

Guide for Buyers of Residential Property



This guide:

- is not transaction specific and is intended for general information purposes only;
- is not intended as a substitute for specific legal advice - each property transaction is different;
- refers to the Real Estate Institute of New Zealand and Auckland District Law Society Agreement for Sale and Purchase ("the agreement"). It highlights some important areas which may be of interest to you; and
- does not cover everything that may occur in a transaction.

Signing agreement

We recommend that you provide us with the agreement before you sign so we can advise you before the agreement is legally binding. Our involvement at that stage can save costly mistakes, hassle and delays.

If you do not have a due diligence condition in your agreement, we recommend you view local Council and Regional Council records for the property and the GIS maps on Council's website before you sign the agreement. Please also check the natural hazards portal to identify any settled Toka Tū Ake EQC claims against the property and if any natural hazards may affect the property. If you are purchasing a property in Auckland, please also check the Tāmaki Makaurau Auckland Flood Viewer. If there are any issues, your insurer could decline cover at the settlement date.

If you do not have an insurance condition in your agreement, we also recommend contacting your insurance company or an insurance broker to confirm that you can obtain insurance for the property at an acceptable price before you sign the agreement.

The Real Estate Institute of New Zealand and Auckland District Law Society Particulars and Conditions of Sale of Real Estate by Auction ("the auction agreement") does not contain any conditions and does not allow you to challenge or requisition the title. It is unconditional on signing and you cannot later withdraw from the auction agreement even if there is a defect in title or other issue with the property. If you intend on buying at auction, we need to complete all checks of the property, title and other property documents before the auction. Please contact us with plenty of notice if you are considering bidding at auction and please do not sign an auction agreement without getting legal advice first.

Conditions to agreement

Any agreement you sign should have sufficient protection for you, such as the conditions outlined below. If you sign an agreement without any conditions, the agreement will be unconditional upon signing, and you will be legally bound to complete the purchase even if we subsequently discover an issue with the property or the title. As noted above, auction agreements do not contain conditions and are unconditional when signed.

Common conditions are:

- **Finance;**
- **Building report;**
- **LIM (Land Information Memorandum);**
- **Toxicology report;**
- **Due diligence; and**
- **Insurance.**

Finance Condition

We recommend speaking with your bank or broker about the timeframes required for a finance condition. They should be able to give you an estimated timeframe. If you need KiwiSaver to assist with the deposit, your finance condition date should be a minimum of 15 working days from the date of the agreement.

You can cancel under a finance condition if you are unable to obtain finance to purchase the property. If requested by the seller, you must then provide written confirmation from your bank or broker that finance has been declined. If you are unable to provide written confirmation that finance has been declined, the seller can object to you cancelling the agreement using your finance condition.

Before you confirm your finance condition, we highly recommend that you contact an insurance broker to confirm that you are able to obtain full replacement cover for the property, building and improvements at a reasonable price. Insurance cover is a requirement of bank finance.

Building report condition

The agreement requires you to obtain a written report prepared in good faith by a suitably qualified building inspector in accordance with accepted principles and methods. If you do not comply with these requirements, you cannot cancel under the building report condition. If you cancel under this condition and if requested by the seller, you must provide a copy of the report. If you are unable to do so, the seller can object to you cancelling the agreement using your building report condition. A written report by a qualified inspector will also ensure you receive the best possible advice concerning the property and that you have legal rights against the inspector if problems arise in the future, and the building report is flawed. If you rely upon an oral report, or a report from someone who is not a specialist, or someone who is not independent of you, your right to claim damages from the inspector may fail.

LIM condition

We strongly recommend you obtain a LIM from Council, as a condition of your agreement.

A LIM provides information held by the Council in relation to the property and includes matters such as rates, public works, building drainage and health requisitions, building consents, resource consents, sewerage connections, public and private drains, soil issues, zoning restrictions, some natural hazards, water connections, flood plains, wood burner consents, swimming pool compliance certificates, and requisitions under the Fencing of Swimming Pools Act 1987.

If there are elements of the LIM that you are not satisfied with, and the seller cannot or will not rectify these issues, you may be able to cancel the agreement.

Some properties may be known to Council as being flood prone, on unstable land or in a coastal erosion zone. A LIM should tell us this. If any of these issues are identified, you must notify your insurer and possibly your bank. You may need to engage specialists such as an engineer.

We always recommend that buyers obtain their own LIM from Council instead of relying on the LIM provided by the agent or the seller. If for any reason in the future you need to seek recourse against Council for anything omitted from the LIM or an error in the LIM, Council may not have a duty of care to you if you were not the party who ordered the LIM. Also, the LIM could be fraudulently altered before it is presented to you. For these reasons, we strongly recommend that you order a LIM in your own name.

