

# **The Virginia Homebuyer's Manual**

## ***Third Edition***

**Prepared by the Real Estate Section of The Virginia Bar Association**  
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The Virginia Homebuyer's Manual is a project of the Real Estate Section of The Virginia Bar Association. Opinions expressed herein are those of the authors and do not necessarily represent the views of The Virginia Bar Association or any of the organizations whose representatives reviewed and commented upon the manual prior to its publication. We gratefully acknowledge the financial support of the Virginia Law Foundation.

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### **IMPORTANT**

This manual is intended to provide information of a general nature. The goal is to acquaint the reader with some of the issues which may be important or helpful in purchasing a home in Virginia. Certain exceptions to general rules have been omitted. Furthermore, there may be issues which are important to a particular reader. Accordingly, the material in this manual will not necessarily be totally applicable or complete with respect to any particular situation or transaction. While the manual is intended to be helpful in giving information and raising questions, it is not intended as, nor can it be considered or used as, a substitute for the advice of an attorney or other appropriate advisor on the subject of the purchase of a home.

The material contained in this manual is based upon the laws and general practices in effect in the State of Virginia as of 2000.

While this manual has been prepared from a model developed by the Task Force on Residential Real Estate of the American Bar Association's Real Property, Probate and Trust Section, neither the model nor this manual has been approved by the American Bar Association or the Section.

## **FOREWORD**

This manual is intended to assist persons who are purchasing a home in Virginia by discussing the various legal and other considerations involved in such a transaction. While it is intended for all who are interested in understanding the basics of the homebuying process, it is particularly directed to those who have never bought a home, or who are buying a home in Virginia for the first time. However, the manual is not intended as a substitute for the advice of an attorney.

We hope and believe that the residents of this state will benefit from the work of those whose efforts were involved in the creation of this manual through a greater knowledge and understanding of the many considerations involved in buying a home in Virginia.

## **CHAPTER ONE**

### **An Introduction to the Home Buying Process**

It has often been said that the single most important purchase for most people is the purchase of a home. For the majority of Americans, the purchase of a home involves a great deal of financial sacrifice. In addition to being the most expensive purchase for most people, it is often one of their most emotional experiences. Even with so much at stake, many people approach the home buying process with little or no knowledge of the process itself.

The Real Estate Section of the Virginia Bar Association has published this manual in the hope that it will enable you to approach the home buying process properly and to remove much of the mystery which most people feel clouds that process. This manual is not an attempt to be the final word on buying a home. It is the intention of the authors to provide you with the information necessary to enable you to ask more questions so that you will better understand the home buying process.

For ease, convenience and quick reference, this manual takes you from the earliest beginnings of the process of buying a home to the closing--the point at which you can walk into your new home and call it your own. An index of terms which are discussed in the manual is included at the end, as is a glossary of additional terms which are often encountered in the home buying process.

Please keep in mind when referring to this manual that it is only a tool to enable you to ask the proper questions and seek the proper answers. Ultimately, it will be the professional advice that you are able to obtain which will help you most. It is for this reason that we encourage you to utilize the services of the professionals normally involved in the home buying process.

#### **Who Is Likely to Be Involved in Your Home Purchase Transaction?**

If your home purchase is typical, you will encounter many parties besides the seller, including some or all of the following:

- "Real estate brokers and their sales associates;
- "Your lender;
- "Your attorney and attorneys for the seller and your lender;
- "A title insurance company;
- "An appraiser;
- "An escrow or closing agency or company;
- "A surveyor;
- "Property inspectors;
- "A mortgage banker or broker.

The role of each of those listed above in the home buying process will be described in this manual.

#### **Where Does the Home Buying Process Start and What Does It Really Involve?**

Most home purchases involve a logical sequence of events which can be divided into four stages: First, making decisions about several matters, including the specific neighborhoods in which to focus house hunting; whether to utilize the services of a real estate broker or an attorney, and if so, which ones; and

how to finance the purchase of the home selected. This series of events is described more fully in Chapter Two.

Second, negotiating and executing a contract for purchase with the seller. Since this contract will create a road map for the rest of the home buying process, this is a crucial stage. It is discussed in Chapter Three.

Third, the undertaking of various activities by everyone involved in the transaction between the time the contract for purchase is signed and the time closing occurs; that is, following the road map created by the contract for purchase so that a successful closing can occur. These activities are described in Chapter Four.

Fourth and last, closing the purchase; that is, meeting with your attorney or closing agent and the seller at a designated time and place to make payment and take on obligations in exchange for delivery by the seller of a deed to, and possession of, your new home. The closing process is described in Chapter Five.

Chapter Six and Chapter Seven describe the concepts of financing and title. Both are of fundamental importance in the home buying process, and you will want to be familiar with the concepts discussed in these chapters.

## CHAPTER TWO Beginning the Process

### Choosing a Neighborhood

At the beginning of the home buying process there are several areas which must receive your attention. One of these is the choice of a neighborhood. This choice can be as important as the choice of the home itself. There are many things to consider in connection with choosing a neighborhood. The following is not a complete list but is intended to give you some ideas:

*"Schools.* For many people, the decision on where they will live will be determined by the quality of the school system servicing their neighborhood.

*"Proximity to Work, Schools, Medical Facilities, Shopping and Places of Worship.*

*"Newer Versus Older Housing.*

*"Amenities.* Amenities which may be important in the choice of a neighborhood are the availability of bus lines to work, schools, shopping and other activities, and the availability of facilities such as cable television, a club or golf course, tennis courts, a pool and other conveniences.

*"Cost of Living in the Neighborhood.* A real estate broker may best be able to give you an idea of the costs involved in living in any neighborhood, and the seller should be asked about such matters.

*"Restrictions and Zoning.* What kind of protection exists to ensure that the attractive neighborhood you see when you find your new home will maintain its character in the future? On the other hand, are there any restraints which will restrict your use of the home you buy?

*"Commuting To and From Important Areas.* This can be particularly important to check out in a large metropolitan area.

*"Traffic Volume and Patterns.* Do you want a quiet cul-de-sac so that children can play safely? Or would you prefer to be on a busier street for security purposes or ease of access?

*"Drainage and Utilities.* Every home and neighborhood should be examined for proper drainage-especially in areas where heavy rain is common. Will you need to buy flood insurance because the home is in a special flood hazard area?

*"Taxes and Other Assessments.* The amount of property taxes may have a substantial bearing on whether or not you are able to purchase the home, because the amount of taxes is usually considered by a lender in computing the maximum monthly payment a homeowner can afford. Is there a homeowners association which charges assessments? Does the neighborhood pay for other special services, such as garbage collection or security? Is the property located within a municipal utility district? Are there other assessments charged or contemplated for such things as sidewalks, curbs and gutters, and street lighting?

*"Availability of Fire and Police Protection, Security and Other Such Services.*

### Selecting a Broker

Real estate brokers and their sales associates are professionals in real estate and are licensed by the Virginia Real Estate Board, a state agency. They can assist you throughout the home buying process in many different ways.

Many brokers and their sales associates are Realtors. To be entitled to be a Realtor (a copyrighted word), a broker must belong to the local Board or Association of Realtors and the National Association of Realtors and subscribe to a strict code of ethics. All brokers are not Realtors, and thus if you wish to

engage the services of a Realtor, you must determine for yourself whether the broker you select is also a Realtor. An advantage to using a broker who is a Realtor is that in most cases a broker must belong to the local Board of Realtors in order to be a member of the local Multiple Listing Service (discussed shortly).

Most home purchases involve both a listing broker and a selling broker. Although sometimes they are the same broker, typically they are different individuals or firms. The listing broker enters into a relationship with the seller - most often a legal relationship called agency - whereby in exchange for the promise of the payment of compensation the listing broker agrees to make reasonable efforts to obtain a buyer for the property on the terms and conditions, including price, offered by the seller.

Many brokers belong to a Multiple Listing Service (MLS), which is a system in which members of the service make their various listings known to each other. Those listings are property information sheets found in MLS books or produced by computer networking. Once a listing is submitted to the MLS, the information about the seller's property is made available to hundreds, sometimes thousands, of other brokers and their sales associates.

Until the past decade, the entry of a listing into the MLS was most often called an offer of subagency to the other MLS members. That is, the listing broker, as the agent of the seller, makes an offer to pay compensation to other brokers for producing a buyer who is willing to buy the seller's property and who enters into a legally binding contract of purchase. The broker who produces the buyer which results in the sale is called the selling broker. Sometimes the listing broker finds the buyer, in which case he also becomes the selling broker and, therefore, entitled to all of the compensation paid by the seller. Most often the selling broker is a different person and is paid a subagent's fee by the listing broker.

