

## LEGAL ADVISORY

### A PRIMER ON RESIDENTIAL REAL ESTATE TRANSACTIONS

The single most valuable item that most Americans buy is their home. Ironically, it's also one of the least understood purchases, and one in which buyers must rely completely on the skills and knowledge of a handful of professionals. We at Sahn Ward & Baker developed this guide to help our residential real estate clients successfully undertake the purchase of a home.

1. Use common sense and do the research carefully before signing a contract. Most buyers rely on their broker as the only source of information about the house and the neighborhood and forget two things: 1) the broker is hired and paid by the Seller, and 2) the greater the purchase price of the house, the greater the broker's commission. Before making a decision and signing the contract, learn as much as possible about the house, the surrounding community, and the local municipalities. This is especially important if the house is next to vacant land, commercial property or other non-residential land which could impact its use and enjoyment in the future.

2. Purchasers have three possible taxes to be aware of. First, if the purchase price of a home exceeds \$999,999.99, which is not unheard of in many parts of Long Island, the Purchaser must pay what is commonly known as the "Mansion Tax"—an additional 1% of the purchase price. Second, if the property is located in certain towns on the eastern end of Long Island, a tax known as the "Peconic Bay" tax must be paid by the Purchaser—2% of the purchase price. Notably, the purchase price is reduced by an allowance which varies depending on the town in which the property is located. The third tax affects Purchasers who obtain mortgage financing. This tax varies between 1% and 2.75%, depending on the county in which the property is located and the amount of the loan. It is important to note that New York State law requires the lending institution to pay 25% of the mortgage tax, and a \$25 discount is given to all residential borrowers.

3. Buyers are frequently asked to sign a broker's commission fee agreement. We advise our clients never to sign anything unless it has first been reviewed by an experienced real estate attorney. Most people sign without reading this agreement and this can be an expensive mistake. We want to ensure that the broker's fee agreement has language that clearly states that the commission—ranging from 3-5% and always negotiable—is due only upon closing of title. The problem is, not all agreements are written that way. Some require payment of the broker's commission whether or not the sale takes place, regardless of the reason. Others state that if the buyer changes his or her mind and decides not to go forward with the sale, the buyer is still contractually obligated to pay the broker's fee. Before you sign any broker agreement, have it reviewed by a competent real estate attorney.

4. Surprisingly, there is typically nothing legally binding about a "binder"—an agreement accompanied by a small check frequently requested when a buyer wishes to secure their offer on a house. Many real estate agents have done away with this archaic part of the transaction. However,

because a binder can, in certain circumstances, take the place of a formal contract if it contains all of the terms required to form a binding contract (under New York State law) and is accompanied by sufficient consideration (funds), it should never be signed without first being reviewed by competent legal counsel.

5. Prior to signing a contract, the house should be inspected by a licensed engineer, architect or related professional. Savvy home buyers go one step further and have specialty inspections by professionals licensed in specific areas: environmental, termite, lead, radon, etc. Oil tanks buried underground and lead paint in homes built before 1978, are just two of many potential problem areas. Read any and all reports carefully and ask questions. The results may help you negotiate a lower closing price, as certain repairs can be a costly investment. Contracts signed before the specialty inspections must include contingency clauses permitting the contract to be cancelled if there are any negative findings by the inspectors. Standard contract riders contain termite contingency clauses, allowing for an inspection within 15 days of execution of the contract. Additional such clauses for various other concerns may be added as needed.

On March 1, 2001, a new law went into effect wherein the Seller must provide the Purchaser with a completed questionnaire describing the condition of various aspects of the house. This Real Property Condition Disclosure Statement must be provided to the Purchaser before the Purchaser signs the contract, or the Seller will suffer a \$500.00 penalty by way of a credit to the Purchaser at closing. However, most attorneys feel that completing the Real Property Condition Disclosure Statement could expose the Seller to future liability, and Sellers are typically advised to simply give the \$500.00 credit at closing instead of providing the Purchaser with the Real Property Condition Disclosure Statement.

6. Title insurance is one of the great mysteries of home buying. The title company searches the “chain of title”—a history of the legal ownership of the property— dating back sixty years to ascertain whether there are any liens on the property and whether the current owner is the legitimate owner. The title company will also insure the “metes and bounds,” or the footprint of the property, by reading a survey and inspecting the land. The title company provides insurance - known as title insurance—for the purchase price of the house, guaranteeing that the Seller is the legitimate owner of the property, that no part of the property has been deeded over to someone else, that no one else has the right to enter the property, and that there are no encroachments onto the property, such as a neighbor’s driveway or fence. The title company will also research the taxes and conduct municipal searches to make sure that all taxes and municipal fees are paid by the Seller at or before the closing. In simplest terms, the title company makes sure the ownership of the property is legitimate so that the property can be successfully transferred from one owner to another.

