

TRICKS OF THE TRADE OR TRAPS FOR THE UNWARY?



DIANE B. DAVIES
FAEGRE & BENSON LLP

JANUARY 7, 2009



J Dator

"We will now observe a moment of silently checking our BlackBerrys."



“Good judgment comes from experience, and a lot of that comes from bad judgment.”

WILL ROGERS

Department of Regulatory Agencies



Division of Real Estate



Real Estate Commission

Commission Rule F

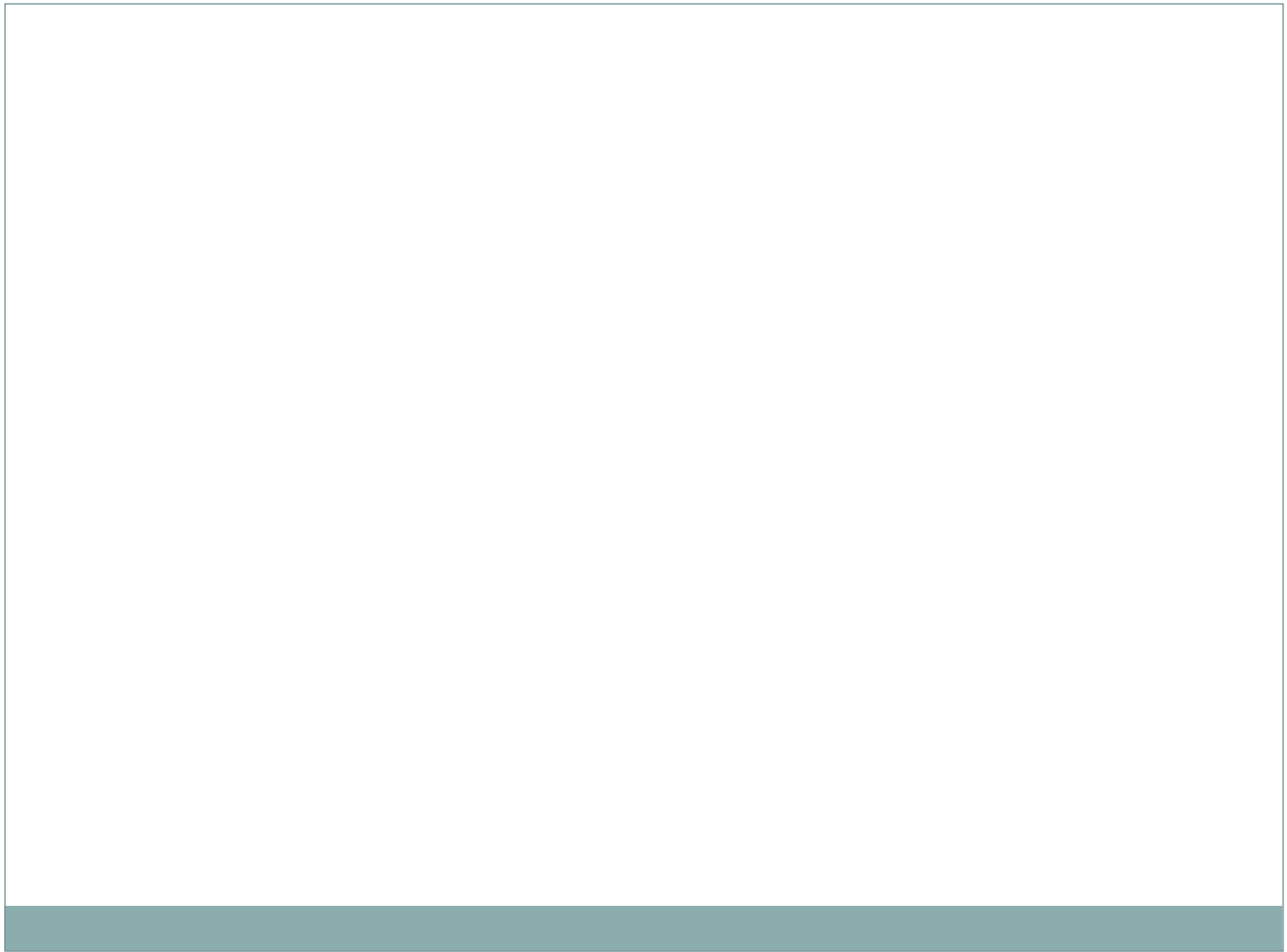


- No modifications to the forms by a broker except as permitted by the rule
- Deletions must be made on the form in a legible manner which shows the deleted language
- Certain specified sections may be deleted as “Omitted as Inapplicable”

Commission Rule F



26. ADDITIONAL PROVISIONS. (The following additional provisions have not been approved by the Colorado Real Estate Commission.)



