



What to Expect When Selling or Buying a Home

© LaCapra, Salz & Kowalski, LLP

REMINDER: *This article of general interest is presented for general information purposes only. It is NOT intended, nor should it be taken, to constitute formal legal advice, nor does publication of this article constitute an attorney/client relationship. Every person's specific legal situation is different, so contact competent legal counsel for help with yours.*

An Exciting Event! Now What?

Congratulations! You are a seller who has decided to sell your home. Or you are a purchaser buying a home. The sale may have been brought about by brokers bringing a seller and purchaser together (or maybe got a seller and purchaser arrived at the sale/purchase decision without a broker). You need to get the process started.

La Capra, Salz & Kowalski, LLP, has extensive experience representing sellers and purchasers in real property transactions. We have seen a variety of issues in a variety of settings and will help your real estate transaction reach a successful conclusion.

Here are just some of the things you can expect during the course of a real estate sale, whether you are a seller or purchaser.

The Contract of Sale

If a broker is involved. Brokers earn their commission when they produce a ready, willing, and able purchaser for a seller. A real estate sale through a broker starts with a summary document sometimes called a deal sheet, binder, or something else. Sellers and buyers should be careful when signing this; you want this to state that the binder is subject to attorney review. Look for a clause or paragraph that makes approval of the deal terms conditional subject to your attorney's approval. It is important that the sales agreement reference the signing of a formal contract (one that will be negotiated between seller and purchaser through their attorneys).

You should also provide your attorney with copies of the listing agreement and other documents you signed when retaining the broker. **As soon as you get something from your broker, bring it to your attorney as quickly as possible.** Your attorney and the purchaser's attorney will negotiate a contract of sale. The seller's attorney will produce a draft contract with one or more riders to express the parties' understanding of the transaction terms. There will be negotiation with the purchaser's attorney that will result in a final contract.

Brokers are often eager for the formal contract to be signed because that demonstrates a ready, willing, and able purchaser (and tends to support their right to an earned commission).

If no broker is involved. If no brokers are involved (purchaser and seller got together without a broker), the next step will be for the seller's and purchaser's attorney to get together to draw up a contract. The drafting and negotiation process for the contract will generally be the same as if a broker is involved (although when brokers are involved, they may have done some of the legwork in fleshing out general terms before the attorneys negotiate and agree on a contract).

The contract will include representations by seller and purchaser that there is no broker involved.

What the contract looks like. The contract of sale will typically consist of a formal routine contract with customized rider(s) that reflect the issues and conditions of the property that reflect the unique concerns of the parties. These can include disposition of fixtures, responsibility for violations, goods that are included or excluded from the sale, explicit declarations about what a seller is or is not responsible for repairing, etc. The property condition disclosure statement required by New York state (see the discussion below) will also be attached to the contract of sale. In the past, formal contract signings occurred with all parties in an office of one of the attorneys but today typically documents are handled electronically and a physical contract may be delivered by a purchaser's attorney to the seller's attorney in order to also send the down payment check (see below).

Seller's contractual obligations. As with all contracts, the specific provisions depend on what the seller and purchaser have agreed to through their attorneys. In any case, in a transfer of real property, an essential obligation of the seller in a contract is to deliver good and marketable title to the property being transferred. This means that any impairment of that title (e.g., outstanding mortgages, judgments, or liens on the property) must be remedied prior to the closing.

The contract might also obligate the seller to make certain repairs, obtain certain permits, and do specific work on the real property prior to closing.

Purchaser's contractual obligations. Contracts typically require purchasers to demonstrate a serious commitment to purchase the real property by putting a certain cash amount down at that signing of the contract (the down payment; more on that later).

Purchasers signing a contract that is contingent on the purchaser obtaining a mortgage are required to exercise good faith and best efforts to obtain a mortgage and to work with lenders to facilitate the grant of the loan.

Seller and purchaser. Both seller and purchaser are subject to the requirement of acting in good faith in performing their obligations under the contract. Also, contracts will generally contain specific deadlines and timelines (e.g., 60 days from the signing of the contract to obtain a mortgage commitment from a lender), so each party will have to pay attention to these.

Modifications. The contract signed by the seller and purchaser is not necessarily fixed. As circumstances require (e.g., clauses required by a mortgage lender or an extension of time to close the sale), the seller and purchaser may execute riders modifying the previously signed contract. Contracts almost always require that modifications of the signed contract's terms be set out in writing signed by seller and purchaser.

