

1. The Nature of a Purchase Agreement (herein, sometimes the “PA”) and its Addenda

- A. Equitable Conversion. The buyer becomes the equitable owner of the property as soon as the PA is signed and delivered. Thereupon, the seller holds bare legal title as security for payment, which is a personal property interest. *First and American Nat’l. Bank of Duluth v. Whiteside*, 292 N.W. 770 (1940); *Village of Hibbing v. Commissioner of Taxation*, 14 N.E.2d 923 (1044); *Tollefson Development, Inc., v. McCarthy*, 668 N.W.2d 701 (Minn. App. 2003).
- i. For this reason, before a seller can close on a sale to Buyer 2, seller will be required to formally cancel a prior PA from defaulting Buyer 1 if the PA contains an unfulfilled condition.
 - ii. Example: Buyer 1 failed to appear on the July 1 closing date set forth in the PA, stating simply that he is no longer interested in purchasing. Failure to close is an unfulfilled condition. Seller accepts a new offer from Buyer 2 at a higher purchase price. Before the sale to Buyer 2 can close, seller must serve a Minn. Stat. 559.217, Subd. 3, “*cancellation with a 15-day right to cure*” notice upon Buyer 1. Buyer 1 then has the right to close within the 15-day cure period. Suppose, however, that Buyer 1 no longer can be found. Seller then must publish the cancellation, thereby extending the 15-day cure period.
 - iii. A family law footnote: Many divorcing spouses enter into purchase agreements for a new home prior to entry of the final decree of dissolution. Because of the doctrine of equitable conversion, the spouse’s equitable interest in the property (and the formal legal description) must be included in the Findings and be awarded in the Conclusions of the dissolution decree. Failure to do so can result in the need for an amended decree.
- B. Counteroffer. A counteroffer is a rejection of the original offer, and puts an end to the negotiations unless the party who made the original offer renews it or properly assents to the terms of the counteroffer. *Kileen v. Kennedy*, 97 N.W. 126 (1903); *Lake Co. v. Molan*, 131 N.W.2d 734 (1964).
- i. Minnesota follows the “Mirror Image Rule,” under which an acceptance must be coextensive with the offer and may not introduce additional terms or conditions. Thus, any purported “acceptance” of a purchase agreement that seeks to vary, add to, or qualify the terms of an offer constitutes a rejection of the offer and a counteroffer. *McLaughlin v. Heikkila*, 697 N.W.2d 231, 235 (Minn. App. 2005)
 - ii. And...a party may withdraw a counteroffer before the other party provides a

written acceptance. *McLaughlin, supra*.

C. Written Offer. Minnesota's Statute of Frauds requires that every contract for the sale of lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing.

- i. The "writing" need not necessarily be a complete PA. Rather, a memorandum of some sort containing sufficiently definite terms will suffice.
- ii. Five elements must be present in the PA or in an executed memorandum: (1) A statement of the consideration; (2) an adequate description of the parties; (3) an adequate description of the land; (4) the general terms and conditions of the transaction; and (5) subscription by the vendor. If these elements are present the contract is not void for failure to comply with the statute. *Greer V. Kooiker, 253 N.W.2d 133 (1977)*.

D. Description of the Property. The PA should be reviewed to determine the sufficiency of the legal description.

- i. Clarity is required to comply with the Statute of Frauds, whether by a street address, PID (parcel identification number), plat drawing, map, survey, or the actual legal description. Consider these examples:
 - a. The PA identifies the subject property as 123 Elm Street, Yourtown, MN, however the house is on "Lot 1, Block 5;" and the spacious yard with the playground equipment and pool is on "Lot 2, Block 5;" and the three car garage is on Lot 3, Block 5." The deed signed at closing sale and later recorded states the legal description to be "Lot 1, Block 5."
 - b. Buyer presumes, but does not verify, that the entirety of the parking lot adjacent to the apartment building is contained within the legal description of the property being purchased. Unfortunately, a portion of the parking lot is owned by an adjacent owner.
 - c. Lakeshore property being sold by the estate's Personal Representative is advertised on the MLS as having 1,000 feet of shoreline, because that's what the decedent, during her lifetime, often had told the Personal Representative. Indeed, seller actually had furnished the PR a sketch of the supposed shoreline prior to her death. Subsequent to closing, the new buyer discovers that there is only 750 feet of shoreline, plus an additional historic and unused easterly 50 foot right away that the city refuses to either vacate or permit construction of outbuildings or a dock. And, oddly enough, the westerly 75 feet of the supposed lot had no legal description, no parcel identification number, and no recorded record of ownership.
- ii. Parol evidence is admissible to explain, but not to contradict or supply, a description of the property. However, if a PA entirely omits a description of

