Questions and Answers on:
OFFER AND ACCEPTANCE

The purchase contract is the most important document in any real estate sale. It must reflect the entire agreement between the buyer and seller. This brochure examines issues arising during contract negotiations in residential real estate sales transactions. In particular, it focuses on "offer" and "acceptance": the process by which a buyer and seller create a binding legal contract. This process typically begins when a prospective buyer makes an offer. Then, the seller either accepts it, rejects it, or rejects it and makes a counteroffer. Then the buyer has the same options (i.e., accept, reject without making a counteroffer, or reject with a counteroffer). When one party accepts the other party's offer or counteroffer, including communicating that acceptance to the offering party, a purchase contract is created.

Any misunderstandings concerning offer and acceptance can result in serious legal and financial consequences for the buyer and seller. Therefore, it is imperative that you carefully read and understand the entire purchase contract and that you consult an attorney if you do not understand any issues regarding it before you enter into a binding contract.

The questions raised in this publication are of special concern to real estate purchasers. Consequently, they are posed from the standpoint of the purchaser.

Q: I have found a home I am interested in buying. How do I make an offer to purchase it?

A: Typically, you will complete a standardized offer to purchase form with the help of a real estate broker — probably a buyer agent. This form will express the terms of the purchase (purchase price, closing date, etc.) that you are proposing to the seller. The most common residential offer form in North Carolina is the "Offer to Purchase and Contract" (Form No. 2-T), jointly approved by the N.C. Bar Association and NC REALTORS®. Many standard "addenda" forms also are available to add provisions of special importance to the parties. Your real estate broker may have a variety of these forms, but if a standard, preprinted form is not available covering the specific terms of your offer, you should consult a private attorney to draft an appropriate document for your use. Real estate brokers are not permitted to draft contracts or even special provisions such as contingencies.

Q: Does my offer to purchase have to be in writing?

A: To be enforceable, real estate sales contracts in North Carolina must be in writing. Since only written offers may become binding contracts, your offer should be in writing and signed.

Q: What should be in my offer?

A: At a minimum, your offer must clearly identify you and the seller, and state the sales price, and closing date and

all of the terms agreed upon by you and the seller. It must also contain an adequate legal description of the property (for example, a reference to a recorded plat map or deed) — a street address alone is not sufficient. There are many other important provisions you should consider. For example, to ensure that items or features of the property you have seen in advertisements or MLS information are included in the sale, you or your broker should list them in your offer. Any form contract supplied to you by a real estate broker must include at least nineteen separate required provisions. The standard form "Offer to Purchase and Contract" includes all these and many more.

Q: Must my offer include earnest money?

A: Earnest money is not required to make a binding real estate sales contract. However, it is a common practice for a buyer to include it with an offer because it shows the buyer's good faith, demonstrates some available cash, and makes it more likely that the seller will accept the offer. Real estate brokers must deposit earnest money checks no later than three banking days after acceptance of the offer, but they may be deposited at any time after receipt. So, be sure your earnest money check is good at the time you write it. (For more information on earnest money deposits, see the Commission's brochure, "Questions and Answers on: Earnest Money Deposits.")

Q: How will my offer be communicated to the seller?

A: The real estate broker with whom you are working must deliver it to the seller's broker or directly to the seller if the seller has no broker. The seller's broker must present it to the seller.

Q: How does acceptance occur?

A: To accept your offer, the seller must sign it without making any changes. Until you or your broker have been notified that the seller has signed your offer, you can withdraw it at any time — even if you have given the seller a deadline by which he or she must respond.

Q: Once the seller has signed my offer, does it become a contract?

A: No. It does not become a binding contract until the seller (or seller's broker) has notified you (or your broker) that the seller has signed it. If your broker informs you that the seller has "verbally" accepted or will accept your offer but has not yet signed it, there is no enforceable contract.

Q: How will I be notified of the seller's acceptance of my offer?

A: Unless the contract specifies the manner in which acceptance is to be given, it may be communicated in a variety of ways including orally by the seller or seller's broker, by personal delivery of the signed offer, mail, facsimile (fax) or electronic mail. If you're told that the seller has accepted your offer, ask whether the seller has signed it, and ask for a signed copy of the contract. Your real estate broker must furnish it to you.

Q: What if the seller changes my offer in some way and then signs it?

A: If the seller makes any changes in your original offer, the offer is rejected and cannot later be accepted. By making changes to the original offer, the seller is, in fact, making a counteroffer to you which you can either accept, reject without making a counteroffer, or reject and make your own counteroffer. The process can continue in this manner indefinitely. You and the seller should initial and date all changes made during the negotiation of an offer. If the offer becomes too "messy" as a result of many changes, re-type the offer in its final form before signing it.

Q: What happens if someone else makes an offer to purchase the property before the seller accepts my offer?

A: Until the seller signs your offer and notifies you or your broker that it has been signed, the seller can consider and accept an offer from a competing buyer — even if your offer was submitted first and is for a higher purchase price. A broker is required to deliver all offers promptly. In order to obtain for their seller-clients the best possible bargain, the seller's broker will usually inform competing prospective buyers that other potential buyers are interested in the property. To treat competing prospective buyers fairly, the seller's broker may not divulge the price and terms of competing offers without the express authority of the offering party. Whether you have been informed of competing offers or not, you should not assume that your offer will receive special consideration or that you are the only buyer who is interested in the property.

Q: What else might happen to my offer after I submit it to the seller?

A: It may simply <u>expire</u> if you include an expiration date in the offer (or within a reasonable period of time if no deadline is set). It is <u>terminated</u> if the seller sells or contracts to sell the property to someone else. Otherwise, unless you withdraw it, the offer remains an offer.

