



# 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 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.

### 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).

### 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.

### Due Diligence Fee

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

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

### 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 in to 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.

### **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 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**

If the buyer and seller agree to make their contract contingent on a sale of other property owned by the buyer, an appropriate contingency 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 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 decide whether to proceed with or terminate the transaction.

### Lender pre-approval

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, income requirement and cash to close and pre-approves the buyer for the loan, subject to an acceptable appraisal of the property.

### 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.

### 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.

- **Closing steps.** Closing includes a number of steps, including the "Settlement," which is the signing and delivery to the closing attorney of all documents 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.

- **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.

### Delays in Settlement/Closing

On occasion, a party is unable to complete the Settlement by the agreed-upon "Settlement Date."

- **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 14 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.