

Buying and Selling a Home in the Berkshires of Massachusetts

The Purchase and Sale Agreement



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INTRODUCTION

Our goal is to dispel confusion and provide some guidance to those unfamiliar with buying and selling real estate in the Berkshires of Massachusetts.

We represent individuals and families who have lived here for generations, as well as those who have relocated here on a full or part-time basis. Many of our out-of-state clients come from New York, New Jersey, Florida, and Connecticut. We often hear that the real estate practice and law here in the Berkshires are foreign to them – even to clients who are lawyers - and that buying or selling a home here is quite unlike their past experiences in other states. Even those who have participated in property transactions in Eastern Massachusetts can be surprised by the differences they encounter when dealing with real estate in the Berkshires.

This guide is not a substitute for experienced counseling by lawyers, realtors, architects, surveyors, and other professionals, all of whose advice may be necessary to successfully conclude a real estate transaction. We hope, however, that what we have written can make your purchase or sale of real property smoother and easier to understand, and to help you avoid the pitfalls, stress, disappointment, and financial loss that can result from uninformed decisions.

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The custom in terms of contracts for the purchase or sale of real property in the Berkshires is somewhat different than other areas in Massachusetts and other states. Elsewhere, a prospective buyer signs an Offer to Purchase, which is a proposal generally detailing the proposed terms of the contract. The written offer is presented to the seller, who can then accept or reject the offer. If the seller accepts the offer, there is an agreed period of time to negotiate the actual contract, called a Purchase and Sale Agreement. Not so in Berkshire County. Here, most residential sales begin with the buyer and seller entering directly into the “Standard Berkshire County Multiple Listing Service Purchase and Sale Agreement,” a form developed by the Berkshire County Board of Realtors® .

Despite that the Board of Realtors contract is almost always used as a basis for the contract, a Purchase and Sale Agreement is not merely a formality. It is a detailed and technical document that often must be tailored to fit a particular transaction. Mistakes or misunderstandings can cost a buyer or seller thousands of dollars, problematic delays, a lost purchase or sale or, in a worst-case scenario, a lawsuit.

Although it is beyond the scope of this e-book to discuss all of the terms in the Purchase and Sale Agreement, there are certain basic provisions that are essential to understand your contract and to participate meaningfully in the process.

Disclosures

Massachusetts is a buyer beware or “caveat emptor” state, which means that a seller is generally not liable for failing to disclose problems with a home, provided the seller is not a builder or in the business of selling homes. Before listing a home for sale, a seller should seek the assistance of a lawyer to determine what must be disclosed to avoid liability. For the same reason, a buyer should consult a lawyer to know what questions to ask of the seller, the seller’s realtor, or other professionals to make sure that all critical information is known to the buyer.

If a buyer asks a seller a specific question about the condition of a property, the seller must answer the question truthfully and completely, to the best of the seller’s knowledge. If a seller is not truthful in response to a buyer’s question, the buyer may have a claim against the seller. The same rules apply to agents of the seller, such as the realtor.

A different and higher standard applies to disclosures by sellers who are in the business of selling homes. In Massachusetts, there is a consumer protection statute that places a higher



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burden on businesses dealing with consumers. Although it is unlikely that a consumer-protection claim can be maintained in a deal between individuals who are not in the business of buying and selling property, it may apply when an unfair or deceptive practice is perpetrated by a broker, contractor, or developer.

The Deposit

In most Berkshire real estate transactions, the buyer pays an initial deposit equal to 1% of the purchase price of the property upon signing the Purchase and Sale Agreement. The deposit is delivered to the listing agent with the signed agreement. The Purchase and Sale Agreement signed by the buyer constitutes an offer to purchase the property, which the seller can accept, reject, or respond to with a counteroffer.

The buyer is typically required to make an additional deposit after the home has been inspected (discussed below). The total money deposited can be negotiated before the Purchase and Sale Agreement is signed, but it is typically equal to between 5% and 10% of the purchase price. As the price of the property increases, the deposit, as a percentage of the purchase price, often decreases.

The purpose of the deposit is to ensure that a buyer will complete the transaction, and correspondingly, that there are funds available to pay the seller if the buyer breaches the contract. In the case of a buyer wrongfully breaking the contract, the seller is entitled to keep the entire deposit. In practice, however, disputes about whether a deposit is to be paid to the seller or returned to the buyer are often resolved by a reasonable compromise.

Because of its importance to both parties in the transaction, the size of the deposit that a seller is willing to accept and a buyer is willing to provide should be carefully considered.