Under the traditional concept of subagency there was frequent confusion over the obligations of the selling broker. Since as a subagent he is acting for the listing broker, he owes a legal duty to the seller. This duty is usually clear to the listing broker, for he is the individual who has established the relationship with the seller and entered into a written listing agreement with him, but it is less clear with the selling broker who is not also the listing broker. Often the selling broker does not personally know the seller and under the Realtor's Code of Ethics usually cannot have direct contact with the seller, but rather can act only through the listing broker. The selling broker often establishes a close personal relationship with the buyer. Yet the selling broker who is acting as the subagent of the listing broker owes his allegiance not to the buyer but to the seller.

This is not to say that the agent representing the seller does not have legal duties to the buyer. Indeed, he must be honest and fair to the buyer and generally may not withhold information about the property that would materially affect the buyer's decision to purchase or not to purchase. The broker, regardless of whom he represents, is charged with revealing to the buyer any significant defects about the property known to him.

It is important to understand the buyer's relationship with the real estate brokers since it is easy to assume that the buyer is being represented by that broker, particularly when he works with the broker over an extended period of time.

A new trend that has become increasingly popular in many areas in Virginia is what is referred to as buyer brokerage. Instead of the selling broker acting as a subagent of the listing broker, a legal relationship is created between the broker and the buyer; that is, the broker becomes the agent of the

buyer. That relationship shifts the legal duty of the broker from the seller to the buyer.

In order to create a legal relationship between the broker and the buyer, an agreement, preferably in writing, must be entered into. One of the most important terms of that agreement is payment of compensation, including the amount, when it will be paid, and by whom; that is, whether the buyer will pay the broker or whether the broker will be paid from the proceeds of the successful transaction.

In order to accommodate buyer brokerage most MLSs have now changed from an offer of subagency, as previously discussed, to an offer of cooperative brokerage. When the listing broker puts a listing into MLS it no longer automatically becomes an offer of subagency whereby the selling broker, in order to accept the offer, is required to become an agent of the seller. Instead the offer in MLS is now an offer of cooperative brokerage whereby the selling broker can become a subagent of the seller or can participate in the sale of the seller's listing as an agent of the buyer.

It is expected that buyer brokerage will become more and more popular. Many suggest that the concept of subagency has no place in the real estate market: it is too misleading to buyers, it is unnecessary for two brokers to both represent the seller, and it is far better for the seller and buyer to be both represented.

Other changes are also occurring in the real estate market, particularly in the fast changing areas of technology. Listings themselves can now be found on the Internet, and many Realtor Associations, including the National Association of Realtors, and brokerage firms have their own web sites. Many believe that the concept of agency itself is outdated and that the legal concept of an agent acting for a principal has no place in the industry. They point out that many sellers are primarily interested in a successful sale and will pay compensation for that sale, but they are not so concerned or interested in how that sale comes about.

One alternative to agency is the independent contractor relationship between the seller, buyer, and broker. Although space does not permit an analysis between agency law and independent contractor law, buyers should be alert to possible changes which could occur should the Virginia General Assembly by legislation redefine the role of the broker from agent to independent contractor.

### **Services of the Broker**

*Finding the Right Home.* A broker can point out both a home's and a neighborhood's advantages and disadvantages. The broker should be able to supply information on property values and will probably have a list of comparable sales which you can use to assess the value of the house you wish to purchase by comparing recent sales prices of similar homes in the same neighborhood. The broker should be able to supply information concerning all of the important factors in determining the proper choice of a neighborhood, and may be able to point out to you aspects of a neighborhood which may be appealing or unappealing to you but which you might not necessarily discover on your own. The broker can assist you in related matters as well, such as determining whether it is appropriate to obtain a home protection plan in connection with the purchase of a particular home.

*Negotiations.* It is difficult to represent oneself in something as emotional and demanding as the purchase of one's home. Buyers often have a hard time expressing sincere interest in a property without appearing overly anxious and thus sacrificing bargaining power when dealing directly with a

seller. In a home purchase transaction a broker is often a negotiator helping both you and the seller work through differences. A broker can often be more objective than the buyer or seller and frequently puts many sales together which otherwise would not materialize.

*Securing the Right Financing.* Financing is critical to your home purchase, as discussed later in this chapter and dealt with in detail in Chapter Six. A broker should have a good working knowledge of the types of loans which are available in the community and should be able to make helpful suggestions concerning financing. In particular, the broker may be able to suggest how the seller can help finance your purchase to make the total financing of your home more attractive and affordable to you. A knowledgeable broker will be able to assist you in shopping the loan market in order to find the best type of loan for you at the best interest rate and at the lowest cost to the seller (the seller may sometimes be required to pay discount, subsidy or buy down points, discussed in Chapter Six; if these are excessive, the seller may be reluctant to sell or to agree to a favorable offering price).

*Following Up On Details.* As the next few chapters will indicate, there are many tasks to be accomplished and many details to be worked out before a successful home purchase can occur. An important way in which the broker can assist you and the seller is to ride herd on the situation by keeping track of these matters and assisting in taking care of them. The broker knows much of the language and many of the procedures of your lender, the title company, the appraiser, the surveyor, the property inspectors and others who may be involved in your particular situation. Since neither listing brokers nor selling brokers usually get paid until a transaction closes, it is in their best interests to do their utmost to see that all of the details and complications are dealt with to the satisfaction of all involved so that a successful closing can take place.

### **Selecting an Attorney**

Your purchase of a home will require you to take on major financial and contractual responsibility; and when you buy your home, you will want to be as sure as possible that you have good title to it.

An attorney knowledgeable in real estate matters whom you hire early on in your home buying process can be useful in several ways. The attorney's review or preparation of your proposed purchase contract and his counsel with you concerning it can give you the comfort of knowing that the deal you want to strike with the seller is fully and accurately set forth; that you will be taking on no more obligations than you intend; and that you will have all the rights you think you are getting. Later, your attorney will prepare and review the loan documents you will be asked to sign in connection with your financing to help you be certain that the papers reflect the deal you think you made with your lender.

Your attorney's review of title matters concerning your home can give you reassurance that you will not be buying a home with title defects which might have been detected by a proper review before you bought the home.

Your attorney can also help you in your negotiations, both before your contract to purchase is signed and afterwards, in the event problems or complications develop. Like a broker, your attorney can sometimes deal with others in your transaction more objectively than you can.

Most attorneys will charge you a fee based primarily on the amount of time they are required to spend in dealing with your transaction. You could be far better off paying for proper legal review and consultation

as you proceed through the home buying process than taking the chance that your transaction will not involve legal problems which you or your broker cannot detect or deal with, and then finding out later that such a problem did exist. At that point, the problem may be far more expensive in terms of money and time to solve-if it can be solved-than proper legal consultation and advice would have been early on.

An important point to remember is that your attorney is your counselor and representative. He is responsible for looking after your interests, and yours alone. While other people involved in your purchase and their attorneys may be knowledgeable about matters such as those just discussed, none are representing your interests and none can therefore be expected to represent you as well as your own attorney.

### **Considering Your Financing Requirements**

#### ***Evaluate All of Your Options***

Chapter Six discusses in detail many types of financing which may be available to you. Financing requirements of buyers have changed over the years, and there has been an increase in the different types of financing available to facilitate financing during periods of high interest rates. Many of these financing alternatives may result in a buyer's being able to qualify for a greater amount of financing than was possible with conventional financing in the past. You may want to consider using the services of a mortgage banker or a mortgage broker. Mortgage bankers and mortgage brokers specialize in helping a buyer find the most suitable and least expensive financing available.

### **Income Tax Considerations**

Every purchase of a home in the United States involves some tax consequences. An accountant or your attorney can give you advice with respect to the tax advantages or considerations involved in connection with a purchase. For the most part, the greatest tax advantage to ownership of a home is the deduction for interest paid with respect to that home. Many buyers take this into account in determining the maximum amount of financing they can afford.

## **CHAPTER THREE**

### **Negotiating and Executing a Contract for Purchase**

#### **Negotiating and Executing a Contract for Purchase**

Once you have settled on a home you want to buy and have negotiated the basic terms of purchase, your agreement with the seller will need to be set forth in a contract for purchase. In such a contract both you and the seller obligate yourselves to buy and sell the property at some time in the future. In order for the contract to be enforceable, it must be in writing and signed by all parties.

