

The Building Contract

“Whereas the party of the first part hereinafter witnesseth...” The contract legalese that confounds and sedates us was written by and passed down through generations of attorneys and judges. The time-tested phrases, already interpreted in the courts, have predictable meanings. Rewording these traditional phrases into everyday English would require reinterpreting them. Rather than risk surprises in court, we all endure the legalese. In spite of this, read the documents associated with planning and building your new home, or ask your attorney to review them. If you have questions, get answers before you sign.

Contracts vary in form, length, content, and print size. Expect standard elements such as the names of the parties, dates and signatures to show up in every contract. Contracts often contain clauses that address company experiences and regional items.

The contract for the purchase of a new home includes a collection of documents. These may include the purchase agreement itself, blueprints, specifications, option and color selection sheets, lighting schedule, site drawing, and limited warranty. Besides drawing this collection together, the purchase agreement includes many common clauses such as those briefly described here.

PRICE AND ALLOWANCES

The total cost of home is stated in the contract. This cost is subject to change based on your change orders and selections. You may be ready to get the building process moving but still need more time to finalize choices for items like carpet, cabinets, tile, appliances, and light fixtures. To address these items, you and your builder can agree to an allowance in the contract. An allowance is the estimated cost of each listed item. This amount is included in the contract total and therefore your mortgage. If the actual cost of the item exceeds the allowance, you can pay the difference in cash or ask your lender to approve a higher mortgage.

FINANCING

Unless you are paying cash for your home, you apply for a mortgage shortly after signing the contract. A standard finance contingency clause protects you in the event you do not qualify for the financing described—a disappointment that prequalifying makes unlikely. However, if this did occur, this clause says that the contract is void and the builder returns your deposit.

CONSTRUCTION

The contract lists the plans, specifications, and buyer selections sheet—by name, number of pages, and date—that describe the work to be done. The builder commits to doing this work in a “workmanlike manner” as defined by general practice region.

COMMENCE AND COMPLETE CONSTRUCTION. Understandably, you are anxious for the builder to start your home. However, several preliminary tasks usually need to be completed before the builder begins construction. Many builders wait for the buyer's loan to be approved before beginning to build the home. Obtaining a permit can take from a few days to a few months. Skilled labor shortages, weather, and change orders can extend the construction schedule. Contracts often specify that the home is considered complete and ready to close when the building department issues a certificate of occupancy. The builder should keep you updated about the target delivery date. Seldom does either party intentionally delay the process; the buyers generally want their home and the builder wants to be paid. However, most contracts describe the liability for extra expenses due to avoidable delays caused by either the builder or the buyers.

CHANGE ORDERS. Many builders allow buyers to request changes during construction. Wise buyers and builders make all changes in writing, including detailed descriptions of materials and labor whether added or deleted, schedule extension, and costs.

CONFORMANCE WITH PLANS AND SPECIFICATIONS. This clause allows the builder to make changes required by code revisions, site conditions, or other events outside his or her control. If a supplier goes out of business or a manufacturer updates models, the builder has no choice but to alter the intended home accordingly. "The builder has the right to substitute materials or equipment of equal or better value" appears in nearly every new home contract.

Similarly, since a home is handcrafted by human beings, exact reproduction is unlikely. Measurements will vary slightly from any models or plans. The exact placement of switches, outlets, and vents change a bit.

Review each detail of your home's specifications carefully. They define the materials and methods the builder will use to construct your home.

PLAN OWNERSHIP. Production and semi-custom builders own the plans from which they build, even if they allow some custom changes. A few builders will sell a copy and grant permission to use them with limitations. The cost is usually significant since house plans are intellectual property.

SITE VISITS. Your builder may restrict site visits due to increased safety regulations and insurance liability. Recognizing buyer's understandable interest, some builders schedule tours of the home at specified stages of construction.

NONINTERFERENCE. The builder's routine inspections identify items that need attention. Your input should be given to the builder, not the people working on site. They have no authority to change anything, and confusion can easily result.

INSPECTION AND ACCEPTANCE. Shortly before closing, you will review your home to confirm that it includes all the items you ordered and that your builder met the promised standards. Most builders combine this tour with an educational demonstration of your new home and discussion of maintenance and limited warranty coverage.

SITE CLEAN-UP. Keeping the construction site clean and safe is the builder's and trade contractor's responsibility.

MANDATORY CLAUSES. An insulation is one example of a mandatory clause. Builders must specify the standards of insulation used in your home. This information can appear in the contract or an addendum to the contract. A notice discussing radon, while not required has become common.

WARRANTY

Another document “incorporated herein by reference” is the builder’s limited warranty. The limited warranty your builder provides defines responsibilities if something goes wrong in your home after you close on it. The limited warranty is then part of the legal agreement between yourself and your builder.

HOMEOWNERS ASSOCIATION

The contract will reference applicable homeowners association documents as part of your agreement. These include Covenants, Conditions, and Restrictions, known affectionately as “CC&RS.” Review them carefully and take them seriously.

SETTLEMENT

This clause explains how the builder transfers ownership of the home to you. The Real Estate Settlement Procedures Act, RESPA, regulates this event.

POSSESSION

When the title or escrow company has recorded transfer of title to the property, you can take possession of your new home. In most jurisdictions, you may take possession or move your belongings into the home only after builder obtains a certificate of occupancy from the building department.

INSURANCE

Adequate insurance coverage for construction work is essential. The contract designates the type and amount of coverage the builder will maintain.

DEFAULT OR TERMINATION

A termination clause defines the circumstances under which either party can terminate the contract and what obligations and costs exist if either party defaults or fails to fulfill its duties under the contract.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

No one plans to have disagreements during construction of a new home or the warranty period but they can occur. Some contracts address the possibility by providing for arbitration or mediation. In arbitration, each side presents its views and the arbitrator makes a decision. In mediation, a mediator facilitates communication and guides the discussion as the two parties come to their own solution. Either can forestall court action, at least until the parties have used the ADR method described in the contract. Make sure the contract is clear about whether the result of

ADR is binding.

CO-OP BROKER

If applicable, the name and address of your real estate agent may appear in the contract along with the percentage or amount of commission due at closing.

MISCELLANEOUS

Most contracts contain clauses covering standard legalities. The “entire agreement” clause is one of the most significant. It says that only what is in writing counts. The contract documents should contain all points of agreement. In fairness to yourself and the builder, do not rely on human memory regarding undocumented promises. Other miscellaneous clauses might include information such as the following:

>where notices about the contract must be mailed

>that pronouns and gender words do not limit the application of the clauses

>that if one clause is found unenforceable by a court or is waived by either party, the rest of the contract still applies.

>that the terms of the contract survive or continue in force after the closing or settlement on the home

The contract is in force only when all named parties have signed it. The meeting to go over all the paperwork and sign everything can take up to several hours. Prepare for it by asking to review and note any questions. Read everything before you sign it. This paperwork is the official beginning of building your new home.