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People and Property: Looking Out for the Homebuyer

by EMANUEL B. HALPER

When I first met the handyman my wife hired to fix some of the things that I couldn't or wouldn't tackle, I figured he must be selling magazines to pay his college expenses or was collecting for a charity. He was only about 130 pounds and not more than five feet six inches tall. But Ted Snow turned out to be rather handy for all of that. He was the most careful worker you ever saw. Equally facile with a paint brush, a hammer, and a washcloth, he made the place look up. He soon became a fixture at the house.

One Saturday afternoon, Ted revealed that being a handyman was not his true profession. In real life, he was an adjunct assistant professor of comparative literature at two local universities. The title of adjunct assistant gives you no tenure and not much salary for that matter. Hence, the miraculous transformation of scholar to handyman in the summer when teaching is concluded. Ted was hoping to save enough money to buy his own house.

When the work was done, so was the summer; and Ted Snow departed for his academic pursuits. Just before he left he asked whether I would consider representing him in the purchase of a house when he had enough money saved. Sure, I told him; but I doubted whether I would hear from him in this century because the combined earnings from his two professions left him in the lowest ten percentile of American families.

Nevertheless, before the next summer, my wife advised me that Ted had called.

"He's buying a house!"

"Probably for $15,000 with $125 down and the balance by mortgage."

I had to find out how *he* could afford a house.

"Ted. Is it true about the house? Where is it? How much?"

"Oh, it's a great house. It's located in an exclusive section of Old Brookville. It has thirteen rooms and sits on two acres. We'll also have a stable and a greenhouse."

"Wait a second, that kind of property costs a lot of money."

"Oh, yes, I forgot to mention that my dear stepmother passed away last month. I inherited one-fourth of her estate—about $2 million."

Of course, I realized at that moment I would need a new handyman; but the justice of the situation warmed my heart. Who needed $2 million more than this hardworking poetic soul whose earnings prospects would otherwise be rather dismal?

Sudden wealth had not changed Ted's spontaneous naivety. He insisted on coming over immediately with wife and sleeping three-year-old to learn what he had to know about buying a house. In less than a half-hour the Snows were huddled around the kitchen table.

"So you want to buy a house. Be prepared for a trying experience. The first rule to follow is not to sign anything unless I get a chance to review it, explain it to you, and change it if necessary."

He grinned.

"Why are you grinning?"

"I signed it. But it's only a binder. The broker said it wasn't important. Here, look at it."

I really didn't have to look to know what had happened. To protect their brokerage arrangement and to try to push the deal along, many house brokers will ask the prospect to sign an innocuous looking piece of paper they call a binder. Unfortunately, it is often an enforceable contract of sale, because it sets forth the price and terms of sale and states that the buyer and seller agree to them. Many of these binders have been held to be legally binding even if the parties and their lawyers are later unable to agree on more formal contracts. The problem is that neither the buyer nor the seller expects that he will be legally bound when he signs the binder.

But Ted signed the damned thing already. So I figured I should focus on something else.

(I should mention that in many states it is customary for contracts of sale to be prepared by brokers, with no attorney participating. The foregoing remarks are made in the context of such states as New York, where this is not the case.)

THE PURCHASER'S MAJOR CONSIDERATIONS

These are the main things we are concerned with when we represent a house purchaser:

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- ☐ Is the house in good physical shape?
- ☐ Does the seller really own the property free of encumbrances?
- ☐ What is the purchase price, and how will it be paid?
- ☐ Will our client have a chance to raise the money by mortgaging the house?
- ☐ Is he getting all the land and building he expects?
- ☐ What personal property, such as lighting fixtures, carpet, and drapes, come with the house?
- ☐ What happens if the house burns down before the closing?
- ☐ When will the closing take place?

Ted phoned the office the following morning and held on for thirty-five minutes while I listened to the problems of one of our more demanding clients, a real estate developer named Harry, who was hoping to buy a sizable part of Chicago, Illinois.

"Ted, what's the matter?"I asked with an appropriate air of deep concern, when I finally took the call.

"What should be the matter? Everything's fine. I just called to find out how it's going."

"How what's going?" I asked.

"The house."

"Well, it's a little early, Ted. I slept a little late this morning and haven't gotten to it yet. I'm really sorry. I know how much you love the house."

