

The Massachusetts Homeownership Collaborative

HOMEBUYER COUNSELING CORE CURRICULUM

SECTION V: LEGAL ISSUES

Section Objectives:

- To encourage participants to secure legal representation during the home purchase process
- To provide information to participants on making an offer on a home
- To inform participants about Purchase and Sale Agreements
- To prepare participants for a mortgage closing

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A. THE LENDER'S ATTORNEY

The lender will always have an attorney to handle the Closing. It is the responsibility of the lender's attorney to represent the interests of the lender, not the buyer. This attorney is hired by the lender to handle the legal aspects of the purchase, including:

- Title examination to ensure clear title
- Checking that there are no liens on the property at the time of the sale (e.g. property taxes, income taxes, mechanics liens, unpaid water and sewer fees)
- Checking for any attachments, easements, restrictions, mortgages, bankruptcies, deaths or probates affecting the lender's interest in the property
- Handling the closing for the lender

The attorney will trace the chain of ownership of the property back 50 years and will issue a certification of title. The lender's attorney also hosts the closing and handles the transfer of funds. Although the attorney represents the lender rather than the buyer, the buyer typically pays for the services of the lender's attorney as part of his/her closing costs.

B. WHY YOU NEED A REAL ESTATE ATTORNEY

You are encouraged to seek the services of an attorney during the stages of buying a home. The only professional in the buying process who is hired, licensed and qualified to represent your legal interests in the purchasing transaction is the lawyer who you formally retain.

The Buyer's lawyer should be involved *as early as possible* in the transaction. In particular, you should seek legal advice before signing the Offer, the Purchase and Sale Agreements and any other documents to ensure that you, your deposit and your legal interests are protected. The Offer to Purchase and the Purchase and Sale Agreement are legally binding contracts. Through these contracts, you make a good faith deposit and commit to perform certain tasks in the process of purchasing a home. If you do not perform these tasks, you will lose your deposit. The standard contracts are written in the best interest of the seller.

It is possible for a buyer to have "dual representation," where you can hire the lender's attorney to also represent you at the closing. This will probably save on fees, but be aware that the lender's attorney is not going to look out for your interests. For example, if a dispute arises between you and the

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seller, the lender's attorney will not help you resolve it the way your own attorney would.

Tip:

In some regions of the state, it is common practice for buyers to use the lender's closing attorney. In other regions, it is very important for the buyer to hire their own attorney to represent them. Make sure to inform participants what the common practice is in your area.

The attorney representing you will also make sure that you understand what you are committing to do and that ample time is provided.

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Your attorney can:

- Set the dates and timing for the purchase to protect your deposit money
- Help negotiate a fair purchase price
- Help you prepare the Offer to Purchase
- Help you negotiate a more favorable purchase price if the home inspection uncovers significant problems
- Draft and/or revise the Purchase and Sale Agreement to protect you and your money
- Review any restrictive covenants or deed riders (for affordable units)
- Review closing documents to protect the buyer at and after the closing
- Attend the closing

C. TIPS FOR FINDING AN ATTORNEY

- Attorneys practice many types of law. Make sure that you hire an attorney that specializes in real estate law.
- Obtain referrals from friends or relatives who may have recently purchased a home.
- Obtain referrals from homebuyer counseling agencies.
- When you contact an attorney, be specific about what services you desire. If you only want an attorney to review and negotiate changes in the Purchase & Sale Agreement, it will cost less than having someone represent you throughout the process, from making an offer to attending the closing.

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- Ask the attorney what he/she charges to perform the tasks you specify. Fees may be negotiable. If the buyer already has a real estate attorney, the lender may allow that attorney to act as the closing attorney. If you are considering purchasing a foreclosed property, you should seek out an attorney who has experience with the short sale and foreclosure process to assist you through the additional and complicated steps.

D. THE OFFER TO PURCHASE

The Offer to Purchase is completed by the buyer, typically with the help of a real estate broker or attorney, and presented with a good faith deposit (“earnest money”). You are encouraged to have your attorney review the terms of the Offer before signing it, since your deposit is a risk. This deposit should be made payable to a broker or an attorney and is held in an escrow account by the broker or attorney pending acceptance. It should never be made payable to the seller. If the offer is accepted, the money is credited towards the down payment (and ultimately the purchase price). If the offer is not accepted, the money should be returned to the buyer.

The Offer to Purchase must contain:

1. Property address.
2. The price you are offering (and the amount of earnest money).
3. A timeline for acceptance of the offer. This is the period of time (typically 24 hours, but could be longer if the buyer or seller is out of town or hard to reach) in which the seller must accept, reject or respond with a counteroffer.
4. A timeline for the drafting and negotiation of the Purchase and Sale (P&S), a date for signing the P&S, and a closing date.

