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April 2, 2005

Issues to consider before signing purchase agreement

For most people, buying a new home is the single largest transaction they will ever make.

Signing a builder purchase agreement involves entering into a contract with 10 to 20 pages of small print, written in a strange language called legalese.

Based on years of experience with thousands of purchase contracts, I have assembled the ultimate legal guide to buying a new home. Here it is:

- Never sign an unconditional agreement of purchase and sale until it has been reviewed by a lawyer experienced in real estate transactions. I find the majority of buyers still do not have their offers reviewed in advance. As a result, they may experience a serious case of sticker shock when the project is delayed, or when they get the bill for closing adjustments.
- Find out who pays the Tarion (new-home warranty) enrolment fee and how much it is. In most cases, the buyer gets stuck with the cost, even though the warranty program charges the fee to the builder.
- Some agreements contain small charges that the builder tries to pass on to buyers. Many builders will delete these on request, since they really don't belong in a purchase agreement. These charges can include \$25 or more to negotiate each deposit cheque and \$250 to negotiate changes to the offer.
- Most agreements also contain larger charges, which can run into the thousands of dollars. Although there is no stated upper limit to these, most builders will cap them on request. Larger charges can include new taxes or levies imposed by any level of government, and connection charges for water, hydro and gas service.
- Every builder offer contains a clause that statements made in the sales office are not part of the deal. So, if the sales agent makes an important promise, put it in writing in the agreement. Some sales offices hand out a separate list of estimated extras, but they are not binding unless they're added as a schedule to the offer.
- Some builder agreements do not contain detailed floor plans. If a floor plan containing measurements is not a schedule to the offer, don't sign the offer.
- The same advice also applies to the exterior design or elevation of a house. Although beautifully rendered sketches of the home design are always handed out in the sales office, they are rarely attached to the offer as a schedule. As a result, they do not form part of the contract and the builder is free to alter the final exterior design.
- Remember that the advertised square footage of a house or condominium is always an exterior measurement around the outside bricks. Ask what the interior usable floor space is.
- Most offers allow the builder to change the house size. The Tarion warranty program has a guideline suggesting that any size reduction should not be greater than two per cent, but it is not binding. Make sure your agreement contains a clause guaranteeing the minimum house size to be delivered.
- In the same vein, most offers allow the builder to alter the interior house layout without the buyer's consent or knowledge. Buyers should discuss with their lawyers what happens if the house built is not the house they were expecting. I recommend this clause be deleted.
- Consider adding a clause to the offer guaranteeing a minimum lot frontage and depth. When it is registered, the plan of subdivision shows the lot sizes. As many agreements allow the builder to change the lot size without compensation, offers should require delivery to the buyer of a copy of the subdivision plan prior to the start of construction, to allow the buyer to verify lot size in advance.
- Insist on getting a copy of the architect's plans on closing. This will make later renovations or additions much easier.
- A recent wrinkle is for the buyer to have to rent the furnace and air conditioner. A monthly furnace rental can cost \$75 or more adding significantly to the carrying charges on a home. The offer should state if the furnace is a rental, and if so, how much the rent is.
- An increasing number of buyers believe in the ancient principles of feng shui: living in harmony with the energy of the surrounding environment. If this is an important factor, discuss with the builder whether these principles can become part of the house design.
- In the same vein, buyers may be concerned about whether there will be a hydro transformer, fire hydrant, streetlight or community mailbox in front of the house. If this is an important factor, it should be clarified with a specific clause in the offer.

- If the purchase price includes an extra charge for a premium lot, it should be clearly set out in the offer what features the premium lot will have such as a larger size, better location or view or proximity to a golf course, park or ravine.
- Occasionally, a builder will refuse to connect the appliances. Make sure the offer requires the builder to install and connect all appliances.
- When a sale closes, some of the purchaser's money will be diverted to pay off and discharge the construction financing.

All purchase agreements contain a clause requiring the purchaser to accept a promise or undertaking to register a discharge of the builder's construction mortgages after closing. Unfortunately, many builder offers require the purchaser to accept a discharge undertaking given by the vendor and not its lawyer. If the builder is unable to discharge the mortgage, the undertaking may not be enforceable and the purchaser does not get clear title. When I review offers, I make it clear the undertaking must come from the lawyer, not the builder this is not negotiable. If the offer has a builder undertaking only, I tell my clients I will not be able to certify clear title if the clause can't be amended.

- Licensed real estate agents are covered by errors and omission insurance, strict codes of conduct, and extensive educational requirements, both before and after registration. Ask your builder sales rep whether he or she is a licensed sales agent.
- Ensure the offer requires the builder to complete any extras and upgrades that were ordered. Read the small print on the extras page more often than not the tiny lettering allows the builder to omit the extra or upgrade and refund the extra cost.

Many builders attach a schedule to the purchase agreement titled: Request for Upgrades. If an offer contains this type of schedule, the builder has the option not to supply the upgrades or extras. Extras or upgrades should be contractually binding, and not a mere request. .

- Consider the builder's ability to extend closing. For a house, it can be 250 days from the closing date in the offer, and for a condominium, occupancy extensions can often run to two years. If you're selling an existing house, make sure you try to co-ordinate the closings so you do not wind up with two houses or none at the closing time.
- Virtually all builder offers prohibit the purchasers from visiting the home under construction due to insurance reasons. Frankly, I don't buy that argument. Last year, hundreds of buyers in the Mirvish-Stinson condominium at 1 King West in Toronto donned hard hats, signed a liability waiver and toured the unfinished building. If these buyers can stand at the edge of the 40th floor of a high-rise, it shouldn't be impossible to tour a two-storey house during construction. Insist on a contract clause allowing two or three visits before the house is finished.
- Remember that a mortgage pre-approval is subject to many conditions. If you retire, or lose your job, or there's a marital separation before closing, you may no longer qualify for financing. If you buy from a builder, the deal is almost never conditional on financing.
- Check out your ability to borrow up to \$20,000 from an RRSP without penalty, and pay it back over time. If there's still money left in the RRSP, consider withdrawing it, paying the tax, and using what's left to reduce the mortgage. I advise clients not to contribute to an RRSP while they have a mortgage on their house. (See Title Page, Feb. 1, 2003, at <http://aaron.ca/columns/2003-02-01.htm>).
- Although it's not part of the purchase agreement, one of the most important aspects of the home-buying process is choosing a real estate lawyer.

Decide what is important to you price, expertise, proximity to work or home, office hours, availability of the lawyer and office staff, languages spoken, and recommendations from friends.

Consider also whether the lawyer's practice has real estate as a significant component, or whether real estate is a sideline.

The lawyer's most significant role isn't creating the paperwork, it's quarterbacking the transaction providing advice when needed, walking the purchaser through all the steps, explaining the money flow, and making sure all the participants (builder and builder's lawyer, mortgage broker and lender, home insurance agent, title insurer) are working together as a team.

Buying a home, watching it under construction, closing the purchase and moving in can be extremely stressful. A caring real estate lawyer can make a rocky path considerably smoother.

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