While there is no standard form for contracts in Virginia, the Virginia Association of Realtors has a number of standard form contracts and VAR Form 600, Residential Contract of Purchase, is frequently used in many areas of the state. The Residential Contract of Purchase prepared by the Real Estate Section of The Virginia Bar Association is also commonly used.

#### **Specific Provisions of VBA and VAR Promulgated Forms**

Even though a broker or attorney may be involved, the ultimate responsibility for seeing that the contract is properly completed rests with the principal parties. Every individual is held to a duty of care of having read and understood everything that he or she has signed. Therefore, you should be absolutely satisfied that the contract contains everything you desire and that it is clear and unambiguous to your own satisfaction. Since The Virginia Bar Association Real Estate Section and the Virginia Association of Realtors forms are the most often used, their terms are fairly standard for most real estate transactions.

*Parties:* The names of both you and the seller should be placed here. For purposes of drafting the papers to transfer title, it is always good practice to write the seller's name exactly as it appears in the deed by which he acquired title to the home.

*Legal Description:* In most residential transactions, the county map or plat records establish a lot and block legal description of the property if it is in a subdivision. If the property is not in a platted subdivision, a metes and bounds description or a description by reference to an existing recorded document will be required. An address, by itself, is not a sufficient legal description. It is also a prudent business practice to obtain the legal description from the previous deed to the property.

*Personal Property:* If personal property is included in the sale, it must be specifically listed in the contract.

*Purchase Price and Financing Conditions:* This particular provision of the contract may require a broker's assistance, as brokers are usually aware of standard financing conditions for lenders in the community.

*Settlement and Possession:* The closing date is also a matter of mutual agreement between the parties. The parties need to have time to obtain and provide title information, surveys and inspection reports prior to the closing. All of this information is usually obtained from other people who are not parties to the contract. The seller frequently has no control over how fast third parties perform their respective functions, and therefore enough time should be allowed to prevent the seller from being in a time bind. The same is true of the buyer's ability to obtain financing and whatever inspections may be

required. As a practical matter, if all the contingencies to the contract have not been satisfied prior to closing, it is usually easier to extend the closing date than to consider the contract breached and discharge the parties of their obligations. If the contract is cancelled by one party because the closing date in the contract has not been met, both parties must start the contracting process all over again, which usually involves more effort than it is worth. Closing the transaction can be done anywhere, at any time agreed to by the parties. For convenience, the closing is usually held at an attorney's office or at a lender's closing office.

Under Virginia law, unless the contract provides that time is of the essence, the date provided for settlement and possession will be construed to mean on or about that date. That means that either party may delay closing for a reasonable time.

*Title:* The concept of title is discussed in Chapter Seven. It is very important for the buyer to have an adequate opportunity to review title and to receive adequate title assurances.

In many transactions in Virginia, title insurance is used. In some transactions a title certification is provided by an attorney. Buyers should insure that one or the other is provided at settlement. But simply receiving a title opinion or policy does not mean you are necessarily assured of adequate title. Obtaining adequate title information and reviewing it are discussed in Chapters Four and Seven.

*Property Condition:* The contract form usually provides that the purchaser will accept the property at closing in its present physical condition except as may be otherwise provided in the contract. It requires the seller, however, to insure that systems are in working order at settlement, and it allows the purchaser to make an inspection of those systems. However, the contract form provides that if the cost of fulfilling the seller's obligations for repairs to the systems or other obligations in the contract exceeds a certain amount, the seller is not required to pay more than that amount. This prevents the seller from being required to undertake unanticipated, large expenses to repair the home in the event an unforeseen defect is discovered requiring extensive repairs. In such an event, the contract form gives the seller the option of making the needed repair, and then gives the buyer some protection by providing that the buyer may cancel the contract if the seller does not make the repair.

*Inspections:* A standard provision found in The Virginia Bar Association contract form and often an addendum in other standard form contracts allows the buyer a specified period of time to have the property inspected by a qualified contractor. If the inspection results are unsatisfactory to the buyer, the seller can correct or repair the deficiencies or terminate the contract.

*Prorations:* Generally, as a buyer, you should be responsible for expenses associated with the ownership of the property only from and after the date of closing. Accordingly, contracts will typically place the responsibility for all such expenses (for example, taxes, insurance, and income from tenant rent payments if the property is a rental home) on the seller to the extent that they accrue through the closing date and on the buyer to the extent that they accrue after that.

*Expenses:* There are various expenses which are often encountered in the process of selling and buying a home. These should be allocated specifically to one party or the other in the contract to avoid dispute at closing. Expenses are allocated in the contract form at the end of this manual generally in accordance with custom.

*Disclosures:* In addition to the Property Owner s Association Disclosure and the Residential Property Disclosure/Disclaimer discussed below, there are other mandatory disclosure requirements which are usually in the contract.

"Notice that persons performing labor or furnishing materials to a building may have a right to file a lien against the property.

"A statement that the seller makes no representations as to matters affecting adjacent parcels.

"Notice of availability of title insurance (discussed later).

"Lead-based paint disclosure.

"Notice that the buyer should exercise whatever diligence he deems necessary with respect to information on registered sexual offenders.

"Buyer s choice of settlement agent.

"Acknowledgment of brokerage relationship (discussed previously).

As you can see, there are many matters dealt with in the contract. In your specific situation, there may be additional matters that should be covered in your contract, or changes which should be made to the provisions of the form contract. Your attorney can help you with these matters. It is very important that you not obligate yourself on a contract unless you understand the rights and obligations it creates and are confident that all of the business terms of your bargain are fully and accurately stated. Both the broker and your attorney have roles to play in this process; you should take advantage of the services each has to offer.

### **The Virginia Property Owner s Association Act**

Many subdivisions are subject to the Virginia Property Owner s Association Act, which requires a seller to provide the buyer with certain information. Not to be confused with the Virginia Residential Disclosure Act (to be hereafter □ discussed) the Property Owner s Association Act discloses information about the homeowner s association, including dues, assessments, and fees. That information is delivered to the buyer in a disclosure packet which the seller is required to provide, and the buyer has three days after receipt to cancel the contract if not satisfied with the information in the packet.

### **The Virginia Residential Property Disclosure Act**

All sellers of residential property in Virginia are required to make specific disclosures about their property or to make a disclaimer stating that the property is being sold as is. The disclosure or disclaimer must be made in writing on a form prescribed by the Virginia Real Estate Board.

If the seller chooses disclosure, he must disclose all information within his actual knowledge relating to the water and sewer systems; insulation; structural systems; plumbing; electrical; heating and air conditioning systems; hazardous or regulated materials; pest infestation; land use matters; and other material defects known to the seller.

The disclosure or disclaimer statement must be delivered to the buyer prior to the execution of the contract, or if made after execution of the contract, the buyer may terminate the contract within three days after delivery. There are specific remedies given the buyer for failure of the owner to comply with the requirements of the Act.

Buyers are cautioned that a disclosure statement is not a substitute for an inspection by a qualified inspector, and such an inspection should be made not only in the case where the seller provides a disclaimer statement stating that the property is sold as is, but also in the case where a disclosure statement is given to the buyer.

## **CHAPTER FOUR**

### **Between Contract and Closing**

After the contract to purchase has been signed by all parties, everyone will breathe a sigh of relief. But now another stage in the process begins—that of following through on the contract. If it is properly written and followed, both you and the seller will have a number of things to do before the closing of the transaction. The number of things to be accomplished will vary from transaction to transaction, but there are certain specific things that will almost always be required; these are discussed below.

*Application for Financing.* If financing is required, you should apply for it immediately. The law implies a duty of diligence on your part to seek and obtain financing as soon as reasonably possible. Your contract may also have specific requirements in this regard.

*Examination of Title.* Your attorney will examine title to the property or obtain a title insurance commitment from a title company. Usually your lender will require a title insurance policy protecting it for the amount of its loan. Most title companies will provide you with an owner's title insurance policy simultaneously with the lender's policy at a discounted rate. Your attorney will explain to you the different ramifications of an attorney's certification and title insurance. In either situation, an attorney will be helpful in evaluating title and determining whether any problems exist. The broker is prohibited by statute from giving advice on title matters. The title company cannot practice law, however, so don't rely on it to act as your attorney. Chapter Seven deals with the concepts of title and title review in more detail.

