



## **Real Estate Transactions**

To help you through the complexities of buying or selling a home, or other real estate transactions, we have prepared discussions on a number of issues. Please read through these offerings to help understand our role, and how we can help in these complex transactions.

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## Agreement of Purchase and Sale

### The New Home Agreement of Purchase and Sale

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The "Agreement of Purchase and Sale" is the document that a buyer is going to sign to purchase a new home. It is a contract. Once signed, it is the blueprint for the entire transaction that follows. It should be read and fully understood before the purchaser signs on the dotted line.

Generally speaking, the layman is not going to fully understand the implications of the Agreement on his or her own. Advice from a lawyer is going to be required in order to appreciate a lot of the legal subtleties in the document.

The Agreement will set out all the basic terms of the deal including the model of home you are purchasing, a legal description of the land it will be located on, the purchase price, the amount of the deposit or deposits, the date or dates on which they must be paid, the date of closing, the time limits and process for colour and other selections, and so on. Most of these terms will be readily understood by the purchaser. However, the Agreement will also deal with legal niceties that may require explanations from legal counsel. These will include: the search of title and related time limits, delays in closing dates, the GST rebate, covenants, easements, zoning matters, rights of way, access, and warranties. If the unit being purchased shares anything in common with other units, such as party walls or access roads, there may also be a joint use agreement included in the Agreement of Purchase and Sale. 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.

One key caution that purchasers should keep in mind is that, once the Agreement is signed, you can basically forget most of the discussions and representations made beforehand. You will be unable to rely on them or enforce them if they have not become part of the written agreement between you and your builder. All new Home Agreements of Purchase and Sale contain a provision which basically boils down to saying "This, the written agreement, is all that counts from the moment that it is signed". So, if you are being promised things by the sales staff, make sure that they are included in the contract before you sign it.

Many Agreements contain a provision that allows you to have the Agreement reviewed by a lawyer after you have signed it. A lot of people are left with the impression that, if your lawyer does not approve of the Agreement, you can get out of the deal. Generally speaking, this is not the case. It is far better for you to see your lawyer before you sign than to try to rely on one of these clauses after you have put your signature on the document.

Most new home sales staff are very knowledgeable about the Agreement of Purchase and Sale. They will go through it with you and explain its provisions. However, this is no substitute for carefully reading the contract on your own and then having it reviewed by your lawyer.



And remember, see the lawyer first! After you have signed, it may be too late for the lawyer to do anything effective to extricate you from a contract that you would not have signed had you fully understood it.



## Buying a New Condominium

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Since the passage of an updated Condominium Act by the Ontario Government in 2001, there has been an upsurge in condominium development. The new legislation allows for types of condominiums which have previously been unknown in the Province. An example is the vacant land condominium which permits the units in a condominium to consist of vacant lots on which the owners are free to build. Common elements of such a condominium corporation might consist of such things as a golf course, clubhouse, or recreational facilities.

The purchaser of a condominium buys a "unit", which he or she owns outright, plus an interest in the "common elements" of the condominium in which they share an ownership interest with the other unit owners. The definition of what constitutes the "unit" varies from condo to condo. In some, it is just the interior of the unit. In others, it may include the exterior as well. In the case of the new vacant land condominiums, it will consist of land only. The "common elements" also vary with the development. In an apartment building, they would usually include the grounds, the entrance areas, the exterior of the building, all hallways and access areas, the parking garage, and amenity areas such as party rooms, swimming pools, etc. At the other end of the spectrum would be the vacant land condominium where the common elements may consist of only the access roads.

Closing of the purchase of a new condominium is usually a two step process. With a non-condominium purchase, you will become the registered owner of the property on the day that you take possession of the house. With a new condo, you take possession of the unit on the "interim occupancy date". Registration happens on the "closing date". Between these two dates, you occupy the premises and pay monthly interim occupancy fees which are approximately equal to the estimated taxes for the unit, the estimated condominium fees, and the interest on the outstanding balance owed to the developer. The length of the interim occupancy period will vary from development to development, depending on many factors.

As with a new house, a new condominium is covered by the Ontario New Home Warranty Program. The Program covers not only your unit but also the common elements. There may be rare exceptions to this where the condominium is located in a renovated or restored existing building.

After you become the registered owner of your unit, you will pay a monthly fee to cover "common expenses". They will include insurance and maintenance costs for common elements, and management fees. Depending on the development, they may also include other items such as water or, in some rare cases, all of the utilities used by the unit owners.

