Due Diligence versus “As Is”
Distinguishing the subtle yet important differences between these two terms.

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These terms have certain subtle but important differences and similarities in the context of the standard form real estate contracts used in Florida. The purpose of this article is to try to analyze the differences and similarities of these concepts and the related implications for termination rights for Buyers and repair obligations of Sellers in a real estate transaction. By strict definition “as is” means in the existing condition without modification. (Black’s Law Dictionary, 9th ed. 2009). Whereas “due diligence” means the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement. (Black’s Law Dictionary, 9th ed. 2009). Extrapolating these literal definitions to the context of a real estate transaction it is fair to say that “as is” means a property is being sold in the existing condition without any obligation of the Seller to make repairs and “due diligence” means the Buyer has the right to conduct inspections and seek information about the property that is ordinarily expected by a prudent person. Due diligence inspection rights exist in contracts that are “as is” by nature and inspection rights also exist in contracts wherein the Seller may have the obligation to make certain repairs.

Let’s first look at these concepts in the realm of the Naples Area Board of Realtors® (NABOR®) Sales Contract (Residential Improved Property). Section 6 of the contract dictates the inspection related provisions. If the right to inspect is reserved by selecting Section 6 (A) then the Buyer has very specific inspection rights listed in Standard D(2)(a) and must use appropriately licensed inspectors. Under this inspection provision the Buyer has the right to request that Seller address defective items failing which the Buyer may terminate. If Section 6 (B) is selected the Buyer has the right to conduct inspections and the Addendum to Sales Contract “As Is” Sale of Property/Due Diligence is utilized. With this Addendum the Buyer may conduct any inspections, and may or may not use appropriately licensed inspectors. Buyer may terminate for any reason during the due diligence period and Seller is not obligated to make repairs. If Section 6 (C) is selected the property will be accepted “as is” without any obligation on the part of the Seller to make repairs. Moreover, while the Buyer may undertake inspections under this third option, the Buyer’s obligation to purchase is not contingent on the results. Therefore, Buyer does not have the right to terminate in this scenario. Under all three options the Buyer has final walk through rights to make sure agreed upon repairs, if any, are done and to ensure certain personal property remains or was removed, as the case may be. Also under all three options

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the Seller bears the risk of loss until closing and has obligation to maintain the property. How do the other standard forms deal with these concepts? The FAR/BAR “As Is” Contract is similar in many respects to the NABOR® Contract with the “As Is” Sale of Property Due Diligence Addendum. The FAR/BAR “As Is” Contract gives the Buyer full inspection rights and the right to terminate. This form also does not obligate the Seller to make repairs other than maintenance obligations. The CRSP-13 As Is with Rights to Inspect Addendum takes a slightly different approach than the NABOR® “As Is” Sale of Property/Due Diligence Addendum and the FAR/BAR “As Is” Contract. The CRSP-13 As Is Addendum does not necessarily give an absolute right of termination. In order to have cancellation rights the Buyer needs to provide the inspection results detailing the defective items along with estimates from qualified contractors for the cost of repairs thereby demonstrating the cost of repairs exceed the predetermined threshold (the default cost threshold is only $250).

So what does this all mean? If a Buyer wants the ability to terminate for any reason during the inspection period the options are to use the NABOR® “As IS Sale of Property/Due Diligence Addendum or the FAR/BAR “As Is” Contract. If the Buyer wants the ability to create a certain threshold condition for the property in terms of the cost of repairs limit they are willing to accept the CRSP-13 Contract with the As Is Addendum will work. While all three of these options will provide termination rights, neither impose an obligation on the Seller to make repairs and Buyer’s failure to cancel timely will obligate the Buyer to accept the property “as is”.

If the Buyer is absolutely enamored with a property and is confident in the condition of the property the waiver of inspection rights may be considered, but the Buyer has to be cautioned that the obligation to purchase is not contingent on inspections and there are no termination rights.

A few final points to ponder, all of which could be a good topic for future articles. First, everything is negotiable and for practical purposes we all know how it plays out. Very often even with an “as is” contract there is some negotiation as to repairs and/or credits. Second, notwithstanding the use of an “as is” contract, Sellers always have the obligation to disclose known defects that are not readily observable (Johnson v. Davis, 480 So. 2d 625). Finally, nothing precludes the Buyer and Seller on agreeing to include a provision or an addendum to the Contract which gives the Buyer termination rights during the due diligence period, but if not terminated also gives the Buyer the right to request defective items be addressed by the Seller.