

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Introductory Material

Handling Real Property Sales Transactions

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Scope of Guide

This Action Guide prepares an attorney representing a buyer or seller of real estate to advise the client at each stage of the transaction, from hiring a broker through postclosing due diligence. It covers essentials of a purchase agreement for a residential or commercial property transfer.

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**Abbreviations**

Advising Partners	<a href="#"><u>Advising California Partnerships (3d ed Cal CEB 1999)</u></a>
California Land Use Practice	<a href="#"><u>California Land Use Practice (Cal CEB 2006)</u></a>
Landlord-Tenant	<a href="#"><u>California Landlord-Tenant Practice (2d ed Cal CEB 1997)</u></a>
Machlin & Young	Machlin & Young, Managing Environmental Risk (1988)
Mortgage & Deed of Trust	<a href="#"><u>California Mortgage and Deed of Trust Practice (3d ed Cal CEB 2000)</u></a>
Real Estate Broker	Approaching an Action Against a Real Estate Broker (Cal CEB Action Guide September 2006)
Real Estate Finance	<a href="#"><u>California Real Estate Finance Practice: Strategies and Forms (Cal CEB 2000)</u></a>
Real Prop Exchanges	<a href="#"><u>Real Property Exchanges (3d ed Cal CEB 2002)</u></a>
Real Property Forms Man	California Real Property Practice Forms Manual (Cal CEB 1988)
Real Property Remedies	<a href="#"><u>California Real Property Remedies and Damages (2d ed Cal CEB 2002)</u></a>
Real Property Sales	<a href="#"><u>California Real Property Sales Transactions (4th ed Cal CEB 2007)</u></a>
Subdiv Map Act	<a href="#"><u>California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001)</u></a>
Title Ins	<a href="#"><u>California Title Insurance Practice (2d ed Cal CEB 1997)</u></a>
Transferring Prop	<a href="#"><u>Transferring Property Without Probate (Cal CEB Action Guide September 2008)</u></a>

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Before Buying or Selling Property

## STEP 1. IDENTIFY CLIENT'S NEEDS AND OBJECTIVES

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### CONSIDER TIMING OF INITIAL CLIENT CONTACT

#### Commercial Buyer or Seller

Typically, the buyer or seller of commercial property will contact you before signing purchase and sale agreement.

#### Residential Buyer or Seller

Typically, the buyer or seller of residential property will first contact you *after* agreement is signed, escrow is closed, and problem develops.

### CONSIDER YOUR ROLE

Depending on the timing of your contact with client, consider nature of assistance client might need, *e.g.*:

- a. Negotiations (see [step 20](#), below);
- b. Drafting or review of sale or related documents (see [step 20](#), below);
- c. Advice regarding broker (see [steps 2-4](#), below);
- d. Review of disclosure and due diligence process (see [steps 4-15](#), [21](#), [27-31](#), below);
- e. Advice regarding sales transaction; or
- f. Dispute resolution.

### INTERVIEW CLIENT

Collect information to help you advise client on desirable contract provisions and structure of transaction.

IF REPRESENTING SELLER

### REASON FOR SELLING

Determine why seller wants to sell the property.

### FINANCIAL CONSIDERATIONS

#### Seller's Expected Profit

Find out amount seller expects from sale of the property.

#### Seller's Risk Tolerance

Ask how much risk seller can tolerate, *e.g.*, whether seller can:

- a. Deal with the uncertainties, delays, and expenses connected with development and other deal contingencies;
- b. Finance all or a portion of the purchase;

c. Share expense or liability risks for defects in, *e.g.*:

- (1) Title;
- (2) Improvements; or
- (3) Land, *e.g.*:
  - (a) Hazardous substance contamination;
  - (b) Other soil conditions.

#### CONDITION OF PROPERTY

Collect information regarding the property, *e.g.*:

- a. Whether it is improved or unimproved;
- b. Status of zoning, land use entitlements, permits, and leases;
- c. Title;
- d. Condition, *e.g.*, defects.

If Property Includes a Business

The considerations involved in the purchase or sale of real property that includes a going business are beyond the scope of this Action Guide. See generally California Real Property Sales Transactions (4th ed Cal CEB 2007), referred to throughout this Action Guide as Real Property Sales; see also Sales and Mergers of California Businesses (Cal CEB 2002).

#### POTENTIAL BUYERS

Determine what seller knows about potential buyers.

#### SELLER'S NEEDS FOR ASSISTANCE

Assist seller in deciding whether to seek professional services to:

- a. Investigate title;
- b. Ascertain market conditions and values;
- c. Assess special circumstances, *e.g.*:
  - (1) Location;
  - (2) Historic landmark status;
  - (3) Special use;
  - (4) Disclosures;
  - (5) Hazardous substances;
- d. Locate potential buyers.

IF REPRESENTING BUYER

#### REASON FOR BUYING PROPERTY

Find out why buyer is interested in the property.

If Investment, What Buyer Wants

If investing in property, determine what buyer expects in return, *e.g.*:

- a. Safety of capital;
- b. High growth potential;
- c. High annual cash earnings;
- d. Liquidity of investment;
- e. Sheltering of income.

## FINANCIAL CONSIDERATIONS

### Buyer's Risk Tolerance

Assess how much risk buyer can tolerate; *e.g.*, can buyer:

- a. Operate highly leveraged property (*i.e.*, property acquired with a relatively small down payment and large loan(s), resulting in high loan repayment obligations);
- b. Handle delays and uncertainties of government permit processes and other development contingencies;
- c. Share expense or liability risks for defects in, *e.g.*:
  - (1) Title;
  - (2) Improvements; or
  - (3) Land, *e.g.*, hazardous substance contamination, or other soil conditions;
- d. Handle disappointing financial results of a business purchase;
- e. Pay the purchase price.

### Financial Deadlines

Calculate whether buyer faces any financial deadlines, *e.g.*, must buyer reinvest proceeds from a tax-deferred exchange by a certain date. For discussion of tax-deferred exchanges, see [step 15](#), below.

## POTENTIAL PROPERTIES

Find out what buyer knows about locating and evaluating specific properties.

## BUYER'S NEEDS FOR ASSISTANCE

Assist buyer in deciding whether to seek professional services to:

- a. Locate and evaluate property;
- b. Ascertain market conditions and values;
- c. Calculate annual net after-tax cash flow and probable appreciation in investment property;
- d. Assess special circumstances, *e.g.*:
  - (1) Location;
  - (2) Historic landmark status;
  - (3) Special use;
  - (4) Hazardous substance contamination;

(5) Flood and seismic zones;

(6) Structural conditions;

e. Evaluate development process and costs.

#### DOCUMENT REPRESENTATION

Determine whether written fee agreement or contract containing specified information is required under the Business and Professions Code, or is otherwise desirable.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Before Buying or Selling Property/STEP 2. CONSIDER ADVISING SELLER OR BUYER TO HIRE A BROKER

## STEP 2. CONSIDER ADVISING SELLER OR BUYER TO HIRE A BROKER

### ADVANTAGES TO SELLER

#### WHAT A BROKER REPRESENTING A SELLER CAN DO

A knowledgeable broker can assist in:

- a. Ascertaining property value;
- b. Developing and implementing effective strategies to market the property;
- c. Compiling information about the physical and economic condition of the property and neighborhood;
- d. Preparing or arranging for reports and surveys;
- e. Negotiating terms;
- f. Finding and exchanging like-kind property;
- g. Marketing the property to prospective buyers; and
- h. Complying with disclosure requirements.

### DISADVANTAGES TO SELLER

#### COMMISSION DECREASES SELLER'S RETURN

Seller pays broker's commission, usually a percentage of the selling price.

#### DUAL AGENCY

Seller's broker may become agent for buyer as well, when, *e.g.*:

- a. Seller and buyer are represented by same broker, but by different salespersons within broker's office; or
- b. Seller's broker, through conduct in dealing with buyer, becomes buyer's agent.

#### Risk of Conflicting Duties

When dual agency occurs, broker/agent owes fiduciary duties to principals with opposing interests, *i.e.*, performing the duties to one principal may violate a fiduciary duty to the other.

**Further Research:** For discussion of the issue of dual agency, see [CC §§2079.21, 2349-2351](#); see also [Real Property Sales, chap 2: Approaching an Action Against a Real Estate Broker, step 11 \(Cal CEB Action Guide September 2006\)](#), referred to throughout this Action Guide as Real Estate Broker.

#### MUST DISCLOSE MORE FACTS TO RESIDENTIAL BUYERS

If the property consists of one to four dwelling units, broker involved in transaction is required to ([CC §§2079-2079.6, 2079.12](#)):

- a. Conduct reasonably competent and diligent visual inspection of accessible portions of the property; and
- b. Disclose to prospective buyers *all facts* revealed by the inspection, especially those that materially affect the value or desirability of property.

## Broker's Duty to Inspect and Disclose

- a. This inspection and disclosure law codifies and modifies the holding in *Easton v Strassburger* (1984) 152 CA3d 90, 199 CR 383. See CC §2079.12.
- b. Under CC §2079.3, a real estate agent's duty of visual inspection does not include areas outside the property, public records, or permits relating to the use or title of the property. But see *Field v Century 21 Klowden-Forness Realty* (1998) 63 CA4th 18, 73 CR2d 784 (broker exclusively representing buyer has broader duty to inspect than required by disclosure statutes).

## NOTE

The disclosure statute is not intended to change any existing duty to disclose material facts within the knowledge of a broker or salesperson. Stats 1994, ch 339, §3.

- c. Existing law affecting transfers of residential real property also applies to the resale of personal property manufactured homes or mobilehomes, as defined, on or after January 1, 1999. Civil Code §1102 and Health & S C §18160 clarify that the disclosure requirements after that date will apply to a manufactured home or mobilehome if it is classified as personal property. For further discussion, see Real Property Sales, chap 2.

