

# Real Estate Contracts 2018

---



## Basic Contract Law

### Creation of a Contract

---

#### Basic types of Contracts:

- Express
  - Written or oral contracts in which the parties have reached specific agreement

#### Implied

Agreements obtained verbally or by actions. May be enforceable under certain circumstances.

#### Parol Evidence Rule

- Evidence of written agreements generally take precedence over verbal agreements.

#### Statute of Frauds:

- Contracts for the Sale of Real Property must be in writing to be enforceable
- Signature/Initials to contract to evidence assent to its terms and conditions

# Basic Contract Law

## Essential Contract Elements

---

### Parties:

- Requires parties to be competent
- Over 18 years of age
- Not otherwise adjudicated unfit or incompetent
- **Note: Estates, LLCs, Trusts, Partnerships, Powers of Attorney**
  - Ensure that the parties are authorized to act
  - Big issue with lender servicing companies
  - Recent Case: Guy Gugliotta

# Basic Contract Law

## Essential Contract Elements

---

### Offer and Acceptance:

- Contract must evidence a “meeting of the minds”
  - Must show agreement to all material terms of the contract
  - Recent Case Law: Bush v. H-Z Leesburg: BE CAREFUL WITH GENERAL DESCRIPTIONS

## Basic Contract Law

### Essential Contract Elements

---

#### Consideration:

- Must contain evidence of consideration---usually monetary
- Legislative and Regulatory Focus on Deposits

## Basic Contract Law

### Essential Contract Elements

---

#### Description:

- Must have agreement as to the object of the contract
- Especially important in real estate that the property in question is clearly stated
  - Vacant lots included? Personal Property? Vested Rights?

## Basic Contract Law

### Essential Contract Elements

---

#### Potential Defenses to contract:

- Illegal purpose or object
- Duress (force or threat of force)
- Undue Influence (drugs/alcohol/dependency/trust)
- Mistake, Misrepresentation or Fraud

## Basic Contract Law

### Essential Contract Elements

---

#### Contracts meeting the essential elements

- Valid Contracts
- Contracts not meeting essential elements may be void or unenforceable
- Contracts may be voidable
  - Contingencies

## Themes for the recent revisions

---

Move from a checklist/educational document to more contract base

more streamlined contract with less addenda

mold contract to standard practices

- IMPORTANT TO CHECK VERSIONS

## July 2017 NVAR Contract Changes

---

### 2. PRICE AND SPECIFIED FINANCING

- ADDS: USDA as a Financing Option

## July 2017 NVAR Contract Changes

---

### 3. DEPOSIT

- Adds the word "DEPOSIT" after each delivery option

## July 2017 NVAR Contract Changes

---

### 10. PROPERTY MAINTENANCE AND CONDITION

- Removes "and/or other inspections" under the option for Buyer to waive home inspection

## July 2017 NVAR Contract Changes

---

### 12. UTILITIES, WATER, SEWAGE, HEATING AND CENTRAL AIR CONDITIONING

ADDS language that Seller must disclose a Septic Waiver Disclosure per Section 32.1-164.1:1

Notifies that State Board of Health Septic System Waivers are not transferable

## July 2017 NVAR Contract Changes

---

### 24. POSSESSION DATE

Updated to add:

- Seller to provide Keys, Key Fobs, Access Codes and Digital Keys at settlement

## July 2017 NVAR Contract Changes

---

### 41. ADDITIONS

#### Adds:

- USDA FINANCING ADDENDUM as an option

## July 2017 NVAR Contract Changes

---

### K1371 USDA FINANCING ADDENDUM

- Specifically Drafted to address the requirements associated with USDA Loans
- Includes provisions for:
  - Rural Housing Guarantee Fee
  - USDA Amendatory Clause for Appraisal Contingency
  - Inclusion of Fences and Outbuildings in Termite Report



## July 2017 NVAR Contract Changes

---

### K1342 HOME INSPECTION AND RADON TESTING CONTINGENCY ADDENDUM

#### ADDS:

- 2. HOME INSPECTION WITH OPTION TO VOID ONLY
  - Created to Clarify the practice of HOME INSPECTION FOR INFORMATIONAL PURPOSES ONLY

## July 2017 NVAR Contract Changes

---

### K1344 CONTINGENCIES AND CLAUSES ADDENDUM

#### 1(C) CONTINGENT ON THE SELLER PURCHASING ANOTHER HOME

- Modified to clarify the purpose of the Contingency
- Permits Seller to ratify a Contract for Purchase of another Home
- Permits Seller to conduct any due diligence deemed necessary (Home Inspection, Radon, etc.)

