

CONTRACTS

(AND RELATIONSHIPS WITH BUYERS AND SELLERS)

CONTRACT ESSENTIALS

Contracts are **express written agreements** between two or more parties who agree to do or not to do some act. It must describe the basic elements of the agreement, but number of words or even whole sentences are not mandated). **Electronic**, pdf and fax signatures are binding.

- (A) There must be **offer** and **acceptance** (mutual assent) evidenced by signatures.
- (B) There must be **consideration**; something exchanged that the party receiving it deems **sufficient** but actual worth is not important; **valuable** consideration is money and **good** consideration is love and affection.
- (C) Object of contract must be **legal**.
- (D) Parties must have **legal capacity** (no party is under 18, mentally incompetent, or intoxicated, suffering from dementia, etc.); competency of parties (an inability to understand the agreement, not illiteracy, which is inability to read).
- (E) **Reality of Consent** - Freedom from the following:
 - Misrepresentation** - an innocent misstatement of fact without intent to deceive.
 - Fraud** - a deliberate misrepresentation of a material fact.
 - Undue Influence** - a mixture of fraud and force by taking unfair advantage of another because of the relationship of the parties.
 - Duress** – overt threat to a party, typically the threat of personal injury.

GENERAL TYPES AND CHARACTERISTICS

- Valid:** Contains all **essential** elements and by its terms is legally binding on all parties.
- Void:** Has forms and words of a contract but is not legally binding by its terms; for example a contract to commit an illegal act.
- Voidable:** **Valid** but contains a factual weakness exploitable by one of the parties. Lack of capacity, misrepresentation, fraud, or duress, etc. The party the law intends to protect may seek a court order to void the contract. It is not automatic.
- Unilateral:** One party promises to do something upon the completed act of another which is not promised absolutely to occur (i.e., agency contract, reward poster).
- Bilateral:** Two parties simultaneously and mutually exchange promises, as when seller promises to sell and buyer promises to buy - (P&S).

Executory: Signed agreement, but not yet closed, it is incomplete.

Executed: A contract that is closed, completed. When the deed is delivered at the passing, the provisions of the P&S merge into the deed. None of its provisions survive the delivered deed unless specifically noted in writing.

Assignment of Contract:

A party may transfer his/her rights/obligations to another party. Old party is *assignor* and new party is *assignee (or nominee/designee)*. Assignment does not relieve assignor of obligations if assignee does not perform. A substitution of parties. Contract can specifically disallow assignment by one or both parties. Parties can agree that assignee will be liable and assignor will be relieved of obligations.

Power of Attorney:

A written power of attorney creates an attorney-in-fact who has the authority to sign on behalf of one of the parties. A proxy/stand-in for a party. Electronic signatures will make this less necessary as the law expands the type of documents that can be signed electronically.

Amendment: After the signing of a contract, any changes are agreed by parties by signatures or **initials** of the changed conditions on the contract; additional contract conditions may be added by a signed **rider** or **amendment** to original contract.

BREACH OF CONTRACT

Breach or default by one of the parties gives the innocent (injured) party certain rights:

- (A) **Rescission** - both parties agree to terminate the contract.
- (B) **Specific Performance** - breaching party forced by court to fulfill promise.
- (C) **Damages** - aggrieved party seeks actual monetary damages incurred.
- (D) **Forfeiture** - breaching party gives up all or a portion of deposit according to terms of contract (a form of liquidated damages).
- (E) **Liquidated Damages** - a sum of money specified in the contract to be paid in event of breach of terms by one of the parties.

THE AGENCY CONTRACT (listing agreement for seller or landlord, representation agreement for buyer or tenant).

A personal services agreement (Statute of Frauds does not automatically require it to be in writing). Seller typically pays their agency. Buyer may agree to pay the agency directly, or seller's agency shares commission based upon negotiation between the two agencies (agencies may be in a multiple listing service (MLS) together). In rentals, payment varies between being made by landlord or tenant or both.