The New York Property Condition Disclosure Statement

Real Property Law §462 generally requires every seller every seller of residential real property pursuant to a real estate purchase contract to complete and sign a property condition disclosure statement (outlined in that statute) and deliver it to the purchaser or purchaser's agent prior to the signing by the purchaser of a binding contract of sale. A copy of the property condition disclosure statement containing the signatures of both seller and purchaser must be attached to the real estate purchase contract.

The property condition disclosure statement is a detailed document that asks numerous questions about the condition of the property, history of flooding, knowledge of material defects in a variety of residential features (e.g., heating and cooling). The statement prominently lets the seller know that "A knowingly false or incomplete statement by the seller on this form may subject the seller to claims by the purchaser prior to or after the transfer of title." Most answers involve the choices of Yes, No, Unknown, or NA (not applicable). Answers of No are directed to be further explained.

The disclosure statement mandated by Real Property Law §462 does not prevent a sale of the property "as is." It seems that one of the purposes of the statement is to establish what "as is" really is.

All sellers must provide a property condition disclosure statement unless an exemption applies.

What is “residential real property”? Under the disclosure law, residential real property is real property with a one-to-four-family dwelling. It **does not** include the following:

- Unimproved real property upon which a one-to-four-family dwelling is to be constructed
- Condominium units
- Cooperative apartments
- Property in a homeowners’ association (e.g., common areas) that is not owned by the seller

Sales and transfers of residential real property exempt from the property condition disclosure statement. There are also a number of transactions for which the statement is not required. Here are a few of them:

- Transfer pursuant to a court order
- Transfer to a beneficiary of a deed of trust
- Transfer pursuant to a foreclosure sale
- Transfer by a fiduciary in the course of the administration of a “descendent’s” [decedent’s] estate, a guardianship, a conservatorship, or a trust

Completion of the form. The state’s disclosure form tells sellers to complete the form as follows:

- Answer all questions based upon your **actual knowledge**.
- Attach additional pages with your signature if additional space is required.
- Complete this form yourself.
- If some items do not apply to your property, check “NA” (Non-applicable). If you do not know the answer check “Unkn” (Unknown)

The form is completed by a seller based upon the seller’s actual knowledge at the time of signing the property condition disclosure statement. The seller’s obligation with respect to the form is to complete it honestly but the seller is not obligated to conduct any type of inspection of the property or to check public records in the course of completing the statement.

Completion of the property disclosure statement is mandatory as of March 20, 2024. The requirement for a property condition disclosure statement has been in effect since 2002. At the time it was enacted, the law allowed sellers to avoid providing the statement by allowing the purchaser a \$500 credit at the time of closing. Most sellers opted for the credit rather than commit to the possible liability of lawsuit after title has closed. The ability to opt out of

completing the form by providing a credit to the buyer was eliminated, effective March 20, 2024. The legislation making the statement mandatory did not affect the categories of property exempt from the statement or alter the definition of “real property” for purposes of the statement.

While it is too early to speculate, expect sellers to be extremely scrupulous in completing the disclosure statement and indicating any question about which the seller is not absolutely sure of by indicating an “unknown” response. Purchasers are still strongly advised to obtain their own home inspection before signing a contract of sale so they will have a better idea of the condition of the property they are purchasing.

Once the Contract of Sale Has Been Signed

The down payment. A common feature of a residential real property contract is the requirement of a cash deposit by the purchaser (a down payment) upon the signing of the contract by the purchaser. This amount (also known as “earnest money”) is commonly 5% to 10% of the purchase price but other amounts can be mutually agreed-upon by the parties. Because a contract obligates the party that signs it, the purchaser generally signs the contract first and at the same time proffers the down payment to the seller so that the seller knows the purchaser is a serious purchaser. The seller then signs the contracts and forwards an executed version of the contract to the purchaser. (The purchaser will need an executed contract in order to apply for a mortgage.)

The purchaser’s title report. As mentioned previously, an essential obligation of the seller in a contract is to deliver good title to the property being transferred. This means that any impairment of that title (outstanding mortgages, judgments, liens on the property) must be remedied prior to the closing. How will a seller know about these? Under the contract, a purchaser is obligated to obtain a title report from a reputable New York title insurance company and provide a copy of that report to the seller. Also, if the purchaser is seeking a mortgage to finance the bulk of the purchase, the lender will require one as well.

The title report will flag objections to a clear title by way of a schedule of exclusions. Some, such as utility easements, are acceptable and not a barrier to conveying title. Others, such as old mortgages, judgments, and other liens or potential claims, must be addressed to the satisfaction of the title insurance company for them to be removed. Sometimes, as in the case of a judgment flagged against someone with a similar last name, only an affidavit is needed to clear the objection. In other cases, it may require the seller and seller’s attorney to do some legwork (e.g., obtaining a satisfaction for an open mortgage that had already been satisfied).

