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Offer to Purchase and Contract: Buyer Beware

Lisa Ann Finger

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OFFER TO PURCHASE AND CONTRACT: BUYER BEWARE

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I. INTRODUCTION

The standard form for a contract for the sale of real property in North Carolina is entitled the "Offer to Purchase and Contract."¹ This form, approved by both the North Carolina Bar Association and the North Carolina Association of Realtors in 1979 and revised in 1982, specifies the legal rights and obligations between buyers and sellers of residential real estate throughout North Carolina. The current form's predecessor, the standard form "Contract of Sale"² previously used in North Carolina residential real estate transactions, was approved by only the North Carolina Association of Realtors. Since it was a Realtor's form, and since Realtors generally act as the seller's agent, the provisions of this form were much more protective of the seller's interests than of the buyer's interests. However, since the current form is approved by both the North Carolina Association of Realtors and the North Carolina Bar Association, the provisions in the current form are not drafted quite so heavily in the seller's favor. Nevertheless, the seller continues to enjoy a distinct advantage over the buyer in a typical real estate transaction.

The purpose of this comment is to closely examine the current "Offer to Purchase and Contract" in the context of a typical real estate transaction, to evaluate its important provisions, to determine whether any of its provisions are inequitable, and if so, how these inequitable provisions could be reformed. This comment will also cover applicable North Carolina law and discuss how the form should be completed to comply with the applicable law to avoid later confusion and litigation. The first section of this comment will examine the front side of the form; it will explain how to properly complete the form and suggest modifications of the form. The second section of the comment will examine the standard provi-

¹ N. C. Bar Association and N.C. Association of Realtors' Offer to Purchase and Contract Form, standard form No. 2 (rev. 1982) [hereinafter cited as Standard Form]. Though this form is not used in all residential real estate transactions in North Carolina, its use predominates over the use of any other single form and is therefore likely to be the form most frequently encountered in residential real estate transactions in North Carolina. The standard form is reproduced in the Appendix following this comment—the section numbers on the standard form correspond with the section numbers used in this comment.

sions on the reverse side of the form and suggest certain modifications which would make the contract more equitable. However, before looking at the "Offer to Purchase and Contract," some background information is in order.

II. THE STANDARD FORM

A. Background

In order to fully understand the standard form, one must first understand what transpires in a typical residential real estate transaction. Generally, a real estate agent, acting on behalf of the seller, arranges the sale. The contract normally purports to be an offer from the buyer to the seller to purchase real estate. When the seller signs this offer, it becomes a binding contract. Assuming financing can be obtained in compliance with the stated terms of the contract and any other condition precedent is satisfied, the buyer has, in essence, bought the property. Though the wording of the contract is executory, the contract is self-executing. In short, equitable conversion has occurred.

Given the fact that the offer seemingly originates with the buyer, it is ironic that the form is supplied and completed by the real estate agent who is normally the agent of the seller; however, necessity dictates the procedure. Otherwise, an unjustifiable amount of time and money would be spent in negotiating a contract for the sale of each particular piece of real estate, thereby causing a sharp increase in the cost of a residential real estate closing. Given the final effect of the completed "Offer to Purchase and Contract," it seems somewhat untenable that the agent would allow an unsuspecting buyer to sign such an offer without independent advice. Nevertheless, a broker or salesman will rarely, if ever, suggest that a potential buyer consult an attorney before signing the offer. The broker or salesman knows that if such consultation occurs, the attorney might suggest changes in the offer that could alter, delay, or totally prevent the sale.

In its present form, the "Offer to Purchase and Contract" provides the buyer with little or no legal protection in several impor-

tant areas. Since the procedure of the transaction is skewed towards the seller, at a minimum, the "Offer to Purchase and Contract" should more adequately protect the legal rights of the buyer. This could be accomplished not only by revising some of the standard provisions, but also by properly completing the form.

B. Side I: Specifications by the Parties

The opening paragraph of the standard form leaves blanks for inserting the names of the buyer and seller. The names of the buyer and seller must appear on the form in order for the contract to comply with the Statute of Frauds.\(^7\) The opening paragraph then states that the buyer agrees to purchase and the seller agrees to sell and convey the "land described below, together with all improvements located thereon and such personal property as is listed below . . . in accordance with the Standard Provisions on the REVERSED SIDE HEREOF and upon the following terms and conditions."\(^8\) This paragraph adequately covers all the kinds of property to be conveyed and specifically alerts the buyer to the standard provisions on the reverse side. The remainder of the contract is divided into specific categories. These categories include real property, personal property, purchase price, conditions regarding the buyer's ability to obtain financing, assessments, time and place of closing, and delivery of possession.

1. Real Property

It is very important that this section of the form be accurately and fully completed. The names of the county and state in which the property is located should present no problems to the drafter. The same may be said of the street address. However, problems often arise with respect to the legal description. These problems range from confusion as to what property has been conveyed to loss of a portion of property thought to have been conveyed. The legal description of the property to be conveyed is the most litigating area. In order to constitute an enforceable contract within the statute of frauds, the written memorandum . . . must be sufficiently definite to show the essential elements of a valid contract. It must embody the terms of the contract, names of the vendor and vendee, and a description of the land to be conveyed, at least sufficiently definite to be aided by parol.

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7. In order to constitute an enforceable contract within the statute of frauds, the written memorandum . . . must be sufficiently definite to show the essential elements of a valid contract. It must embody the terms of the contract, names of the vendor and vendee, and a description of the land to be conveyed, at least sufficiently definite to be aided by parol.

8. Standard Form, Appendix.
gated portion of the contract for the sale of real estate. "This description will determine whether the buyer gets the property he has in mind," as opposed to, for example, a smaller tract of land excluding the garden and the gazebo the buyer admired. Consequently, special attention should be paid to the accuracy of the legal description.

In order for the contract to be valid, the legal description must comply with the Statute of Frauds. It must be "certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers." Although the contract may be valid with respect to the Statute of Frauds, despite an indefinite legal description, the buyer should not settle for a less than precise description. The drafter should describe the property by metes and bounds or by lot, block, and plat reference. Although a short form reference to tax maps and street location may be binding, reference to these items should be avoided since they lack the desired precision.

This provision could be improved by simply providing more space in which to place the legal description. A mere two lines of space for the legal description wrongfully implies that not much is necessary by way of a legal description. However, the fundamental

12. The general rule is that if the description on its face identifies a particular tract of land as distinguished from other lands, it is adequate and parol evidence can be admitted and utilized to fit the description to the particular land. In this situation, the description is said to be latently ambiguous; i.e. it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made. On the other hand, it may also be said generally that if a description in a contract shows a patent ambiguity as written, parol evidence is inadmissible to fit the description to the land and the description will be held inadequate. A patent ambiguity involves a description which leaves the land in question in a state of absolute uncertainty and refers to nothing extrinsic by which the land might be identified with certainty.

P. HETRICK, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 142 at 158-59 (1981).
flaw concerning the legal description originates in the residential real estate transaction procedure. Few buyers are aware of what a proper legal description contains. As long as the description contains a vague reference to what the buyer believes he is buying, the buyer is often satisfied. This initial satisfaction may turn to dissatisfaction when litigation arises over the inaccurate legal description. In order to avoid this problem, the drafter of the legal description could advise the buyer to consult an attorney before signing the form. Unfortunately, such advice is unlikely to come from the drafter (usually the real estate agent). In lieu of such advice, real estate brokers and salesmen could be instructed by the Real Estate Commission to accurately complete the legal description and place it on the form before showing the property to prospective purchasers. This solution may have more appeal to real estate agents if they understand that the contract is void without a valid legal description. If the contract is void, the agent does not receive his commission.

