

The Agreement of Purchase and Sale

A written agreement is required when you wish to purchase a home or lot of land. If you are buying a property which is being sold through a real estate agent, the agreement will be drafted by the agent on a standard form agreement. For private sales where the services of an agent are not used, it will be necessary for a lawyer prepare the agreement. In either case, the agent or the lawyer will need to tailor the agreement to meet the particular concerns of the parties as each property presents different concerns. Some of the usual clauses which are inserted for your protection are as follows:

Financing

In most cases, a buyer will either assume an existing mortgage or arrange new mortgage financing to assist in the purchase of the new property. A clause which sets out the amount, the rate and the term of the mortgage should be set out in the agreement. Also, a sufficient number of days to obtain a written commitment from the mortgage lender should be specified. Even if you have a pre-approved mortgage, you should ensure that the property which you are buying meets with the approval of the mortgage lender and a financing clause should be used.

It is important to know most financing clauses are “deemed” to be

arranged unless the buyer notifies the seller or the seller’s agent in writing on or before a specific date. Therefore, if you have not arranged financing by the specified deadline, you must take steps to avoid legal liability and you should seek advice from either your agent or your lawyer.

House inspection

It may be in your best interest to retain the services of a qualified professional to inspect the condition of the property. If so, a clause should be inserted in the agreement allowing for a qualified professional to inspect the entire house for problems. It is important not to limit the inspection clause to specific areas or parts of the house. Also, a sufficient number of days to complete the inspection should be specified. In most cases the inspection will be “deemed” to be acceptable unless the buyer notifies the seller or the seller’s agent to the contrary. Again, action is needed before the deadline if there is a problem.

Clauses that require the seller to guarantee that the basement or roof do not leak or which addresses other specific concerns can also be inserted in the agreement.

What things are included in the purchase price

A clause that sets out the items which are to be included in the price


is important. Many items will be negotiable with the seller, such as appliances, woodstoves, blinds, drapes, tracks, security systems. This list is not exhaustive. However, if you are concerned that the seller may take or remove any item you should specify that it is included and must remain with the property. You should also enquire whether the furnace or hot water heater are owned or leased from an oil company if your house is heated by oil or propane.

What about leased equipment?

You should enquire as to whether or not there is any leased equipment on the property. The agreement of purchase and sale should specify whether or not there is leases equipment on the property and if so, the cost of the lease, who holds the lease and whether or not you will be assuming the lease or the lease is to be paid out by the seller on or before the closing date. In the event you are assuming the existing lease of a furnace or hot water tank or some other type of leased equipment, you should ensure that the assumption documentation is signed and completed prior to the time of closing. You should consult with your agent to determine who holds the existing lease.

What if the property has a well and a septic system?

Your mortgage lender will require a certificate that the well water is safe for human consumption. This



usually means that the water is free from coliforms. You may wish to include in the agreement the right to test for high mineral content in the water that may potentially cause health problems. Furthermore, you may also wish to include a clause in the agreement that the well and septic system are in good working order and will supply the needs of you and your family. Finally, you may also wish to have the seller agree to provide the location of the well and septic and certify that both are wholly situated on the property.

What about the use of the property, are there any restrictions?

You should enquire about the municipal zoning regulations that may govern the use of your property. If the property has an in-law suite or rental unit you should examine whether it is a legal use. It is wise to insert a clause in all agreements that the agreement is subject to the property conforming with all municipal zoning, by-laws and restrictive covenants.

In most subdivisions, there will be a set of rules called restrictive covenants which apply to the use of the property. These should be reviewed prior to signing the contract to ensure there are no rules or conditions that are unacceptable.

When is the Closing Date

The Closing Date is the date the buyer and the seller agree to complete the

transaction. This generally should be a weekday when your mortgage lender and lawyer are open for business. As a courtesy only, the seller should move out before noon on the closing date. However, if you have special requirements to move in on the closing date by a special time you should have your agent stipulate this in the agreement. You cannot change the closing date after the contract is signed without the seller's consent.

What about a Location Certificate?

If you are obtaining a mortgage, your mortgage lender will require a location certificate from a qualified land surveyor indicating the location of the house in relation to the metes and bounds description of the property. We strongly recommend a certificate be obtained to protect your investment. You should be clearly aware that you cannot rely on a certificate that has been prepared for someone else. If it is determined at some later point that there are difficulties or errors with the survey, unless you have paid the surveyor directly for the certification, you may have no recourse against that surveyor.

Do I need insurance

You are required to obtain an insurance policy by the mortgage lender prior to the closing. The insurance should be effective 12:01 a.m. on the closing date. You should consult


with an insurance agent after signing the agreement to obtain advice on the most appropriate coverage. Your lawyer will require written confirmation from your insurance agent indicating the amount of coverage and that the mortgage lender has been named as loss payee in the policy. You should ensure that you give the agent the correct name and address of your mortgage lender. You should also confirm that the amount of insurance is not less than the amount of your mortgage unless otherwise advised by your mortgage lender that it is not necessary. In such cases, special arrangements are needed to satisfy your mortgage lender that insurance coverage is adequate.