"Yes, we do love it, and we don't want to take a chance on losing it. The broker says he's never heard of a deal taking so long and that if the contract is not signed by tomorrow afternoon he'll get another buyer."

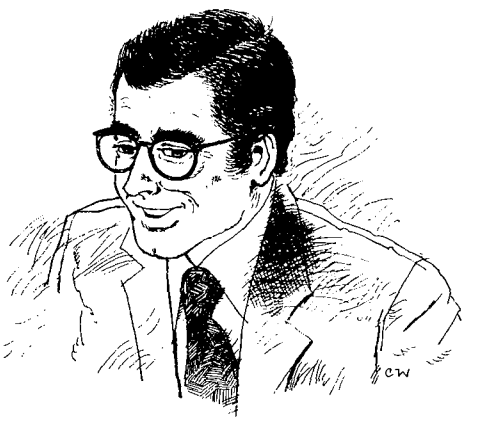
"Oh, that's broker talk, Ted, don't worry. The deal is only one day old."

I called the seller's lawyer as soon as I could. We agreed that he would prepare a proposed contract. Traditionally, in one-family house deals the seller's attorney insists upon "preparing" the contract. What he really does usually is fill in blanks on a semi-illiterate, poorly drafted, and largely disorganized printed form distributed by title insurance companies, realty boards, and commercial stationers. We're familiar with the forms in vogue in our area and prepare our own form of rider to take care of the interest of our client.

We agreed on a meeting to take place in about a week so that the seller's lawyer would have time to draw, and we would have time to review, the form with his insertions.

Ted called five more times that day to gauge our progress. During the ensuing week we comforted him and his wife twenty-six times.

The contract-signing conference was held, as usual, in the office of the seller's attorney. The assembled included Ted, wife, child, seller, seller's wife, broker, seller's lawyer, and me.



When confronted with my form rider to his form contract, the seller's lawyer advised all present that I was a deal-breaking pervert from the big city.

I protested that I wasn't a deal-breaker.

The broker menaced Ted with some quaint expressions.

The seller was making faces and cracking his knuckles.

It was time for a joke. Ted didn't like it, but the rest of them laughed. Now we could get down to business.

THE PURCHASE PRICE

Of course the purchase had been agreed to before the lawyers were involved. I wanted to make sure that Ted would not be obligated to buy unless a lending institution actually obliged him with a mortgage equal to 75 percent of the purchase price. The seller's attorney thought this a quite reasonable request. I insisted that we also specify an interest rate and terms of repayment. In some communities it's hard to find an institution to lend 75 percent on a really expensive house. For such deals, it is wise for the buyer to convince the seller to defer payment of part of the price. Customarily, the deferred payment would be secured by a second mortgage. If a deferred payment is contemplated, the contract should specify the interest rate for the deferred payment, the method of payment, the form of the note, and the form of the second mortgage.

A part of the purchase price—usually 10 percent—is paid when the contract is signed. When I represent a buyer, I insist that this sum be held in escrow until the closing. However, many sellers successfully insist upon having unrestricted use of this payment even before the closing.

Normally, the down payment is paid by ordinary check. But the balance of the purchase price is paid by certified check or official bank check at closing.

WHAT IS BEING PURCHASED?

The form contract specified that we were buying a piece of land described by "metes and bounds." It's hard to understand a metes-and-bounds description without looking at a property survey at the same time. I reviewed the description with Ted against the survey to make sure he was getting all of the land he was expecting to get.

The survey showed that the house sat far from the lot lines, indicating that Ted would be protected from claims that the house encroached on someone else's property.

The contract stated that the seller would convey the property described by metes and bounds "together with all buildings, structures, and improvements thereon." An agreement to convey land and the improvements to the land does not imply that the seller is also selling the personal property in the buildings. Some "personal property" is sold automatically with the house, for example, a boiler. But if the sale includes carpets, drapery, appliances, garden tools, or other similar types of property, the contract must so specify. Trees, shrubs, and other vegetation are conveyed automatically in most states. But it's a good idea to specify just what is being sold and what is not being sold.

There's often an advantage to the buyer if the contract allocates the purchase price between the real property and the personal property. One reason for allocation is that the sales price of real property is evidence of its value for real estate tax purposes.