2. Personal Property

Title to personal property is an area of frequent dispute between buyer and seller. A buyer is usually not aware of the legal distinction between personal property and real property. A separate valuation of the personal property being transferred with real property is seldom made. However, the purchase price usually reflects the value of personal property as well as the value of the real property in the transfer.

Although a conveyance of real property does not implicitly include personal property, it does include fixtures.

A fixture is a thing which was originally personal property but which has been attached to the land in a more or less permanent manner and under such circumstances that it is considered in law to have become a part of the real property and thus belongs to the owner of the land to which it is attached.

In order for a fixture to pass implicitly with a conveyance of real property, the annexor must have intended that the annexed item...

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15. Note, supra note 3, at 346. See also Brown v. Land Bank, 213 N.C. 594, 197 S.E. 140 (1938) (dispute over whether mill equipment was included in sale of property).
16. A. Bicks, supra note 13, at 24.
17. Friedman, supra note 10, at 596.
should not later be removed from the land to which it was attached. Four factors may be considered in determining whether such an intent was present: (1) the objectively expressed intent of the annexor, (2) the character of the annexation, (3) the permanency of the interest the annexor claims in the land, and (4) the nature and purpose of the annexation.¹⁹

Since both personal property and fixtures may be reflected in the purchase price of the property and since the decision as to whether a chattel is a fixture may be impossible to make without a court decree, the drafter should specifically list all of the fixtures and personal property to be conveyed. The standard form does provide a very limited amount of space in which to list these items, but in order to adequately protect the buyer it should provide more. It should include a standard provision on its reverse side in which items commonly considered to be fixtures are listed, in conjunction with a statement that these items, unless expressly deleted, will be conveyed to the buyer.²⁰ Items such as ranges, refrigerators, cabinets, storm doors and windows, carpeting, and air conditioning and heating units should be included in this list. The standard provision might also include a list of items not normally considered to be fixtures, such as draperies, fireplace utensils, and small storage sheds. Since these items are not normally included in the sale of the residence, a checkoff procedure should be used for them. This means that the items are included with the property only if checked.

Also, it may be prudent for the drafter to list all intangible property that will be transferred. Such intangibles may include security deposits, warranties, service contracts, and engineers’ drawings.²¹

### 3. Purchase Price

The statement of the purchase price is an important element and material term of the contract for the sale of real property.²² In

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¹⁹. *Id.*, § 13 at 15.
²². In North Carolina, a written contract for the sale of land that does not state the purchase price is unenforceable by the seller against the buyer. The purchase price is an essential term if enforcement against the buyer is sought and cannot be supplied by parol evidence. However, if the seller is the party to be charged, a statement of the purchase price is not essential to the contract’s validity. The purchase price is not an essential term when enforcement against the
North Carolina, absent a provision to the contrary, a contract of sale is construed to require payment of the purchase price, in cash, at the time the deed is delivered. However, the “Offer to Purchase and Contract” provides for more than merely a statement of the purchase price. It also does an excellent job of providing a breakdown of how the purchase price will be paid. This breakdown of the purchase price, whereby the total is stated first and then broken down into its component parts, eliminates confusion, for example, as to whether the assumption of an existing mortgage on the property increases or reduces the stated purchase price. The purchase price is broken down into the following categories.

a. Earnest Money

The first component of the purchase price is the earnest money. The payment of the earnest money protects the seller (and real estate agent) in the event of a default by the purchaser. The provision requires the drafter to insert the amount of the payment, the manner in which it is to be paid, and who will act as escrow agent. The provision further requires that the payment will remain in escrow until closing when it will be credited to the buyer, or until the contract is otherwise terminated, in which case it will be disbursed in accordance with the standard provisions on the reverse side of the form. However, the provision fails to specify what the escrow agent should do with the earnest money. If the amount of the earnest money is relatively small and held only for a short period of time, no instructions are necessary. The escrow agent merely holds the money. But if the buyer pays a substantial amount of earnest money, to be held in escrow for an extended period of time prior to closing, the escrow agent should be required to place the money in an interest-bearing account. The interest earned should be applied to payment of the purchase price at close.
ing. The provision should also specify whether the buyer or the seller receives the interest if the parties fail to close. These provisions could be included with the standard provisions on the reverse side of the form.

b. Assumption of Existing Indebtedness

Assumption of an existing mortgage may be critical to the successful closing of the contract of sale. Though a purchaser normally is not required to assume an existing loan, he often finds it desirable to do so. If the buyer does want to assume the existing loan, the material terms of the assumption agreement should be fully described. (Additional information which should be required when a buyer assumes an existing loan is located in the “Conditions” sections on both the front of the form and the standard provisions on the reverse side. This information will discussed in more detail later in this comment.) However, the purchaser may choose not to assume the existing indebtedness. In this case, the existing indebtedness will be paid at closing.

c. Purchase Money Mortgage

Sometimes a seller may agree to finance a portion of the purchase price. If so, this purchase money mortgage provision provides the drafter with spaces in which to insert the rate of interest, the number of payments, the amount of the payments, and the date on which the payments are to begin. The drafter may also specify prepayment rights and assumption or transfer rights. Though the provision does not mention charges for late payments, delinquent interest rates, escrow accounts for taxes and insurance, and acceleration rights, these issues are covered by the North Carolina Bar Association Forms 4 and 5 which are required to be used in the transaction by Standard Provision Number 3 of the “Offer to Purchase and Contract.”

26. This provision only provides for the assumption of existing indebtedness. Therefore, unless modified, the purchaser may not take the conveyance subject to existing indebtedness except without recourse. DeVaney, Daniel & Sutton, supra note 9, at III-10.

27. Id.


29. For example, the interest rate on the existing mortgage may be significantly lower than the current prevailing rate.

d. Balance Due at Closing

The final provision of this section simply requires the drafter to insert the total amount due from the buyer at closing.

4. Conditions

Contracts of sale are frequently contingent on the buyer's ability to obtain a loan in accordance with stated terms. This provision is not favorable to the seller since the buyer is not bound by the contract until he can obtain such loan. Nevertheless, a "conditions" provision is included in almost every contract of sale since often it is the only means by which the buyer can make an offer and the seller can hope to complete a sale.31

The "conditions" provision in the standard form is generally well-drafted, though certain additions would provide needed clarity. The provision requires the drafter to insert the amount, the term, and the interest rate of the loan that the buyer must be able to obtain. It also requires a statement of the date by which the buyer must obtain the loan.32 This requirement prevents the seller from having to withdraw his property from the market for an extended period of time, and continue paying taxes and other carrying charges, while he waits to see if the buyer eventually obtains a loan.33 The provision also includes space for the maximum number of mortgage loan discount points and who will pay them, as well as who will pay the loan closing costs.

The "conditions" provision also states that the buyer agrees to use his "best efforts" to secure a loan in accordance with the stated conditions. Whether the purchaser has complied with this requirement is a subjective determination and if litigation over this term ensues, it will be left to the jury for final determination. In order to avoid uncertainty as to what "best efforts" requires, the contract should specify certain obligations of the purchaser regarding his efforts to obtain financing. For example, the contract should require the buyer to apply to certain lending institutions, to supply

31. Some claim that the subject to financing clause, in effect, gives the buyer an option to buy the property. However, so long as the clause requires the buyer to take specific steps to obtain a mortgage on specified terms, it is not an option. Friedman, supra note 10, at 596.