## Compare With Seller Disclosure Obligation

Seller is required to disclose only *material facts already known* to seller (*i.e.*, no duty to inspect). *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325; *Lingsch v Savage* (1963) 213 CA2d 729, 735, 29 CR 201; *Herzog v Capital Co.* (1945) 27 C2d 349, 353, 164 P2d 8.

## COMPARE COMMERCIAL PROPERTY

Broker has no comparable duty to inspect and disclose in connection with commercial property or residential property with more than four units. See *Smith v Rickard* (1988) 205 CA3d 1354, 1360, 254 CR 633.

See step 4, below. See also Real Property Sales, chap 2.

## ADVANTAGES TO BUYER

## EXPERT HELP

A knowledgeable broker can help buyer:

- a. Ascertain property value;
- b. Negotiate terms;
- c. Compile information about physical and economic condition of property and neighborhood; and
- d. Prepare or arrange for reports and surveys.

## TYPICALLY NO EXTRA COST

Broker:

- a. Does not usually charge buyer unless buyer has signed buyer-broker agreement with broker;
- b. Shares listing broker's commission, which already is built into the purchase price.

## DISADVANTAGES TO BUYER

## DUAL AGENCY

Buyer's broker may have fiduciary duties to seller that conflict with its duties to buyer, *e.g.*, duty to sell for highest price

obtainable on market for seller versus duty to negotiate lowest price for buyer:

How Arises

- a. Buyer's broker may be subagent of seller's broker, if seller's broker was authorized by seller (in listing agreement and in multiple listing services) to appoint other brokers as its subagents; or
- b. Buyer's broker accepts duties and responsibilities to seller, while leading buyer to believe that its interests are being protected.

**Further Research:** On issue of dual agency, see CC §§2079.21, 2349-2351; see also Real Property Sales, chap 2; Real Estate Broker, step 11.

NOTE

In California, the practice of offering subagency in listing agreements or multiple listing agreements is not common. However, practitioners should still check the documents to see whether subagency is offered in a particular transaction.

LESS COMPETITIVE OFFERS

Buyer's offer may be less attractive to seller who:

- a. Does *not* already have a listing agreement with a broker who intends to cooperate with other brokers; and
- b. Must negotiate a commission with buyer's broker before receiving buyer's offer.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Before Buying or Selling Property/STEP 3. IF HIRING BROKER, ENTER INTO WRITTEN AGREEMENT

STEP 3. IF HIRING BROKER, ENTER INTO WRITTEN AGREEMENT

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USE WRITTEN, NOT ORAL, AGREEMENT

Protects Broker

Expect broker to require a written contract or listing agreement, because broker's right to a commission depends on it. See CC §1624(a)(4); Phillippe v Shapell Indus., Inc. (1987) 43 C3d 1247, 1258, 241 CR 22. Compare Phillippe with Torelli v J.P. Enters., Inc. (1997) 52 CA4th 1250, 61 CR2d 76.

Protects Client

Recognize that a written agreement also protects client's interests, because it sets forth:

- a. Prerequisites to payment of the commission; and
- b. Broker's duty to disclose (CC §2020; see Batson v Strehlow (1968) 68 C2d 662, 675, 68 CR 589):
  - (1) Dual representation;
  - (2) All offers regarding the property's value or price; and
  - (3) Self-dealing, *i.e.*, broker's direct or indirect involvement with principal in the transaction. For example, see Roberts v Lomanto (2003) 112 CA4th 1553, 5 CR3d 866 (vendor sued his real estate agent, alleging that agent had made secret profits when she purchased the property and then assigned the contract to another).

SELLER: SELECT LISTING ARRANGEMENT

DETERMINE TYPE OF LISTING AGREEMENT

- a. Review types of listing agreements with seller to determine which agreement:
  - (1) Satisfies seller's need for flexibility; and
  - (2) Ensures that broker will supply the necessary sales effort.
- b. Choose a listing agreement that will be accepted by a multiple listing service if seller desires; most will accept exclusive right to sell and exclusive agency listings.
- c. Attempt to modify any unacceptable terms of the agreement selected. See discussion of seller negotiating terms of agreement, below, in this step.

FORM AGREEMENTS

For sample listing agreements and form clauses, see Real Property Sales, chap 2; California Real Property Practice Forms Manual §§1.1-1.16 (Cal CEB 1988), referred to throughout this Action Guide as Real Property Forms Man.

EXCLUSIVE RIGHT TO SELL

Distinguishing Features

With exclusive right to sell:

- a. Broker earns a commission if the property is sold during the listing period by anyone, including seller; and
- b. Broker need not procure, or even have contacted, prospective buyer.

## Typical Users

Residential and commercial sellers use exclusive right to sell.

## EXCLUSIVE AGENCY

### Distinguishing Features

With exclusive agency:

- a. Listing broker (and buyer's agent, if any) are the only agents entitled to a commission; and
- b. Broker does not earn a commission if seller procures a buyer and sells the property.

## Typical Users

Sellers who are active in marketing their property use exclusive agency.

## OPEN LISTING

### Distinguishing Features

With open listing:

- a. Seller may market the property through many brokers; and
- b. Only the broker who procures an acceptable buyer receives a commission.

## NOTE

Brokers do not favor open listings and generally are unwilling to expend time or money under them.

## Typical Users

A seller who is active in marketing the property (usually in many geographical areas) uses open listings.

## ONE-PARTY LISTING

### Distinguishing Features

With one-party listing:

- a. Seller may market the property through many brokers; and
- b. Broker receives a commission if broker's client named in the agreement buys the property.

## Typical Users

When a broker with a potential buyer wants written assurance that the owner will pay a commission if his or her client buys the property, the broker uses one-party listing.

## FINDERS

### Distinguishing Features

Finder simply brings buyer and seller together; finder does not negotiate the terms of the sale.

### License Not Required

A finder who is not licensed as a real estate broker or salesperson may collect a fee for introducing buyer and seller *if* finder:

- a. Has a written fee agreement (CC §1624(a)(4); *Tenzler v Superscope, Inc.* (1985) 39 C3d 18, 25, 216 CR 130); and
- b. Did not engage in activities requiring a broker's license, *e.g.*, negotiating the terms of the sale. *Tyrone v Kelley* (1973) 9 C3d 1,

**Further Research:** See generally Real Property Sales, chap 2.

#### NOTE

Federal law generally prohibits the giving and receiving of a referral fee in a transaction covered by the Real Estate Settlement Procedures Act (RESPA). 12 USC §2607; 24 CFR §3500.14(b).

#### Typical Users

Usually buyer or seller does not seek a finder; a finder comes with a particular property or prospective buyer.

NEGOTIATE TERMS OF AGREEMENT
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#### PREPRINTED CONTRACT

Broker will probably propose a preprinted contract (a "listing agreement," "commission agreement," or "brokerage agreement"), but you should negotiate important terms listed below, if applicable.

#### MARKETING OR LOCATING PROPERTY

Specify broker's duties of marketing or locating property.

#### LENGTH OF ENGAGEMENT

Negotiate the length and dates of the engagement.

#### AMOUNT OF COMPENSATION

State the amount of compensation.

#### CONDITIONS FOR PAYMENT

Specify conditions for payment of broker's commission, *e.g.*, on close of escrow and recording of deed to buyer.

**Further Research:** See Real Property Sales, chap 2.

#### BROKER COMPENSATION IF SELLER REMOVES PROPERTY FROM MARKET

*If seller-broker agreement:* Specify whether broker earns a commission (see Real Property Sales, chap 2):

- a. If seller removes the property from the market or makes it unmarketable; and
- b. If so, in what amount.

#### COMMISSION RIGHTS AFTER LISTING EXPIRES

Specify for what period and under what circumstances broker earns a commission following expiration of the listing agreement. See Real Property Sales, chap 2.

#### WHETHER LISTING WILL BE PLACED WITH MLS

- a. Specify whether residential listing will be placed with a multiple listing service (MLS); listing may not be placed in a multiple listing service unless authorized or directed by owner. CC §1088.
- b. Increasingly, listings of many properties are put on the Internet. See, *e.g.*, the California Living Network at <http://ca.realtor.com/>.

#### NOTE

There is generally no MLS dedicated exclusively to commercial property; one exception is the Association of Industrial Realtors

(AIR) in the Los Angeles basin.

## CONFIDENTIALITY OF SELLING PRICE

If you want the ultimate purchase price and transfer tax to be confidential, the listing agreement should specify that such information is confidential and not to be released to MLS or other agencies.

## AGENCY RELATIONSHIP

Be sure that the agreement clearly states that broker is seller's (or buyer's) agent.

## DISPUTE RESOLUTION

Specify manner for dispute resolution, *e.g.*, arbitration, mediation.

***Further Research:*** For additional discussion of listing agreements generally, see [Real Property Sales, chap 2](#). On binding contractual arbitration and other ADR alternatives, see [California Real Property Remedies and Damages, chap 14 \(2d ed Cal CEB 2002\)](#), referred to throughout this Action Guide as Real Property Remedies.

## IF BUYER-BROKER AGREEMENT

Because buyers' brokers typically earn their commissions from sellers, buyer-broker agreements are not common.

***Sample Form:*** For a sample buyer-broker agreement, see [Real Property Sales, chap 2](#).

***Further Research:*** For discussion of possible terms, see [Real Property Sales, chap 2](#).

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Before Buying or Selling Property/STEP 4. IF A BROKER IS HIRED, REVIEW BROKER'S REQUIRED DISCLOSURES

## STEP 4. IF A BROKER IS HIRED, REVIEW BROKER'S REQUIRED DISCLOSURES

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### CONFIRM AGENCY RELATIONSHIP IN RESIDENTIAL TRANSACTION

If property is residential property of one to four units when offered for sale or rented with a lease over 1 year, or mobilehomes offered for sale through a real estate agent (see [CC §2079.13\(j\)](#)):

#### Obtain Broker's Disclosures

a. Make sure client receives on time broker's mandatory written agency disclosures and confirmations ([CC §§2079.13-2079.17](#)):

(1) Describing potential agency relationships (*i.e.*, representing buyer exclusively, representing seller exclusively, or representing both); and

(2) Confirming whom broker represents.

b. For example, see *Huijers v DeMarrais* (1992) 11 CA4th 676, 14 CR2d 232 (real estate agent who gave sellers statutorily required disclosure form, after sellers signed purchase contract, failed to substantially comply with statute requiring disclosure form to be provided before entering into listing agreement).

