

# OVERVIEW OF STANDARD CONTRACT FORM

In North Carolina, many real estate agents use the standard “Offer to Purchase and Contract” (form 2-T) for North Carolina residential real property transactions (the “Standard Contract”). The Contract is jointly approved by the NC REALTORS® and the NC Bar Association and is widely used across the State of North Carolina.

The following summary This Overview highlights some of the most important aspects of the Standard Contract and the contract process. It is not a substitute for a review of the Standard Contract itself. A real estate agent may assist a buyer or seller in completing a pre-printed sales contract form and is expected to possess a basic understanding about the buyer and seller’s rights and responsibilities under the Standard Contract. However, if a buyer or seller has questions about the Standard Contract or the adequacy of the form for a specific transaction, they should consult a North Carolina real estate attorney before they sign it.



# CONTRACT FORMATION

## When does the Standard Contract become binding?

According to the Standard Contract, the contract becomes binding:

- when it has been signed by both the offering party and the party to whom the offer has been made, and
- the party to whom the offer has been made has communicated that they have signed to the offering party.

## Is the contract binding if any fee payable by the buyer hasn't been delivered?

Yes; however, the buyer's failure to timely deliver any fee gives the seller the right to terminate the contract if the buyer fails to deliver the fee within one banking day following notice from the seller.

## EARNEST MONEY

It is common, but not required, for earnest money, called an "Earnest Money Deposit" in the Standard Contract ("EMD"), to be paid by a buyer as an indication of the buyer's intention and ability to buy the property. **The contract provides that the buyer may negotiate to pay initial and/or additional EMD.**

## Who holds EMD?

The EMD is held in trust by an Escrow Agent (typically a real estate firm representing the seller or buyer or an attorney who will "close" the transaction).

## When is the Initial EMD due?

The EMD must be made payable and delivered to the Escrow Agent within 5 days of the Effective Date. If the EMD is not timely delivered, then the seller may demand in writing that the EMD be paid. If the EMD is then not delivered within one banking day, seller may terminate the contract and seek recovery of the Due Diligence Fee (defined below) as well as any EMD that has been paid or is payable.

## Refund of EMD

The EMD is refunded to the buyer under certain circumstances, including:

- buyer's notification to seller prior to the end of the Due Diligence Period (defined below) that buyer is terminating the contract
- seller's inability to complete the transaction.

## Loss of EMD

If buyer "breaches" the contract, the EMD is payable to the seller as "liquidated damages," which means that the seller's damages will be limited to the amount of the EMD.

# BUYER'S "DUE DILIGENCE" PROCESS

The Standard Contract permits the buyer, at buyer's cost, to investigate the condition of the property and the financial aspects of the transaction (financing, appraisal, insurance, etc.) for an agreed-upon period of time, called the "Due Diligence Period."

## Buyer termination rights

Buyer may terminate the contract for any reason or no reason during the Due Diligence Period, but only if the buyer has paid any agreed-upon Due Diligence Fee. Unless the buyer has a lawful reason to terminate, such as the seller's breaching the

contract first, the buyer's terminating the contract after expiration of the Due Diligence Period will be a breach of contract and may result in loss of the EMD.

## Due Diligence Fee

Although not required, in many cases a negotiated fee, called the "Due Diligence Fee" ("DDF") or "DDF" is paid to the seller in exchange for the buyer's right to terminate the contract during the Due Diligence Period.

- **DDF non-refundable.** Unlike an EMD, the DDF is paid directly to seller and generally is non-refundable; however, if seller is unwilling or unable to complete the transaction, buyer may be entitled to a

refund of the DDF. In the event of a material breach of the contract by seller, recovery of the DDF may be time-consuming and costly if seller does not voluntarily refund it.

- **Credit to purchase price.** The DDF will be credited toward the purchase price if buyer completes purchase.

**How much "due diligence" money should be paid?** The amount of any DDF is entirely negotiable between buyer and seller, and is influenced by market forces such as availability of housing inventory, desirability of the property, as well as seller's motivation to sell the property and buyer's motivation to buy it.

**When is the DDF due and payable?** The DDF is due immediately when the contract becomes effective. If the DDF is not delivered within one banking day's after written notice demand from the seller, seller may terminate the contract and seek recovery of the DDF as well as any EMD earnest money deposit that has been paid or is payable. In addition, buyer's right to terminate the contract for any reason or no reason during the Due Diligence Period does not apply unless buyer has paid any DDF that has been agreed on.

