

# The Massachusetts Homeownership Collaborative

## HOME BUYER COUNSELING CORE CURRICULUM

### SECTION V: LEGAL

#### 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

<b>A. THE LENDER’S ATTORNEY</b>	<b>V-2</b>
<b>B. WHY YOU NEED A REAL ESTATE ATTORNEY</b>	<b>V-2</b>
<b>C. TIPS FOR FINDING AN ATTORNEY</b>	<b>V-3</b>
<b>D. THE OFFER TO PURCHASE</b>	<b>V-4</b>
<b>E. THE PURCHASE AND SALE AGREEMENT</b>	<b>V-6</b>
<b>F. THE CLOSING</b>	<b>V-8</b>
<b>G. TITLE INSURANCE</b>	<b>V-10</b>
<b>H. HOMESTEAD DECLARATION</b>	<b>V-11</b>

#### Core Handouts:

##### Legal Outline

Sample Offer to Purchase Real Estate form (standard form)

Standard Purchase and Sale Agreement (standard form)

HUD Settlement Statement (standard form)

Fact Sheet and Sample Homestead Declaration (standard form)

## SECTION V: LEGAL

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### A. THE LENDER'S ATTORNEY

**There always will be an attorney involved in the purchase of a house. 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 most important role an attorney can play is to review the Offer to Purchase and Purchase and Sale Agreement.**

**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.**

**You should seek legal advice before signing these contracts to ensure that they are altered to protect your deposit and interest in following through on the purchase. The attorney representing you will also make sure that you understand what you are committing to do and that ample time is provided.**

**An attorney can:**

- **Set the dates and timing for the purchase to protect your deposit money**

## **SECTION V: LEGAL**

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- **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**
- **Assist in the mortgage process**
- **Prepare you for the final walk through the property**
- **Review closing documents**
- **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. Keep in mind that the lender's attorney ensures clear title and hosts the closing.**
- **Ask the attorney what he/she charges to perform the tasks you specify. Fees are negotiable.**
- **One option the buyer has is to hire the same attorney that represents the lender since both parties have similar (although not the same) interest in the property. The buyer may select the lender's attorney from a list provided by the lender. In this case, the lender should provide the buyer with a list of at least three closing attorneys to choose from. (Note, however, that this is called "dual representation" and if the lender's attorney is also your attorney and a dispute arises between you and the lender, the attorney is legally**

## SECTION V: LEGAL

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required to step aside and not represent either of you.) 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. There are many conditions that are stipulated in these types of transactions by the selling lender that protect the interests of the bank but also add risk to the buyer.**

*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.*

### 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 to the seller. You provide a small good faith deposit (“earnest money”) at the time of the Offer. 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 counts toward the down payment. 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.

## SECTION V: LEGAL

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- 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, satisfy all contingencies and get a mortgage. If you can't do it during the specified period, and the seller does not agree to an extension, it is considered a breach of contract and you will lose the deposit.**

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

1. **The sale is subject to a professional home inspection conducted on the house within a specified period of time (generally ten days).**

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.” The language stating that the home inspector must find “serious structural damage” should be deleted. The language should indicate that the buyer is “generally satisfied” with the inspections.

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.

2. **The sale is subject to a pest inspection within a specified period of time.**
3. **The sale is subject to a lead paint inspection within a specified period of time.**

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.

4. **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 and the date by which applications must be submitted.**
5. **An appraisal contingency.** This can specify that the appraisal must equal or exceed the sales price.

## SECTION V: LEGAL

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6. **The seller provides a certificate indicating a satisfactory Title V inspection.** This pertains to houses not connected to town/city sewerage. The inspection certifies that the private septic system is in proper working condition and meets state and local board of health requirements.
7. Any request to have the seller contribute to the buyer's closing costs should be included in the Offer.
8. **If the property is occupied, that it be delivered vacant and in "broom swept condition."** If it is a multi-family, a buyer should specify which unit they would like to have delivered vacant.

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

- E. **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 that is mutually acceptable to you and the seller. THE PURCHASE AND SALE AGREEMENT**

**The Purchase and Sale Agreement (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 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 commitment**
- **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.*

**There should also be a mortgage contingency clause concerning your ability to obtain mortgage financing by a specific date so that you do not lose the deposit on the house if the loan is not approved. The contingency can include how many lenders to which you must apply.**

**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.)**

**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 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 HUD-1 Settlement Statement.**

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.

### **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:**

- **HUD-1 Settlement Statement.** 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.) Both the buyer and seller must sign it. The buyer should request a copy a day before closing. Effective January 2010, new RESPA guidelines now require that lender closing costs reflect those stated on the Good Faith Estimate, and that other certain settlement charges not vary by more than 10%. The HUD-1 has also been modified to make it easier for the buyer to understand the costs of the transaction and the terms of the loan.
- **Truth-in-Lending Disclosure Statement.** This form, also required by federal law, discloses, among other things, the annual percentage rate (APR), which reflects the cost of the mortgage at a yearly rate. This rate may be higher than the interest rate stated in the mortgage because it includes any points, fees and other costs of credit. The buyer should have received an estimate of this as well within three business days of the application date. Since the actual APR at closing will always differ (even if by a small amount) from the lender's initial estimate, a new statement is required to be issued at the closing. The Statement will also disclose certain loan terms, such as any prepayment penalty.
- **The Note.** The 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 Mortgage.** The mortgage is the legal document that secures the note and gives the lender a claim against the home if the buyer defaults on the note’s terms. 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” in a mortgage transaction) as if the borrower had failed to make the monthly payments.
  - **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 recording the discharge at the Registry of Deeds.

### **Before the Closing**

**Before the closing, the buyer should:**

## SECTION V: LEGAL

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- **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**
- **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**
- **Check with the lender's attorney to get the exact amount of money needed for the closing and get a certified bank check (made out to the seller, or as instructed by the lender's attorney) in that amount. Bring the check to the closing with picture identification. Bring your checkbook, too, just in case.**
- **Obtain a paid insurance policy (or binder) for the house. Bring it to the closing.**
- **Collect all receipts (e.g. canceled checks) for expenses related to the purchase that have already been paid (e.g. earnest money, deposit, application fee).**
- **Collect any and all commitment letter(s) regarding all loans and assistance programs and bring them to the closing to confirm that the final documents are as expected. A signed document, especially a note, mortgage or other financial agreement (such as a soft second, buy-down or assistance repayment) is presumed to have been read, understood and agreed to by the borrower. The borrower should make sure to check these matters carefully before signing.**
- **Walk through the house to ensure that it is in proper condition.**

### G. TITLE INSURANCE

**The lender purchases a lender's insurance policy at the time of the closing that protects the lender in the unlikely event that any liens on the property are discovered in the future. You pay for the lender's policy as part of the closing costs.**

**You also have the option of purchasing an owner's policy that protects your equity in the property. You are given the opportunity to purchase an owner's title insurance policy at the time of the closing. The insurance is not expensive and you are encouraged to purchase it if possible. Especially in distressed**

## SECTION V: LEGAL

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markets experiencing a high number of foreclosure, as errors and omissions impacting the Title are more common and can create legal headaches for the new buyers. Shortly before the closing, you should tell the closing attorney if you wish to purchase the policy. This insurance is purchased once, and provides coverage for the duration of ownership.

### H. HOMESTEAD DECLARATION

In Massachusetts, homeowners may protect \$500,000 of the equity in their principal residence against the claim of unsecured creditors by filing a Homestead Declaration at the Registry of Deeds. The attorney performing the closing can do this, for a 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.