### REVIEW OTHER REQUIRED DISCLOSURES

Recognize other disclosures California brokers are required to make relating to, *e.g.*:

#### Earthquake Fault Zones

Earthquake fault zones (for discussion of general earthquake safety and natural hazard zone disclosures, see [step 8](#), below; [Real Property Sales §§4.81, 6.52](#));

#### Residential Property Defects

Known material defects, and visually observable defects that broker's reasonably competent and diligent visual inspection of reasonably accessible areas of the property would reveal (for discussion of disclosure of more facts to residential buyer, see [step 2](#), above; [Real Property Sales, chap 2](#));

#### Broker's Involvement in Transaction

Broker's involvement as a principal in the transaction, or close relationship (*e.g.*, spouse or shareholder) to one of the principals ([Real Property Sales §2.134](#));

#### Foreign Seller

Foreign status of seller (for discussion of compliance with the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) (IRC §§861(a)(5), 897, 6039C, 6652(g), 1445), see [step 36](#), below; [Real Property Sales, chaps 6, 15](#)); and

#### Loans

Loan terms, amount of commission, and other costs charged to borrower on any real property loan negotiated by broker. See [Bus & P C §§10240-10241](#); 10 Cal Code Regs §2840; [Real Property Sales, chap 2](#).

### TRANSFER DISCLOSURE STATEMENT

A California real estate licensee is also responsible for delivering a Real Estate Transfer Disclosure Statement (TDS) to anyone acquiring an interest in residential property of one to four units. [CC §§1102-1102.17](#); see [step 8](#), below.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 5. SELLER: REVIEW GENERAL REQUIREMENT TO DISCLOSE MATERIAL FACTS

Seller's Premarketing Due Diligence

STEP 5. SELLER: REVIEW GENERAL REQUIREMENT TO DISCLOSE MATERIAL FACTS

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REASONS TO DISCLOSE

Disclose material facts to:

- a. Prevent claims of fraud or negligent misrepresentation under the common law and the general fraud statutes (CC §§1572, 1710);
- b. Comply with mandatory disclosure statutes and regulations (see step 8, below); and
- c. Facilitate closing by anticipating buyer's objections and conditions to closing.

WHAT FACTS ARE MATERIAL

This area is a moving target; decisional law and disclosure statutes prescribe what facts are material. Starting places are the residential disclosure forms (CC §§1102.6, 1103.2), but those lists are not exhaustive. See step 8, below; Real Property Remedies, chap 3. See also Real Property Sales, chaps 2, 6.

WHAT SELLER MUST DO

To prevent nondisclosure claims, seller must:

Disclose Facts

Fully disclose material facts affecting value or desirability of the property if:

- a. Seller has actual knowledge of the facts; and
- b. Facts are not easily observed by buyer.

**Further Research:** See Lingsch v Savage (1963) 213 CA2d 729, 735, 29 CR 201; Herzog v Capital Co. (1945) 27 C2d 349, 353, 164 P2d 8. See also Blickman Turkus, LP v MF Downtown Sunnyvale, LLC (2008) 162 CA4th 858, 76 CR3d 325 (distinguishing Lingsch).

NOTE

Be aware that for residential property (one to four dwelling units), seller's duty of disclosure applies to all known material facts affecting value or desirability of property *regardless of whether they are observable by buyer*. See CC §§1102.6.

Not Conceal Facts

Not conceal material facts by (CC §§1102.3, 1572(3), 1710(3)):

- a. Nondisclosure; or
- b. Active concealment.

Not Misrepresent Facts

Not misrepresent facts concerning the property, *e.g.*, seller must avoid (CC §§1572(1), 1710(1), 1710(2)):

- a. Suggesting as a fact something that is not true, when seller does not believe it to be true; and
- b. Asserting as a fact something that is not true, when seller has no reasonable ground for believing it to be true.

Complete Partial Disclosures

Complete any partial disclosures. Hale v Wolfson (1969) 276 CA2d 285, 290, 81 CR 23. See also Blickman Turkus, LP v MF Downtown Sunnyvale, LLC (2008) 162 CA4th 858, 76 CR3d 325 (distinguishing Hale).

Relate Change in Circumstances

Correct previously accurate disclosures rendered false by changed circumstances. Southern Cal. Dist. Council, Assemblies of God v Shepherd of the Hills Evangelical Lutheran Church (1978) 77 CA3d 951, 956, 144 CR 46. See also CC §1102.5 (information rendered subsequently inaccurate does not violate law), and Blickman Turkus, LP v MF Downtown Sunnyvale, LLC (2008) 162 CA4th 858, 76 CR3d 325.

#### Corrective Work Does Not Eliminate Disclosure Obligation

Disclose known past problems to buyer, even if seller believes the problem has been cured, *e.g.*, by construction of drains. Barnhouse v City of Pinole (1982) 133 CA3d 171, 190, 183 CR 881. But see Alexander v McKnight (1992) 7 CA4th 973, 9 CR2d 453, and Pagano v Krohn (1997) 60 CA4th 1, 70 CR2d 1 (disclosures may not be necessary if seller reasonably believes that the problem was corrected).

#### NOTE

Be aware that the law regarding seller disclosures is evolving; be alert to any new legal authority providing guidance on disclosure of specific conditions and parties to whom duty is owed, *e.g.*, duty to disclose may be extended to purchaser down the line (*i.e.*, not in privity with seller) under certain circumstances. See Shapiro v Sutherland (1998) 64 CA4th 1534, 76 CR2d 101.

#### EFFECT OF SELLING "AS IS"

##### Seller Still Must Disclose

Selling the property "as is" clarifies that seller is not undertaking repair obligations, *but* seller still must:

- a. Disclose known material defects, even if they are hidden; and
- b. Avoid making statements he or she knows to be false.

**Further Research:** See Blickman Turkus, LP v MF Downtown Sunnyvale, LLC (2008) 162 CA4th 858, 76 CR3d 325; Loughrin v Superior Court (1993) 15 CA4th 1188, 19 CR2d 161; Katz v Department of Real Estate (1979) 96 CA3d 895, 901, 158 CR 766; Lingsch v Savage (1963) 213 CA2d 729, 742, 29 CR 201; Orlando v Berkeley (1963) 220 CA2d 224, 228, 33 CR 860.

##### May Shift Some Risk to Buyer

- a. There *may* be circumstances where, in the absence of fraud, an "as is" sale shifts some risks of hidden defects to buyer. See Shapiro v Hu (1986) 188 CA3d 324, 332, 233 CR 470, and Driver v Melone (1970) 11 CA3d 746, 752, 90 CR 98 (read cases cautiously and only in conjunction with the other cases and statutes cited above).
- b. In a strong seller's market, seller's attorney should consider including a release clause in the purchase contract, including a waiver of CC §1542, particularly with respect to any identified defects.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 6. SELLER: EVALUATE PHYSICAL CONDITION OF PROPERTY AND IDENTIFY CONDITIONS FOR DISCLOSURE

STEP 6. SELLER: EVALUATE PHYSICAL CONDITION OF PROPERTY AND IDENTIFY CONDITIONS FOR DISCLOSURE

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REASONS TO INSPECT

Although seller generally has no affirmative duty to inspect for defects, consider advising seller to inspect property to:

Avoid Disclosure Disputes

Avoid later disputes with buyer concerning seller's general disclosure obligations (see [step 5](#), above), by:

- a. Making sure seller has not forgotten a known defect;
- b. Identifying other material conditions for disclosure, to prevent later disputes about whether seller knew about defects that he or she failed to disclose; and
- c. Verifying accuracy of any representations seller makes or made about the property's condition;

Calculate Costs of Repair

Calculate costs of repair to determine whether value is added by repairing; and

Improve Negotiations

Discover and disclose defects before buyer makes an offer, so seller can:

- a. Address defects that buyer is sure to discover on inspection;
- b. Explain what seller plans to do about them, and why seller's price is appropriate; and
- c. Preempt argument by buyer that the price buyer initially agreed to should be reduced, now that defects have been discovered.

PROPERTY CONDITIONS REQUIRING DISCLOSURE
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ADVISE SELLER

Advise seller to identify the following property conditions for disclosure.

NOTE

Most of the conditions identified here must be disclosed in the Transfer Disclosure Statement (TDS). See [step 8](#), below.

STRUCTURAL DEFECTS

Seller must disclose material structural defects that are:

- a. Known to seller; and
- b. Not known to, or not within the reach of, the diligent attention and observation of buyer.

**Further Research:** See *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325; *Lingsch v Savage* (1963) 213 CA2d 729, 735, 29 CR 201; see 1 Miller & Starr, California Real Estate §1.138 (3d ed 2000).

NOTE

Be aware that for residential property (one to four dwelling units), seller's duty of disclosure applies to all known material facts affecting value or desirability of property *regardless of whether they are observable by buyer*. [CC §§1102-1102.17](#).

FILL

Seller or developer must disclose that:

## Raw Land

Raw land is fill (see Massei v Lettunich (1967) 248 CA2d 68, 73, 56 CR 232);

## Improved Property

Improvements are built on fill. Central Mut. Ins. Co. v Schmidt (1957) 152 CA2d 671, 673, 313 P2d 132.