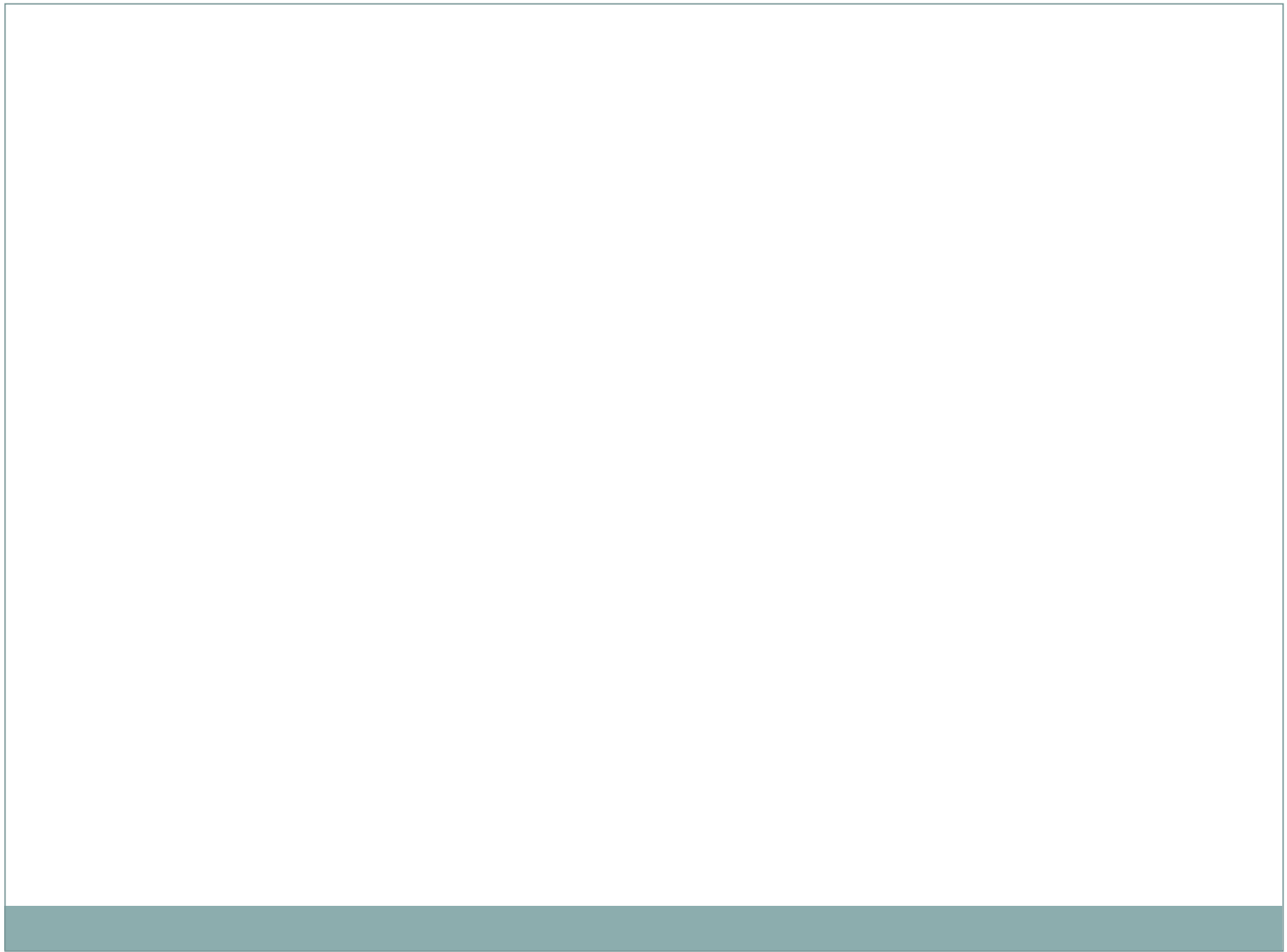
Not Included in Commission Approved Forms

