

Pre-Contract Considerations

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A. Seller

1. Client interview:

- Consider giving the client an engagement letter, explaining the scope and terms of your engagement (though one is not required if the attorney's fee will be less than \$3000). N.Y. Comp. Codes Rules & Regulations, title 22, pt. 1215. Clarifying these matters in writing is advisable in all cases.
- Obtain basic information from the client listed on the checklist: parties, property, brokers, price, personal property, closing date, mortgage commitment contingency, special features (such as swimming pool), property condition disclosure, encumbrances made by seller, smoke and c.o. detectors.
- Obtain copies of seller's deed, title insurance policy, survey, certificate of occupancy and tax bills.
- Ask whether any improvements have been made since the last survey and whether permits or certificates of occupancy or compliance have been obtained for them (for decks, pools, gazebo, etc).
- In Western NY, obtain the seller's abstract of title and survey or information where they are stored (title company?)

2. Broker listings and commissions; agency disclosure:

- Most homes are offered by brokers through multiple listings (except NYC)
- Obtain a copy of any listing agreement. Is it an exclusive right to sell or exclusive agency? Does it have an expiration date (and a tail period)?
- The broker must be licensed to collect a commission, but an agreement to pay compensation for the sale of real estate is not required to be in writing to be enforceable. G.O.L § 5-701(a) (10).
- Rates of commissions vary, but there is usually a customary rate in an area, such as 6% for ordinary sales.
- Note that, unless a written brokerage agreement provides otherwise, a commission is earned when a licensed broker produces a purchaser who is ready, willing and able to purchase on terms set by the seller. Any brokerage agreement must be conditioned on closing the sale and payment of the price.
- Brokers are required to disclose whom they represent as an agent; brokers can be dual agents, representing both parties. R.P.L. § 443.

3. Property Condition:

- Advise the sellers of their right to give a \$500 credit at the closing in lieu of delivering a Property Condition Disclosure Statement (PCDS). Holtzschue, *With a PCDS, the Purchaser has More than A Ghost of a Chance*, 41 N.Y. Real Prop. L.J. 25 (Winter 2013) (see online materials)

- If a PCDS is to be given, consider adding an explanation of any ambiguities in the questions. Remind the seller that the seller's broker has a duty under the agency disclosure statute form (R.P.L. § 443) to disclose to the purchaser any defects known to the broker.
- The "as is" clause in the contract of sale will protect the seller against claims based on oral representations, but probably not if the seller makes a fraudulent misrepresentation.
- R.P.L. § 443-a provides that it is not a material defect that an owner or occupant had HIV or AIDS of the property was the site of a homicide, death or felony. Inquire whether any underground fuel oil tank has leaked.
- For homes built before 1978, federal law requires giving the purchaser an informational pamphlet and a lead-based paint disclosure (allowing the purchaser 10 days to inspect and cancel, which may be waived or shortened).
- Advise that an inspection should be completed before the contract of sale is signed, to prevent renegotiation of the price after the inspection report is received. If the contract is to be conditioned on an inspection, consider adding that the seller has the option to cure defects costing up to an agreed amount (say 1% of the price).
- R.P.L. § 242 requires the seller to provide written notice to a purchaser of (1) a lack of electric service and (2) any electric or gas utility surcharges for line extensions prior to accepting a purchaser offer.

4. Estimate of closing costs: it is advisable to provide the seller with a written estimate of closing costs, such as city, county and state transfer taxes, mortgage satisfaction charges, brokerage commission, existing mortgage payoff costs and seller's attorney's fee.

5. Tax planning: advise the seller to consult with his or her accountant as to any capital gains tax due on the sale.

B. Purchaser

1. Client interview:

- Consider giving the client an engagement letter, explaining the scope and terms of your engagement (though one is not required if the attorney's fee will be less than \$3000). N.Y. Comp. Codes Rules & Regulations, title 22, pt. 1215. Clarifying these matters in writing is advisable in all cases.
- Obtain basic information from the client listed on the checklist: parties, property, brokers, price, personal property, closing date, mortgage commitment contingency, special features (such as swimming pool), property condition disclosure, smoke and c.o. detectors.
- Ask about the purchasers' current living situation and what they will do if the closing is delayed.

2. Broker agency disclosure: brokers are required to disclose whom they represent as an agent; brokers can be dual agents, representing both parties. R.P.L. § 443.

