

Purchase Agreements

Patrick A. Karbowski

- I. Overview §3.1
- II. Which Forms to Use
 - A. The Mythical Standard Form §3.2
 - B. Using the Forms in This Chapter §3.3
- III. Basic Legal Requirements
 - A. The Requirement for a Written Document §3.4
 - B. Dower §3.5
 - C. Minimum Provisions §3.6
 - D. Offer and Acceptance §3.7
- IV. Key Provisions and Negotiating Points
 - A. In General §3.8
 - B. Personal Property §3.9
 - C. The Deed, the Land Division Act, and the “Subject to” Clause
 - 1. In General §3.10
 - 2. Marketable Title §3.11
 - 3. The “Subject to” Clause §3.12
 - D. Financing
 - 1. In General §3.13
 - 2. Cash §3.14
 - 3. Land Contract §3.15
 - 4. Mortgage §3.16
 - E. Taxes, Assessments, and Prorations §3.17
 - F. Condition of Title and Title Insurance §3.18
 - G. Survey
 - 1. In General §3.19
 - 2. Mortgage Surveys §3.20
 - 3. Staked Boundary Surveys Versus ALTA/ASCM Surveys §3.21
 - H. Earnest Money Deposit
 - 1. In General §3.22
 - 2. The Two-Tiered Deposit §3.23
 - I. Closing and Possession
 - 1. In General §3.24
 - 2. Possession at Closing §3.25
 - 3. Postclosing Occupancy Period
 - a. The Seller’s Concerns §3.26
 - b. The Buyer’s Concerns §3.27
 - J. Condition of the Property §3.28
 - K. Contingencies

1. In General §3.29
 2. Attorney Review Contingencies §3.30
 3. Inspection Contingencies
 - a. In General §3.31
 - b. Pest Inspections §3.32
 - c. Well and Septic Inspections §3.33
 - d. Governmental Inspections §3.34
 4. “Sale of the Buyer’s Home” Contingency §3.35
 5. Other Contingencies §3.36
 - L. Disclosure Requirements
 1. Michigan’s Seller Disclosure Act §3.37
 2. Lead-Based Paint §3.38
 3. Private Road §3.39
 - M. Risk of Loss §3.40
 - N. Alternative Dispute Resolution; Arbitration §3.41
 - O. Miscellaneous Provisions
 1. Water Escrow §3.42
 2. Default Provisions §3.43
 3. Brokers’ Commissions §3.44
 4. Warranties and Representations §3.45
 5. Boilerplate §3.46
 - V. New Construction
 - A. Types of Arrangements §3.47
 - B. “Spec” Homes
 1. In General §3.48
 2. Points to Watch §3.49
 - C. Pure Construction Contracts §3.50
 - D. New Construction When the Builder Owns the Land §3.51
 - E. General Points to Consider §3.52
- Forms
- 3.1 Drafting Checklist with Alternative Clauses for Purchase Agreements
 - 3.2 Pro-Seller Residential Real Estate Purchase Agreement
 - 3.3 Pro-Buyer Residential Real Estate Purchase Agreement
 - 3.4 Land Contract—Residential (Pro-Seller)
 - 3.5 Land Contract—Residential (Pro-Buyer)
 - 3.6 Residential Building, Sale, and Purchase Agreement (Buyer Owns Land)

I. Overview

§3.1 The purchase agreement—the written agreement that sets forth the terms of the sale and purchase—is the document that will, or at least should, dictate how the residential transaction is to unfold. In preparing the purchase agreement, remember that, in most cases, your client wants to complete the deal using a purchase agreement that provides sufficient protections and assurances for the parties, without being overly favorable to one party or the other. Know what is important to your client and tailor the agreement accordingly. For example, often a seller will accept a contract that provides the buyer with certain protections, such as a right to inspect the property, as long as the protections do not reduce the seller’s expected proceeds from the sale or give the buyer an unreasonable right to cancel the deal.