real estate, such description cannot be supplied by parol evidence, and the PA therefore is unenforceable under the Statute of Frauds. *Malevich v. Hakola*, 278 N.W.2d 541 (Minn. 1979).

- iii. The PA need not state an exact legal description, however advisable that might be. Other options exist.
 - a. The description of land which a written sales contract purports to convey satisfies the statute of frauds if, in the light of the circumstances and conditions surrounding the parties with respect to the land during the negotiations (as established by parol evidence or by a permissible taking of judicial notice), such description provides, when applied to the physical features of the surrounding terrain, a reasonably certain guide or means for identifying such land to the exclusion of all other lands. Since even the most specific and precise description may require some parol proof to complete the identification of the property, the test is does the writing furnish a reasonably certain means of identification? Clearly, a description of land may be adequate to satisfy the statute of frauds even though it is not so certain as to render unnecessary the resort to extrinsic evidence to apply it to the land. If, with the aid of extrinsic evidence, the description can be applied to the property so as to identify and distinguish the intended area from all other lands, it is adequate. Although parol evidence is inadmissible to aid a defective description by supplying an essential part which is missing, it is admissible to interpret or translate the description's word symbols as the parties must have used and understood them in the light of circumstances and conditions which surrounded their negotiations. *Miracle Construction Co. v. Miller*, 87 N.W.2d 665, 669 (1958).
 - b. A map must be integrated into the PA if it is to comply with the Statute of Frauds. However, maps not so integrated can be used as parol evidence to clarify the required description. *Malevich*, supra.

E. Necessity of Essential Terms. The PA will be null and void if there is a failure to agree on all essential terms. *Lake Co.*, supra; *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 121 (Minn. 1981).

- i. Practice Pointer: Perhaps the most common example of an indefinite term inserted into a financing addendum is the term “market” in the following blank found in either the MNAR form or M.S.B.A Real Property Form No 2:

“Buyer shall apply for and secure a mortgage with an initial rate of _____%”

2. The Nature of Contingency Addenda.

A. A Note on Terminology: An “Addendum” is part of the original PA. An “Amendment”

amends the original PA.

- B. Most PAs will contain contingency addenda including, but certainly not limited to a Financing Addendum, Inspection Contingency Addendum, Buyer's Home Sale Contingency Addendum, a Title Examination Contingency, a CIC ("Common Interest Community") Addendum, or an addendum contingent upon the seller's ability to complete a 1031 exchange. And, the due diligence provision in a commercial PA will contain multiple contingencies.
- C. Contingencies are conditions precedent, and therefore must be fully performed before the PA becomes enforceable. *Hanson v. Moeller*, 376 N.W.2d 220, 224 (Minn. App. 1985).
 - i. Where a PA was contingent upon buyer's ability to obtain financing, the inability to do so voided the PA. *Chapman v. Salem Lutheran Church*, 221 M.W.2d 129, 139 (1974).
 - ii. Where the agreement contained a contingency that the parties agree on the security for the note by which the real estate was to be paid for, their failure to agree rendered the agreement null and void by reason of failure to agree on essential terms. *Romain*, supra.