7. A common problem in residential sales today is a missing Certificate of Occupancy, or “CO.” Years ago, banks were not concerned about CO for structures other than the house, but today banks require CO on many different structures: extensions, decks, sheds and more. If the owner did not obtain a CO, the bank may not give a mortgage for the home. If there have been any

significant changes to the structure from when it was first built, the Seller must provide the buyer with any and all CO for those changes. The problem is, whatever structure is in need of the CO must be in compliance with present day building codes. If a second garage was built in 1975 but was never issued a CO, it must be brought up to the standards of today - which may require new wiring, new safety features on a garage door, etc. The sale cannot go forward until changes are made and the CO is obtained.

8. Closing dates are typically set for 60 days after the execution of the contract because the mortgage contingency clause provides 45 days to obtain financing. However, be aware that if you receive your mortgage commitment earlier and you and the Seller wish to close title before the closing date, there is nothing barring you from setting an earlier date for the closing.

9. Just before closing, usually 24-48 hours before the actual closing date, the buyer should visit the home and get one last look—known as the “walk-through.” This will be the last chance to ascertain whether the house is in the condition bargained for in the contract of sale. Make sure that the appliances not excluded by the contract are still present and in working order and that the light fixtures and window treatments included in the sale are still there. Essentially, any fixture of the house is included in the sale unless specifically excluded by the contract.

10. If a problem is spotted during the walk-through, the buyer may come to an agreement for a credit from the Seller, or the buyer may agree that the Seller’s attorney maintain a sum of money in the escrow account until the problem is rectified. Once the deed is received, unless certain clauses in the contract state that they “survive the closing,” the terms of the contract merge into the deed and are no longer enforceable.

11. The typical Seller needs the funds from the sale to pay for his or her next home purchase, so he or she usually does not move out of the house until after the sale. Consequently, the Seller includes a “possession agreement” in the contract. The agreement permits the Seller to remain in the premises for a period of time after the closing, usually five days. During this time period, the Seller does not usually pay any rent, but he or she does pay the taxes, utilities and any other adjustments, including the Purchaser’s per diem mortgage interest. The Seller’s attorney holds a pre-determined sum of money in escrow until after the Seller gives possession to the Purchaser and the Purchaser has had an opportunity to conduct a walk-through. This escrow ensures that the Seller will vacate the premises and that the premises will be in the same condition as dictated by the terms of the contract of sale.

12. Prior to closing, the Seller’s attorney and the buyer’s attorney should discuss the real estate tax adjustments. Each county has a different tax period, and depending on the municipality, there may also be village and/or city taxes to pay as well. If the closing occurs in the middle of the tax period and the Seller has already paid those taxes, then the Purchaser must reimburse the Seller for the remainder of the taxes following the closing date. If the Seller has not yet paid the taxes and the closing occurs after the tax period commences, then the Purchaser will typically pay the taxes

at the closing, and the Seller will reimburse the Purchaser for the days from the beginning of the tax period until the date of the closing. In addition, in most cases, if the Purchaser is obtaining mortgage financing, the bank will require that any taxes due within 60 days of the closing be paid to the title company at the closing.

Additionally, the Seller's attorney must advise the Purchaser's attorney as to how to have the checks drawn, as more often than not, the Seller will require certified or official bank checks from the Purchaser. This becomes even more important when there is mortgage financing, as the Purchaser's attorney must advise the bank attorney that certified funds will be needed at closing, and this information must be communicated at least 24 hours in advance of the closing.

13. Closing costs for the Seller vary, but unless modified by way of the contract of sale, the Seller is required by law to pay the New York State transfer tax of four dollars per every thousand dollars of the purchase price of the property. Additionally, depending on the locale of the property, the Seller may also be required to pay a local transfer tax. This is the case in New York City, where the local transfer tax rate varies depending on the purchase price.

14. It takes many professionals to allow a closing to take place. Those attending the closing include the Purchaser, the Purchaser's attorney, the Seller, the Seller's attorney, the title closer, the bank attorney if the sale is being financed, which is most often the case, and any brokers. A good attorney will explain each of what seems like an endless stream of documents as the process moves forward, as well as explain the terms of the mortgage and the meaning of the title documents. A typical closing takes about two hours.

Buying or selling a home is a complex transaction. At Sahn Ward & Baker, we believe that our clients benefit by gaining a thorough understanding about this important financial event. If you have any questions, please feel free to contact us at 516-228-1300 or [info@sahnwardbaker.com](mailto:info@sahnwardbaker.com).

Please note that the information presented herein is not a substitute for legal representation, and readers are advised to seek the aid of competent counsel for any sale or purchase of real estate.

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