CONDITION OF THE PREMISES

Most one-family house resales are sold on an "as is" basis. The seller is seldom willing to commit himself to making repairs and renovations. But some sellers are willing to make repairs or warrant that the house is in good order and repair.

When there is time to do so before the contract meeting, we recommend that our clients engage a professional engineer to inspect the house thoroughly. If the engineer's report is favorable, we won't feel too bad about a statement in the contract that the buyer will accept the premises "as is."

Many house deals are plagued by hyperaggressive brokers. Ted's broker had pushed the contract meeting so fast that there had been no time to arrange an inspection. I was left with no choice but to insist that the buyer have the right to conduct a physical inspection of the house and the option to cancel the contract within ten days if he felt discouraged by the inspection report. The broker and the seller's attorney were indignant at the suggestion. The broker slammed the conference table and stamped his foot. The attorney screamed "That's it. No deal." He thrust his papers into his attaché case and dramatically squeezed it closed. The sellers looked puzzled.

But although the attorney packed his things, his buttocks did not break contact with the cushion of his worn Victorian conference chair. After all, how can you walk out of your own office?

He tried to reason with us. "Look, we don't do things like that around here!"

I smiled back indicating that his was certainly a persuasive speech, but I wasn't really moved. For a while nobody said anything—perhaps the most pleasant moment of the meeting. It was up to the broker to break the impasse.

"Look, you guys want a ten-day kickout, and those guys want a no-day kickout. We can solve this by splitting the difference right down the middle. The sellers nodded, the attorney nodded, Ted nodded. Not me. How are we going to get an inspector there in five days? I suggested eight days, and we compromised on seven.

THE CLOSING DATE

Of course, the contract specifies the date of the closing. That's when the property is conveyed, and the purchase price is paid. There's usually not too much debate about this subject, but problems do arise.

If the seller is buying a new house, he is often faced with the problem that he can't pay for the new house until he gets paid for the old house. However, we can't sell or get paid for *our* old house until *we* move out. There are lots of ways to solve this problem. One way is to provide in the contract that the seller need not deliver possession of the house at the closing. He might ask for the right to stay on for a period of a month or more. The buyer should avoid such an arrangement, because it is hard to evict the seller if he stays on after the closing.

To induce the cooperation of a seller who remains in possession after closing, the buyer might insist that a portion of the purchase price be held in escrow and that seller pay rent as long as the occupancy continues. The rate of rent might be structured so that it will rise dramatically if the seller doesn't vacate when he is supposed to.

Traditionally, the closing takes place in the office of the seller's attorneys unless there is an institutional mortgage loan in the offing. When the purchase is being financed in part by a mortgage loan, the privilege of housing the closing goes to the mortgagee's attorney.

THE SELLER'S TITLE

The seller can't sell you more than he has. So if he had already sold his house to someone else, he can't sell it to Ted. Similarly, he could have mortgaged the property, granted easements over it, or agreed to a restrictive covenant that limits the way the premises might be used.

Therefore, we ask the seller to agree that he will convey "good and marketable" title to the buyer. If he agrees to this at a time when the premises are encumbered by a mortgage, it becomes the seller's obligation to see to it that the mortgage is discharged at or before the closing. Of course, many buyers agree to buy subject to existing mortgages. When they do, the amount of the debt secured by the mortgage is deducted from the cash purchase price.

When the parties expect that the buyer will take title notwithstanding the existence of a mortgage, easement, restriction, or other encumbrance, the contract states that the buyer will take "subject to" the specified encumbrances.

Sometimes a seller's attorney will insist that the buyer take subject to "any state of facts an accurate survey may show" or to "easements and restrictions of record." It doesn't make sense to agree that you will buy property despite any state of facts shown on a survey you haven't seen. The survey could show that the house encroaches on the street, which could mean that the house might have to be torn down or moved. It could show that a neighbor's house encroaches on your property; and, as the result of the passage of years, title to the property under the neighbor's house really belongs to him ("adverse possession"). The number and types of problems the buyer can encounter as a result of agreeing to take title subject to the state of facts on a survey he hasn't seen lead me to believe that the buyer should never agree to such a provision.

An agreement by a buyer that he will purchase notwithstanding any "easements and restrictions of record" seems even more haphazard and self-destructive, unless one has searched the record and reviewed all recorded documents. Few buyers or their attorneys are able to do so before a contract is signed. Neither was I when I represented Ted Snow, but the seller's attorney insisted upon such a clause.