32. This date should be well ahead of the closing date to prevent cancellation by the buyer after the seller has incurred substantial expenses in preparation for the sale. DeVaney, Daniel & Sutton, supra note 9, at III-28.

33. Friedman, supra note 10, at 596.
the prospective lender all the information he requests, and to execute any mortgage instruments and other documents normally required by lenders. The contract could also require the buyer, at the option of the seller, to accept a purchase money mortgage on the same terms as those sought from the lending institution. Finally, it should provide that if the purchaser is unable to obtain a loan on the terms agreed upon, and gives the seller notice of his inability within a specified date, the seller shall return all amounts previously paid by the purchaser (with reductions for expenses incurred by the seller and agreed upon by the parties). Upon the return of such amounts, the contract would be void. 34 Inclusion of these provisions would aid the buyer and seller equally by eliminating uncertainty and could conveniently be inserted as a standard provision on the reverse side of the form. 35

The second condition a buyer must fulfill in order for the contract to be executed concerns the assumption of an existing mortgage. This condition allows the parties to specify the interest rate and maximum discount points on the assumed loan. This condition, when combined with the standard provision concerning an assumed loan, adequately covers the buyer's assumption of the seller's loan.

The final condition on the form requires that there be no private restrictions, easements, or other governmental regulations that would prevent the reasonable use of the property for the purpose specified. This provision protects the buyer from buying property which, because of such restriction(s), he will be unable to use for its intended purpose. It is also important that the drafter specify the precise purpose for which the property is to be used. For example, if the buyer intends to build a single family dwelling on the property, the drafter should insert the phrase "single family residential" as the intended purpose.

5. Assessments

Many buyers assume that the purchase price of the property includes the cost of the sidewalks, the water and sewer systems, the roads and other improvements. This assumption is usually correct in North Carolina. But this will not help the buyer if the seller

34. DeVaney, Daniel & Sutton, supra note 9, at III-12.
35. See Smith v. Dickinson, 57 N.C. App. 155, 290 S.E.2d 770 (1982) for an example of a contract that could have benefited from clarification of the term "best efforts."
has not paid for the assessment, because a special assessment for completed improvements constitutes a lien upon benefited property.\footnote{36}{P. \textsc{Hetrick}, supra note 12, § 455 at 536.} The lien for special assessments is superior to all other liens on the property except state, local, and federal tax liens.\footnote{37}{N.C. \textsc{Gen. Stat.} § 160A-233(c) (1982).} A lien for special assessments makes the land itself subject to the lien; the owner of the improved property is not personally liable for the amount of the assessment.\footnote{38}{City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942).} Consequently, liens for special assessments can only be enforced by foreclosure against the specific property assessed.\footnote{39}{P. \textsc{Hetrick}, supra note 12, § 455 at 536.} Therefore, if the lien is enforceable by foreclosure on the property in the hands of the seller at the time of transfer, it is enforceable by foreclosure on the property in the hands of the buyer when the transfer is completed.\footnote{40}{Metropolitan Life Insurance Co. v. City of Charlotte, 213 N.C. 497, 196 S.E. 809 (1938).}

This provision requires the seller to warrant that “there are no encumbrances or special assessments, either pending or confirmed,”\footnote{41}{Standard Form, Appendix.} except those which are listed. It also provides space in which the parties may set forth an agreement on how such assessments may be prorated, though usually there should be no proration.\footnote{42}{The purchase price reflects the full value of the property and, therefore, the seller should pay the entire amount of the assessment.} This provision gives needed protection to the buyer. Without it the buyer is liable for any assessments pending prior to the closing date but levied thereafter.

6. Other Provisions and Conditions

This provision, like the opening paragraph, alerts the buyer to the standard provisions on the reverse side of the “Offer to Purchase and Contract” and requires deletion of any that the parties agree will not apply to the particular transaction. The provision itself is as thorough as possible on this point. However, once again, the buyer’s failure to consult an attorney may place him at a distinct disadvantage. Although the provision makes the buyer aware of the standard provisions, it fails to tell him which ones he should attempt to delete or modify in order to protect himself. The provision does not give the buyer the sophistication he needs to
negotiate specific terms with the broker. As stated above, the broker should encourage the buyer to seek legal advice.

7. Closing

The closing provision requires the drafter to specify the time and place of closing. However, it omits the phrase "time is of the essence." Absent this phrase, the parties have a reasonable time after the date set for closing to complete performance.\(^\text{43}\) What constitutes a "reasonable time" is generally a question to be resolved by the jury\(^\text{44}\) and can be a very confusing issue.\(^\text{45}\) The exclusion of the "time is of the essence" clause can cause problems for both the buyer and the seller since neither will be able to determine with certainty when the other is in default. For example, in Childress v. Trading Post\(^\text{46}\), the North Carolina Supreme Court held that a delay of two months in completion of the house that the plaintiffs had contracted to purchase did not justify recission of the contract where time was not of the essence. Although the buyer still has a cause of action against the seller for damages, recission of the contract may be a much more convenient and desirable remedy. In order to avoid this uncertainty, the provision should include a "time is of the essence" clause. However, since the average real estate closing does not occur on the closing date, a later date should be stated and the "time is of the essence" phrase should refer to this later date.

The closing provision also requires the drafter to specify to whom the deed is to be made. This determines the form of tenancy by which the buyer(s) take the property. "A deed to husband and wife, nothing else appearing, vests title in them as tenants by the entirety."\(^\text{47}\) The legal incidents of this form of tenancy include, among others, automatic devolution to the survivor upon the death of the other tenant,\(^\text{48}\) exclusive right to manage the property,\(^\text{49}\) and

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46. 247 N.C. 150, 100 S.E.2d 391 (1957).
49. In North Carolina, the husband in a tenancy by the entireties has the exclusive right to the use, control, possession, rents and profits of the property during the joint lives of the husband and wife. Hinton v. Hinton, 17 N.C. App.
limitations on the claims of creditors. The buyer(s) should be informed of these legal ramifications and given the opportunity to determine whether this form of tenancy suits their needs.

8. Possession

Typically, possession of the property is delivered at closing. However, if possession is delivered after closing, the seller must pay the buyer rent for each day that he retains possession after closing. This “possession” provision first requires the drafter to specify when possession will be delivered. The provision then states that if the buyer agrees that possession will not be delivered at closing, the seller agrees to pay the buyer a daily rent, as agreed upon by the parties. However, the provision fails to state whether the buyer must pay the seller rent if the buyer moves in before closing. The provision should address this issue and also specify when the rental payment shall be made. Normally, the rent will be paid at closing and incorporated into the closing statement.

9. Counterparts

Once the parties complete the “counterparts” provision, the offer becomes a binding contract. This provision requires the drafter to insert the date of the offer and the date of acceptance of the offer. However, the provision does not require the drafter to specify the date on which the offer will expire if not accepted. Therefore, unless the buyer revokes the offer, the seller has a “reasonable time” within which to accept the offer. To avoid uncertainty as to what constitutes a “reasonable time”, or whether the offer has been properly revoked, the provision should require the drafter to specify the expiration date of the offer.

