# The Home Purchase Agreement

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This article contains a description of the terms common in residential purchase agreements. The provisions of real estate purchase agreements are generally negotiable between the buyer and the seller. There are a few provisions that are typical in a particular community, but almost all provisions are negotiable. I have also provided a checklist for residential purchases on this website.

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As with all contracts, you should understand the terms contained in the contract before you sign the contract. Once the contract has been signed, you are not likely to be excused from performance, and you have lost your bargaining position. Each clause has a purpose, and if you do not understand the reason for the clause, you should consult with an attorney. Contracts are a way of allocating risks between the buyer and the seller. Before you accept a risk, you should be certain that you understand the risk and the effect of having the contract allocate the risk to you.

The following provisions are typical in most real estate contracts.

1. Identify the Buyer and the Seller. As simple as it sounds, identifying the parties is the first, and most important part of the purchase agreement. As a buyer, you should be certain that the seller is actually the owner of the property. In Lancaster County, a buyer can check the records of the Register of Deeds Office and the County Assessor and Treasurer's Offices to determine whether the seller is actually the owner of the property. It may be that our seller, "John Seller," owns the property with his wife "Jane Seller" and under Nebraska law, if the property is the sellers' homestead (the place they live) then both owners must both sign and have their signatures acknowledged by a notary or the sale contract is void. It may be that the seller has some kind of an unrecorded contractual right to purchase the property; that the seller is actually the trustee of some kind of a trust ("John Doe, Trustee of the Doe Family Trust dated August 9, 2000"); or, if the home is owned by an investor, the home may be in the name of a corporation or limited liability company ("John Doe, LLC").

The buyer's names are also important. If the buyers are a married couple, and they intend to use the property as their homestead, then both the husband and wife must sign the purchase agreement, and their signatures must be notarized or the contract to purchase the homestead is void under Nebraska law. Although less common, it is possible that the

buyer will choose to hold title in an entity ("John Doe, Inc.") or as trustees of a trust ("John Doe, Trustee of the Doe Family Trust dated August 9, 2000"). Note that under Nebraska law a trust is not a legal entity and that the trust can not hold title to real estate. The property must be deeded to the trustee under the trust, and the conveyance should be in the form set forth in the foregoing sentence.

2. Identify the Property Being Sold. The topic of the purchase agreement is the sale of a particular parcel of real estate. Normally the property is described both by a street address and by the more formal or legal description. Normally the legal description should read something like: "Lot ____, Block _____, _____ subdivision, _____ City, _____ County, Nebraska."

Where does the legal description come from? Normally the plat of the subdivision subdivides the large parcel into smaller parcels, which are then sold to individual owners. The best place to find the legal is from the seller's deed. If you are looking at the legal description from the Assessor's Office or the Treasurer's Office, note that the legal description used by those offices is backwards. Typically starting with the subdivision name followed by the block followed by the lot number. There is nothing wrong with using the legal description as provided by the Assessor or Treasurer. However, I feel better with using the legal description contained in the deed to the current seller.

You can also get the legal description by asking the seller for a copy of the title insurance policy to the property. The title insurance policy will contain the legal description of the real estate. The legal from the title insurance policy is probably the most accurate legal description that you will find.

If the property is located in an area where there are issues with the adequacy of legal descriptions, the title insurance agent will be able to give you the legal description that will be insured by the title company. If the legal description is to be provided later, the purchase contract should specify that the exact legal description will be provided later.

3. The Purchase Price/Earnest Money/Financing Contingencies. The purchase price is normally the one item of a purchase agreement that is subject to the most negotiation. Once parties agree to a final price, the next set of concerns involves the amount of the earnest money that the buyer will deposit with the purchase agreement, and the terms of any financing contingencies. As a general rule the seller wants a large earnest money deposit and no financing contingencies and the buyer wants a small earnest money deposit and wants the purchase to be contingent on financing.

