1983

Drafting the Residential Contract of Sale

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DRAFTING THE RESIDENTIAL CONTRACT OF SALE

CARYL A. YZENBAARD†

Contemporary residential real estate transactions increasingly require the attention of an attorney. Professor Yzenbaard provides a step by step guide to the considerations that should be examined by the practitioner when drawing up a real estate contract for sale. Professor Yzenbaard’s analysis is multijurisdictional, but supplemented with relevant Minnesota authority.

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I. INTRODUCTION

The purchase and sale of the family home is probably the greatest investment made by the average family.1 Notwithstanding that fact, most buyers and sellers enter into the initial stages of the


1. For an extensive treatment of the sanctity of home ownership in the United

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transaction without the benefit of their own legal counsel, and may continue without such representation throughout the transaction. This lack of adequate representation is particularly acute during the time of negotiating and drafting the contract of sale, the instrument which is the crucial document in the transaction. In fact, the role of the lawyer in the negotiation and preparation of the contract of sale has been severely limited and questioned during the past decade. Courts tend to reflect the general popular sentiment that the expertise of a lawyer is not needed at this "ini-


No real estate transaction can be said to be unimportant. Whether it involves an inexpensive lot upon which the purchaser expects to build a home or a business property of greater worth, the undertaking, at least relatively speaking, is likely to be one of the most important in the lifetime of the buyer.

Houck, Drafting of Real Estate Instruments: The Problem from the Standpoint of the Bar, 5 LAW & CONTEMP. PROBS. 66, 67 (1938). “Nationwide studies reveal that a residential real estate transaction is the most common situation in which the parties need lawyers. The sale or purchase of a home by the average citizen is usually the financial transaction of a lifetime. . . .” Comment, The Lawyer's Role in Real Estate Transaction, 1978 REAL PROP. J. 6.

2. Buyers and sellers often feel that they are already adequately protected by the real estate broker, title examiner, or bank’s attorney. Nonetheless, the broker, examiner, and bank attorney are not responsible for others in the transaction and have interests that differ from the buyer and seller. For example, the broker is the agent of the seller and owes him fiduciary duties. The lender, even though its interests often coincide with the buyer/borrower, owes no duty to the buyer and has interests which are separate from the buyer/borrower.

Even if a buyer or seller has an attorney, the attorney is often not employed until after the contract of sale has been executed. See Raushenbush, Who Helps the Home Buyer?, 1979 ARIZ. ST. L.J. 203.

As a matter of fact, it is much more probable that the buyer is somewhat unreasonable and not very prudent, and will, instead, sign a printed form supplied by the real estate agent. In this he will be flying in the face of fortune and may suffer bitter regrets when he finds that the contract holds him to a bad bargain, does not express the intention of the parties or is inenforceable [sic] for indefiniteness. But sign it he all too often will, for the American lay public is not yet convinced that a lawyer is needed at this juncture and prefers to thrust itself into the hands of the real estate agent.


3. The contract of sale is the “blueprint” of the transaction. All other documents and the closing itself merely carry out the terms of the contract. See A. Bicks, CONTRACTS FOR THE SALE OF REALTY 1 (1973); Friedman, Buying a Home: Representing the Purchaser, 47 A.B.A. J. 596 (1961). Often the emphasis is placed on the deed, but the deed must conform to the provisions of the contract. See, e.g., United Coop. Realty Co. v. Hawkins, 269 Ky. 563, 108 S.W.2d 507 (1937); Buswell v. O.W. Kerr Co., 112 Minn. 388, 128 N.W. 459 (1910).

4. The traditional conflict has been between brokers and attorneys with the discussion focusing upon the broker's argument for public convenience and the lawyer's support
The author of this Article adopts the position that lawyers are crucial in the residential real estate transaction, particularly during the negotiation and drafting of the contract of sale. This Article will not address the issue of the unauthorized practice of law. That issue has been addressed often and further discussion will not resolve the crucial issue at hand: that buyers, in particular, and sellers, need the unique skills of their own lawyers for their protection when they are making one of the major transactions of their lifetimes. Consequently, the objective of this Article is to present for public protection.

5. Although there is often a dispute whether a particular document fits within the layman's drafting skills, most, if not all, courts that have considered the question, have stated that the contract of sale may be drafted by a layperson so long as it consists merely of filling in blanks on a form prepared by a lawyer. See, e.g., Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 53 Ill. App. 2d 388, 203 N.E.2d 131 (1964), rev'd on other grounds, 34 Ill. App. 2d 116, 214 N.E.2d 771 (1966); State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n, 244 Ind. 214, 191 N.E.2d 711 (1963); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940); see also Shedd, Real Estate Agents and the Unauthorized Practice of Law, 10 REAL ESTATE L.J. 135 (1981); Annot., 53 A.L.R.2d 788 (1957). But see Martineau v. Gresser, 19 Ohio Op. 2d 374, 182 N.E.2d 48 (1962) (addition of even "simple conditions" to a form contract would amount to unauthorized practice of law). See generally K. Hulsebus, The Residential Real Estate Transaction, in 1 MINNESOTA REAL ESTATE — RESIDENTIAL 1, 11-17 (Minn. Continuing Legal Educ. 1980).

6. This was also the position taken by the American Bar Association as approved by the House of Delegates on August 9, 1978, in a report of the Special Committee on Residential Real Estate Transactions of the American Bar Association entitled Residential Real Estate Transactions: The Lawyer's Proper Role-Services-Compensation. See A. BICKS, supra note 3, at 2.

7. Minnesota specifically permits brokers to assist the parties to a real estate transaction, and to draw up the documents.

SUBD. 3 PERMITTED ACTIONS. The provisions of this section shall not prohibit:

(3) any one, acting as broker for the parties or agent of one of the parties to a sale or trade or lease of property or to a loan, from drawing or assisting in drawing, with or without charge, papers incident to the sale, trade, lease, or loan;

(9) any person or corporation from drawing, for or without a fee, farm or house leases, notes, mortgages, chattel mortgages, bills of sale, deeds, assignments, satisfactions or any other conveyances except testamentary dispositions and instruments of trust;

MINN. STAT. § 481.02, subd. 3 (1982). See also Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940). Such assistance by brokers would otherwise be the unauthorized practice of law and subject to criminal sanctions. MINN. STAT. § 481.02, subs. 1, 8 (1982); see also New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Bds., 93 N.J. 470, 461 A.2d 1112 (1983) (approving standards for broker preparation of real estate contracts for sale and leases).
an overview or checklist of those areas which must be addressed in the residential contract of sale.

II. THE CONTRACT

The contract may take one of several forms depending upon custom and usage in the jurisdiction. It may be a bilateral contract which the seller and buyer sign. Certainly this is an appropriate format, and possibly the preferable one, when attorneys for both the buyer and the seller are involved. The contract may take the form of an offer by the buyer with an acceptance clause by the seller. When the offer-acceptance form is used, provisions should be included which require the seller to accept within a specified period of time and require duplicate copies so that each party may have a signed copy. In some jurisdictions, the contract takes the form of a deposit receipt in which the broker acknowledges receipt of the down payment. Regardless of the format selected, all provisions should serve to fulfill the specific requirements of the parties’ selection.

The contract may be either a printed form or an instrument

8. See Minn. Stat. § 513.05 (1982). The "real estate sale is normally a two or three-step process characterized by the execution of written documents at each step in the transaction." O. Browder, R. Cunningham, J. Julin & A. Smith, Basic Property Law 1015 (3d ed. 1979) (hereinafter cited as Browder & Smith). The terms given to the various instruments differ among communities. A purchase agreement or earnest money contract generally embodies the initial agreement between vendor and purchaser and is accompanied by a deposit of "earnest money" by the purchaser. See infra notes 60 and 61 and accompanying text. Where the transaction involves borrowing by the purchaser from a third party or extension of credit to the purchaser by the vendor, a second instrument, either a mortgage or contract for deed, respectively, is required. See Browder & Smith, supra, at 1027. The ultimate completion of the transaction is embodied in the execution of a deed of conveyance which transfers the vendor's interest in the land to the purchaser. See id.

9. Query the necessity of an offer or deposit receipt going "through" the broker. The broker, as will be noted, may be an appropriate person to hold the earnest money. Other than duties regarding that money, however, there is no need for the broker to be a signatory to the contract. The broker can simply sign as to the earnest money provision. Additional clauses reiterating the seller's agreement to pay the broker's commission, to release the broker, or to list the sale price with the multiple listing service, are not relevant to a contract of sale with the buyer and may even be detrimental. For example, the payment of the broker's commission (as well as other clauses) should be included in the listing agreement entered into between the seller and the broker. The listing agreement may have provided for a payment of the commission only on the closing of the sale. See, e.g., Ellsworth Dobbs, Inc., v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967). Generally, in the contract of sale, however, payment is typically due after the broker finds a "ready, willing and able" buyer who signs a contract. As a later document, the contract would control over the listing agreement.

10. For copies of Minnesota standard forms of purchase agreement and contract for

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written for the particular transaction. The use of a printed form is satisfactory in many situations and may be more efficient and economical than an individually written contract. When a form is used, however, special care should be taken to include all relevant and exclude all extraneous provisions. The overriding concern is that the form fulfills the particular needs of each of the parties. From the lawyer's viewpoint, use of the printed form may detract from the spirit of personal care and concern essential for productive attorney-client relations. Not only would such a detraction jeopardize the effectiveness of the present transaction, but it may also discourage the client from future use of the attorney and from referring others to the attorney.\footnote{11}

The contract must satisfy the applicable statute of frauds.\footnote{12} Typically, this will mean that the writing must contain the names of the buyer and seller, a description of the land, the price, conditions of the sale, and the signatures of the parties.\footnote{13} If an agreement lacks even one of the statutory requisites, it will not be enforceable unless saved by the doctrine of part performance or promissory estoppel.\footnote{14}

Many individuals feel that the contract they sign is not binding and can be amended later to add or change provisions.\footnote{15} Often
this impression is created by the practice of calling such contracts "binders" or "offers" instead of "contracts" and by the atmosphere of haste in which they are signed. The seller wishes to sell the property, the buyer doesn't want to lose the opportunity to buy the home, and the broker, if involved, wants the commission. Lawyers are called most often after the contract has been signed, and are viewed only as individuals who will slow down and add expense to the transaction. Unfortunately, even a short delay in seeking legal advice may be detrimental to the naive buyer or seller. In addition, a further danger exists where the contract contains a clause that states a more comprehensive agreement will be signed later. Even with such a clause, most courts enforce the original agreement.