## July 2017 NVAR Contract Changes

---

K1344 CONTINGENCIES AND CLAUSES ADDENDUM

2(F) REAL ESTATE COOPERATIVE

New Paragraph

For use in Real Estate Cooperatives Only---tracks statutory requirements for Cooperatives

Buyer has the right to void the contract upon receipt of the Public Offering Statement

## July 2017 NVAR Contract Changes

---

K1360 WELL AND SEPTIC ADDENDUM

Clarifies a distinction between a "Water Potability Test" in 1(A)

and

a "Well Water Inspection" in 1(B)

Also

Mirrors Home Inspection Contingency

- Inspection Deadline
- Negotiation Period
- Buyer's Election Period

## July 2017 NVAR Contract Changes

---

### K1360 PRIVATE WELL AND/OR SEPTIC CONTINGENCY ADDENDUM

#### 2. SEPTIC

- A. ALTERNATIVE SYSTEM MAINTENANCE CONTRACT
- Not a new provision, now has its own paragraph to highlight its importance

## July 2017 NVAR Contract Changes

---

### K1360 WELL AND SEPTIC ADDENDUM

#### 2. SEPTIC

- B. Septic Inspection Contingency
  - Mirrors Home Inspection Contingency
  - Clarifies a Walk Over Inspection with Probing of the Drainfield Area for Conventional
  - Clarifies a Visual Inspection for Alternative Septic
  - Permits buyer to elect
    - Pumping and Inspection for treatment tanks
    - Excavation as necessary to inspect distribution boxes
  - Buyer required to restore property if the contract is voided

## January 2018 NVAR Contract Changes

---

K1360---PRIVATE WELL AND/OR SEPTIC CONTINGENCY ADDENDUM

**2. Negotiation Period.** In the event of B.1a)above, the parties shall have until 9 p.m. Days after Buyer's Delivery of Septic Inspection Addendum

TECHNICAL CHANGE TO CORRECT AN ERRONEOUS REFERENCE TO A.1 TO B.1a)

## July 2017 NVAR Contract Changes

---

K1020 and K1225 Pre- and Post Settlement Occupancy Agreements

Language clarifies that the agreements are exempt from the VRLTA and the VLTA

## January 2018 NVAR Contract Changes

---

K1020---SELLERS POST-SETTLEMENT OCCUPANCY AGREEMENT

K1225---BUYER'S PRE-SETTLEMENT OCCUPANCY AGREEMENT

**3. PROPERTY MAINTENANCE AND CONDITION** Buyer shall conduct the walk-through inspection(s) of Property, as provided in the Contract, before Date of Occupancy. Any exceptions shall be governed by the terms of the Contract. Unless Buyer immediately Delivers to Seller written exceptions from the walk-through inspection(s), Buyer accepts the condition of Property. After occupancy, Buyer shall maintain and repair Property, including electrical, plumbing, existing appliances, heating, air conditioning, equipment and fixtures in substantially the same condition as of Date of Occupancy. Occupancy, without Delivering written objection to defects, satisfies the property condition provisions of the Contract.

## January 2018 NVAR Contract Changes

---

K1208---NEW HOME SALES CONTRACT

- NEW FORM
- ONLY USED WHEN BUYER BUYS THE LOT AND THEN CONSTRUCTS HOME
- DO NOT USE IF:
  - LOT IS ALREADY OWNED (NO SALE CONTEMPLATED)
  - BUILDER OWNS THE LOT AND WILL BE BUILDING A HOUSE
  - BUILDER OWNS THE LOT AND HAS ALREADY BEGUN BUILDING A HOUSE

## January 2018 NVAR Contract Changes

---

K1208—NEW HOME SALES CONTRACT

**2. IMPROVEMENTS, OPTIONS, AND/OR EQUIPMENT INCLUDED** (collectively, the “Improvements”). **The Seller agrees to construct and/or install all Improvements in compliance with the drawings, specifications and plans created by the Seller**, which are attached, hereto (collectively, the “Plans”), including providing and installing all standard features and options listed on a separate addendum (See Option Addendum attached). Seller shall include an active radon remediation system as part of the Plans. Subsequent changes to the Plans or to the Options Addendum will be handled as stated in the CHANGES AND ADDITIONAL WORK REQUESTS Paragraph of this Contract.

## January 2018 NVAR Contract Changes

---

K1208—NEW HOME SALES CONTRACT

**CONSTRUCTION** Within 5 business days following the Date of Ratification, **Seller shall seek all appropriate permits and approvals for the construction of the Improvements to complete the Project**. Seller shall name the Settlement Agent’s title insurance underwriter as its Mechanics Lien Agent on all permit applications and Seller shall post all permits at Property at all times and in accordance with law.