Normally, in a typical residential agreement the earnest money is $500.00 to $1,000.00. In some cases sellers negotiate for a higher earnest money to give the sellers a greater assurance that the sale will ultimately close. Some agreements may set the earnest money as low as $100.00. If you are a seller, ask whether you would even consider selling to a person who does not have $1,000.00 to put down on the house? How could such a person qualify for financing? If the buyer is an investor, what kind of an investor can not commit $1,000.00 to the purchase of a property?

As a buyer ask yourself similar questions: If you offer a small earnest money deposit, will the seller think that your are not serious about their home? If you are an investor, what signal are you sending the seller if you offer a low earnest money deposit and then refuse to negotiate the amount of the earnest money deposit? If you can not afford a $1,000.00 earnest money deposit, should you even be considering the purchase?

One technique for a seller to obtain a higher earnest money deposit is to agree to a smaller deposit with a larger amount to be deposited upon the happening of some condition, such as the house passing the whole house inspection, or the buyer's financing being approved. Once the buyer has either obtained a clean report from the inspector or has been approved for a loan, the buyer should be more willing to put additional money down on the purchase price.

Having the earnest money held by a third party, such as a realtor or the title company that is going to close the transaction, might make the buyer more comfortable with a larger earnest money deposit.

As a buyer, you might be able to convince a seller that other conditions (no sale of house contingency; a quick closing; no financing contingency; paying some of the closing costs that are typically paid by the seller) of the agreement offset the small amount of the deposit.

The identity of the person holding the deposit is also an important consideration. The last choice is to let the seller hold the money. The seller will undoubtedly cash the check for the deposit, which is appropriate, but the seller almost never retains the funds. If the seller spends the deposit, and one of the contingencies in the purchase agreement fail, then the seller may either not have the capacity to repay the deposit, or may have difficulty in returning the buyer's deposit.

Once you have agreed on a deposit, and who will hold the deposit, the next question is who should hold the money. Most real estate transactions close with a title company acting as the escrow closing agent. Using a title company to close the sale should give the buyer greater confidence that the buyer's escrow deposit will be held by an independent party. Buyers are rightfully concerned about the seller holding the earnest money. Even if the seller intends to close, if something happens and the buyer cancels the deal, the title company is required to maintain the escrow account separate from their other funds, and the earnest money should be easily transferred back to the buyer.

If either party wants to use their attorney to hold the earnest money, the concern is that the attorney is obligated to observe the directions of the attorney's client. If the seller's attorney is holding the funds, and the seller does not want the funds returned to the buyer, the seller's attorney will be in a difficult position when the buyer is entitled to the funds, the seller/client refuses permission to release the funds, and the attorney knows that the buyer is entitled to the money. If a party's attorney holds the earnest money, the client should be certain that the funds are being held subject to the right of the buyer to get the

funds back without the seller's consent or over the seller's objection, if one of the contingencies of the purchase agreement is not satisfied.

If the amount of the earnest money deposit is significant, the parties should agree for the payment of interest on the earnest money during the interim between the deposit and the closing. If interest is desired, the parties should determine whether an intermediary could deposit the funds in an interest bearing account. Realtors and title companies should be able to arrange for interest on the earnest money deposit. Attorneys have more difficulties with paying interest on earnest money deposits due to the ethical rules requiring that the attorney participate in the bar association's IOLTA ("Interest On Lawyer's Trust Account") rules. It is still possible to open trust accounts with the client being able to earn interest on the deposit, but the account and the closing of the account have to be disclosed in writing to the bar association.

A related clause deals with financing contingencies. The financing contingency can be broad ("The purchase is contingent on Buyer obtaining suitable financing"), which permits the buyer to walk away from the deal pretty much at will because the Buyer can always find something unattractive about the financing package. The financing contingency could be narrow ("The purchase is contingent on Buyer obtaining a loan secured by a first lien on the Real Property in the amount of $_____, with an interest rate of _____% payable over _____ years"). The financing clause could identify lenders; loan officers; and permit direct contact between the seller (or the seller's realtor, attorney or loan officer) and the buyer's loan officer. Normally the financing clause requires that the buyer make application within a few days after the purchase agreement is signed. The seller should be aware that the seller has to monitor performance under the financial contingency provision.

