The All-Important Purchase/Sales Agreement

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Most riparians are eventually involved in a purchase or sale of their waterfront property. With the exception of perhaps the deed (or land contract) and the title insurance policy, the purchase/sales agreement ("purchase agreement") is probably the most important document in a waterfront sales transaction. A purchase agreement is a binding contract. It is not merely a guide, letter of intent, or other nonbinding document. Unless both the prospective buyer and seller agree to a formal signed written amendment or change to an already-signed purchase agreement, both parties are "stuck" with the originally-executed purchase agreement.

All of the significant terms of the property purchase/sale should be expressly dealt with in the purchase agreement. Some of those important items include, but are not limited to, a preface or introductory clause that often states the names and addresses of the parties and the purpose of the agreement or contract, a "time is of the essence" clause, environmental issues, a risk of loss clause, an "as-is" clause for the seller (no warranties except as to title) or an express warranty, the purchase price, legal description for the property, fixtures and personal items included in the sale (full or partial "with contents" clause), financing, earnest money deposit, who pays any broker or expert fees, proration of property taxes at closing, proration for other fees (water bills, association dues, etc.), the type of deed or land contract to be given at closing, title warranties, representations, miscellaneous contingencies, real estate transfer taxes, arbitration clause, possession date, the closing date, seller's disclosure, land division rights (if any), survey, inspections, closing costs, title insurance (and title commitment), and remedies upon a breach. Unlike most purchase agreements, however, a purchase agreement for riparian property may also include a representation and warranty on behalf of the seller, or a contingency allowing the buyer to confirm, that the property includes not less than a specified number of feet of frontage on a particular body of water.

In Michigan, to be valid, an agreement regarding the purchase or sale of real property must be in a written document, signed by both parties. This is covered by what is commonly called the "Statute of Frauds." See MCL 566.106, 556.108, and 556.132. Every contact in Michigan must include an offer and an acceptance. *Mathieu v Wubbe*, 330 Mich 408 (1951). In a real estate purchase agreement, typically, the buyer makes the "offer" and the seller effectuates an "acceptance." Once the purchase agreement has been signed by the parties, it is not really that important who made the "offer" and who made the "acceptance."

At a bare minimum, a binding purchase agreement for real estate in Michigan must be in writing and must include all of the following essential terms:

- A description of the property (address, permanent parcel number/tax identification number, and/or the actual legal description).
- The terms (including the purchase price, which is sometimes called the "consideration").
- The time of performance.
- It must be signed by both parties.

While no one wants to make the purchase of a waterfront property any more adversarial than the transaction needs to be, a prospective purchaser should assume that no representation, warranty, promise, agreement, or guarantee by the seller (or the seller's realtor, broker, or attorney) is binding unless it has been put in a writing signed by the seller. The notion that the buyer and seller can have oral side agreements will frequently involve promises or representations that prove forgotten or unenforceable.

If a purchase agreement is litigated in court and there is an ambiguity, Michigan law indicates that any ambiguity is to be construed against the party who drafted the document, which is usually the seller (although sometimes it is the buyer). If there is a standard printed purchase agreement provided by the seller, generally any ambiguity will be construed against the seller. *Cousins v Melvin F Lanphar & Co*, 312 Mich 715 (1945); *Keller v Paulos Land Co*, 381 Mich 355 (1968).

In Michigan, there is no legal requirement that a specific form or type of a purchase agreement be utilized (although certain wording or topics must be included in the written document). Typically, real estate brokers have come up with standard purchase agreement forms for different regions of Michigan, which are generally widely accepted. There are other forms

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available. On occasion, the parties themselves (or their attorneys) will draft a unique contract for the particular real estate transaction involved. Whenever standard forms are used, they will likely require some modification—even "good" forms must usually be altered. Regardless of whether a standard or customized form is used, both parties should fully and carefully read all portions of the agreement and understand all terms before signing. Better yet, whether you are a buyer or a seller, have your real estate attorney review the document before you sign it. Do not assume that the document can be modified later. Typically, the document cannot be amended unless the other side also agrees in writing, which frequently, the other side will refuse to do.