This provision also requires the signatures of the buyer(s) and seller(s). As a result, the contract clearly satisfies the signature requirement of the Statute of Frauds regardless of who the party to be charged is in any future lawsuit. It is important for all of the buyers and all of the sellers to sign the contract and for the signatures to match the names of the parties as written in the opening

52. For a discussion of what is sufficient to fulfill the signature requirement of the Statute of Frauds see P. HETRICK, supra note 12, § 141 at 157.
paragraph. This is especially true with regard to the sellers. For example, if the sellers own the property as tenants by the entirety, the signatures of both husband and wife are necessary to convey an absolute interest in the property. 53 Even if one person is the sole owner of the property, his or her spouse must sign the contract to release the dower rights in the property. 54 If the owners hold the property as tenants in common, a conveyance by one co-tenant only conveys his share of the property. 55 Once again, the buyer is unprotected. The form should protect the buyer by stating, as a condition to the contract, that: "All buyers and all sellers must sign the contract." 56

Finally, this provision states that the escrow agent (normally the broker) has received the earnest money. It requires the drafter to insert the date on which the earnest money is received and requires the recipient to sign the contract. The buyer should make sure that the recipient of the earnest money signs this portion of the contract. Otherwise, problems may arise concerning the fact and amount of payment.


1. Earnest Money

This provision is thorough, well-drafted, and unbiased. It states that earnest money will be returned to the buyer if the seller does not accept the offer, if the buyer is unable to fulfill the conditions of the contract, or if the seller breaches the contract. 57 It further provides that the buyer will surrender the earnest money to the seller if the buyer breaches the contract. However, these are not the only remedies available. The provision also states that the return of the earnest money to the buyer does not affect any other remedies he may have, such as an action for damages, specific per-

53. P. Hetrick, supra note 12, § 125 at 129-30.
55. A tenant in common may bind his co-tenants only if he has been empowered to act as their agent. However, an agency relationship does not arise from their relationship as mere tenants in common. P. Hetrick, supra note 12, § 113 at 114.
56. Problems concerning the authority of corporate agents and partners to sign this contract is beyond the scope of this comment.
57. "Not every breach of a contract justifies a cancellation and recission. The breach must be so material as in effect to defeat the very terms of the contract." Childress v. Trading Post, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957).
formance, specific performance with abatement in the purchase price, or recission of the contract and recovery of all amounts paid by the buyer.\textsuperscript{58} Neither is retention of the earnest money the sole remedy for the seller upon breach by the buyer. Other remedies include an action for damages, specific performance, recovery of possession, and recission of the contract.\textsuperscript{59} This provision reduces the likelihood of confusion, and perhaps litigation, over what happens to the earnest money upon the occurrence of certain conditions.

2. Loan Assumed

This provision requires all payments on the assumed loan to be current at the date of closing. The principal balance shall be computed on the date of closing. Then the amounts shown for the assumption balance and cash at closing shall be adjusted to reflect any change in the principal balance on the date of closing.

This provision also requires the existing loan to be assumable: (1) without acceleration of the amount secured, (2) without change in the original terms of the note and deed of trust, and (3) without imposition of any charge to the buyer other than a reasonable transfer fee, which shall not exceed $175. This clause is very important to the buyer.

Most loans today do contain an acceleration provision and, according to the standard form, are unassumable. However, often a buyer may obtain permission from the lender to assume the loan. This permission is usually contingent on payment of a reasonable transfer fee. It is important that steps be taken to avoid acceleration of the entire amount payable. Otherwise, the lender may institute foreclosure proceedings soon after the buyer moves into the house. It is also important the buyer know that there will be no changes in the terms of the note and deed of trust and that he will not be responsible for any charge for the assumption of the loan exceeding $175. Finally, the provision requires any escrow account to be purchased by the buyer.

3. Promissory Note and Deed of Trust

If the buyer gives the seller a promissory note secured by a deed of trust, this provision requires the promissory note and deed

\textsuperscript{58} P. HETRICK, \textit{supra} note 12, § 145 at 164-65.
\textsuperscript{59} Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).
of trust to be identical in form and substance to the promissory note and deed of trust forms approved by the North Carolina Bar Association. This requirement incorporates all of the provisions on the approved promissory note and deed of trust forms, thereby insuring that these instruments will not be vague and will satisfy the Statute of Frauds.

4. Prorations and Adjustments

This provision requires the following items, unless otherwise provided, to be prorated and adjusted between the parties or paid at closing.

(a) "Ad valorem taxes on real property shall be prorated on a calendar year basis to the date of closing."\(^{60}\) This provision designates the closing date as the date to which such taxes are prorated. Without such designation, a seller who has delivered possession before closing may argue that the taxes should be prorated to the date of possession. Therefore, it is important to specify the date to which taxes shall be prorated.

This provision fails to address the problem that arises when the amount of taxes due for the year is unknown. In North Carolina, property owners must list their property for taxation by January 1.\(^{61}\) The tax lien on the property attaches as of January 1.\(^{62}\) The amount of taxes payable is then determined by July 1. Therefore, if real property is sold between January 1 and July 1, the amount of taxes payable is unknown. Many alternatives are available in this situation. First, 110% of the prior year's taxes could be established as a basis on which to prorate the current year's taxes.\(^{63}\) This is generally an accurate approach, provided the property has not been improved since the prior year's taxes were assessed.\(^{64}\) Second, an escrow fund may be established from which the proportionate amounts of taxes may be paid. Finally, the buyer may be allowed to deduct the seller's pro rata share of the real

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60. *Standard Form*, Appendix.
64. However, if the property has been improved in the interim, one could estimate the amount the improvement adds to the value of the property and calculate the tax payable on that amount, based on the prior year's tax rate. Then 110% of that amount could be added to the 110% amount of the prior year's taxes to get a fairly accurate estimate of the amount of taxes payable for the current year.
property taxes from funds that may be due the seller after the closing.\textsuperscript{65} The contract should specify which method will be used to avoid uncertainty and disagreement.

(b) "Ad valorem taxes on personal property for the entire year shall be paid by the seller."\textsuperscript{66} It is only proper that the seller should pay the taxes on the personal property that he or she listed earlier in the year.

(c) "All late listing penalties, if any, shall be paid by the seller."\textsuperscript{67} The penalty for failure to list property to be taxed within the time prescribed by statute consists of a fine not to exceed $500 dollars or imprisonment not to exceed six months.\textsuperscript{68} It is only proper to impose this penalty on the seller since its imposition hinges on his failure to file.

(d) "Rents, if any, for the Property shall be prorated to the date of closing."\textsuperscript{69} Similar to the provision concerning ad valorem taxes on real property, this provision avoids uncertainty by specifying the date to which rents shall be prorated.

(e) "Accrued, but unpaid, interest and other charges to the Seller, if any, shall be computed to the date of closing and paid by Seller; interest and other charges prepaid by Seller shall be credited to the Seller at closing and paid by the Buyer."\textsuperscript{70} This merely allocates the charges between the buyer and seller according to the time when they receive the corresponding benefits. Though this is the normal way to allocate such charges, it is beneficial to specify it in the contract.

5. Fire or Other Casualty

This provision places the risk of loss for damage by fire or other casualty prior to closing on the seller. Although at first glance, this risk of loss provision appears to favor the buyer, this is not necessarily true. A buyer may sometimes want to take the risk of loss, especially if he would also then be entitled to all the insurance proceeds collected by the seller under the seller's insurance policy. And where the insurance proceeds exceed the purchase

\begin{footnotes}
\item[65] DeVaney, Daniel & Sutton, \textit{supra} note 9, at III-14.
\item[66] \textit{Standard Form}, Appendix.
\item[67] \textit{Id}.
\item[68] N.C. GEN. STAT. § 105-308 (1979).
\item[69] \textit{Standard Form}, Appendix.
\item[70] \textit{Id}.
\end{footnotes}
price, the buyer may gladly take the risk of loss. However, the standard form does not give the buyer this option.