*Survey.* A survey of the property is usually required by your lender; if a lender is not involved or does not require it (as, for example, in the case of assumption of an existing loan), you may want to require it. Who pays for the survey is open to negotiation. If the buyer requires delivery of the survey as a condition to the seller's title, the seller usually pays. If the survey is required by the lender as a condition of the loan, the buyer usually pays for it. For title insurance purposes, most title companies require a staked, on the ground survey (that is, a survey based upon a physical examination of the property by the surveyor in which all corners of the property are marked with permanent stakes or other markers) by a registered surveyor which shows any encroachments, improvements which may extend onto the wrong property, and potential boundary conflicts. Typical conflicts include fence, garage and driveway encroachments. When the survey is obtained, it is important for you or your attorney to closely examine the boundary lines of the property shown on the survey to be sure that none of these conflicts exist.

*House Inspections.* The physical condition of the home and the equipment and other items in it which you are buying should be checked by experts. Do not confuse these experts, who will provide you with detailed property condition reports, with appraisers, whose job and talents are different.

*Appraisal.* The lender will require an appraisal of the property to ensure that the value is sufficient for loan purposes. A problem which may arise is that the sales price of the house may be one figure (for example, \$150,000) but the appraised value comes in substantially lower (for example, \$130,000). If this happens, and if the lender agrees to accept another appraisal, the easiest alternative may be to choose a new appraiser. Appraisers can vary widely in their opinions of value, and a second appraiser's opinion may be different.

Alternatively, the seller may be forced to lower the sales price, or you may have to make a much

larger down payment than you had anticipated.

*Miscellaneous.* There are a number of arrangements both parties should be making during this period, which are more a matter of prudent business judgment than satisfying contract requirements. These include:

"Arranging for the acquisition of new insurance. Your lender will require evidence that your home is adequately insured before it will fund your loan.

"Both you and the sellers notifying your movers to ensure that you can move in on time and that the seller will be moving out on time.

"Arranging for a pre-closing walk through inspection.

"If required, making arrangements to have the home cleaned or repaired prior to your move-in.

"Checking utility connections to make sure that the existing utilities are paid prior to your new connections being made, and arranging for the turning on of all utilities before your move-in.

Except for those matters which are legal in nature, a real estate broker can be of great help to you in dealing with the foregoing activities, helping you to find the right people to do the work and coordinating their efforts. There are many things to be done, and it is important that none are overlooked. If the job is properly done, you should be able to look forward to an orderly closing and approach it with confidence instead of nervous anticipation worrying about what you forgot to do.

## **CHAPTER FIVE**

### **Closing**

#### **What Is The Closing ?**

The final consummation of the purchase and sale of the home is generally referred to in the contract as the settlement or closing. There are actually two closings involved in any standard residential transaction. These will usually happen simultaneously. The one closing is the loan closing. This is the closing of the loan between the buyer and the lender. The seller has no involvement in this particular part of the transaction. It is often done without the presence of the seller or his attorney. The other closing is the closing of the sale from the seller to the buyer, which involves the transfer of title by deed. At the same time, the seller, usually through his attorney or other representative, also delivers the keys, transferring possession of the house to the buyer.

#### **The Mechanics of Closing**

The mechanics of the closing may appear to be confusing, but they are usually very well coordinated. Financial statements, called closing or settlement statements, are prepared by the attorneys or the title or escrow company. These statements set forth in detail the closing costs to be paid, who pays each cost, and how the cost has been prorated. In most residential transactions, the buyer is required to use a federal closing statement form called a HUD-1 Settlement Statement. Both the seller and buyer will be required to read and sign these closing statements. The broker or your attorney can help you go over the statements to determine that the statements of costs are complete; the allocations and prorations between buyer and seller are proper and accurate; and the calculations are accurate in general.

You should also seek to review and approve all other documents prior to closing. This will allow you to review them at your leisure and ask pertinent questions of your attorney so that the closing time and conflicts can be kept to a minimum. Unfortunately, it is not always convenient to obtain documents prior to closing, and this often adds to the stress when the closing finally occurs. Documentation changes from transaction to transaction, but as a general rule the parties should walk away from closing with at least the following:

#### ***Seller***

"Cash in an amount which should be predetermined (this may be delayed if funding of the buyer's loan is not to occur at closing) and shown on the seller's closing statement;

"If the seller is going to finance the transaction, the buyer's promissory note to the seller, a copy of the seller's deed of trust from the buyer, and a mortgagee policy of title insurance;

"A copy of the deed of conveyance, particularly in the case where the seller's deed of trust has been assumed;

"The seller's closing statement; and

"Hopefully, a smile.

#### ***Buyer***

"The deed or a copy;

"Inspection reports as requested or required (such as a mechanical equipment inspection, a termite inspection, and water and septic inspections);

"An owner's title policy or binder or attorney's certificate;

"A bill of sale (if title to any personal property is to be transferred, such as stoves, refrigerators or similar items);

"If there is a mortgage listed in the title policy, the owner of the note should provide a certificate setting forth the amount of outstanding debt, the consent to the sale to the buyer (if required), and the amount of any existing escrow account for taxes and insurance;

"The survey (if required);

"Copies of the documents signed in connection with the buyer's financing (discussed in Chapter Six);

"The buyer's closing statement; and

"Keys to the home.

As a general rule, the originals of the deed and any deeds of trust delivered at closing will be sent or hand delivered by the buyer's attorney or title company to the County Clerk for recording. Often the title company will issue only a commitment for title insurance at (or before) closing, and prepare the actual policy after the documents delivered at closing are recorded. Likewise, the signed attorney's certificate will be available only after closing takes place.

### **After Closing**

Buyers are sometimes surprised to discover that after they have closed, they must tell the taxing authorities that the ownership of the property has changed. Typical taxing authorities include the county, the school district, and the city. It may be your obligation to notify taxing authorities of your ownership after the closing. Doing this prevents delinquencies in your ad valorem (property) taxes, particularly if you do not have money escrowed with your lender for this payment. If the taxing authorities are not notified, you may not receive tax statements. There will also be times when you will discover that the taxes were not prorated properly at closing. Taxes may have been increased, or the use of the property may have changed. When this occurs, it is generally between you and the seller to readjust your proration. Such an adjustment is required only if it was specifically provided for by agreement between the parties (usually placed in the contract covering the sale).

### **Early Occupancy by the Buyer or Late Occupancy by the Seller**

There are times when the seller may want to occupy the house after closing, or when the buyer may want to occupy the house prior to closing. In such situations, a lease or occupancy agreement should be executed to establish the rights and obligations of each party. In addition to the contractual sale and purchase relationship, the parties now create a landlord and tenant relationship. In all landlord and tenant situations there are certain liabilities and duties which the parties may not have anticipated. This is particularly true if the lease agreement is the result of a compromise to an otherwise difficult contractual relationship. An attorney should always be consulted in such cases.

## **CHAPTER SIX**

### **Financing**

#### **Source of Funds**

There are many sources of funds available for home buyers. However, three types of financing are most commonly used in purchasing a home: (1) new third party financing from savings and loan associations, mortgage companies, banks or other institutional lenders; (2) seller financing in situations where the seller of the home agrees to accept a portion of the purchase price as a down payment and allows the buyer to pay all or part of the remaining purchase price over a period of time; and (3) assumption of the existing loan or loans on the property being purchased. Several types of financing may be combined if the total funds needed to purchase the property are not available from one source. In addition, funds may be obtained from friends, family members, credit unions or pension funds. You should be cautioned, however, that certain types of financing prohibit borrowing your down payment. So you should be sure to inquire if this will create a problem for the type of financing you are seeking.

As suggested in Chapter Two, before negotiating a contract, you should evaluate the source of financing, funds for down payment, and the amount of monthly payments which are feasible for you and available to you. If all of the funds must be borrowed from a third party lender, such as a bank, savings and loan association or mortgage company, the interest rate on the loan will often be higher than the rate paid to a seller for seller financing, or on a loan which can be assumed. The terms of financing the house must be incorporated into the contract at the time it is signed. Therefore, you must do some advance planning and investigation, perhaps with the assistance of a real estate broker or attorney, to determine what options are available to you. You may also want to contact a mortgage banker or mortgage broker, who can often be helpful in locating available money and helping you qualify for the loan. You will want to incorporate provisions in the contract which make your obligation to purchase the house conditional on your ability to obtain financing on terms specified in the contract.

#### **General Aspects of Financing Security for the Loan**

Unless you obtain a loan from family, friends or other friendly sources, a lender will require security for the loan, typically a lien on the property being purchased. In some states that lien is called a mortgage; in Virginia it is a deed of trust. In some cases, banks, credit unions or other sources may allow or require a pledge of other assets, such as stocks or certificates of deposit, as security for the loan.

