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## Attorney Corner

### ▶ **The Ins, Outs and All Arounds of New Construction** by Adam Leitman Bailey, Esq.



When you buy a newly constructed property, your hope is to live in a home with the most technologically advanced electrical and ventilation systems, the latest appliances, the best fixtures, and perfect plumbing.

You also want the advantage of owning brand-new big-ticket items such as the boiler and roof. The replacement or repair costs of either would add significantly to the price of an older home. Another advantage to buying new is the option to customize to your exact specifications. However, when planning your not-yet-built home, keep in mind the following:

Check the builder's previous jobs Make sure the builder has a reputable record. Obtain references from the builder. Ask the builder for a list of other properties he or she has developed. Visit these properties if possible and ask the residents if they are satisfied. Ask real estate professionals for their opinion of the builder. A few phone calls can ensure that your future home will be built with the care and quality described in the builder's brochure.

Conduct an extensive inspection of the premises with an engineer, architect, or home inspector. An extensive inspection by a qualified inspection service should take place before closing on the property. A qualified inspector can detect physical and mechanical problems as well as minor problems and issue a report.

Your attorney should include a provision in the contract of sale where you, as buyer, are not required to close or purchase the property until all problems listed in the report have been cured. However, many builders won't negotiate their contracts. Checking for structural defects ahead of time can save you thousands of dollars.

A three-phase inspection process is recommended: The first phase should be after the completion of the framing of the property. The second should occur after the installation of all cooling and heating systems, plumbing and electrical equipment. The final inspection should occur after your property is completed. Inspections usually cost only a several hundred dollars and it's money well spent.

Obtain warranties from the builder. New York law clearly enforces warranties given to a buyer of a newly constructed property. However, New York State law is not as generous when certain warranties are waived in the contract of sale. Warranties concerning the property's plumbing, electrical, heating, cooling and ventilation systems cannot be waived for two years after purchase.

Other basic warranties requiring that the property be built in a skillful manner and be safe and habitable cannot be waived. However, as long as the builder gives an express limited warranty of some kind, the builder may exclude all other warranties. Without a provision in the contract giving the buyer all possible warranties that exist or may exist, you may be paying for repairs yourself.

Buyers should make the contract of sale include the maximum warranty protection as the law can provide. Specify the name brands of all fixtures and appliances to be installed. The brand names, appliances and fixtures should be itemized in the contract of sale. In order to get the greatest value from your new construction, your appliances and fixtures should be well made and durable.

Watch out for contract clauses regarding your move-in date. Moving in on the date the builder promises is not guaranteed. Bad weather, material shortages and problems during construction can keep the builder from producing on time. A provision should be negotiated into the contract stating that if the premises are not in move-in condition by a certain date, you can either cancel the contract and receive a refund or a reduction in the purchase price.

Many new construction contracts require the buyer to close when a temporary certificate of occupancy is obtained. However, a builder can obtain a temporary certificate of occupancy while the building is under construction. For your protection, strike this clause from your contract of sale.

You may also lose a favorable interest rate that you locked in with your bank if you pass the bank's deadline. These costs can reach thousands of dollars over the course of the loan. By having the builder agree to pay all added costs associated with your loan if the property cannot close on time, have the builder agree to give you a mortgage locked at your previous interest rate that has not expired. And remember, do not close on the loan until the premises has been inspected and is known to be free from defects.

Let us understand the relationship between yourself and a **builder/contractor (BC)**, otherwise known as a **BC**. Whether you like it or not, this relationship is likely to be adversarial. The **BC** wants to make the most money for the least amount of effort and material. You, on the other hand, would like to get the most for your money. This is a situation where "caveat emptor" - buyer beware - applies.

With your attorney's help, try to work out an arrangement where you are always withholding at least 10 to 15 percent of every payment until the project is completed to your satisfaction or to the contractual agreement. Warning: Contracts written by the **BC**, unsurely benefits the **BC**. Here again, check with your attorney.

Money usually brings them back to finish or complete the job. When a **BC** cries that he needs the money to finish the job, it is likely that he will not finish the job. Having the **BC's** money in your pocket is the only power you have to ensure that at least you get what you paid for.

Mr. Bailey practices residential and commercial real estate law in New York and New Jersey as the principal of Adam Leitman Bailey, P.C. He writes a real estate column for the New York Law Journal and is frequently featured in the media for his expertise on real estate matters.