How could he, you say? Should he be embarrassed to ask such a thing with a straight face? I would be. But he was made of sterner stuff and proclaimed that this was universally accepted. I needed time and suggested we go for lunch. The broker, in a rare moment of good humor, offered to buy lunch. Everyone but I accepted. I had work to do. The seller's attorney had told me that title was insured by Purity Title Insurance Company, but that he didn't have a copy of the policy.

The new president of Purity was an old crony of mine. Luck would have it that he was in when I telephoned. He called his local office on my behalf, and I was allowed to review their abstract of title information. I was able to accomplish this in one hour and a half. Since the title was clear except for a restriction prohibiting a glue factory, I returned to the meeting hungry but with the confidence that the contract would get signed.

LIMITATION OF LIABILITY

There are times when even the most enthusiastic homebuyers have a change of heart and hate with a consuming passion what was looked upon only with fondness yesterday. Also it is not hard to understand that sickness, death, and an abrupt change of financial circumstances might make it necessary for a buyer to regret his obligations. To this end, we try to insist that the buyer's liability be limited to the deposit, come what may. Such a suggestion is met with occasional opposition, but the average seller understands that it is unjust to expect a buyer to lose more than the deposit if things go awry.

TAXES AND ASSESSMENTS

Everyone expects a buyer and seller to adjust taxes so that each bears an amount fairly allocable to his period of ownership. Assessments, sometimes known as betterment assessments, are a type of tax imposed on owners of real estate to pay for specific public improvements which are said to benefit their property. Since the value of the public improvement, such as a sewer line, is already reflected in the price of the property, most sellers are willing to bear the cost of any assessments relating to improvements constructed prior to the contract.

Customs vary as to whether buyer or seller bears the burden of installments of betterment assessments which come due after the date of the contract. Probably the obligation falls on the seller most often, providing that the improvement was authorized before the contract was signed.

RISK OF LOSS

If the house is damaged by fire or casualty before closing, a buyer would like to be able to choose whether to cancel the contract or to take the insurance proceeds and go through with the deal. Many states have adopted the rule by statute so it is not always necessary to provide for this exigency in the contract. In some cases, sellers insist that the buyer assume the risk of loss by fire. In such a case, it is absolutely necessary for the buyer and his attorney to make sure that insurance coverage is proper.

TITLE INSURANCE

There is too much to be said about title insurance to cover the subject adequately here. But title insurance should be discussed in the contract except perhaps in those communities in which title insurance is not available. The buyer should insist upon a right to cancel unless a title insurance company acceptable to him is willing to insure title to the property. Title companies do limit their coverage by designating exceptions to coverage and by the standard conditions of their title insurance policies. A buyer should be willing to live with the conditions of the policy and many of the so-called standard exceptions. In some states title companies will delete some of their "standard" exceptions for the consideration of an extra premium. If the title insurance binder sets forth any other exception, the buyer should have the right to refuse to buy unless the exception relates to a mortgage, easement, or other lien to which the buyer consents when he signs the contract.

PREPARATION FOR THE CLOSING

It is important to think about the ultimate closing day even while discussing the contract. Remember that the seller owns the property until title passes. Pay little attention to the theoretical concept in some states which proclaim that "beneficial title" passes when the contract is signed. The fact remains that whether one has beneficial title or not, the seller still lives in the house and can exclude the buyer from it.

It is important for a buyer to get inside the house before closing. Why? To make another physical inspection. A homebuyer will want to check before closing to see whether the physical condition of the house has deteriorated. Although many sellers use the utmost care to deliver the house broom clean and in good repair, some have been known to deliberately destroy parts of the house. Unless the contract gives a right of entry to the buyer, the seller can legitimately exclude him until title passes.

With a bit of salesmanship, a little acting, and a lot of hard work, I had persuaded the seller's attorney to see most things my way. (And why not!) Buyers and sellers signed the contract with a great deal of relief. The broker handed out cigars. We departed.

With the contract behind us, the rest went well. The house showed up well on inspection. Title was good. Even the closing was harmonious.

Ted finally owned his house.

Now that Ted was a millionaire and owned a big home, I scurried about to find a new handyman. It was reasonable to expect that Ted might not want to caulk my windows anymore.

You all know what an ecologist is—a guy who bought last year.

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