The seller and a seller’s broker will want a short time period for the Purchase and Sale Agreement to be signed. Note that this will likely take longer if the sale is a short sale or a foreclosed property.

Your attorney should make sure that the time period is adequate to negotiate the P&S, have a home inspection, satisfy all contingencies and get a mortgage loan commitment. If the buyer is unable to meet the deadlines, and the seller does not agree to any necessary extensions, it is considered a buyer’s breach of contract, which may result in losing your deposit.

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The Offer should also contain standard conditions, known as “contingencies,” including:

1. The sale is subject to a professional home inspection conducted by the buyer’s licensed home inspector within a specified period of time (generally seven to ten days).
2. The wording of the standard inspection contingency should be altered to state that the sale is subject to “a home inspection satisfactory to the buyer, in the buyer’s sole discretion.” The language stating that the home inspector must find “serious structural damage” in order for the buyer to terminate the Offer and get their deposit back, should be deleted.

If you are purchasing a foreclosed property, make sure all utilities are turned on before you conduct your inspection, otherwise you will not be able to get an accurate inspection report. You may need to add in extra time to make sure this is possible. A request to have utilities turned on should be specified in the Offer.

3. The sale is subject to a pest inspection, to the satisfaction of the buyer, in the buyer’s sole discretion, within a specified period of time.
4. The sale is subject to a lead paint inspection within a specified period of time. (For properties built before 1978, the law requires that the buyer have up to ten days to have an inspection for the presence of lead paint, although the buyer has the right to waive this inspection.)

This is particularly important if you are purchasing a multi-family home and will become a landlord and/or if you have young children. There are very strong and specific laws regarding the responsibility of the owner in dealing with lead paint issues.

5. A financing clause. This means that the sale is subject to you receiving mortgage financing by a certain date (“date of commitment”). You should be as specific as possible when describing the type of financing, interest rate and any down payment assistance programs for which you are applying. Note as well that this clause should specify how many lenders you must apply to (you may want to limit this to one) and the date by which applications must be submitted.
6. An appraisal contingency. This can specify that the appraisal must equal or exceed the sales price.
7. The seller provides a certificate indicating a satisfactory Title V inspection. This pertains to houses not connected to town/city

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sewerage. The inspection certifies that the private septic system is in proper working condition and meets state and local board of health requirements.

8. Any request to have the seller contribute to the buyer's closing costs should be included in the Offer.
9. If it is a multi-family, a buyer should specify which unit they would like to have delivered vacant. If the property is a multi-family, the buyer's obligations should be conditioned on the buyer's review and approval of the existing leases and/or tenancy terms for any tenants which the buyer is "inheriting" with the purchase. It is important to clarify whether the property is to be free of tenants at closing, as well. If that is the case, the property should be delivered vacant and in "broom swept" condition.
10. In the case of purchasing an Affordable Housing unit, the Offer is not as relevant because participating in a lottery replaces the Offer and its acceptance procedure in the homebuying process.

Note that any verbal agreements should be written into the Offer and transferred to the P&S. Verbal agreements are not enforceable.

E. THE PURCHASE AND SALE AGREEMENT

Once an offer is accepted, you have the time specified in the Offer to have a home inspection done and to negotiate a Purchase and Sale Agreement (P&S) that is mutually acceptable to you and the seller.

The P&S must include everything that is verbally negotiated between the buyer and the seller, even if they are already contained in the Offer. It is the final binding agreement between the buyer and the seller. The P&S includes:

- A legal description of the property
- The final agreed upon sales price
- The amount of earnest money and down payment
- Items of personal property to be included in the sale
- The period of time for the borrower to get a mortgage loan commitment letter

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- The price confirmed by an acceptable appraisal. The appraisal report should support the sales price of the home with three recent comparable sales.
- The date, time and place of the closing

TIP:

The date of the closing may determine the date on which each mortgage payment is due. It may be to the buyer's advantage to ensure that the mortgage payment coincides with his/her regular pay period.

It is important that you have completed all inspections prior to signing the P&S. Any repairs to be made to the property, price changes or agreements that are negotiated between the buyer and seller should be included in the P&S.

The buyer typically increases the amount of the deposit when the P&S is executed. Sellers will generally want the buyer to make a large deposit. You should put down as little as possible. (In any case, be sure the deposit is held in an insured, interest bearing account and that the interest is divided evenly between the buyer and seller at the time of closing.) If the buyer is expecting to receive down payment or other grant funds, the P&S should that the closing be contingent upon receiving these funds.

