

THE ARIZONA ASSOCIATION OF REALTORS®
2005 RESIDENTIAL RESALE REAL ESTATE PURCHASE CONTRACT

By K. Michelle Lind

The Arizona Association of REALTORS® (“AAR”) Residential Resale Real Estate Purchase Contract (“Contract”) has been revised by several workgroups led by Chairperson Laura Mance. The Forms Steering Group drafted and approved the actual Contract language. An Enlarged Forms Revision Work Group, made up of 40-50 participants balanced geographically, comprised of broker/managers who review forms on a regular basis, active residential practitioners, and real estate instructors, identified problems in the field and provided conceptual direction to the Forms Steering Group. Additionally, several specialized groups, including the Lenders Group, the Title/Escrow Group, the Home Inspectors Group, and the Attorneys Group provided recommendations to the Forms Steering Group concerning the areas of the Contract most affecting those industries.

Once an initial draft was completed, AAR posted the form on its website and solicited input from a wide range of real estate industry professionals. After considering literally hundreds of comments and suggestions, the Steering Group finalized the Contract and it was approved by both the Industry Issues Key Result Area (“IIKRA”) and the Executive Committee.

The following is an overview of the major provisions and changes from the 5/00 contract in each of the sections of the 2005 Contract.

FORMAT

The Contract format was changed in an attempt to make the form more “readable” and “user-friendly.” Section and subsection numbers were added in addition to line numbers. And, every attempt was made to keep each subsection as short as possible. The Receipt section was omitted because it was essentially unnecessary. Earnest money, of course, is still addressed in the Contract. The “Offer” section is now entitled “Property.”

The Warranty section was separated from the Inspection section. The Inspection section is now called “Due Diligence” to reflect the fact that investigations are performed in addition to physical inspections of the property.

BUYER ATTACHMENT

The Buyer Attachment is essentially unchanged. However, a few additional issues are now included. The buyer is advised to apply for a home loan and the buyer’s responsibility to insure funds are in escrow in sufficient time to allow escrow to close is emphasized. The buyer is also advised to review the title commitment and any homeowner’s association documents within five days of receipt.

PROPERTY SECTION

Both the buyer and the seller are identified at the beginning of the Contract and the agreement to buy and sell is spelled out. If the buyer’s broker does not know the seller’s name when writing the offer, the buyer’s broker can simply check “. as identified in section 9c,” which is the Acceptance section. The description of the property to be conveyed (the “Premises”) and the purchase price provisions were essentially unchanged. Close of Escrow: The close of escrow (“COE”) provisions are much more specific. COE is still defined as when the deed is recorded at the appropriate county recorder’s office. Provisions were made for circumstances in which either the escrow company or the recorder’s office is closed on the “COE Date.” In such a case, COE will occur on the next day that both are open for business. The buyer and seller agree to comply with all terms and conditions, execute and deliver to escrow company all closing documents, and take all other necessary actions in sufficient time to allow COE to occur on the COE Date. The buyer is now specifically obligated to deliver to the escrow company a cashier’s check, wired funds or other immediately available funds to pay any down payment, additional deposits or buyers closing costs, and to instruct the lender to deliver immediately available funds to the escrow company, in a sufficient amount and in sufficient time to allow COE to occur on the COE Date.

Possession: The seller agrees to deliver possession and keys to the buyer at COE or as otherwise indicated. The advisory required by Arizona Department of Real Estate Commissioner’s Rule in regards to the risks of pre- or post-possession agreements is now included in the Contract.

Addenda Incorporated: Several addenda were drafted or revised in conjunction with the Contract. The addenda include: the HOA Condominium/Planned Community Addendum (“H.O.A.”), the On-site Wastewater Treatment Facility Addendum, the Domestic Water Well Addendum, and the Additional Compensation Addendum. Each of these addenda should be carefully reviewed prior to use. These addenda along with the Assumption and Carryback, Buyer Contingency, HUD forms, Lead-Based Paint Disclosure, and Additional Clause Addendum are listed in this sub-section. The Buyer Contingency and Additional Clause Addendum, but should be available in the coming months.

