

## **WA Association of Realtors**

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**To:** 14258279378

**From:** Annie Fitzsimmons

**Re:**

**Date:** 04/03/2010

TO: DESIGNATED BROKER  
Coldwell Banker Bain

RE: Inquiry on 4/3/2010 and our response on 4/3/2010  
Inquiry made by Gerhard Ade

Thank you for using the Washington REALTORS (WR) Legal Assistance Hotline. The Washington REALTORS is offering this service to further the education and to reduce the risk of liability of its members.

The Legal Assistance Hotline is part of WR's Education and Member Services Departments. It is intended to help keep its members abreast of legal developments and concerns involving real estate brokerage and sales. It is also designed to supplement the educational and written materials available to the real estate brokerage professional with answers to specific questions on related legal issues. The responses made by Annette T. Fitzsimmons, P.S. are for your information only and are not to be relied on by or passed on to clients and customers. Moreover, the responses should not be admitted, used or considered as legal argument or for any other reason in any arbitration proceeding.

We hope that the attached response satisfies your inquiry. Our response is based only on the facts recited in your question. In any particular transaction, a complete review and understanding of the facts is necessary and it may be advisable that you review this matter in greater depth with your legal counsel. The information contained in this letter is general in nature and is intended for your educational use only. Annette T. Fitzsimmons, P.S. is not acting as your attorney, but is merely providing you with a source of legal information.

Very Truly Yours,

Annie T. Fitzsimmons

cc: Washington Realtors  
Principal Broker

## \*\*\*\*\* QUESTION \*\*\*\*\*

We have mutual agreement with seller with form 22SS being current through April 16. Assuming that the approval by the lienholder occurs after April 30th will my buyer still be entitled to the tax credit? Also, we haven't done the inspection (not wanting to waste money in case lienholder does not approve short sale). Does not having done/waived inspection affect the tax credit?

## \*\*\*\*\* ANSWER \*\*\*\*\*

Buyer and seller have reached mutual acceptance when they fully execute the purchase agreement including the Form 22SS, short sale contingency. The IRS rule requires that the parties be subject to a binding agreement not later than April 30. The purchase agreement contingent on seller's lender's approval or buyer's inspection contingency should satisfy that requirement. While seller has a contingency in the event lender does not approve the short sale and buyer has an inspection contingency, the parties still have a binding agreement. It should be noted however, this transaction must close by June 30, 2010 for buyer to obtain the credit.

Moreover, the parties should need to keep an eye on the calendar and be prepared to revive the purchase agreement if it expires before April 30, 2010. The effect of Form 22SS, paragraph 2, is that the purchase agreement terminates on the last day for lender consent (30 days after mutual acceptance is the default provision), if lender consent is not provided. Should the agreement terminate before April 30, the parties can execute an addendum extending the purchase agreement and extending seller's Form 22SS contingency, they can execute a new agreement or they can revive the agreement in some other way. But, the parties need to revive the agreement in some way so that they have an active, fully executed agreement on April 30, 2010. If the agreement is terminated on April 30, even by a technical provision, that could cause a problem for a buyer seeking the tax credit.

The IRS rules do not define "binding agreement" thus there is no clear directive indicating that the agreement contingent on lender's approval is or is not a binding agreement. However, the IRS documentation does not require production of a purchase agreement. Rather, it simply asks the question whether the parties had a binding agreement on April 30 and then moves to proof of closing before June 30, through production of the HUD1. Accordingly, tax lawyers who reviewed the issue assure that the lender contingent purchase agreement satisfies the IRS requirement for a binding agreement.