## How long should the Due Diligence

## Period be?

Like the amount of any DDF, the length of the Due Diligence Period is entirely negotiable between buyer and seller. The Due Diligence Period should be of sufficient length to permit buyer:

- to conduct any desired inspections of the property during the Due Diligence Period
- to pursue qualification for any loan that the buyer may obtain, taking into account time needed for an appraisal to be completed, and for the lender to provide sufficient information for the buyer to decide whether to proceed with or terminate the contract.
- to be reasonably satisfied, prior to the end of the Due Diligence Period, that closing on other property the buyer needs to sell in order to qualify for a new loan or to otherwise complete the purchase of the seller's property will take place prior to the Settlement Date of the Contract with the seller.

## What things should buyer investigate during the Due Diligence Period?

The Standard Contract gives examples of things the buyer should consider investigating during the Due Diligence Period.

## May the buyer ask the seller to make any repairs/improvements?

As a result of the buyer's investigation of the property, the buyer may request that the seller make repairs or improvements. The seller may be willing to negotiate repairs or improvements, but is not required to do so. The buyer may also request that the seller give a credit or concession at closing to the buyer instead of performing repairs, subject to lender approval. The seller has no obligation under the contract to agree to any repairs or concessions.

## What if the buyer is not satisfied?

If the buyer is not satisfied with the results of the buyer's Due Diligence or the progress of the repair/improvement negotiations, the buyer is strongly advised, before the end of the

Due Diligence Period, to enter into a written agreement with seller to extend the Due Diligence Period or terminate the contract. The seller is under no obligation to extend the Due Diligence Period.

## Access to the property

The seller is obligated to provide reasonable access to the property through the entire course of the transaction to the buyer and buyer's agents and representatives in order for the buyer to conduct buyer's due diligence. ~~However, following the end of the Due Diligence Period, the buyer's right to terminate the contract based on any matter relating to the buyer's due diligence is limited.~~

# BUYER'S SALE OF OTHER PROPERTY

**Sale of buyer's property is part of the due diligence process.** If the buyer must sell or lease other real property in order to qualify for a new loan or to otherwise complete the purchase of the property from the seller, the buyer should seek to close on the buyer's other property prior to the end of the Due Diligence Period or be reasonably satisfied prior to the end of the Due Diligence Period that closing on the buyer's other property will take place prior to the Settlement Date of the contract with the seller.

## May the buyer terminate the contract if their property doesn't close?

After the end of the Due Diligence Period, the buyer does not have a right to terminate the contract if their existing property doesn't close.

## Attorney-drafted contingency

The contract states that the buyer must buy the property even if the buyer's current home does not sell before closing. There are no contingencies in this contract for the sale of buyer's property or

otherwise. If the buyer and seller agree wish to make their contract contingent on a sale of other property owned by the buyer, an appropriate contingency agreement should be drafted by an NC real estate attorney and added to the contract. It is advisable for a party presented with a contingency drafted by an attorney representing the other party to have the contingency reviewed by their own attorney to ensure that their interests are protected.

**Disclosure of need to sell other property** Any fact directly affecting a buyer's ability to complete a transaction, including but not limited to any need to sell and/or close on a current property before the buyer will be able to close on the sale purchase of the seller's property, is a material fact that must by law be disclosed by the buyer's agent. A real estate agent working with a buyer cannot hide any material fact relating to the buyer's ability to complete the transaction and should not be asked to do so.

# FINANCING

## Part of Due Diligence Process

If a buyer intends to finance the purchase of a property and the Standard Contract is used in the transaction, they should pursue qualification for and approval of any loan during the Due Diligence Period.

The buyer should consult with their lender prior to signing the Contract to assure that the Due Diligence Period allows sufficient time for any appraisal to be completed and for the lender to provide sufficient information for the buyer to decide whether to proceed with or terminate the transaction.

## Lender pre-approval/Appraisal

- A buyer should consider seeking pre-approval from a lender prior to writing an offer. A pre-approval

letter should state that the lender has reviewed the buyer's credit report, credit worthiness, income requirement and cash to close, and pre-approves the buyer for the loan, subject to an acceptable appraisal of the property.

- Seller may ask the buyer to produce a pre-approval letter or request documentation showing the buyer has sufficient funds to buy the property without a loan.
- The appraiser will normally work for the lender, not the buyer. A seller has no obligation to negotiate with the buyer based on the appraiser's opinion of the property's value.

## Who does appraiser work for?

The appraiser will normally work for the lender, not the buyer.

## Seller request for information

The seller may, in considering any offer the buyer makes, ask the buyer to produce a pre-approval letter from a lender or, if the buyer indicates that they do not intend to obtain a loan, request documentation which demonstrates that the buyer will be able to buy the property without having to obtain a loan.

# CLOSING/CLOSING ATTORNEY

## Closing

If, following the end of the Due Diligence Period, the buyer decides to continue with the transaction, a "closing" (defined below) will be scheduled.