Fixtures and Personal Property: The fixtures and personal property to be included in the sale is now in a list format. Additional personal property, such as the refrigerator, washer, and dryer, which are commonly included in the sale, are listed to be included if checked. A line is provided to describe or include the model number of the appliance. The refrigerator, washer, dryer and any other specified additional existing personal property included are not considered part of the Premises and are transferred with no monetary value, and free and clear of all liens or encumbrances. The seller warrants that all additional personal property included

in the sale will be in substantially the same condition as on the date of Contract acceptance.

FINANCING SECTION

The Financing section has been revised to obligate the buyer to take specific steps to obtain a loan and to clarify the financing contingency. The 5/00 contract was contingent upon the buyer “qualifying” for a new first loan. In working with the Lender Group, it was discovered that brokers and lenders were not always speaking the same language, resulting in frequent misunderstandings. To address this concern, terms are much more specific in this Contract. Additionally, because the Title/Escrow Group indicated that there was often confusion about the consequences of unfulfilled contingencies, the contingency provisions are more detailed.

Loan Contingency: The loan contingency provision is more specific than in the 5/00 contract. The buyer’s obligation to complete the sale is contingent upon the buyer obtaining loan approval for the loan described in the AAR Loan Status Report (discussed in detail below) without conditions no later than the COE Date. If the buyer is unable to obtain loan approval without conditions by the COE Date, the loan contingency is unfulfilled, the Contract is cancelled and the earnest money is released to the buyer. In order to give everyone involved in the transaction notice of an unfulfilled loan contingency, the buyer is obligated to deliver a notice of the inability to obtain loan approval to the seller or the escrow company no later than the COE Date. If the buyer fails to deliver this notice by the COE Date, the seller must give the buyer cure notice (as described in the Cure Period subsection) and a three day opportunity to deliver the notice of the unfulfilled contingency. If the buyer fails to deliver the notice, the buyer is in breach (not for the failure to qualify, but for the failure to deliver the notice) and the seller agrees to accept the earnest money as damages (as set forth in the Breach sub-section).

Unfulfilled Loan Contingency: As in the 5/00 contract, the Contract is cancelled for an unfulfilled contingency if, after diligent and good faith effort, the buyer is unable to obtain loan approval without conditions by the COE Date. The inability to obtain loan approval by the COE Date is not a breach of contract; therefore, the Cure Period does not apply to extend COE. However, the buyer’s failure to have the down payment or other funds necessary to obtain loan approval without conditions and close escrow is not an unfulfilled loan contingency, but a breach of Contract after expiration of the Cure Period. If the buyer is unable to obtain loan approval and delivers the unfulfilled contingency notice as required, the buyer is entitled to a return of the earnest money.

Appraisal Contingency: The buyer’s obligation to complete the sale is contingent upon an appraisal of the Premises for at least the sales price. If the Premises fails to appraise for the sales price, buyer has five days after notice of the appraised value to cancel the Contract or waive the appraisal contingency. The notice of the appraised value may be written notice from any source; a complete copy of the appraisal is not required to trigger the five-day time period. If the buyer is unable to obtain the loan and close escrow after waiving the appraisal contingency, the seller should deliver the cure notice to the buyer. If the buyer fails to close within the Cure Period, the buyer has breached the Contract and the seller agrees to accept the earnest money as damages (as set forth in the Breach sub-section).

Loan Status Report: The AAR Loan Status Report (“LSR”) was drafted in conjunction with the Contract and replaces the Conditional Loan Approval form. The LSR must be attached to every offer and must have, at a minimum, the Buyer’s Loan Information section completed, describing the current status of the buyer’s proposed loan. The requirement that the LSR be attached to every offer does not necessitate that the buyer obtain pre-qualification from a lender prior to submitting an offer; the buyer can simply indicate on the LSR that the buyer has not yet had the opportunity to visit a lender.ii Including the LSR information allows the seller to better evaluate the buyer’s offer. **Loan Application:** Unless the buyer has previously completed the loan application and related actions, the buyer is obligated to:

- (i) complete, sign and deliver to the lender a loan application, with requested disclosures and documentation;
- (ii) grant the lender permission to access buyer’s Trimerged Residential Credit Report; and
- (iii) pay all required loan application fees within five days after Contract acceptance.

