

REAL ESTATE CONTRACTS
“The Devil is in the Details”

1. **What is a Contract?**

a. Definition: “An agreement between two or more persons which creates an obligation to do or not do a particular thing.” Blacks Law Dictionary

b. Example to Consider

Joe wants to sell his farm.

Sam wants to buy a farm.

Joe: Do you want to buy my farm for \$250,000.00?

Sam: Yes, I will buy your farm for \$250,000.00

Do Joe and Sam Have a Contract??

2. **Essential Elements of a Contract**

a. Competent Parties – “Capacity to Contract”

1) Examples of “Incompetent Parties”

- Minors
- Persons with Mental Disabilities
- Corporations acting Outside the Stated Corporate Purpose

2) Effect of Incapacity – Makes the Contract Void or Voidable, depending upon the incapacity.

Example: Joe is only 17!
Contract is Voidable.

b. Subject Matter – Essential elements

- 1) Identification of Parties – Who
- 2) Description of the Subject Matter - What
- 3) Time for Performance - When
- 4) Price – How Much

c. Valuable Consideration

1) Valuable Consideration Defined: A Bargained For Legal Detriment. The promise to do, or not to do, any act which but for this bargain the promisor was not legally obligated to perform.

Example: Joe has to turn over the farm to Sam.
Sam has to pay Joe \$250,000.00

- 2) Mutual – Must be mutual legal obligation
- Gifts Distinguished
Example: What if Joe offered to give Sam his farm on Sunday, but on Monday, changes his mind. Can Sam force Joe to give him his farm?

d. Mutuality of Agreement - “Meeting of the Minds”

- 1) Do both parties understand the terms of the contract the same way?

Example:

Joe has 2 farms to sell. One has an old trash dump on it and cannot be used for growing crops. He also has another farm that has fertile soil and has wheat and corn growing on it. Joe wants to sell his “trash farm” Sam wants a farm that he can grow crops on.

Joe: I will sell you my farm for \$250,000.00 (thinking “trash farm”)

Sam: I will buy your farm for \$250,000.00 and I’ll sign the contract! Let’s go to settlement! (thinking the farm with fertile soil)

What farm, if any, has Sam purchased??

3. Oral v. Written Contracts

- a. **General Rule** – Oral contracts are valid and enforceable as long as they possess all of the essential Characteristics of a valid contract.
- b. But Can Contracts for the Sale of Property Be Oral?
1. No. Statute of Frauds Exception.
 2. Statute of Frauds requires that some contracts must be in writing in order to be enforceable.
 3. “SLY ME Good”
 - a) S: Surety Contracts – Contracts to guaranty the debt of another. Example. If Sam doesn’t pay for the farm, I will
 - b) **L: Land – Contracts for the sale of land must be in writing.**
 - c) Y: Year – Contracts that cannot be performed within one year. Joe and Sam. I will sell you my farm 2 years from today, and no sooner.
 - d) M: Marriage - Contracts in consideration of marriage (outdated)

4. **Key Real Estate Contract Provisions:**

a. Maryland Association of Realtors (“MAR”) Contract:

1. Time is of the Essence Clause: Makes dates in Contract material factors and failure to follow is a material breach of the Contract.
2. Seller/Buyer Identification (Paragraphs 1 and 2): Important to make sure that the proper parties are the individuals that hold record title to the property.
3. Property Description and Estate Description (Paragraphs 4 and 5):
 - Fee Simple or Leasehold? Failure to indicate that the property may be subject to ground rent may render the title unmarketable. If property is to be conveyed in fee simple, contract should specifically state as such.
 - Manner of Description: metes and bounds; street address; or lot number in subdivision. Whatever the description, it should be sufficiently clear to identify the property and permit specific performance of the contract.
****Best Practices Tip**** Legal description from the deed by which the property was conveyed to seller should be used.
 - Appurtenances, Fixtures and Personal Property: Attached to the land and pass with the land under contract of sale. Typical language after description of property “together with appurtenances and fixtures thereto belonging”
Any items of uncertain property should be specifically included or excluded (see Paragraph 13 of MAR contract).
4. Purchase Price (Paragraph 6): Must be specifically stated in the contract. Standard practice is to put in both words and in numerical figures.
5. Payment Terms (Paragraph 7): Addresses the following:
 - Handling of deposit