4. Other Contingencies. The contingencies to a purchase agreement are as varied as there are people to negotiate the other contingencies. For example, the sale could be contingent on the sale of the buyer's existing house; contingent on passing a termite inspection; contingent on passing a whole house inspection. If the buyer is concerned about asbestos, radon, lead based paint or mold the buyer should have the home tested by a responsible professional inspector.

The purchase agreement should not only identify the contingencies, but also identify what happens if the house fails to satisfy any contingency. Normally the agreement will provide that "if the x contingency occurs, then the purchase agreement can be cancelled by either the Buyer or the Seller, and if cancelled the Buyer shall receive a refund of the earnest money and the purchase agreement shall be terminated." If the parties' intent is to make sure that the party accepting the risk can cancel the deal, be certain that the party with the risk has the option to cancel the deal. I prefer to make the failure of a contingency a basis for one party to cancel the transaction rather than mandating cancellation. For example, if the seller has agreed to repairs up to $1,000 and the cost to repair a defect is $1,075, the Seller would probably pay the extra $75 to keep the sale. If the purchase agreement automatically terminates, then the seller would have to obtain the buyer's consent to keep the purchase agreement in force, and if the buyer does not agree,

the purchase agreement is terminated by its terms. This situation also shifts the negotiating power to the buyer, who can either walk away at no risk, or can keep the agreement alive. A buyer may trade the buyer's consent for some other concession from the seller.

Another comment about contingencies during the "gap" period between the acceptance of the offer by both parties and the closing date. If the seller accepts an offer that is subject to many contingencies, the seller should get the borrower's agreement that the house may remain on the market for the purpose of obtaining secondary offers. If a secondary offer is received, then usually the seller wants the ability to force the buyer into waiving the contingency. While the exact terms are subject to negotiation, a typical provision requires the seller, who has accepted a back up offer, to give its first buyer notice that the seller has accepted a back up offer and then the first buyer has a limited time (such as 24 hours) to waive the contingency or the seller can accept the backup offer and the first purchase agreement would terminate automatically.

A word of caution about contingencies. Some authors recommend adding contingencies such as "subject to attorney approval" or "subject to partner's approval" or "subject to acceptable financing" to real estate contracts. Be aware that these contingencies give the buyer the ability to cancel the deal for no reason. As an attorney representing sellers, if my client wants out of a deal, I would not approve the purchase contract. Many times the partner does not exist, or is used as a negotiation tool to force additional concessions from the seller—"Gee, we'd like to buy the house, Mr. Seller, but my partner won't agree to the $125,000 purchase price we agreed on last week. My partner will agree to $115,000. Can we deal at that number, or my partner will not approve the deal." If a buyer approaches you with that kind of approach, you are probably being scammed. I suggest responding: "The deal is for $125,000, I am not interested in reducing the price further. Either take the deal, or let's cancel it right now." Of course, if you use the "take it or leave it" approach, the buyer might "leave it" and you might not get the deal. If you, as a seller, are desperate and if the buyer detects your desperation (and savvy buyers start their negotiations by exploring the seller's motivations for sales), be prepared to negotiate one deal, and then have the buyer come back and seek an additional reduction to the price, or ask you to carry back some or all of the purchase price.

5. Escrow Closing. Normally, closings are conducted by a title company. The title company is usually the company that issued the title commitment on the house being purchased. The title company prepares the closing documents and the deed to the house, arranges the time for the closing, conducts the closing, collects funds from the buyer and the buyer's lender, and delivers checks to the seller, the seller's lender, and pays the recording costs, transfer taxes, and the other expenses of the closing.

If a party has a preference on the escrow agent, then the party should express that concern in the purchase agreement. The concern could either be a requirement that the closing be conducted by a particular title company or attorney, or that the closing not be handled by a particular title company or attorney.

The agreement should also specify who pays for the escrow closing. Typically, the escrow closing costs are split between the buyer and the seller. Closing fees are generally a flat fee for a particular type of closing as specified by the title company.

