Protect Yourself When Buying a Home to be Constructed

(see also CB13 Protect Yourself When Buying Real Property)

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This brochure was prepared courtesy of the Georgia Association of REALTORS® to help buyers with the new construction home buying process. The recommendations herein are general in nature and are not intended to be exhaustive. Some of the recommendations may not apply to specific properties. Buyers are encouraged to consult with experts and professionals of their own choosing to ensure that they are protected in buying a new constructed house.

Having a new home built is a dream come true for most home buyers. It is a chance for the buyer to have input into the design of the house, select building materials and finishes that are just what the buyer wants and end up with a home that uniquely reflects the buyer's tastes and personality. While the process can be fun and exciting, there are some steps the buyer should take to be protected.

Be Specific in Describing the Work that will go into Building the Home. Most disputes between builders and buyers result from the contract not being specific enough in describing the scope of work that is to be performed by the builder and the type and quality of materials and fixtures to be used. So, for example, if the contract does not include plans and specification showing that there will be crown molding in the various rooms in the house, the buyers should not expect crown molding. Buyers should follow the general rule that if an item is not included in the plans and specifications, the buyer is not entitled to the item. Therefore, plans and specifications should be very thorough. Buyers should also not assume that fixtures and finishes in a model house will necessarily be included in the house to be built for the buyer unless this is specifically stated in the contract. Insisting on detailed plans and specifications is probably the most important way a buyer can protect himself or herself in a new construction contract.

Check Builder's References. As with all professionals, some builders have better reputations than others. Checking builder references is a good way to determine how other buyers who are now living in houses built by the builder view the builder's work. Buyers are also encouraged to go see some homes constructed by the builder. This is a good way for buyers to evaluate the builder's attention to detail and quality. Ask other buyers how easy the builder was to work with when changes in the work need to be made (referred to as "change orders"), whether the builder met time deadlines and how well the builder addressed punch list and warranty issues. These are all good predictors of whether the buyer will or will not have a good experience with a particular builder.

Get Your Financing Together. Few builders will construct a new home for a buyer until the buyer has arranged financing to purchase the home (unless the buyer is paying cash). Normally, the builder will give the buyer a short period of time to verify that he or she has the financial ability to purchase the property. After this time period is over, the purchase contract is no longer subject to a financing contingency. This means that if the buyer's financial status changes and the buyer can no longer afford to buy the house when it is completed, the buyer will be in breach of contract and will likely lose his or her earnest money and other construction deposits if the buyer does not close. While this may seem harsh to some buyers, not buying the home can cause significant financial hardship to the builder since the builder's money is tied up in the house until it can be sold to someone else.

Know Who is Holding Earnest Money and Construction Deposits. Who holds earnest money and/or construction deposits is usually a matter of negotiation between the builder and the buyer. Builders often want control of earnest money and construction deposits to make it easier to access in the event the buyer defaults. Builders will also often use construction deposits to build the house. Buyers sometimes want a Broker to hold the earnest money since such funds will be held in the broker's trust account. Satisfying both the builder and the buyer in these negotiations is not always easy. If the builder goes out of business before the house is finished (as sometimes happens in a real estate downturn), buyer deposits will often be lost. However, builders will not generally make upgrades or modifications to houses without being paid up front for such improvements (since they may reflect the buyer's unique tastes and may make the house more difficult to market). As a result, most buyers have to accept some risk with regards to these deposits. This is another reason to investigate the background of the builder.

Have Realistic Expectations Regarding the Closing Date. Having a new home built for the buyer can be subject to conditions, such as bad weather, that are beyond the control of the builder. As a result, most real estate contracts give the builder the right to extend the closing date due to unforeseen circumstances. Buyers should have realistic expectations regarding the possible need to extend the closing date. If the buyer needs to be in the property by a particular date, this should be negotiated into the contract. The buyer should also regularly communicate with the builder as the house is being built to confirm that there are no circumstances which may result in the closing date being delayed.

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Read any Declaration of Covenants Applicable to the Community. Most new subdivision homes are now located in communities where all property owners are subject to a Declaration of Covenants, Conditions and Restrictions (often referred to as a "Declaration") that, among other things, obligates owners to be a member of and pay assessments to a homeowner's association. The Declaration also typically includes restrictions regarding how owners may use their properties. Buyers in these communities should read the Declaration to confirm they understand their financial obligations relative to any homeowners' association and are comfortable with the nature and scope of the use restrictions. For example, it is common for such restrictions to require approval by the homeowners association of: all exterior changes made by the owner to the home and lot, whether the property can be used for business purposes, the number of pets an owner can have, how a property must be maintained and whether or not it can be leased.

Understand What Warranties Come with the Home. In Georgia, developers are not legally obligated to provide buyers with a home warranty. Therefore, it is important for buyers to ask their builders about whether a warranty is being provided and to incorporate it into the purchase and sale agreement. Some warranties are provided directly by the builder while others are provided by independent warranty companies. Some warranties include detailed information about what is and is not a defect. Others require that very specific procedures be followed in order to file a warranty claim. Knowing what the warranty provides is the best way to avoid surprises down the road.

Read All Builder Disclosures Carefully. In many new construction purchase and sale contracts, the builder will disclose conditions in the property and neighborhood of which the buyer may be unaware. So, for example, the builder might disclose that there is a nearby quarry, the view from the buyer's lot may change over time, homes in later phases of the subdivision may not be as large as the homes presently being built or that the schools serving the subdivision may change due to redistricting. In many cases, the disclosures are of things buyers could easily have discovered had they exercised due diligence prior to signing the contract. Buyers should read all such disclosures so that they better understand what and where they are buying and because they are presumed to have read and understood everything that is in the purchase and sale agreement regardless of whether or not they actually did. Buyers should also do their own investigations of the broader community to ensure that they are aware of any objectionable conditions.

Put All Builder Promises in the Contract. In the event of a contractual dispute, courts will generally only look at the contract in deciding the rights of the parties. Therefore, all builder promises should be written into the contract. So, for example, if the house is going to be served by a septic system, have the builder warrant in the purchase and sale agreement that the system will be designed to serve the number of bedrooms in the house and ask for the warranty to survive the closing. Additionally, if the contract does not state that promises will survive the closing, then the buyer's right to insist that promises be honored usually ends at the closing itself.

Use the Right Contract. REALTORS® recommend that a special new construction purchase and sale agreement be used when a buyer is having a builder construct a new home for the buyer. This is because the contract needs to include or incorporate by reference the plans and specifications describing the scope of work involved in building the house. New construction purchase and sale agreements also typically address other issues unique to building a new home such as what rights the buyer will have to inspect the construction, whether and what type of warranty the builder will provide to the buyer, procedures for change orders, delays in construction and the closing date and who will be responsible for obtaining permits and a certificate of occupancy. The GAR New Construction Purchase and Sale Agreement is generally intended to be used in situations where the builder is building a new house and retaining ownership of the property until the house is finished and the closing has occurred. If the house is already completely constructed when the buyer puts it under contract, most REALTORS® recommend that a regular GAR Purchase and Sale Agreement be used in the transaction.

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