3. Purchase Agreement and Addenda Forms

- A. MNAR Forms. The most common forms used in the residential home sales market are those drafted by the Minnesota Association of REALTORS® ("MNAR"). This is because most transactions involve the use of a real estate agent, and therefore consumers and settlement service providers such as closers and title companies are familiar with their content. In rare cases an attorney will be asked to review the PA and addenda prior to execution, however in most cases these agreements will come to an attorney's attention only after a dispute has arisen.
 - i. MNAR forms include the purchase agreement, addenda, and disclosures.
 - ii. MNAR forms are drafted, reviewed and updated annually by the MNAR Forms Committee composed of 20+ REALTORS® that meet regularly during each year.¹ The committee composed principally of active brokers and salespersons also includes several attorneys who are Minnesota State Bar Association certified Real Property Law Specialists, as well as the principal legal representatives from several of Minnesota's largest real estate companies. The committee is staffed by an MNAR attorney, and assisted by MNAR outside counsel.
 - iii. MNAR forms are copyrighted and unavailable for use by individuals who are not MNAR members. MNAR will send cease and desist letters to copyright violators, and reserves the right to vigorously pursue copyright violations.

¹ MNAR committee membership is limited to MNAR members.

MNAR regularly declines requests from attorneys to use the forms, since use of the forms is considered an MNAR member benefit.

- iv. Caution: The term “REALTOR®”² designates a real estate licensee who is a member of both the National Association of REALTORS® and the Minnesota Association of REALTORS®. Not all real estate brokers or salespersons are members. Nor does Minnesota Statutes Chapter 82 regulating brokers and salespersons require the use of any specific forms. Therefore, a real estate agent who is not an MNAR member does not have access to MNAR forms, and may be drafting their own forms or using forms drafted by the licensee’s attorney.

B. MSBA Forms. The Minnesota State Bar Association publishes on practicelaw.org M.S.B.A Real Property Form No. 1, the *Minnesota Standard Residential Purchase Agreement*, and select supporting addenda and disclosures.

- i. An exhaustive comparison of MNAR and MSBA forms is beyond the scope of this presentation.
- ii. MSBA forms are available to both MSBA members and the general public. Unfortunately, they have not been updated since 2008. This can create misunderstandings in the marketplace, and careful counsel who elects to use this form should consider the need for changes and updates.
 - a. Example: In 2010 HUD (now the Consumer Finance Protection Bureau, or “CFPB”) defined “title service fees” payable by the buyer to include title searches and examinations, flood certifications, tax lien searches and survey fees (see Sections B and C of the CFPB Loan Estimate form effective August 1, 2015). This conflicts with MSBA Form 1 that continues the previous long-standing practice of having the seller pay the cost of a title commitment or abstract extension. MNAR addressed this issue by developing an optional form requiring a seller to contribute cash or a percentage of the purchase price to buyer’s closing costs.
 - b. Example: MSBA Form 1 requires seller to provide a title insurance commitment only if seller is unable to find the abstract, or if seller did not receive an abstract at the time of purchase. However, since virtually all mortgages now are sold on the secondary market, buyers will be required to provide their lender with title commitments rather than abstracts.
- iii. Nonetheless, the MSBA forms provide the practitioner a checklist of several of the many items to be considered.

C. Your Form Library. Counsel advising either brokers, salespersons, buyers or sellers should maintain an up-to-date library of either complete forms, or clauses to add to

² Pronounced “Re-al-tor,” not “Rela-tor”

standard form MNAR or MSBA forms.

- i. Despite the availability of standard forms, the statutory authority of real estate brokers and salespersons (hereinafter, "Licensees") is limited. Counsel for both Licensees, buyers and sellers therefore have a unique and positive role when reviewing a draft PA and addenda.
 - ii. Minn. Stat. §481.02, Subd. 3a, provides that the general prohibition against the unauthorized practice of law shall not "be construed to prevent a real estate broker, a real estate salesperson, or a real estate closing agent, as defined in section 82.55, from drawing or assisting in drawing papers incident to the sale, trade, lease, or loan of property, or from charging for drawing or assisting in drawing them..."
 - iii. This narrow exception DOES NOT permit a Licensee to provide legal advice regarding purchase agreements, addenda or amendments, or to draft more complicated clauses to address specific legal issues involved in the transaction.
4. **Survivability, and the Doctrine of Merger.** Simply stated, the longstanding doctrine of merger presumes that all representations, warranties, and covenants contained in the purchase agreement merge with the deed at closing. Put another way, none survive closing unless the drafter inserts a survival provision into the purchase agreement.