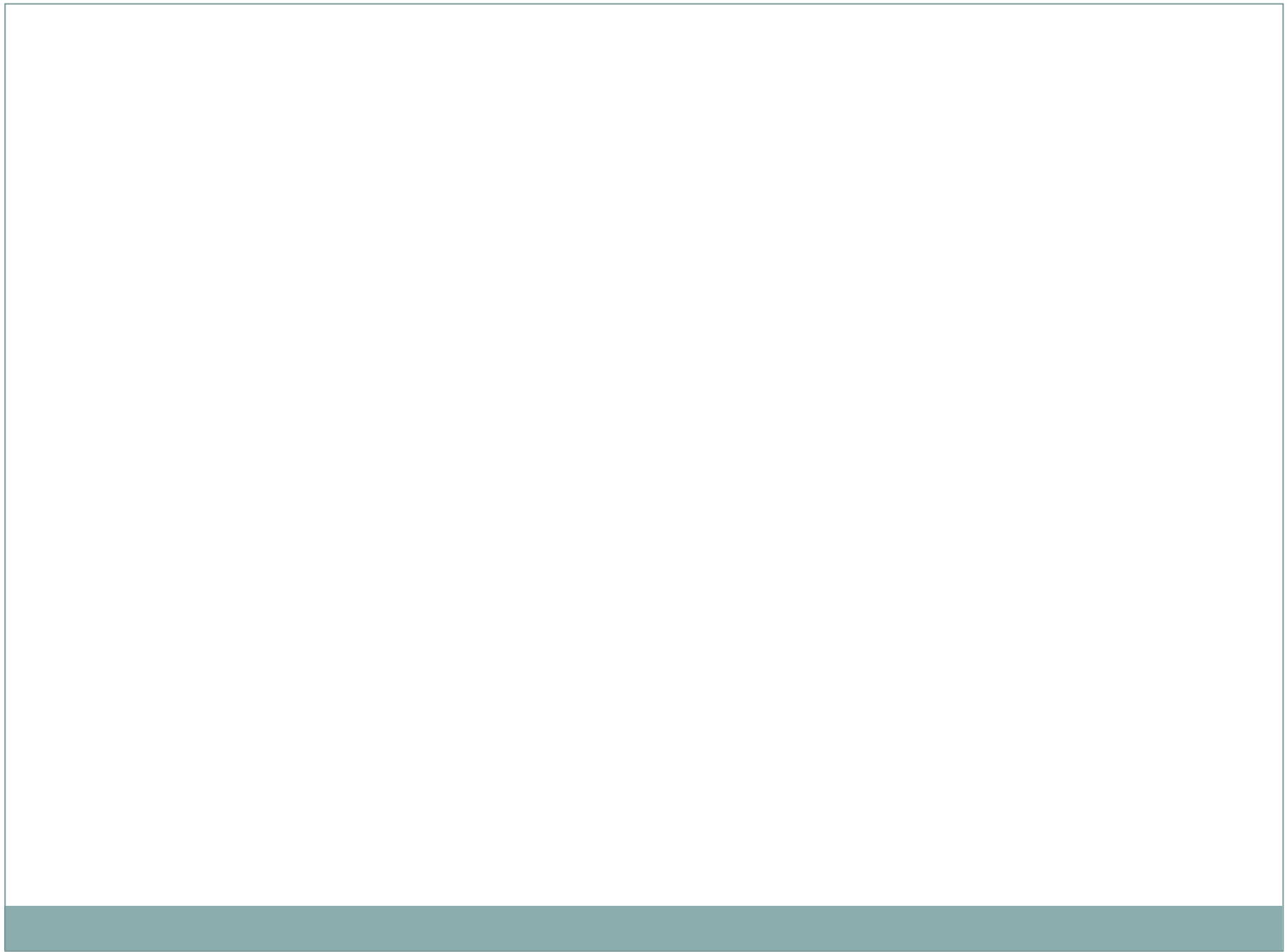


- **Representations or Warranties**
- **Disclaimer of Representations and Warranties**
- **Provision regarding condemnation**
- **Provisions regarding 1031 Exchange**

- (1) physical condition of Property,
- (2) physical condition of Inclusions,
- (3) any proposed or existing transportation project, road, street or highway, or
- (4) any other activity, odor or noise (on or off the Property) and its effect or expected effect on the Property or its occupants

unsatisfactory in Buyer's
subjective discretion







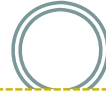
June, 2007

- **ALTA Decertified Prior Loan and Owner's Policies in Favor of 2006 Forms**

Division of Insurance Regulation 72-3 Title Company Conducted Closings



C.R.S. §10-11-106



1) A reasonable examination of the title and a determination of insurability of title in accordance with sound underwriting practices for title insurance companies is required.

(2) A title insurance company shall not be obligated to make a written disclosure to its prospective insureds of the following documents if a reasonable examination of title referred to in subsection (1) of this section reveals a recorded document that:

(a) Is a spurious lien or spurious document

(b) Is not, according to sound underwriting practices for title insurance companies, an impairment of record concerning the property to be insured;
or

(c) Although it may purport to do so, does not encumber the property to be insured

16.5. Final Settlement. Unless otherwise agreed in writing, these prorations shall be final.

C.R.S § 39-1-108



If there is no express agreement as to whether grantor or grantee shall pay the taxes levied in the year of conveyance, then

- If the conveyance is made after the thirty-first day of December and before the first day of July next following, the grantee pays
- If the conveyance is made after the thirtieth day of June and before the first day of January next following, the grantor shall pay such taxes



Good Funds

C.R.S. § 38-35-125

- **Available for immediate withdrawal as a matter of right means:**
 - Wire transfer
 - Cashier's check
 - Certified check
 - Teller's check
- **Exception for incidental fees not exceeding \$500**
- **Seller may waive**

**☐ 7.1. Listing Brokerage Firm
or Seller May Pay. Buyer IS Obligated to Pay**

☐ 7.2. Buyer Will Pay.

☐ 7.2.1. Success Fee. Brokerage Firm shall be paid by
Buyer

**☐ 7.3 Listing Brokerage Firm or Seller May Pay.
Buyer is NOT Obligated to Pay**

Forfeiture of Payments



Paragraph 19:

One half to the Brokerage Firm and One half to the Seller

Listing Holdover



Paragraph 16(b)

- # of days after expiration of Listing Period
- Broker negotiated
- Name disclosed in writing during the Listing Period
- No commission payable if Seller pays commission to another Broker pursuant to a Exclusive Agreement