Of course, the most important term in any purchase agreement is likely to be the price of the property. Realtors and real estate agents typically have extensive experience in determining realistic property sales prices. They also have access to a significant number of databases that will help the seller determine a reasonable listing price, as well as advising buyers what a particular property is really worth. Under Michigan law, the assessed value of a property for property tax purposes should equal approximately 50 percent of the true cash value (or fair market value) of the property. Thus, theoretically, doubling the assessed value or state equalized value of a property (not the "taxable value") should provide a fairly good indication of what the property is worth. Finally, either a buyer or seller can hire an independent third-party appraiser to give a formal professional opinion regarding what the property is worth.

Quite often, a "mating ritual" occurs between a seller and a potential buyer regarding the proposed purchase agreement. One party (or the other) will submit a purchase agreement to the other side (with specific terms and conditions), which will be rejected by the receiving party. That party will then submit a new, revised purchase agreement or a written counter-offer. That counter-offer is sometimes rejected and the first party will submit a counter-counter-proposal. In some situations, such "back and forth" can be a waste of time. In many cases, it is best for the parties to simply agree orally on the significant terms (such as the purchase price and financing), with one of the parties then preparing a purchase agreement consistent with the oral agreement.[1] Of course, until the final purchase agreement is signed by all parties, any oral agreement will not be binding. Nevertheless, reaching agreement orally on significant terms (and having a purchase agreement drawn up accordingly thereafter) can sometimes cut down on the wasted "back and forth," and potentially, the expenses of having attorneys, realtors, or others revise, draw up, or redraw purchase agreements. In almost all real estate transactions, contingencies should be added to the standard purchase agreement form. What is a contingency? A contingency is a matter written into a contract that, if a certain matter doesn't occur, allows a particular party to the contract to cancel the contract. Having a contingency in the purchase agreement allows the benefited party to "lock in" the other party but still permits the benefited party an "out" if an important matter covered by the contingency is not met. Some common contingencies for a purchase agreement for waterfront property include, but are not limited to, the following:

- **Certain financing being available to the buyer at or before closing (for example, the ability to obtain a 30 year mortgage with 20% down and an interest rate of 5% or lower).**
- **The results of a property inspection being acceptable to the buyer.**
- **Positive test results for an on-site private septic system and water well.**
- **The occurrence of certain zoning and other municipal approvals.**
- **The buyer's (or her attorney's) approval of the title insurance commitment results and the seller's title.**
- **The buyer's (or her attorney's) approval of survey results.**
- **The ability of the buyer to obtain a certain type of permit from the local government or from county or state officials, departments, or agencies before closing.**
- **A third party appraisal valuing the property at a certain level or higher for financing or other purposes.**
- **Confirmation that the property is riparian and how much lake frontage is involved.**
- **The buyer's approval of environmental tests, inspections or reports (typically limited to non-residential properties).**

Most contingencies benefit one party or the other, but rarely benefit both the buyer and the seller.

In Michigan, if a property sale involves an existing dwelling, the seller must fill out a seller's disclosure statement pursuant to the Michigan Seller Disclosure Act, MCL 565.951, *et seq.*, and provide it to the prospective purchaser.[2] The disclosure statement should be delivered to the prospective buyer at or prior to the time that the purchase agreement is signed. The disclosure statement can be delivered to the buyer at a later date, but it is important to note that the Seller Disclosure Act provides that the buyer may terminate the purchase agreement within 72 hours after the disclosure form is personally delivered by the seller to the buyer (or within 120 hours if the disclosure statement is delivered by registered mail) if delivered after the purchase contract is signed. Accordingly, a failure to deliver the disclosure statement when the contract is signed can provide a pitfall for a seller who believed that she had a binding agreement for the sale of the property.[3]