Loan Processing During Escrow: The buyer agrees to diligently work to obtain the loan, to promptly provide the lender with all required documentation, and to authorize the lender to provide loan status updates. A Loan Status Update form was drafted for this purpose, but its use is not required. The buyer is required to sign all loan documents three days prior to the COE Date to allow the funds to be ordered and escrow to close as agreed. If the buyer fails to sign the documents, the seller should give the buyer a cure notice (as described in the Cure Period subsection). If documents are not available for signature by the COE Date because the buyer has not obtained loan approval after a diligent and good faith effort, the loan contingency is unfulfilled and the Contract is cancelled. If the buyer has obtained loan approval but does not sign the loan documents within three days after receiving the cure notice, the buyer is in breach of contract and the seller may pursue the remedies for breach.

Type of Financing:

The type of financing - conventional, FHA, VA, Assumption or Seller Carryback - is indicated in this section.

Loan Costs: The buyer is responsible for paying any required Private Mortgage Insurance (“PMI”). The party to be responsible for

paying other loan related costs, such as discount points, lender title insurance policy, origination fee and appraisal fee, is indicated in this section.

Other Loan Costs: As in the 5/00 contract, this section addresses the additional amount the seller agrees to pay in the event of an FHA or VA loan. All other costs of obtaining the loan are to be paid by the buyer. Changes: The buyer is now obligated to immediately notify the seller of any changes in the loan program, financing terms or lender described in the LSR. As in the 5/00 contract, the buyer may not make any changes without the prior written consent of the seller unless the changes do not adversely affect the buyer's ability to obtain loan approval without conditions, increase the seller's closing costs, or delay COE. The notice to the seller of any changes, even if the changes do not affect the buyer's ability to obtain loan approval, delay COE or increase costs, is simply to keep the seller informed as to the buyer's progress in obtaining the loan.

FHA Notice: As in the 5/00 contract, the HUD home inspection notice is included in the Contract.

TITLE AND ESCROW SECTION

The changes to the Title and Escrow section are primarily in formatting. However, the Escrow Company is now instructed to send a notice of sale to any homeowner's association in which the home is located and record an Affidavit of Disclosure if provided.

Escrow: The Contract continues to be used as escrow instructions and the escrow company is identified in this subsection.

Title and Vesting: The options for taking title have been omitted and the buyer will take title as determined before COE. The buyer is advised that taking title may have significant legal, estate planning and tax consequences; therefore, the buyer should obtain legal and tax advice.

Title Commitment and Title Insurance: As in the 5/00 contract, the escrow company is instructed to deliver a commitment for title insurance together with complete and legible copies of all documents that will remain as exceptions to the title insurance ("Title Commitment") to the buyer. The title company is instructed to send the Title Commitment directly to the buyer and seller, not the broker(s). The buyer has five days after receipt of the Title Commitment and after receipt of notice of any subsequent exceptions to provide notice to the seller of any items disapproved. The seller still agrees to convey title by general warranty deed and provide the buyer with the best title policy available.

Additional Instructions: The additional escrow instructions require the escrow company to:

- (i) Furnish a notice of the pending sale that contains the name and address of the buyer to any homeowner's association in which the Premises is located.
- (ii) Deliver to the buyer and seller, upon deposit of funds, a closing protection letter from the title insurer indemnifying the parties for any losses due to fraudulent acts or breach of escrow instructions by the escrow company, if the escrow company is also acting as the title agency but is not the title insurer issuing the title insurance policy.
- (iii) Modify its standard documents to the extent necessary to be consistent with the Contract.
- (iv) Allocate escrow company fees equally between the seller and buyer, unless otherwise stated.
- (v) Send copies of all notices and communications pertaining to the transaction to the seller, buyer and broker(s).
- (vi) Provide the broker(s) access to escrowed materials and information regarding the escrow.
- (vii) Record the Affidavit of Disclosure at COE, if applicable.

Tax Prorations: Real property taxes payable by the seller are prorated to COE based upon the latest tax information available.

Release of Earnest Money: As in the 5/00 contract, in the event of a dispute between the buyer and seller regarding any earnest money deposited with the escrow company, the parties authorize the escrow company to release the earnest money pursuant to the terms and conditions of the Contract in its sole and absolute discretion. The parties agree to hold harmless and indemnify the escrow company against any claim or loss arising from the release of the earnest money.