3. Inspection of property:

- Advise the purchasers of their right to receive a Property Condition Disclosure Statement (PCDS) or a \$500 credit at the closing in lieu of delivering a PCDS. Cases place a heavy duty on the purchaser to have an inspection, make inquiries and check records. Holtzschue, *With a*

PCDS, the Purchaser has More than A Ghost of a Chance, 41 N.Y. Real Prop. L.J. 25 (Winter 2013) (see online materials)

- Downstate, sellers' attorneys usually advise giving the \$500 credit; upstate a PCDS is usually given (usually obtained by the broker as or before the contract is signed)
- Advise the purchaser that the seller's broker has a duty under the agency disclosure statute form (R.P.L. § 443) to disclose to the purchaser any defects known to the broker.
- The "as is" clause will protect the seller against claims based on oral representations, but probably not if the seller makes a fraudulent misrepresentation. Consequently, the purchaser should have any crucial oral representations repeated in writing in the contract of sale, specifying whether they are to survive the closing.
- R.P.L. § 443-a provides that it is not a material defect that an owner or occupant had HIV or AIDS or the property was the site of a homicide, death or felony, so a purchaser concerned about these matters should inquire about them.
- The purchaser should inquire whether there is an underground fuel oil tank and, if so, if it has leaked.
- For homes built before 1978, federal law requires giving the purchaser an informational pamphlet and a lead-based paint disclosure (allowing the purchaser 10 days to inspect and cancel, which may be waived or shortened).
- Advise that an inspection as to structural defects, wood-destroying organisms, septic system, well water flow and quality, radon and other matters should be completed before the contract of sale is signed, and that the purchaser should accompany the inspector on the inspection. If the contract is conditioned on an inspection, consider asking for a reduction in the purchase price to remedy any defects.
- R.P.L. § 242 requires the seller to provide written notice to a purchaser of (1) a lack of electric service and (2) any electric or gas utility surcharges for line extensions prior to accepting a purchaser offer.
- Energy Law § 17-103(a) allows a purchaser to request disclosure of heating and cooling bills for 2 years and information concerning insulation.

3. Financing:

- Most purchasers need financing to buy a new home. Mortgage brokers may assist in finding loans. Consequently, the contract of sale is usually conditioned upon obtaining a commitment for a new loan by a certain date (it is advisable for the attorneys to calendar this date).
- Federal law required lenders to residential borrowers to provide a Good Faith Estimate (GFE) disclosure form upon application, which the purchaser should review carefully.
- When a mortgage commitment is received, it should be reviewed before acceptance to make sure that the terms and any expiration date are acceptable.
- Financing may be provided by the purchaser taking over an existing mortgage to the seller
- Financing may be provided by a mortgage loan from the seller to the purchaser

4. Estimate of closing costs: it is advisable to provide the purchaser with a written estimate of closing costs, such as mortgage loan origination fee, appraisal, credit report, lender's attorney's fee, mortgage recording tax, mortgagee title insurance, fee title insurance, mortgage recording fee, deed recording fee, departmental searches, survey inspection, escrow for future taxes and casualty insurance, mortgage interest until first payment, casualty insurance, inspection cost, N.Y.S. Mansion Tax (sales of \$1,000,000 or more), and purchaser's attorney's fee.

C. Binders (statute of frauds): warn each client, but especially the seller, not to enter into an informal agreement of sale, often called a “binder,” as it is usually difficult to determine if a “binder” will be enforceable. Sometimes a purchaser may try to bind the seller to prevent losing the property.

D. Good Faith Estimate (HUD-GFE)

E. Property Condition Disclosure Statement

F. Checklists

1. Seller (see online materials)
2. Purchaser (see online materials)

G. Note any Recent Broker and Pre-Contract Developments (see following)

Property Condition Disclosure Statement

Name of Seller or Sellers: _____

Property Address: _____

The Property Condition Disclosure Act requires the seller of residential real property to cause this disclosure statement or a copy thereof to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale.

Purpose of Statement:

This is a statement of certain conditions and information concerning the property known to the seller. This disclosure statement is not a warranty of any kind by the seller or by any agent representing the seller in this transaction. It is not a substitute for any inspections or tests and the buyer is encouraged to obtain his or her own independent professional inspections and environmental tests and also is encouraged to check public records pertaining to the property.