Construction will begin within \_\_\_\_\_ days after Settlement and Seller will Deliver Notice of Substantial Completion on or about (“Substantial Completion Date”). Buyer is aware that delays caused by events beyond the control of Seller such as: work stoppages, municipal approvals and permits, strikes, lockouts, weather, availability of labor, materials, craftsmen, acts of God, terrorism, and anything unanticipated and unforeseen are not included in the calculation of time estimates. **Notwithstanding the above, in the event the Project is not Substantially Complete within 24 months from the Date of Ratification, then this Contract may be voidable at the sole option of the Buyer.** Any such termination shall be without penalty to Buyer, and any Deposit shall be promptly returned to Buyer.

Delays caused by such events do not constitute abandonment or constitute a default on Seller’s part and are not included in calculating time frames for payment or performance.

## January 2018 NVAR Contract Changes

---

K1208---NEW HOME SALES CONTRACT

**8. OCCUPANCY** Occupancy may occur only after Buyer has received **Seller's Notice of Substantial Completion**. Delivery of Property at Settlement, and completion of the Project are not severable and Seller's obligation of performance **requires that the Project be Completed and delivered to the Buyer under the terms and conditions of this Contract.**

## January 2018 NVAR Contract Changes

---

K1208---NEW HOME SALES CONTRACT

**A. Express Warranty.** In addition to any other warranty implied by law, the Seller warrants that, as of Occupancy, the Improvements shall be (i) **free from structural defects**, so as to pass without objection in the trade; (ii) **constructed in a workmanlike manner**, so as to pass without objection in the trade; and (iii) **fit for habitation**. Seller shall assign all manufacturer warranties to Buyer on Project Completion Date. Unless otherwise agreed to in writing, no other warranty is provided. Buyer may wish to pursue obtaining a separate warranty.

**B. Third Party Homeowners Warranty.** Seller shall provide Buyer at **Seller's cost a new home warranty of at least 10 years** issued by a nationally recognized third-party homeowner's warranty insurance company. Buyer acknowledges that before signing this Contract, Buyer has received and reviewed information concerning the terms and conditions of such third-party homeowner's warranty insurance. Seller shall pay the premium associated with such insurance, thereafter Buyer's rights and responsibilities

## January 2018 NVAR Contract Changes

---

K1208---NEW HOME SALES CONTRACT

### 26. INSPECTIONS

**A. Progress Inspections.** For each Benchmark (defined below), Buyer and/or Buyer's representative shall have the right to conduct progress inspections of Property for purposes of assuring that the Seller is constructing the Improvements in accordance with this Contract. Seller shall Deliver Notice to Buyer of each Benchmark no less than 2 Days in advance of the Benchmark. The following times shall be a "Benchmark" permitting such inspections:

- a) After foundation cure and waterproofing but prior to backfilling;
- b) After rough-ins for electrical and plumbing (where Buyer can select locations not already identified in the Plans for finishes and outlets) and prior to close-in; and
- c) Prior to Substantial Completion, as part of the Inspection processes, identified herein

Buyer shall Deliver Notice to Seller of any discrepancy with the Plans within 2 Days following the Benchmark. Prior to Project Completion Date, Seller shall Deliver written assurance that the discrepancies have been cured and such assurance shall survive Project Completion Date and is not part of any disclaimer of warranty.

## January 2018 NVAR Contract Changes

---

K1208---NEW HOME SALES CONTRACT

### B. Buyer Private Final Inspection.

1. Buyer and/or Buyer's representative will have the right to conduct a Private Final Inspection. If Buyer wishes to conduct a Private Final Inspection, Buyer must Deliver to Seller Notice of Private Final Inspection with the date and time of such inspection no more than 2 business days after receipt of the Notice of Substantial Completion. The Buyer Final Inspection shall occur no less than 2 business days after the Notice of Private Final Inspection is Delivered to Seller but no later than 5 business days after Buyer's receipt of the Notice of Substantial Completion.

2. Buyer must Deliver a copy of the Private Final Inspection Report to Seller within 2 business days of the Inspection. Seller will include the agreed upon items from the Private Inspection Report, if any, on the Seller's Final Inspection Report, but reserves the right to deny items. Any items from the Private Final Inspection Report that are denied by Seller will be explained in writing and Delivered to Buyer in a separate report prior to Project Completion Date.



# January 2018 NVAR Contract Changes

---

K1208----NEW HOME SALES CONTRACT

## C. Seller Final Inspection

**1. Scheduling if Buyer Conducts Private Final Inspection.** If Buyer conducts a Private Final Inspection, as defined above, then Seller will schedule the Seller's Final Inspection within 2 business days of receipt of Buyer's Notice of Private Inspection. The Seller Final Inspection will be set for a time no sooner than 1 business day, and no later than 2 business days after the Buyer Private Final Inspection.