Proration of Assessments and Fees: All assessments and fees that are not a lien as of the COE, including homeowner's association fees, rents, irrigation fees, and, if assumed, insurance premiums, interest on assessments, interest on encumbrances, and service contracts are to be prorated as of COE unless otherwise indicated.

Assessment Liens: The amount of any assessment, other than homeowner's association assessments, which is a lien as of the COE, will be paid as indicated.

IRS and FIRPTA Reporting: As in the 5/00 contract, the seller agrees to comply with IRS reporting requirements. If applicable, seller agrees to complete, sign, and deliver to Escrow Company a certificate indicating whether seller is a foreign person or a non-resident alien pursuant to the Foreign Investment in Real Property Tax Act ("FIRPTA"). Both buyer and seller acknowledge that if the seller is a foreign person, the buyer must withhold a tax equal to 10 percent of the purchase price, unless an exemption applies.

DISCLOSURES SECTION

The disclosure section has been reduced and simplified. H.O.A disclosures are now handled with a new addendum that addresses H.O.A. assessments and details the disclosures and information that the association or seller must provide the buyer pursuant to Arizona law. Swimming pool and home warranty plan information is now addressed in the Due Diligence section. The "Seller's Notice of Violations" section in the 5/00 contract is incorporated into a provision requiring the seller to notify the buyer of any changes in the disclosures made. Homeowners insurance claims history is now specifically addressed.

Seller Property Disclosure Statement ("SPDS"): The AAR SPDS form is now specifically required and the seller is obligated to deliver a completed AAR SPDS form to the buyer within five days after Contract acceptance. The issue of late delivery of the SPDS is addressed in that the buyer has the Inspection Period or five days after receipt of the SPDS, whichever is later, in which to provide notice of items disapproved. Insurance Claims History: The seller is obligated to deliver a written five-year insurance claims history regarding the Premises (or a claims history for the length of time the seller has owned the Premises if less than five years) from the seller's insurance company, an insurance support organization (such as the Comprehensive Loss Underwriting Exchange "C.L.U.E."), a consumer reporting agency, or if unavailable from these sources (for example, if the property is a second home), from the seller, within five days after Contract acceptance. The buyer has the Inspection Period or five days after receipt of the claims history, whichever is later, in which to provide notice of items disapproved. Lead-Based Paint Disclosure: This subsection is unchanged from the 5/00 contract. If the Premises was constructed prior to 1978, the lead-based paint ("LBP") information must be provided, preferably prior to Contract acceptance. The buyer is obligated to return a signed copy of the Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards to the seller prior to COE. The buyer must initial this subsection on the appropriate line in every transaction.

Affidavit of Disclosure: If the Premises is located in an unincorporated area of the county, and five or fewer parcels of property other than subdivided property are being transferred, the seller must deliver a completed Affidavit of Disclosure in the form required by law to the buyer within five days after Contract acceptance. The buyer must provide notice of any Affidavit of Disclosure items disapproved within the Inspection Period or five days after receipt of the Affidavit of Disclosure, whichever is later.iii The buyer should deliver the Affidavit to the escrow company so that it can be recorded at COE.

Changes During Escrow: The seller agrees to immediately notify the buyer of any changes in any of the seller's disclosures. Unless the seller is already obligated to correct or repair the changed item, the buyer has five days to provide notice of disapproval.

WARRANTIES SECTION

The Warranties section has been separated from the Inspections section. The seller now warrants that all additional existing personal property included in the sale will be in substantially the same condition as of the date of Contract acceptance and that all personal property not included in the sale and all debris will be removed by COE.

Seller Warranties: The seller warrants and is obligated to maintain and repair the Premises so that, at the earlier of possession or COE:

- (i) all heating, cooling, mechanical, plumbing, and electrical systems (including swimming pool and/or spa, motors, filter systems, cleaning systems, and heaters, if any), free-standing range/oven, and built-in appliances will be in working condition;
- (ii) all other agreed upon repairs and corrections will be completed pursuant to Section 6j;
- (iii) the Premises, including all additional existing personal property included in the sale, will be in substantially the same condition as on the date of Contract acceptance; and
- (iv) all personal property not included in the sale and all debris will be removed from the Premises.