The Closing Date

The “closing date,” sometimes referred to in other states as the “settlement date,” is the date chosen by the parties to transfer ownership and possession of a property in exchange for payment of the purchase price. If a buyer is financing the purchase with a mortgage, this is also the date that the buyer closes the loan by signing a promissory note and a mortgage.

In the rush to enter into a Purchase and Sale Agreement, the parties sometimes choose a closing date without reflection on their own availability and whether the date is realistic. In

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choosing a closing date, both buyer and seller need to consider what they must accomplish prior to the closing. The seller needs to have time to document a septic system's compliance with state and local regulations (see The Septic System Inspection Provision, below); obtain a smoke/carbon monoxide detector certificate from the local fire chief; move out of the house; clean the house; and, if necessary, arrange for new accommodations. The buyer needs to have sufficient time to consult with professionals such as home inspectors, contractors, architects, and engineers; to arrange for financing and to transfer the funds necessary to complete the purchase; and possibly to arrange for the transportation or purchase of furnishings. Because of the differences in the needs of buyers and sellers, the date for closing a transaction is often a subject of negotiation. Once the date is selected, in most cases, it can only be changed by agreement of both parties.

Prior to the closing, unless the parties agree otherwise (which is rare), the seller must remove all items that are not included in the sale from the property. The property must also be left in the condition specified in the Purchase and Sale Agreement - usually, the property must be left "broom clean" and free of tenants.

The Mortgage Contingency Provision

If a buyer needs to borrow money from a lender to purchase the property, the Purchase and Sale Agreement should contain a mortgage contingency provision. The purpose of this provision is to make certain that the buyer may cancel the deal and obtain the return of the deposit if the buyer cannot obtain a loan from a lender on acceptable terms.

When the Purchase and Sale Agreement contains a mortgage contingency provision, the agreement will usually provide that the buyer must apply for a mortgage within a certain time period. That time period, usually 5 to 7 days after the contract has been executed by the parties, is called the "mortgage application period."

The mortgage contingency provision typically provides that if the buyer fails to obtain a commitment from a lender for a mortgage on terms specified in the Purchase and Sale Agreement within a certain time period (most frequently 30 to 45 days), the buyer can cancel the agreement and obtain a full return of the deposit. Therefore, the mortgage contingency expiration date must be carefully monitored by the buyer.

If the buyer is unable to obtain the necessary financing, it is essential to obtain some form of proof of that fact to assure a full return of the deposit. Usually, this documentation will consist of



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a letter from the lender setting forth the lender's denial of the buyer's mortgage application.

If the lender requires more time to determine whether they will provide financing, a buyer may need to request an extension of the mortgage contingency period. Although the seller has no obligation to agree to an extension, they often will do so. The buyer may also waive the mortgage contingency date if he or she has the ability to purchase the property without a mortgage or is willing to risk forfeiting their deposit if they don't have the funds necessary to complete the transaction.

The Inspection Contingency Provision

The Berkshire County Board of Realtors' Purchase and Sale Agreement provides the buyer with a certain period of time within which to have a property inspected. The inspection contingency period is usually 14 days, but can be longer or shorter, based on the agreement.

It is standard for the buyer to retain a licensed home inspector, a professional who is familiar with the building code, safety, and construction issues. ([More information here.](#)) The home inspector can also arrange to test the water and to test the house for the presence of radon. A buyer may want to retain other professionals, such as a contractor, architect, or engineer, if renovations or additional construction is desired. Finally, it is often vital for a buyer to consult with a wetlands professional to make sure that there are no wetland-related issues that would prevent the use of all areas of the property.

Why do I need to have a professional inspection if I am only buying land?

Even if a buyer is purchasing unimproved land with the desire to build a house or other structure in the future, it is essential to confirm that the lot is buildable. An engineer and/or environmental consultant may be helpful in determining whether the property can support a septic system and well, and that no environmental issues prohibit building a structure on the lot. A buyer of land should also ask their attorney to prepare a zoning opinion and make sure that no local or state regulations interfere with the buyer's building plans (see more on zoning reviews below).

The Inspection

A home inspection should be scheduled by the buyer as soon as a Purchase and Sale Agreement has been executed by the parties. Timing is especially critical during late spring, all

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summer, and the early autumn, as these are the busiest seasons for home buying and there are a limited number of inspectors in our area. It is always valuable for the buyer to be present during the home inspection to fully appreciate the inspector's advice and to learn about the property being purchased. Home inspectors generally enjoy sharing their knowledge and experience with buyers during the inspection, including how to operate systems within the property.

