

The Last Inspection: Final Investigation of Condition

In the beginning ... Paragraphs 3L(3), 8C and 12 of the RPA define a buyer's contractual right to investigate the property and matters affecting it. By default, within the first 17 days after Acceptance a buyer has the contractual right to conduct inspections, investigations, tests, surveys and other studies of and concerning the property. A buyer, through others or on their own, may have a general home inspection, a lead-based paint inspection, a wood destroying pest inspection, explore the cost and availability of homeowner's insurance, flood insurance or fire insurance, or any other investigations only limited by the buyer's curiosity, and money. Although the seller is contractually obligated to make the property available to the buyer, the seller is not obligated to move any existing personal property. As a consequence, the buyer may not be able to learn everything about the property. And if the seller has not moved personal property for a long time, the seller may be unaware of problems. Even if there is no investigation contingency, or it is removed early, the buyer has the contractual right for a limited period of time after acceptance to access the property – maybe to measure rooms, or have a contractor give an estimate for work to be performed later (RPA, 3L(3)). Buyers, in most cases, should not give up the investigation right early.

In the middle ... If the buyer and seller negotiate repairs, the repairs shall be performed in a good, skillful manner and the work completed at least 5 days prior to the close of escrow (RPA, 15,16 and 3J). The seller also has an obligation to deliver the property in the same condition it was in on date of acceptance (plus agreed repairs) and to remove debris and personal property not included in the sale (RPA, 7B(1)). But, if the buyer must wait until after COE to confirm these seller obligations have been met, the buyer loses all leverage to receive the property as promised. The buyer's protection is the right to conduct a pre-closing inspection.

In the end ... RPA paragraph 16 gives the buyer the right, pre-closing, to verify the condition of the property. While not a contingency in its own right, paragraph 16 could trigger a buyer's right to delay or prevent the closing (for a material breach), or negotiate for an otherwise acceptable solution if the seller's contract obligations have not been fulfilled. C.A.R. form VP, Verification of Property Condition, can be used to document the results of the final inspection. The buyer does not need to be present but can choose to have a professional inspector conduct the verification. Discovery of new problems will not trigger any rights of the buyer to be compensated if the problem existed at time of acceptance, and was overlooked during the initial investigation, even if personal property in place prevented the discovery initially. **The final verification should be exercised as a routine matter, and only waived in unusual situations.**

Material vs. immaterial breach. If, for example, the buyer discovers a tree limb damaged the roof, or the seller failed to properly correct a foundation problem, the buyer would likely have a legal excuse not to close escrow. If, however, the seller failed, as agreed, to fix a loose handle on a toilet, the seller would still be in breach. The buyer could sue for the cost of repair after COE, or try to negotiate a credit at closing.

Seller Possession After Close. The buyer should conduct the final verification before COE even if the seller will remain, either pursuant to a lease after sale (C.A.R. Form RLAS) or a short-term license (C.A.R. Form SIP). By doing so, seller breaches can be negotiated prior to the close, and any problems that are discovered after the seller gives up possession can be more easily attributable to a pre-closing or post-closing breach, and would potentially be covered by buyer's insurance. The buyer does not have the right to inspect the property during the seller's continued occupancy, except in case of emergencies or to make agreed-upon repairs.