6. Title Insurance. A closely related topic to the selection of the escrow closing agent is the selection of the title company that will write the title insurance policy. Typically, the company that will write the title policy will do the closing. Normally, the seller picks the title company but if the buyer has strong feelings either for or against a particular title company, any requirements should be identified in the purchase agreement. It is also a good practice for the person who is going to order the title commitment to make sure that all parties and their realtors know who is responsible for ordering the title insurance.

In Lincoln, the premium for the title insurance policy is divided between the buyer and the seller, although the buyer should pay for those parts of the title policy that are required by the buyer's lender (such as the lender's endorsement). In other counties the prevailing practice is for the seller to pay the whole cost of the title policy; the argument being that the seller is warranting the seller's title; and therefore should pay for the entire cost of the title insurance policy.

Except in rare instances, the parties to a purchase agreement should avoid the temptation to proceed with a transaction without title insurance. While a premium might run from $500 to 750, attorney's fees associated with litigation over title issues will be far greater.

7. Allocation of Expenses. Normally the following expenses are allocated among the parties. Real estate taxes: Normally taxes for years before the closing are paid by the sellers and the real estate taxes for the current tax year are divided, with the seller to pay that portion of the allocation based on the number of days from January 1st through the date of closing. Title insurance premiums and escrow closing costs are generally divided equally between the buyer and the seller. The buyer typically pays the cost for the recording of the deed and the seller agrees to pay the real estate transfer tax imposed by the state on deeds filed in Nebraska. The buyer and seller are free to allocate the payment of the closing expenses in any way that the parties may agree.

8. Parties' Professionals. The contract should identify whether either party is represented by a realtor or by an attorney. If either the buyer or seller has a realtor, the buyer or seller is probably contractually obligated to pay a commission on the purchase or sale of the real property. If there is a realtor involved and if the realtor's standard offer form is not used, the attorney has a chance to prepare the purchase agreement. If either party is represented by an attorney, or wants notices to go to his or her accountant, then the contract should reflect the identity of the professionals to whom notice is required. In addition, if there is some form of compensation from the closing due to the realtor, the buyer and seller should determine who is going to pay for any professionals involved with the transaction.

9. Closing Date/Possession. The closing date and the date when the buyer shall have possession of the home should be specified. Possession can be a difficult matter to

negotiate. If the buyer plans to remodel the home, the buyer may want possession before paying the purchase price. I recommend against permitting any kind of remodeling to be undertaken before the payment of the purchase price. The risk is too high that the buyer will start a remodel, discover something that was not apparent from an inspection of the home and will then try to cancel the purchase agreement, leaving a partially completed home repair project. There is a distinction between permitting the buyer, or its inspectors, access to the home for inspections or to measure the rooms in the house to prepare construction plans. Normally, the buyer and the buyer's experts should have almost unlimited access to the home. If the seller denies access, and a defect is later discovered, the buyer has a good argument that the seller's delay in permitting inspections is part of the seller's attempt to keep defects concealed from the buyer.

The best advice is to be reasonable. There is little risk that someone measuring the house for new carpet will cause damage to the home that the buyer will not repair before the closing, so allowing access should not be a problem. I would not let the carpet contractor remove the old flooring before the closing.

If the buyer insists on access to the property, then the seller should consider specific provisions in the purchase agreement to protect the seller. The buyer should be required to indemnify the seller for any injury or other loss or damage caused by the access to the property.

10. Personal Property. Any specific items of personal property that are included in or that are excluded from the sale should be listed in the agreement. For example, it is typical to list the washer, dryer, build in appliances, curtains, and window shades. If items of personal property are going to be removed, such as a decorative rock in the front yard, or a special light fixture, the items of personal property not subject to the purchase agreement should be identified.

A word to the wise: If there is some item that has some special or sentimental value, then the seller should simply remove the item from the house before showing the home. I have had cases where the rocks in the front yard were excepted from the sale. The best assumption is that the item that the sellers want to remove is the item that the buyers fell in love with and the buyers can't see buying the house without the special light fixture in the hallway, or without the curtains in the master bedroom. If the buyer removes the items, the seller never sees them, never thinks about them, and the items are never involved in negotiations.