The details with respect to a new condominium will be spelled out in a "Disclosure Statement", a document which the developer of a new condo is obliged, by legislation, to provide to each purchaser. You should review this information very carefully. After you have read it, you should discuss it with your lawyer who will be pleased to answer your questions and explain your rights and liabilities as a unit owner.



## Buying and Selling Your Home

### You and Your Lawyer

When buying or selling real estate in Ontario, you will require the services of a lawyer to represent your interests in the transaction. Here we provide some of the questions which may arise during the course of your real estate transaction.

AT DUST EVANS, WE:

- are committed to serving you in your community with knowledgeable lawyers and staff;
- are experienced in corporate and government transfers;
- are on the military transfer list.

### When do I see a lawyer?

Generally, as soon as you are about to enter, or have entered, into a legal binding contract. Remember that an Agreement of Purchase and Sale, once signed by all parties, cannot be altered without the mutual consent of all parties.

### What does my lawyer do?

Your lawyer is there to explain the terms of the Agreement of Purchase and Sale to you, and to make sure you fulfill all of your contractual obligations.

If you are a purchaser, he or she will perform the various searches against the property so that, upon closing, you will have good and marketable title to the lands. Your lawyer may discuss obtaining title insurance as part of this process. You will also be made aware of any encumbrances, rights of way and/or restrictions applicable to your property.

### What is the "Survey"?

In a typical residential real estate transaction, the purchaser, as part of the search of title, will require an up-to-date "building location survey" of the lands.

This survey shows the boundary lines of the lands, plots the location of any buildings and other permanent structures within the property, and reveals any encroachments upon the property.

It will also assist in determining compliance with zoning requirements, etc.

### What is Title Insurance?

As the name implies, title insurance is simply a policy of insurance on the title to a piece of real estate.



Premiums are paid at the time of purchase. These are one-time premiums. They cover the purchaser's entire period of ownership.

Title insurance provides broader coverage than a lawyer's certificate of title.

You should discuss the pros and cons of title insurance with your lawyer immediately after your purchase is unconditional.

### **What will it cost?**

The budget shown below will assist you in determining the cost associated with your transaction. These items must be discussed with your lawyer early in the transaction so that you will have all the funds in place for closing.

### **What is the "Closing"?**

This is the time when legal title is transferred to the purchaser in exchange for delivery of the required funds to the vendor.

You should discuss the requirements and timing of this critical step with your lawyer well ahead of time. You will want to know when to bring your money to the lawyer, what has to be signed, when you will get the keys, etc.

### **What do I receive after closing?**

If you are a purchaser, you will receive from your lawyer a written title opinion and report enclosing all title documents, which will include the Deed of Land. If title insurance was arranged, you will receive the certificate and policy from the insurer. These should be kept in safekeeping for future reference.

If you are a vendor, your lawyer must give you a written account of money received and disbursed as well as a synopsis of the transaction.



## Budget ( Purchase )

Purchase Price		.....\$
Subtract:	Deposit(s)	.....\$
	Mortgage	.....\$
Add:	Mortgage Appraisal/Fees	.....\$
	Land Transfer Tax	.....\$
	Legal fees and disbursements	.....\$
	Survey (if applicable)	.....\$
Add/Subtract:	Adjustments	.....\$
Add:	Moving costs	.....\$
	Other costs	.....\$
AMOUNT REQUIRED		.....\$

## Budget ( Sale )

Selling Price		.....\$
Add/Subtract:	Adjustments	.....\$
Subtract:	Realtor's Commission	.....\$
	Legal fees and costs	.....\$
	Mortgage payout(s)	.....\$
	Moving costs	.....\$
	Other costs	.....\$
NET PROCEEDS		.....\$

### To calculate Land Transfer Tax:

Purchase Price	X	Less	=
0-55,000	x .005	\$ 0	
55,001-250,000	x .010	- 275	Land
250,000 +	x .015	-1,525	Transfer
400,000 +	see your lawyer	see your lawyer	Tax



## Conditions

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You have probably heard people speak of "Conditional Offers" or of agreements being "Subject to Conditions". Conditions are inserted into Agreements of Purchase and Sale so that the Agreements will not be binding on the parties unless certain events take place.

Conditions may be inserted for the benefit of the builder or of the purchaser. It is fairly common in new Home Agreements of Purchase and Sale to see builder's conditions dealing with things like the approval of subdivisions, obtaining 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 of Purchase and Sale by the purchaser's lawyer, obtaining 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 would be the provision of subdivision approval. If the developer is unable to register the necessary subdivision plans and agreements, the developer is legally prevented from proceeding with the transaction. There is nothing that the builder can do to get around these requirements. If they are not met, the deal cannot close.