Once the P&S is signed, you need to meet the deadlines that have been established. The biggest timing issue is often when you expect to have a commitment letter from the lender approving the mortgage. If the lender does not provide a commitment letter by the date specified in the contract, you risk losing your deposit unless a written request for an extension is given to the seller by the established date (per the financing contingency). If the lender needs more time, you and the seller can sign a written extension of the commitment date as an addendum to the P&S.

Your attorney should change the standard language of the contract to limit your liability to your deposit in the event that you default on the contract. Your attorney should also ensure that you have the right to a final "walk through" of the property just before closing to verify that the property is in the condition agreed upon.

F. THE CLOSING

The closing is a meeting between the buyer, seller, their

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attorneys, lender representatives and real estate brokers for the purpose of both conveying title (ownership) of the property from the seller to the buyer and completing the loan transaction between the borrower and lender. The financial transactions for both the buyer and the seller are identified on a form referred to as the Closing Disclosure. Many Lenders or Closing Attorneys will also prepare a Seller's Form of the Closing Disclosure and a Settlement Statement which compares the buyer's and seller's sides of the financial transaction. These forms are sometimes created because the seller cannot be provided with the Buyer's Closing Disclosure which contains the buyer's loan and other financial information.

The P&S specifies the date, time and place of the closing. (The buyer's attorney should confirm the closing date with the lender's attorney when the commitment is received.) The lender's attorney usually prepares the closing documents, which include the Note, Mortgage and HUD Settlement Statement. The lender's attorney will review the seller's deed, obtain documents necessary to clear the title and pay off the seller's mortgage.

Prior to the Closing

Before scheduling the closing, the lender will require that the buyer present a Hazard Insurance Policy on the home in an amount that is equal to or greater than the mortgage loan amount, or is for the "full replacement value." (See the Insurance Chapter for more information.)

No later than three business days (which includes Saturdays) prior to the Closing, the buyer must receive the Closing Disclosure from the buyer's lender. This will tell you how much money to bring to Closing, and allows you the opportunity to carefully and comprehensively review all aspects of the loan and the closing costs/fees. It also allows you to confer with your attorney as to any questions you may have and to ask questions of your lender about any perceived issues, problems or discrepancies from the earlier-provided Loan Estimate. The "three-day rule" was designed to eliminate any surprises to the buyer at the Closing.

Before the closing, the buyer should:

- Double-check that the seller will be out of the house before the closing date (if a multi-family, that other units are vacant)
- Confirm the moving date with his/her moving company
- Give his/her landlord 30 days' notice, or whatever legal notice is required as specified in the lease

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- Notify the gas, electric and telephone companies of the move, so they can shut off service in the present home and turn it on in the new home
- Walk through the house to ensure that it is in proper condition.

Documents Signed at the Closing

Prior to the closing, you should review the documents to be signed with your attorney. The documents to be signed at the closing include:

- **The Closing Disclosure.** This form, required by federal law, itemizes the services provided and lists the charges to the buyer and the seller. (An estimate of these charges should be sent to the buyer within three days of the application date in the form of a Loan Estimate.)
- **The Note.** The Promissory Note represents the buyer's promise to pay the lender according to the agreed terms. The terms of the loan are set forth, including the date on which payments must be made as well as the location to which they must be sent. The note also details any penalties that will be assessed if the buyer falls behind in paying the loan. It also explains that the lender has the right to require full payment of the loan before the end of the term (called "call" in a loan), if the buyer fails to make the required payments.
- **The Deed.** The seller must bring the deed to the closing, properly signed and notarized. It is the document that transfers ownership from the seller to the buyer.
- **The Mortgage.** The mortgage is the legal document that acts as security (collateral) for the repayment of the Promissory Note. It provides the lender with a "secured" claim against the property if the buyer defaults on the note's terms or on the terms of the mortgage itself. The buyer has possession of the property, but the lender has partial ownership (called "encumbrance") until the loan has been fully repaid. The mortgage also gives the lender certain contractual rights such as the right to escrow for taxes and insurance, to enter the property if it is abandoned and to require that the borrower actually live in the property. The borrower's failure to do any of these things will give the lender just as much right to repossess the house (called "foreclosure") as if the borrower had failed to make the monthly payments.

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- **Affidavits and Disclosures.** The buyer may be required to sign numerous affidavits (for example, that it is your intention to occupy the property) and disclosures (for example, how the escrow account will be administered throughout the year). They may be required by the lender, state law or by secondary marketing agencies. If the buyer provides false information, he/she can face criminal penalties and run the risk that the lender may call in the loan. You are also required to sign an agreement that absolves the bank from any future liability with regard to lead paint.
- **The Deed.** The seller must bring the deed to the closing, properly signed and notarized. It is the document that transfers ownership from the seller to the buyer.

The lender's attorney will request that the buyer present a paid insurance policy (binder) on the house and a certified check for all closing costs (see below).

