live infestation and Seller transfers the treatment warranty to Buyer.

>> The procedure for WDO is similar but not identical to general repairs.

- b. WDO Report. Buyer must deliver a copy of the WDO report to Seller within the Inspection Period (typically 15 days).
- c. Estimates. Seller has 10 days from receipt of the report to deliver estimates to Buyer. The estimates have to be for repair of the damage and necessary corrective treatment.
- d. At or Under WDO Limit. Seller obligated to fix and/or treat.
- e. Over WDO Limit. Within 5 days of receipt of Seller’s estimate, Buyer, by written notice to Seller, may either:
 - a. Agree to pay the excess; or
 - b. Designate which repair/ treatment to do (not exceeding WDO Limit), and accepting the balance in its AS IS condition.
- f. Termination. If Buyer does not give this notice, then either party may terminate the Contract. Again, there is no time limit for termination.

H. INSPECTIONS UNDER “AS IS” CONTRACTS

1. The inspection provision is under Paragraph 12(b) of the FR-BAR “AS IS” Contract, which also contains a Right to Cancel.
2. There is a blank for the timing of the inspection (15 days default if left blank).
3. There is no limit on the types of inspections.
4. Buyer can self-inspect (doesn’t have to be a Professional Inspector).
5. Buyer and Seller will often negotiate the repairs, a repair credit, and/or a price reduction.
6. If repairs are agreed to, there are no repair standards unless otherwise specified in an addendum.

>> *So Seller or a handyman can make the repairs. From a Buyer’s prospective, you may want to incorporate the Repair Standards from the General Contract (e.g., stipulate that all repairs must be done by appropriately licensed persons, etc.).*

7. If Buyer is going to terminate, should say “the Property is not acceptable,” which is the standard for cancellation.
8. Addendum K - “As Is”: This is the Addendum used with the standard FR-BAR Contract, which converts it to an “As Is” Contract.

>> *If you are drafting the Contract, better to simply use the “As Is” Contract.*

>> *If the parties decide while the Contract is going back and forth to convert it to an “As Is” Contract, it may be easier to use the “As Is” Addendum. (It’s just a little harder to follow because of all the deletions and substitutions.)*

9. Addendum L – Right to Inspect and Right to Cancel

>> This is a type of hybrid, and has a “free-look” component.

- a. The “Right to Inspect Period” replaces the Inspection Period under Paragraph 12(a). This is a blank that needs to be filled-in (default being 15 days).
- b. Buyer can have such inspections of the Property performed as Buyer desires.
- c. Buyer can terminate the Contract if the Property is not acceptable to Buyer. Termination must be in writing to Seller on or before the expiration of the Right to Inspect Period.
- d. If Buyer elects to proceed (or fails to terminate), there are two possible scenarios:
 - a. If Buyer has conducted inspects permitted under Paragraph 12, and timely reports any Repair Items to Seller in writing, then Seller pays up to the applicable Repair Limit; or
 - b. If Buyer fails to conduct inspections permitted under Paragraph 12 (or fails to timely deliver to Seller written notice or report of General Repair Items), then Buyer waives Seller’s obligation to make repairs.

I. PROPERTY MAINTENANCE REQUIREMENT

1. This is a separate issue from inspections and repairs.
2. Paragraph 11 states that Seller shall maintain the property (including, but not limited to lawn, shrubbery, and pool) in the condition existing as of the Effective Date.
3. Exceptions are:
 - a. ordinary wear and tear;
 - b. Casualty Loss; and
 - c. those repairs, replacements, or treatments required to be made under the Contract.

4. Paragraph 12(b)(ii) also states that all the items listed in this section shall be maintained in Working Condition.
5. Failure to meet the Property Maintenance Requirement usually comes up during the walk-through.

J. WALK-THROUGH INSPECTIONS/ RE-INSPECTION

1. Under Paragraph 12(e), on the day prior to the Closing Date or the Closing Date, Buyer or Buyer's representative may perform a walk-through inspection of the Property solely to verify that:
 - a. All items of Personal Property are on the Property;
 - b. Seller has maintained the Property as required by the Maintenance Requirement;
 - c. Seller has made repairs and replacements required by the Contract; and
 - d. Seller has met all other contractual obligations.
2. Buyer can have a follow-up inspection by the home inspector under this provision.
3. PRACTICE POINTER: It is a good practice to get a walk-through acknowledgement signed by the Buyer for your file.

K. REPAIR ESCROWS

1. Covered under Paragraph 9(a).
2. Typically comes up under two scenarios, namely:
 - a. Seller has not met the Maintenance Requirement; or
 - b. Seller has not completed repairs, treatments or permitting as required under Paragraph 12.

3. 125% of the estimated cost is escrowed, but can't exceed the Repair Limit.
4. If the cost to fix exceeds the escrow, Seller is still obligated to pay the difference (capped at the Repair Limit).
5. Any excess funds are returned to Seller.

L. REPAIR CREDITS

1. The parties can always agree to handle one or more (sometimes all) repairs by means of a repair credit from Seller to Buyer.
2. If Buyer is getting a loan, the Lender will not allow a repair credit (but a "closing cost credit" is sometimes allowed).
3. An advantage of a repair credit is the Buyer gets to fix the problem the way the Buyer wants to fix it, which may include an upgrade (this works well for appliances).
4. A disadvantage of a repair credit is that for certain items it is sometimes difficult to know what the extent of the problem or issue is until the repairs are begun (such as a leaking pipe, which may also have caused damage behind a wall or mold).
5. If a repair credit is used, consider adding the following to the addendum:
 - a. The credit is in lieu of Seller's repair obligation under the Contract for the item being repaired, and the Seller's Repair Limit is reduced accordingly; or
 - b. Buyer is taking the Property (or item) AS IS.

>> Broker Repair Credit. Unfortunately, in some instances, a Broker may end up giving a repair credit or doing the repair. If this happens, a release might be appropriate depending on the circumstances.

>> Also, if you pay for a repair that is a party's obligation, you should have a clear written understanding from the appropriate party regarding reimbursement.

M. ACCESS AND UTILITIES

1. Paragraph 18(l) states Seller shall, upon reasonable notice, provide utility service and access to the Property for appraisals and inspections, including a walk-through (or follow-up walk-through, if necessary) prior to Closing.

>> Seller shouldn't disconnect utilities prior to the walk-through.

N. SELLER DISCLOSURES

1. Typically, there is a written Seller's disclosure statement.
2. Paragraph 10(j) states Seller knows of no facts materially affecting the value of the real property which are not readily observable and which have not been disclosed to Buyer.
3. Seller's disclosures do not impact Seller's repair obligations under the Contract unless the Contract is amended to specifically state what Seller is not going to fix.
4. If a deal falls through (for any reason), Seller may be obligated to disclose material issues from the previous Buyer's inspection report.
5. It is important to update a Seller's disclosure form as things become known or if re-listing a property.
6. An "AS IS" Contract does not negate Seller's disclosure requirements.