On the other hand, there are conditions which do not necessarily have to be met in order to allow the transaction to proceed. For instance, even though the agreement is conditional on the sale of the purchaser's present home, there is nothing to prevent the purchaser from waiving that condition and proceeding with the agreement, notwithstanding that his or her own home has not been sold. If you do not want a condition to be a true condition precedent which must be fulfilled for the transaction to proceed, it is important that the condition be appropriately worded and that the entitlement to waive the condition be available to the party in favour of whom the condition has been inserted.

If the right to waive a condition is inserted into the agreement, then the condition is considered to be fulfilled upon the execution of a waiver. If all conditions are waived or fulfilled, then the agreement is a "firm" or unconditional agreement. If all the conditions are not fulfilled by the date specified in them, then, barring an extension on the time allowed for fulfilling the condition, the agreement is null and void and, in most circumstances, the purchaser's deposit will be returned in full.

Conditions relating to the sale of the purchaser's own home deserve further comment. These conditions are often worded in such a way that the builder can continue to offer the new house for sale until such time as the purchaser waives or fulfills the condition relating to the sale of his or her own home. They usually also provide that if the builder receives another acceptable offer on the new home, then the builder is to provide written notice to this effect to the purchaser at which point the purchaser will have a specified period of time, usually 24 hours or 48 hours, to waive the condition. If the original purchaser does not do so, his or her Agreement of Purchase and Sale is null and void and the developer is free to sell the house to the new purchaser.

Depending on the state of the local real estate market, builders may not be willing to accept conditional offers, especially those that are conditional on the sale of the purchaser's own home. Consequently, if



you can only buy on a conditional basis, it makes sense to ask the developer early in your discussions whether or not a conditional offer will 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. Consequently, it is always wisest to consult your lawyer on the wording of conditions. This consultation should take place before the agreement is signed. Once it is executed, your lawyer is unlikely to be able to negotiate changes in wording.



## Covenants and Restrictions

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In reviewing your contract for the purchase of your new home, you are almost certain to come across "Covenants" or "Restrictions". In order to fully appreciate your rights and obligations in relation to the home you are purchasing, you should have a basic understanding of what these terms mean.

The words "Covenant" and "Restriction" are used fairly interchangeably. They are basically promises to do or not to do something in relation to the property against which they are registered.

The Covenants and Restrictions that will apply to your new home are usually contained in a schedule to the Agreement of Purchase and Sale. This schedule is generally a repetition of provisions found in subdivision agreements registered on the title to your new home. At the time of closing, these covenants will be repeated in your Deed or will otherwise be registered on your title in such a way that they will apply to it, either in perpetuity or for a limited period of time.

Covenants and Restrictions are usually common sense provisions which prevent you from doing things which will cause damage to property or depreciate property values. Fairly common covenants relate to things like not altering the drainage pattern on your own lot, not planting certain kinds of fast growing trees with pervasive root systems, and not damaging anything in the subdivision which belongs to the municipality.

If you are purchasing a dwelling that is attached to another, the property will likely be subject to Covenants and Restrictions which limit your ability to change the exterior appearance of your dwelling without the consent of the owners of the attached dwelling or dwellings. These are common sense limitations which, once again, preserve the value of your property and those of your neighbours.

In some cases, Covenants and Restrictions may prevent you from doing certain things with your property which would severely limit your enjoyment of it. For instance, if your home backs onto a ravine, there may be restrictions on title which will prevent you from installing a swimming pool.

In other cases, a Covenant may create a positive obligation. A good example would be a Covenant which requires every home owner in a subdivision to install and maintain a lawn light.

While you live in your home, you should be careful to abide by all Covenants and Restrictions. Breach of a Covenant could lead to the municipality pursuing you to force you to remedy it. It could also lead to your neighbours bringing an action against you. As well, when you go to sell your home, if you have breached Covenants you could be forced to rectify the situation prior to your closing date. In a worst case scenario, breach of a Covenant might even give a prospective purchaser the right to refuse to complete the transaction.

Before agreeing to purchase a home, you should fully understand the Covenants and Restrictions that apply to it. Your lawyer will be pleased to review them with you and answer your questions.