The focus of this chapter is the sale and purchase of an existing residential home. Special features related to the sale and purchase of a newly constructed home are summarized in §§3.47–3.52.

II. Which Forms to Use

A. The Mythical Standard Form

§3.2 Often, the attorney's first involvement in the residential transaction will not be to draft the purchase agreement but to review a preprinted form, usually prepared by a real estate broker. Despite what you may hear, there is no such thing as the standard form, and each form must be carefully reviewed and then tailored to meet your client's particular needs. In making changes to the preprinted form, unless there are only a few, it is often advantageous to prepare an addendum to the form, using the same size paper, font, and type as the preprinted form, as opposed to marking up the preprinted form with handwritten revisions.

B. Using the Forms in This Chapter

§3.3 This chapter includes examples of drafted and preprinted purchase agreements; the drafted forms are included on the CD that accompanies this book. Form 3.1 is a comprehensive drafting checklist with numerous sample clauses and brief commentary on the clauses. Form 3.2 is a form I developed that I loosely call a “pro-seller” purchase agreement. I say “loosely” because not all provisions in this form are pro-seller. For example, this form requires the seller to pay the transfer tax for the sale of the real estate. A more onerous pro-seller form might shift the obligation of paying the transfer taxes to the buyer. Consult the drafting checklist for additional alternative clauses. Although form 3.2 was developed for use in transactions in which a real estate broker is not involved, it also works well for brokered transactions.

Form 3.3 is the “pro-buyer” counterpart to form 3.2. Again, some of the provisions may not be particularly pro-buyer, so, as with any form, be careful how you use it. Compare the provisions of form 3.2 to those of form 3.3 and you will readily see where you can obtain an advantage or added protection for your client without making the agreement too onerous for either the seller or the buyer. Consult the drafting checklist for additional alternative clauses.

Additional ideas for clauses can be found in preprinted forms developed for local and regional associations of Realtors. Many of the provisions in these forms are similar to those in forms 3.2 and 3.3. Having been developed for Realtors, however, each form may be characterized as pro-broker. Some contain statements regarding the broker's agency disclosure form and an arbitration clause relative to disputes over the earnest money deposit and the condition of the property. Although not necessarily contrary to the interests of the seller and the buyer, these are examples of provisions that have been included to meet the special concerns of real estate agents.

With some preprinted forms, an effort has been made to generate an all-inclusive document with both pro-seller and pro-buyer provisions. These forms may use a check-the-box approach to allow the parties to pick and choose which provisions to apply to their transaction.

Some Realtor associations provide optional addendums to be used when the seller will occupy the property after closing, when financing for the purchase is by land contract, or when the property is vacant. In some preprinted forms, although designed to be neutral (i.e., favoring neither the seller nor the buyer), the contingencies provision may allow either party to terminate the agreement at, potentially, a very late stage of the transaction. This provision has the potential to be very negative for one of the parties.

Preprinted forms are developed with a particular person or persons in mind. Equally important, each was developed with a particular geographic location in mind. For example, preprinted forms from west Michigan often contain a contingency for pest or insect inspections because the concern about termite or carpenter ant damage has historically been greater on the western side of

the state. Understanding the intended audience and the intended geographic region will help you to use preprinted forms with care.

Some preprinted forms are designed with someone in mind who is not (technically) a party to the agreement—the real estate broker. This highlights the importance of knowing the source of any preprinted form you may be asked to review. Similarly, these forms highlight the need not to presume that something that has been characterized as a pro-seller or pro-buyer form is, in every aspect, favorable to the seller or the buyer, as the case may be. Some typical provisions in which a pro-seller form may differ from a pro-buyer form include the “subject to” clause (discussed in §3.12), the mortgage contingency (discussed in §3.16), the earnest money deposit (discussed in §3.22), the seller’s postclosing occupancy (discussed in §§3.26–3.27), and the inspection contingency (discussed in §3.31).