To better serve the public, lawyers must draft the contract of sale in an effective and expeditious fashion. Ideally, a formal contract satisfactory to all parties can be drafted and signed shortly after the initial oral agreement. If contract preparation will take additional time, the attorney may wish to draft a preliminary contract that binds the parties to certain basic items such as the price but leaves the negotiation of other items for a future time.

the completeness of the written instrument, the vendor's acceptance of cash payments, and the purchaser's acts toward consummating the transaction. The binding effect of the initial agreement requires that the real estate purchase agreement or earnest money contract contain the entire agreement between the parties. "A thorough purchase agreement leaves nothing open for further negotiation." G. SHUMAKER & C. MCLAGEN, MINNESOTA REAL ESTATE 35 (1981).

16. Many individuals do not realize or acknowledge that the contract of sale is in fact a "binding" contract. R. KRATOVL, REAL ESTATE LAW 102 (6th ed. 1974). It cannot be emphasized too strongly that clients—both sellers and purchasers—should be urged not to sign binders. As prepared by many realtors, the binders may sufficiently present the details of the proposed sale to be enforced as contracts. In such cases, the parties may have missed an opportunity to include clauses necessary for their protection. Clients may realize too late that they will be bound to perform a contract unwittingly executed. See also F. FISHER, BROKER BEWARE: SELLING REAL ESTATE WITHIN THE LAW 123 (1981) (noting the danger of buyers accepting more than one offer at a time). In a recent case, Bouten v. Richard Miller Homes, Inc., 321 N.W.2d 895 (Minn. 1982), the Minnesota Supreme Court refused to enforce a "purchase agreement offer."


18. Cf. Callender v. Kalscheuer, 289 Minn. 532, 533, 184 N.W.2d 811, 812 (1971) (if owner makes definite and complete written offer to sell, written acceptance of offer by other party results in formation of enforceable contract).


20. One example of this type of arrangement occurred in the case of Indoe v. Dwyer, 176 N.J. Super. 594, 424 A.2d 456 (1980), wherein the agreement signed by both parties
III. THE PARTIES

Although the identification of the parties to the contract is required by the statute of frauds,21 there is a tendency to understate the importance of getting the signatures of all appropriate parties. Nonetheless, that the proper parties sign may be essential in the event of a later breach.22

The buyer's attorney should be certain that the seller has been adequately identified and has properly signed the contract.23 If the property is jointly owned, all owners should be identified and should sign. Failure to have all sellers sign the contract may prevent the enforcement of the contract.24 If the seller is an individual, the buyer should ascertain the competency of the seller. If the seller is a corporation, an appropriate corporate resolution should be presented noting the signers' authority to enter into the agree-

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[1] The Minnesota statute of frauds requires that a contract for sale of land be "scribed by the party by whom the lease or sale is to be made..." MINN. STAT. § 513.05 (1982). The signatures of both parties are not required in Minnesota to validate the contract. Although the buyer need not sign the contract, he must accept it in order for it to be valid. Also, where an agent is acting for a vendor, the agent's authority must be in writing. See Schwinn v. Griffith, 303 N.W.2d 258 (Minn. 1981); see also Krohn v. Dustin, 142 Minn. 304, 172 N.W. 213 (1919); Gregory Co. v. Shapiro, 125 Minn. 81, 145 N.W. 791 (1914); Wilson v. Hoy, 120 Minn. 451, 139 N.W. 817 (1913). Additionally, the vendor's "subscription" need not be a written signature. See Radke v. Brenon, 271 Minn. 35, 39, 134 N.W.2d 887, 891 (1965) (typewritten name of prospective vendor at bottom of letter offering land for sale sufficient); 34 MINN. L. REV. 277 (1950).

22. See Friedman, supra note 3, at 598.

23. See supra note 21.

24. See, e.g., Glinski v. Sheldon, 88 Wis. 2d 509, 276 N.W.2d 815 (1979) (The court would not order specific performance of a contract which only the husband/seller had signed when the property was jointly owned with his wife. Damages were awarded, however, because the seller had misrepresented his authority to sign for his wife.); MINN. STAT. § 507.02 (1982) (sale of homestead without spouse's signature renders contract void); see also Friedman, supra note 3, at 598; cf. Radke v. Brenon, 271 Minn. 35, 39-40, 134 N.W.2d 887, 891 (1965) (failure of vendor's wife, a joint tenant, to sign offer to sell property could not be raised for the first time on appeal by vendor from decree of specific performance).
ment. Similarly, the appropriate partners in a partnership must have authority to sign the agreement. Finally, if the seller is a trustee, executor, or other fiduciary, the buyer should examine the seller’s authority to sell in that capacity.

The seller, on the other hand, should not include the signatures of individuals who are not owners of the property. For example, even though the property may be owned by only one spouse, it is often common practice for both to sign. Nonetheless, the only interest of the nonowning spouse is a dower or curtesy interest which requires release. A careful attorney for the seller will have the nonowning spouse sign the agreement only to release the dower or curtesy at the time of closing, precluding that spouse from obligations under the other terms of the agreement. If the spouse refuses to sign the deed, a court may permit specific performance of the contract for the purchasers subject to the spouse’s inchoate interest.

The buyer should be identified and should sign the contract. The sellers will want to verify that the buyer is an adult and of sound mind. If more than one buyer will be purchasing the property, all should sign in order to avoid potential problems in the event one should die. Again, if the buyer is a corporation, partnership, or fiduciary, precautions should be taken to verify the authority to sign the contract.

Although it is not customary in many areas of the country, the buyers should include a provision regarding how title will be taken. For example, in the case of joint ownership, it might be by tenancy in common, joint tenancy, or tenancy by the entirety. If the buyer has not decided how he or she will take title, a provision should be included to ensure that notification of how title will be taken is given to the drafter of the deed within a stated period of time. In the absence of such a provision, a seller might draft a deed which will require a subsequent reconveyance to achieve the desired result. On the other hand, the deed must conform to the
contract and a buyer may reject a deed which is nonconforming.  

In a similar vein, the buyer's lawyer should insert a provision for review of the deed to ascertain its accuracy prior to closing. The buyer may also wish to include a provision to permit assignment of the contract if that is contemplated.

IV. THE PROPERTY DESCRIPTION

The contract should include the best available description of the property. Although a description might be sufficient if the property can be identified either by the contract itself or from references therein, some courts either have held that the description in the contract must be as complete as that in the deed or have been otherwise insistent upon complete details. The current draft all deeds to buyers as tenants in common if both the husband and wife signed the contract to purchase. Later, if they desired another form of joint ownership, the buyers would have to redraft the deed. Although typically a seller's attorney will draft the deed as desired by the buyers, the buyers may not know this if they are unrepresented. Similarly, a corporation may want to have title taken in the name of a subsidiary corporation.

30. See, e.g., Wahl v. Fairbanks, 405 Ill. 290, 294, 90 N.E.2d 735, 737 (1950) (a deed to the husband alone must be reformed to comply with the contract of sale which stated title was to be in the name of husband and wife as joint tenants); cf. Williams v. Gilbert, 120 Minn. 299, 139 N.W. 502 (1913) (buyer need not accept deed from third party where contract states seller is to convey title).

31. For example, if tenancy by the entirety or joint tenancy with right of survivorship is desired, the correct language must be used in order to avoid a statutory preference for tenancy in common. In Minnesota, tenancies by the entirety have been abolished, Wilson v. Wilson, 43 Minn. 398, 45 N.W. 710 (1890), and all conveyances to two or more persons will be construed as tenancies in common "unless expressly declared to be in joint tenancy." MINN. STAT. § 500.19(2) (1982). It is often unclear what language will suffice to show the requisite intent. For a discussion of this subject, see 2 T. McDermott, Ohio Real Property Law and Practice § 8-16 (Supp. 1980), where the author notes several different methods to create a valid joint tenancy with right of survivorship in Ohio and several which will not suffice. A review prior to the closing will save time and possible attorney embarrassment at the closing.

32. In the absence of any restriction, the purchaser's interest is assignable. See, e.g., Coraci v. Noack, 61 Wis. 2d 183, 212 N.W.2d 164 (1973).

33. See, e.g., Roberts v. Lebrain, 113 Cal. App. 2d 712, 715, 248 P.2d 810, 813 (1952); Colstad v. Levine, 243 Minn. 279, 282, 67 N.W.2d 648, 652 (1954) (contract must provide "adequate guide to locate and identify the property in light of the surrounding circumstances . . .").


35. See G. Thompson, supra note 14; accord, Martin v. Seigel, 35 Wash. 2d 223, 212 P.2d 107 (1949) (description must include correct lot number, block number, addition, city, county, and state).

The Minnesota standard for a sufficient description was set out in Miracle Constr. Co. v. Miller, 251 Minn. 320, 87 N.W.2d 665 (1958). The court held that the description must provide a reasonably certain guide or means for identifying the land to the exclusion of all other lands. Id. at 323, 87 N.W.2d at 669. In so holding, the Miller court recognized
practice of using only the street or common address in the contract also creates the risk that the parties will not fully understand which parcel of land is being conveyed. The seller can convey only the land which the seller owns even if that does not correspond to the common description; a discrepancy between the two might either void the contract or frustrate the desires of the parties.\textsuperscript{36}

If the street or common address is to be used, it should be noted in the contract that the street or common address will be supplemented by the legal description by which the seller acquired title. A preferable method for obtaining a description is to extract the legal description from a copy of the seller’s deed or title opinion and to attach the document to the contract. Regardless of the description used, the buyer’s attorney should ascertain that the correct legal description has been used and should define the description for the buyer. For instance, the buyer’s attorney could trace the description with a protractor and a ruler.