Note that the title report ***is not*** title insurance. A title insurance company will issue and insure a real property title based on the results of the title report. A mortgage lender will require the

purchaser to obtain a lender's title policy. The lender policy is issued in an amount up to the amount of the mortgage loan to the purchaser.

Although a purchaser is not required to obtain title insurance for the purchase it is highly recommended. Additionally, it is highly recommended that the purchaser obtain a title insurance policy with a market value rider, which will increase coverage to the market value of the property at some future date (at which point the market value will likely be higher than when purchased). Failure to obtain the market value rider limits the face value of the purchaser's policy to the purchase price paid by the purchaser, which may not be enough to obtain another residence in the future.

Seller's repairs and other work. The contract may also obligate the seller to make certain repairs to the property during the pendency of the sale. The seller needs to move promptly and in good faith to make these things happen prior to the closing date.

The closing date. The seller often is buying another residence and will have a contract as a purchaser with that other seller and so will be interested in closing within the time specified. The seller's attorney will be mindful of that time consideration.

Additionally, many purchasers are buying a residence with a loan from a financial institution. The contract will often contain a mortgage contingency clause giving the purchaser a certain amount of time to obtain a mortgage (such as 60 days from the signing of the contract by both parties); if, after good faith efforts to secure the mortgage the purchaser is unable to do so, the contract can be canceled by the purchaser in which case the purchaser will be entitled to return of the agreed deposit.

As a rule, the closing date specified in the contract is an "on or about date" not a fixed deadline. This allows for some flexibility on the part of both the seller and the purchaser.

Again, the exact rights and obligations of the parties to the sale are governed by the particular language in their contract.

The date for the closing will be set by the seller, the purchaser, the mortgage lender, and the title company. Arriving at a closing date requires a fair amount of coordination, particularly when the seller and/or purchaser is simultaneously selling a property and at the same time purchasing another property (with the proceeds of a sale being used to finance the subsequent purchase).

At the Closing

If the purchaser is obtaining a mortgage, the closing will typically take place at the lender's place of business. If there is no mortgage involved (an all-cash deal), the closing typically takes place at the seller's attorney's office but it can take place at either the seller or the purchaser's office.

Where there is a mortgage, the purchasers will be signing many documents from the lender. These loan documents do not involve the seller.

The seller will also have documents to sign but they are much fewer than those of the purchaser financing the purchase with a mortgage. One of the most important is the deed to the property. The seller will also sign several other documents required by the state (e.g., relative to the real property transfer tax) or by the federal government. Prior to the closing, the seller's attorney will communicate to the purchaser's attorney how the purchase price is to be split up (i.e., the checks to be issued, such as to a bank to pay off an existing mortgage, to the seller, to the brokers involved, to the seller's attorney, etc.)

The money received by the seller at closing. The ultimate amount of money delivered to the seller at the closing will be the contractual purchase price, reduced by the purchaser's down payment (held in escrow by the seller's attorney), increased by money owed to the seller (such as oil in an oil tank or real estate taxes paid that cover part of the time after which the purchaser takes title), and reduced by money paid by the purchaser that covers the time when the seller had title (such as real estate taxes that will be paid by the purchaser covering the time when the seller had title). Adjustment types are customary but can be divided otherwise by the seller and purchaser as they both agree.

After the Closing

Generally, the seller's involvement with the real property transaction is concluded after the closing. The seller's attorney and purchaser's attorney will each prepare summary closing statement for their clients and deliver it to them.

There may be times when further adjustments of amounts are needed, such as for tax restoration amounts (amounts calculated based on the fact that existing real property tax exemptions the seller has like a veteran's exemption will not be available to the purchaser) that had not been properly communicated by a municipality as of the closing.

This is not a Complete Summary

Although real estate transactions have many similarities, each is unique and can present its own set of challenges. This description that you just read is not intended, and cannot, exhaustively

cover all of the possible ins and outs a seller and purchaser might encounter. Our attorneys will guide you through the process.

REMINDER: *This article of general interest is presented for general information purposes only. It is NOT intended, nor should it be taken, to constitute formal legal advice, nor does publication of this article constitute an attorney/client relationship. Every person's specific legal situation is different, so contact competent legal counsel for help with yours.*

La Capra, Salz & Kowalski, LLP

2 Roosevelt Avenue

Port Jefferson Station

New York 11705

Tel.: 631.582.4990

Fax: 631.582.4690

info@lskesq.com