PRINCIPAL: Client, Seller/Vendor, Buyer/Vendee, Landlord, Tenant

SPECIAL AGENT: Broker, Property Manager – works directly for the client

SUBAGENT: Salesperson, Co-Broker – works indirectly for the client

THE AGENCY CONTRACT (seller or buyer)

October 1, 20- **[Date here not necessary to contract]**

In consideration of the services of Apollo Realty ("Broker") **[a defined term to shorten drafting]** to be rendered to the undersigned ("Client") and of the promise of Broker to make good faith efforts to obtain a purchaser/locate property **[a unilateral contract]**, Client hereby lists with Broker the real estate and all improvements thereon ("Property")/agrees to work with Broker. Client grants to Broker the **exclusive right to sell/exclusive right to represent [this type of agency gives the Broker the most protection.]** the client from 12:00 p.m. on October 1, 20 - until 11:59 p.m. on January 1, 20 - ("Period of Time"). **[The exact period of time agency exists.]**

[For seller]: The price is \$100,000 or for such price and upon such other terms as Client may authorize during the Period of Time. **[The parties leave open the possibility that the price will change over the Period of Time. Any change must be approved by Client.]** **[For buyer]:** Broker shall locate and show property as described by Client.

[For seller]: It is understood by Client that the above sum or any other price authorized by Client shall *include* a cash fee of _% **[making clear that this is not an illegal net listing.]** payable by Client to Broker upon transfer of title to any purchaser of the Property during the Period of Time whether or not Broker was a procuring cause of any such sale. **[The essential element of an exclusive right to sell listing.]** **[For buyer]:** Client shall pay Broker a fee of _% of purchase price if listing agent or seller does not.

If Property is **sold** by any person to any purchaser **[or Client if it's buyer agency]** to whom the Property was shown by Broker or any representative of Broker, within 120 days **[an arbitrary period of time]** after the expiration of the Period of Time mentioned above, Client agrees to pay Broker the same fee as mentioned above. **[The protection clause prevents broker from loss of earned commission if the principals try to out-wait the Period of Time.]**

Broker is authorized by Client to place a "For Sale" sign on the Property during the Period of Time. **[Specific written permission is required.]**

Client agrees to make the Property available to Broker at all reasonable hours for the purpose of showing it to prospective purchasers. **[Cooperation from Client is necessary for the Broker to fulfill its promise.]**

Client agrees to convey Property to the purchaser by **Deed** with the usual covenants of title and free and clear of all encumbrances, tenancies, liens (for taxes and otherwise) but subject to applicable **restrictive covenants** of record. **[Client is promising that property can be conveyed.]**

Client acknowledges receipt of copy of this Agreement.

Client's signature **[This binding agreement between Client and Broker establishes legal relationship and must include all conditions of hiring. This is NOT a real estate contract. It is a personal services contract and does not come under the Statute of Frauds. It comes under the LAW OF AGENCY.]**

Broker's signature and Company name **[The sales agent may sign and bind only with written permission of Broker.]**

THE PURCHASE AND SALE AGREEMENT

This agreement made as of December 13, 20- among R.B. Buyer ("BUYER"), J.A. Seller ("SELLER") and Apollo Realty ("BROKER") provides that BUYER agrees to buy through BROKER as agent for SELLER and SELLER agrees to sell the real estate and all improvements thereon, located at 771 Main Street, Waltham, Massachusetts ("Property").

[Surveyor Property Description from deed or reference to deed recorded at Registry]

The purchase price is \$100,000 and shall be paid as follows: \$5,000 earnest money deposit; \$15,000 at closing and \$80,000 mortgage loan.