If a survey is used, appropriate language should be included in the contract noting which description will be used in the deed should the survey description differ from the prior legal description. If the descriptions vary, both should be used, noting that the second description is based upon a cited survey and that a “being” clause is used to refer to the earlier description.\textsuperscript{37} Obviously, if the discrepancy is too great, corrective methods must be used and provided for in the contract. For example, the parties may agree that the buyer must accept the property as long as the discrepancy is less than ten percent of the land to be conveyed, and if greater than ten percent the buyer be given the option to terminate, or the parties may agree that a quiet title action be brought to verify

\textsuperscript{36} See Colstad v. Levine, 243 Minn. 279, 282, 67 N.W.2d 648, 652 (1954) (court will not apply Minnesota statute of frauds in rigid manner and hold attempted conveyance void when contract and related instruments provide adequate guide to locate and identify property).

\textsuperscript{37} See Elliot v. Green, 294 Ky. 660, 172 S.W.2d 442 (1943) (deed which recited it was same property as that conveyed by previous deed in the chain of title, conveyed all land described in earlier deed even though subsequent deed described smaller tract of land). The “being” clause often is used when the property is described by both a metes and bounds description and by block and lot. A. BICKS, supra note 3, at 25 (“being the same premises conveyed to the seller by deed dated _____ and recorded _____”). Some state statutes require a reference to the prior deed. See, e.g., KY. REV. STAT. ANN. § 382.110 (Bobbs-Merrill 1972). Minnesota does not have the requirement.
ownership. The use of a survey is recommended especially in those situations where the land is a remnant of a larger tract, where the description is no longer reflective of the true boundary lines, or where encroachments are possible.

It is a maxim that fixtures remain with the real property and personal property does not. Nevertheless, the contract of sale should embody the parties' understanding concerning fixtures and personal property. Any fixture to be removed by the seller, should be clearly noted in the contract. A long list of fixtures that will remain on the property should not be included in the contract of sale for two reasons. First, the use of a list creates the risk of omission. For instance, if a fixture is not specifically mentioned, it could be removed. Second, a list gives the appearance that the contract is merely a form and that the client is not getting the personal attention deserved. On the other hand, listing fixtures does serve as notice to laypersons that the items listed will remain on the property. Whether the fixtures are enumerated in the contract or not, the subject should be discussed with the client. Only items to be excluded should be noted in the contract unless the buyer has a special concern about a particular fixture. A fixture to be removed by the seller should be removed prior to the closing.

Unlike fixtures, personal property of the seller does not pass to the buyer unless expressly stated in the contract. No reference

38. If the jurisdiction provides for title registration, the parties, particularly the buyer, may wish to require registration of the title in the event the legal descriptions vary significantly.

39. The use of “monuments” such as oak trees or barns for boundary lines in a description demonstrates a need for a survey. In addition, surveys for the sale of parcels of land located in older parts of cities are recommended.

40. Teaff v. Hewitt, 1 Ohio St. 511 (1853), states the traditional three-part test:
   1. Actual annexation to the realty, or something appurtenant thereto.
   2. Appropriation to the use or purpose of that part of the realty with which it is connected.
   3. The intention of the party making the annexation to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.
   Id. at 530. (emphasis in original).

41. For instance, if there is a particularly valuable item that the buyer wants to have included in the sale, that intent should be expressed orally and in the written contract.

42. For example, the author recalls a situation where an entire barn was to be removed by the seller. Express provision was made for the removal in the contract of sale, but no time period was set. Considerable time elapsed after the closing before the barn was removed.
should be made in the contract to personal property not to be included in the sale. The buyer’s attorney should make certain that the description and price of personal property to be sold are specifically noted. The buyer should receive a bill of sale and an assignment of any warranties or service contracts for the items sold. The seller’s attorney should remember that the sale of personal property may carry certain implied warranties which are absent from real property.44

V. ENCUMBRANCES

The seller should agree to sell the real property subject to any and all encumbrances (except for outstanding liens which will be paid prior to or at the closing), zoning ordinances, and encroachments. If there is an outstanding mortgage to be satisfied at the closing, the seller’s attorney should include a provision stating that the proceeds of the sale can be used to satisfy the mortgage lien or other liens which may be present. In the absence of such a clause, a buyer might insist that the liens be cleared prior to the closing when the seller might not have the assets.45

Commonly a parcel of property is encumbered by easements or restrictions. Obviously, the seller will want to convey the property subject to such easements and restrictions.46 Provisions to that effect should be included in the contract’s property description, deed clause, and the marketable title provisions. The seller should not limit the clause to easements and restrictions of record because the

43. The seller should consider whether the price for the personal property should be stated separately or included in the gross sale price. The sale of real and personal property should be treated separately if the broker’s commission is to be based on the gross sale price.

44. See A. BICKS, supra note 3, at 28.

45. At common law all such liens were to be cleared prior to the closing. See, e.g., Johnson v. Malone, 252 Ala. 609, 42 So.2d 505 (1949). The trend today is to permit the proceeds of the sale to be used to discharge the liens as long as appropriate safeguards are present to protect the buyer. See Lone Star Dev. Corp. v. Miller, 564 F.2d 921 (10th Cir. 1977).

A seller’s attorney should not only know the amount of the outstanding lien but make appropriate provisions for the release of the lien. The buyer’s attorney should verify that the only outstanding covenant is the money to be paid and appropriate provisions should be made for the release of the lien. Typically, the lien will be released at the same time that the deed is recorded.

46. The seller will want to make the encumbrance an exception to the title. Otherwise, the buyer might object to the encumbered title. See Annot., 57 A.L.R. 1253, 1413-14 (1928).
property may well be subject to implied easements or easements acquired by prescription.

The buyer, on the other hand, should not agree to purchase property subject to unknown easements and restrictions. Language limiting encumbrances to easements and restrictions of record will not necessarily adequately protect the buyer. For example, the buyer may not be permitted to use a portion of the home as a separate unit for an aged parent or to have a white picket fence, if valid restrictions of record against such activities exist. In like manner, a tree cherished by the buyer may be cut if it interferes with a recorded easement.47

The best solution is for the seller to list all easements and restrictions. If the seller has a copy of the title opinion, abstract of title, or Torrens certificate given at the time of seller’s purchase of the property, easements and restrictions of record will be noted therein at least to that date and can be specifically noted in the contract of sale. Typically, however, the seller does not have ready access to such information. In such a case, a provision can be included allowing the buyer a specific period of time for objection, possibly the same period allowed to determine the marketability of title. If no objection is made, the contingency is satisfied and the deed will be conveyed subject either to all easements and restrictions or to those specified in the contract.

Similarly, provision should be made for outstanding encroachments, if any, and zoning ordinances. A seller’s attorney should not accept a contract of sale in which the seller represents the current status of the zoning, unless definitely known to the seller.48 Instead, the contract of sale should provide that the property will be conveyed subject to all zoning ordinances. Zoning ordinances obviously can affect the buyer’s use of the property. Because such ordinances, however, do not affect the marketability of title to the property, the buyer must take the property subject to them even if not specified in the contract of sale.49 Consequently, the buyer’s

47. Often easements or restrictions will not affect a lender’s security and the lender’s attorney will not bring them to the attention of the buyer.
48. See Garrison v. Berryman, 225 Kan. 644, 594 P.2d 159 (1979) (Rescission of the contract permitted because both parties knew of the intended use. The seller knew or should have known about a recent zoning modification which prohibited the planned use. The court permitted the buyer to rescind the sales agreement under a theory of mutual mistake of fact.). Other courts, however, have taken the position that a misrepresentation of zoning, being a mistake of law, will not permit rescission. See, e.g., Gignilliat v. Borg, 131 Ga. App. 182, 205 S.E.2d 479 (1974).
49. See Lasker v. Patrovsky, 264 Wis. 589, 60 N.W.2d 336 (1953). Generally zoning
attorney should insert a clause making the buyer’s approval of the zoning a condition of purchase. If the buyer’s attorney will be doing a title opinion, the attorney should also check the applicable zoning ordinances, which is not a great imposition. Again, the approval period can be the same as that used for ascertaining the marketability of title.

VI. THE DEED

The contract of sale should clearly state the type of deed that shall be used. In the absence of such a provision many courts will state that the seller need only give a quitclaim or a bargain and sale deed without covenants. The buyer will probably want a warranty deed so that he may sue for damages if one of the warranties is breached. The seller, on the other hand, should verify that he is able to give the type of deed stated. An executor or other fiduciary might be able to give only a limited deed. In some circumstances the seller may wish to give only a special warranty deed thereby limiting his liability. If a statutory vendor’s ordinances and building code restrictions are part of the law of the land and imposed by the government. All persons are expected to have notice of them. See Annot., 39 A.L.R.3d 362, 370 (1971). Note, however, that violations of zoning ordinances and building code restrictions may render the title unmarketable. See Lohmeyer v. Bower, 170 Kan. 442, 227 P.2d 102 (1951) (At the minimum, a buyer’s attorney should add to the contract a statement that there are no existing violations of zoning and building code restrictions). But see Bernard v. Schneider, 264 Minn. 104, 117 N.W.2d 755 (1962) (restrictive covenant prohibiting all construction of buildings except for use as single family dwelling valid although zoning ordinance prohibited building of dwellings).

50. See, e.g., Morris v. Goldthorp, 390 Ill. 186, 60 N.E.2d 857 (1945) (seller had to give only a quitclaim deed to convey fee simple title). This is not the case in Minnesota. If a contract of sale is silent regarding the type of instrument to transfer the title, the buyer is entitled to a warranty deed. See Building Indus., Inc. v. Wright Prod., Inc., 240 Minn. 473, 62 N.W.2d 208 (1953).

51. A buyer will want a deed containing the five common law warranties of seisin, right to convey, freedom from encumbrances, quiet enjoyment, and general warranty. Note that many jurisdictions permit the use of a statutory short form deed which may include all or some of the warranties. See 6A R. Powell, supra note 14, ¶¶883, 895; see, e.g., Williams v. Township of Lynd, 312 N.W.2d 110, 113 (Minn. 1981) (warranty deed express provision of transferring “all legal causes of action arising from the use or misuse of conveyed premises” permitted vendee right to recover damages from earlier trespass), noted in 1 Minn. Real Est. L.J. 26-27 (1982).