11. Walk Through. A walk through is a provision in the contract that permits the buyer to perform a final inspection of the home before the closing. Usually the walk through is done a day or two before closing or a matter of hours before closing. A walk through is valuable if the seller is supposed to complete some home improvement project, move that lifetime collection of junk from the garage or if there are repairs to the home that are to be completed before the closing. There is no excuse for a buyer's failure to inspect the home before closing. The buyer should perform the inspection two to three days before closing to be certain that any repairs have been made to the buyer's satisfaction. If not, a

day or two should be adequate to allow the seller or the seller's contractor time to redo the work. If the work is not satisfactory, the buyer has two choices. Either delay the closing, which is frequently not possible because of scheduling, or to escrow funds to complete the work. There is no excuse for a buyer's failure to take advantage of a walk through to verify that work has been completed.

12. Assignment. Frequently buyers, particularly investors, may want the right to assign the right to buy the property to another person or to an entity. The right to assign the contract allows the buyer to sell his rights under the contract to another party, or to transfer the right to purchase the property to an entity to be created for the transaction. If the identity of the buyer is a matter of any concern to the seller, then the seller should prohibit assignment, or permit assignment only with the seller's consent. If the buyer wants the right to assign the agreement, the buyer should include language permitting free assignment of the rights under the contract. One issue to deal with in the assignment clause is the effect of an assignment on the liability of the buyer. My recommendation is that the original buyer should remain liable for breach of the contract. Since the seller did not have the opportunity to qualify the assignee, it is not appropriate to have the seller accept the risk that the assignee will not close the deal. The buyer wanted the right to assign the agreement and the buyer should assume the risk that the assignee will breach the agreement.

13. Default. Buyers and sellers should pay particular attention to the default provisions of the purchase agreement. The default clauses frequently appear at the end of the agreement, and are almost added as an after thought. The entire reason for the contract is to determine the rights of the parties and the default clauses specifies what happens if one party does not close.

Generally, real estate contracts provide that the seller's failure to close gives the buyer the right to have a court require that the seller "specifically perform" the contract. The seller can be required to convey the real estate, assuming that the buyer can prove that the buyer was capable of closing. The seller may also be liable for damages to the buyer caused by the seller's delay or failure to close.

If a buyer defaults, courts are reluctant to force the buyer to buy the property. Generally, a court will require that the buyer compensate the seller for the loss of his bargain. For example, if the real estate was sold for $125,000 and the buyer fails to close and the seller resells the property to a second buyer for $100,000, the seller is out the $25,000 difference in price. The seller may also have losses for the carrying costs of keeping the property until a second sale is found.

The contract frequently permits the seller to retain the earnest money as liquidated damages. That means that the seller keeps the deposit, and the deposit is presumed to equal the seller's damages from the buyer's default. The contract at this point can provide that retaining the deposit is the sole remedy, in which case the seller's only claim is for the deposit. The contract can provide that the seller can, at the seller's option, retain the

deposit as liquidated damages, or hold the buyer liable for damages in excess of the deposit.

14. Boiler Plate Provisions. Most contracts contain additional clauses that lawyers refer to as "boiler plate." Typical boiler plate provisions include clauses specifying where notices are to be sent; specifying that the contract is governed by Nebraska law; requiring that suit be brought in a particular court; waiving jury trial; an "integration" clause—providing that all negotiations merge into the written contract; a provision acknowledging that the buyer has received the required seller's disclosure statement; a provision acknowledging receipt of any required lead based paint disclosure and other provisions.

The most important tip in dealing with a purchase contract is to read the contract and determine why each provision was inserted into the contract. None of the language is placed in the contract by accident. All of the provisions have a purpose and if you can not determine the purpose, you should seek an attorney's advice. Under Nebraska law, a person who signs a contract without reading the contract is bound by the contract. Persons are presumed to understand the provisions of the contract, and if you do not understand the contract, you should seek an attorney's advice.

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