## UNDERGROUND WATER AND SOIL CONDITIONS

Seller must disclose knowledge of seeps, springs, and slides. Barnhouse v City of Pinole (1982) 133 CA3d 171, 190, 183 CR 881.

## HAZARDOUS SUBSTANCES

- a. Seller must disclose presence of hazardous substances, or contaminated soil and water on the property.
- b. Seller may also be subject to disclosure requirements imposed by state and federal environmental laws. See step 7, below.

## TERMITE INFESTATION

### Disclose Known Pest Infestation

Seller must disclose known damp rot and termite infestation. Orlando v Berkeley (1963) 220 CA2d 224, 228, 33 CR 860.

## NOTE

Consider providing to buyer copies of previous pest control reports (if still on file with Structural Pest Control Board), along with record of work done.

## Deliver Report

If the purchase agreement or buyer's lender requires a structural pest inspection report (CC §1099):

- a. Report must be prepared in accordance with Bus & P C §8516; and
- b. Seller must deliver it to buyer as soon as possible before closing.

## ILLEGAL UNITS

Seller who markets property as income property must disclose knowledge that units are illegal; seller's knowledge of zoning and building code violations is question of fact. See Birch v Ciria (1962) 205 CA2d 1, 22 CR 798.

## ILLEGAL WORK

Seller must disclose any known improvements constructed without a permit. Unger v Campau (1956) 142 CA2d 722, 726, 298 P2d 891.

## ZONING AND BUILDING VIOLATIONS

Seller must disclose known building code or zoning violations. Failure to disclose can be grounds for rescission (Hartman v Rizzuto (1954) 123 CA2d 186, 188, 266 P2d 539) or damages (Barber v McClung (1949) 93 CA2d 692, 697, 209 P2d 808).

## BOUNDARIES, ACREAGE, AND GEOGRAPHY

Seller has duty to know correct boundaries and not to misrepresent quantity of land or its geography. Wilbur v Wilson (1960) 179 CA2d 314, 317, 3 CR 770; but see Marvin v Adams (1990) 224 CA3d 956, 961, 274 CR 308, for circumstances excusing seller misrepresentations.

## ENERGY CONSUMPTION DATA

After January 1, 2010, owners of nonresidential buildings must disclose to prospective purchasers the U.S. EPA's Energy Star Portfolio Manager benchmarking data and rankings (showing energy consumption for the building) for the most recent 12-month period. Pub Res C §25402.10.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 7. SELLER: ASCERTAIN SELLER'S DUTIES WITH RESPECT TO HAZARDOUS SUBSTANCES

STEP 7. SELLER: ASCERTAIN SELLER'S DUTIES WITH RESPECT TO HAZARDOUS SUBSTANCES

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OBJECTIVE

Determine whether transaction is covered by environmental statutes, and if so:

- a. Advise seller of scope and nature of:
  - (1) Hazardous substance disclosure obligations; and
  - (2) Seller's potential liability; and
- b. Determine whether to conduct environmental investigation.

HAZARDOUS SUBSTANCE, GENERAL DEFINITION

- a. Be aware that there are many definitions of hazardous substances; but
- b. You can offer a general definition, *e.g.*, anything that is, or in sufficient quantities or concentrations may be, harmful to human health or the environment because of:
  - (1) Flammability;
  - (2) Toxicity;
  - (3) Reactivity; or
  - (4) Corrosiveness.

APPLICABLE STATUTES

Recognize and review the various federal and state statutes applicable to hazardous substances, *e.g.*:

- a. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601-9675), which authorizes cleanup of contaminated sites and recovery of cleanup costs;
- b. Resource Conservation and Recovery Act (RCRA) (42 USC §§6901-6992k), which establishes a system for controlling hazardous substances from generation through disposal;
- c. Carpenter-Presley-Tanner Hazardous Substance Account Act (California Superfund) (Health & S C §§25300-25395), which authorizes cleanup and cleanup cost recovery in connection with contaminated sites;
- d. Toxic Mold Protection Act of 2001 (Health & S C §§26100-26156); (see Jauregui & Brown, *A New Real Estate Issue: Toxic Mold*, 25 CEB Real Prop L Rep 40 (Jan. 2002));
- e. Hazardous Waste Control Law (HWCL) (Health & S C §§25100-25250.25).

NOTE

This is only a partial list of possibly applicable statutes.

WHAT SELLER MUST DISCLOSE TO BUYER UNDER CALIFORNIA STATUTORY LAW

Contamination of Nonresidential Property

Seller of nonresidential property must give written notice of hazardous waste or contamination that seller knows or has reasonable cause to believe has come to be located on the property. Health & S C §25359.7.

Asbestos in Commercial Buildings

Seller of commercial building built before 1979 must disclose asbestos seller knows to be in building. Health & S C §§25915-25919.7.

Toxic Mold in Both Residential and Commercial Property

Seller and broker must disclose presence of toxic mold. [Health & S C §§26100-26156](#).

**Further Research:** For general information about mold in homes, see <http://www.cal-iaq.org/cal-iaq%20moldinformation.htm>. For a list of mold inspection/remediation companies published by the California Department of Health Services, go to <http://www.cal-iaq.org/FIRMS/Howto.htm>.

## NOTE

Be aware that owners of commercial property also must disclose presence of contamination, toxic mold, and asbestos to tenants, incoming co-owners, and contractors.

## Homeowners Guide as Disclosure for Residential Sale

If any seller or broker of real property delivers to buyer the booklet entitled Environmental Hazards: A Guide for Homeowners and Buyers, developed by California Departments of Real Estate and Health Services, seller or broker will have provided adequate disclosure of environmental hazards, *except* in the case of specific hazards known to seller or broker. [CC §2079.7](#). This booklet may be viewed at [http://www.dre.ca.gov/pub\\_disclosures.html](http://www.dre.ca.gov/pub_disclosures.html).

## Release of Illegal Controlled Substance

If toxic contamination by an illegal controlled substance has occurred on a property, the seller must disclose this information to the buyer ([CC §1102.18](#)):

- a. On receipt of a notice from the Department of Toxic Substances Control (DTSC) or other agency; or
- b. If the seller has actual knowledge of the toxic contamination.

## WHAT SELLER MUST DISCLOSE TO BUYER UNDER FEDERAL PRINCIPLES

Under federal principles, seller must disclose to purchaser any known contamination.

## LIABILITY FOR CLEANUP COSTS

Superfund laws impose liability for cleanup costs on (42 USC §9607(a); [Health & S C §25323.5\(a\)](#)):

- a. Seller, *i.e.*, the current owner (regardless of whether he or she actively disposed of hazardous substances);
- b. Any prior owner who owned the property at the time of a toxic release or disposal;
- c. Intervening owners who had actual knowledge of the contamination and failed to disclose it to their buyers (for discussion of avoiding liability, see below); and
- d. Person who actually caused the contamination, *e.g.*, a tenant.

## Liability Continues

*Even after a sale*, all of the above parties will remain liable to government agencies. [Health & S C §25323.5\(a\)](#); 42 USC §9607.

## "As Is" Sales

Warn seller that even with an "as is" provision in the sales contract, if seller caused contamination, seller:

- a. Will still be liable for cleanup costs imposed by EPA or other government agencies; and
- b. May still be liable for contribution in a private party CERCLA action brought by any responsible party who has incurred cleanup costs. 42 USC §9607(e); *Wiegmann v Rose Int'l Corp. v NL Indus.* (ND Cal 1990) 735 F Supp 957, 962.

SELLER'S INVESTIGATION

## ENVIRONMENTAL INVESTIGATION DEFINED

An environmental investigation or audit of a property is a systematic assessment of its:

- a. Condition, *i.e.*, presence of contaminants or hazardous materials on the property; and
- b. History of use and prior ownership.

## HOW SELLER BENEFITS FROM INVESTIGATION

Advise seller that investigating will help seller:

- a. Comply with all disclosure and reporting requirements, some of which apply to landowners who *should* have known about contamination;
- b. Complete any necessary remedial work and control the amount of work and time to completion;
- c. Anticipate and address all issues that might arise in negotiations with buyer, after buyer's due diligence investigation, and prevent the opportunity for later renegotiation;
- d. Determine which warranties concerning specific environmental conditions seller is prepared to make to a prospective buyer;
- e. Prevent delays and termination of offers if buyer discovers contaminants, possibly shortening and simplifying buyer's investigation;
- f. Limit liability exposure for:
  - (1) Future contamination, by establishing contaminants present or not present at time of property sale; and
  - (2) Existing contamination, by alerting seller to existing or threatened contamination that might be prevented or mitigated.

## RISKS OF INVESTIGATION

Advise seller to evaluate the risks of investigation, such as:

- a. Disclosure, reporting, and cleanup obligations may result from the investigation;
- b. Seller may incur, directly or indirectly, costs of remediation, monitoring, indemnification liability, or legal action against other legally responsible parties (for discussion of liability for cleanup costs, see above in this step);
- c. If severe contamination is found, the property, as a practical matter, may be rendered unsalable and unfinanceable.

***Further Research:*** For additional discussion of hazardous waste considerations and environmental investigations, see [Real Property Sales, chap 7](#); Machlin & Young, *Managing Environmental Risk: Real Estate and Business Transactions* §§8.03-8.04, 9.03-9.04, 9.07 (1988), referred to throughout this Action Guide as Machlin & Young.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 8. SELLER: PREPARE REQUIRED RESIDENTIAL PROPERTY DISCLOSURES

STEP 8. SELLER: PREPARE REQUIRED RESIDENTIAL PROPERTY DISCLOSURES

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DISCLOSURE LAW IS COMPLEX

Disclosure law is a complex system involving both statutory and common-law rules. For comprehensive discussion, see [Real Property Sales, chaps 2, 6](#); [Real Property Remedies, chap 3](#).

**Caution:** The following are the primary disclosures that must be made, but the list is not exhaustive of all potential disclosure requirements.