Warranties that Survive Closing: As in the 5/00 contract, the seller warrants that:

- (i) the seller has disclosed all material defects and any information, excluding opinions of value, which materially and adversely affect consideration to be paid by the buyer;
- (ii) payment in full will have been made for all labor, professional services, materials, machinery, fixtures, or tools furnished within the 150 days immediately preceding the COE in connection with the construction, alteration, or repair of any structure on or improvement to the Premises;
- (iii) the information regarding connection to a sewer system or on-site wastewater treatment facility is correct to the best of seller's knowledge.

Buyer Warranties: The buyer's warranty is also essentially unchanged. The buyer warrants that the buyer has disclosed any information which may materially and adversely affect the buyer's ability to close escrow and that the buyer has conducted all desired independent inspections and investigations and accepts the Premises at the earlier of possession of the Premises or COE. The buyer also warrants that the buyer is not relying on any verbal representations concerning the Premises except disclosed on the line in this subsection. If the buyer is relying on verbal representations in drafting the offer, the buyer would be well advised not to complete or submit the offer until the buyer has verified or investigated any verbal representations.

DUE DILIGENCE SECTION

The Inspections section is now entitled "Due Diligence" to reflect the fact that both inspections and investigations of the home

should be performed. Inspection Period: The buyer's Inspection Period continues to be ten days unless otherwise indicated. The "laundry list" of possible inspections and investigations has been omitted. The Contract now obligates the buyer to:

- (i) conduct all desired physical, environmental, and other types of inspections and investigations to determine the value and condition of the Premises;
- (ii) make inquiries and consult government agencies, lenders, insurance agents, architects, and other appropriate persons and entities concerning the suitability of the Premises and the surrounding area;
- (iii) investigate applicable building, zoning, fire, health, and safety codes to determine any potential hazards or defects in the Premises;
- (iv) verify any material multiple listing service ("MLS") information;
- (v) investigate the presence of sex offenders in the vicinity or the occurrence of a disease, natural death, suicide, homicide or other crime on or in the vicinity if material.

The buyer is advised to consult the Buyer Advisory to assist in the due diligence inspections and investigations. The buyer remains obligated to keep the Premises free and clear of liens, indemnify and hold the seller harmless from all liability and repair all damages arising from the inspections. The buyer is also obligated to provide the seller and broker(s) upon receipt, at no cost, copies of all inspection reports concerning the Premises.

Square footage: The buyer is advised that any reference to square footage is approximate and must be investigated during the inspection period if material. Wood-Destroying Organism or Insect Inspection: The buyer is no longer required to perform a termite inspection. If current or past wood-destroying organisms or insects are a material matter, the buyer must investigate the issue during the Inspection Period at buyer's expense, just like any other inspection. If the lender requires an updated Wood-Destroying Insect Inspection Report prior to COE, it will be performed at buyer's expense. If wood infestation is found during the updated inspection and the lender requires it to be treated before approving the buyer's loan, the buyer and seller will be required to negotiate whether the treatment will be performed and at whose expense. If the treatment is not performed and the lender will not approve the buyer's loan, the unfulfilled loan contingency provisions will apply.

Flood Hazard: The buyer is obligated to determine flood hazard designations or the cost of flood hazard insurance during the Inspection Period. The buyer is advised that if the home is in a special flood hazard area, the lender may require the purchase of flood hazard insurance and it may also affect the ability to encumber or improve the Premises. Insurance: If homeowner's insurance is material, the buyer is obligated to apply for and obtain written confirmation of the availability and cost of homeowner's insurance. The buyer is still advised that any desired insurance should be in place at COE. Sewer or On-site Wastewater Treatment System: This paragraph indicates whether the Premises is connected to a sewer system, septic system, or alternative system and must be initialed in every transaction. If a sewer connection is a material matter to the buyer, it must be investigated during the Inspection Period. If the Premises are served by a septic or alternative system, the AAR On-site Wastewater Treatment Facility Addendum that was drafted in conjunction with the Contract should be completed and incorporated into the Contract. This Addendum addresses permits, inspections, repair costs, transfer documents and transfer fees.

Swimming Pool Barrier Regulations: The buyer agrees to investigate all applicable state, county, and municipal swimming pool barrier regulations and agrees to comply with and pay all costs of compliance prior to occupying the Premises unless otherwise agreed. If the home contains a swimming pool, the buyer acknowledges receipt of the Arizona Department of Health Services approved private pool safety notice. The buyer must initial this paragraph in every transaction.