52. In Minnesota, a personal representative of a decedent “has the same power over the property of the estate that an absolute owner would have . . . .” Minn. Stat. § 524.3-711 (1982). The purchase of land from an administrative sale takes the title and interest of the decedent. See Kietzer v. Nelson, 157 Minn. 463, 196 N.W. 641 (1924). Some sales by fiduciaries, however, must first be approved by the probate court to be valid. Minn. Stat. § 525.662 (1982) (sales by guardian or conservator).

53. A special warranty deed limits the seller’s liability to claims arising by, through,
As noted previously, the deed must conform to the contract of sale. The buyer's attorney should determine that no limiting language, such as title conveyance subject to easements of record has been added. On the other hand, if the seller's attorney determines that limiting language should be inserted the attorney should bring it to the buyer's attention.

The attorneys for the buyer and seller should be cognizant of the doctrine of merger which provides that the terms in a deed conveying real property supersede any which may be conflicting in the contract of sale. If the seller makes any representations or warranties that are not stated in the deed and they are breached, the operation of the doctrine would preclude the buyer from asserting them as a basis for legal action. This position has been modified in several jurisdictions with regard to items deemed collateral to the title. Merger will not apply to items deemed collateral. The buyer's attorney should include in the contract a

or under the seller. A special warranty deed may also be described as a limited warranty deed. A limited warranty deed, however, more accurately describes a deed in which some, though not all, of the common law title warranties are given.

54. The common law recognized both an equitable vendee's lien and vendor's lien. The vendee's lien is a lien by the buyer on land to secure reimbursement for funds expended by the buyer and owed by the seller, whereas the vendor's lien is a lien on the land by the seller for any unpaid purchase money. See Grace Dev. Co. v. Houston, 306 Minn. 334, 335, 237 N.W.2d 73, 75 (1975). Many states also authorize a statutory vendor's lien for the unpaid purchase price; however, to be effective it must be noted or recorded either by reservation in the deed or by a separate recital and must state the amount owed. See, e.g., Ohio Rev. Code Ann. § 5301.26 (Page 1981).

55. See Hubachek v. Estate of Brown, 126 Minn. 359, 362, 148 N.W. 121, 122 (1914); cf. Peters v. Fenner, 294 Minn. 488, 199 N.W.2d 795 (1972) (held that terms of agreement merged in contract for deed and under doctrine of integration contract for deed governed).


57. See, e.g., Rouse v. Brooks, 66 Ill. App. 3d 107, 383 N.E.2d 666 (1975). In Rouse, the contract of sale provided that all improvements should be in good order. After the transfer of title, the buyers discovered that several items of improvement were not in good order including the swimming pool, septic tank, and air conditioner. The buyers sued on the warranty clause in the contract of sale. The trial court held that the warranty of the seller had merged into the deed and could no longer be used to support a cause of action. The appeals court reversed, noting that the doctrine of merger would not apply to items in the contract of sale not dealing with the status of the title which were viewed as collateral. Id. at 110, 383 N.E.2d at 668. Collateral matters contained in the contract of sale are a matter of concern only between the buyer and the seller. Application of the doctrine of merger where items of title may affect third parties may be appropriate because typically only the deed is recorded. Id.
provision stating that all representations and warranties contained therein shall survive the closing and delivery of the deed.\textsuperscript{58} The doctrine of merger will not protect the seller from liability for his fraud nor will the doctrine negate the implied warranty of habitability.\textsuperscript{59}

VII. THE PRICE

The purchase price should be stated clearly. The contract should state the amount of down payment or earnest money to be paid, if any, and the method by which the balance will be financed.\textsuperscript{60} If, as will be discussed, the contract is to be contingent upon the buyer securing adequate financing, that condition should be clearly noted.

A down payment accompanying the contract of sale is now commonly required. The most frequently cited reasons for the necessity of a down payment are to provide a remedy for the seller in the event of the buyer's breach and to impress upon the buyer the seriousness of the transaction.\textsuperscript{61} The amount of the down payment typically is determined by local custom. Under some circumstances, however, there will be a departure from the custom. For example, a seller may want a larger down payment if the seller is uncertain of the buyer's ability to complete the sale or if the closing will not occur for a significant period of time. In the latter case, the seller may want additional protection due to the length of time that the property will be off the market.\textsuperscript{62} The seller's attorney should insist on cash for the down payment. The buyer may

\textsuperscript{58} See K. ROER, RESIDENTIAL REAL ESTATE 1982, at 22.

\textsuperscript{59} See, e.g., Borden v. Litchford, 619 S.W.2d 715 (Ky. Ct. App. 1981). In Borden, the buyers sued the sellers for numerous defects in the home. For those defects covered by express warranties, the doctrine of merger was applied and the buyer did not have a cause of action. For the allegation of a breach of an implied warranty of habitability with a new home, however, the court held that merger did not apply. Id.

\textsuperscript{60} If the purchase price or the manner in which that amount is to be financed is unclear, a court will not enforce the agreement. See, e.g., Barry M. Dechtman, Inc. v. Sidpaul Corp., 178 N.J. Super. 444, 454-55, 429 A.2d 411, 416 (1981); Huntley v. Smith, 153 Minn. 297, 190 N.W. 341 (1922). See generally K. ROER, supra note 58, at 4-16 (1982)(examples of financing terms and contingencies).


\textsuperscript{62} In Boatwright Constr., Inc. v. Kemrich Knolls, 306 Minn. 519, 238 N.W.2d 606 (1976), the contract of sale in question contained a provision for a down payment as well as a liquidated damages clause providing for the retention of a specified amount thereof in the case of default or breach by the purchaser. The subsequent breach caused the vendor to sustain a loss of $45,000 for which he was awarded the total amount specified in the liquidated damages clause, $38,500.
wish to use a personal note, but if the buyer defaults, the seller would then have to sue to collect.\(^{63}\)

The contract of sale should state who will hold the down payment pending the closing. Obviously, the buyer would not be appropriate. The buyer probably will be leery of allowing the seller to retain the money because if the seller defaults, the buyer would then have to sue for the return of the down payment. If a real estate broker is involved, the broker might be the appropriate person to hold the down payment. A broker is generally amenable to doing so.\(^{64}\) If not, one of the attorneys would be appropriate.\(^{65}\)

Regardless who holds the down payment, the contract of sale should clearly state what is to be done with the money. Whether the money is to be held for a substantial or short time pending closing, the money should be held in an interest bearing account. The buyer's attorney may want to provide that if the transaction closes, all the interest be applied to the purchase price or at a minimum, the interest be split between the parties.\(^{66}\) If the seller defaults, the buyer should be entitled to the down payment and all interest earned thereon. In like manner, if the buyer defaults, the seller should retain the earnest money and all interest earned thereon. Some commentators have noted that even in the absence of specification, the seller may retain the down payment when the

\(^{63}\) See Griffeth v. Zunbrennen, 577 P.2d 129 (Utah 1978) (personal check might be stopped or have insufficient funds).

\(^{64}\) MINN. R. CIV. P. 22 allows a broker to pay earnest money into court as an interpleader if a dispute arises concerning disbursements. But see Kilgore v. Texas Real Estate Comm'n, 565 S.W.2d 114 (Tex. Civ. App. 1978). In Kilgore, the realtor retained the funds after the parties failed to close. Both wanted the money and he asked the court to determine how it should be paid. The Commission held that he had improperly handled his escrow deposit and suspended his license for three months. The Commission noted that the broker was to account for the funds and meant paying the money to whom it was owed, but here he had done nothing. \(\text{Id.}\) Note that the broker typically has a special escrow account which will be used. In addition, the broker is viewed as an independent party to the transaction, or as serving the interests of both buyer and seller. Coupled with his licensing requirement, the parties can reasonably conclude that the broker will not abscond with the funds.


\(^{66}\) This type of provision would have benefitted the buyer in Terry v. Castleton Farm, 618 S.W.2d 583 (Ky. Ct. App. 1981). The downpayment was 10% of the purchase which amounted to $228,000. The buyer wanted the interest to be credited to the purchase price. The court, however, found that in the absence of a provision to the contrary, the interest was a part of the purchase price which belonged to the seller. The buyer was entitled to the return of the money only in the event that there was a default by the seller. \(\text{Id.}\)
buyer defaults. Nonetheless, because this is a forfeiture, the seller's attorney is well advised to clearly state in the contract of sale that the seller may retain the down payment upon the default of the buyer. The seller's attorney should also determine whether the seller alone is to retain the down payment on default by the buyer; many form agreements state that the broker is entitled to one-half of the down payment in the event of the buyer's default.

The buyer's attorney should include a provision stating that upon seller's default or other occurrence, such as lack of marketability of title or failure of a condition, the down payment is to be returned to the buyer within a specific period of time. To trigger the time period, the buyer's attorney should provide for notice to the seller upon the failure of a condition.

The seller and buyer should determine whether or not the retention or the return of the down payment is to be the sole remedy available to the non-defaulting party. The seller's attorney may wish to phrase this as a liquidated damages clause; however, due consideration should be given to whether the retention of the down payment is to be the seller’s sole remedy. The seller’s attor-

67. See M. Friedman, Contracts and Conveyances of Real Property 773-82 (3d ed. 1975); R. Kratoval, supra note 16, at 117. In a few jurisdictions, courts have adopted the position of the Restatement of Contracts § 357(2) (1932) allowing the seller to retain only the amount of actual damages incurred and requiring the return of the remainder to the buyer. As noted in Zirinsky v. Sheehan, 413 F.2d 481, 489 (8th Cir. 1969), cert. denied, 396 U.S. 1059 (1970), the buyer will have difficulty proving the amount of unjust enrichment.

