

ATTORNEY WRITES

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“Buying and Selling Waterfront Property—The Pitfalls”

Isn't buying or selling waterfront property the same as similar transactions for non-waterfront properties? No! There are many legal and practical differences for transactions involving waterfront properties than conventional properties.

Perhaps the most important component of any real estate transaction is the sale/purchase agreement. That document (signed by both the buyer and seller) “sets” all of the important matters for the ensuing real estate transaction. While some inexperienced buyers and sellers view the document as simply a preliminary informal agreement or something akin to a letter of intent, it is not. A signed sale/purchase agreement is fully binding, usually contains all of the important terms of the real estate transaction and cannot be changed or varied unless consented to by both parties in writing. Accordingly, if you are a prospective purchaser, it is important to make sure that every major issue is addressed in the sale/purchase agreement including any contingencies or “outs.” Some of the major clauses in a sale/purchase agreement for waterfront property include the following:

- Purchase price
- Property legal description and address
- Financing contingencies
- Earnest money/deposit
- Fixtures and items that are included in the sale
- Type or quality of title to be given
- Warranties or “as-is” clause
- Remedies upon default
- Title insurance
- Closing costs and who pays what
- Property tax proration
- Proration of other items
- Inspection clauses
- Contingency/cancelation clauses
- Survey
- Real estate transfer taxes
- Broker fees
- Closing date
- Seller's disclosure statement (if a dwelling is involved)
- Private road disclosure

- Type of deed or land contract
- Arbitration clause
- Notices

If a prospective purchaser is considering buying a waterfront property, it is essential to determine whether in fact the property is true waterfront property and if so, the extent of the rights associated with that property. Many properties that are advertised as “waterfront” property turn out not to be or the property’s riparian rights could be very limited. An off-lake or off-water property is not riparian—a lot or parcel must actually have frontage on a body of water to be riparian. Furthermore, any water usage rights for an off-lake or back lot property is almost always extremely limited. Typically, any lake access rights involve access only (that is, travel), with no rights to have a dock, moor a boat or even lounge or sunbathe. It is also fairly common for a purported waterfront property to actually not run to the water itself (“land gaps” are quite common) or to have an easement, walkway, road or other recorded interest run along the waterfront. Quite often, it will take a skilled real estate attorney to advise the purchaser whether the property at issue is truly waterfront and if so, whether there are any restrictions or limitations.

Some of the other matters that a prospective purchaser should familiarize himself or herself with before making a binding decision regarding purchasing a waterfront property include the following:

1. Are there any deed restrictions that limit use?
2. How much waterfront does the lot actually have?
3. Is there a voluntary or mandatory property owners association?
4. What will the property taxes be after the transaction?
5. Are there any lake access easements, private or public road right-of-ways, public or private walkways or similar items that bind the property or are located nearby?
6. Is the property subject to any special assessments for aquatic weed controls, municipal services, or other matters?

7. Are there any local municipal, zoning or other ordinance requirements that would impact buildability, dockage, the number of boats allowed, etc.?
8. Has a recent survey been done for the property?
9. Are there any negative uses nearby (for example, an expressway, prison, airport, or landfill) or are there nearby properties that could be heavily developed later?
10. Is the body of water healthy or degraded?
11. What are the bottomlands of the property like?
12. Are there chronic disputes in the neighborhood?

It is simply not prudent for a prospective buyer or seller of waterfront property to assume that the closing transaction will be the same as with any other piece of property. Where a waterfront property is involved, it is normally wise to utilize an attorney who is skilled in the area.

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A recently released book that I authored for the Michigan Lakes & Streams, Inc., *Buying and Selling Waterfront Property in Michigan*, delves into waterfront property real estate transactions in much more detail than this article. An order form for this new book can be found at www.mymlsa.org.