#### **Loan Documents**

If a loan is secured by the property purchased, several documents will be used. The most important of these are the following:

- "A promissory note payable to the lender (this is your actual promise to pay );
- "A deed of trust and security agreement (this is your mortgage, and is a document which creates a lien on your property); and
- "A Regulation Z Disclosure Statement, by the lender (this statement, usually required by federal law, discloses the cost to you of your loan).

Residential lenders typically will allow only minor modifications, if any, to the loan documents. You should, however, obtain a copy of the loan documents prior to the closing and review them with your attorney so that you are aware of your rights and obligations under the loan documents. It is not advisable to rely solely on information from the loan officer regarding the terms of the loan; if the information is incorrect, any subsequent legal dispute may involve a great deal of time and money, even if you are successful.

### **Specific Provisions**

The purpose of the deed of trust is to create a lien on the property so that the lender may foreclose upon the property if the loan is not paid according to its terms or if the borrower defaults in its obligations under the deed of trust. The deed of trust will usually contain a power of sale (which gives the lender the right to foreclose without going to court), and the terms and conditions on which the lender may foreclose on the property. If the loan has been accelerated by the lender because of a default by the borrower, the entire amount of the loan is then due and must be paid to avoid the foreclosure. However, some deeds of trust have provisions which require additional notices by the lender and which may, even after acceleration, allow the loan to be reinstated before the foreclosure day by payment of only the past due payments (if acceleration occurred because of the failure to make payments), plus expenses of the lender. You should request a copy of the deed of trust to be used by the lender before the closing of the loan so that you may, with the assistance of your attorney, be aware of the provisions for notice and foreclosure of the loan.

Most deeds of trust currently used by residential lenders also contain provisions which impose certain additional restrictions and conditions on the loan. One of these is the restriction on the sale of the property and/or assumption of the loan, which allows the lender to require the loan to be paid in full if the property is sold, or may allow the lender to escalate the interest rate on the loan. Such provisions are commonly referred to as due on sale clauses. Home buyers typically inquire of the loan officer whether or not the loan is assumable when shopping for a loan, but even if the lender's representative states that the loan is assumable, you should inquire further whether the lender has the right to modify the terms of the loan, raise the interest rate and/or investigate the credit worthiness of the proposed assumptor. All of these factors may affect your subsequent sale of the property.

Other restrictions and provisions contained in the deed of trust may include the requirement of additional payments to the lender each month for the payment of property taxes and hazard insurance premiums, such sums to be held by the lender in an escrow (or reserve) account. There may also be requirements that the borrower properly maintain the property. Such provisions are common and protect the lender from loss of its security.

The promissory note or deed of trust may also contain provisions which prohibit prepayment of the loan prior to maturity or impose certain restrictions on prepayment, i.e., the time and amount of prepayments which may be accepted. If prepayment is prohibited, a borrower will not be able to refinance the loan if interest rates decline. Additionally, it may be more difficult to sell the house at some future date since the loan cannot be paid off and any prospective buyer may have to qualify for the loan with the existing lender. If prepayment is permitted, the loan documents may require the payment of a prepayment penalty, a fee charged if the loan is paid off before it is due. Generally, unless a note requiring payments on specific dates contains a specific provision that it is prepayable, the note will not be prepayable.

## **New Financing Compared With Assumption**

In a rising interest rate market, it is often more advantageous to try to assume any existing loans on the property which may have lower interest rates. Whether or not the existing loans can be assumed depends on the terms of the existing loan documents, as is more fully discussed elsewhere in this chapter. Most lenders require a transfer fee to change their records to reflect the assumption by a buyer; however, some closing costs, paperwork and time delays involved with new financing can often be significantly reduced or eliminated.

## **Institutional Lenders Interest Rate and Loan Options**

There are many lenders in the business of making loans to finance the purchase of homes. Savings and loan associations and mortgage companies are the most common sources of loans. Mortgage companies often originate loans for other lenders, and after the loan closing will transfer the loan to another lender, which may be a savings and loan association, a life insurance company or a pension or investment fund. Some mortgage companies only originate loans on behalf of other lenders; they typically represent a variety of lenders and therefore have a greater variety of loans to offer to a prospective applicant. However, many savings and loan associations now sell their loans in the same manner and can offer loan options previously unavailable.

Real estate brokers and mortgage bankers or brokers are typically aware of the various options available from the many lenders in the market and may be able to suggest certain associations or companies to contact (or may make such contacts for you). You can call any savings and loan association, mortgage company or bank and inquire about the current programs being offered. However, until an application is made and a commitment is issued by the lender, any rates quoted are subject to change. The terms of a loan include the interest rate, points due and length of repayment. A point is a term used in the financial industry to mean one percent of the loan amount being borrowed. Points are usually paid to the lender at closing.

Some buyers obtain short-term loans, or bridge loans, from banks with which they do business. Banks usually make short-term loans (with loan terms of five years or less), and, depending upon their relationship with the borrower, may charge a higher interest rate. Banks, however, typically do not charge as many points, if any, since they are committing their money to be loaned for a shorter period of time.

Unless a lender issues a loan commitment at the time of application or loan approval specifying the major terms of your loan, the rate and points quoted at the time of application may change prior to closing. If you are limited by your personal funds to a maximum interest rate or number of points you are willing to pay at the closing, any such limitations should be incorporated into an agreement with the lender, and into the contract. Although such a provision will not bind the lender, it will allow you to cancel the contract and obtain a return of your earnest money if the rates or points exceed that amount.

Federal law requires a lender in most situations to provide you with both a good faith estimate of settlement costs and a booklet prepared by the federal government explaining settlement costs and the settlement process within three days after the date of your application for a loan.

## **Types of Loans Made by Institutional Lenders**

*Fixed Rate Loans.* Some lenders offer loans where the payment amounts and interest rates are fixed for the full term of the loan (generally 15, 25 to 30 years). If the loan is a conventional loan, a lender may loan up to 95 percent of the sales price or appraised value of the property, whichever is lower, assuming the borrower can qualify for the payments required for such a loan amount. If less than 20 percent (and with some lenders 25 percent) of the purchase price is paid as a down payment, a premium for private mortgage insurance (often called PMI) will usually be charged. That amount is typically one-half of two percent of the loan amount, and in addition to each month's payment for principal and interest and escrows for taxes and insurance, an additional amount will be required to maintain the private mortgage insurance policy in effect. Because of the uncertainty of the interest rate market, fixed rate loans may carry a higher interest rate or require more points to protect the lender against losses in a market where the prevailing interest rate may rise drastically above the fixed rate. Conventional fixed rate loans are often not assumable and, if they are made at a high interest rate, may prohibit or contain penalties for prepayment.

*Adjustable Rate Mortgages.* A popular alternative to the conventional fixed rate loan has been the adjustable rate mortgage (ARM) loan. Adjustable rate mortgages contain provisions in the loan documents which allow the lender to modify the interest rate at specific intervals during the life of the loan, typically every year to every five years. The rate charged on a loan is tied to an index which fluctuates from time to time. One advantage of ARMs is that lenders typically will make the initial interest rate lower so that the borrower can qualify for the loan. Also, fewer points may be required since the lender is protected from major shortfalls in the interest rate because of the adjustment provisions. Some ARM loan programs offer maximum and minimum limitations for increases on each adjustment date and over the life of the loan. A disadvantage to the borrower is that the future payments after adjustments may increase dramatically. This fact is often overlooked or forgotten — be sure to keep it in mind if you consider this type of loan. ARMs are often assumable without modification and without payment of large transfer or assumption fees.

*Graduated Payment Mortgages.* A graduated payment mortgage has a low initial monthly payment, but the monthly payment thereafter increases in specified amounts, typically during the first few years of the loan. Normally the payment during the early years does not cover accruing interest, resulting in an increasing principal balance during the first four to six years (see Negative Amortization Loans).

*Buy-Down Loans.* To create a buy-down loan, the seller, builder or buyer pays a specified number of points (sometimes called buy-down, discount or subsidy points) at the closing to lower the monthly payments on the loan for the first few years. In some loans, the sum of money represented by the points is placed in an account which may be drawn upon only by the lender. With each monthly payment, the lender draws a portion of the funds out of the buy-down account and adds it to the monthly payment paid by the borrower to equal the monthly principal and interest stated in the note. The note will state the full interest rate, and the terms of the buy-down will be set forth in a separate buy-down agreement. The buy-down agreement may provide that if the property is sold or the loan is assumed, the buydown will expire and any unused funds may be kept by the lender without any refund to the person who paid them. In some cases, however, the buy-down agreement may instead provide that the buy-down will continue for the benefit of the new owner upon a resale of the property. Graduated payment mortgages or buy-down loans may be combined with either an adjustable rate mortgage or a fixed rate mortgage. If you consider this kind of loan, be sure you take into account the

increases in your payments in future years which the loan may require.