A. Consider this forceful explanation set forth in *Bruggeman v. Jerry's Enterprises, Inc.*, 591 N.W.2d 705, 708 (Minn 1990):

Over a century ago, we announced our endorsement of the merger doctrine. See *Whitney v. Smith*, 18 N.W. 181 (1885); *Fritz v. McGill*, 18 N.W. 753 (1884). The merger doctrine generally precludes parties from asserting their rights under a purchase agreement after the deed has been executed and delivered. As we explained more than 100 years ago in *Griswold v. Eastman*, 53 N.W. 542, 543 (1892) . Where deeds are executed and accepted in performance of executory contracts to convey, the latter become functus officio, and thenceforth the rights of the parties are to be determined by the deeds, and not by the contracts, the presumption being that the deeds give expression to the final purposes of the parties; and the deeds will be conclusive unless it be shown that the grantees have been led by fraud or mistake of fact to accept something different from what the executory contracts called for, in which cases the courts will give relief as in other cases of fraud or mistake. By 1893, we declared that "[n]o rule of law is better settled" than the doctrine of merger. *Slocum v. Bracy*, 56 N.W. 826, 827 (1893).

5. **Overall Caution - Beware (or Take Advantage of) the "...is cancelled" Trap**

A. The PA or addenda may contain language providing that if a contingency is unfulfilled, the PA automatically is cancelled. By contrast, a provision that does not contain the automatic cancellation language is considered an unfulfilled condition that, in the event of default, only is able to be cancelled by the buyer as a “*cancellation with a 15-day right to cure*,” as provided by Minn. Stat. 559.217, Subd. 3.

B. Consider this language from the MNAR Inspection Contingency Addendum:

If Buyer, or licensee representing or assisting Buyer, notifies Seller, or licensee representing or assisting Seller, of the identified issues and proposed remedy, and if within _____ Business Days after such notice Buyer and Seller have not agreed in writing to a remedy of the identified issues, this Purchase Agreement is canceled without further notice required. Buyer and Seller shall immediately sign a *Cancellation of Purchase Agreement* confirming said cancellation and directing all earnest money paid hereunder to be refunded to Buyer, and thereafter neither party shall have any further liability to the other.

C. *Kalenburg v. Klein*, 847 N.W.2d 34 (Minn. App 2014) considered a provision in an MNAR Financing Addendum providing that “*If Buyer cannot secure financing specified in this purchase agreement, and the purchase agreement does not close on the closing date specified, this purchase agreement is cancelled.*” The court held that this language automatically cancelled the PA by its own terms, and that no formal declaratory cancellation under Minn. Stat. 559.217, Subd. 4, even though the Financing Addendum offered that permissive option to either party.

D. Practice Pointer: If time really is of the essence to your client, or if your client prefers that a contingency be accomplished by a certain date, consider inserting the phrase that in the event of default, “...this purchase agreement is cancelled.”

i. Alternatively, if your client does not prefer to risk automatic cancellation, delete the language that permits it, such that the defaulting party will have the right to cure.

E. Several MSBA forms include language stating that if a contingency is not met, the PA shall be “void,” or “void within 5 business days after the deadline date.” This language likely will be interpreted to cancel the PA under the *Kalenburg* reasoning.

6. **The Purchase Agreement.** An exhaustive analysis of the purchase agreement is beyond the scope and time allotted for this presentation. That said, we highlight some of the more common issues or misunderstandings.

A. Earnest Money. Contrary to popular lay-persons’ belief, it is elementary that the payment of earnest money is not required for the formation of a valid purchase agreement. Rather, payment is a simple condition of the contract which is a curable default. A mutual exchange of promises to buy and sell real property is sufficient consideration. *Craigmile v. Sorenson*, 58 N.W.2d 865, 872, (1953).