Sellers are rarely present during the inspection and are, in fact, often instructed not to be present. There are two main reasons for a seller to avoid the inspection: the first is to avoid inadvertent statements from sellers about house condition for which they may be held accountable or statements that are off-putting to the buyer, and second, because sellers often have a difficult time listening to strangers making comments about their homes. Correspondingly, the presence of a seller can inhibit buyers from discussing the property candidly.

When home inspectors perform the inspection, they observe all areas of the building that are accessible and will prepare a written report identifying problems that require attention or correction. Your attorney is a good resource for reputable home inspectors.

A home inspection report should provide a client with a complete and detailed description of the building being inspected. This includes the structure, the roof system, windows, siding, flooring, heating, and cooling systems, and the plumbing and electrical systems. Often, inspectors include pictures of the conditions described in their report. The inspector should also identify any concerns, including safety issues, building-code violations, and problems such as rotted wood, inadequate or dated wiring, worn-out roofing materials, and the like. The inspector will indicate any areas in the home that he was not able to inspect due to inaccessibility, as well as items the inspector feels should be further investigated, such as a furnace or well. Also, the report should note whether there is evidence indicating the possible existence of an underground fuel tank or the presence of potentially toxic mold, asbestos, or other hazardous materials. Note that the home inspector does not test for these conditions and they are not formally included in the inspection report, but she or he may see a condition that warrants further investigation.

Based on the advice of the home inspector and other consultants, the buyer can identify any items of concern and has the opportunity to learn the cost of any necessary repair to the house, any additional structures such as guest house, storage shed, or pool.



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Environmental Contaminants

A note about environmental contaminants: if you are purchasing or selling an existing home or unimproved property and there is any sign of, or reason to believe there may be hazardous material contamination, it is essential to consider obtaining the advice of an environmental consultant. If a property has been used for commercial purposes or is near a property used for commercial purposes, it is prudent to consult with an expert called a Licensed Site Professional (“LSP”) to determine whether an investigation should be performed and, if so, the extent of such an investigation. This topic is much broader than can be covered in this volume. ([More information here.](#))

The types of hazardous materials that are most commonly encountered include: asbestos siding or pipe insulation, lead paint, radon, a past or ongoing oil spill or an activity such as dry cleaning or auto repair that was conducted on or near the property. An environmental consultant can examine the property and provide advice as to whether these hazards exist. If contamination exists, the consultant can determine what remediation is necessary, and in some cases, the approximate cost of remediation. While some conditions are easily dealt with, many others may require legally-mandated and expensive solutions. A simple investigation currently costs between \$1,200 and \$2,400. A more thorough investigation including well monitoring can cost in excess of \$7,500. If there is a question regarding contamination, hiring an LSP and obtaining his or her opinion is well worth the cost.

Termination of a Contract – Proceed with Caution

If the result of any of these inspections is unsatisfactory to the buyer, the buyer has the right to terminate the contract during the inspection period and to have their deposit returned. Termination of the contract under the inspection contingency or under any other provision of the Purchase and Sale Agreement is an action of legal significance and should be handled by the buyer’s attorney.

We are often reminded by our clients that in many states, purchase and sale agreements provide sellers with the right to remedy defects found by home inspectors and thus prevent buyers from withdrawing from the contract due to the presence of a defect. This is generally not the case in the Berkshires. Here, at least in our standard Purchase and Sale Agreement, the buyer may cancel the transaction based on the inspection if the condition of the house is not satisfactory.



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Members of our law firm have often debated the question of whether a buyer can obtain the return of a deposit where the contract merely calls for a home inspection and the home inspector's report indicates there are no defects or minimal defects, or if the seller volunteers to completely repair the defect before the closing. As of this date, that question has not been adjudicated by any court in the Commonwealth.

Both parties need to understand the nature and timing of the inspection contingency, and in the case of the mortgage contingency provision, carefully monitor the inspection contingency date.

A Note for Sellers About Pre-inspections

Before putting a home on the market, it is a good idea for a seller to invest in their own professional home inspection in order to determine what problems may exist, and whether those problems can or should be remedied before listing the house for sale. This eliminates problems before they can disrupt a deal, or at least such problems can be factored into the selling price and disclosed to a potential buyer.

The Septic System Inspection Provision

Although many areas of the Berkshires are serviced by municipal sewage disposal systems, many properties have private septic systems. When a property has a septic system, a Purchase and Sale Agreement should provide that the seller must have the system inspected by a Massachusetts licensed septic system inspector within a certain time period after the execution of the contract (usually 15 to 20 days).