**2. Scheduling if Buyer Does Not Conduct Private Final Inspection.** If Buyer elects not to conduct a Private Final Inspection, then the date and time of the Seller Final Inspection to be set by Seller no sooner than 2 business days after Seller's Delivery to Purchaser of Notice of Substantial Completion.

**3.** At a date and time scheduled pursuant to 1 or 2 above, Buyer and Seller shall, during normal business hours, inspect Property. Seller shall prepare a Seller Final Inspection Report, which includes an itemized list which Buyer shall sign at the time of this inspection. The Seller Final Inspection Report is Buyer's assurance that any incomplete work duly noted thereon will be done as promptly as weather and work load permit. It is further understood and agreed that no funds shall be held in escrow in the event that any of the items on the Seller's Final Inspection Report are not completed at Project Completion Date. Items noted on Seller's Final Inspection Report will be corrected only if Buyers are entitled to the items under this Contract or the warranty. Nothing contained herein shall prevent the parties from mutually agreeing to combine the Buyer Private Final Inspection and the Seller Final Inspection to be concurrently conducted. The provisions of this paragraph shall survive Project Completion Date.

# January 2018 NVAR Contract Changes

---

K1208----NEW HOME SALES CONTRACT

**D. Walkthrough Inspection** Buyer and/or Buyer's representative will have the right to make walk-through inspection(s) within 2 days prior to Project Completion Date unless otherwise agreed to by Buyer and Seller. Seller shall be responsible for providing all utilities required for such inspection.

# January 2018 NVAR Contract Changes

---

K1382---CONSTRUCTION FINANCING AND APPRAISAL CONTINGENCIES ADDENDUM

Single Financing Contingency Form for all standard financing types

# January 2018 NVAR Contract Changes

---

K1382---CONSTRUCTION FINANCING AND APPRAISAL CONTINGENCIES ADDENDUM

## 2. FINANCING CONTINGENCY

B. If this contingency has not been satisfied by the Financing Deadline, **this contingency will continue up to and including Settlement Date**. However, upon expiration of the Financing Deadline, Seller may at **Seller's option Deliver Notice to Buyer** that Buyer has 3 Days to void the Contract. If **Buyer does not void** the Contract within 3 Days following Delivery of Seller's Notice, this **contingency is removed** and the Contract will remain in full force and effect with no Financing Contingency.

# January 2018 NVAR Contract Changes

K1382---CONSTRUCTION FINANCING AND APPRAISAL CONTINENCIES ADDENDUM

## APPRAISAL CONTINGENCY

### A. Conventional Financing.

2. The Appraisal is **equal to or greater than the Total Purchase Price**. However, Buyer elects not to proceed with consummation of this Contract because **Property does not satisfy the lender(s) requirements**, the Appraisal **does not allow for the Specified Financing** or Property is **inadequate collateral**. Such Notice must be **accompanied by a written denial** of the financing showing written evidence of the lender(s)'s decision concerning Property. Buyer must provide such written evidence concurrently with Buyer's Notice of election not to proceed; **OR**

3. The Appraisal is **not equal to or greater than** the Total Purchase Price and **Buyer elects not to proceed** with consummation of this Contract unless **Seller elects to lower the Total Purchase Price** to the appraised value. Buyer's Notice shall include a copy of the written statement setting forth the appraised value of Property. It will be **Seller's option** to lower the Total Purchase Price to the appraised value and the parties shall proceed to Settlement at the lower Total Purchase Price. If Seller does not make this election, the parties may agree to mutually acceptable terms. Each election must be made by Notice within three Days after Notice from the other party. The parties will immediately sign any appropriate amendments. If the parties fail to agree, this Contract will become void; **OR**

4. **Buyer elects to proceed** with consummation of this Contract without regard to the Appraisal. The parties shall proceed to Settlement.

5. If Buyer fails to give Seller Notice by the Appraisal Deadline, this **contingency will continue**, unless Seller at Seller's option gives Notice to Buyer that this Contract will become void. If Seller delivers such Notice, this Contract will become void at 9 p.m. on the third day following Delivery of **Seller's Notice**, unless prior to such date and time Buyer delivers the required Notice.