B. Effective Date. The “effective date,” used in the MNAR form, or the “acceptance date” used in the MSBA form is the date that the PA is signed and delivered by the

last signing party. It is the key date from which other contractual deadlines flow. The MNAR form specifically provides a line for insertion of the effective date, whereas the MSBA form does not. In the author's experience, far too many real estate agents fail to insert this key date.

- C. Closing Date. Neither the MNAR form nor the MSBA form contain the magic words that if closing does not occur by the specified date, "*this agreement is cancelled.*" This renders the failure to close a curable default. Consider whether automatic cancellation language is appropriate for your client.
- D. Wireless Devices. The days of exchanging only keys at the closing are since long over. Homes now often contain electronic or wireless locks, security systems, heating and air conditioning controls, appliance controls, etc. The PA should identify such items, and contain a provision requiring the seller at closing to deliver all electronic log-ins and password information.
- E. Built-Ins. Be certain that all fixtures are identified in the purchase agreement if there is any potential for misunderstanding. Common disputes can occur with respect to whether built-in entertainment systems, wall mounts, chandeliers, home security systems, dishwashers, satellite dishes, etc. are personal property or fixtures.
- F. FIRPTA Affidavit. The *Foreign Investment in Real Property Tax Act* (FIRPTA) requires that a buyer withhold 15% of the sale price and remit the funds withheld at closing along with Internal Revenue Service (IRS) forms 8288 and 8288-A unless an exemption to withholding applies. The buyer is responsible for determining whether any seller is a foreign person and if any withholding is required. If the buyer fails to withhold as required, the buyer may be held liable by the IRS for the seller's tax, penalty and interest.
 - i. The purchase agreement should require that the seller supply the "FIRPTA Affidavit," the most common exemption authorized by IRC § 1445(b)(2), that provides that for the buyer to be exempt from the withholding requirement. The affidavit must include a CNFS (Certification of Non-Foreign Status) stating under penalty of perjury; the seller's U.S. tax identification number; legal name; home address; address of property sold; and that the seller is not a foreign person.
- G. Homestead or Non-Homestead. Consider a representation in the PA regarding the homestead or non-homestead status of the property, since residential real estate title records do not reveal whether or not the property is seller's homestead. Minn. Stat. §507.02 requires both spouses to convey real estate. A conveyance of the homestead must be by joint deed signed by both spouses, and a conveyance without both signatures is void, as opposed to voidable. By contrast, a conveyance of non-homestead real estate requires both signatures, but sellers may use separate deeds.

- H. Electronic Signatures and Counterparts. The PA should contain the parties' agreement that the electronic signature of any party shall constitute valid and binding signatures, and that the agreement may be executed in counterparts.
- I. Personal Property. Mortgage loan underwriters do not wish to see, and often reject, a purchase agreement that lists items of personal property that requires a bill of sale, since lenders are not in the business of financing personal property. If appliances such as the refrigerator, washer, dryer, and microwave are to be included in the sale, the PA should contain a recital that these items are being transferred with no additional monetary value.
- i. And...it certainly is prudent to conduct a UCC-1 search in the office of the Secretary of State to ensure that the personal property is free from any encumbrances.
- J. Representing Your Licensee. Attorneys advising real estate brokers should be mindful of the view of the Minnesota Department of Commerce with respect to sloppy drafting. Consider this enforcement action quoted from *In the Matter of the Real Estate Broker's License of Donna Jean Grover*, MN DOC File #35416/CDL:

(The broker) has an established pattern of incomplete documentation and inadequate and insufficient preparation of documents to clearly identify the specific terms and obligations of the parties. Specifically: (a) Type of Financing - not specified in contracts; (b) Financing Contingency - terms upon providing evidence ambiguous and unclear; (c) Final acceptance date - not noted in file; (d) Extension of contracts - not in writing and signed off by all parties; (e) Estimate of Closing Costs - incomplete; (f) Evidence of acceptance of counter-offers, addendums or amendments - missing signatures and/or dates; (g) As-is term - ambiguous and unclear; and (h) Undated documents.