TRANSFER DISCLOSURE STATEMENT (TDS)

TDS

Definition

The TDS is a specific form that must be filled out and delivered to buyers of residential property; it does not necessarily cover all disclosures required in a transaction, so you may have to supplement it.

Where to Find It

The required contents of the form are set forth in [CC §1102.6](#).

**Sample Form:** See [Real Property Sales §6.37](#); Real Property Forms Man §2.6.

WHO PREPARES TDS

a. Both seller and both real estate licensees (if there are two agents representing respectively the seller and buyer) must complete their portions of the TDS if seller is transferring by sale, exchange, installment land sale contract, lease with an option to purchase, any other option to purchase, or a ground lease coupled with improvements ([CC §§1102.1, 1102.6, 2079](#)):

- (1) Real property that is improved with one to four dwelling units;
- (2) A residential stock cooperative improved with one to four dwelling units; or
- (3) Resale of a manufactured home, as defined, or mobilehome, as defined (*i.e.*, personal property intended for residential use). See [CC §1102\(b\)](#).

NOTE

For resales of personal-property-type manufactured homes or mobilehomes, sellers and agents must fill out a TDS designed especially for mobilehomes. [CC §§1102.1\(b\), 1102.6d](#). Mobilehomes or manufactured homes that are classified as real property must already comply with the law. See [CC §1102\(a\)](#).

b. Each party should prepare only that portion of the TDS designated for that person to prepare, *i.e.*, a seller should not rely on its broker to prepare seller's portion of the TDS.

EXCEPTIONS TO TDS REQUIREMENT

A TDS is not required for transfers (including, but not limited to, the following transfers ([CC §1102.2](#))):

- a. By court order;
- b. By a fiduciary in administering an estate, conservatorship, guardianship, or trust (except if fiduciary is the sole trustee of a revocable trust, is a natural person, and is the former owner of the property or occupied the property within the preceding year);
- c. Among co-owners;
- d. Between spouses or persons in lineal line of consanguinity;
- e. Resulting from divorce decrees or settlements;

- f. To or from government entities; or
- g. By a foreclosure sale or transfer after a foreclosure.

**Further Research:** See Real Property Sales, chaps 2, 6.

#### NOTE

The TDS cannot be waived. CC §1102(c). This statute supersedes the dictum in Loughbrin v Superior Court (1993) 15 CA4th 1188, 19 CR2d 161. The legislative intent of this statute is codified in CC §1102.1.

#### DELIVERY

The TDS is to be delivered before close of a sale. However, the form must be delivered before making or acceptance of offer (CC §1102.3(b)) in a:

- a. Transfer by real property sales contract (as defined in CC §2985);
- b. Lease with option to purchase; or
- c. Ground lease coupled with improvements.

#### NOTE

When delivery of the TDS or any material amendment is made after the execution of an offer to purchase, the buyer has 3 days after delivery in person to terminate the offer by delivery of a written statement to the seller or agent. Similarly, if delivery is done by mail, buyer has 5 days after deposit in the mail to back out. CC §1102.3(b). Seller's statutory duty to deliver the TDS is a nonwaivable condition precedent to the buyer's performance. See Realmuto v Gagnard (2003) 110 CA4th 193, 1 CR3d 569.

### LOCAL DISCLOSURE REQUIREMENTS

#### CHECK FOR LOCAL TDS

Check city and county ordinances for additional required disclosure forms.

**Further Research:** For a discussion of the requirements for local TDS forms, see CC §1102.6a; see also Real Property Sales, chaps 2, 6.

#### OTHER LOCAL DISCLOSURES

Review ordinances for other written disclosure requirements, *e.g.*, requiring seller to provide a report of residential building records. Govt C §§38780-38785.

### DISCLOSURE REQUIREMENTS FOR NEWLY CONSTRUCTED HOUSING

#### WARRANTY DISCLOSURES

If selling new housing, disclose the ways, if any, it fails to conform to implied warranties of quality and fitness. Pollard v Saxe & Yolles Dev. Co. (1974) 12 C3d 374, 380, 115 CR 648.

**Exception:** If seller is an owner-builder who is not in the business of selling or constructing housing, there are no implied warranties of quality and fitness. See Siders v Schloo (1987) 188 CA3d 1217, 1220, 233 CR 906.

#### NOTE

For new single-family homes and units in common interest developments, there is a minimum 1-year express written warranty covering certain components. See CC §§900-945.5.

#### Compare With Resales of Buildings

Warranties of quality and fitness are *not* implied in the resale of an existing building. East Hilton Drive Homeowners' Ass'n v Western Real Estate Exch. (1982) 136 CA3d 630, 632, 186 CR 267.

#### UTILITY AND ENERGY CONSERVATION

A seller of new homes must disclose the type, thickness, and R-value of insulation in the residence. 16 CFR §460.16.

## SAFETY DISCLOSURES

### FORMER MILITARY MUNITIONS LOCATION

If selling one to four dwelling units, seller must disclose ([CC §1102.15](#)):

- a. Whether within one mile of the property there is any area that has been designated as a former military training ground that may contain explosive munitions; *but only*
- b. If actually known to seller.

### NOTE

A similar provision applies to landlords. [CC §1940.7](#).

### INDUSTRIAL USE ZONE LOCATION

The seller of real property subject to the TDS law must disclose actual knowledge that the property is adjacent to, or zoned to allow, an industrial use, or is affected by a nuisance created by such use, as soon as possible before transfer of title. [CC §1102.17](#); [CCP §731a](#).

### WINDOW SECURITY BARS AND SAFETY RELEASE MECHANISM

If selling one to four dwelling units, seller must disclose ([CC §1102.16](#)), using the form in [CC §1102.6](#) or [§1102.6a](#), the existence of any window security bars and any safety release mechanism on the bars.

### OPERABLE SMOKE DETECTOR

#### Generally

If selling a single-family dwelling, seller must give buyer a statement that the property contains an operable smoke alarm. [Health & S C §13113.8\(b\)](#). See preprinted form agreement ¶4.E of [Appendix B](#). For sale of other residential dwellings, see [Health & S C §13113.7](#).

### NOTE

All dwelling units must have smoke detectors, approved and listed by the State Fire Marshal, installed at a point centrally located in the corridor or area giving access to each separate sleeping area. See 1998 Cal Fire C, App I-A, §6 (24 Cal Code Regs pt 9, App I-A, §6).

#### Exceptions

Transfers exempted from the requirement include but are not limited to the following ([Health & S C §13113.8\(d\)](#)):

- a. Court-ordered transfers;
- b. Intrafamily transfers; and
- c. Certain divorce-related transfers.

#### Check Local Ordinances

Check local ordinances, because they often impose more specific and greater responsibility on seller, such as a duty to install hard-wired smoke detectors in each bedroom.

### EARTHQUAKE RESISTANCE OF WOOD-FRAME DWELLINGS

If seller's building contains one to four residential units, built before 1960, of conventional light wood-frame construction, seller must ([Govt C §§8897.1\(a\)](#), [8897.2](#)):

- a. Furnish to buyer a copy of the state's Homeowner's Guide to Earthquake Safety (described in [Bus & P C §10149](#)); and
- b. Disclose specified deficiencies within seller's actual knowledge that are material and that would increase the dwelling's vulnerability to earthquake damage (*e.g.*, absence of anchor bolts or existence of unreinforced masonry dwelling walls).

#### Exceptions

Seller need not provide the booklet and disclosures if the transfer is one of those listed in [Govt C §8897.1\(c\)](#), *e.g.*:

- a. Between co-owners;
- b. Required to be preceded by delivery to buyer of copy of public report under Bus & P C §11018.1;
- c. Transfer under court order, *e.g.*, probate sale;
- d. Transfer exempt by the TDS law, except transfers or exchanges to or from a governmental agency.

## GENERAL EARTHQUAKE SAFETY

### Residential Property

After delivering Homeowner's Guide to Earthquake Safety (described in Bus & P C §10149) to buyer, seller or seller's broker need not provide additional information on geologic and seismic hazards in general and the mitigating measures that buyer or seller might consider. CC §2079.8(a).

### Commercial Property

Seller of a commercial building must deliver to prospective buyers a copy of the Commercial Property Owner's Guide to Earthquake Safety, published by the Seismic Safety Commission, *if* building was constructed (Govt C §§8893-8893.5; CC §2079.9(a); Bus & P C §10147):

- a. Before January 1, 1975; and
- b. From precast concrete or reinforced/unreinforced masonry with wood frame floors or roofs.

### NOTE

If residential properties fit characteristics described above, the delivery of the Commercial Guide is also necessary. See also disclosures pertaining to natural hazard zones, below.

## LEAD-BASED PAINT

a. Under federal law, with specified exceptions, before a purchaser or lessee becomes obligated to purchase or lease a single-family or multi-unit dwelling that was built before 1978 and is used or will be used for residential purposes, seller, lessor, or real estate agent (if any) must:

- (1) Provide a lead hazard information booklet;
- (2) Disclose presence of any known lead-based paint hazards and provide any available lead hazard evaluation report to buyer or tenant; and
- (3) Permit buyer a 10-day period (unless parties mutually agree to a different period) to conduct a risk assessment or inspection for lead-based paint hazards.

b. The purchase contract also must contain a prescribed "lead warning statement" and other specified information, acknowledged in writing by the purchaser. See 42 USC §4852d; 24 CFR §§35.80-35.96, 40 CFR §§745.100-745.119. For exceptions, see 24 CFR §35.82, 40 CFR §745.101.

c. Under California law, seller or broker, if any, has the lead-based paint disclosure obligation in a residential sale, and may discharge that obligation by delivering a consumer information booklet to the buyer. See CC §2079.7; Bus & P C §10084.1; Health & S C §25417.

### NOTE

Check city or county ordinances dealing with the lead paint issue.