How about utilities?

In due course you should arrange for utilities to be connected in your name. The utilities should be changed into your name effective the date of closing.

Who should be named in the Deed?

With respect to taking title, you can take title as either joint tenants, tenants in common, or sole ownership. Joint tenancy is a form of ownership which gives to each owner an undivided one-half interest in the property. The result is that if one joint tenant predeceases the other, the property automatically vests in the surviving joint tenant. In other words, the person who survives the longest



will ultimately receive title to the property subject to any agreement by the two of you to convey your interests prior to that time.

Tenancy in common is a form of ownership in which the tenants in common have separate land interests. Each tenant in common would have the ability, subject to partition rights, to convey at any time his or her half interest in the property. The interests of the two tenants in common in the property are severable, and one person could apply for a partition of land and failing agreement, could receive a court order that the land be sold and that the proceeds be divided equally. If one person dies where a tenancy in common title exists, the interest of the deceased person would flow through to that person's estate and would not automatically vest in the survivor as in a joint tenancy relationship. In such instances, the deceased's estate shall be required to pay probate fees on the value of the property.

With respect to sole ownership, title can vest in one person's name alone and if married the spouse of the person in whose name the title vests will only have a matrimonial interest if the property is being occupied by both spouses as their matrimonial home. The "non-owner" spouse would be required to release the matrimonial interest at the time of any conveying or mortgaging.

In the event that you are purchasing the property with a common-law spouse, there is no statutory framework that governs the disposition of your property if your common-law relationship terminates. Therefore, common law couples should consider addressing their ownership concerns by way of a separate agreement such as a cohabitation agreement.

Adjustments, Legal Fees and Disbursements

On closing there may be a number of adjustments to the purchase price, some of which are set out below:

Tax Adjustment

The buyer will be responsible for taxes on that portion of the year that you own the property, that is, from the closing date to the end of the year.

If you have a tax portion with your mortgage payment, there may be a deduction at the time of the mortgage advance to ensure there is enough collected in your mortgage tax account to pay the next bill when it falls due. You should check with your mortgage company with respect to the approximate amount that may be deducted.

If there have been any new improvements, such as paving, sewers or curbs installed recently, you should advise your lawyer. In some cases

the municipality charges the property owner for this work. It may be the case that the seller is responsible for these improvements even if the bill has not yet been issued.

Fuel Adjustment

If your house is heated by oil or propane, there will normally be an adjustment for fuel oil or propane in the property at the time of closing. The general practice is to adjust for a full tank as partial tanks are difficult to gauge. The cost of a tank of oil will vary from time to time. Your lawyer will provide an exact figure before closing.


Deed Transfer Tax

The municipalities charge a tax for the transfer of property. The Deed Transfer Tax is payable on the closing date and can be as high as 1.5% of the purchase price. You should determine the applicable Deed Transfer Tax of the municipality prior to purchasing the property.

Harmonized Sales Tax

Most used residential houses are exempt from HST. However, you may wish to specify the property is not subject to HST in the agreement. New houses, lot sales by developers and newly renovated houses are some examples when HST is payable. An HST rebate may be available.

You will also pay HST on your legal fees, applicable legal disbursements and survey fees. As a general rule,



HST is payable on all disbursements other than those payable to the Province of Nova Scotia or the Government of Canada.

Title Searches

Your lawyer will conduct a title search of the property to determine outstanding mortgages, liens or other encumbrances registered against the property. Your lawyer will make arrangements to have these removed at the closing time. You will receive a certificate of title from your lawyer stating that you have clear and marketable title to the property, subject to your mortgage, restrictive covenants, easements or other agreed upon encumbrances.

What if the property is a condominium or new home construction

If your property is new home construction or you are purchasing a condominium there are special considerations that you should discuss with your lawyer.

The Closing

Finally, prior to the closing date, your lawyer will advise you how much money will be required to complete the transaction. The lawyer will require a certified cheque or bank draft payable to your lawyer's firm "in trust". Your lawyer will arrange to pick up your mortgage money directly from your mortgage lender. Your lawyer will schedule an

appointment on or before the closing date to sign your mortgage and related closing documentation and will review the closing adjustments in detail. Your lawyer will send the agreed upon balance to the seller's lawyer in exchange for the Deed, keys and related closing material.

The effect of our new *Land Registration Act*

The Province of Nova Scotia has acquired new technology to modernize our 250-year-old Registry of Deeds system. The new system guarantees land ownership and will improve the way Nova Scotia land records are stored. The effective conversion date for each municipality will vary. Conversion to the new land registration for any property located within the Halifax Regional Municipality was necessary after December 1, 2004, if the owner intended to sell or mortgage property or subdivide it into three or more lots for the purposes of selling those lots. As an owner, you will require the assistance of a lawyer to transfer a parcel into the new system.

In the event you are buying, selling or refinancing your home, or wish to register your property pursuant to the new *Land Registration Act*, Auld Allen would be pleased to meet all your real estate requirements.