Builders of new homes often purchase a commitment from a lender to make specific loan programs available to their qualified buyers. Generally, the builder has paid points or agrees to pay points at the closing to enable more buyers to qualify at a lower interest rate. Depending on the changes which may have occurred in the lending market after the builder purchased the commitment, a buyer may be able to find a more attractive loan program from another lender if the program offered by the builder is not satisfactory.

*FHA Insured Loans.* The Federal Housing Administration of the U. S. Department of Housing and Urban Development (HUD) insures mortgages made by lenders, generally on lower terms than available for conventional loans or adjustable rate mortgages. FHA mortgages also require lower down payments and may not require monthly mortgage insurance premium payments for private mortgage insurance; but, if monthly payments are not required, the mortgage insurance is paid in full when the loan is closed. All FHA loans are assumable with no prepayment prohibitions or penalties. FHA loans usually require the payment of more points at closing than a conventional loan, depending upon the interest rate of the loan. Either party may pay these points, or the parties may share in their payment. The maximum loan amount which may be borrowed under an FHA insured loan, however, is typically lower than the limit imposed by conventional lenders.

*VA Guaranteed Loans.* Veterans may qualify for a loan guaranteed by the Veterans Administration with little or no down payment. Fixed and graduated VA loans are available and the number of points a borrower is allowed to pay is limited by the Veterans Administration. VA loans are assumable and have no penalties for or prohibitions against prepayment.

*Negative Amortization Loans.* A negative amortization loan is one which provides for payments which do not cover all of the interest as it accrues. As each scheduled payment is made, the portion of interest which is unpaid is then added into the principal balance of the loan and accrues interest at the same rate as the principal originally advanced by the lender. Since the principal balance of the loan is continually increasing (rather than decreasing, as is usually the case), for the first few years there will be times when the amount required to pay off the loan will be greater than the original loan amount. A negative amortization loan may be advantageous in situations where a seller will not and a buyer cannot pay numerous points to buy down or subsidize the loan rate, but the buyer needs a lower payment amount to qualify for the loan. However, it may be dangerous to the buyer because of requirements for increased payments in future years.

*Qualification Standards and Credit Requirements.* All loans made by institutional lenders will be subject to minimum qualification standards and will require satisfactory credit history. To qualify for a conventional loan, your total monthly income usually must be equal to four times the amount of the total monthly payment on the loan (including principal and interest, escrows for taxes, insurance, mortgage insurance premiums and maintenance or other assessments). Additionally, your total monthly income should be at least three times the amount of the mortgage loan payment plus any other long-term debt owed by you, such as payments for car loans, school loans, or long-term retail charge financing. The qualification standards for FHA and VA loans are calculated somewhat differently, but are similar to the rules of thumb for conventional mortgages. At the time of application, the lender will send forms to verify your employment, income, bank deposits and credit history. When negotiating the contract, you should allow sufficient time for the lender to accumulate the necessary information. Loan approval can

take four to twelve weeks, depending upon the source of your income and whether all credit information can be obtained locally. If you are moving from out of state, or are self-employed, a longer period of time may be required to obtain credit information. A prudent lender will usually also require previous years' tax returns as verification of income sources and amounts.

### **Taking Advantage of the Seller's Existing Financing Assumption of an Existing Loan**

If the seller's existing mortgage is to be assumed, your contract should include a provision that you will be released from the contract if the terms and conditions of the loan(s) to be assumed are not acceptable to you. You may be required to submit financial information and other credit information to the lender for approval. In some cases, where the loan documents contain a due on sale clause, the lender may allow an assumption of the loan only if a transfer fee is paid, the interest rate is increased, or the terms of the loan are modified in some other way. In such cases, it is advisable to have an attorney review the due on sale clause specifically to determine whether the lender has the right to require such modification. In any event, the contract should require, and you should obtain, a statement from the lender (i) that the assumption of the loan has been approved, (ii) specifying the balance due on the loan, and (iii) specifying the amount of any funds held in escrow by the lender for payment of insurance, taxes or other assessments.

If an existing loan is assumed in connection with the purchase of property, you will execute either an assumption agreement with the lender, which may modify the terms of the loan assumed, or an agreement with the seller of the property in which you agree to become liable for the payment of the note and debt being assumed.

### **Wraparound Loan**

If the existing loan is not to be paid, you may arrange a wraparound or all inclusive loan with the seller. The loan amount will be the total purchase price less the amount paid in cash and will include the amount of the existing loan. You will then pay a lump sum payment to the seller each month; the seller will in turn pay a portion of that to the existing lien holder. A disadvantage of wraparound financing is that typically a higher rate is paid on the wraparound note, which includes the existing note, than the interest rate required if the existing loan were assumed. If the existing loan contains a due on sale clause, approval of the wraparound financing must be obtained from the existing lien holder in the same manner as if the loan were to be assumed (see above).

It is important to be sure that the documents for the wraparound loan contain provisions which protect you if the seller does not make payment on the underlying loan after you have made payment to the seller. Often the loan documents will incorporate provisions requiring the seller to furnish proof to you that each monthly payment is made to the holder of the underlying loan, allowing you to pay the required portion of the payment directly to the holder of the underlying loan, or allowing you to pay the monthly payment to a collection agent who in turn splits the payment between the holder of the underlying loan and the seller.

Wraparound financing is by its nature complicated and can contain many pitfalls for an unwary buyer. An attorney should always be consulted where such financing is involved.

## **Seller Financing**

If the seller has agreed to finance a portion of the purchase price, the contract should contain the exact terms and provisions of the loan from the seller, such as the interest rate, the amount of the payments, the term over which the loan is to be amortized and the maturity date. It is also advisable to agree on the form of documents at the time the contract is executed to avoid any subsequent dispute over other terms and provisions in the seller's loan documents. Your attorney can advise you on the form of documents which will best protect your interests.

Seller financing is typically more advantageous than new third party financing, since there is less paperwork, time and expense involved. A seller will often offer more flexible terms and a better rate of interest in order to sell the house. A disadvantage is that a seller is typically not willing to wait as long as an institutional lender to be repaid the full amount of the loan and therefore will require a shorter term for the loan. Loans by sellers typically provide for a balloon payment at maturity. A balloon payment is necessary at the end of a loan when all previous regular installments have been determined, assuming a loan term longer than the actual term. This would occur, for example, in the case of a 15-year loan where the regular installment payments were based on repayment of the loan in full over a 30-year term (or a 30-year amortization). The balloon payment is larger than the previous regular installment payments—it is that amount necessary to pay the loan off in full. Typically, payment of the balloon will require refinancing.

## **CHAPTER SEVEN**

### **Title to Your Home**

#### **What Is Title And Why Is It Important?**

It is difficult to understand the concepts of title or good title, but there are some basic objectives in the title review process and some bottom-line consequences to having or not having adequate title to your home. Generally speaking, if you have adequate title to your home you will own your home free and clear of unanticipated or unacceptable rights of others to interfere, now or later, with your full use, occupancy and possession of the home. However, some rights on the part of others will probably be expected and acceptable. As a buyer, you need to find out who has rights which could affect you in the occupancy, use or possession of your property, and what those rights are. Then you should determine which of these actual or potential rights held by third parties which can be generally characterized as encumbrances to title are acceptable and which are not. This is the process of title review.

#### **Forms of Title Assurance**

As we discussed in Chapter Three, buyers in Virginia have two alternative methods of title assurance available to them. If an attorney's opinion is to be furnished, the attorney will search the title to the property, usually for a minimum period of 60 years, and will issue a report showing all matters affecting title disclosed by the public records. Based on those matters the attorney gives an opinion of the status of title.

The second and more widely-used alternative is title insurance. If title insurance is to be issued, the title company will probably issue a commitment for title insurance within 20 to 30 days after your purchase contract is signed and a request for title insurance is made. At or shortly after closing, a title policy will be delivered to you based on this commitment.