III. Basic Legal Requirements

A. The Requirement for a Written Document

§3.4 For an agreement to sell and purchase real estate to be enforceable, it must be in writing. The relevant statute of frauds states that

[n]o estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

MCL 566.106. Remember that part performance can sometimes take an agreement out of the statute of frauds. MCL 566.110. Part performance is not likely to apply, however, in most residential transactions. The typical part performance case involves a situation in which a person has agreed to live with and care for another in exchange for title to the home after death. *See, e.g., Betterly v Granger*, 350 Mich 651, 87 NW2d 330 (1957).

B. Dower

§3.5 A married man selling real estate must have his wife sign the purchase agreement to ensure that it is enforceable against the buyer. This is true even if the wife was not named as a grantee on the husband’s deed, because the wife retains a dower interest in the property. *See Slater Mgmt Corp v Nash*, 212 Mich App 30, 536 NW2d 843 (1995). It is important, therefore, to make sure that all necessary parties have signed the purchase agreement.

C. Minimum Provisions

§3.6 According to case law, a binding agreement for the sale of real estate exists when there is a writing identifying the parties, the property, and the price (and how and when it must be paid). *See MacRitchie v Plumb*, 70 Mich App 242, 245 NW2d 582 (1976).

An essential element of the purchase agreement is the identification of all necessary parties to the agreement. You may be surprised at how often a purchase agreement is signed by only one spouse when both spouses are necessary to close the deal. And, as discussed in §3.5, because of dower rights, be careful when dealing with a married male seller, even if the husband is the only person shown as the titleholder.

Ideally, the purchase agreement should include a legal description of the land to be conveyed. What if you do not have a legal description? Use as many of the following three items as are available: (1) the tax or parcel identification number (e.g., 01-02-345-000-01); (2) the common address

(this is almost always available); and (3) language similar to the following: “Legal description to be that in the survey or commitment for title insurance.” If the property is to be split from an existing parcel, include land division language. See §3.10.

The purchase agreement should state the purchase price and the time and method of payment, including the method and amount of any financing. The purchase price is frequently negotiated. As a result, you may have handwritten changes in this portion of the purchase agreement. Whenever handwritten changes are made to a preprinted or typed purchase agreement, make sure all parties date and initial all changes so that there can be no doubt on a meeting of the minds, especially on this basic element. Remember also that the time for payment of the purchase price must be unequivocally stated.

D. Offer and Acceptance

§3.7 As with any contract, to have a binding agreement for the sale and purchase of real estate, you must have an offer and an acceptance. Although this may seem obvious, it is important to remember, especially in the context of counteroffers, such as a handwritten change in the price or date of closing (as discussed §3.6) or in the context of contingencies. As is discussed in more detail in §3.30, any material change made by the offeree to an offer creates a counteroffer, which may be accepted, rejected, or countered. When making an offer (or a counteroffer), the offeree should consider limiting the time for acceptance. It may also be wise to state an express method of acceptance. Again, be sure that any handwritten changes to the purchase agreement are initialed and dated by all parties.

IV. Key Provisions and Negotiating Points

A. In General

§3.8 Although case law may not require more than the basic elements of parties, property, and price for a binding agreement, the purchase agreement should be sufficiently detailed to effectively guide and protect the parties as they proceed toward closing. In §§3.9–3.46, certain key provisions and negotiating points in the purchase agreement are discussed. Unless otherwise noted, examples of each of the following provisions are included in forms 3.2–3.3. The annotated checklist, form 3.1, also includes a variety of key provisions to pick and choose from when drafting a purchase agreement. It includes some additional provisions not used in form 3.2 or 3.3. The checklist also indicates which provisions are particularly pro-buyer or pro-seller.

B. Personal Property

§3.9 The purchase agreement should recite the personal property to be sold along with the real estate. Most preprinted form purchase agreements include a list of items to be conveyed with the real estate, with space to add additional items as needed. It is a good idea to use such lists in your purchase agreement and to review the list with your client before the purchase agreement is signed to make sure that the agreement properly reflects what is to stay with the home and what is not.