## Closing

"Closing" is defined in the Standard Contract as the completion of the legal process that results in the transfer of the title to the Property from the seller to buyer.

## Closing Steps

Closing includes a number of steps, including the "Settlement," which Settlement is the signing and delivery to the closing attorney of all documents (deed, settlement statement, loan documents, etc.) necessary to complete the transaction (deed, settlement statement, loan documents, etc.) and the closing attorney's receipt of all funds necessary to complete the transaction. Settlement commonly takes place at the closing attorney's office.

Once Settlement is complete, Closing will occur after the closing attorney performs a title update, receives authorization to disburse funds, and records the deed and any deed of trust as the final step. Unless the parties have agreed otherwise, the buyer is only entitled to receive the keys and take possession of the property after Closing is complete. It is common that Settlement and Closing will occur on the same day, although that is not always the case.

• **Where does closing take place?** The Settlement commonly takes place at the closing attorney's office.

• **When is closing completed?** The last step in the Closing is when the closing attorney records the deed and any deed of trust. This is commonly, but not always, done on the same day as the Settlement.

• **When may the buyer take possession of the property?** Unless the parties agree otherwise, the buyer is entitled to possession of the property if and when the "Closing" process has been completed.

## What does the closing attorney do?

Among other things, the closing attorney will perform an examination of the property's title to ensure that the seller can convey clear title to the buyer, obtain title insurance, prepare and/or supervise the execution of all closing documents, and record the deed and any deed of trust (the document the buyer signs pledging the property as collateral for repayment of any loan).

## Use of attorney

It is the position of the NC Bar Association and the NC REALTORS® that all buyers should hire an NC-licensed attorney to perform the closing. A real estate agent may be able to assist the buyer in finding a North Carolina real property attorney.

## Who pays the closing attorney?

The Standard Contract provides that the closing attorney is selected and paid by the buyer.

**What does the closing attorney do?** Among other things, the closing attorney will perform an examination of the property's title to ensure that the seller can convey clear title to the buyer, obtain title insurance, prepare and/or supervise the execution of all closing documents, and record the deed and any deed of trust (the document the buyer signs pledging the property as collateral for repayment of any loan).

## Does the seller need an attorney?

The closing attorney may prepare the deed and all other documents necessary for the seller to perform seller's obligations under the contract, or the seller may retain their own attorney to prepare the seller's documents. In either case, the seller will be responsible for paying the attorney.

## Who is responsible for costs of Closing?

The Standard Contract allocates responsibility to the buyer and seller for the payment of various costs and fees associated with closing the transaction, including but not limited to real estate taxes, attorneys fees, loan-related costs, dues and fees charged by any owners association or owners association management company, and any "Special Assessments," which are defined in the Standard Contract as certain charges against the property by a governmental authority or owners association.

**Who pays special assessments?** Unless otherwise agreed by the parties, Special Assessments that are confirmed prior to

Settlement must be paid by the seller, including payments that may become due after Settlement if their amount is known. On the other hand, Special Assessments that are under consideration but have not been approved prior to Settlement are the responsibility of the buyer.

## Closing Process

"Closing" is defined in the Standard Contract as the completion of the legal process which results in the transfer of the title to the Property from the seller to buyer.

## Delays in Settlement/Closing

On occasion Sometimes, a party is unable to complete the Settlement by the agreed-upon "Settlement Date." Common examples include the buyer's lender needing more time, or the closing attorney's discovering a title issue the seller needs to fix. In such cases, the contract permits the "Delaying Party" up to 7 days after the Settlement Date, without penalty, to complete Settlement and Closing. If parties wish, they can negotiate extensions longer than 7 days, although neither the buyer nor the seller has any obligation to do so.

## Seller Closing Duties

The seller has many obligations under the contract as part of turning over possession to the buyer on Closing. The seller must leave on the utilities through Closing (regardless of the time Closing occurs) and deliver the property to the buyer in substantially the same or better condition as when the offer was made. The seller must unpair smart devices, remove any fixtures that do not convey to the buyer, complete any agreed-upon repairs, and remove all personal property and garbage. Seller should consult with their agent to ensure they are fulfilling all their obligations under the contract leading up to and including Closing.

**Examples.** Common examples include a delay by the buyer's lender in completing the loan process or the discovery by the closing attorney of a defect in the title to the property.

that requires corrective action by the seller.

• **How long may Settlement/Closing be delayed?** In such cases, the Standard Contract permits the “Delaying Party” up to 7 days after the Settlement Date to complete Settlement and Closing.

**Planning for possible delay.** In making their plans, it is prudent for the buyer and seller to take into account the potential for a delay in the completion of the transaction.