It is important to recognize that simply receiving a title opinion or a title policy is not necessarily receiving assurance that you have adequate title. A title opinion or a title insurance policy will contain exceptions and exclusions from coverage regarding certain title encumbrances which affect your property. Whether these encumbrances should be acceptable or not to you as a buyer is for you to determine.

#### **Reviewing a Title Commitment**

If title insurance is to be issued, the title company's commitment for title insurance will be the single most informative document you will receive for the purpose of title review. It will set out various matters, or exceptions, which the policy will not insure against.

Schedule B will contain standard exceptions for various matters. These include:

1. Restrictive covenants of record applicable to the property (there should be a notation of them or a statement that there are none of record);
2. Matters which a correct survey would show (most of these can be deleted as exclusions from title insurance coverage if a proper survey is provided);
3. Taxes for at least the current and subsequent years, and subsequent assessments for prior years

based on change in land usage or ownership (you should make sure the current year is the earliest year referred to, and should request the words "not yet due and payable" to be added to this exception as it appears in the actual policy); and

4. Rights of parties in possession (this can be deleted from the policy by an affidavit of the seller and/or payment of a fee to the title company for its reasonable and actual costs to inspect the property to determine that no one other than the seller is occupying the property. If the exception is not to be deleted, the title company will usually require the buyer to execute at closing a document acknowledging that the title company has made no visual inspection of the property).

Schedule B will also show specific encumbrances which relate to your particular property.

Schedule B will also contain a list of encumbrances or title problems which the title company will require (or in some cases, assumes the buyer will require) to be removed, or cured, prior to issuance of the actual policy. (Any matters not so removed or cured would be shown on the actual policy.) It will be up to you to examine the title commitment promptly and ask questions about exceptions you do not understand or which do not look proper. You should also ask how objectionable items will be dealt with and by whom, so they do not appear on your title policy at closing.

### **Specific Types of Encumbrances**

As previously mentioned, some specific encumbrances are to be expected. Others may have to be investigated to determine whether they are acceptable, and some may be objectionable on their face. Examples of encumbrances which may appear are the following:

1. *Restrictive Covenants of Record.* Standard subdivision restrictions should be unobjectionable. In fact, if the neighborhood is not zoned, their applicability to the neighborhood in general may be very important to you. It is a good idea to review the restrictions to know what will be expected of you as owner of the property and what you can expect of your neighbors. Some matters which the restrictions may cover are restrictions against certain uses of the property; requirements concerning what may be built on the property and where; maintenance responsibilities; and the establishment of a community association (often with the power to make assessments against property owners for payments on a regular or special purpose basis).
2. *Easements.* Utility and drainage easements located along property boundary lines are very common and are usually necessary for the good of all of the homeowners in the neighborhood. On the other hand, other easements may require investigation. (It is sometimes difficult to know if an easement is a problem until it is located on a survey.)
3. *Mineral Reservations.* Mineral reservations are common in parts of Virginia, but certain types may require investigation to ensure that the holder of the rights involved does not have the right to use the surface of your property.
4. *Liens.* Some liens, such as those securing your seller's existing financing, will be obviously acceptable or unacceptable depending upon whether you have agreed to take on the burden of the existing financing, through assumptions or otherwise. Other liens, called involuntary liens, will generally be objectionable. Examples are judgment liens or mechanics' and materialmen's liens. Some liens may require further investigation: for instance, a lien securing maintenance assessments of a homeowners' association (or maintenance lien) may be acceptable if it is determined that no assessments are past due which are not to be properly accounted for at closing.

**Survey**

In reviewing title encumbrances, a survey may be important. A survey can help determine if there are problems which are not apparent from documents filed of record. (See the discussion of surveys in Chapter Four.)

**Your Attorney's Role**

It is often helpful to have your attorney assist you in the title review process. Your attorney can help you understand and analyze the title commitment and survey and the title encumbrances or problems shown in them. Your attorney can also be very persuasive and helpful in working with the title company and the seller in eliminating problems or objections if they exist.

## **CHAPTER EIGHT**

### **Special Situations**

#### **Purchasing a Condominium**

If the home you are purchasing is a condominium, there are additional matters to consider which are not applicable in connection with the purchase of other forms of property. If you purchase a condominium, you will be purchasing the space within the defined boundaries of the condominium unit, as well as the improvements within the unit. In addition, you will be purchasing a defined percentage interest in the facilities (general common elements) which are shared by all owners in the condominium project. In some cases you might acquire a percentage interest in facilities (limited common elements) which may be for the exclusive use of one or more, but not all, of the owners of the condominium units. Some typical limited common elements are assigned parking spaces, storage areas, and balconies.

All condominium projects in Virginia are governed by a document called a declaration of condominium which is recorded in the office of the clerk of the city or county in which the project is located. Certain matters in each condominium declaration are required by law, but most of the matters covered in a condominium declaration represent the agreement of the owners of residence units in the condominium project. Some of the matters which are covered in almost all condominium declarations are:

- "Use restrictions;
- "Provisions relating to the establishment and the governing of the council of co-owners, which administers the condominium project;
- "Provisions for the charging and paying for expenses;
- "Insurance and condemnation provisions;
- "Provisions regarding necessary renovations;
- "Restrictions regarding the lease or sale of a unit; and
- "Various exhibits showing the floor plans of the buildings and each of the units together with diagrams of each of the parking and storage spaces, if any, and a list of the percentage ownership interests in the owners.

In addition to the condominium declaration, there will also be articles of incorporation for the association of co-owners and bylaws to govern the association of co-owners.

In purchasing a condominium, you should review the condominium declaration, as well as the articles of incorporation, the bylaws, any applicable rules and regulations, and any management agreements associated with the condominium project to be certain that you have no objections to the provisions of those instruments. There are many provisions which can cause buyers problems. Some of the more important provisions which should be given close scrutiny are those regarding assessments and how they are made; your right to sell or lease your unit; the developer's rights; various use restrictions relating to pets, structural or other changes to a unit; and other matters which restrict the use of your condominium unit.

In addition to the foregoing documents the seller is required to deliver to you a public offering statement before a sales contract can become binding. The public offering statement is a narrative statement explaining the formation, organization and operation of the condominium. Finally, in order for a

condominium to be valid the foregoing documents must be filed with and approved by the Virginia Real Estate Board.

The co-owners' association may carry the insurance with respect to the structure of the building and each unit. But even if such insurance coverage is provided by the association, it is up to each individual condominium unit owner to carry his or her own insurance on the contents in a condominium unit. To be certain that you have the proper insurance, you should check with your insurance agent and the co-owners' association. You should also be certain that the co-owners' association has sufficient liability insurance coverage for all owners.

Special attention should be given to the portions of the condominium declaration which provide for assessments against each of the homeowners. If you are purchasing an older condominium unit where there is a possibility that the main boilers or main air conditioning plant will have to be replaced, you should be prepared for a future significant assessment by the co-owners' association.

### **Buying a New Home From a Builder**

By statute in Virginia there is a one year implied warranty in the sale of every new home by a builder. However, when purchasing a new home, you should consider the reputation of the builder and determine whether the builder has its own warranty form. You should be sure you understand what such warranties do and do not cover. (You should beware of any contract offered you which contains a waiver of expressed and implied warranties. You may be waiving important rights provided by law which are not otherwise covered in your contract.) Many builders now use the Homeowner's Warranty (HOW) program, which warrants the home against certain defects for a period after the closing. If the builder is a member of the HOW program, even if the builder is no longer in business, the warranty will be honored by the entity which has issued the homeowner's warranty.

There are several warranty programs for new homes in the United States. The HOW program operates in 49 states and the District of Columbia (the exception is Alaska). In the HOW program, builders are scrutinized before HOW will allow them to use its warranty program.

Do not make the mistake of assuming that because you are purchasing a new home, inspections of the type discussed in Chapter Four are unnecessary. The problems which are most likely to exist in a new home are different from those which are usually discovered in an older home, but it is still a good idea to have the home checked by an expert representing your interests rather than the interests of the builder selling the home to you.

## **Names and Addresses of Regulatory Agencies and Trade Organizations**

### **Realtors**

Virginia Association of Realtors, P. O. Box 15719, Richmond, VA 23227

### **Brokers and Licensed Property Inspectors**

Virginia Real Estate Board, Fifth Floor, 3600 West Broad Street, Richmond, VA 23230-4917

### **Attorneys**

Virginia State Bar, Eighth and Main Building, 707 East Main Street, Suite 1500, Richmond, VA 23219-2803

## Glossary

*Amortization.* The method of repaying a debt by making equal installments of principal and interest over a period (e.g., equal monthly payments over a 30-year period), so that at the end of the set period the debt is completely paid off.