A knowingly false or incomplete statement by the seller on this form may subject the seller to claims by the buyer prior to or after the transfer of title. In the event a seller fails to perform the duty prescribed in this article to deliver a disclosure statement prior to the signing by the buyer of a binding contract of sale, the buyer shall receive upon the transfer of title a credit of five hundred dollars (\$500.00) against the agreed upon purchase price of the residential real property.

"Residential Real Property" means real property improved by a one to four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons, but shall not refer to (a) unimproved real property upon which such dwellings are to be constructed or (b) condominium units or cooperative apartments or (c) property on a homeowners' association that is not owned in fee simple by the seller.

Instructions to the Seller:

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

Seller's Statement: The seller makes the following representations to the buyer based upon the seller's actual knowledge at the time of signing this document. The seller authorizes his or her agent, if any, to provide a copy of this statement to a prospective buyer of the residential real property. The following are representations made by the seller and are not the representations of the seller's agent.

General Information

1. How long have you owned the property? _____
2. How long have you occupied the property? _____
3. What is the age of the structure or structures? _____
Note to Buyer - If the structure was built before 1978 you are encouraged to investigate for the presence of lead based paint.
4. Does anybody other than yourself have a lease, easement or any other right to use or occupy any part of your property other than those stated in documents available in the public record, such as rights to use a road or path or cut trees or crops?
Yes No Unkn NA (If yes, explain below.)
5. Does anybody else claim to own any part of your property?
Yes No Unkn NA (If yes, explain below.)

6. Has anyone denied you access to the property or made a formal legal claim challenging your title to the property? Yes No Unkn NA (If yes, explain below.)
7. Are there any features of the property shared in common with adjoining land owners or a homeowners association, such as walls, fences or driveways?
Yes No Unkn NA (If yes, describe below.)
8. Are there any electric or gas utility surcharges for line extensions, special assessments or homeowner or other association fees that apply to the property?
Yes No Unkn NA (If yes, explain below.)
9. Are there certificates of occupancy related to the property?
Yes No Unkn NA (If no, explain below.)

Environmental

Note to Seller - In this section, you will be asked questions regarding petroleum products and hazardous or toxic substances that you know to have been spilled, leaked or otherwise been released on the property or from the property onto any other property. Petroleum products may include, but are not limited to, gasoline, diesel fuel, home heating fuel, and lubricants. Hazardous or toxic substances are products that could pose short- or long-term danger to personal health or the environment if they are not properly disposed of, applied or stored. These include, but are not limited to, fertilizers, pesticides and insecticides, paint including paint thinner, varnish remover and wood preservatives, treated wood, construction materials such as asphalt and roofing materials, antifreeze and other automotive products, batteries, cleaning solvents including septic tank cleaners, household cleaners and pool chemicals and products containing mercury and lead.

Note to Buyer - If contamination of this property from petroleum products and/or hazardous or toxic substances is a concern to you, you are urged to consider soil and groundwater testing of this property.

10. Is any or all of the property located in a designated floodplain?
Yes No Unkn NA (If yes, explain below.)
11. Is any or all of the property located in a designated wetland?
Yes No Unkn NA (If yes, explain below.)
12. Is the property located in an agricultural district?
Yes No Unkn NA (If yes, explain below.)
13. Was the property ever the site of a landfill?
Yes No Unkn NA (If yes, explain below.)
14. Are there or have there ever been fuel storage tanks above or below the ground on the property?
Yes No Unkn NA
If yes, are they currently in use?
Yes No Unkn NA
Location(s) _____
Are they leaking or have they ever leaked?
Yes No Unkn NA (If yes, explain below.)
15. Is there asbestos in the structure?
Yes No Unkn NA (If yes, state location or locations below.)
16. Is lead plumbing present?
Yes No Unkn NA (If yes, state location or locations below.)
17. Has a radon test been done?
Yes No Unkn NA (If yes, attach a copy of the report.)
18. Has motor fuel, motor oil, home heating fuel, lubricating oil or any other petroleum product, methane gas, or any hazardous or toxic substance spilled, leaked or otherwise been released on the property or from the property onto any other property?
Yes No Unkn NA (If yes, describe below.)

19. Has the property been tested for the presence of motor fuel, motor oil, home heating fuel, lubricating oil, or any other petroleum product, methane gas, or any hazardous or toxic substance?
 Yes No Unkn NA (If yes, attach report(s).)