What happens if a contingency in a purchase agreement is not met? Contingencies can run in favor of the purchaser, seller, or both. If a contingency is not met and the party

benefited by the contingency properly notifies the other party in a timely fashion, the purchase agreement is typically canceled, with no further obligation by either party (except for the normal obligation of the seller to return the buyer's earnest money to him/her).[4] One word of caution regarding contingencies involves proper notification from the party benefited by the contingency to the other party. Even if a contingency is not met, the benefiting party cannot benefit from that contingency's failure and cancel the agreement unless the benefiting party provides appropriate written notice (usually, as specified in the agreement) to the other party by some date specified in the agreement or prior to closing. If the notice requirements for "exercising" a contingency are not followed, the party otherwise benefited by the contingency may be deemed to have waived the right to cancel under that contingency and may be stuck with going through with the real estate transaction.

It is important to remember that canceling a purchase agreement due to the failure of a contingency (which is lawful and consistent with the agreement) is different than breaching or breaking the agreement (which, of course, constitutes a breach of contract).

If both parties agree to a change, amendment, or modification of one or more terms of the purchase agreement, it can be effectuated by a document signed by both parties, which is often referred to as an "addendum" to the purchase agreement (although on occasion, it is called an "amendment").

What if one party to a purchase agreement breaches or violates a provision of the agreement? Assuming that the person in apparent violation of the agreement is not properly exercising a contingency, they will have breached the agreement and are subject to potential penalties. While there are certain remedies available pursuant to statute and common law in Michigan, in many cases, the remedies for a breach of a purchase agreement can actually be modified by a provision in the agreement itself. Normally, however, if one party breaches the purchase agreement, the other party is entitled to "specific performance" should litigation arise. Specific performance is simply a court order requiring the breaching party to fulfill the terms of the agreement (usually, that means proceeding to a closing regarding the real estate involved). In some cases, if a prospective purchaser breaches a purchase agreement and a closing cannot occur, the breaching purchasing party would likely forfeit their earnest money, but may also be subject to other additional penalties. On occasion, the "wronged party" can also recover damages from the breaching party.[5]

It should be kept in mind that a purchase agreement does not, in and of itself, transfer title to real estate. Rather, it is a contract by which the parties agree to proceed to an eventual closing whereby title is formally transferred to the purchaser via a deed (or land contract) at closing if certain conditions and requirements are met. Accordingly, purchase agreements normally are not recorded with the local county register of deeds. On rare occasions, the parties may execute a short document entitled "Memorandum of Agreement" (or the equivalent) that is recorded with the county register of deeds to indicate to the public that a purchase agreement has been entered into by the parties regarding a particular piece of property (i.e., a sale is pending) and that a closing might occur regarding the property. That will give formal notice to the public, so that creditors and other potential other buyers will have "record notice" of the pending potential sale.

By the way, contrary to popular myth, one cannot get out of a signed purchase agreement due to the "fine print" based on a claim that the person did not understand the terms of the agreement. The general binding nature on both parties of a signed purchase agreement for real estate in Michigan cannot be overstated (assuming that the document is properly drafted and contains no "loopholes").

[1] Some real estate professionals strongly disagree with this assessment and believe that the party who submits the first purchase agreement (with their own wording) has a tactical advantage.

[2] Likewise, if a dwelling has lead paint (or was built prior to 1978), a similar disclosure must be made.

[3] A prospective purchaser should coordinate the seller disclosure statement with the purchaser's professional inspector.

[4] Many contingencies have an express time limit associated with them. Not acting within the time period can result in a sanction against the party otherwise benefiting from the contingency (for example, waiver of a right for inspection or cancelation based on inspection results, having to go through with the closing regardless, etc.).

[5] Sometimes, such damages can also include having to pay the commission or fee of one or more realtors or real estate agents.