Minnesota has not completely adopted the Restatement position on the retention of the down payment. Under the Restatement, the vendor is permitted to retain only those amounts constituting actual damages. In the case of Miller v. Snedker, 257 Minn. 204, 101 N.W.2d 213 (1960), however, the court permitted the vendor to retain all of the original payment tendered by the vendee. Upon a vendee's inexcusable default, no right of refundment is recognized. Id. at 217, 101 N.W.2d at 224.

68. See Nelson v. Rosenblum Co., 289 Minn. 32, 182 N.W.2d 666 (1976). Absent compelling circumstances, there is no reason for the seller to agree in the listing agreement to the broker retaining part of the earnest money. Typically, the broker's commission is a percentage of the sale price. That percentage may or may not be dependent upon the amount of time actually spent on the sale. Generally, the broker receives no expense monies. The percentage is often justified as covering expenses and the "lost" sales. If indeed the commission is to be earned only if the sale is consummated, there is no reason to pay a portion of the earnest money from a failed sale. The seller and the broker may agree to different arrangements for the earnest money in the contract of sale.

69. Melco Inv. Co. v. Gapp, 259 Minn. 82, 105 N.W.2d 907 (1960), the seller’s failure to institute either statutory or judicial remedies in the event of default by the purchaser resulted in the purchaser successfully asserting his rights in a suit for specific performance after the agreed upon date of closing.

70. The use of the liquidated damage clause language is common in many jurisdictions. The California courts went through a long tortuous process to conclude that a seller...
ney should consider the sufficiency of the down payment and expressly provide for other remedies such as damages or specific performance. The buyer's attorney, on the other hand, may wish to limit the buyer's liability to the down payment.\footnote{Yzenbaard: Drafting the Residential Contract of Sale, 1983}

VIII. CONTINGENCIES

Rarely does a contract for sale not include at least one contingency. Typically, a contingency is requested by the buyer who desires to have time to verify certain subject matters while keeping the seller committed to the sale. The seller, on the other hand, should be concerned with the effect of the contingency and should carefully scrutinize its wording.

Obviously, a contingency should be clearly drafted. Express time limits for the waiver or exercise of the contingency should be included. While the contingency is in effect, the seller typically has the property off the market. If the delay is long, a seller might miss several potential buyers. The seller's attorney therefore should consider one or more of the following drafting alternatives. First, a reasonable time period should be established for exercise or waiver of the contingency. For example, depending upon the custom in the area, a reasonable period of time to determine the status of the title might be three to four weeks.\footnote{In Coney v. Commercial Nat'l Realty Co., 88 Ill. App. 3d 1026, 410 N.E.2d 1181 (1980), a contract provision stating that the earnest money would be retained by the seller “in full of all claims of every kind and nature against the purchase herein” barred a suit for specific performance by the seller. The court noted that the mere use of a liquidated damage provision will not by itself bar the remedy of specific performance. Explicit language of limitation may bar other remedies. See also Miller v. United States Naval Inst., 47 Md. App. 426, 423 A.2d 283 (1980). The Miller court held that the presence of a liquidated provision calling for retention of the earnest money did not prevent a suit by the seller on specific performance on default by the buyer without a clear indication that other remedies were relinquished.}

Obviously, mutually agreed upon written extensions are always an alternative. Second, the seller's attorney should consider the possibility of continuing to list the property for sale. The contract of sale could provide that

may retain a down payment upon buyer's breach only if clause calling for such retention is found to be a valid liquidated damages clause. See Caplan v. Schroeder, 56 Cal.2d 515, 15 Cal. Rptr. 145, 364 P.2d 321 (1961). To qualify as a valid liquidated damage clause, the sum itself must be a reasonable forecast of the harm caused by the breach, the harm itself must be difficult to accurately estimate, and the amount set must not be a penalty. In addition, if the clause is treated as a liquidated damage clause, the pursuit of other remedies may be limited.

\footnote{The Minnesota standard form purchase agreement provides only ten days for examining the title and making objections after receipt of the abstract. See generally K. Roer, supra note 58, at 3-27.}
the buyer has a stated period of time, for example, forty-eight hours after receipt of notice from the seller of another bona fide offer, in which the buyer must either waive the contingency or terminate the contract. Alternatively, the contract of sale could permit the seller to continue showing the property and accept other offers as long as the later offers are contingent on the failure of the first offer to close.

Adequate provisions should be included for notice of exercise or waiver of the contingency. The format of the notice should be specified, for example, in writing delivered by mail to the seller. The contract should also state the consequences of lack of receipt of notice by the given date. Typically, failure to give notice results in waiver of the contingency.

In recent years, it has been increasingly important to identify the beneficiary of the contingency and the person who may waive the exercise of the contingency. Generally, the party who can waive the contingency is also the beneficiary of it. Nonetheless, the identity of the contingency's beneficiary may be unclear. In the case of *Dan Bunn, Inc. v. Brown*, the contract of sale provided that enforceability of the contract was contingent upon the buyer's receipt of subdivision approval from the local zoning board. The approval was denied. Nevertheless, the buyer decided to purchase the property. The seller contended that the contract was void because the contingency had not been met. The court agreed, noting that the clause was for the benefit of both parties, and thus the buyer alone could not waive it. The court stated that the rezoning was crucial to the seller as well, because, without such rezoning, the seller’s security in the property would be lessened. Although the inclusion of the waiver clause may be important to both the seller and the buyer, it is particularly important for the buyer.

### A. The Financing Contingency

Probably the most common contingency in a contract for sale of residential property is the financing clause. It is a rare buyer who

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73. *See* 3A A. Corbin, *Contracts* § 752 (1960); *see*, *e.g.*, Felder v. Terry, 351 So. 2d 244 (La. Ct. App. 1977) (buyer could waive a contingency for financing and instead pay cash, noting that financing clause was for sole benefit of purchaser who could waive it, because seller's only interest was in funds); *cf*. McDonald v. Cullen, 559 P.2d 506 (Or. 1977) (seller's insistence on clause to guarantee financing by a certain date and prevent a subsequent default caused by inability to secure financing did not permit purchasers to waive clause and sue for specific performance).

can afford to pay cash. Nonetheless, this clause is too often overlooked or incorrectly drafted.\textsuperscript{75} Obviously, the buyer's attorney should make certain that the clause is properly written. It should not be too vague, indefinite, illusory,\textsuperscript{76} or, on the other hand, drafted with such excessive detail that it permits a party to escape on mere technicalities. Today, courts tend to utilize a reasonableness standard to compensate for any indefiniteness, and a good faith standard if the condition appears illusory.\textsuperscript{77} Proper drafting, however, can avoid recourse to the courts.

Prior to the advent of "creative financing," financing, generally, was secured from an institutional lender in the form of a conventional loan or an insured loan. The primary concern was that the financing clause be specific.\textsuperscript{78} If a traditional loan is contemplated, the buyer's attorney should include the following terms: the interest rate noting the upper acceptable limits, the loan-to-value ratio noting the minimum ratio, the term noting the minimum or maximum acceptable terms, and the maximum acceptable points or closing costs. The seller's attorney should verify that the specified terms are realistic and should expressly require the buyer to use good faith in securing the financing. The seller may wish to include a provision requiring the buyer to approach a stated number of institutions for the financing or, alternatively, the seller to seek financing for the buyer.

Many home purchases today are financed by "creative financing" methods rather than traditional institutional financing.\textsuperscript{79} The institutional lender may be involved in "creative financing." The mortgage loan granted by the institutional lender may utilize one of the following formats: a "blended interest rate mortgage" in which the interest is based upon a figure between the interest rate on the seller's existing mortgage and the prevailing interest

\textsuperscript{75} See Aiken, "Subject to Financing" Clauses in Interim Contracts for Sale of Realty, 43 MARQ. L. REV. 265, 265-73 (1960).
\textsuperscript{77} See Manning v. Bleifus, 272 S.E.2d 821 (W. Va. 1980) (clause "subject to the approval of financing" required purchasers to make reasonable good faith effort to obtain financing and was not so indefinite as to void contract).
\textsuperscript{78} See, e.g., Imas Gruner & Assocs. v. Stringer, 48 Md. App. 364, 427 A.2d 1038 (1981) (contract which did not specify amount, term, and interest rate held too ambiguous to be enforceable).
\textsuperscript{79} This Article does not pretend to provide a thorough analysis of the modern alternatives to home mortgages. For helpful guides to creative financing, see Caswell, The New Mortgages: A Functional Legal Analysis, 10 FLA. ST. U.L. REV. 95 (1982); Washburn, Alternative Mortgage Investments in California, 12 AKRON L. REV. 599 (1979).
rate; an adjustable mortgage loan in which the interest rate fluctuates according to a predetermined index; a renegotiable rate mortgage in which the interest rate is set for a period of time (typically three to five years) and is adjusted at that time to reflect the current rate according to a predetermined index; or a combination of the adjustable rate and the renegotiable rate mortgage. As with traditional financing, the buyer's attorney should determine whether the financing contingency is realistic and will protect the buyer. If flexible interest rates are acceptable to the buyer, the buyer's attorney should determine whether the financing contingency accurately reflects the range of interest rates, index, and term which are acceptable to the buyer. If flexible interest rates are not acceptable, the financing contingency should exclude the possibility of such use.

The buyer and seller may wish to use other methods of "creative financing." For example, the buyer may wish to assume the seller's outstanding mortgage. The assumption of the seller's existing mortgage is an increasing favorite among buyers, especially when the interest rate of the seller's mortgage is significantly lower than the interest rates available from institutional lenders and the seller's equity is low. If the mortgage is assumed, the buyer pays the seller's equity in the home, which may represent a considerable amount of cash and may well be more than the traditional down payment on an institutional loan. Buyers and sellers should be aware that a "due-on-sale" clause may be present in the seller's mortgage. Until 1982, jurisdictions were divided on whether such clauses could be automatically enforced. In 1982, the United States Supreme Court upheld the automatic enforcement in federally chartered institutions and federal legislation has now preempted state in this area except for certain loans made in the "window period." Even in those jurisdictions which prohibit the automatic enforcement of the clause, the lender is permitted to


enforce the clause in cases in which the proposed assuming grantee poses a financial risk to the mortgagee.\textsuperscript{82}

Assumption of the seller's mortgage may also involve the use of a wrap-around mortgage, especially when the buyer does not have sufficient assets for the payment of the seller's equity. With a wrap-around mortgage, the buyer borrows the additional amount needed, the interest rate is based on the total indebtedness, and the mortgage securing the total indebtedness "wraps-around" the existing mortgage.