This risk of loss provision negates the application of the Uniform Vendor and Purchaser Risk Act, adopted by North Carolina in 1959. The Uniform Vendor and Purchaser Risk Act may be summarized as follows:

If neither legal title nor possession of the property has been transferred, and all or a material part of the property is destroyed without fault of the vendee, then the vendor is not entitled to enforce the contract and vendee is entitled to recover any portion of the price that has been paid. If either legal title or possession of the property has been transferred and all or any part of the property is destroyed without fault of the vendor, then the purchaser is not relieved from a duty to pay the price, nor is the purchaser entitled to recover any portion of the price already paid.

Since both legal title and possession are normally delivered at closing, the standard provision is in accordance with the Uniform Vendor and Purchaser Risk Act in placing the risk of loss on the seller during the period prior to closing and on buyer subsequent to closing.

However, the standard provision is much too general. First, it fails to specify what will happen should such fire or casualty occur. May the buyer merely rescind the contract, or may he also recover earnest money or other amounts previously paid? May he still purchase the property, with an abatement in purchase price? Second, the provision also fails to specify what will happen if such loss is partially or wholly due to the fault of the seller. May the buyer sue the seller for damages? It is especially important that this provision address these concerns since North Carolina case law provides little clarification on these issues.

6. Conditions

(a) The first condition requires the property to be in substantially the same condition on the date of closing as on the date of the offer, excepting reasonable wear and tear. This helps to assure the buyer that he will receive substantially the property for which he bargained. However, the form should also advise the buyer to

71. S. Goldberg, supra note 5, at 465.
73. P. Hetrick, supra note 12, § 151 at 169-70 (emphasis in original).
physically inspect the property immediately before closing. If the seller has damaged a wall while moving furniture or taken the draperies that he promised to leave behind, it is much easier to settle these matters at the closing, before the seller receives his money.

(b) The second condition requires all deeds of trust, liens, and other charges against the property, which have not been assumed by the buyer, to be paid and cancelled by the seller prior to or at closing. The provision should also require the seller to furnish proof as to such cancellations.

(c) The third condition requires the seller to deliver title at closing by general warranty deed. It must be a fee simple marketable title, free of all encumbrances except ad valorem taxes for the current year,\(^7\) utility easements, "unviolated restrictive covenants that do not materially affect the value of the property",\(^7\) and other encumbrances specifically approved by the buyer. This provision also requires the property to have legal access to a public right of way. These provisions prevent the seller from giving the buyer a deed stating that the property is subject to encumbrances of record, of which the buyer, at the time of the offer, is unaware.\(^7\)

(d) The final condition states that if the buyer is assuming an existing loan and the lender requires its approval for the assumption of the loan, the approval of the lender is a condition of the contract. The provision also requires the buyer to diligently seek such approval. This prevents the contract from failing simply because the buyer refuses to cooperate with the seller in order to obtain the lender's approval.

7. New Loan

This provision properly exempts the seller from any obligation to pay any charges incurred by the buyer with respect to any new loan obtained by the buyer. However, it does not preclude the seller from paying some of these charges. (Such payment by the

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74. Standard Provision 4(a) requires these to be prorated to the date of closing. See supra notes 60-65 and accompanying text.
75. *Standard Form*, Appendix. This statement however, does not relieve the buyer of liability for violated restrictive covenants.
76. Keep in mind that at the time the buyer signs the offer, he has not procured a title search of the property. Therefore, these provisions are very important.
8. Utilities

Problems abound with this provision. It is inequitable, incomplete, and inconspicuous. For several reasons, the buyer is at a distinct disadvantage if forced to rely on this provision. First, the provision reinforces the now unpopular maxim of *caveat emptor* as it applies to sales of real property. Application of the *caveat emptor* doctrine means that the seller gives no implied warranties as to the conditions of the premises and is under no obligation to disclose defects in the property which are discoverable by the buyer upon a "reasonable" inspection. The seller must disclose only *material* facts which he knows are not reasonably discoverable by a diligent purchaser. Many buyers, excited about their future home, fail to make more than a cursory inspection. They assume that the oven, refrigerator, and other utilities are in working condition. Also, a "reasonable" inspection is a subjective standard, not susceptible of simple definition. This subjective standard makes it difficult to determine whether a particular defect would have been discovered upon a reasonable inspection. An initial buyer of a home may find some protection in the North Carolina Supreme Court's holding in *Hartley v. Ballou*. In this case, the court found an implied warranty of workman-like construction and no major structural defects in situations where an initial buyer purchases a recently completed dwelling or one under construction from a seller who is in the business of building such dwellings.

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77. The conditions section on the front of the standard form allows the buyer to stipulate the maximum amount he will pay in order to get a new loan.
82. This implied warranty is only recognized if the following requirements are met:

(1) [T]he contract must be for the sale of a recently completed dwelling or a dwelling then under construction; (2) the vendor must be in the business of building such dwellings; (3) the implied warranty is for the benefit of the initial vendee of the dwelling; (4) the implied warranty refers to the condition of the dwelling at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs); (5) under it, the builder-vendor warrants that the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner so as to meet the standard of work-
Given the doubly-disadvantaged position of the unrepresented buyer purchasing subject to the maxim of *caveat emptor*, the standard provision should give the buyer more protection—something this provision fails to do. First, the provision states that all electrical, plumbing, heating, and cooling systems, and built-in appliances, if any, shall be in good working order at closing. This seems fair enough until, many lines later, the provision states that closing shall constitute acceptance of all the above-mentioned utilities in their existing condition, unless otherwise provided. This may effectively nullify the prior guarantee that all utilities will be in good working order at closing. Furthermore, this escape clause is inconspicuously located at the end of the provision in what could be termed "fine print." Such a significant disclaimer, if included, should immediately follow the warranty and be in boldface print. However, with respect to the provision in its current form, the attorney handling the closing should warn the buyer to carefully inspect the utilities before closing.

Second, the provision generously gives the buyer the option to have the utilities inspected by a reputable inspector or contractor, but then requires the buyer to pay for the inspection. Many buyers may forego a professional inspection, choosing to save their money and perform the inspection themselves. A less complicated and more equitable provision would require the seller to certify that all utilities are in good working order and reimburse the buyer for any repairs necessary for defects discovered within a reasonable time following closing.

Third, the provision requires the inspection to be completed in sufficient time before closing to permit any repairs necessary to be performed before closing. However, the provision fails to specify what will happen if the inspection is made weeks before closing.

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manlike quality then prevailing at the time and place of construction; (6) the implied warranty is not extinguished under the doctrine of merger and survives the passing of the deed or the taking of possession by the vendee.

P. Hetrick, *supra* note 12, § 149 at 168 (footnotes omitted). Also, the implied warranty is not applicable to defects that are discoverable by a reasonable man upon inspection of the dwelling nor to defects that occur as a result of exposure to extreme conditions. Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

83. If the broker is made aware of a defective utility in an attempted sale of the property, and effects a subsequent sale of the property without disclosing such defect to the buyer, he has violated N.C. Gen. Stat. § 93A-6(a)(1) (1981) and may have his broker's license revoked.
but, because of the difficulty or amount of repairs needed, the repairs cannot be completed before closing. May the parties extend the date of closing or must the buyer accept the defective property and pay for the repairs himself? The provision should specify the respective rights of the buyer and seller should this problem arise.