Structural

20. Is there any rot or water damage to the structure or structures?
 Yes No Unkn NA (If yes, explain below.)
21. Is there any fire or smoke damage to the structure or structures?
 Yes No Unkn NA (If yes, explain below.)
22. Is there any termite, insect, rodent or pest infestation or damage?
 Yes No Unkn NA (If yes, explain below.)
23. Has the property been tested for termite, insect, rodent or pest infestation or damage?
 Yes No Unkn NA (If yes, please attach report(s).)
24. What is the type of roof/roof covering (slate, asphalt, other.)?
 Any known material defects?
 Yes No Unkn NA (If yes, explain below.)
 How old is the roof? _____
 Is there a transferable warrantee on the roof in effect now?
 Yes No Unkn NA (If yes, explain below.)
25. Are there any known material defects in any of the following structural systems: footings, beams, girders, lintels, columns or partitions?
 Yes No Unkn NA (If yes, explain below.)

Mechanical Systems & Services

26. What is the water source (Circle all that apply - well, private, municipal, other)?
 If municipal, is it metered?
 Yes No Unkn NA
27. Has the water quality and/or flow rate been tested?
 Yes No Unkn NA (If yes, describe below.)
28. What is the type of sewage system (Circle all that apply - public sewer, private sewer, septic or cesspool)?
 If septic or cesspool, age? _____
 Date last pumped? _____
 Frequency of pumping? _____
 Any known material defects?
 Yes No Unkn NA (If yes, explain below.)
29. Who is your electric service provider? _____
 What is the amperage? _____
 Does it have circuit breakers or fuses? _____
 Private or public poles? _____
 Any known material defects?
 Yes No Unkn NA (If yes, explain below.)
30. Are there any flooding, drainage or grading problems that resulted in standing water on any portion of the property?
 Yes No Unkn NA (If yes, state locations and explain below.)
31. Does the basement have seepage that results in standing water?
 Yes No Unkn NA (If yes, explain below.)

Are there any known material defects in any of the following (If yes, explain below. Use additional sheets if necessary.):

- | | | | | |
|---|-----|----|------|------|
| 32. Plumbing System? | Yes | No | Unkn | NA |
| 33. Security System? | Yes | No | Unkn | NA |
| 34. Carbon Monoxide Detector? | Yes | No | Unkn | NA |
| 35. Smoke Detector? | Yes | No | Unkn | NA |
| 36. Fire Sprinkler System? | Yes | No | Unkn | NA |
| 37. Sump Pump? | Yes | No | Unkn | NA |
| 38. Foundation/Slab? | Yes | No | Unkn | NA |
| 39. Interior Walls/Ceilings? | Yes | No | Unkn | NA |
| 40. Exterior Walls Or Siding? | Yes | No | Unkn | NA |
| 41. Floors? | Yes | No | Unkn | NA |
| 42. Chimney/Fireplace or Stove? | Yes | No | Unkn | NA |
| 43. Patio/Deck? | Yes | No | Unkn | NA |
| 44. Driveway? | Yes | No | Unkn | NA |
| 45. Air Conditioner? | Yes | No | Unkn | NA |
| 46. Heating System? | Yes | No | Unkn | NA |
| 47. Hot Water Heater? | Yes | No | Unkn | NA |
| 48. The Property is located in the following School District: | | | | Unkn |

Note: Buyer is encouraged to check public records concerning the property (e.g. tax records and wetland and flood plain maps.)

The seller should use this area to further explain any item above. If necessary, attach additional pages and indicate here the number of additional pages attached.

Seller's Certification: Seller certifies that the information in this property condition disclosure statement is true and complete to the seller's actual knowledge as of the date signed by the seller. If a seller of residential real property acquires knowledge which renders materially inaccurate a property condition disclosure statement provided previously, the seller shall deliver a revised property condition disclosure statement to the buyer as soon as practicable. In no event, however, shall a seller be required to provide a revised property condition disclosure statement after the transfer of title from the seller to the buyer or occupancy by the buyer, whichever is earlier.

Seller _____ Date _____

Seller _____ Date _____

Buyer's Acknowledgment: Buyer acknowledges receipt of a copy of this statement and buyer understands that this information is a statement of certain conditions and information concerning the property known to the seller. It is not a warranty of any kind by the seller or seller's agent and is not a substitute for any home, pest, radon or other inspections or testing of the property or inspection of the public records.

Buyer _____ Date _____

Buyer _____ Date _____