- Additional deposits (if any)
 - Escrow agent
 - Acknowledgment that purchase price less any deposits is due by purchaser at settlement date
 - Interest bearing account or non-interest bearing account
6. Settlement Date (Paragraph 8): Remember “time is of the essence” clause.
7. Financing (Paragraph 9): Cash Deal? Or is Buyer’s Obligation to purchase property is contingent upon Buyer obtaining a written commitment for a loan secured by the Property?
8. Financing Application and Commitment (Paragraph 10):
- Typically Buyer has been pre-approved for financing, but not always.
 - If not, Buyer must make application for financing within specified number of days from date of contract acceptance by Seller.
 - Buyer must obtain written commitment for financing with a specified number of days from date of contract acceptance by Seller.
 - Remember “time is of the essence” language.
 - Default provisions for Buyer failures.
- 9.
10. Agricultural Assessed Property (Paragraph 14) and Forest Conservation and Management Program (Paragraph 15):
- Statutorily Required Notices that property may be subject to specific taxes imposed by the State of Maryland.
11. Addenda (Paragraph 17):
- Written agreements to modify or delete certain provisions of the sales contract.
 - Must be executed by both parties to the sales transaction
 - Should always be attached to the original contract.

- Some are required by Statute (i.e. First Time Homebuyer, Homeowners Association Notice, Property Disclosure/Disclaimer Form, etc.)
- Can encompass any subject matter of contract (i.e., extension of settlement date)

12. Deposit (Paragraph 19):

- Placed in escrow after contract offer is accepted by the Seller.
- Contract not accepted, returned to Buyer.
- Deposit disbursed at settlement, credit towards purchase price.
- Contract terminated for any other reason or settlement does not occur, including default of either party, deposit shall be disbursed by Broker only in accordance with a “Release of Deposit” Agreement.
- Certain restrictions under 17-505(b) of Business and Occupations Article.

13. Deed and Title (Paragraph 20):

- Upon payment by Buyer, Seller is to execute a Deed of “Special Warranty” and further assurances. What does Special Warranty Mean (as opposed to General Warranty or Quit Claim
- Seller to provide title which is to be good and merchantable, and free and clear of liens and encumbrances, except as specifically specified (i.e. easements of record, utility easements, HOA declarations and covenants, zoning laws and restrictions, etc.).
- If Seller unable to give good and merchantable title, Seller can at its expense have option of curing defects, or if Buyer is willing to accept defects in title, contract remains in full force and effect. (Settlement date may be extended up to 14 days if Seller elects to cure title defects).
- If Seller cannot cure title or obtain title insurance policy to the benefit of Buyer, Buyer can take whatever title Seller can give or terminate contract and receive deposit back.

14. Condition of Property (Paragraph 21)

- Seller is to provide property in substantially same condition as on Contract Acceptance date.
- All electrical, heating, air conditioning, plumbing (including well and septic) and any other mechanical systems are to be in working condition.

- Standard Disclaimer—“**Unless otherwise specified in Contract, including this paragraph, the property is sold “As-Is”.**
- Property Disclosure and Disclaimer Forms required by 10-702 of the Real Property Article. (Addendum)

15. Settlement Costs (Paragraph 23):

- Typically negotiable between the parties.
- However, standard MAR contract has **Buyer** paying all settlement charges and costs, including but not limited to, lender’s fees, title examination and title insurance fees, document preparation and recording fees, notary fees, survey fees, recording charges, etc.

16. Transfer Charges/Taxes (Paragraph 24):

- Pursuant to 14-104 of Real Property Article, unless otherwise negotiated between the parties, recordation taxes and transfer taxes shall be shared equally between the Buyer and Seller.
- First Time Home Buyer Exception 14-104(c) of Real Property Article:

--Buyer must be “First Time Homebuyer” as defined by the statute. Note that if more than one “Buyer” all Buyers have fit definition of “First Time Homebuyer”. (Addendum Required)

--Recordation and Local Transfer Taxes: Buyer and Seller expressly agree that payment of recordation tax and local transfer tax shall be shared equally between the parties.

--State Transfer Tax: 13-203(b) of Tax Property Article states that the amount of state transfer tax due on the sale of the property **shall be reduced from 0.50% to 0.25% and shall be paid entirely by the Seller.**

17. Homeowners’ Association Clause (Paragraph 29):

- Addendum required.
- Buyer acknowledges receipt of all HOA documents and attests it has knowledge of costs, fees, assessments.

18. Default Provision (Paragraph 33):

- Parties contractually obligated to make full settlement in accordance with any terms of the Contract (including any addenda or other contingencies as stated therein)

- Buyer Default: Seller may retain deposit, only if Release of Deposit Agreement is executed by the parties. If the parties do not agree to execute Release of Deposit Agreement, Buyer and Seller shall have all legal and equitable remedies. Go through some remedies
- Seller Default: Buyer shall be entitled to pursue such rights and remedies available at law or equity, including action for specific performance and/or monetary damages. Describe how to calculate monetary damages
- If dispute between parties regarding release of deposit, Broker's only duty is pay deposit in Court as an interpleader action—Buyer and Seller release, indemnify and hold harmless Broker from any liability.

