

# SERVICE LAW FIRM

78 Mary Street, P.O. Box 40, Stn. Main, Barrie, Ontario, L4M 4S9  
Phone.: (705) 737- 2123, Fax.: (705) 737- 2194

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## **PURCHASER'S MEMORANDUM - the long story**

*The contents of this Memorandum relate, generally, to the purchase of land, and specifically residential land, in the Province of Ontario, Canada. It is not intended to be relied upon to provide legal advice for any particular set of circumstances, and liability for any such use is disclaimed. Always consult a Barrister and Solicitor, qualified to practice law in the Province of Ontario, Canada, for legal advice with respect to an Agreement of Purchase and Sale.*

## **AGREEMENT OF PURCHASE AND SALE**

Generally, a solicitor is retained after execution of an Agreement of Purchase and Sale which is a contract for the sale of real property. In Ontario, Agreements of Purchase and Sale are generally entered into through real estate agents, one acting for the vendor and one acting for the purchaser.

It is the Agreement of Purchase and Sale which details the terms of the sale and which will regulate most of what occurs thereafter until such time as a sale is completed. The contract must contain certain terms, including a description of the land, the sale price, deposit, the closing date and, generally, contains numerous other terms and conditions. Competent advice from a qualified real estate agent or a solicitor is recommended prior to execution of an Agreement of Purchase and Sale. Once signed and accepted, it is a binding contract. There is no "cooling off" period allowing a vendor or purchaser to escape.

Agreements of Purchase and Sale for newly constructed homes, are often specifically prepared for a builder. In consequence, there are usually "hidden costs" built into the Agreement which can add considerably to the cost of a new house. Examples include subdivision damage deposits, the Ontario New Home Warranty Insurance fee and the costs of installation of utilities such as water, gas and hydro. An Agreement of Purchase and Sale for a new home should be reviewed very carefully, with a solicitor, prior to execution.

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Generally a condition period to obtain financing should be a term of an Agreement of Purchase and Sale. This applies even to "pre-approved" mortgages, since such pre-approval is always subject to the bank's appraisal of the value of the purchased property.

## **CONFLICT OF INTEREST**

In most purchases, the Purchaser's solicitor also represents a Lender, avoiding duplication of cost to the Purchaser, since virtually all lending agreements require that the Purchaser pay the Lender's costs. Where a solicitor is asked to act for a Purchaser and a Lender, he must inform both parties that he is acting for both and that no information which he receives in connection with the transaction from either party, can be treated as confidential, so far as the other party is concerned. The solicitor must obtain the consent of both parties to act for them and advise them that should there be a conflict of interest which cannot be resolved, he cannot continue to act for both parties in the matter and may not be able to act for either.

## **LENDER'S COSTS**

Generally, lending agreements upon the security of land require that a Purchaser pay all of the Lender's costs in processing the loan. There are generally an application fee and an appraisal fee, both of which can be subject to negotiation. If a residence is being purchased, and the down payment is less than 25% of the appraised value, the law of Ontario requires that mortgage default insurance be purchased. This will give rise to another application fee, and an insurance premium, both payable by the Purchaser/borrower. This insurance premium is taxable at the rate of 8% under the Ontario Retail Sales Tax Act. In addition, if land taxes are to be paid through the mortgage, a tax hold back may be deducted from the mortgage advance. At the time of application for the loan, all of these costs and deductions should be discussed with the Lender to provide an estimate of the expected closing deductions from the mortgage.

## **HOME INSURANCE**

Home insurance is necessary for the protection of the property. In fact, a lender

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requires that property be insured to the maximum insurable value. The advice of a good insurance agent can assist to select a policy which is suitable for a homeowner. There are two types of common policies, named perils policies or all risk policies. Named perils policies protect against loss arising from the named perils, fire and theft, for example. All risk policies protect against all losses, except those which are specifically excluded, losses arising from acts of war or nuclear accident, for example. Generally all risk policies are more expensive because more risks are covered.

The coverage on the policy of home insurance must commence on the date set for closing. If the property is to be financed by a mortgage, then the policy must show each mortgage company and its priority; for example, first mortgage, second mortgage, etc., as their interest may appear. Because fire insurance is relatively inexpensive, it is recommended that a property and its contents should be protected to their full insurable value, with a replacement cost rider. In no case should the coverage be less than the amount of the total mortgages.

Decisions concerning the type of policy and additional coverages are best made with the assistance of an insurance broker. Proof of coverage must be provided prior to closing.