7. **Common Contingencies.**

- A. Title Examination. This, perhaps, is the most important service an attorney can render to a prospective buyer. The title commitment may indicate the need for many of the usual objections to marketability of title (e.g., the need to satisfy existing liens and encumbrances, record a certified copy of seller's divorce decree, etc.). However, the lender will be exclusively concerned with the validity and priority of its mortgage. The buyer, on the other hand, primarily will be concerned with their ability to use the property for their intended purpose, and the odds are very high that easements, restrictive covenants, and other documents of record may constrict that use, and that the restrictions will only be discovered after closing.
- i. This Actual Example. A couple signs a PA for the purchase of a new home on a small pond, intending that Spouse A relocate her highly profitable day care business from their former home. State regulations will require a fence

enclosing the yard and prohibiting the children's access to the pond. Spouse B intends to erect an architecturally tasteful, high quality storage shed immediately adjacent to the home. Buyers also intend to construct a deck off the dining room sliding glass doors. The good news is that there are no zoning restrictions on any of the intended uses. Documents of record, however, include restrictive covenants prohibiting any home business occupation, fencing, or the construction of outbuildings, as well as an electrical easement prohibiting construction of a deck in the intended area. Buyer had no attorney ("they cost too much"), and therefore no one calls these encumbrances to buyers' attention. After closing, buyers erect the fence, construct both the deck and the outbuilding, and re-open the day care business. Two weeks later, the next door neighbor, armed with a copy of the restrictive covenant, demands closure of the business, and removal of the fence and shed. The neighbor also reports the violation of the easement to the electrical company. Spouses A and B angrily complain, "*Nobody ever told us about this. Yeah, we saw the title commitment, but thought everything was OK because the lender approved our loan. We're now going to consult an attorney...admittedly after the fact.*" You, of course, know what advice you will give, to your clients' great dismay.

B. Financing Addendum

- i. Several Concerns to be Addressed, Including:
 - a. Buyers may not qualify for mortgage financing;
 - b. Buyers may qualify, but at an unacceptably high interest and PMI (private mortgage insurance) rate and terms;
 - c. In the current marketplace, most lenders will advise their buyers that the appraisal and underwriting process will take from 45 – 60 days from the date of the PA;
 - d. Sellers want immediate confirmation that buyers really do qualify for a loan;
 - e. Who will pay for any lender work orders?
- ii. Notwithstanding seller's desire for evidence of a binding loan commitment once the PA has been signed, Minn. Stat. 58.13, Subd. 1(12) expressly prohibits a loan originator from issuing "any document indicating conditional qualification or conditional approval for a residential mortgage loan, unless the document also clearly indicates that *final qualification or approval is not guaranteed, and may be subject to additional review.*
- iii. Drafting (or review) of the Financing Addendum will depend on the type of loan sought.

- a. Conventional loan;
- b. FHA (Federal Housing Administration) loan;
- c. DVA (Department of Veterans Affairs) guaranteed financing;
- d. USDA (U.S. Department of Agriculture) Rural Development Loan;
- e. MN Housing Financing Agency loans;
- f. Seller's mortgage to buyer;
- g. Contract for Deed financing;
- h. Down payment resource programs.

C. Appraisal Contingency

- i. The Concerns:
 - a. The appraisal might show a value less than the purchase price.
 - b. If the appraisal is low, does the buyer have the right to cancel the PA?
 - c. If the appraisal is low, may the seller contractually be permitted to reduce the purchase price?
 - d. If the appraisal is low, may the buyer contractually be permitted to unilaterally elect to pay the full purchase price with additional cash?
- ii. DVA Financing Addendum must contain the required escape clause:

DEPARTMENT OF VETERANS' AFFAIRS ESCAPE CLAUSE: "It is expressly agreed that, notwithstanding any other provisions of this contract, the purchaser shall not incur any penalty by forfeiture of earnest money or otherwise be obligated to complete the purchase of the Property described herein, if the contract purchase price or cost exceeds the reasonable value of this Property established by the Department of Veterans' Affairs. The purchaser shall, however, have the privilege and option of proceeding with the consummation of this contract without regard to the amount of reasonable value established by the Department of Veterans' Affairs."