Fourth, if any repairs are necessary, the provision gives the seller the option of (a) completing them, (b) providing for their completion, or (c) refusing to complete them. If the seller decides to make the repairs, then the buyer is bound to consummate the purchase. However, if the seller refuses to make the necessary repairs, the buyer then has the option of (a) accepting the property in its defective condition or (b) terminating the contract, in which case the earnest money shall be refunded. This provision overlooks the object of the contract. Normally, the buyer wants the property that he has contracted to buy in good working condition. He does not want to terminate the contract. Yet, this provision requires him to either take the property in a defective condition or not take it at all. The seller should be required to either make the necessary repairs or accept an abatement of the purchase price equal to the amount necessary to make the repairs. Otherwise, the seller could simply wait to sell until he found an unwary buyer who failed to discover the defect. The seller could then receive the full purchase price and escape his duty to repair. This possibility should not be allowed.84

The provision closes by recommending that any inspections be made prior to incurring expenses for closing. This statement tells the buyer what to do, but fails to warn him of what might happen if he fails to do it. Expenses for a title search, a survey, and preparation of necessary instruments can accumulate into a significant amount of money. These services, once performed, must be paid for, even if the buyer later decides not to accept the property because of defective utilities. An unsophisticated buyer may fail to recognize the importance of this statement and, therefore, fail to heed its warning. Hence, this provision should both state the reason for this recommendation and emphasize the recommendation by putting it in boldface print.

84. This disclaimer may also preclude application of the implied warranty to utilities recognized in Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974). In Griffin v. Wheeler Leonard Co., 290 N.C. 185, 225 S.E.2d 557 (1976), the court held that a builder-vendor could enter into a binding agreement with the purchaser that prevented application of the implied warranty.
9. **Termites**

This provision requires the seller to provide at the seller’s expense:

[A] report from a licensed pest control operator on a standard form in accordance with the regulations of the North Carolina Structural Pest Control Committee, stating that there was no visible evidence of wood-destroying insects, and that no visible damage therefrom was observed, or, if new construction, a new construction termite bond.\[^{86}\]

The regulations of the North Carolina Structural Pest Control Division require pest control operators to make a careful visual examination of all accessible areas of a building and attempt (by “sounding” accessible members) to determine the presence of any damage by wood-destroying insects.\[^{86}\] The pest control operator also must report any wood-destroying insect damage, any evidence of recent activity, and any conditions conducive to subterranean termites (e.g., insufficient ventilation, cellulose debris under structure, etc.).\[^{87}\] However, as the North Carolina Structural Pest Control Division stated in a recent memorandum, the Wood-Destroying Insect Information Report is not a warranty as to the absence of wood-destroying insects, rather, it is a report of the apparent absence of such insects at the time of the inspection.\[^{88}\] Therefore, although the house may have extensive termite infestation and damage, if such evidence is not visible, the buyer is not protected.\[^{89}\]

In order to enhance the buyer’s protection in this area, the provision should require the buyer to pay for the termite inspection. The buyer could then request the inspector to perform a more thorough inspection than that required by the contract. Unlike the inspection of the utilities, the buyer would not forgo a professional termite inspection simply because he had to pay for it. Most buyers realize that they are not capable of making a reasonable termite inspection. The provision should also suggest that such

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\[^{85}\] Standard Form, Appendix.
\[^{87}\] Id.
\[^{88}\] Memorandum from Structural Pest Control Division, Dep’t of Agriculture to Homeowners, Realtors, Builders, Lending Institutions, Closing Attorneys and Others (1985) (discussing U.S. Dep’t Housing and Urban Development Wood Destroying Insect Information Report—HUD Form No. 92053 (OMB No. 63-R1395) (1980)).
an inspection be performed before incurring any closing expenses.

The provision also states that if any structural repairs are necessary, the seller has the option to either pay for them or refuse to pay for them. If the seller refuses to pay for them, the buyer may either accept the property in its damaged condition or terminate the contract, in which case the earnest money will be refunded. Like the utilities provision, this provision overlooks the object of the contract. The buyer wants the property he contracted for, free of termite damage. The seller should then be required to either repair the damage or convey the property to the buyer with an abatement of the purchase price equal to the amount necessary to make the repairs.

Also, this provision fails to require the seller to have the termite inspection performed before the buyer has incurred any closing expenses. If the provision is going to require the seller to procure and pay for the inspection, it should also require the seller to submit the report to the buyer within ten days after the contract is signed. It should then tell the buyer that he should wait until he receives the report to incur any closing expenses.

Finally, the provision appropriately warns the buyer that the report “may not reveal either structural damage or damage caused by agents or organisms other than termites and wood-destroying insects.”

10. Labor or Materials

This provision requires the seller to provide at closing an affidavit and indemnification agreement showing that all labor or materials furnished to the property within 120 days prior to closing have been paid for and agreeing to indemnify the buyer for any costs resulting therefrom. North Carolina General Statutes section 44A-8 states:

Any person who performs or furnishes labor or professional design or surveying services or furnishes materials pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a lien on such real property to secure payment of all debts owing for labor done or

90. One wonders why the seller would want such a provision. Does he sincerely think that someone will pay the full purchase price for a house damaged by termites?

91. Standard Form, Appendix.
professional design or surveying services or material furnished pursuant to such contract. 92

To acquire such a lien, a claim of lien must be filed within "120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien." 93 Therefore, this provision protects the buyer from purchasing property subject to a mechanic's or materialman's lien.

11. Fuel Oil

This provision properly requires the buyer to purchase from the seller any fuel oil in the fuel oil tank on the property at the prevailing rate per gallon. Any cost of measuring the amount of the fuel in the tank must be paid for by the seller. 94

12. Closing Expenses

This provision requires the seller to pay for the preparation of the deed and the revenue stamps. This is the normal custom and practice in North Carolina. This provision then requires the buyer to pay for recording the deed and all instruments required to secure the balance of the purchase price at closing. It is North Carolina custom and practice for the buyer to pay for recording the deed, since the buyer is the one who benefits by its recordation. It does not necessarily accord with North Carolina custom and practice to have the buyer pay for all instruments required to secure the balance of the purchase price. If the instrument that secures the balance of the purchase price is a deed of trust, it is custom and practice in North Carolina for the buyer to pay for its recordation. 95 However, if the instrument that secures the balance of the purchase price is a purchase money deed of trust, customarily the seller pays for its recording. This provision should separate the broad category of "instruments required to secure the balance of the purchase price" 96 into the two above-mentioned categories and allocate the expenses accordingly.

94. To eliminate the need to measure the amount of fuel in the tank, the seller could simply have the tank filled to capacity on the day of closing and have the buyer pay the applicable per unit price.
95. The bank or other lending institution requires the debtor to pay for recording the deed of trust.
96. Standard Form, Appendix.
13. Evidence of Title

This provision requires the seller to deliver to the buyer, as soon as reasonably possible after the seller accepts the offer, copies of all title information available to the seller. This title information includes, but is not limited to "title insurance policies, attorney's opinion on title, surveys, covenants, deeds, notes and deeds of trust and easements relating to the real and personal property" covered by the contract. If the buyer is able to give all of this information to his attorney, it will save his attorney time in preparing the documents necessary for the sale, thereby saving the buyer money.