## Disclosure in New Condo Purchases

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Once the purchaser of a new condominium unit enters into an agreement of purchase and sale, the developer must provide the purchaser with a Disclosure Statement. The purchaser then has a 10 day "Cooling Off Period" to review the Disclosure Statement and decide whether or not to proceed with the purchase.

A purchaser should take advantage of the Cooling Off Period to study the Disclosure Statement and review it with a lawyer. It is important to see a lawyer early in the ten day period so that there is ample time to study the documentation and discuss it with the client. If you decide not to proceed with the purchase, you can cancel the Agreement of Purchase and Sale during the ten day period and get a full refund of your deposit.

The Disclosure Statement is accompanied by extensive documentation. The package is meant to give the purchaser of a new condominium all of the information and documents needed to make an informed decision about whether or not to proceed with the transaction. The *Condominium Act* dictates the content of the Disclosure Statement and the document package that accompanies it. It would take more than the allotted space for this column to give you an exhaustive list of what must be in this package. Here is a sampling of what must be included in the Statement:

- A provision indicating whether the condominium is a freehold or a leasehold condominium. If the condominium is freehold, the provision must also indicate whether it is a standard, phased, vacant land or common elements condominium;
- The name and municipal address of the developer (the "Declarant" in *Condominium Act* terms) and the mailing and municipal addresses of the condominium property, if available;
- A general description of the condominium property;
- Confirmation that the condominium property is, or may be, subject to the provisions of the *Ontario New Home Warranties Plan Act* and whether the proposed units and common elements are enrolled, or are intended to be enrolled;
- An indication as to whether any building or unit proposed to form part of the condominium has been converted from a previous use;
- A statement indicating whether any of the units, or proposed units, may be used for other than residential purposes;
- A provision as to whether the Declarant intends to market any of the units to investors and if so, the number of units that may be sold to investors;
- What percentage of units the Declarant intends to lease;
- A schedule of the intended commencement and completion dates with respect to the condominium's amenities that have not yet been constructed or completed; and
- A list of the proposed amenities that will be provided to purchasers during the period of interim occupancy.

The document package that accompanies the Disclosure Statement must include a copy of the condominium's existing or proposed by-laws, declaration, rules, trust agreement and other contracts



and leases that will affect the completed condominium. It will also include a copy of the proposed budget for the condominium for the first year following its registration, or, if more than one year has passed since the registration of the condominium, its budget for the current fiscal year.

While this package of information may seem daunting, it is very important that prospective purchasers read it and get advice about it well before the end of the Cooling Off Period. If a lawyer is contacted early, there should be no trouble arranging for timely review of the documents. Every effort should be made to avoid having to make a last minute decision about whether or not to proceed.



## Easements and Rights of Way

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"Easements" and "Rights-of-Way" are terms that you will find in all new home purchase agreements. To the layman, these terms are relatively interchangeable. 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, among other things. 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 will be 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, conduits, etc. across a portion of your property. If a utility easement is registered against your property, then you cannot do anything with that portion of your lot which would prevent the utility company from making reasonable use of its easement. For instance, you could not install a swimming pool on top of a utility easement, thereby denying the utility company the ability to maintain and repair the wires or pipes which run under the ground in that location.

### 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, if not impossible, 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 on townhouse or rowhouse developments. Unless there is an access easement registered allowing the owner of an inner unit to traverse neighbouring properties, it will be impossible to get into or out of his or her backyard without traipsing through the house. Registered easements usually allow the owner of an inner unit to go down the sideyard of the end unit and across the back of the rear yards on the units between the end unit and the inner unit. It is important that these easements be kept open. If you want to fence your yard, you are entitled to fence all of it, including the portion that is subject to the easement. However, you must make certain that you put gates in the fence so that the neighbours continue to be able to exercise their right to cross your property. If you fail to respect the easements in this way, you could be forced to put gates into the fence in the appropriate places when you go to sell the property. Blocking the easement would be considered to be a defect in the property which a purchaser could insist you rectify.



Before signing to purchase a new home, you should fully understand all easements and rights-of-way that affect it. Your lawyer will be pleased to explain your rights and your obligations in relation to them.



## New Condo Closing Process

### The Closing Process for New Condominiums

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Purchasers of new condominiums face a unique two step closing process. This is because the new condominium is generally going to be ready for occupancy before legal title can be conveyed to the new owner. It is only if your closing date is after the date on which the condominium is legally registered that you take possession and become the registered owner all on the same date. The two step closing process consists of an interim closing and a final closing.