19. Mediation Provision (Paragraph 34):

- Requires Parties to submit disputes to non-binding mediation before the Maryland Association of Realtors.
- Obligation to mediate applies to all disputes arising within 1 year from settlement date or date when settlement should have occurred.
- Buyer and Seller agree not to commence any action in Court within 1 year time period unless first submitting to mediation.
- If breach by party with regard to mediation provision, breaching party agrees to pay all costs and expense of non-breaching party (including attorneys fees) in effort to enforce the mediation requirement.
- Provision survives closing and does not merge with the deed.

20. Attorney Fees (Paragraph 35):

- Disputes arising out of Contract including breach of contract, negligence, fraud, etc., prevailing party in action may recover costs and attorneys fees from the other party.
- If Broker is brought into any dispute between the parties or parties against Broker, Buyer and Seller agree to jointly and severally indemnify and hold Broker harmless from and against any and all liability, loss, cost, damages or expenses (including attorneys fees) incurred by broker in such action or proceeding, provided that such action or proceeding does not result in a judgment against Broker.

21. Buyer's Right to Select Settlement Services Provider (Paragraph 36):

- Typically, Buyers choose whatever settlement officer or company is recommended to be used by their lender.

- Buyer always has right to choose whomever they want to conduct settlement.
- Buyer acknowledges that Seller may not be prohibited from offering owner financing as a condition of settlement.

22. Residential Real Property Disclosure Notice (Paragraph 40):

- Required addendum for all single family dwellings that are not new. 10-702 Real Property Article.

23. Notice to Buyer Provisions: Land Use and Zoning Regulations:

- Paragraph 43: Chesapeake Bay and Atlantic Coastal Bays Critical Area:
- Paragraph 44: Wetlands Notice:
- Paragraph 45: Forest Conservation Act Notice:
- Paragraph 46: Conservation Easements:
- Paragraph 49: Military Installations:

24. Boilerplate Provisions: “Rarely Understood, Heavily Litigated”

- Non-Assignability (Paragraph 51): Assignment of Contract requires written consent of Buyer and Seller.
- Paragraph Headings (Paragraph 52):
- Computation of Days (Paragraph 53): Consecutive calendar days not including day of event, act or notice.
- Entire Agreement (Paragraph 54): Typical “Integration Clause”.
- Electronic Delivery (Paragraph 55): Faxes and email acceptable.

25. Common Addenda:

a. Southern Maryland Addendum to State Contract:

- Note Paragraph #10 regarding survival of terms of contract, non-merger into deed.

b. Appraisal Contingency Addendum:

c. On-Site Sewage Disposal System Addendum:

- Allows for Contract contingency for inspection of well and septic systems within allotted time frame

- d. First Time Homebuyer Addendum:
 - Definition of “First Time Homebuyer”
 - All Buyers must fit definition.
 - State Transfer Tax implications
 - Recordation and Local Transfer Tax implications

- e. Sale, Financing, or Lease of Other Real Estate Addendum:
 - Creates Contract contingency whereby, for example, Buyer must sell its current residence before purchasing the Seller’s property.

- f. Property Inspections Addendum:
 - Creates Contract contingency on Buyer’s right to hire a licensed inspector to inspect the property for physical condition and environmental hazards as a condition precedent to purchasing property.

- g. Maryland Non-Resident Seller Transfer Withholding Tax Addendum:
 - Certification by Seller that it either (a) a resident of the State of Maryland; or (B) a non-resident of the State of Maryland.
 - If Seller non-resident, transfer taxes must be withheld to be paid to the State department of Assessments and Taxation. Both parties must be first time home buyers

- h. Maryland Residential Property Disclosure and Disclaimer Statement:
 - Required Addendum pursuant to 10-702 of the Real Property Article.
 - Seller option to provide “Disclosure Statement” (discloses physical condition of items that the Seller has actual knowledge of) or “Disclaimer Statement” (i.e. “as-is, with no representations”)
 - New Requirement that Seller must disclose actual knowledge of “latent defects” even if providing a “Disclaimer Statement”.
 - Definition of “latent defect”: Material defects in real property or an improvement to real property that:
 - (1) a Purchaser would not reasonably be expected to ascertain or observe by a careful visual inspection of the real property; and
 - (2) would pose a direct threat to the health and safety of:
 - (i) the purchaser; or

- (ii) the occupant of the real property, including a tenant or invitee of the purchaser.

26. Practical Considerations:

- Open building permits on the property
- Structures built by previous owner that were not permitted.
- Critical Area considerations and trips to the BOA by the Buyer through no fault of their own = **TIME, \$, and possible REMOVAL OF STRUCTURES !!!!!**