## WATER HEATERS

a. An owner of any residential real property containing a water heater must have it:

- (1) Braced, anchored, or strapped to resist falling or horizontal displacement caused by earthquake motion; or
- (2) At a minimum, secured in accordance with California Plumbing Code or local variances as provided under Health & S C §17958.5. Health & S C §19211(a), applicable to all new and replacement water heaters and all existing residential water heaters.

b. A seller of any real property must certify to purchaser that seller has complied with the statute in accordance with any local code requirements. The certification must be in writing and may be included in existing transactional documents, including but not limited to:

- (1) The Homeowner's Guide to Earthquake Safety (see [Bus & P C §10149](#));
- (2) A real estate purchase contract or receipt for deposit;
- (3) A TDS (see [CC §1102.6](#)); or
- (4) A local option disclosure statement (see [CC §1102.6a](#)). [Health & S C §19211\(b\)](#).

#### NOTE

The legislature has clarified that the water heater bracing requirements apply to rental units as well. See [Health and S C §19210](#).

#### TOXIC MOLD

- a. The Toxic Mold Protection Act of 2001 ([Health & S C §§26100-26156](#)) requires sellers and their brokers to disclose to potential buyers the presence of toxic molds on the property.
- b. Although these obligations are deferred until the California Department of Health Services establishes standards and guidelines, the act (see [Health & S C §26150\(a\)](#)) specifically does not limit other obligations of sellers under statutory and common law to disclose known material facts affecting the value and desirability of their property (see [step 5](#), above).

**Further Research:** For general information about mold in homes, see <http://www.cal-iaq.org/cal-iaq%20moldinformation.htm>. For a list of mold inspection and remediation companies published by the California Department of Health Services, go to <http://www.cal-iaq.org/FIRMS/Howto.htm>.

#### REGISTERED SEX OFFENDERS DATABASE

Seller must disclose directly in the residential purchase agreement ([CC §2079.10a](#)) that prospective buyer may access information about registered sex offenders from the appropriate state or local governmental agency. For a sample clause, see ¶6.E of [Appendix B](#). For further discussion, see [Real Property Sales, chap 6](#).

#### NOTE

The State Department of Justice is required to post specified information regarding serious and high-risk sex offenders on an Internet website for public access. See [Pen C §290.46](#). The information may be accessed at <http://meganslaw.ca.gov>.

Some local counties and cities may also have their own websites providing related information.

#### DEATHS ON PROPERTY

Seller has *no* duty to disclose that ([CC §1710.2](#)):

- a. A death occurred on the property more than 3 years before purchase (note that there is no immunity for making an intentional misrepresentation concerning deaths on the property in response to a direct inquiry from a transferee); or
- b. An owner or occupant was afflicted with, or died from, acquired immune deficiency syndrome (AIDS).

#### NOTE

Check federal Fair Housing Act Amendments of 1988 for possible violation when person with HIV infection is discriminated against. 42 USC §3602(h); 24 CFR §100.201.

#### AIRPORT NOISE DISCLOSURE

A developer seeking to develop a subdivision subject to DRE jurisdiction will have to file a Notice of Intention that, among other things, must include information about "the location of all existing airports, and of all proposed airports shown on the general plan of any city or county, located within two statute miles of the subdivision." See [CC §1102.6a\(d\)](#).

- a. If the property is located within an "airport influence area," as defined in [CC §1102.6a\(d\)](#), the Notice of Intention must include an "Airport Vicinity Notice":

- (1) Natural hazards disclosure companies and statutorily enumerated experts (including licensed engineers, land surveyors, and geologists acting within the expertise of their licenses or expertise), if asked, must determine if the property for sale is located within an "airport influence area." If the property is located in one, the "Airport Vicinity Notice" must be included in the report. [CC §1103.4](#).

- (2) If a common interest property is located within an "airport influence area," any declaration recorded after 1/1/2004 must include the Airport Vicinity Notice. The declaration's acknowledgement of this does not make it a "title defect, lien or encumbrance." [CC §1353](#).

b. A city or county adopting a different or additional disclosure form regarding the proximity or effects of an airport must include in that form, at a minimum, the information in the "Notice of Airport in Vicinity." See Bus & P C §11010 and CC §§1103.4, 1353.

## NATURAL HAZARD ZONES DISCLOSURE REQUIREMENTS

### WRITTEN DISCLOSURE STATEMENT

Independently of the TDS (CC §1102.6), transferor's agent, or transferor if acting without an agent, is required to deliver a natural hazard disclosure statement (NHDS) to a prospective buyer (see form in CC §1103.2(a)) when residential property consisting of one to four dwelling units is subject to one or more of six specified hazard zones or areas:

- a. Zone "A" or "V" special hazard flood areas designated by the Federal Emergency Management Agency (Govt C §8589.3);
- b. Potential flooding areas (Govt C §§8589.4-8589.5);
- c. Very high fire hazard severity zones (Govt C §§51178-51183.5);
- d. State fire responsibility areas (Pub Res C §§4125-4136);
- e. Delineated earthquake fault zones (Pub Res C §§2621.9-2622); and
- f. Seismic hazard zones (Pub Res C §§2694-2696). See CC §§1103-1103.14.

### NOTE

The local option disclosure statement (see CC §1102.6a) may be substituted for the NHDS, as long as it includes substantially the same information and warnings required by the NHDS. See CC §1103.2(e).

Various changes were made to the form, including information about third party providers and check boxes. See CC §1103.2. A cottage industry of third party providers has sprung up to meet the demand of disclosures related to natural hazards, the Mello-Roos Community Facilities Act of 1982 (Govt C §§53311-53368.3), and others.

Query Seller and Check With Public Agency for Maps/Lists

Disclosure of each of these special zones or areas is triggered if:

- a. Transferor or its agent has actual knowledge that the property is located within the special zone or area; or
- b. Relevant map or list of parcels included in the special zone or area has been delivered to or compiled by the local jurisdiction, and notice of the map's or list's availability and location has been posted in county recorder's, assessor's, and planning commission's offices.

Effect of Special Zone Designation on Property

Effect of special zone designation is that:

- a. The state has no responsibility for fire protection services in a state fire responsibility area absent an agreement with the local agency. See Pub Res C §4136(b).
- b. Construction in an earthquake fault zone may be subject to special earthquake engineering requirements and limitations. See Pub Res C §§2623-2624.
- c. Property owners must obtain a geotechnical report before undertaking any construction in a seismic hazard zone. See Pub Res C §2697.

Contact State or Local Agency to See or Purchase Maps/Lists

Property located in, *e.g.*, an Alquist-Priolo Earthquake Fault Zone (formerly special studies zone) or seismic hazard zone, is designated on a map prepared by a state geologist; check with the California State Department of Conservation (see <http://www.conservation.ca.gov/cgs/rghm/ap/Pages/index.aspx>) or local planning agency to view map, or with BPS Reprographics Services (<http://www.bps.com>) to purchase it.

Residential and Commercial Disclosures Distinguished

In all sales of residential and commercial properties not otherwise exempt by statute, the disclosure of natural hazard zones or areas is required. If the property to be sold is one to four dwelling units, the natural hazard disclosures must be made by using either:

a. The local option real estate disclosure statement under CC §1102.6a; or

b. The natural hazard disclosure statement under CC §1103.2.

*Further Research:* See Real Property Sales, chap 6.

## DISCLOSURE REQUIREMENTS FOR COMMON INTEREST DEVELOPMENTS

### DEFINITION OF COMMON INTEREST DEVELOPMENT

A common interest development is any of the following, as defined in CC §1351:

a. A community apartment project;

b. A condominium project;

c. A planned development; or

d. A stock cooperative.

### GENERAL DISCLOSURE REQUIREMENTS

If selling a unit in a common interest development, seller must provide to buyer (CC §§1368, 1375.1):

#### Rules

A copy of the development's governing documents;

#### Statement on Age Restriction

If the governing documents restrict use or occupancy based on age, a statement that the restriction is enforceable only to the extent permitted by CC §51.3;

#### Financial Information

The most recent documents specified in CC §1365;

#### Statement of Assessments

A statement of the amount of the association's current regular and special assessment and fees prepared by the governing body;

#### Change of Assessments

Any change in the current regular and special assessment and fees that has been approved by the board of directors, but has not yet become due and payable as of the date disclosure is made;

#### Assessments Against Seller's Interest

A statement of the amount of any unpaid assessments, monetary fines, or penalties levied against seller's interest, including late charges, interest, and costs of collection that are or may be levied against seller's interest;

#### Unresolved Seller Violations

A copy or summary of any notice sent to seller under CC §1363(h) setting forth alleged violations by seller of governing documents that remain unresolved at the time of disclosure;

#### Preliminary List of Defects

A copy of the preliminary list of defects provided to each member under CC §1375 and a statement that a final determination of the accuracy and completeness of the list has not been made; and

#### Settlement Agreement

A copy of the latest settlement information between the association and the builder provided to the homeowners.

#### Exceptions to Disclosure Requirements

Seller is not subject to above disclosure requirements *if*:

a. Seller is subject to Bus & P C §11018.6 disclosures (see CC §1368; Bus & P C §§11018.1, 11018.6; 10 Cal Code Regs §2801.5); or

b. The unit is in a common interest development that is expressly zoned for and limited in use to commercial or industrial purposes. CC §1373.

**Further Research:** See Real Property Sales §§6.60-6.63.

## IF REPRESENTING OWNER OF A CONDOMINIUM CONVERSION PROJECT

### Disclose Defects

If seller is owner/subdivider of a condominium conversion project, provide prospective buyers with written statement of all substantial defects in major systems of the unit and common areas.

### Buyer's Right to Rescind

If buyer receives the disclosures after signing purchase agreement, buyer can terminate purchase by giving written notice to seller or broker within 3 days after personal delivery of disclosures, or 5 days after delivery by mail. CC §1134(b).