*Appraisal.* An opinion of the value of property based on an analysis by a person trained in evaluating property (an appraiser).

*Assessment.* (1) An estimate of the value of property for the purpose of imposing taxes. (2) A fee imposed on property, usually to pay for improvements such as streets and sewers. (3) A fee charged by a community association (in a subdivision) or council of co-owners (in a condominium project) to maintain or replace common areas or property.

*Attorney-in-Fact.* A person (agent) who is authorized to act for another person (principal), under a power of attorney. The authority of the agent to act on behalf of the principal is limited to the act or acts authorized in the power of attorney.

*Building Code.* A set of laws, usually enacted by city ordinance, which regulates the design, materials and construction of buildings.

*Condemnation.* The taking of property for public use by a governmental agency or other authorized body, such as a public utility company, with payment of compensation to the property owner.

*Conveyance.* The transfer of an interest in real estate.

*Covenant.* (1) Any agreement. (2) One of a series of guaranties as to the title to property being conveyed which are set out or implied in a warranty deed. (3) A restriction on property.

*Deed.* A written document which conveys an ownership interest in land or other real property.

*Deed Restrictions.* See Restrictive Covenants.

*Down Payment.* A percentage of the purchase price of a property which is paid by the buyer in cash, as opposed to the percentage of the purchase price which is advanced by a lender, assumed by the buyer or financed by the seller.

*Easement.* A property interest which gives the owner of the easement the right to use the property for the purposes for which the easement was created. For example, if A gives B an easement to use a road on A's property to get to and from B's house, then B has the right to use the road on A's property, but only for the specified purpose.

*Encroachment.* Generally, a structure which extends impermissibly over a property line, easement boundary or building setback line.

*Equity.* The portion of the total value of a property which is not financed (borrowed).

*Exclusive Agency to Sell.* A listing agreement between a broker and the owner of property in which the broker will receive a commission if that broker or another broker sells the property, but not if the owner sells the property without using any broker. (Compare Exclusive Right to Sell Listing.)

*Exclusive Right to Sell Listing.* An agreement between a real estate broker and an owner of property whereby the owner agrees to pay a fee or commission to the broker upon the sale of the property, whether or not the broker is the cause of the sale. The broker, in return, may agree to use his best efforts to sell the property. (Compare: Exclusive Agency to Sell.)

*Fair Market Value.* An estimate of the value of a property equal to the purchase price which a willing buyer and willing seller would be likely to negotiate.

*Fee Simple Title.* The most complete form of ownership of real property, under which the owner has the power to dispose of the property during his lifetime, and which can pass by will or to his heirs by law upon his death.

*First Mortgage.* A mortgage creating a lien against a property which has priority over all other voluntary liens which exist against the property. Foreclosure of a first mortgage lien will generally

extinguish or cut off any second mortgage lien or other subordinate lien.

*Fixture.* Personal property which has been attached to a tract of land or improvements on a tract of land so that it becomes a part of such land or improvements.

*General Warranty Deed.* See Warranty Deed.

*Home Protection Plan.* A residential service contract, which typically provides for repairs for problems arising after closing with the electric, plumbing or mechanical components of a home at limited cost to the new owner in the form of a deductible or service fee. Not all repairs which may become necessary will be covered; for example, structural work is usually excluded from the coverage of the contract. These plans are sometimes offered through listing brokers.

*Home Warranty.* See Home Protection Plan.

*Homeowners Association.* An association of persons who own houses in the same subdivision or other designated area, formed to promote the common welfare.

*Improvements.* Valuable additions to land, such as buildings, fences, drives and sewers.

*Judgment Lien.* An involuntary lien which can be created against the property of a person who fails to pay the judgment ordered in a lawsuit.

*Junior Mortgage.* A mortgage creating a lien which is inferior or subordinate to a prior lien. (Compare: First Mortgage and Second Mortgage.) Foreclosure of a junior mortgage will not extinguish or cut off the lien of any mortgage which is superior to it.

*Lessee.* One who occupies property under a lease; a tenant.

*Lessor.* One who grants to another the right to occupy property under a lease; a landlord.

*Lienholder.* A mortgagee or other creditor who has a lien against the property of another.

*Listing Agreement.* An agreement between a real estate  broker and the owner of property which authorizes the broker to assist in the sale of the property, as by advertising it and showing it to prospective buyers. (See also Exclusive Right to Sell Listing and Exclusive Agency to Sell.)

*Loan Package.* The file containing all of the documents, such as the loan application, credit report and similar items, based on which a lender decides whether or not to loan money to the applicant.

*Lot.* A parcel of land; generally, part of a series of parcels which make up a subdivision, and the boundaries of which are created by and shown on a plat.

*Mechanics and Materialmen's Liens.* Involuntary liens against real property which can be imposed on property under some circumstances by certain types of workers, including those who make improvements on the property, or who supply materials which are used in improving the property, for failure to make payments as provided in the relevant contract for work done on, or materials delivered to, such property.

*Mineral Rights.* Ownership of an interest in the minerals (such as coal, oil and gas) which lie in, on or under a tract of land, as opposed to ownership of the surface of the land.

*Payoff.* The payment in full of an existing loan.

*Per Annum.* Yearly.

*Percolation Test or Perk Test.* A test to determine the ability of land to absorb water. This test is usually performed to determine whether the land is suitable for a septic tank or for construction.

*Per Diem.* Daily.

*Performance Bond.* A bond which is put up by a builder to guarantee completion of building.

*Personal Property.* Generally, any property which is not real property (such as land or improvements on land) or fixtures.

*Plat.* A map or diagram of a subdivision, usually showing the layout of the lots, blocks and streets and the location of certain easements. Plats are usually recorded in the public records of the city or county in which the land covered by the plat is situated.

*Principal.* (1) The amount of money which is borrowed from a lender; this amount does not include

interest. (2) The person who authorizes an agent to represent him. (See Attorney-in-Fact.)

*Protective Covenants.* See Restrictive Covenants.

*Purchase Money Mortgage.* A mortgage given by the buyer of property to a lender who supplies the money used to purchase the property.

*Quitclaim Deed.* A conveyance which makes no guarantees that the grantor owns the property or can convey it free of encumbrances.

Real Estate Settlement Procedures Act (RESPA). A federal law designed to take the mystery out of the settlement (or closing) process. The rights (described in this manual) to see a closing statement before closing and to be provided at the time of loan application with an estimate of settlement costs are created by this law.

*Recordation.* Generally speaking, the act of filing a document, such as a deed or deed of trust, in the appropriate public records for the purpose of giving notice to the public of the existence of the document and the underlying transaction.

*Release of Lien.* A document executed by a lienholder which shows that a lien has been eliminated and no longer exists as an encumbrance to title. Restrictions. See Restrictive Covenants.

*Restrictive Covenants.* Prohibitions on the use of property for specified purposes. For example, lots in a subdivision may be restricted so that only single-family houses can be built on the lots. Restrictive covenants may be contained in a deed, or they may be set out in a declaration of restrictions filed by the subdivider at the time the property is subdivided.

*Right-of-Way.* With reference to land, an easement granted by the owner of the land giving the holder of the easement the right to pass across the land.

*Second Mortgage.* A mortgage which creates a lien which is inferior (junior) to the lien created by a first mortgage. (Compare First Mortgage and Junior Mortgage.)

*Setback Lines.* The boundaries, often established on lots by local ordinances or by property restrictions, behind which building of some or all improvements must take place. For example, a building setback line established for a lot of 25 feet from the front property line means that the front of any building erected on the lot must be at least 25 feet from the front property line.

*Special Warranty Deed.* See Warranty Deed.

*Subdivide.* The process by which a subdivider or developer divides a tract of land into lots, and establishes a plan for houses, streets, parks and other neighborhood features.

*Subdivision.* The neighborhood created by a subdivider or developer through subdividing a tract of land.

*Subordinate Mortgage.* See Junior Mortgage.

*Warranty Deed.* A deed in which the grantor makes certain express guaranties as to title to the property conveyed. In Virginia, warranties of title are usually either general warranties or special warranties. A general warranty is a more complete warranty than a special warranty and is customarily given in residential transactions.

*Zoning.* A method of regulating the use of real estate by dividing a city or other area into zones, and designating the various purposes for which land in each zone can be used.

*Zoning Ordinance.* A city or county law which establishes zoning.

Your Real Estate Attorney or Agent can assist you with obtaining necessary contract and/or related forms.