Buyer Acknowledgement: The buyer acknowledgement language has been clarified. The buyer recognizes, acknowledges, and agrees that the broker(s) is not qualified, nor licensed, to conduct due diligence with respect to the Premises or the surrounding area. The buyer is instructed to consult with qualified licensed professionals to assist in the buyer's due diligence efforts. Because conducting due diligence with respect to the Premises and the surrounding area is beyond the scope of the broker's expertise and licensing, the buyer releases and holds harmless broker(s) from liability for any defects or conditions that could have been discovered by inspection or investigation. This provision must be initialed in every transaction.

Inspection Period Notice: Prior to expiration of the Inspection Period, the buyer may deliver a signed notice of any items disapproved. AAR's Buyer's Inspection Notice and Seller's Response formiv ("BINSR"), which was revised in conjunction with the Contract, is available for this notice. The BINSR now contains provisions for the buyer's notice, the seller's response, and the buyer's election, as well as a space for notice of non-working warranted items. This provision is essentially unchanged from the 5/00 Contract, but the Contract specifically states that all desired inspections and investigations must be conducted prior to delivering the notice and all due diligence items disapproved are to be provided in a single notice.

Buyer Disapproval: This subsection applies to the Inspection Period notice and all other provisions in which the buyer is allowed an opportunity to disapprove of items. The disapproval process is essentially unchanged from the 5/00 contract, but the language was clarified and several issues that had caused disputes are specifically addressed. Notably, the buyer's disapproval no longer must be reasonable. If the buyer, in buyer's sole discretion, disapproves of items as provided in the Contract, the buyer must deliver a notice of the items disapproved and state in the notice that the buyer elects to either:

- (1) immediately cancel the Contract and all earnest money shall be released, or
- (2) provide the seller an opportunity to correct the items disapproved, in which case:

- (a) the seller must respond within five days or as otherwise provided. The seller's failure to respond within the specified time period is deemed to be a refusal to correct any of the items disapproved.
- (b) If the seller agrees in writing to correct any items disapproved, the corrections must be made, any repairs completed in a workmanlike manner, and any paid receipts evidencing the corrections and repairs delivered to buyer three days or an otherwise specified number of days prior to the COE date.
- (c) If the seller is unwilling or unable to correct any of the items disapproved, the buyer may cancel the Contract within five days. If the buyer does not cancel the Contract, the buyer is obligated to close escrow without correction of those items that the seller has not agreed in writing to correct.

The parties are advised that verbal discussions will not extend these time periods and only a written agreement signed by both parties will extend response times or cancellation rights. As in the 5/00 contract, the buyer is further advised that the failure to give notice of disapproval of items or cancellation within the specified time period shall be deemed buyer's election to close escrow without correction of any disapproved items. If the seller fails to complete the repairs three days prior to the COE Date and the buyer immediately delivers the cure notice, the seller will be liable for breach of contract and breach of warranty if the repairs are not complete by COE (as described in the Cure Period and Seller Warranty subsections).

Notice of Non-Working Warranted Items: Like the 5/00 contract, the buyer is obligated to provide the seller with notice of any non-working warranted item(s) of which the buyer becomes aware during the Inspection Period or the seller warranty for that item(s) will be waived. The buyer may provide this notice on the BINSR form. However, the Contract and the BINSR form make it clear that the notice does not affect the seller's obligation to maintain or repair the warranted item(s).

Home Warranty Plan: The buyer and seller are advised to investigate the various home warranty plans and acknowledge that different home warranty plans have different coverage options, exclusions, limitations, and service fees, and most plans exclude pre-existing conditions. If a home warranty plan is to be included, the Contract specifies who is responsible for ordering it, with what options, from what company, and at a cost not to exceed a specified amount.

Walkthrough(s): The walkthrough provision recognizes that more than one walkthrough may be required, i.e., the buyer may desire a walkthrough three days prior to COE to confirm agreed upon repairs have been completed. The seller grants the buyer and buyer's inspector(s) reasonable access to conduct walkthrough(s) of the Premises for the purpose of determining that any agreed upon corrections or repairs have been completed, warranted items are in working condition and that the Premises are in substantially the same condition as of the date of Contract acceptance.