If assumption of the mortgage is anticipated, the buyer should provide in the contract of sale that the contract is contingent upon the ability to assume. The seller may want to include a provision to the effect that the ability of the buyer to assume is contingent upon the seller's ability to secure a release from the lender. Without a release from the mortgagee, the seller might become liable on the loan if the buyer defaults. In case an assumption is unavailable, the parties should provide for additional contingencies or have the contract terminated. For example, if the mortgage is assumable, but there is no release of liability for the seller, the seller will want protection from liability on the debt such as an indemnity clause or agreement with the buyer. If the lender will not agree to the assumption, the buyer and seller may wish to arrange, if possible, for alternative agreements such as a private assumption agreement, a lease with an option to purchase, or an installment land contract.

The installment land contract, particularly, and the purchase money mortgage with the seller, are becoming increasingly popular. When utilizing such devices, the seller should realize that the seller will not receive the full purchase price for the property, but will receive only a portion thereof. In the past, installment land contracts were viewed as being advantageous for the seller because title remains with the seller until the full amount due had been paid. This arrangement permits the seller to retain greater control over the property and to continue to use the property for his own financing. In addition, the seller is permitted to use many contractual remedies if the buyer defaults. For example, forcible entry and detainer proceedings for possession are available and a forrei-

\textsuperscript{82} See, \textit{e.g.}, Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 148 Cal. Rptr. 379, 582 P.2d 970 (1978).
ture clause to retain monies paid can be used.83 Many jurisdictions, however, have modified the pro-seller bias of the installment contract either by statute84 or by judicial decision, typically holding that the installment land contract will be viewed as an equitable mortgage with traditional mortgage remedies available to the buyer on default.85

If an installment land contract is to be used, the attorneys for the buyer and the seller should be especially concerned with the amount of interest and down payment. The term of the installment land contract is also significant. In the past, the term often was the same as the conventional mortgage, but in recent years a short term such as five years with a large balloon payment at the end has been used. The buyer’s attorney should include a provision describing the events upon completion of a short-term, balloon payment installment land contract. For example, the buyer’s attorney may wish to include a provision, stating that if traditional financing cannot be secured at the end of the term, the contract will continue for another set period of time. The buyer may also be amenable to renegotiating the interest rate. Other significant provisions should deal with possession, insurance, prepayment opportunities, and upkeep. If at the time the contract for sale is executed the installment land contract form is completed, it should be attached to the contract of sale and referred to in the body of the contract of sale. Typically, however, the installment land contract will not be ready at the time the contract of sale is signed. In such a case, the contract of sale should state who will draft the installment land contract, the terms agreed upon at the time of signing the contract, and a provision for review and approval of the final installment land contract. The approval by the non-drafting party should be a condition of the contract. To avoid risking long delays, possible nonagreement, and eventual voidance of the contract, the time period for drafting the installment land contract should be the same as the normal time period required to secure traditional financing.

B. The Contingency for Title Examination

Another common contingency clause in the contract of sale involves the determination of the title's status. In the absence of a clause, a marketable title will be implied. Nonetheless, it is to the advantage of both the seller and buyer to include a clause delineating their respective duties. For example, the seller need not provide a marketable title until the closing date. Obviously, such a time delay could hurt either party; the seller would have the property off the market for a considerable amount of time, and the buyer would not know until the closing whether the title was in fact marketable. Consequently, a provision should be inserted in the contract stating that the determination will be made by a specific date. The time period selected should be shorter than that set for closing, but should conform to local custom and the time restraints required to do an adequate title search. Depending on the particular locality, the determination of marketability of title may be accomplished by a title search based on courthouse records, from a title abstract, or from the files of a title insurance company. The seller or buyer may perform the search or agree to furnish either the abstract of title or title policy for review. Ultimately, it is the buyer who must be satisfied with the status of the title. The seller, nevertheless, should note any exceptions to the marketability of the title in the contract.

If the title proves to be unmarketable, the contract should provide that the seller receive timely written notice stating the alleged...
defect. The seller should be allowed reasonable time to cure the title defect. The consequences of failure to cure the alleged defect should also be stated in the contract. For example, the buyer may want the option either to proceed with the closing, to purchase at a reduced rate, or to terminate the contract. Other remedies might include requiring the seller to bring a quiet title action or to provide title insurance. 90 The contract of sale should state the remedies selected by the parties. 91

If there is to be time between the title search and the closing, the buyer should include a provision stating that there will be no change in the status of title from the time of the title search and closing. The buyer should also verify that no change has occurred on the date of closing, especially if an escrow closing is not used.

C. Contingency for Inspections

An increasingly popular contingency is to allow for an inspection of the physical premises. Buyers are especially interested in the condition of items such as the plumbing, roof, and furnace. The increased interest coincides with the judicial trend to imply a warranty of habitability to new homes sold by builders. 92 As

90. In the absence of a clause enumerating alternative remedies, the buyer cannot insist that such action be taken. See, e.g., Bartos v. Czerwinski, 323 Mich. 87, 34 N.W.2d 566 (1948).

91. Freedom of selection of remedies has been upheld by the Minnesota Supreme Court. In Space Center, Inc. v. 451 Corp., 298 N.W.2d 443 (Minn. 1980), the court stated:

In the absence of a remedy-limiting clause, a vendor is liable for damages for breach of contract for failure to convey marketable title where the vendor has otherwise agreed to convey marketable title. Parties are free to limit remedies for nonperformance and to provide for the annulment of the contract on the occurrence of certain conditions.

Id. at 448. The clause in Space Center stated: "If the title to the premises is not marketable and is not made so within 120 days after the date of making written objections thereto . . . this Agreement shall be null and void and neither party shall be liable for damages . . . ." Id. The court distinguished this case from those which involved clauses requiring automatic voidance where title "is not marketable and cannot be made so," and refused to uphold nullification. The vendor’s foreclosure was deemed to be a defect arising from factors within the control of the vendor and not dealt with in the general defects clause quoted above. The court concluded that the general title defects clause “did not excuse [vendor] from a duty to preserve [its] ability to convey marketable title where the [vendor] is responsible for [its] inability to convey.” Id. at 451.

92. See infra note 93. Currently, at least 30 states imply a housing warranty, calling it either a warranty of quality, habitability, fitness, or good workmanship. Query if all have the same meaning. See Comment, Home Sales: A Crack in the Caveat Emptor Shield, 29 Mercer L. Rev. 323 (1977). Note also the response of the National Association of Home Builders which adopted a Home Owners Warranty Program (HOW) which provides new home protection for 10 years. See Comment, The Home Owners Warranty Program: An Initial Analysis, 28 Stan. L. Rev. 357 (1976); see, e.g., Yepsen v. Burgess, 269 Or. 635, 525 P.2d
noted in the implied warranty cases, the use of caveat emptor is no longer applicable in the modern market, at least regarding the sale of new homes by builders, because the modern buyer has neither the requisite expertise to detect problems with the home nor the bargaining power to require express warranties.\textsuperscript{93} The implication of this warranty, though expanded in recent years to extend the builder's liability to subsequent buyers, has not been implied for older or used homes.\textsuperscript{94} The duty of the buyer to inquire about problems continues to exist although the courts are requiring a greater duty of disclosure by the seller, especially regarding latent defects.\textsuperscript{95} The seller's attorney should counsel the seller not to expressly warrant the condition of various items in the home, such as the plumbing or the roof, unless the seller has actual knowledge of their condition. A properly worded contingency for inspection can assist in a smooth transaction by alerting both parties to the importance of the issue of habitability.

The contingency clause should state further that inspections are to be conducted soon after the contract of sale has been signed. A short time period will limit the period the property is off the market, if the seller is not allowed to continue showing the property. The clause should state who is to perform the inspections, what inspections are to be made, who is to pay for them, when they are to be performed, and what consequences will follow if the inspec-

\textsuperscript{93} See, e.g., Vetor v. Shockey, ___ Ind. App. ___, 414 N.E.2d 575 (1980) (court refused to extend warranty of habitability to used home from nonbuilder/seller and noted that seller had no greater expertise in determining quality than did purchaser and purchaser still had cause of action for misrepresentation or fraudulent concealment).

\textsuperscript{94} Liability of the seller was extended to a subsequent buyer and privity was indeed irrelevant. See Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). But see Insurance Co. of N. Am. v. Bonnie Built Homes, 64 Ohio St. 2d 269, 416 N.E.2d 623 (1980) (court found that implied duty of habitability arose from contract of sale; privity was relevant but not present).

Minnesota now extends protection to buyers of used homes to cover home improvements made by the seller. Minn. Stat. § 327A.02(3) (1982).

\textsuperscript{95} See, e.g., Janinda v. Lanning, 87 Idaho 91, 390 P.2d 826 (1964) (noting that duty of disclosure by seller is required in cases involving latent, dangerous physical conditions of land). On the other hand, even the implied warranty of habitability typically does not extend to defects that are easily observable. See McDonald v. Mianechi, 159 N.J. Super. 1, 386 A.2d 1325 (1978), aff'd, 79 N.J. 275, 398 A.2d 1283 (1979) (warranty is implied only when buyers do not know of defective condition or could not reasonably have discovered it).
tion reveals a problem. Although who will pay for the inspection will depend on local custom, in the absence of a clear custom, the buyer will pay. If the inspection reveals a problem, the clause should provide that notice be given to the seller. In the event that no problem exists, waiver of the clause should be provided. Typically, because the seller is in possession of the property during the time designated for inspections, the contract should require the seller to have the property available for inspection upon reasonable notice.

The contract should state the consequences of finding a defect. For example, the buyer may want the option to have the seller correct the problem prior to the closing, to deduct the cost of repair from the sale price, or to terminate the contract. The seller's attorney should try to limit such options. For example, the seller's attorney may provide that if the cost of repairing the defect is less than a certain small percentage of the sale price, the seller may repair or allow the deduction from the sale price at closing, allowing the buyer to terminate only if the cost exceeds the percentage. In addition, the seller may want to choose his own inspector. If the two inspectors disagree, a third could be selected by the parties or the matter could be submitted to arbitration.