Toxicology condition

We recommend that all buyers include a condition in the agreement to allow for drug contamination testing if there is concern that persons have or may have been manufacturing drugs at the property e.g. some previously tenanted properties or abandoned properties.

Due diligence condition

We highly recommend a due diligence condition, if possible, as it allows buyers to look into many different aspects of the property before the agreement is unconditional.

If you do have a due diligence condition, we recommend that you view local Council and Regional Council records for the property, the GIS maps on Council's website, the Tāmaki Makaurau Auckland Flood Viewer and the natural hazards portal as noted above. If there are any issues, your insurer could decline cover at the settlement date.

The property you are purchasing may also be affected by rising sea levels in the future. This could affect your ability to obtain insurance or finance and is something you should check with your insurance provider or bank if you do have concerns. Rising sea levels or flood prone areas may also affect your ability to further develop the site and you may wish to obtain specialist advice.

You can also use the due diligence condition to look into future development of the property such as if you are able to subdivide the land and whether there are any building restrictions.

Insurance condition

If you do not have a due diligence condition, we recommend that a specific insurance condition is inserted into the agreement, so you can ensure that insurance is obtainable for the property at a price and on terms acceptable to you.

Escape clause

The agreement may contain an "escape clause" or "cash-out clause". This will allow the seller to accept another offer, require you to confirm the agreement as unconditional within a specified timeframe and if not, cancel the agreement.

Confirmation of agreement

If your agreement is subject to **any** conditions, please contact us on or before the dates for confirmation of these conditions so we can guide you through the process. We must provide written confirmation of satisfaction of any conditions to the seller's lawyer, generally by 5pm on the specified date. The seller may cancel the agreement if written confirmation is not provided in time.

When all conditions in the agreement have been satisfied, the agreement is then "unconditional".

Title

We will search the title and any interests registered on the title such as easements and encumbrances. You can serve a notice of requisition (or challenge) on the seller for issues with the title that are defective. This notice must be served within 10 working days of the date of the agreement, or you will lose your rights to requisition.

There is then a strict procedure which can lead to either party accepting the requirement or pulling out of the agreement. We will guide you through this process if it applies.

You should check the property you are buying is the one shown on the plan attached to the title. Refer to the Council planning maps and photographs as a double check. Let us know if you have any concerns.

Cross leases (if applicable)

If the property is on a cross lease, there are special provisions in the agreement relating to this type of ownership. Cross lease ownership is more complex than freehold ownership. Each owner holds a long-term lease over their property and those leases contain significant restrictions on

alterations and development of the property. Cross leases can lead to neighbour disputes if they are not managed well.

It is important to check the footprint of the actual buildings on the property against the plan shown on the Flats Plan to ensure that there have not been any alterations to the exterior of the flat (building) since the Flats Plan was deposited. If there have been structural alterations within the footprint, then the consent of all other owners in the cross lease development should have been obtained.

If the alterations extend beyond the dimensions of the plan and are closed in, then the Flats Plan should have been amended to show the alteration. If this is not the case, you can require the seller to rectify the title by obtaining the consent of the other owners, depositing a new Flats Plan, possibly new cross leases and having a new title issued which correctly shows the amended dimensions. You must "requisition the title" within 10 working days to correct this issue and protect yourself.

In the case of stand-alone buildings and structures erected on "exclusive use" areas not shown on the Flats Plan, you generally have no right to requisition the title, provided the consent of the other owners was obtained to the building or structure. You can, however, require a copy of the written consent. If the seller cannot provide written consent, you can cancel the agreement.

It is therefore very important that you thoroughly check whether any changes have been made to the building that are not shown on the Flats Plan. This can sometimes be very difficult to detect. We recommend that your building inspector examines the property and the original building plans, to thoroughly investigate this aspect. In particular, to check whether the "footprint" of the building is as shown on the Flats Plan.

It is important because a change in the footprint of the cross lease can negate the title, which will be very difficult and costly to rectify (if possible at all). It will cause difficulty when you sell the property in the future. Your bank may not lend to you.

If there have been other internal structural changes to the flat without the consent of all the other cross lease owners, then you can be in breach of your lease and liable to remedy that breach, even though you did not make the change yourself. If your builder identifies any discrepancies, please talk to us as it could have serious consequences.

Unit titles

Similar provisions apply in respect of unit titles as to cross leases. It is important to ensure no changes have been made to the boundaries of the building as shown on the Title Plan, otherwise rectification in the future can be extremely costly.

The Unit Titles Act 2010 provides that the seller must give you complete and accurate "pre-contract disclosure" through a statement which is prescribed in the legislation. This must be done before the agreement is signed. If not, you may be able to delay settlement.

Likewise, not later than the 5th working day before settlement, the seller must provide you with a complete and accurate "pre-settlement disclosure statement" setting out the prescribed information with a certificate from the body corporate certifying that the information in the statement is correct. If not, you may be able to delay settlement.