14. Assignments

This provision prohibits assignment of the contract by either party except with the agreement of all parties. This provision protects the seller who agrees to accept from the buyer a purchase money deed of trust by preventing assignment of the contract to an unreliable assignee.

15. Parties

This provision makes the contract binding on the parties, their heirs, successors, and assigns. It also makes the provisions with regard to the promissory notes and deeds of trust contained in the contract, binding on all the parties, as well as subsequent owners of the property and subsequent owners of the notes and deeds of trust. This assures that the contract will be carried out according to its terms, regardless of whether the buyer or seller assigns the contract or dies. For example, if the seller dies, the buyer can still purchase the property, and do so according to the original terms of the contract. The seller's heirs could not force the buyer to agree to harsher terms just because they know the buyer wants or needs the property.

97. Id.
99. S. GOLDBERG, supra note 5, at 265. Absent a novation, the original buyer would remain secondarily liable to the seller, while the assignee would be primarily liable. Nevertheless, this provision rightfully protects the seller from resort to a lawsuit against the assignee and the original buyer in order to obtain payment.
16. Survival

This provision states, in effect, that the seller's representations and warranties survive the closing for such period as is necessary to ascertain that the representations and warranties are correct. This survival clause is necessary to assure the buyer that if, after closing, he discovers that some of the representations or warranties made by the seller are false, the seller will remain liable for any damages the buyer suffers.100 Without such a clause, the contract merges into the deed when the deed is accepted, thereby eliminating the warranties contained in the contract.101

17. Entire Agreement

This provision states that the contract contains the entire agreement between the buyer and seller. It states that there are no other representations or inducements other than those contained in the written agreement and that all modifications of the contract must be in writing and signed by the parties. This provision prevents litigation over alleged oral agreements of which there is no proof. It is not intended to benefit the seller at the expense of the buyer. Rather, it provides the certainty desirable in a contract. In fact, it even warns the buyer that he must get all modifications in writing. The provision concludes by stating that the buyer acknowledges that he has inspected the property and that nothing in this contract shall alter any agreement between a broker and a seller.

III. Conclusion

The unwary buyer deserves more protection than the “Offer to Purchase and Contract” provides. Both the North Carolina Association of Realtors and the North Carolina Bar Association have approved this standard form contract. Since Realtors normally act as agents of the seller, the Association of Realtors’ approval implies that the form will adequately protect the interests of the seller. And, since the Bar Association purports to serve the interests of the consuming public, its approval implies that the form will adequately protect the interests of the buyer. Unfortunately, the latter implication cannot properly be supported. The North Carolina Bar Association should either withdraw its approval from the current

100. This provision is not applicable to the condition of utilities.
form or revise the form to more adequately protect the interests of the buyer.

Ideally, the North Carolina Bar Association would revise all of the inequitable provisions contained in the "Offer to Purchase and Contract." However, minimally, it should insist that a phrase similar to the following be inserted just above the line for the buyer's signature: "Upon signature by both parties, this form becomes a binding contract. Read it carefully. If you do not understand any portion of it, consult an attorney before signing." This phrase impresses upon the buyer the solemn and permanent significance of his action.

The purchase of a home is often the single most important investment a person makes in his lifetime. The buyer of a home deserves adequate protection in making this important purchase. Absent professional legal advice, a contract of sale, revised as suggested, is the best and simplest means of providing such protection.

Lisa Ann Finger
OFFER TO PURCHASE AND CONTRACT

1. REAL PROPERTY: Located in the City of ____________________________ County of _______ State of North Carolina, being known as and more particularly described as:

Street Address ____________________________________________________________
Legal Description _________________________________________________________

2. PERSONAL PROPERTY: ______________________________________________

3. PURCHASE PRICE: The purchase price is ____________________________ and shall be paid as follows:

(a) $ ____________________ in earnest money paid by ____________________ (cash, bank, certified, or personal check) with the delivery of this contract, to be held in escrow by ______________________ as agent, until the sale is closed, at which time it will be credited to Buyer, or until this agreement is otherwise terminated and it is disbursed in accordance with the Standard Provisions on the REVERSE SIDE HEREOF.

(b) $ ____________________ by assumption of the unpaid principal balance and all obligations of Seller on the existing loan secured by a deed of trust on the Property.

(c) $ ____________________ by a promissory note secured by a purchase money deed of trust on the Property with interest prior to default at the rate of _____% per annum, payable by _____ payments of $ __________ commencing on __________. Prepayment rights, if any, shall be: __________________________

Assumption or transfer rights, if any, shall be: __________________________

(d) $ ____________________ the balance of the purchase price in cash at closing.

4. CONDITIONS: (State "N/A" in each blank of paragraph 4(a) and 4(b) that is not a condition to this contract)

(a) The Buyer must be able to obtain a firm commitment effective through the date of closing for a loan in the principal amount of $ ____________________ for a term of ___ year(s), at an interest rate not to exceed _____% prior to _______. The Buyer agrees to use his best efforts to secure such commitment and to advise Seller immediately upon his receipt of the lender’s decision. Mortgage loan discount points not to exceed _____% of the loan shall be paid by ______________________ for the purpose of ________.

(b) The Buyer must be able to assume the unpaid principal balance of the existing loan described in paragraph 4(b) above for the remainder of the loan term, at an interest rate not to exceed _____% fixed or adjustable. If such assumption requires the lender’s approval, approval must be granted prior to the date that possession is to be delivered as above set forth. Buyer agrees to advise Seller immediately upon his receipt of the lender’s decision. In addition to any reasonable transfer fee (see STANDARD PROVISION No. 2), mortgage loan assumption and/or discount points not to exceed $ ____________________ shall be as follows:

(c) There must be no restrictions, easement, zoning or other governmental regulations that would prevent the reasonable use of the real property for __________________________

5. ASSESSMENTS: Seller warrants that there are no encumbrances or special assessments, either pending or confirmed, for sidewalks, paving, water, sewer or other improvements on or adjoining the Property, except as follows: __________________________

(Insert "none" or the identification of any such assessments, if any; the agreement for payment or provision of any assessments indicated is to be set forth in paragraph 6 below.)

6. OTHER PROVISIONS AND CONDITIONS:

(a) All of the Standard Provisions on the REVERSE SIDE HEREOF are understood and shall apply to this instrument, except the following numbered Standard Provisions shall be deleted: __________________________

(If none are to be deleted, state "None" in this blank.)

(If additional space is needed, the bottom of the reverse side of this page may be used.)

7. CLOSING: All parties agree to execute any and all documents and papers necessary in connection with closing and transfer of title on or before ____________ at a place designated by __________________________

Deed is to be made to __________________________

8. POSSESSION: Possession shall be delivered ____________; in the event that Buyer has agreed that possession is not delivered at closing, then Seller agrees to pay to Buyer the sum of $ ____________ per day to and including the date that possession is to be delivered as above set forth.

9. COUNTERPARTS: This Offer shall become a binding contract when signed by both Buyer and Seller and is executed in counterparts with an executed counterpart being retained by each party hereto.

Date of Offer: __________________________
Date of Acceptance: __________________________

Buyer __________________________ (SEAL) __________________________
Buyer __________________________ (SEAL) __________________________

Agent/Firm __________________________

I hereby acknowledge receipt of the earnest money herein set forth in accordance with the terms hereof.