D. Miscellaneous Contingencies

Depending on the locale and the needs and desires of the contracting parties, other conditions may be included in the contract of sale. For example, in some parts of the country a termite inspection is common even if other inspections are not performed. Another popular contingency allows the buyer to condition the buyer's performance on his ability to sell his present residence. This assures the buyer of the requisite funds needed to purchase the new home and relieves him of the obligation of paying for two homes simultaneously. Sellers, on the other hand, should resist such clauses because they require the seller to remove his home from the market with no assurance of a sale. Possible compromise clauses include: a short period for the contingency to be satisfied or waived, a good faith requirement by the buyer to sell the buyer's existing residence, permitting the seller to continue offer-

96. In Shaper v. Gilkison, 217 S.W.2d 878 (Tex. Civ. App. 1949), a good faith requirement to sell the buyer's home was included in the contract. The buyer refused to accept an offer which was $850 less than the $10,850 asking price. This was held not a breach of the buyer's duty to use good faith. Id. at 880. The seller should provide for a
ing the house for sale subject to the first contract or a combination of these provisions. The buyer could be given the right to exercise or waive the contingency within a stated period of time after notice by the seller of another bona fide offer.

IX. Dates

All dates contained in the contract of sale should be clearly stated. Of great importance is the closing date. The parties should set a realistic closing date, accommodating the time requirements for financing and title searches as well as the particular needs of the parties. For example, a buyer who is moving into the area may have special requirements to coordinate the buyer's move.

The date of possession should be stated. If the contract does not expressly state otherwise, possession will follow the legal title; the buyer will be entitled to possess the house on the closing date. In many parts of the country, the seller customarily remains in possession for a stated number of days, often one month, after the closing. A seller typically needs the additional time to move after closing. The buyer, on the other hand, should have possession on the day of closing. If the seller continues to be in possession after the closing, difficulties could arise if the seller does not move when the time period has expired. In addition, the buyer as the owner of the premises should be concerned with the expenses attendant to ownership, such as real estate taxes, mortgage payments, insurance payments, and similar liabilities during the holdover period.

97. See 8A G. THOMPSON, supra note 14, at § 4449.

98. Although a seller may well be amenable to granting possession on the day of closing, a seller's attorney should discourage the seller from allowing possession prior to the date of closing. This obviously does not apply to the installment land contract situation. A buyer who moves into the premises prior to the closing may find several problems or defects with the home that may hamper the eventual closing. For example, he could find that the faucet leaks, the street is noisier than expected, or the neighbors are not friendly. If the buyer desires early possession, the seller should move up the closing or have a closing in escrow. Similarly, the buyer's attorney should object to the seller remaining in possession for an extensive period of time after the closing. At a minimum, an ending date should be noted. A buyer's attorney should avoid a seller conditioning vacation of the premises on the closing for a new home. This may be a considerable period of time.

99. See J. RICHARDSON, supra note 11, at § 277. Typically, the seller is not viewed as a tenant and thus cannot be removed under eviction procedures.
If the seller insists on remaining in possession after the closing, the buyer's attorney should include a provision requiring the seller to pay rent for the time of such occupancy. The rent payment should be sufficient to cover the real estate taxes, insurance, and mortgage payments. The date for the transfer of possession should be noted. Additionally, the buyer may wish to withhold or place in escrow a portion of the sale price pending the seller's removal in order to guarantee timely removal and protect against damage caused to the property. In contrast, if the buyer insists on possession on the day of closing, the seller's attorney may wish to include either a liquidated damages clause or insist upon a larger down payment to cover expenses should the buyer not close.

Before closing and again before taking possession, the buyer's attorney should provide for the buyer's right to inspect the property. An inspection will assure the buyer that all items to be conveyed with the property are present and no damage has occurred. Similarly, a provision should be inserted for the transfer of all keys either at the closing or at the time of possession.\textsuperscript{100}

The parties' attorneys should verify whether the dates set in the contract are important to their respective clients. If the closing must occur on a stated date because the money is needed to buy another home or possession is needed to facilitate a move, the contract should state that time is of the essence. Without such a clause, or without it being necessarily implied from the language or conduct of the parties, the court will allow additional reasonable time.\textsuperscript{101} The attorney should specify the times to which the provision applies.\textsuperscript{102} If subsequent to the making of the contract

\textsuperscript{100} Ownership of the keys to a building pass when the deed is delivered to the buyer. \textit{See} United States v. 967.905 Acres of Land, 305 F. Supp. 83, 88-89 (D. Minn. 1969), \textit{rev'd on other grounds}, 447 F.2d 764 (8th Cir. 1971), \textit{cert. denied}, 405 U.S. 974 (1972).

\textsuperscript{101} \textit{See}, e.g., Tanenbaum v. Sears, Roebuck & Co., 265 Pa. Super. 78, 401 A.2d 809 (1979). "It should be made explicit that in law and equity, in contracts for the sale of real property, time is not of the essence unless it is expressly stipulated, or necessarily implied from the language of the contract or clear action of the parties." \textit{Id.} at 88, 401 A.2d at 814. Thus, the use of the words "time of essence" is not essential as long as the importance of the time factor is clearly stated. In fact, the Uniform Land Transactions Act states that the inclusion of such words by themselves will not be sufficient to discharge the duties of the other party. \textit{Unif. Land Transactions Act § 2-302(c)} 13 U.L.A. 539 (1980); \textit{see also} Austin v. Weeks, 30 Minn. 335, 15 N.W. 409 (1883).

\textsuperscript{102} In Stork v. Felper, 85 Wis. 2d 406, 270 N.W.2d 586 (1978), the contract stated that time was of the essence as to physical occupancy but did not include similar language with respect to the closing. \textit{Id.} at 408, 270 N.W.2d at 587. The closing and occupancy dates were the same. \textit{Id.} The court held that time of essence only applied to the occupancy date. \textit{Id.} at 411, 270 N.W.2d at 589. The court therefore allowed additional time for transfer of title and permitted the buyers to sue for specific performance. \textit{Id.}; \textit{cf.} Leav-
one of the parties determines that time is important, courts will generally permit a unilateral change to the contract by permitting the party to make time of the essence after reasonable written notice has been sent to the other party.\footnote{103}

\textbf{X. RISK OF LOSS}

No contract for the sale of land would be complete without the inclusion of appropriate provisions for the risk of loss which may occur to the property between the signing of the contract and the transfer of title. Jurisdictions are not in agreement regarding which party should bear the loss when neither party is at fault in the absence of a provision in the contract.\footnote{104} The majority view places the risk of loss on the buyer under the theory of equitable conversion.\footnote{105} These courts follow the common law doctrine that equity regards as done that which ought to be done, and thus when there is a valid and enforceable contract for the sale of land, the buyer is considered the real or equitable owner. The seller’s only interest is in the proceeds of the sale. Nonetheless, in the jurisdictions where the buyer bears the risk of loss, the majority rule is that the buyer is entitled to the seller’s insurance proceeds, if any.\footnote{106} Thus, if the premises are destroyed, the buyer must complete the purchase, but is awarded the insurance proceeds.\footnote{107} In a few jurisdictions, the insurance contract is viewed as a personal contract between the insurer and the insured, and the buyer is not entitled to the proceeds of the seller’s insurance.\footnote{108} Obviously, in these jurisdictions the buyer should insure the property immedi-
ately after signing the contract of sale. Even if the buyer is entitled
to the insurance proceeds the proceeds may be insufficient to cover
the buyer’s actual loss.

A minority view, sometimes referred to as the Massachusetts
view, places the risk of loss on the seller pending the closing.109 In
the jurisdictions adopting the Massachusetts view, the purchaser
may either seek specific performance with an abatement of the
purchase price or, if the loss is substantial, be released from the
contract.110

A third approach is provided by the Uniform Vendor and Pur-
chaser Risk Act.111 It places the loss on the seller until the buyer
takes possession or receives title.112

Most buyers and sellers probably do not realize that the buyer,
in the majority of jurisdictions, will bear the risk of loss if the prop-
erty is destroyed before closing. All parties, particularly buyers,
are benefitted by providing for the risk of loss and insurance in the
contract of sale. The buyer’s attorney will want to keep the risk of
loss on the seller until closing or until there is a change in posses-
sion. The risk of loss clause should be written to include all losses
caused by sudden casualty and those losses that are not the fault of
either party.113

The procedure to be followed upon the occurrence of a casualty
should also be noted in the clause. The seller should be required
to notify the buyer, and the clause should specify the relief if a loss
occurs. For example, the buyer may wish to have the option to
purchase the property with no abatement in the purchase price,
with an abatement equal to the insurance proceeds, with an abate-
ment equal to the actual loss sustained, or with the opportunity to
terminate the contract. The seller, on the other hand, may wish to
limit such options, particularly if the loss is relatively minor.114

The seller may want the buyer to accept the property with an
abatement in the purchase price equal to the insurance or the loss,

110. See Friedman, supra note 3, at 602.
111. UNIF. VENDOR & PURCHASER RISK ACT § 1, 9C U.L.A. 313 (1957).
112. An example of a state statute which follows the Uniform Act is found in MICH.
1922). Sudden casualties include fire, wind, or storm damage.
114. Special provision may be made for relatively minor damage such as to one room
in the building or in the amount of less than 10% of the purchase price.
or the seller may wish to have the opportunity to repair. Only if the loss is substantial should the buyer have the right to terminate.

Concomitant with the risk of loss provisions should be provisions for insurance. Typically, the seller has insurance on the property. The buyer's attorney may wish to provide that the seller continue to carry insurance, and perhaps have it increased to the full purchase price\(^{115}\) for the benefit of the buyer. The buyer, however, may wish to secure his own insurance. If the seller agrees to carry insurance for the buyer, the seller may want to require the buyer to complete the sale despite a loss.