Seller's Responsibility Regarding Inspections and Walkthrough(s): The seller continues to be obligated to make the Premises available for all inspections and walkthrough(s) upon reasonable notice by the buyer. However, the seller is now obligated to have all utilities on, including any propane, until COE to enable the buyer to conduct these inspections and walkthrough(s).

REMEDIES SECTION

The remedies provisions have been revised in two primary respects. First, the parties are given an opportunity to correct or "cure" potential breaches of the Contract. For example, if the buyer failed to pay all loan application fees within five days, the seller would have to give the buyer three days to pay the fees before the seller could declare a breach of Contract. Similarly, the buyer could not immediately declare a breach if the seller failed to deliver an insurance claims history within five days, without giving the seller three days to deliver the document. However, an unfulfilled loan contingency is not a potential breach of contract and is not subject to the Cure Period. Secondly, the Contract defaults to binding arbitration to settle disputes, unless one of the parties opts out.

Cure Period: A party is given an opportunity to cure a potential breach of the Contract. If a party fails to comply with any provision of the Contract, the other party must deliver a notice to the non-complying party specifying the non-compliance. If the non-compliance is not cured within three days after delivery of the notice ("Cure Period"), the failure to comply becomes a breach of Contract. As specified in the Calculating Time Periods sub-section, if the buyer does not sign loan documents or the seller does not complete repairs three days prior to the COE Date, and the cure notice is immediately delivered, the non-complying party will be in breach at COE. If the cure notice is not immediately delivered, the Cure Period may delay COE for up to three days.

Breach: If after receiving the notice of non-compliance the party does not perform the specified obligation, the non-complying party is in breach of Contract. In that event, the non-breaching party may cancel the Contract and/or proceed against the breaching party in any claim or remedy, subject to the Alternative Dispute Resolution obligations set forth in the Contract. In the event of buyer's breach, the earnest money may be deemed a reasonable estimate of damages and the seller may accept the earnest money as the sole right to damages. As indicated previously, in the event of buyer's breach arising from the failure to deliver the notice of the inability to obtain loan approval or the inability to obtain loan approval due to the waiver of the appraisal contingency, the seller agrees to accept the earnest money as the sole right to damages. This provision also states the obvious: an unfulfilled contingency is not a breach of Contract.

Alternative Dispute Resolution ("ADR"): The buyer and seller agree to mediate any dispute or claim arising out of or relating to the Contract and all mediation costs will be paid equally. If mediation does not resolve the dispute, the unresolved dispute must be submitted to binding arbitration unless either party opts out within thirty days after the conclusion of the mediation conference by

notice to the other. If a party opts out of arbitration, either party has the right to resort to court action.

Exclusions from ADR: As with the 5/00 Contract, the following matters are excluded from the requirement for ADR:

- (i) any action brought in the Small Claims Division of an Arizona Justice Court (up to \$2,500);
- (ii) judicial or nonjudicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or agreement for sale;
- (iii) an unlawful entry or detainer action;
- (iv) the filing or enforcement of a mechanic's lien; or
- (v) any matter that is within the jurisdiction of a probate court. The filing of a judicial action to record a lis pendens or order of attachment, receivership, injunction, or other provisional remedies is not a waiver of the obligation to submit the claim to alternative dispute resolution, or a breach of the duty to mediate or arbitrate. Attorney Fees and Costs: The prevailing party in any dispute will be awarded their reasonable attorney fees and costs.

ADDITIONAL TERMS AND CONDITIONS SECTION

Risk of Loss: As in the 5/00 contract, if there is any loss or damage to the home prior to COE or possession, whichever is earlier, by reason of fire, vandalism, flood, earthquake, or act of God, the risk of loss shall be on the seller, unless the cost of repairing such loss or damage would exceed ten percent of the purchase price. In that case, either seller or buyer may cancel the Contract.

Permission: Buyer and seller grant broker(s) permission to advise the public of the Contract.

Arizona Law: The Contract is governed by Arizona law and any action relating to the Contract will take place in Arizona.

Time is of the Essence: The parties acknowledge that time is of the essence in the performance of the Contract.

Compensation: The seller and buyer still acknowledge that the broker(s) will be compensated for services rendered as previously agreed by separate written agreement(s), which shall be delivered by brokers to escrow company for payment at COE, if not previously paid. If the seller is obligated to pay the broker(s), the Contract constitutes an irrevocable assignment of seller's proceeds at COE. If the buyer is obligated to pay broker(s), payment shall be collected from buyer as a condition of COE.

