

# Should It Stay or Should It Go?

## Required TREC Addendum Addresses Fixture Leases

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**B**eginning April 1, 2021, if a fixture lease is on a property for sale, a new contract addendum must be attached to the contract as part of the transaction.

No, this is not an April Fool's Day joke. It is the result of many months of deliberation by the Broker-Lawyer Committee and the Texas Real Estate Commission (TREC) acknowledging a lack of direction for parties to a transaction in which a fixture lease exists on the property.

The new Addendum Regarding Fixture Leases will make parties aware of and enable them to address the many special issues that arise with fixture leases at the time of contract rather than weeks before closing. A copy of the addendum is provided at the end of this article.

### What is a Fixture?

A fixture is an improvement to real property, generally some type of personal property, that is affixed or fastened in some way that makes it become a permanent part of the real property. A fixture conveys with the real property unless specifically excluded in the contract. There have been many real estate disputes about what is or is not a fixture. In *Logan v. Mullis*, 686 S.W.2d 605 (Tex. 1985), the Texas Supreme Court set out three factors that are relevant in determining whether personal

### The Takeaway

The Texas Real Estate Commission will soon require a new addendum on contracts for properties that have a fixture lease. The addendum will allow the parties involved in the sales transaction to address issues associated with the lease early in the transaction process rather than later.

property has become a fixture that conveys with the real property:

- (1) the mode and sufficiency of annexation, either real or constructive;
- (2) the adaptation of the article to the use or purpose of the realty; and
- (3) the intention of the party who annexed the personal property to the realty.

The first factor considers how the personal property is attached to the real estate and whether its removal will result in damage to the real property. A cabinet that is nailed into the wall studs would be considered a fixture, whereas a free-standing refrigerator merely plugged into an outlet would not. A flat bathroom mirror glued to the wall would be a fixture, while a framed mirror hanging on the wall with a picture hook would not.

The second factor considers whether the personal property was customized for the real property. A sub-zero refrigerator built into kitchen cabinetry is an example. An outdoor grill built into back porch masonry is another.

Courts give the third factor the most weight. What was the intention of the party who attached the item to the realty? The first two factors usually supply the evidence of this third factor.

Paragraph 2 of TREC-promulgated contracts refers to fixtures as being “permanently installed and built-in items” and lists many examples, including wall-to-wall carpet, mirrors, security equipment, light fixtures, and landscaping.

### **What is a Fixture Lease?**

A fixture lease is an agreement with a third party who leases personal property to a homeowner that is attached to the real property in some way.

The most common types of fixture leases are solar panel leases (attached to the roof), security system leases (wired into the walls, doors, and windows), propane tank leases (attached by gas lines to the house and powers household systems), and water softener leases (attached by water lines to the house).

### **What Happens to a Fixture Lease When the Home is Sold?**

The leased fixture property is not owned by the homeowner, so it does not automatically convey under the improvements provision of Paragraph 2 B of the TREC contracts. What happens to the leased fixture property on the sale of a home is determined as much by the terms of the fixture lease as the desires of the parties. This bears repeating: *What happens to the leased fixture property is largely determined by the terms of the fixture lease.*

Each fixture lease is different, and the higher the cost of the leased property (read: solar panels), the more complex the terms for buyout or assignment of the lease. Most fixture leases will have some provisions that deal with the sale of the underlying realty. In general, they allow the seller to move the property under the fixture lease to their new home, assign the fixture lease to the buyer, or pay off the remainder of money owed under the lease.

Each one of these options raises questions and concerns. For instance, if the fixture property is taken by the seller, who is obligated to repair any damage to the real property caused by the removal? If the fixture property

and lease are to be assumed by the buyer, does the lessor have the right to approve or reject the buyer? If the buyer is approved, is there an assignment fee? If the buyer is rejected, does the seller have to pay off the lease in full at closing? If the buyer does not assume it, can the seller be required to remove the property and repair any damage? If the seller just leaves the property, does the lessor have the right to remove the leased property? If so, who is responsible for repairing any damage caused by the removal?

Fixture leases were required to be delivered to buyers in former TREC contracts under the general lease provision in former Paragraph 10 B(2), but no specific negotiated contract terms were set out in the promulgated contracts to deal with the questions raised above. Addressing those issues was the main purpose for adding the Addendum Regarding Fixture Leases.

### **Using TREC’s New Fixture Lease Addendum**

The most important part of this one-page addendum is contained at the bottom of the page in the notice. It states that “Seller and Buyer should consult with the lessor and their attorneys regarding the assignment, assumption, or termination of any Fixture Lease.” Fixture leases, especially solar panel leases, can be complicated, and both parties need to understand the terms of the lease before a decision can be made as to assumption or termination. Keep in mind license holders cannot interpret the terms of a fixture lease for their clients, nor can they give advice as to whether their client should assume or terminate a lease. Both of these actions would constitute the unauthorized practice of law.