Q: What happens if the sales transaction does not close?

A: If you terminate the contract before the due diligence period expires, the earnest money should be refunded to you. If you terminate after the due diligence period, the earnest money is usually forfeited to the seller unless the seller is unable or unwilling to satisfy the terms of the contract. If there is any dispute between you and the seller and you cannot agree to a resolution of your respective claims, you may sue the other party in the appropriate court to resolve them. With regard to any earnest money you may have paid, the real estate broker (or attorney escrow agent if using the standard contract form) must retain it in an escrow account until you and the seller reach a written agreement for its disbursement or a court resolves the dispute. Alternatively, with proper notification to you and the seller, the broker or attorney escrow agent may remit it to the clerk of court in the county where the property is located. When attorneys hold earnest money in a transaction not using the standard contract form, they must hold or dispose of it in accordance with the rules of the North Carolina State Bar.

Q: The seller has accepted my offer but the resulting contract requires that certain things (loan approval, inspections) be done by a certain date. What happens if they are not completed by this date?

A: Generally, these "conditions" and "contingencies" must be performed by the dates specified in the contract or very soon thereafter, depending upon whether the contract states that "time is of the essence." If time is of the essence, and you or the seller fail to perform by the stated deadline, the other party may terminate the contract. If the contract does not state that "time is of the essence" and, through no fault of your own, you are unable to complete the inspections by the deadline, but do so within a reasonable time, the seller must still go forward with the transaction. Although the seller may be able to recover damages from you for your failure to perform by the stated date, the seller must still perform his or her obligations under the contract.

Q: Once I have entered into a contract with the seller, is there any way I can cancel it?

A: The standard form contract allows the buyer a "due diligence period" in order to perform inspections and obtain a loan. As a buyer, you have the right to terminate for any or no reason prior to the expiration of the due diligence period. After the expiration of the due diligence period, your right to terminate is limited to any special provision provided in the contract. The law grants a special rescission right in the following limited circumstances:

- ***Residential Property Disclosure Act.*** At or before the time you make your offer in a residential transaction, the seller (whether or not a real estate broker is involved) must provide you with three written disclosures: (1) Residential Property Disclosure Statement; (2) Owners' Association and Mandatory Covenants Disclosure Statement; and (3) Mineral and Oil and Gas Rights Mandatory Disclosure Statement. If the seller does not, any resulting contract is subject to a limited right of rescission — usually up to three calendar days from the time the contract is formed. You should be aware, however, that there are a number of exceptions to this requirement. Consequently, for application of this law to a particular situation, you should consult your attorney.
- ***Lead Paint Disclosure.*** If you are purchasing a residential building constructed before 1978, federal law requires sellers and their brokers to provide you written information about the possible presence of lead paint and the associated hazards. If you are not given this information (and an inspection period) before entering into the purchase contract and have not signed a written waiver of your rights, you have a ten day inspection period during which you may be able to cancel the contract.
- ***Condominiums.*** If you are purchasing a new condominium from a person classified by law as a *developer*, you have seven days to rescind your purchase contract. When the seven day period begins or ends can vary from one transaction to another, but it usually begins when you are given the required *public offering statement.* During this period, all monies paid by you must be held in escrow by the developer. Immediately contact an attorney for advice if you have questions about your rescission rights. (For more information on condominiums, see the Commission's brochure, "Questions and Answers on: Condominiums and Townhouses.")
- ***Timeshares.*** If you are purchasing a new timeshare in North Carolina from a seller classified by law as a *developer of a timeshare project,* you have five days to cancel your purchase contract which you can do by mail. If you are a resident of another state, you may also have additional rescission rights under the laws of your home

state. The developer must hold all funds received from you in an escrow account for at least ten days. However, if you are purchasing the timeshare from another consumer or through a foreclosure sale, there is no rescission period or mandatory escrow of payments.

Q: Are there ways to purchase real estate other than using the standard offer to purchase and contract?

A: Yes. Here are a few:

- ***Option to Purchase.*** With an option to purchase, you have the option to buy property at an agreed upon price during an agreed period of time. For this right, you will pay *option money* to compensate the seller for taking the property off the market during the option period. Although subject to negotiation, option money is non-refundable and paid directly to the seller at the signing of the option. Depending upon the terms of the option agreement, you may or may not receive credit for some or all of your option money against the purchase price if you "exercise" your option. You should read any option contract carefully and consult your attorney if you have any questions.
- ***Lease with Option.*** When a lease is coupled with an option to purchase, you have the right to buy property at a set price while leasing it. There are no standard forms available for this purpose. Attempting to modify other standard forms for such use may result in a muddled or even unenforceable contract, and constitutes the unauthorized practice of law when performed by real estate brokers. Since these transactions may be riskier than a conventional purchase, you should consult your attorney before into entering such agreements.
- ***Lease-Purchase.*** In lease-purchase transactions, you occupy property as a tenant but agree to purchase it at a future date. There is no standard lease-purchase form available, so you are again advised to consult your attorney.
- ***Installment Land Sale.*** In an installment land sale (also known as a *contract for deed*), title remains with the seller while you make payments to the seller. Usually, the contract allows you to possess and use the property while making payments but such terms are not legally required. If you are in possession of the property and default on your payments, the seller can sue you to regain possession of it and is generally entitled to retain all the money you paid under the contract.

THE NORTH CAROLINA
REAL ESTATE COMMISSION
P.O. Box 17100 • Raleigh, NC 27619-7100
Phone: 919/875-3700 • Website: www.ncrec.gov

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