After having used due care in drafting a risk of loss clause, the seller should also be sure that the protective clause is not negated by other provisions in the contract. The contract of sale often provides that the seller will deliver the property in the same condition, absent normal wear and tear, as it was on the date of signing the contract. The inclusion of such a clause might negate or modify the provisions contained in the risk of loss clause. A careful draftsperson will tie the two provisions together.

XI. PRORATIONS

Provisions should be included in the contract of sale for the prorations of certain ongoing expenses. The most common proration is for real estate taxes. Typically, real estate taxes are prorated to the date of closing.\(^{116}\) Depending on the area, the current tax bill for the property might not be available.\(^ {117}\) If not, the proration generally is based on the last available tax bill. The contract should provide for the adjustment of proration discrepancies.\(^ {118}\) If the discrepancy is substantial, the parties should consider the use of an escrow. The method of proration may also make a difference. For example, the proration may be based on a 360-day year, a 365-day year, a division into respective six-month time periods, or on tables. If a discrepancy in amounts is possible, the method of

\(^{115}\) Many sellers have their homes underinsured, often having the insurance only to the extent required by their lender.

\(^{116}\) Even if the contract does not provide for proration, or if it provides for another method of tax payment, the Internal Revenue Code requires proration. See I.R.C. § 164(d) (1982).

\(^{117}\) In Minnesota, notices of property taxes levied in one year, Minn. Stat § 275.07 (1982), are mailed to the property owners January 31 of the following year. Minn. Stat. §§ 275.28(3), 276.04 (1982).

\(^{118}\) Obviously, this is a clause which should survive the closing and not merge into the deed. See supra notes 55-58 and accompanying text.
proration and adjustment to be used at the closing should be specified in the contract of sale.

A provision for the proration of special tax assessments is commonly appended to prorations of real estate taxes. A buyer should not automatically agree to such a provision. The seller may have received the primary benefit of the assessment with the payment postponed, in which case proration would be unfair to the buyer. The assessment should be paid by the party or parties who obtain the benefit. If the agreement contains no mention of assessments, and assessments constitute an encumbrance on the property, the seller may have to pay all. If the assessment does not become a lien until after closing, however, the buyer may have to pay all.119

There may be other expenses that should be prorated. If the home is heated by fuel oil and oil is stored on the premises, provisions should be made for payment by the buyer for the oil. Other utilities should be transferred on the date of closing or date of occupancy. If the buyer assumes the mortgage, provision should be made for the proration of the mortgage payments. If the insurance is assumed, the premiums should be prorated. If the property includes rental property, provision should be made for the proration of the rent and appropriate means to transfer the security deposits.120

XII. MISCELLANEOUS PROVISIONS

An escrow can be useful in a residential real estate transaction. Depending on the area of the country, the closing itself may be made by the use of the escrow. In the common "deed and money escrow," the escrow agent records and delivers the deed to the buyer and the money to the seller, only if a review of the status of title indicates that the title conforms with that required under the contract of sale. Use of an escrow arrangement assures the buyer that the title is that agreed upon, without the fear that a last-minute encumbrance has been placed of record. The escrow procedure also assures the seller that the closing will occur if the title is as required in the contract.121 If the closing is to be in escrow, the contract of sale should so provide and the terms of the contract

119. See Friedman, supra note 3, at 600.
120. Other items of concern will be such things as having appropriate notices mailed to the tenant and ascertaining that rents have not been prepaid.
and escrow agreement should match. The escrow agreement can be expanded to include the use of other documents. An escrow also assists in proving delivery and can be most useful when an intervening event occurs, such as the death of one of the parties, under the theory of relating back.

An escrow may also be useful in other contexts. If any condition remains to be performed under the contract of sale, the use of an escrow can permit the closing to continue with the exception of that condition. For example, if the property is a new home and landscaping must be performed, a portion of the purchase price can be placed in escrow pending the completion of the landscaping. Obviously, the buyer will want to have an adequate amount withheld to accelerate the performance and the seller will want less withheld. It is best to provide for the use of escrow in the contract in case a problem arises, especially where a problem is foreseeable. Otherwise, one or both of the parties might be reluctant to enter into a subsequent agreement.

The requirements for a valid escrow often have been stated. Basically, there must be an enforceable contract and there must be delivery to the escrow agent. The agent should be an independent third person who has received conditioned instructions with regard to the items delivered.

In many jurisdictions, a contract for the sale of land may be recorded. If the contract can be recorded, the buyer's attorney should do so; the attorney should ensure that the contract is in the proper form for recordation and provide for recordation in the contract of sale. Recording the land contract is a way to notify

122. If the terms are inconsistent, the terms of the escrow agreement will prevail. See Widess v. Doan, 112 Cal. App. 343, 296 P. 899 (1931).
123. See J. Cribbet, supra note 121.
124. See generally Corbin, Conditional Delivery of Written Contracts, 36 Yale L. Rev. 443 (1927); 17 Minn. L. Rev. 817 (1933).
125. See 8 G. Thompson, supra note 14, at § 4243.

In 1983, the Minnesota Legislature required that "[a]ll contracts for deed executed on or after January 1, 1984, shall be recorded within six months in the office of the county recorder or registrar of titles in the county in which the land is situated." Act of June 14, 1983, ch. 342, art. 2, § 25, 1983 Minn. Laws 2167, 2234 (current version at Minn. Stat. § 507.235(2) (Supp. 1983)). Failure to record the contract for deed results in the imposition of a penalty equal to .15% of the principal amount of the contract debt. See id. § 25, 1983 Minn. Laws at 2234.
127. For example, in Ohio a document must be signed in the presence of two witnesses and acknowledged. Ohio Rev. Code Ann. § 5301.01 (Page 1981). The Minnesota stat-
third parties of the existence of the contract and to prevent the seller from selling to another bona fide purchaser for value. Appropriate provision should also be made, on behalf of the seller, to have the contract removed from the record in the event the closing does not occur.\footnote{128}

The time of drafting the contract of sale is an appropriate time to consider the inclusion of various provisions addressing default. Previously discussed was the use of the down payment,\footnote{129} liquidated damages clause,\footnote{130} and vendor's and vendee's liens.\footnote{131} In addition, the careful draftsperson should consider the remedies of specific performance and damages. Traditionally, specific performance is a remedy sought by buyers, particularly when the market is rising. In the absence of unconscionability or harshness, the buyer generally encounters few problems in seeking specific performance.\footnote{132} If the buyer desires specific performance with abatement of the purchase price, however, the buyer may encounter difficulties.\footnote{133} Consequently, if the buyer anticipates that abatement may be an appropriate remedy, a clause should be inserted in the contract of sale. For example, if the sale is for a stated number of acres, the buyer's attorney may wish to provide that if less than the stated acreage is to be conveyed, the purchase price will be ratably reduced. Before agreeing to such a provision, the seller's attorney will want to provide that the abatement, if any, will be either small or limited to avoid destruction of the seller's expectations.

Specific performance is not always available to the seller. Unlike real property, money for the purchase price is not unique. A variety of legal theories have been advanced for the seller favoring the remedy of specific performance, with the majority relying on execution acknowledgment by the parties, and certification of the acknowledgment. \footnote{Minn. Stat. § 507.24 (1982).}

\footnote{128. Otherwise the contract will be a cloud on the title. See, e.g., Rogers Carl Corp. v. Moran, 103 N.J. Super. 163, 246 A.2d 750 (1968).}

\footnote{129. See supra notes 60-68 and accompanying text.}

\footnote{130. See supra notes 70-71 and accompanying text.}

\footnote{131. See supra note 54 and accompanying text.}


\footnote{133. See, e.g., Rudd v. Lascelles, 1 Ch. 815 (1900) (court noted specific performance with abatement would not be granted if hardship was great or if deficiency would be difficult to value); see also Wood v. Rusher, 42 Minn. 389, 44 N.W. 127 (1890) (Vendee may sue for specific performance, damages, or rescission; he cannot obtain more than one remedy); Merritt v. Cirelli, 361 Pa. 239, 64 A.2d 796 (1949) (specific performance with abatement permitted only where defect is in the vendor's title or deficiency in quantity of land to be conveyed and where it would not result in undue hardship).}
the theory of mutuality of remedies. Recently, however, some courts have denied specific performance because other remedies are more appropriate. Although recognizing the potential denial of its use, a seller’s attorney should include a provision permitting the seller to seek specific performance as an option in the contract of sale. Thus the seller must be ready to perform, which means keeping the property off the market while continuing the obligations of ownership, although he is not ensured of the buyer’s performance.

Damages is a remedy available to either the buyer or the seller. Nonetheless, although jurisdictions generally agree that the seller’s damages are measured by the difference between the purchase price and the fair market value of the property as of the date of breach, there is no such agreement where the buyer seeks damages on default by the seller. One view, often referred to as the English view, notes that if the seller was acting in good faith, the buyer’s damages are limited to the consideration already paid and the interest thereon. Only bad faith on the part of the seller will allow the buyer the benefit of bargain damages. The so-called American rule permits the buyer to get the benefit of the bargain damages without regard to the presence or lack of good faith. In an English view jurisdiction, the buyer’s attorney may wish to include a provision permitting benefit of the bargain damages in the event of the seller’s default.

XIII. Conclusion

The contract of sale is the vital document in the real estate transaction. It requires the ideas and skilled drafting of an attorney. The foregoing suggestions highlight several provisions which should be included in the contract of sale but are often omitted or

134. See 8A G. THOMPSON, supra note 14, at § 4479.
136. See, e.g., Frank v. Jansen, 303 Minn. 86, 226 N.W.2d 739 (1975) (difference between purchase price and market value at breach plus expenses as vendors reasonably incurred in attempting to mitigate less amount vendors have already received as down payment).
137. See Raisor v. Jackson, 311 Ky. 803, 225 S.W.2d 657 (1950); 8A G. THOMPSON, supra note 14, at § 4478.
poorly drafted when the contract of sale is prepared by a layperson or when a form is used. These suggestions can be readily incorporated into a simple contract of sale with appropriate changes depending on the circumstances. The provisions are always needed, however, for the protection of both buyers and sellers, especially in residential real estate transactions.