If the seller owes money to the body corporate, the body corporate can withhold the certificate, but this can generally be rectified by the seller's lawyer giving an undertaking to the body corporate to pay any outstanding amounts on settlement with you.

The supply and checking of this information is most important because unit titles are complex. For that reason, unit titles do not fall into the Smart Move fixed fee criteria.

Notices on Title: Sections 72 – 74 of the Building Act 2004 or Section 36 of the Building Act 1991.

Great care is needed when such a notice is on the title. It indicates:

- Possible restrictions on further building on the site (because of danger of slipping, flooding etc.);
- Likely difficulties obtaining insurance (your insurance company must be informed that there is a notice on the title). You may not be able to get insurance, and consequently fail to get a mortgage;
- You may not get a mortgage. You (and we as your lawyers) have a duty to inform any lender to you of the existence of the notice. The lender may not lend because it is concerned about the risk;
- The Earthquake Commission may decline to pay out on any claim you make if you have flooding or a slip (Earthquake Commission Act 1993 Schedule 3 Clause 3). In some circumstances, you should not purchase the property.

Boundary pegs and fences

If you are purchasing bare residential land, the agreement requires the seller to identify the boundary pegs. We recommend that you check that the boundary markers are in place and let us know if they are not. If you are purchasing a property that is not bare residential land, the seller cannot be required to identify the pegs.

If you are concerned about where the boundaries are, you may need to arrange for a site survey with a surveyor. Please advise us if you intend to do this.

Deposit

The deposit is usually 10% of the purchase price and is usually paid when all of the conditions are satisfied and the agreement is deemed "unconditional". The default payment date under the agreement is on signing, but this is usually amended, and we recommend that such an amendment is included.

If you are using your own funds to pay the deposit, please make sure you are able to access them in time to pay the deposit. If they are on term deposit or in an overseas bank account, please factor in how long it will take for those funds to become available and take steps to ensure the funds are available for payment when due.

When a deposit is paid using your own funds i.e. not KiwiSaver, the real estate agent holds the deposit for 10 working days (unless the parties agree to an early release). Once the funds are paid from the real estate agent to the seller's lawyer, the seller is able to access those funds immediately. They can use these funds as a deposit on their next home or spend them as they please. If the seller defaults on settlement and does not transfer the property to you, you will be an unsecured creditor and if the seller disappears or is in financial difficulty, it may be difficult or impossible to recover the deposit and you have limited protection. You can require the deposit to be held until settlement but this is unusual and usually resisted by sellers and their lawyers.

KiwiSaver

If you are planning to withdraw KiwiSaver contributions, you must comply with all the qualifying conditions including:

- Contributions must be used to purchase the property and cannot be used to repay a loan after settlement e.g. you cannot settle with loans from parents and then withdraw the KiwiSaver contributions later to repay the loan; and
- You must allow, in most cases, at least **15 working days** to withdraw funds **prior to paying the deposit or settlement**.

As noted above, if you are using KiwiSaver for the deposit, please allow a finance condition period of 15 working days to give you sufficient time to come into the office or meet a JP, complete the KiwiSaver forms and submit them to the provider. It takes a KiwiSaver provider roughly 10 working days to approve the withdrawal and withdraw the funds from investment. If you intend to pay the deposit using KiwiSaver funds, the agreement needs to include a specific clause requiring the funds to be held by the seller's lawyer until settlement. Please ensure that the real estate agent knows you are using KiwiSaver for the deposit so they can include the appropriate clause. We can provide suitable wording if the agreement is provided to us before signing.

Chattels

The chattels included in the purchase are detailed in Schedule 2 of the agreement. If there are other chattels which should be included, but are not described in the agreement, please advise us immediately. The chattels must be provided to you in reasonable working order.

Swimming pool / spa pool / fireplace?

Is there a swimming pool, spa pool or fireplace on the property? A LIM will identify if Council has approved the construction or installation.

If a fireplace or chimney is not checked on a regular basis (i.e. yearly), your home may not be covered for fire insurance.

Councils have strict conditions regarding swimming pools and surrounding fencing. If the property you're intending to purchase has a swimming pool or spa pool, you will have to comply with 3 yearly Council inspections and the fees associated with same.

Mortgages and guarantees

Are you obtaining a bank loan to finance the property? If so, your loan will be secured by an "all obligations" mortgage over the property. It not only secures the loan now being made to you, but any other obligation you may have to the bank, whether now or in the future. For example, if you have signed a guarantee in favour of the bank for someone else, that may also be secured by the mortgage. Please urgently let us or your bank know if you think this may be an issue for you.

We are acting for you as buyer but we are also acting for the bank to register the mortgage. We have to provide a certificate on settlement to the bank confirming that we have acted in accordance with their instructions. This means we also have an obligation to tell the bank about any issues we are aware of with the property such as unconsented building works or leaky homes. If you fail to disclose this to the bank during the conditional stage of the agreement, we may be required to notify the bank before settlement, the bank may withdraw from lending and you would be in a difficult position on settlement day.