Typically, the purchase price of the personal property is incorporated into the purchase price of the real estate. When the value of the personal property makes up a substantial part of the purchase price, the parties should consider stating the actual value of the personal property in the purchase agreement. In this way, a lower purchase price may be stated on the property transfer affidavit (form 8.19, discussed in §8.27), which might yield lower real estate taxes in the future. This may also have some benefit with regard to taxable gain (or exclusion from taxable gain) for federal income tax purposes. On the other hand, separating the price of the personal property from the price of the real estate may reduce the amount available to the buyer on a mortgage loan.

Form 3.1 includes a sample pro-seller clause transferring the personal property on an “as is” basis (used in form 3.2) and a pro-buyer clause in which the seller warrants the property sold, transfers warranties, and provides available owner’s manuals (used in form 3.3).

C. The Deed, the Land Division Act, and the “Subject to” Clause

1. In General

§3.10 The purchase agreement should recite the form of deed by which the land will be conveyed. The buyer should require conveyance by warranty deed. Purchase agreements often state that the property will be conveyed “by the usual warranty deed conveying marketable title, subject to” When the seller is an estate or a trust, the seller should consider conveyance by a covenant deed or *C deed*. See §8.12. In addition, when the seller is an estate, the buyer should require protection against the inchoate federal and state estate tax liens that may attach to the property, even after closing. At both the federal and state level, a waiver of the estate tax lien may be obtained (see forms 8.11 and 8.12). However, the seller may object to executing the state waiver form, because it requires the estate to escrow 8 percent of the “net cash proceeds” from the sale with the state treasury.

When the property to be sold is not part of a subdivision or condominium (i.e., the legal description is by metes and bounds), the purchase agreement should include language guiding the parties through the complex and confusing requirements of the Land Division Act, MCL 560.101 et seq. Such a provision is critical when the parcel to be conveyed is to be split from an existing parcel (called a “parent” parcel under the act). MCL 560.109(3) states that the deed for the conveyance of such unplatted land must include the following language: “The grantor grants to the grantee the right to make [insert number] division(s) under section 108 of the land division act, Act No. 288 of the Public Acts of 1967.” In the past, some attorneys would simply insert the word “all” in place of “[insert number],” to convey whatever division rights the seller may have had. When a seller had no desire to retain any division rights, this was viewed as an effective way to avoid the cost and confusion of deciphering the complex statutory scheme for determining the actual number of divisions available to be conveyed. However, the Attorney General’s office, in a letter dated January 26, 1998, to Representative Pat Gagliardi and signed by a deputy attorney general, stated that an actual number must be inserted in place of the bracketed language, even if the seller intended to convey all division rights. If the deed does not set forth the number of divisions conveyed, the statute presumes that all division rights remain with the parent parcel. MCL 560.109(3). See §8.16 for further discussion. *See also* OAG No 7005 (Dec 30, 1998) (transfer of entire interest in unplatted land that has not been subject to division since March 31, 1997, does not require statement in deed about right to make further division).

Thus, when the purchase agreement relates to property that will be split from an existing or a parent parcel, care should be taken to include in the purchase agreement language that will guide the parties in the determination of the number of divisions to be conveyed with the property. For example, in describing the property (see §3.6) or as part of the “subject to” language in the deed (see §3.12), the purchase agreement should recite the statutory language, including the actual number of divisions to be conveyed. This will eliminate any potential issue at closing about the inclusion or exclusion of division rights as part of the conveyance. The buyer will also want to include language requiring the seller to execute and deliver at closing a completed Michigan Department of Treasury form 3278, Notice to Assessor of Transfer of the Right to Make a Division of Land (see form 8.23). The owner of the parent parcel (usually the seller) must file this form within 45 days of the transfer of the division rights.