BUYER has made a deposit of \$5,000 with BROKER, receipt of which is acknowledged and such deposit shall be held by BROKER in **escrow** until date of settlement and then applied to purchase price. **[The reason why Broker is included as a party to this agreement. Broker is responsible for the safety of this money.]**

SELLER agrees to convey to BUYER by deed with the usual covenants of title and free and clear from all monetary encumbrances, tenancies, liens (for taxes or otherwise), except as may be otherwise noted, but subject to applicable covenants of record. SELLER agrees to deliver possession of Property on date of settlement. **[If Seller is unable to do so, Seller is in breach of this agreement.]**

Settlement **[closing]** shall be made at Middlesex South Registry of Deeds, Cambridge, Massachusetts on or before 10 a.m., February 1, 20-. Time is of the essence. **[The parties are expected to perform exactly on time as specified.]**

All taxes, interest, rent and impound escrow deposits, if any, shall be **prorated** as of date of settlement. **[Proration clause directs parties to apportion certain charges.]**

All risk of loss or damage to property by fire, windstorm, casualty or other cause is assumed by SELLER until date of settlement. **[Makes clear who bears the risk of loss.]**

BUYER and SELLER agree that BROKER was the **procuring cause** of this contract of purchase and SELLER agrees to pay BROKER % of purchase price (Buyer's broker also often stated to be paid at closing).

If either party defaults under this contract, such party shall be liable for the fee of BROKER **[liquidated damages]** and any expenses incurred by the non-defaulting party in connection with this transaction **[actual damages]**. If BUYER defaults under this contract, he/she shall forfeit the deposit **[forfeiture/liquidated damages]**.

SUBJECT TO: BUYER obtaining loan of \$80,000 at prevailing rates, such commitment from the lender to be obtained no later than 12 noon, January 2, 20-. **[Mortgage Contingency Clause: the contract of sale is conditional while Buyer uses good faith (bona fide) efforts to secure financing. Buyer is released from this agreement if turned down by lenders.]**

This agreement is subject to a home inspection satisfactory to BUYER. **[Deleted if inspection occurred with offer.]** The Property shall be left in broom clean condition.

This contract constitutes the entire agreement among the parties and inures **[becomes]** to the benefit of the heirs and **assigns** of the parties.

THE OPTION

A **written** contract by which an owner, in exchange for consideration gives another party the **right** to purchase (or lease) property within a certain time and other certain agreed conditions, but without imposing any obligation to lease or purchase.

- **Optionor** is owner who gives right. Enforceable against the estate if the optionor dies.
- **Optionee** is potential buyer or lessee who receives right. If optionee is a lessee, the clause is a *lease option*.
- **Consideration** (note, cash or property) is usually retained if option is not exercised.
- May be assigned without consent of optionor.
- A unilateral contract, lack of mutuality of obligation, a voluntary encumbrance on owner.
- **Advantage** in an option contract goes to **optionee**. Options buy time for developer to gain control of the parcels while gathering support such as financing.
- The purpose of the option for the owner is to keep open an offer to sell.
- Agent who is hired to bring a ready and able buyer but instead brings an optionee, does not earn a commission unless optionee becomes a buyer by exercising his/her option to buy, executes a sales agreement and completes the sale.
- A right of first refusal may benefit an owner more than an option by giving the owner the power to decide when and if to sell and ensuring any sale will yield fair market value.

TYPES OF AUTHORITY

EXPRESS

Directly stated

IMPLIED

Principal and agent act as if it exists

APPARENT

Situation gives appearance of authority to others

THREE TYPES OF EXPRESS AUTHORITY

Open Listing/Open Agency: Principal hires multiple brokers (working independently/competitively) to earn commission based on the terms specified in the listing agreement (verbal or written). No commission is earned if the seller procures a buyer unassisted or buyer finds property without agent help.

Exclusive Agency: Principal hires only one agency that can earn the commission by being the “efficient and procuring” cause of the sale and may share with other agencies and with agents within in it. The agency agreement is typically in writing and contains an expiration date of the hiring. No commission is earned if the seller procures a buyer unassisted or buyer finds property without agent help.

Exclusive Right to Sell/Exclusive Right to Represent: Exclusive agency earns the commission **even** if owner sells through another or sells unassisted or buyer finds property without agent help. **Must be in writing per Mass law.**