#### Interim Closing

The Agreement of Purchase and Sale normally requires the purchaser to take possession of the unit on the date when the unit is substantially complete and ready for occupancy. This is called the "Interim Closing Date". On this date, the Purchaser pays the balance owing under the contract and is given possession of the unit. However, the purchaser does not receive legal title to the unit at this time. This will only occur on the "Final Closing Date". All monies paid towards the purchase price on the Interim Closing Date must be held in trust in accordance with the provisions of the *Condominium Act* or security must be provided to ensure that the funds will be protected until legal title is given to the purchaser.

During the Interim Occupancy Period, which runs from the Interim Closing Date to the Final Closing Date, the purchaser must fulfill certain obligations set out in the Agreement of Purchase and Sale. As a minimum, he or she is going to have to abide by all rules and regulations of the condominium and pay a monthly occupancy fee. Usually post-dated cheques for the occupancy fee will be delivered to the Vendor on the Interim Closing Date.

The Interim Occupancy Fee varies from one development to the next as it is based on a formula set out in the *Condominium Act*. The fee cannot exceed the sum of: (a) the common expenses that a registered owner would be required to pay; (b) an amount reasonably estimated on a monthly basis for municipal taxes attributable to the unit; and (c) the interest payable on the balance of the purchase price not paid in cash on the Interim Closing Date. The more cash you pay on the Interim Closing Date, the lower your Interim Occupancy Fee will be.

If you are putting on a mortgage, the funds being loaned to you under it cannot be advanced to you until the Final Closing Date. However, you will pay interest on the amount of your mortgage during the Interim Occupancy Period. You will not pay this interest to your mortgage company but to the Vendor. The *Condominium Act* allows the Vendor to require you to sign a temporary mortgage in its favour to enable the Vendor to collect this interest from you. The amount of the mortgage will equal the balance of the purchase price not paid by you on Interim Occupancy. The mortgage will be cancelled on the Final Closing Date.



If the purchaser fails to pay the occupancy fees during the Interim Occupancy Period or breaches any other obligations under the Agreement of Purchase and Sale, the developer, at its option, can terminate the contract, keep the deposits, and require the purchaser to vacate the unit.

## **Final Closing**

Once the Condominium Corporation is registered, the developer can transfer title to the individual units to the purchasers. On the Final Closing Date, the purchaser will be required to pay the balance of the purchase price, either from his or her own funds or from a mortgage advance. The developer will provide a deed for the purchaser's unit. The Vendor will also prepare and deliver a final accounting for all sums paid or owing under the terms of the Agreement of Purchase and Sale. Once documents and cheques have been exchanged between the Vendor's and Purchaser's lawyers, the deed may be registered, making the Purchaser the legal owner of his or her condominium unit.

Experienced real estate lawyers will be knowledgeable about this two step closing process. They will guide you through the Interim Closing and the Final Closing. They will also advise you of your rights and obligations during the Interim Occupancy Period.



## Title Insurance in New Home Purchases

### The Use of Title Insurance in New Home Purchases

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Title Insurance is an old product which has only become popular in Ontario in the last four or five years. Since January of 1998, all lawyers acting for purchasers or mortgagors in Ontario have been obligated to discuss Title Insurance with their clients.

As the 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" premium which covers you for your entire period of ownership.

Title Insurance has a number of advantages over relying on a lawyer's certificate of title. Some of these are:

1. The Title Insurance policy covers defects not covered by a lawyer's certificate of title. For instance, it will insure you for defects in the survey which, on a new home purchase, the builder generally provides.
2. Title Insurance can actually save you money. In many cases, Title Insurance companies relieve your lawyer from the obligation 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 that result from not having to get the certificates or do the searches usually exceed the cost of the Title Insurance premium.
3. If you discover you have a title problem, you need not locate and pursue the lawyer who certified title to you. If the problem is covered by your policy, you simply make a claim against the Title Insurance Company, leaving it to decide whether or not it pursues the lawyer who made the mistake.
4. The use of Title Insurance can assist in overcoming problems arising from the time constraints in new home purchases. With today's booming housing market, documents relating to the title to a new home are often not registered until fairly shortly before closing. This being the case, it is often difficult for the purchaser's lawyer to perform a full search of title and then obtain related clearance certificates prior to the closing date. 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 being protected for any problems that might have been disclosed by these certificates.

In summary, Title Insurance is a product which offers some attractive advantages to the new home buyer. You should be certain to ask your lawyer to discuss it with you.