Rebating Commission



Commission Position – 12

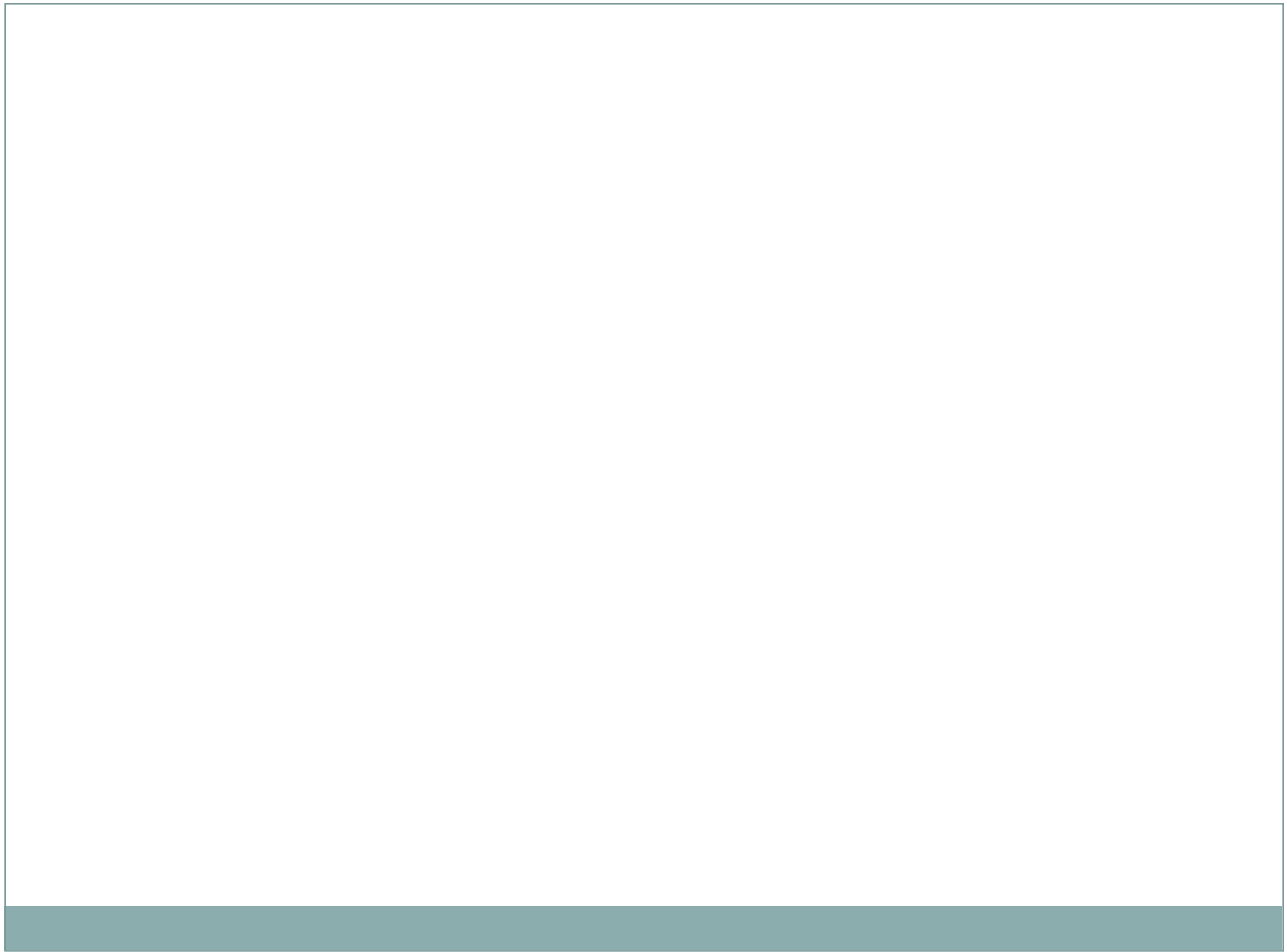
Referral Fees and Finder's Fees prohibited

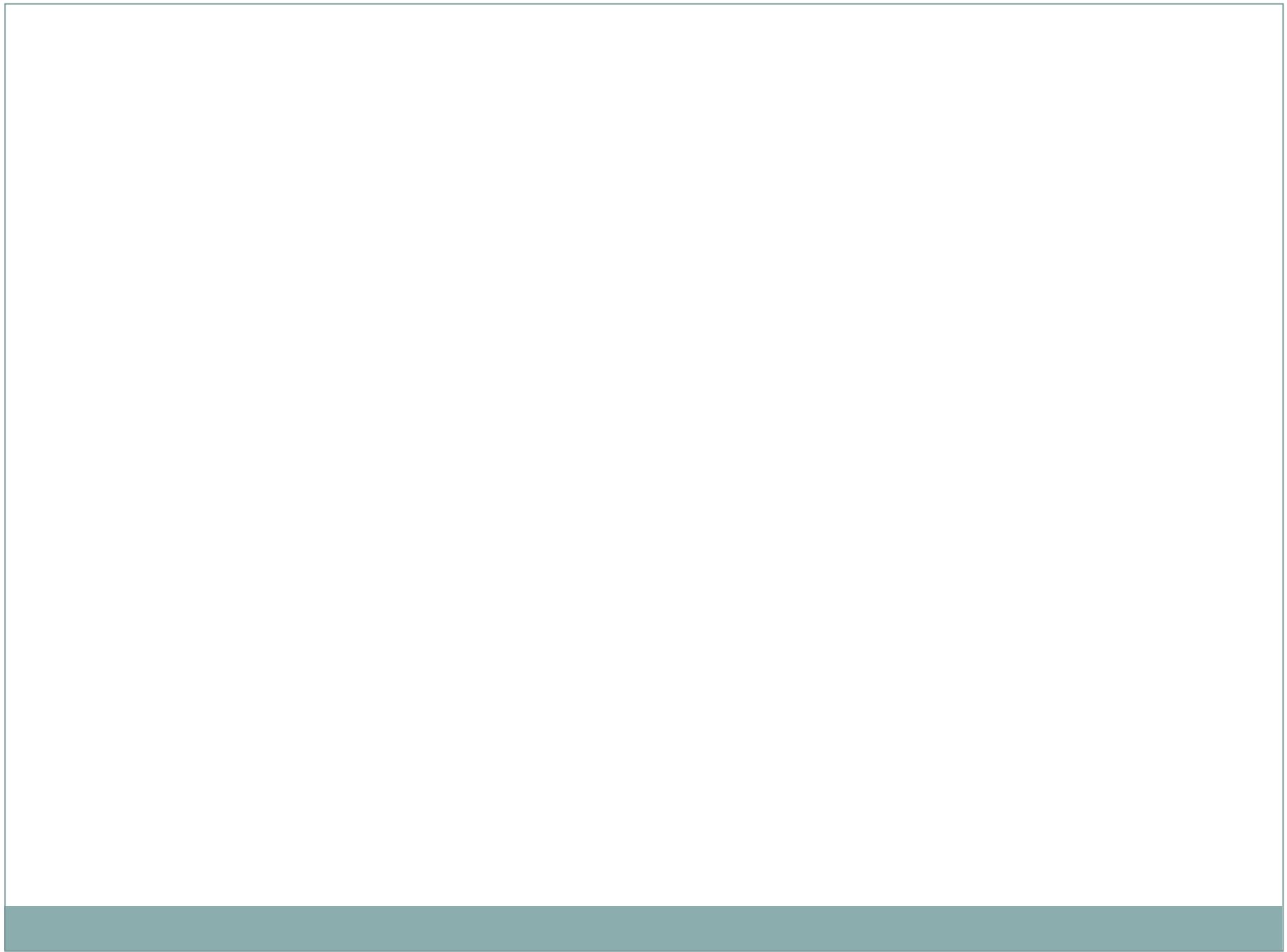
- Payment to Seller is a reduction in the amount of the commission
- Rebate to Buyer is acceptable, but should not be done without notice to, and consent of, Seller