- iii. MNAR Financing Addendum provides that if buyer cannot secure the financing specified in the PA, the PA is cancelled. A low appraisal likely will prevent buyer from securing the specified financing. However, the MNAR PA gives the following relief to a buyer who wishes to bring more cash to the table in order to purchase at a price higher than that appraised value: "buyer may finance ___% of the sale price, or more in Buyer's sole discretion."
- iv. MNAR forms are deliberately written to be neutral. However, Licensees are free to add additional clauses that favor their client. The author recommends that buyers' Licensees add an appraisal contingency, although strictly speaking one arguably is not necessary if the low appraisal results in lender's denial of financing and the buyer wants out.
- v. Consideration also should be given to a clause permitting seller to reduce the purchase price to the appraised value.

- vi. MSBA Form NO. 17 (Addendum to PA Contingencies for Survey, Appraisal, Development Evaluation, and Archeological / Historical Survey) contains language for an appraisal contingency, and permission of the seller to reduce the purchase price within a three-day period.
- vii. *Kalenburg*, supra, at 40: Lender denied financing for the purchase of a \$740,000 home because the appraisal came in at \$588,000. Seller notified buyer that they would reduce the price to \$588,000, but buyer declined. Held: seller's notice had no effect. "The financing addendum states that if Buyer cannot secure financing specified in this purchase agreement...this purchase agreement is cancelled...These provisions establish that the inability to obtain financing and the failure to close cancels the purchase agreement."

D. Inspection Contingency Addendum

- i. The Issues:
 - a. Buyers always should require such an addendum.
 - b. How long should the inspection period be, and what will be the consequences if the condition of the property becomes materially different between the inspection period and the closing date?
 - c. What qualifications or certifications, if any, should the inspector have?
 - d. Multiple inspections during the inspection period should be considered. For example, the initial inspector may recommend a supplemental inspection by licensed electrician, a fireplace inspector, moisture intrusion expert, structural engineer, or building contractor.
 - e. May the buyer cancel the PA based on the results of the inspections(s)? if so, may the buyer cancel the purchase agreement in their sole discretion based on the inspection results, or must some materiality threshold be met?
 - f. Must buyer furnish a copy of the inspection report to seller? In the alternative, might buyer wish to furnish excerpts of the report to seller if the defects are material so that both the seller and seller's agent would be required to disclose defects to future buyers? Why? Because...
 - i. ...Minn. Stat. §513.55 requires the seller to disclose to buyers all material facts that could adversely and significantly affect an ordinary buyer's use and enjoyment of the property; and ...
 - ii. ...Minn. Stat. 82.68 requires the seller's agent to disclose such material facts to buyers, regardless of whether the seller permits their agent to do so.
 - g. Consider the unreported case of *Zehrer v. Helland*, 1998 WL 346651 (Minn. App 1998) that held that as a matter of law, a buyer who has

obtained a professional inspection is deemed to have relied upon the results of that inspection, rather than on any of the seller's representations.

E. Seller's Contributions to Buyer's Closing Costs Addendum

- i. The Concern: Buyer may wish seller to agree to pay a portion of buyer's closing costs, determined by either a fixed cash contribution, a percent of the sale price, or a percent of the mortgage amount. This contribution could include an offset of buyer's title each fees. Such a provision is common in today's marketplace.
- ii. MNAR Form: Contains a broad definition of closing costs, including buyer's closing fees, title service fees, title searches, title examinations, abstracting, lender's title insurance, owner's title insurance, prepaid items, other costs allowed by buyer's lender, and any mortgage discount points. Any used portion shall be retained by seller.
- iii. MSBA Form No. 2: Contains a restrictive provision limiting seller's contribution only to buyer's mortgage discount points.