A Homestead Declaration may also be a part of the closing (see Section H, below).

At closing, after all the papers have been signed and all the fees have been paid, the buyer can get the keys to the home. The lender's attorney will record the deed and mortgage at the Registry of Deeds to finalize the closing. The lender's attorney will also take care of paying off the seller's mortgage and paying off the seller's mortgages and liens, clearing the title of prior encumbrances.

G. TITLE INSURANCE

The lender requires a lender's insurance policy be issued at the time of the closing that protects the enforceability of the lender's mortgage. This loan policy of title insurance insures that the lender is able to foreclose on the mortgage if necessary and that there will not be title issues or unexpected claimants which will get in the lender's way. You pay for the lender's policy as part of the closing costs. The lender's title insurance policy does not protect the Buyer's interests.

At the closing, you also have the option of purchasing an owner's policy that protects your equity in the property. The insurance is not expensive and you are encouraged to purchase it if possible. You pay the premium at closing as a closing cost, and you are never billed for any more premiums. The coverage lasts as long as you own an interest in the property. The number of title issues in existence is significant and a problem with title can be quite costly to an

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owner. In some instances it could wipe out an owner's savings. **Shortly before the closing, you should tell the closing attorney if you wish to purchase the policy.**

H. HOMESTEAD DECLARATION

In Massachusetts, homeowners may protect \$500,000 of the equity in their principal residence against the claim of most unsecured creditors by filing a Homestead Declaration at the Registry of Deeds. The attorney performing the closing can do this, for a small fee. As in purchasing title insurance, you should inform the closing attorney of your wishes to file a Homestead Declaration shortly before the closing. You can also file your own Homestead Declaration after the closing. Forms are available at the Registry of Deeds, and the current filing fee is only \$35.00.

ADDENDUM: New 2015 Federal Regulations' Effect on Homebuying Process

Effective for loan applications submitted on or after October 3, 2015, new real estate lending regulations were put in place by the federal government's Consumer Financial Protection Bureau (CFPB). The new regulations are referred to by the CFPB as Truth In Lending Real Estate Settlement Procedures Act Integrated Disclosures (TRID) or, more commonly as "Know Before You Owe."

The following is a summary of the major changes in the home buying process:

1. The time it will take to complete the homebuying process in a transaction that includes financing can increase by as much as two weeks from date of Offer to date of closing as the new regulatory requirements are put into place.
2. The CFPB requires lenders to supply a brochure to all mortgage loan applicants in which it advises all borrowers to shop at least three lenders before selecting a lender. The CFPB further recommends that while lenders, brokers, and real estate agents can be informative, they also have a stake in the transaction and borrowers are better off getting information from outside sources such as financial and housing counselors, friends, relatives, coworkers and websites.
3. Lenders must provide an estimate of all the closing costs associated with the loan within 3 days of receiving the application and cannot charge any application fees (except credit report fees) until the borrower has informed the lender s/he wishes to proceed. The CFPB believes that if the borrower does not have to pay the application fee in order to receive

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good faith cost estimates, it will allow borrowers to shop more lenders and shop around for better loan terms.

4. The CFPB has reformed and redrafted the forms that lenders have been providing to borrowers in the past, which show good faith estimates of closing costs at application stage and show actual costs at closing. The Truth in Lending and Good Faith Estimate forms have been replaced by the Loan Estimate form. The final Truth in Lending and HUD-1 Settlement Statement have been replaced by the Closing Disclosure Form. The new forms are easier to read, contain more detailed information, and are easier to understand than the previous forms.
5. The Loan Estimate requires the rate lock to be displayed, along with the proposed rate, which cannot change and should help the borrower shop other lenders and feel more secure about whether their rate will change. Because the Loan Estimate also contains all the costs the buyer is expected to incur in the purchase and loan process, it can be used to compare costs of various loans from various lenders without incurring lender fees or seeing negative impacts on credit scores.
6. The CFPB requires the Closing Disclosure Statement be in the hands of the borrower three business days before closing in order to prevent surprises at the closing table. Both the Loan Estimate form and the Closing Disclosure form will be prepared and presented to the borrower by the lender. (In the past, the settlement agent prepared and presented the HUD-1 to the borrower. Most lenders made any changes as they occurred.) The three day advance delivery must restart if a change is not minor but includes significant changes in interest rates and loan programs.
7. The CFPB recommends lenders impound escrows for real estate taxes and home owner insurance for all first time homebuyers.
8. If the Lender the buyer selects has a closed list of attorneys, and the Lender prohibits the buyer from having their attorney close the loan, then the CFPB requires the fees for title services be the same on the Loan Estimate provided to the buyer and the Closing Disclosure.