Because of weather conditions or commitments made by the few inspectors in our area, septic inspections are often not completed during the septic-system contingency and the seller may require an extension of the septic system contingency deadline.

As in the case of the mortgage and inspection contingency, the septic system contingency allows a buyer to terminate the transaction and obtain the return of the deposit under certain conditions. If the septic report (called the "Title 5" inspection report) issued by the septic system inspector indicates that the system "failed," the Berkshire County Purchase and Sale Agreement provides that the buyer may terminate the contract within three days of receiving that report. Unfortunately, the standard form does not address many of the problems that can confront the parties if a septic system must be replaced or if it receives a "conditional pass." Therefore,

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language addressing these possibilities should be added by the buyer's and seller's attorneys during the initial drafting of the Purchase and Sale Agreement. The Title 5 inspection is an expense borne by the Seller and, at this time, typically costs between \$800 and \$1500.

If a septic system passes inspection, the buyer should receive a copy of the Title 5 inspection report or, in the case of new construction, a copy of the septic system plan as approved by the town Board of Health, as well as a Certificate of Compliance demonstrating that the system has been installed and complies with applicable law.

Certain transfers of real estate are not considered transfers of title that trigger the requirement of a Title 5 inspection. These include granting a mortgage, certain changes in the form of ownership (such as placing it in a family trust in which the owners are the beneficiaries), adding or deleting a spouse from title to the property, and certain other transfers.

Ascertaining Legal Use Limitations, Including Zoning

Towns and cities in Massachusetts have the power to regulate the use of property within the town or city. In order to do so, municipalities decide what use can be made of property, where a particular use is permitted or prohibited, and what dimensions are required for the lot, itself, and for the location and size of any structures. This regulation of the use and dimensions of property is called "zoning." Each of our thirty-two municipalities in Berkshire County has a different zoning bylaw. Some of the municipalities' zoning laws are quite simple (which can create its own problems) and others are more complex. It is critical that you discuss your plans for the property with your attorney and that you perform any necessary investigation or analysis before the end of the inspection contingency period or within any negotiated zoning contingency period.

As a buyer, the Purchase and Sale Agreement should provide that your obligation to purchase a property is conditioned upon your ability to use the property in the manner and for the purposes you contemplate. For instance, if you intend to keep horses on your property, you need to be sure that the property is zoned to allow you to do so. If you want to build a guest house, or have a home office, or add another floor to the house, you need to check the relevant rules.

Neither the fact that a property has been used in a certain way in the past, nor even the fact that a local building inspector has given his or her assurance that there are no zoning problems, guarantees that a current or future use of the property may be allowed. It is a common mistake



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for buyers to consult with local building inspectors or other town officials and to rely on that advice. This can lead to disastrous results. However illogical and unfair, be advised that a town official's advice does not bind the town in such matters. For instance, we had a buyer who wanted to purchase a four-family house. The buyer could not afford the house unless she was able to rent out all four apartments. She took what she believed to be the responsible step and consulted with the town's building inspector, who advised her that the four-family house was legal and could be used as she intended. She purchased the property – only to be told by the same building inspector that the property could not be used as a four-family house for zoning reasons. The only way to be assured that you may use property in a certain way is by obtaining a zoning opinion from your lawyer. A zoning opinion is not standard and is not included in a typical representation of a buyer in the purchase of the house. Thus, it is critical to discuss your plans for the property with the attorney and to have the attorney conduct a zoning review if you require a particular use of the property.

A zoning review is especially important when you are buying vacant land on which to construct a home. In that situation, you must be very sure that the property conforms to local and state (and in some case Federal) law so that your land is “buildable” and that your contemplated construction and use of the property will be legal. Making such a determination requires a careful title review by an experienced real estate lawyer. Failure to obtain such a zoning opinion can lead to costly and disappointing consequences.

The Berkshires are quite rural: we have wetlands, ponds, rivers, streams, protected species, and ridge lines, as well as an abundance of laws and regulations to protect them. These restrictions include the Scenic Mountains Act, a Massachusetts state law that applies only to Berkshire County, as well as the statewide Wetlands Protection Act. In addition, many of our properties are affected by private restrictions created by landowners to govern or restrict use, allow access to adjacent property or limit development in a certain manner. Also, natural restrictions such as rock formations and hillside locations can make development challenging. For these reasons, it is essential that the right professionals be consulted during contingency periods, to avoid finding out after a purchase that a planned use cannot be accomplished.



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