Recording Contract, Lien or Lis Pendens



- No right to record the Listing Agreement
- No right to record a mechanics lien
- No right to record a lis pendens
- May result in Commission action







GROSS NEGLIGENCE

EXCEPT VS. RESERVE



EXCEPTION

- The North $\frac{1}{4}$ of Section 12, except the South 200 feet thereof.

RESERVATION

- The North $\frac{1}{4}$ of Section 12, reserving to Grantor an easement for ingress and egress over the South 200 feet thereof.

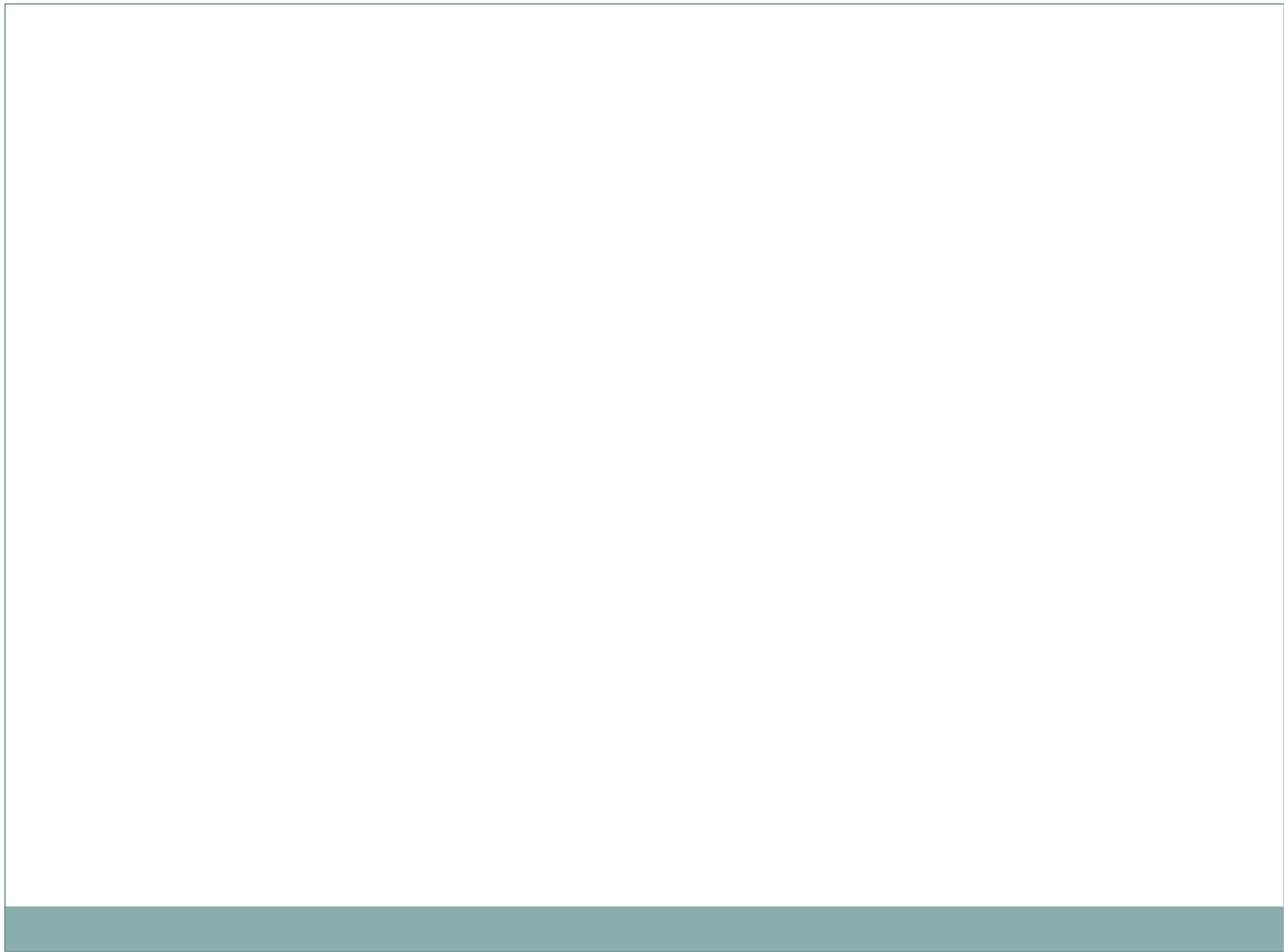


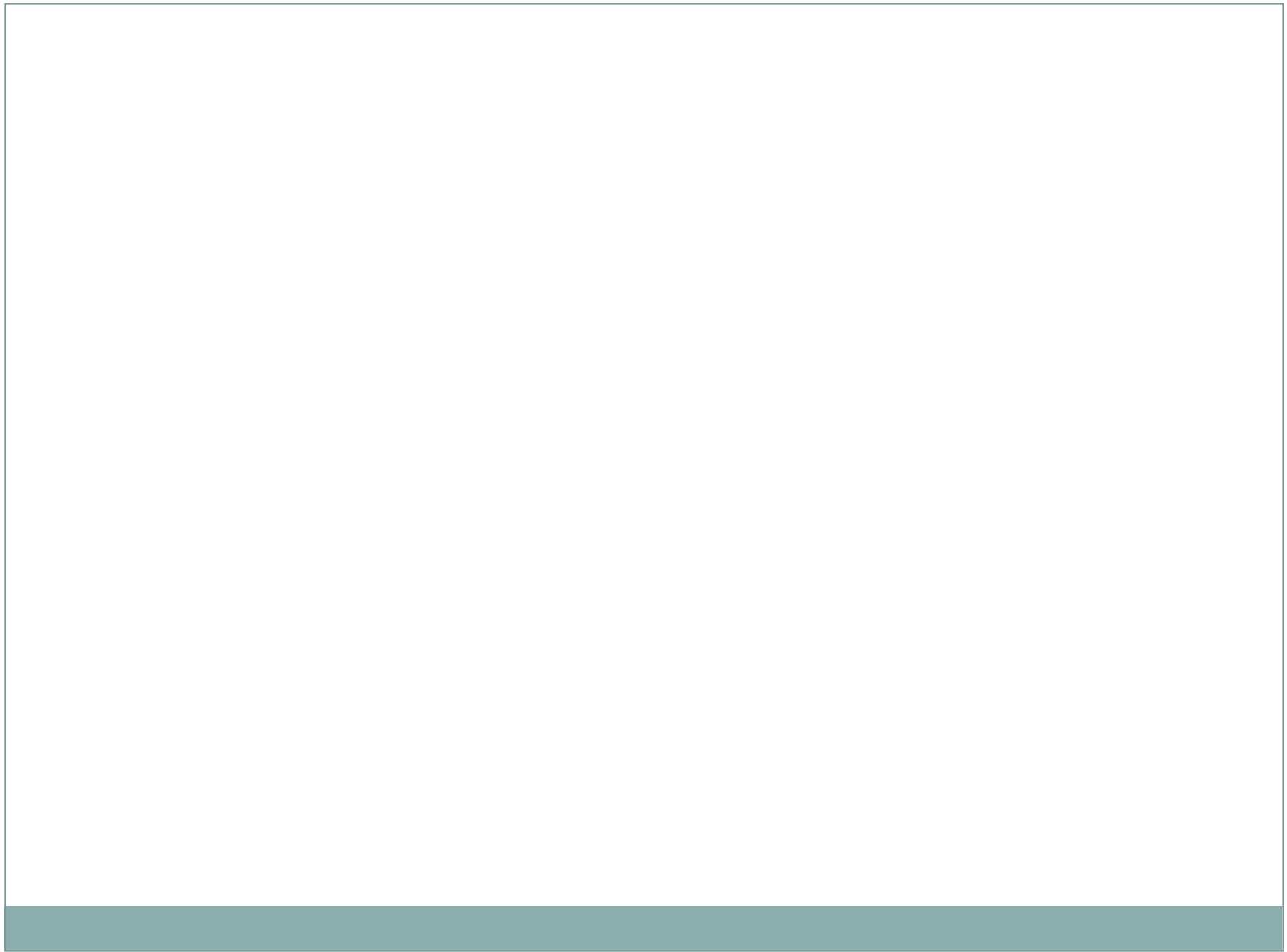
Best Efforts



Not Unreasonably
Withheld

Sole and Absolute
Discretion





RIGHTAWAY



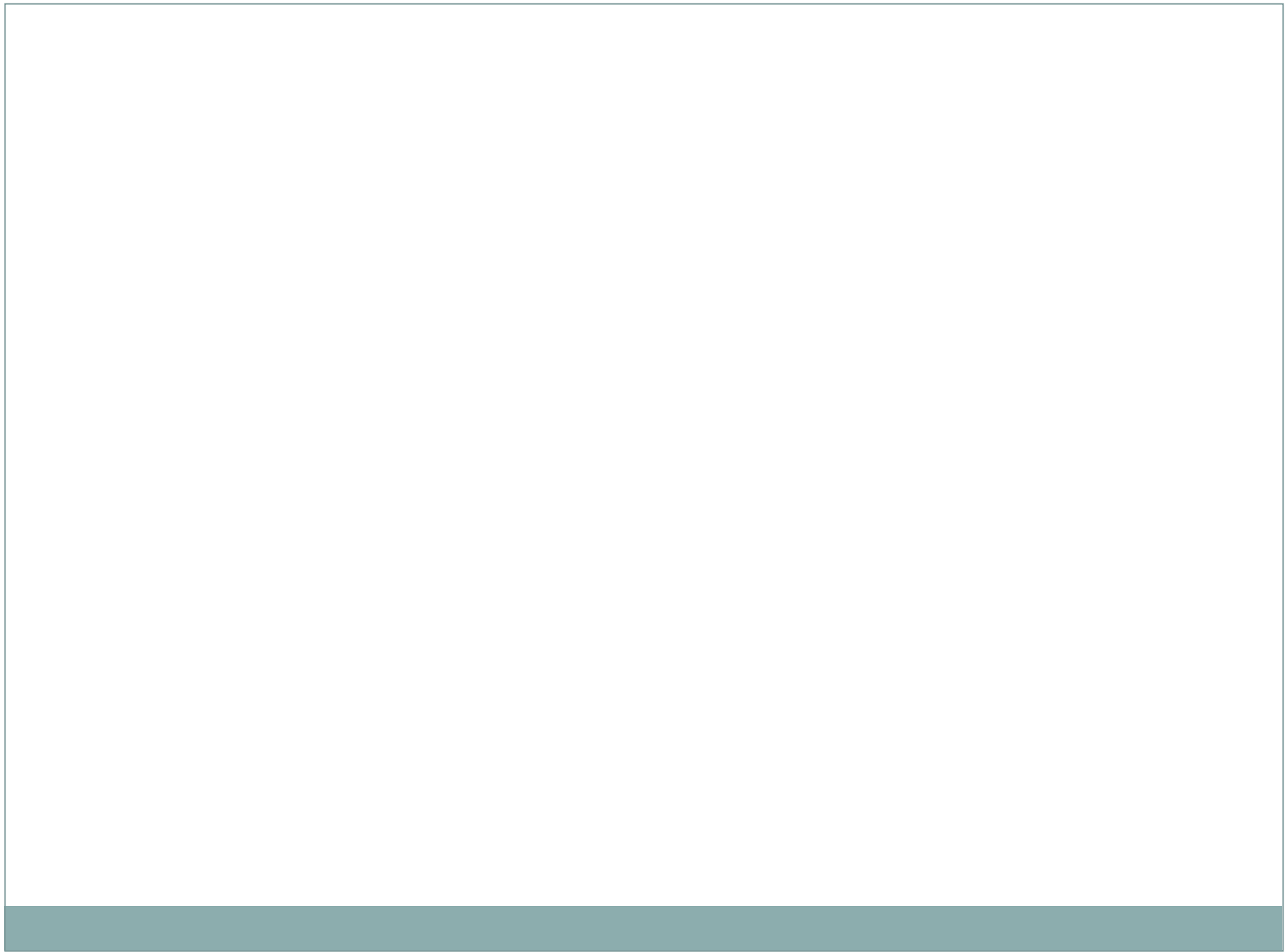
This Rightaway Deed Made this 19th day of December, A.D. 1964 by and between Garfield Oliver and wife, Grace Oliver; Melvin Mansfield and wife, Edna Mansfield; Fred Ernul and wife, Luzie Ernul,

We, the undersigned, do hereby give, grant, bargain and convey a 20-foot rightaway for public use for now and forever more—

Oliver v. Ernul, 178 S.E.2d 393 (N.C. 1971)

DEED TO LOU

QUICK CLAIM DEED





Warranty Deed

and warrants
the title to the
same

- **Grantor covenants:**
- **Lawfully seized of an indefeasible estate in fee simple and has good right and full power to convey**
- **Free and clear of encumbrances, except as stated**
- **Warrants quiet and peaceable possession and covenants to defend**
- **Covenants are binding as if fully set forth in the deed**