Copies and Counterparts: A fully executed facsimile or electronic copy of the entire Contract shall be treated as an original Contract. The Contract and any other documents may be executed by facsimile or other electronic means and in any number of counterparts, which shall become effective upon delivery, except that the Lead-Based Paint Disclosure Statement may not be signed in counterpart. All counterparts are deemed to constitute one instrument, and each counterpart is deemed an original.

Calculating Time Periods: This provision explains how time periods in the Contract are to be calculated. The day of the act or event from which the time period begins to run is not included (i.e., the date of Contract acceptance), and the last day of the time period is included. The provision explicitly states that Contract acceptance occurs on the date that the signed Contract (and any incorporated counter offer) is delivered to and received by the appropriate Broker. Acts that must be performed three days prior to the COE Date must be performed three full days prior; for example, if the COE Date is Friday, the act must be performed by 11:59 p.m. on Monday. Days: All references to days are calendar days. A day begins at 12:00 a.m. and ends at 11:59 p.m.

Entire Agreement: The Contract and any addenda and attachments constitute the entire agreement between the seller and buyer, shall supersede any other written or oral agreements, and can be modified only by a signed writing. The failure to initial any page of the Contract does not affect its validity or terms.

Subsequent Offers: The buyer acknowledges that the seller has the right to accept subsequent offers until COE. However, any subsequent offer accepted must be a backup offer contingent on the cancellation of the Contract.

Cancellation: A party who wishes to exercise the right of cancellation allowed in Contract may cancel the Contract by delivering notice stating the reason for cancellation to the other party or to the Escrow Company. Cancellation becomes effective immediately upon delivery of the cancellation notice.

Notice: Unless otherwise provided, (i.e., for delivery of the title commitment or for acceptance), delivery of all notices and documentation required or permitted in the Contract must be in writing, addressed as indicated in the referenced sections, and will be deemed delivered and received when:

- (i) hand-delivered;
- (ii) sent via facsimile transmission;
- (iii) sent via electronic mail, if email addresses are provided; or
- (iv) sent by recognized overnight courier service.

Earnest Money: If applicable, the form of earnest money and where it will be deposited is addressed in this paragraph.

Release of Broker(s): As in the 5/00 contract, the parties expressly release, hold harmless and indemnify all broker(s) from any and all liability and responsibility regarding the listed items relating to the Premises. The buyer should initial this paragraph in every transaction.

Terms of Acceptance: The terms of acceptance are unchanged from the 5/00 contract. Contract acceptance occurs and the offer becomes a binding Contract when acceptance is signed by the seller and a signed copy delivered in person, by mail, facsimile or electronically, and received by the specified broker by the specified time and date. **Broker on Behalf of Buyer:** The broker and salesperson contact information is included in this paragraph for addressing notice to the buyer, for agency confirmation, and for earnest money receipt.

Agency Confirmation: As in the 5/00 contract, the agency relationship of the broker writing the offer is confirmed. Both agency confirmations are contained on the same page so that any inconsistencies will be obvious.

SELLER ACCEPTANCE SECTION

Broker on Behalf of Seller: The listing broker's information is contained in this paragraph. All notices to the seller must be sent to the listing broker unless otherwise provided.

Agency Confirmation: The agency relationship of the listing broker is confirmed. **Seller Receipt of Copy:** The seller acknowledges receipt of a copy of the Contract and grants permission to the broker to deliver a copy to the buyer.

Counter Offer: If a Counter-offer is attached the seller should sign both the offer set forth in the Contract form and the Counter-offer. If there is a conflict between the offer and the Counter-offer, the provisions of the Counter-offer are controlling. **Offer Rejected by Seller:** If the offer is rejected, the seller should initial and date this provision.

CONCLUSION

The new AAR Contract attempts to address many of the issues in the 5/00 contract that caused confusion and disputes. No contract form is perfect, but it is hoped that the revisions in this Contract will make transactions proceed more smoothly and reduce liability for the parties and the brokers.

Michelle is General Counsel to the Arizona Association of REALTORS® and a State Bar of Arizona board certified real estate specialist.

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