



Buying a New Home

The Agreement of Purchase and Sale

The Agreement of Purchase and Sale is the contract you sign to purchase a new home. Once signed, is the blueprint for the transaction that follows—regardless of what you might have agreed to previously or what sales staff have promised. That said, most new home sales staff are very knowledgeable and will go through the Agreement with you to explain its provisions. This is no substitute, however, for carefully reading the contract on your own and having it reviewed by your lawyer.

The Agreement sets out the basic terms of the deal including the model of home, a legal description of the land it is located on, the purchase price, the amount of the deposit or deposits and the date or dates on which they must be paid, the date of closing, time limits, process for colour and other selections, and so on. The purchaser will readily understand most of these terms. The Agreement also includes legal specifics such as search of title and related time limits, delays in closing dates, tax rebates, covenants, easements, zoning matters, rights of way, access and warranties. If the unit being purchased shares anything in common with other units—party walls or access roads, for example—a joint use agreement may be included. This will usually require an explanation as to its meaning and its practical impact on your ability to enjoy your property on a day-to-day basis.

Remember: see your lawyer before signing. After you have signed the Agreement, it may be too late to make changes.

Conditions

People often talk about “conditional offers” or Agreements being “subject to conditions.” Conditions are inserted into Agreements of Purchase and Sale for the benefit of either the builder or the purchaser, making sure the Agreement is not binding unless certain events take place. Many new home Agreements include builder’s conditions on things like approval of subdivisions, consents to sever the land in question, and the availability of building permits. Common purchaser’s conditions relate to the approval of the terms of the Agreement by the purchaser’s lawyer, financing, and selling the purchaser’s present residence.

“Conditions precedent” must be met for the transaction to proceed. A good example of a true condition precedent is the provision of subdivision approval. If a developer is unable to register the necessary subdivision plans and agreements, he or she cannot legally proceed with the transaction.

Depending on the local real estate market, builders may not be willing to accept conditional offers, especially those conditional on the sale of your current home. If you can only buy on a conditional basis, ask the developer early on whether a conditional offer would be considered.

Carefully worded conditions can respond to the needs of both vendor and purchaser. A poorly worded condition can become a headache for all concerned. It's always best to consult your lawyer on the wording of conditions before the Agreement is signed.

Waiving conditions

Other conditions do not necessarily have to be met for the transaction to carry on. For instance, even though the Agreement is conditional on the sale of your present home, there is nothing to prevent you from waiving that condition and going ahead with the Agreement. If you do not want a condition to be a true condition precedent, make sure it is worded appropriately—with entitlement to waive the condition by the party who has asked for it to be included.

If the right to waive a condition is inserted into the Agreement, the condition is considered to be fulfilled on the execution of a waiver. If all conditions are waived or fulfilled, then the Agreement is “firm” or unconditional. If all the conditions are not fulfilled by the date specified, the Agreement becomes null and void unless an extension is agreed to. In most cases, your deposit is returned in full if conditions go unmet.

Conditions related to selling your current home

Conditions relating to the sale of your own home are often worded in a way that the builder can continue to offer the new house for sale until you waive or fulfill the condition. They usually also provide that if the builder receives another acceptable offer on the new home, he or she is to provide you with written notice—at which point you have a specified period of time, usually 24 or 48 hours, to waive the condition. If you don't do so, your Agreement is null and void and the developer is free to sell the house to the new buyer.

Title insurance

Title insurance has existed for a long time but has only become popular in Ontario fairly recently. Since January 1998, all lawyers acting for purchasers or mortgagors in the province have been required to discuss title insurance with their clients.

As its name implies, title insurance is an insurance policy on the title to your home. The premium is payable on closing; it is a one-time charge that covers you for your entire period of ownership.

Title insurance has a number of advantages over a lawyer's certificate of title. It deals with issues not covered by a lawyer's certificate of title (for example, insuring you against defects in the survey which, on a new home purchase, the builder generally provides). Title insurance can save you money by relieving your lawyer from having to provide certificates relating to various matters

dealing with title issues. As well, the title insurance company may simply absolve your lawyer from the requirement that he or she perform certain searches. The savings from not having to get the certificates or do the searches usually exceed the cost of the Title insurance premium.

If you discover you have a title problem, you don't need to contact the lawyer who certified title to you. If the problem is covered by your policy, just make a claim against the title insurance company, leaving it to decide whether or not it pursues the lawyer who made the mistake.

Title insurance can help overcome problems arising from time constraints associated with new home purchases. Documents related to the title of a new home are often not registered until fairly shortly before closing—making it difficult for your lawyer to perform a full search of title and then obtain related clearance certificates on time. If title insurance is used, the lawyer may not need to get these certificates. This allows the transaction to close on time with the purchaser still fully protected.

Easements and rights-of-way

Easements and rights-of-way are terms that appear in all new home purchase agreements. Both of them mean that someone else has the right to come on your property for a limited purpose, or that you have the right to go on someone else's property for a limited purpose.

Most easements and rights-of-way are based on common sense. They allow you to make the fullest possible use of your property while respecting the needs of your neighbours regarding services, maintenance and access. They protect the value of your property and at the same time preserve the value of all of the other properties in your neighbourhood. They are registered on your title—and failure to comply with them can result in serious consequences, including the inability to sell your property to a prospective purchaser on resale.

Utility easements

Utility easements relate to the entitlement of utility companies to run their pipes, wires, cables and conduits across a portion of your property. If a utility easement is registered against your property, you cannot do anything with that portion of your lot that might prevent the utility company from making reasonable use of its easement. For instance, you can't install a swimming pool on top of a utility easement.

Maintenance easements

Another common form of easement or right-of-way relates to maintenance of your property. With today's modern homes being built on relatively small lots, it is often difficult to maintain your own home without straying onto your neighbour's property. This is particularly so if your house is actually attached to your neighbour's. Therefore, common sense dictates that you be entitled to go onto your neighbour's property to the extent necessary to make repairs to or to maintain your own home.

Access easements

Access easements are common in townhouse or row house developments. Unless there is an access easement registered allowing the owner of an inner unit to traverse neighbouring properties, it is impossible to get into or out of the inner backyard from the exterior. Registered easements usually allow the owner of an inner unit to go down the side yard of the end unit and across the back of the rear yards. It is important that these easements be kept open. Owners are entitled to fence their entire yards, including the portion subject to the easement, but have to put gates in the fence so that neighbours can cross the property. If you fail to respect the easements in this way, you could be forced to put gates into the fence when you sell the property.

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