Rates and water rates

The Council requires the current rating instalment to be paid by the seller on settlement. The seller is liable for rates for the period up to settlement, and you are liable for the balance of the

rating instalment period. These rates are apportioned on settlement day and will be included as adjustments on the "settlement statement" provided by the seller's lawyer. You are not required to attend to any matters in respect of rates as we will notify Council of the change of ownership.

The seller's lawyer will obtain and pay for a special water meter reading to the date of settlement. You will be liable for water consumption after the settlement date and the water provider should be notified of the change of ownership.

House insurance

As noted above, we recommend you confirm during the conditional period whether the house can be insured. If the agreement becomes unconditional, please put in place the insurance cover as soon as possible, with the cover to take effect on the date of settlement. The policy must be in the names of the new owners e.g. yourself, company name, or your trust's trustees. Your bank (if you are obtaining a mortgage) must be noted as first mortgagee or interested party. Your insurer must send a Certificate of Currency to our office to supply to your bank before we can receive your loan advance.

Power, phone, internet, gas, etc

It is your responsibility to contact the utility companies directly to make arrangements for supply of these services from your chosen supplier.

Preparation for settlement

It is prudent to allow at least 15 working days from the date the agreement goes unconditional until settlement so that your bank can issue loan documents, we can meet you for signing and effect settlement in time.

Settlement must occur on a "working day". If the settlement date is not a "working day", settlement must take place on the previous working day.

Once the agreement is unconditional and we have received loan documents from your bank, we will make an appointment with you to sign the transfer documents and loan documents. We will discuss the settlement procedure further with you at that appointment.

Right to inspect

The standard agreement provides that you are able to inspect the property prior to settlement. We recommend that you do this no later than 2 working days before settlement. Contact the real estate agent directly to make a time to do this. It must be on "reasonable notice" to the seller. When you inspect, you are checking to see that the property and chattels are in the same condition they were when you viewed the property. We recommend you test lights, hot water, ovens etc. to ensure they are working. If they are not, please urgently advise us, even if the real estate agent says they will sort the issues. Do not leave this until settlement day as it is likely we will not be able to do anything about the issues at that late stage.

Payment of balance of purchase price

We will advise you of the balance needed from you to complete settlement, including our costs. That balance will need to be paid to our trust account preferably on the day before settlement by direct credit or other terms as agreed by us. If you are obtaining a loan, the bank arranges for those funds to be deposited into our trust account on settlement day.

If there are surplus funds left over after completion of settlement, we will make arrangements to transfer them to you.

Settlement day

We recommend contacting us during the morning to confirm there are no unforeseen issues which could affect settlement.

Provided we are holding all funds needed to complete settlement, we will endeavour to complete settlement as early as possible. However, other factors may affect the time of settlement beyond our control e.g. if the seller's documents have not been signed and they are not ready to settle.

If delays occur, we will endeavour to contact you. We are aware that the removal company you may have engaged will be charging for its time. **For this reason, we strongly recommend you organise your removal company to move you later in the day.**

Possession

It is normal for you to take possession of the property only after we have paid the purchase monies to the seller's lawyers in exchange for the title to the property. Unfortunately, we are not able to give you a time estimation for when this will occur.

Keys

On most occasions, keys are supplied by the real estate agent. Contact the real estate agent prior to settlement to make arrangements for you to collect the keys following settlement.

Any remote-control devices for access should also be held by the agent and made available to you immediately following settlement. Any alarm codes should also be supplied at the same time.

We will contact you as soon as settlement has occurred so that you can collect the keys.

After settlement

You will receive a detailed statement showing all fees, receipts and payments through our trust account, as well as a copy of the Record of Title showing the new owner's name with the registered mortgage if applicable.

Relationship property

If you have commenced a personal relationship prior to purchasing the property or you commence a personal relationship after purchasing the property, and the relationship lasts 3 years or longer, or there is a child of the relationship, your partner may be able to acquire a half share in the property in the event of separation or death. If this is not what you want, you should consider a contracting out agreement setting out your contributions to the purchase, and how the property is to be distributed in the event of separation or death.

If you wish to discuss the implications of your relationship, please speak with us as soon as possible. Our conveyancing retainer does not cover any advice on the application or otherwise of the Property (Relationships) Act but we do offer a free 15 minute discussion with one of our property lawyers to discuss your relationship property situation – as long as it is before settlement of your purchase.

Ask us for help

Buying a property can be an exciting and overwhelming time. We have done this many times before, and we know the process inside out. This guide is intended to assist you with understanding the usual process, but ultimately every transaction is unique. Please ask us to explain anything that you do not understand – we are happy to help.