Date __________________________
Agent/Firm __________________________

By: __________________________

This Standard Form has been approved jointly by: The N. C. Bar Association and The N. C. Association of REALTORS®, Inc.


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James William & Co., Inc., Box 177, Yadkinville, N. C. 27055

http://scholarship.law.campbell.edu/clr/vol8/iss3/5
STANDARD PROVISIONS

1. EARNEST MONEY: In the event this offer is not accepted, or in the event that any of the conditions hereinafter are not satisfied, or in the event of a breach of this contract by Seller, then the earnest money shall be returned to Buyer, but such return shall not affect any other remedies available to Buyer for such breach. In the event this offer is accepted and Buyer breaches this contract, then the earnest money shall be forfeited, but such forfeiture shall not affect any other remedies available to Seller for such breach.

2. LOAN ASSUMED: In the event a loan is assumed as part of the purchase of the purchase price, then all payments due from Seller hereunder must be current at closing, and the principal balance assumed shall be computed as of the date of closing. The amounts shown for the assumption balance and cash at closing shall be adjusted as appropriate at closing to reflect the final computations. Unless Buyer has otherwise requested in writing, the existing loan must be assumable without acceleration of the amount secured or any change in the original terms of the note and deed of trust and without imposition of any charge, fee or cost to Buyer other than a reasonable transfer fee or similar charge not to exceed $175.00. The escrow account, if any, shall be purchased by Buyer.

3. PROMISSORY NOTE AND DEED OF TRUST: In the event a promissory note secured by a deed of trust is given by Buyer to Seller as part of the payment of the purchase price, the promissory note and deed of trust shall be in the form and contain the provisions of the promissory note and deed of trust forms approved by the N.C. Bar Association as Forms 4 and 5, as modified in paragraph 3(d) on the reverse side.

4. PROJECTIONS AND ADJUSTMENTS: Unless otherwise provided, the following shall be protected and adjusted between the parties or paid at closing:
   (a) Ad valorem taxes on real property shall be prorated on a calendar year basis to the date of closing.
   (b) Ad valorem taxes on personal property for the entire year shall be paid by Seller.
   (c) All late penalty fees, if any, shall be paid by Seller.
   (d) Renta, if any, for the Property shall be prorated to the date of closing.
   (e) Accrued, but unpaid, interest and other charges to Seller, if any, shall be computed to the date of closing and paid by Seller; interest and other charges prepaid by Seller shall be credited to Seller at closing and paid by Buyer. (Other charges may include FHA mortgage insurance premiums, private mortgage insurance premiums and Homeowners' Association dues.)

5. FIRE OR OTHER CASUALTY: The risk of loss or damage by fire or other casualty prior to closing shall be upon Seller.

6. CONDITIONS
   (a) The Property must be substantially in the same condition at closing as on the date of this offer, reasonable wear and tear excepted.
   (b) All deeds of trust, liens and other charges against the Property, not assumable by Buyer, must be paid and cancelled by Seller prior to or at closing.
   (c) Title must be delivered at closing by general warranty deed and must be free of any encumbrances except ad valorem taxes for the current year (prorated to date of closing), utility easements and unrecorded restrictive covenants that do not materially affect the value of the Property and such other encumbrances as may be assumed or specifically approved by Buyer. The subject Property must have legal access to a public right of way.

7. NEW LOAN: Buyer shall be responsible for all charges made to Buyer with respect to any new loan obtained by Buyer and Seller shall have no obligation to pay any discount fee or other charge in connection therewith unless specifically set forth in this contract.

8. UTILITIES: Unless otherwise stated hereinafter, the electrical, plumbing, heating and cooling systems and built-in appliances, if any, shall be in good working order or at closing. Seller is hereby given the option to hire a reputable inspector or contractor at Buyer's expense, but such inspections must be completed in sufficient time before closing so as to permit repairs, if any, to be completed by closing. If any repairs are necessary, Seller shall have the option of (a) completing them, (b) providing for their completion, or (c) refusing to complete them. If Seller elects not to complete the repairs, then Buyer shall have the option of (a) accepting the Property in its present condition, or (b) terminating the contract, in which case the earnest money shall be refunded. Closing shall constitute acceptance of the electrical, plumbing, heating and cooling systems and built-in appliances in their existing condition unless provision is otherwise made in writing pursuant to this paragraph.

[R ECOMMENDATION: Buyer should have any inspections made prior to incurring expenses for closing.]

9. TERMINATES, ETC.: Unless otherwise stated herein, Seller shall provide at Seller's expense a report from a licensed pest control operator on a standard form in accordance with the regulations of the North Carolina Structural Pest Control Commission, stating that there was no evidence of wood-destroying insects and that no visible damage therewith was observed, or, if new construction, a new construction termite bond. All extermination required shall be paid for by Seller and completed prior to closing, unless otherwise agreed upon in writing by the parties. If any structural repairs are necessary, Seller shall have the option of (a) paying for them, or (b) refusing to pay for them. If Seller elects not to pay for such structural repairs, then Buyer shall have the option of (a) accepting the Property in its present condition, or (b) terminating the contract, in which later case the earnest money shall be refunded. The inspection and report described in this paragraph may not reveal either structural damage or damage caused by agents or organisms other than termites and wood-destroying insects.

10. LABOR OR MATERIALS: Seller shall furnish all labor, materials, and services necessary to complete all work and guarantee said work, including work performed by others. Seller shall furnish and guarantee said work, including work performed by others, subject to reasonable and necessary modifications agreed upon in writing.

11. FUEL: Buyer agrees to purchase from Seller the fuel oil, if any, situated in a tank on the premises for the prevailing price per gallon with the cost of measurement thereof, if any, being borne by Seller.

12. CLOSING EXPENSES: Seller shall pay for the preparation of a deed and for the revenue stamps required by law. Buyer shall pay for recording the deed and for preparation and recording of all instruments required to secure the balance of the purchase price unpaid at closing.

13. EVIDENCE OF TITLE: Seller agrees to exercise his efforts to deliver to Buyer as soon as reasonably possible after the acceptance of this offer, copies of all title information in possession of or available to Seller, including but not limited to title insurance policies, attorney's opinions on title, survey, covenants, deeds, notes and deeds of trust and easements relating to the real and personal property described above.

14. ASSIGNMENTS: This contract may not be assigned without the written agreement of all parties, but if the same is assigned by agreement, all the same shall be binding on the Assignee and his heirs.

15. PARTIES: This contract shall be binding and shall inure to the benefit of the parties and their heirs, successors and assigns. The provisions herein contained with respect to promissory notes and deeds of trust shall be binding upon and shall inure to the benefit of all parties to the same as well as subsequent owners of the Property and the said notes and deeds of trust. As used herein, words in the singular include the plural and the masculine includes the feminine and neuter genders, as appropriate.

16. SURVIVAL: Any provisions herein contained which by its nature and effect if required to be observed, kept or performed after the closing shall survive the closing and remain binding upon and for the benefit of the parties hereto until fully observed, kept or performed.

17. ENTIRE AGREEMENT: Buyer acknowledges that he has inspected the above-described property. This contract contains the entire agreements of the parties and there are no representations, inducements, or other provisions other than those expressed in writing. All changes, additions or deletions hereto must be in writing and signed by all parties. Nothing herein contained shall alter any agreement between a REALTOR and the Seller as contained in any listing contract or other agreement between them.

CONTINUATION OF OTHER CONDITIONS FROM REVERSE SIDE, IF APPLICABLE

[Reverse side for continuation of conditions]

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