F. Buyer's Current Home Sale Contingency.

- i. The drafter should carefully consider whether closing is dependent upon buyer's ability to sell their current homestead. In the current market, such a contingency will be unattractive to many sellers. Most agents will advise buyers to have a fully executed PA for the sale of their home before entering into a PA for the purchase of a new home.
- ii. MNAR Form effective August 1, 2016, contains three options.
 - a. Option 1: Seller has right to demand removal of the contingency for the sale of buyer's home by providing written notice to buyer. Demand can be made for any reason or for no reason at all. Upon such demand, buyer can remove the contingency only by providing the seller with a valid purchase agreement. A showing of buyer's financial ability to close without sale of buyer's home is not sufficient to remove the contingency.
 - b. Option 2: Very simply, the purchase agreement is contingent upon the closing of the buyer's current home.
 - c. Option 3: Buyer represents their ability to financially perform the PA without having to sell or close on any other property.
- iii. MSBA Form 9.
 - a. Option 1: Buyer needs to sell buyer's current homestead. If no such sale occurs by the deadline date, and buyer does not waive this contingency, then the PA shall be void 5 business days after the deadline date.

b. Option 2: Buyer does not need to sell buyer's current homestead.

8. Point of Sale Inspections.

- A. Some Minnesota cities require point of sale inspections or Truth-In-Sale-of-Housing ("TISH") inspections.
 - i. Caution: some cities require such inspections before listing the home for sale, whereas other cities require such inspections prior to closing.
- B. The Minnesota Association of REALTORS® has compiled the following list of cities requiring such inspections: Bloomington; Crystal; Faribault; Golden Valley; Hopkins; Maplewood; Minneapolis; New Hope; North Mankato; Osseo; Richfield; Robbinsdale; St. Louis Park; St. Paul; and South St. Paul.
- C. Counsel should carefully review the applicable ordinance. Penalties for non-compliance vary, and some municipalities make violations a misdemeanor.

9. Common Disclosures

- A. Seller's Property Disclosure Statement (Minn. Stat. 513.52 – 513.61).
 - i. A seller who fails to disclose a known adverse condition is liable for any resulting harm. *Minn. Stat. §513.57, subd. 2.*
 - ii. However, liability will not be imposed upon a seller for "any error, inaccuracy, or omission" if it "was not within the personal knowledge of the seller." *Minn. Stat. §513.57, subd. 1.*
 - iii. Nor will liability be imposed on a seller for failure to disclose information "that could be obtained only through inspection or observation of inaccessible portions of the real estate or could be discovered only by a person with expertise in a science or trade beyond the knowledge of the seller." *Minn. Stat. §513.57, subd. 1; see also Nance v. Evje, 2007 WL 247499 (Minn. App. 2007).*
 - iv. The statutory standard is not one of negligence, but rather that of "scienter," such that an offending party must know that his act or omission is wrongful. *Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 186 (1999), citing Restatement (Second) Torts §876(b).*
- B. Common Interest Community (CIC) Disclosure and related Resale Disclosure Certificate for those properties subject to Minnesota Statutes Chapter 515B (Minnesota Common Interest Ownership Act).
 - i. Beware: Disclosure is not required where no association or master association has an obligation to maintain any building containing a dwelling. Common examples include CIC's where the association maintains the monument, a park, a pool or other amenities.
 - ii. Practice Pointer: Carefully review the title commitment to determine whether

any such association exists. If so, obtain all association documents and records, and determine the number of dues and/or arrearages.

C. Arbitration Disclosure – An MNAR Form.

- i. Voluntary; must be signed by buyer, seller, buyer's agent and seller's agent.
- ii. Waives the right to litigate disputes.
- iii. Administered by the National Center for Dispute Settlement, www.ncdsusa.org.
- iv. A request for arbitration must be filed within 24 months of the date of the closing on the property or else the claim cannot be pursued. In some cases of fraud, a court or arbitrator may extend the 24-month limitation period provided herein.
- v. Consider this opening statement at a CLE presentation to trial attorneys by one of the author's most admired attorneys specializing in real estate dispute resolution: "*My professional opinion is that 100% of real estate disputes should be resolved by arbitration rather than litigation. Who disagrees with me?*" Several hours later, no contrarians were left standing...but that's another story.