## **ADJUSTMENTS TO THE PURCHASE PRICE**

Every Agreement of Purchase and Sale contains a clause which sets out that the purchase price is to be adjusted by certain items. For a resale home this normally means only municipal taxes, however, unmetered utilities such as flat rate water, propane or fuel oil are also the subject of adjustments.

For municipal taxes, assuming that a purchase is not closing on the first day of the year, the closing will occur part way through the annual taxation cycle. It may be that the Vendors have paid either more or less than the amount appropriate for the number of days of their ownership. This shortage or excess will be the subject of adjustment on the Statement of Adjustments. In estimating the closing costs on any particular house, one-third of the annual taxes, is a reasonable estimate of the maximum possible adjustment.

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For a newly-constructed home, there may be many additional costs that are treated as adjustments. Some are set out above, and include the cost of the Ontario New Home Warranty, for example. These will be set out in the "fine print" of the Agreement of Purchase and Sale,

## **NOTIFICATION OF UTILITIES/HEATING**

If the home is serviced by electricity and/or natural gas, the meters will be read on the day of closing and a new account will begin from the date of purchase. The final accounts to the date of closing are forwarded to the Vendor for payment. It is necessary for a purchaser to confirm with the utility companies several days prior to closing, to provide them with the account information which will be required for future billing; otherwise the meters may be locked off.

If the home is heated by oil or propane fuel, the tanks should be filled on the day of closing by the Vendor and the account in this regard is paid by the Vendor. The vendor is reimbursed through the Statement of Adjustments. A purchaser should, as a precaution, check the fuel tank when moving in to be certain that it has been filled.

## **SURVEY**

A survey, prepared by an Ontario Land Surveyor, is an accurate scale drawing of the house and attachments, any accessory buildings, the boundaries and fences. It shows the dimensions of the land, as well as the distances of each structure from the boundaries. If a current survey is not supplied, it is not possible to know if the house, accessory buildings and fences are located wholly upon the land and whether the location of the house and accessory buildings comply with zoning by-laws. A survey is also necessary to identify any encroachments onto the land from adjacent properties. It is advisable to obtain a survey if one is not available from the Vendor. The cost of a survey is approximately \$750.00. In addition, most mortgage lenders require a current survey and it may, therefore, be necessary that a survey be obtained. An alternative to a current survey is Title Insurance.

## **SEARCH OF TITLE**

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A search of title for at least 40 years on the purchased land, is necessary. Other necessary inquiries, called “off title searches” are also made to ensure that the land is conveyed free of adverse interests. Generally, searches include:

- Depending upon whether the land is registered in the Land Titles system or the Registry system of land registration, the Parcel Register or the Deeds in the chain of title to ensure that good title has been conveyed by each previous owner, to ascertain outstanding mortgages, charges, liens or other registered encumbrances and to identify and remove any clouds on title;
- Executions, which are liens against the land filed with the Sheriff. Generally, in the Registry system, a search is conducted of the present Vendor and the owners for the previous 20 years. In the Land Titles system, only current owners need be searched. If the property is financed by a mortgage, a search will also be conducted against the Purchaser;
- Land taxes, for arrears for either the current year or previous years;
- Work orders, which are issued by the governing municipality and which, in the hands of the local Building Inspector, form a charge on the land;
- Zoning of land, to confirm land use compliance and, if a survey is available, building location compliance.

In addition to these searches, it may be necessary to conduct searches to ascertain the corporate status of prior orders, for a septic system user permit, for well drillers reports and for compliance with the fire code, depending upon the nature of the transaction.

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## TITLE INSURANCE

Title Insurance is a relatively new product in the Province of Ontario. It is designed to supplement a lawyer's work, not to replace it. For a one time premium, the policy protects a purchaser for as long as they own the land against title defects, liens, encumbrances and other matters existing as of the date of the policy and not specifically excepted from coverage. Title Insurance also protects against loss or damage arising from problems which would have been disclosed by an up to date survey, without requiring a new survey, in most residential transactions. Title Insurance, where no new survey exists, is the least cost option since a policy generally costs \$270.00 and a new survey is about \$750.00. In addition, most Title Insurance companies do not require off title searches to be conducted, thereby saving the costs associated with those searches.

Title Insurance also protects against matters about which no solicitor's opinion concerning title can be expressed. For example, in searching title, it is assumed that the persons who have executed each document are who they way they are, and have the legal capacity to sign the document. This is not always true. No solicitor can express an opinion concerning fraud or forgery in the chain of title. Title Insurance protects against such a risk.

Generally, Title Insurance has much to recommend it.