# January 2018 NVAR Contract Changes

K1373---OPTIONS ADDENDUM (NEW HOME SALES CONTRACT)

CONTAINS TWO SECTIONS:

1. OPTIONS INCLUDED IN THE BASE SALES PRICE
2. OPTIONS NOT INCLUDED IN THE BASE SALES PRICE

## January 2018 NVAR Contract Changes

---

K1336---EXCLUSIVE RIGHT TO SELL LISTING AGREEMENT

TECHNICAL CHANGE---RENUMBERED SECOND PARAGRAPH 26 TO 27 (ATTORNEYS FEES)

## January 2018 NVAR Contract Changes

---

K1338---EXCLUSIVE RIGHT TO REPRESENT BUYER AGREEMENT

CLAIFIES BUYER RESPONSIBLE TO PAY EARLY TERMINATION FEE TO BROKER IN ADDITION TO ANY OTHER FEES TO WHICH BROKER MAY BE ENTITLED

**4. TERM AND TERMINATION** This Agreement commences when signed and, subject to the COMPENSATION paragraph, expires at 11:59 p.m. on \_\_\_\_\_ (“Expiration Date”). Either party may terminate this Agreement prior to the Expiration Date by notice to the other. In the event Buyer wishes to **terminate this Agreement prior to the Expiration Date, without good cause**, Buyer shall **compensate Broker** \$\_\_\_\_\_ (“Early Termination Fee”), in addition to any compensation otherwise due pursuant to this Agreement.

## January 2018 NVAR Contract Changes

---

### K1338---EXCLUSIVE RIGHT TO REPRESENT BUYER AGREEMENT

**5. BROKER'S DUTIES** Broker shall promote the interests of Buyer by: (a) performing the terms of the brokerage agreement; (b) seeking a property at a price and terms acceptable to Buyer; (c) presenting in a timely manner all written offers or counteroffers to and from Buyer; (d) disclosing to Buyer all material facts related to the property or concerning the transaction of which they have actual knowledge; (e) accounting for in a timely manner all money and property received in which Buyer has or may have an interest. Unless otherwise provided by law or Buyer consents in writing to the release of the information, Broker shall maintain the confidentiality of all personal and financial information and other matters identified as confidential by Buyer, if that information is received from Buyer during the brokerage relationship. In satisfying these duties, Broker shall exercise ordinary care, comply with all applicable laws and regulations, treat all prospective sellers honestly and not knowingly give them false information. In addition, Broker may: show the same property to other buyers; represent other buyers on the same or different properties; represent sellers relative to other properties; or provide assistance to a seller or prospective seller by performing ministerial acts that are not inconsistent with Broker's duties under this Agreement. **Buyer acknowledges that seller or seller's representative may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by a written confidentiality agreement between the parties.**

## January 2018 NVAR Contract Changes

---

### K1338---EXCLUSIVE RIGHT TO REPRESENT BUYER AGREEMENT

**6. BUYER'S DUTIES** Buyer shall: (a) work exclusively with Broker during the term of this Agreement; (b) pay Broker, directly or indirectly, the compensation set forth below; (c) comply with the reasonable requests of Broker to supply any pertinent financial or personal data needed to fulfill the terms of this Agreement; and (d) be available during Broker's regular working hours to view properties.

**Buyer is advised against and assumes responsibility for taking, posting, publishing or displaying any photo or video recording of any property without first obtaining seller's prior written consent. Buyer hereby releases and holds harmless Broker, Broker's designated agents, sales associates and employees from any liability which may result therefrom. Buyer also acknowledges that seller may have a video and/or audio recording system in the property, even if prior disclosure is not made.**

## January 2018 NVAR Contract Changes

---

### K1338---EXCLUSIVE RIGHT TO REPRESENT BUYER AGREEMENT

#### Paragraph 8(B)(1):

Modified to clarify that Broker's Fee is owed to Broker after Termination only if Buyer later acquires real property of the same type a discussed in the Purpose (paragraph 7)

## January 2018 NVAR Contract Changes

---

### K1338---EXCLUSIVE RIGHT TO REPRESENT BUYER AGREEMENT

#### Paragraph 14:

Adds headings to each paragraph for clarity:

Professional Services

Megan's Law

Wire Fraud

Service Provider Referrals

#### NOTE: WIRE FRAUD HIGHLIGHTED DUE TO SIGNIFICANT RISKS

- WARNS BUYER TO TAKE PRECAUTIONS
- ADVISED NOT TO RELY EXCLUSIVELY ON ELECTRONIC COMMUNICATIONS
- ADVISED TO ORALLY VERIFY ANY CHANGES TO WIRE INSTRUCTIONS

## Questions? Contact me:

---

Charles Fincher, Esq.

The Fincher Law Firm/ METROPOLITAN TITLE

Leesburg | Gainesville | Fairfax | Middleburg | Winchester

703.771.0000 p | 703.771.1767 f