A listing agent should discuss the existence of any fixture leases with sellers at the listing appointment. The agent should stress the importance of getting a copy of all fixture leases ready prior to going under contract. This is important for two reasons.

First, as already mentioned, the client will want to review the terms of the lease (preferably with an attorney) to see what options are available to them. Second, as set out in Paragraph B of the addendum, if the fixture lease is not delivered before or at the time of the contract, the seller will have an obligation to deliver the lease to the buyer within five days of the effective date, and the buyer will have a right to terminate the contract within seven days after receiving a copy of the lease and have the earnest money refunded. If the seller does not deliver the lease after five days, the buyer may declare the seller in default *any time* before delivery up to closing and

seek remedies under default Paragraph 15. This includes termination and return of the earnest money.

Be sure to read and understand how Paragraph A of the addendum works. All subsections of Paragraph A should be filled out. They are not an either/or proposition like the first two paragraphs of the Addendum Regarding Residential Leases. The body of Paragraph A sets out which type of fixture leases exist on the property.

Paragraph A(1) states that the buyer *shall* assume and the seller *shall* assign all of the fixture leases checked *except* \_\_\_\_\_. If a buyer does not want to assume a fixture lease, the type of fixture lease must be written in this blank. The second blank in this subsection allows the parties to negotiate a cap on how much the buyer will pay the lessor for assignment of the lease or leases. Both parties agree to sign required lessor documents for the assignment. How much is paid and what documents have to be signed will be determined by the terms of the fixture lease.

Paragraph A(2) addresses whether the seller will or will not (one of those boxes must be checked) remove leased fixtures covered by leases the buyer does not assume. It

also states that the seller will repair any damage caused by the removal of the leased fixtures. If the leased fixtures are not removed, the fixture lease will control what rights the lessor has to the leased fixtures. Note that this paragraph does not address who completes repairs if the lessor removes the leased fixtures. Again, this would be controlled by the fixture lease.

Finally, Paragraph C states that there will be no liens or security interests against leased fixtures on leases the buyer does not assume. This means the seller will have to pay off any sums due for termination of the fixture lease, either before closing or out of sales proceeds at closing. This could be quite a sum for solar panel leases and is another good reason the seller should review the lease and understand the options before listing the property for sale.

Nothing in this publication should be construed as legal advice for a particular situation. For specific advice, consult an attorney. 📌

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**ADDENDUM REGARDING FIXTURE LEASES**



**CONCERNING THE PROPERTY AT:** \_\_\_\_\_  
(Street Address and City)

A. Leased Fixtures are those fixtures in or on the Property that Seller leases and does not own, specifically the:  solar panels,  propane tanks,  water softener,  security system,  \_\_\_\_\_ (collectively, the Leased Fixtures). All rights to the Leased Fixtures are governed by Fixture Leases.

- (1) Buyer shall assume, and Seller shall assign to Buyer the Fixture Leases at closing, except the following \_\_\_\_\_. Buyer shall pay the first \$ \_\_\_\_\_ of any cost necessary to assume or receive an assignment of the Fixture Leases and Seller shall pay the remainder. Buyer and Seller agree to sign any documents required by the lessor in the Fixture Leases to assume or assign the Fixture Leases.
- (2) Prior to closing Seller  will  will not remove the Leased Fixtures covered by the Fixture Leases that Buyer does not assume. Seller will repair any damage to the Property caused by any removal. Notice: Any Leased Fixture remaining in the Property are subject to the rights of the lessor under the Fixture Lease.

B. Delivery of Fixture Leases (check one box only):

- (1) Buyer has received a copy of all Fixture Leases Buyer has agreed to assume.
- (2) Buyer has not received a copy of all Fixture Leases Buyer has agreed to assume. Seller shall provide a copy of the Fixture Leases within 5 days after the Effective Date. Buyer may terminate the contract within 7 days after the date the Buyer receives the Fixture Leases and the earnest money shall be refunded to Buyer.

C. At closing, there will be no liens or security interests against Leased Fixtures which will not be satisfied out of the sales proceeds except for Leased Fixtures covered by Fixture Leases Buyer agrees to assume.

**Notice: Seller and Buyer should consult with the lessor and their attorneys regarding the assignment, assumption, or termination of any Fixture Leases.**

\_\_\_\_\_  
Buyer

\_\_\_\_\_  
Seller

\_\_\_\_\_  
Buyer

\_\_\_\_\_  
Seller



The form of this addendum has been approved by the Texas Real Estate Commission for use only with similarly approved or promulgated forms of contracts. Such approval relates to this contract form only. TREC forms are intended for use only by trained real estate license holders. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not intended for complex transactions. Texas Real Estate Commission, P.O. Box 12188, Austin, TX 78711-2188, (512) 936-3000 (www.trec.texas.gov) TREC No. 52-0.