**Further Research:** For a discussion of condominium conversions generally, see Forming California Common Interest Developments, chap 4 (Cal CEB 2004).

## DISCLOSURE REQUIREMENTS FOR SUBDIVISIONS

### WHAT SUBDIVIDER MUST PROVIDE

If seller intends to offer subdivided lands for sale, Subdivided Lands Act (Bus & P C §§11000-11200) requires seller to make certain disclosures and file certain reports. See Bus & P C §§11010-11023; CC §1133. A discussion of these obligations is beyond the scope of this Action Guide.

**Further Research:** For discussion of disclosure obligations generally, see Real Property Sales, chaps 2, 6.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 9. SELLER: DETERMINE IMPACT OF LEASES AND OPTIONS

STEP 9. SELLER: DETERMINE IMPACT OF LEASES AND OPTIONS

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REVIEW TERMS AND STATUS OF LEASES

For each existing lease, advise seller to prepare a schedule of the following information (and when appropriate, assist seller):

Payments

- a. What rental payments are currently required, in arrears, or prepaid;
- b. Whether rental payments escalate in accordance with an escalation clause or a percentage rent clause;
- c. Whether there have been any defaults by seller or tenant, and whether there are currently any uncured defaults or matters that would constitute a default with the giving of notice or passage of time;

Tax and Expense Pass-Throughs

Whether any taxes and/or operating expenses are passed through as charges to tenants, and, if so, which ones (*e.g.*, Proposition 13 tax increases, elevator maintenance costs), and in what amounts;

Remaining Term, Rights to Extend or Terminate

The remaining term of the lease and whether there are any options to extend or renew, or rights to terminate;

Improvements

Whether seller or tenant has any obligation to construct improvements or to perform maintenance;

Offset Rights

Whether tenant has any offset rights against amounts owing under the lease;

Options or Rights of First Refusal

Whether any tenant or other party has an option to purchase or lease the property or a right of first refusal to purchase the property or lease space;

Indemnity Obligations

The existence of any obligations under an indemnity agreement;

Guarantor Obligations

The existence of any obligations under a lease guaranty;

Exclusive Rights

Whether the existence of a right to sell a class of merchandise from the property is the exclusive right to do so and whether there are any violators of the exclusive right; and

Deposits

Whether tenant has any right to, *e.g.*:

- a. Security deposit;
- b. Cleaning deposit.

See CC §§1950.5, 1950.7.

WHEN TO USE THIS INFORMATION

Use the above information when:

- a. Preparing tenant estoppel certificates (see step 33, below);

- b. Negotiating with potential buyers;
- c. Drafting representations and warranties (see form agreement in ¶¶4.8, 7 of [Appendix A](#)); and
- d. Closing the transaction and giving closing notifications to tenants.

#### DEAL WITH ANY OPTION OR FIRST REFUSAL RIGHTS

##### Review Rights of Third Parties

Review with seller the terms and enforceability of any purchase option, right of first refusal, or other right to purchase.

##### Develop Strategy

Make sure that you and seller:

- a. Comply with the rights of the holder or obtain his or her waiver of those rights; and
- b. Notify brokers and prospective buyers of such third party rights in a manner that does not adversely affect potential buyers.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 10. SELLER: DETERMINE EFFECT OF SALE ON EXISTING LOANS

STEP 10. SELLER: DETERMINE EFFECT OF SALE ON EXISTING LOANS

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REVIEW LOAN DOCUMENTS

Review deeds of trust encumbering the property, and the notes secured by them, paying particular attention to due-on-sale and prepayment clauses to determine whether:

- a. Loan is assumable; and
- b. A sale will trigger a prepayment penalty.

IF LOAN IS ASSUMABLE

Negotiate with lender concerning:

- a. Who may assume loan and on what terms; and
- b. What the cost of assuming the loan will be (often 1/2 to 1 percent of the then-outstanding principal balance of the loan).

IF DUE-ON-SALE CLAUSE

a. Determine whether due-on-sale clause is enforceable. See California Mortgage and Deed of Trust Practice, chap 8 (3d ed Cal CEB 2000), referred to throughout this Action Guide as Mortgage & Deed of Trust; California Real Estate Finance Practice: Strategies and Forms §§1.68, 1.84, 3.22, 4.43, 4.53 (Cal CEB 2000), referred to throughout this Action Guide as Real Estate Finance.

b. Be aware that this clause allows lender to:

- (1) Approve or disapprove an assumption; or
- (2) Accelerate the loan in the event of a sale or other specified transfer without lender's consent.

IF PREPAYMENT PENALTY

If the loan has a prepayment penalty, carefully review the provision to determine:

Prepayment Penalty Legal

Whether prepayment penalty in loan secured by one-to-four-unit single-family dwellings is legal under:

- a. CC §§2954.9, 2954.11, limiting enforceability of prepayment penalties to 5 years;
- b. CC §2954.10, prohibiting prepayment penalties when the loan is accelerated under a due-on-sale clause; or
- c. CC §2954.12, limiting charging or collecting future payments for mortgage insurance or mortgage guaranty insurance;

Loan Is in "Lock-In" Phase

Whether a sale will trigger damages if the loan is in a "lock-in" phase;

Advance Notice for Prepayment

Whether prepayment requires giving lender advance notice of intent to prepay, sometimes up to 60 days; and

Penalty for Failing to Complete a Prepayment

Whether failure to prepay after notifying lender that prepayment will occur triggers a substantial penalty.

**Further Research:** For a discussion of prepayment penalties, see California Mortgage and Deed of Trust Practice, chap 8 (3d ed Cal CEB 2000).

Factor Penalty and Notice Requirements Into Price and Deposit

Advise seller to take into account the amount of the penalty and notice requirements when:

- a. Pricing the property; and
- b. Calculating the deposit (seller should be sure that buyer's deposit is sufficient to cover lender's penalty if seller does not complete the prepayment after notifying lender that he or she will).

#### NOTE

Prepayment penalties may be analyzed on enforceability as invalid or unreasonable liquidated damages. For discussion of liquidated damages, see [step 22](#), below.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 11. SELLER: DETERMINE TAX IMPACT OF SALE

STEP 11. SELLER: DETERMINE TAX IMPACT OF SALE

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MAKE PERTINENT INQUIRIES

Advise client to consult with you, an accountant, or a tax expert concerning:

Tax-Deferred Transaction or Reorganization

Advisability of structuring a tax-deferred transaction (*e.g.*, IRC §1031 exchange (see [step 15](#), below) or a reorganization).

Allocating Proceeds Among Assets

Allocation of purchase price among assets, *e.g.*, personal property, real property, land, assets requiring recapture of depreciation, covenant not to compete, goodwill, and consulting agreement.

NOTE

The goal is to allocate the maximum permissible amount to capital assets that have been held long enough to qualify for capital gain treatment. See [Real Property Sales §§4.36, 4.182](#).

Providing Seller Financing

Impact if seller provides financing, *e.g.*, treatment of installment sale proceeds (see below).

Taxes Due

- a. Federal and state income taxes, and sales and use taxes due on sale;
- b. Transfer taxes (who must pay what amount to whom; see [step 30](#), below).

Recapture

Recapture of depreciation and tax credits.

Withholding Requirements

Applicability of state and federal foreign investor withholding requirements (for discussion of compliance with FIRPTA withholding law, see [step 36](#), below).

Leasing

Whether to consider leasing.

Property Tax Reassessment

Effect of property tax reassessment. See [step 30](#), below.

EVALUATE USE OF INSTALLMENT SALE TREATMENT

Advise seller that if financing the sale (see [step 14](#), below), he or she may take advantage of deferral of reporting and paying tax on the gain through the installment sales provisions of IRC §453. See [Real Property Sales §§9.14-9.17](#).

NOTE

Keep in mind that if seller is foreign, special arrangements may be required to satisfy federal withholding requirements (see IRC §§897, 1445). For discussion of situation if seller is foreign, see [step 36](#), below.

How It Affects Tax Payment

If sale qualifies for installment sale treatment:

- a. Seller will pay tax on the gain ratably as each payment is received.
- b. If debt on the property exceeds the property's tax basis, excess debt is treated as a payment in the year of sale.

## NOTE

If the down payment is small and the depreciation recapture and/or excess debt is large, the tax may exceed the amount of cash received.

- c. Tax on deferred gain may be accelerated if the note is discounted or used as security.
- d. Additional tax (which is computed like interest on the deferred tax liability) may be due if seller has over \$5 million in deferred installment sales obligations. IRC §453A.

### When to Avoid

Recognize that an installment sale is disadvantageous when:

- a. Seller's tax liability will exceed proceeds received, *e.g.*, if there is extensive depreciation recapture or debt on the property is substantially greater than the property's tax basis; or
- b. Buyer insists that seller's deed of trust be subordinated to the lien of buyer's other financing, and seller is unable or unwilling to assume the additional risk (for discussion of considering subordinating seller's deed of trust, see [step 14](#), below).

### Requirements

For a discussion of the requirements for using the installment method, see [Real Property Sales §§9.14-9.17](#).

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 12. SELLER: INVESTIGATE TITLE TO ENSURE CONVEYANCE OF CLEAR TITLE

STEP 12. SELLER: INVESTIGATE TITLE TO ENSURE CONVEYANCE OF CLEAR TITLE

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DETERMINE HOW PROPERTY HELD

Obtain Preliminary Report

Obtain a preliminary report from title company that will be issuing buyer's title policy and review it with seller to determine seller's authority to sell. On preliminary reports, see California Title Insurance Practice, chap 5 (2d ed Cal CEB 1997), referred to throughout this Action Guide as Title Ins.

NOTE

If buyer is requesting American Land Title Association (ALTA) extended coverage (see step 35, below), inform title company and ensure that preliminary report anticipates ALTA coverage.

IF TITLE IN

If title is in:

Corporate Name

Corporate name, obtain approval of the board of directors, or of others as set forth in the articles, bylaws, or minutes.