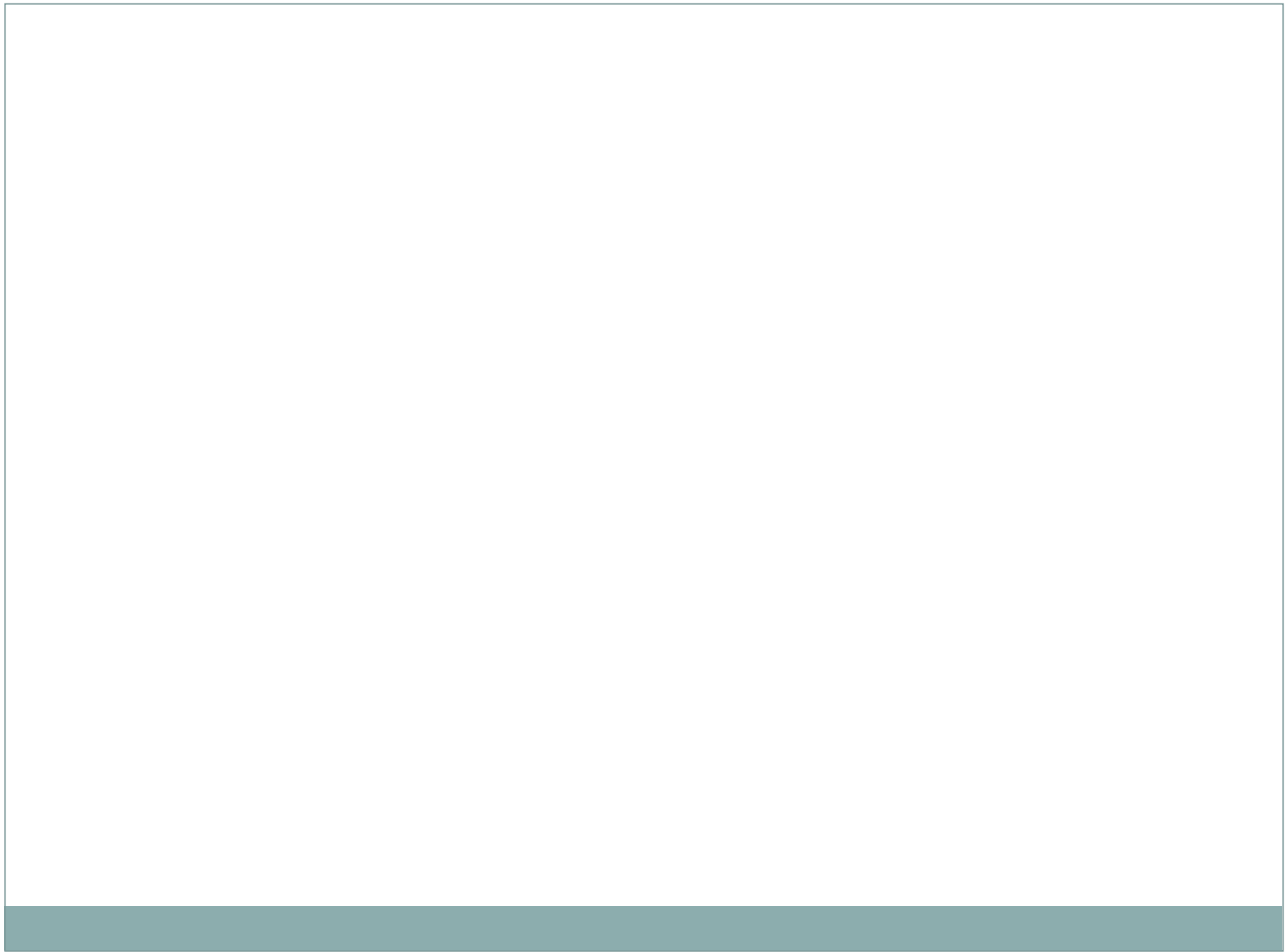
Bargain and Sale and Special Warranty

Bargain and Sale

- Omit “and warrant the title to same”
- Passes after acquired title

Special Warranty

- Change to “and warrant the title against all persons claiming under me”





Joint Ventures and Trusts

- **C.R.S. § 38-30-166**
- **C.R.S. § 38-30-108**

Joint Tenancy



- In Joint Tenancy
- As Joint Tenants
- JTWROS
- As Joint Tenants with Right of Survivorship
- In Joint Tenancy with Right of Survivorship

2006 Amendments



- Provides the exclusive method of creating a joint tenancy
- Confirms that a joint tenancy may only be created between natural persons, except in the case of fiduciaries
- Created a presumption that a conveyance to two fiduciaries creates a joint tenancy
- Any conveyance to two or more persons which does not create a joint tenancy creates a tenancy in common
- There is no Tenancy by the Entirety in Colorado

Reference to Unrecorded Instrument



C.R.S. § 38-35-108

- **Binds only parties to the instrument**
- **No duty of inquiry**
- **Memorandum vs. Short Form**

Recording Statute



C.R.S. § 38-35-109

C.R.S.A. § 38-35-109



- (2) All deeds . . . shall include a notation of the legal address of the grantee of the instrument, including road or street address if applicable. Any such deed submitted to the county clerk and recorder lacking such address shall not be recorded and shall be returned to the person requesting the recordation. Acceptance of a deed by the county clerk and recorder in violation of this subsection (2) shall not make such deed invalid. A notation as required in this subsection (2) may be made by a person other than the grantee after the execution of the deed.

Disclosures



- No duty to disclose circumstances psychologically impacting real property
- Duty to disclose:
 - Special Taxing District
 - Common Interest Community Obligations
 - Potable Water Source
 - Meth Lab
 - Transportation Projects

Landlord - Tenant



Interest



- Title 5
- Statutory Interest
- Usury
- Interest Upon Foreclosure

Credit Agreements Must Be in Writing



- **C.R.S. § 38-10-124**
- **Application to credit agreements for amounts in excess of \$25,000**
- **Credit Agreement includes amendment, cancellation and waiver as well as formation**
- **May not imply a credit agreement**
 - Fiduciary relationship
 - Part performance
 - Promissory Estoppel

Funds Held for Payment of Taxes



- **C.R.S. § 39-1-119**
- **Reconciliation required by May 20 of each year**
- **Refund of amounts in excess of 3/12ths by May 30**
- **Annual adjustment**
- **Penalty for non-compliance**