Partnership Name

Partnership name, review partnership agreement for any provisions restricting power to sell or requiring partners' approval to sell the property.

Limited Liability Company Name

Name of limited liability company, obtain approval of members according to articles of organization and written operating agreement.

Trust

Trust, review trust document for information concerning:

- a. Who can sell the property;
- b. Any restriction on power to sell; and
- c. Whether court approval is necessary.

Two or More Co-Owners

Names of two or more co-owners, obtain approval of all.

Estate

Name of estate:

- a. Determine whether court approval is:
  - (1) Necessary; or
  - (2) Desirable, to take advantage of court bidding procedures.
- b. Review need to obtain Internal Revenue Service (IRS) release of special lien for death taxes.

**Further Research:** For discussion of sales of property subject to probate, see 1 California Decedent Estate Practice §§13.13-13.60 (Cal CEB 1986).

IF TITLE IN INDIVIDUAL SELLER'S NAME

If the property is in seller's name, determine whether an ownership interest is held by anyone whose name does *not* appear on

record title:

#### Spousal Interest

- a. Ask about seller's marital status and determine whether the property is community or separate property. See Real Property Sales §4.21.
- b. If seller is married or divorced, title company may require a quitclaim deed from spouse or former spouse.

#### Partner Interest

- a. Ask whether seller has any partners and determine whether the property is in fact partnership property being held in seller's individual name.
- b. If so:
  - (1) Review partnership agreement for restrictions on power to sell and requirements for partners' approval; and
  - (2) Inform title company, and comply with title company's reasonable requirements relating to seller's conveyance of title.

**Further Research:** For discussion of partnership property held in partner's name, see Corp C §15010; *Patel v Patel* (1989) 212 CA3d 6, 9, 260 CR 255. See also Real Property Sales §§4.24-4.26.

#### Seller Holds Title for Beneficiary

- a. Ask seller if he or she holds title as trustee for a beneficiary; and
- b. If so, review trust document to:
  - (1) Verify that seller is acting within its terms;
  - (2) Determine whether court approval is necessary or desirable (see discussion of property held in trust, above, in this step).

**Further Research:** For discussion of trustees as sellers, see Real Property Sales §4.19. See also California Trust Administration §§5.47-5.62 (2d ed Cal CEB 2001).

PREPARE TO TRANSFER CLEAR TITLE

#### PROTECT SELLER FROM IMPLIED COVENANTS

##### Explain Law

Explain that when seller conveys title with a standard grant deed, seller impliedly covenants that (CC §1113):

- a. Seller has not previously sold the same estate, or any right, title, or interest in it, to any other person; and
- b. Estate is free of all liens and encumbrances done, made, or suffered by seller, or any person claiming under seller. This covenant:
  - (1) Applies even if buyer has actual knowledge of the encumbrance (*Fidelity Nat'l Title Ins. Co. v Miller* (1989) 215 CA3d 1163, 1171, 264 CR 17); but
  - (2) Does not apply to encumbrances that are apparent from an inspection of the property. See *Evans v Faught* (1965) 231 CA2d 698, 710, 42 CR 133.

##### Scrutinize Preliminary Report

*Carefully* review preliminary report to make sure that each title exception (*e.g.*, lien, easement, mortgage) known to seller and potentially covered by CC §1113 is listed. See Title Ins, chap 5.

##### Put Protection in Purchase Agreement

Make sure purchase agreement states that:

- a. Any warranties or covenants of title to be given by seller specifically will exclude all title exceptions that parties have agreed may appear in buyer's title policy; and
- b. Such warranties, covenants, and exclusions will survive delivery and recording of grant deed.

**Caution:** At a minimum, the purchase agreement should state that seller will convey title "subject to easements, covenants and other encumbrances of record" that seller does not intend to clear by the closing. See Stevenon v Baum (1998) 65 CA4th 159, 75 CR2d 904.

#### OBTAIN CONSENTS AND WAIVERS

Obtain consent, waiver, or approval of any other party with an interest in the property.

#### REMOVE PROBLEMATIC TITLE EXCEPTIONS

If possible, negotiate removal of any liens, rights of way, restrictions, easements, encroachments, and encumbrances that will adversely affect marketability.

#### NOTE

Title companies should be helpful in removing encumbrances and conveying clear title.

#### FACTOR INTO ASKING PRICE

Advise seller to calculate effect on the asking price, financing, and funds received by seller of payments made to clear:

- a. Tax liens;
- b. Loans secured by the property;
- c. Judgments; and
- d. Mechanics' liens.

#### DETERMINE WHETHER PROPERTY IS LEGAL PARCEL

Determine whether the property is a legal separate parcel. See California Subdivision Map Act and the Development Process §2.2 (2d ed Cal CEB 2001), referred to throughout this Action Guide as Subdiv Map Act.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 13. SELLER: CONSIDER RESERVING RIGHTS IN PROPERTY

STEP 13. SELLER: CONSIDER RESERVING RIGHTS IN PROPERTY

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WHEN RETAINING PROPERTY INTEREST

Advise seller:

- a. That he or she may opt to sell less than an entire fee interest by retaining rights as described below; but
- b. Retaining rights may cause buyer resistance or reduce the price seller can obtain.

WHEN SELLER OWNS ADJACENT PROPERTY

If seller owns property adjacent to that being sold, advise him or her to consider ways of benefiting the retained parcel, *e.g.*:

Ingress and Egress Easement

Reserving an easement for ingress and egress.

Light and Air Easement

Reserving an easement for light and air.

Utility Hookup Easement

Reserving an easement to permit utility hookups.

Retained Fee Interest

Withholding a fee interest, such as a roadway to ensure access (be sure you comply with the Subdivision Map Act ([Govt C §§66410-66499.37](#))). See [Subdiv Map Act, chap 2](#).

NOTE

Usually access is preserved through easements, but sometimes the benefited property is more marketable if the access road is owned in fee.

CC&Rs

Imposing covenants, conditions, and restrictions (called CC&Rs) regulating type, design, or number of improvements on the conveyed parcel.

IF PART OF LARGER PROJECT

If seller's property is part of a larger project, *e.g.*, a subdivision or shopping center, advise seller to consider:

Reciprocal Easements

Reciprocal easements benefiting the entire subdivision;

Right of Refusal

A right of first refusal or repurchase option triggered by buyer's failure to develop property as provided under the sales agreement, if this failure will have a material, adverse impact on seller;

CC&Rs

Separately recording CC&Rs that benefit and burden the property to be conveyed and adjacent property by:

- a. Restricting the use of the property to be conveyed;
- b. Imposing design criteria on future improvements to be constructed on the property; and
- c. Imposing a series of reciprocal utility easements and access easements.

NOTE

You must include in each grantee's deed notice that the property is to be restricted under recorded documents. Scaringe v JCC Enters., Inc. (1988) 205 CA3d 1536, 1543, 253 CR 344, overruled in part in Citizens for Covenant Compliance v Anderson (1995) 12 C4th 345, 47 CR2d 898.

#### RETAINING MINERAL RIGHTS

If seller believes that valuable minerals may be present, consider:

- a. Reserving a right in all oil, minerals, gas, and other hydrocarbon substances below a depth of 500 feet (reserving a right above 500 feet may dramatically inhibit financing);
- b. Reserving right to extract the minerals by subsurface means, *e.g.*, by slant drilling; and
- c. Negotiating rights of surface entry, which are usually specifically excluded.

#### RETAINING WATER RIGHTS

Seller should consider reserving water rights if:

- a. Seller owns adjacent land not served by public water supply; and
- b. In the future, seller may need water rights or want to convey the rights to other users located in the same water basin.

#### RESERVING A LIFE ESTATE

When to Consider

Be prepared to discuss relative merits of, and procedures for, reserving a life estate for a seller who:

- a. Desires continued use of the property, as an income stream or as a residence; but
- b. Wants to place title to the property in the hands of a beneficiary now.

#### NOTE

If seller retains life estate in only a portion of the property, make sure that the arrangement complies with Subdivision Map Act (Govt C §§66410-66499.37). See Subdiv Map Act, chap 2.

Need Cooperating Buyer

You or seller must find a cooperating buyer, *e.g.*, a family member or a charity.

**Further Research:** For discussion of creation of life estate, and rights and duties of holder, see *Tenant v John Tennant Mem. Home* (1914) 167 C 570, 140 P 242.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 14. BUYER AND SELLER: CONSIDER SELLER CARRYBACK FINANCING

STEP 14. BUYER AND SELLER: CONSIDER SELLER CARRYBACK FINANCING

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SELLER FINANCING DEFINED

Seller financing is when seller agrees to defer payment of all or a portion of the purchase price and accepts a promissory note for the unpaid amount.

Deed of Trust

- a. Typically the note is secured by a deed of trust, which provides seller with a security interest in the property.
- b. Seller records deed of trust at County Recorder's office to protect the priority of seller's interest.

ADVANTAGES TO SELLER

Advise seller that providing financing to a buyer can result in:

- a. A higher purchase price;
- b. A larger market of buyers and hence a quicker sale;
- c. Deferred recognition of gain through use of the installment sales provisions (for discussion of evaluating use of installment sale treatment, see [step 11](#), above); and
- d. A flow of interest income secured by a lien on the property.

ADVANTAGES TO BUYER

Seller financing allows buyer to:

- a. Purchase property when institutional financing is unavailable; or
- b. Purchase property when available institutional financing is insufficient; and/or
- c. Pay the purchase price from funds generated by the property.

SELLER RISKS

Evaluate risks with seller, *e.g.*:

- a. Buyer may default on the note;
- b. Buyer may assert right of setoff, withholding payments on the note to recover amounts allegedly owed by seller as a result of defaults under the purchase agreement;
- c. Seller loses use of the funds and possibly another investment opportunity;
- d. Possibly reduced security if seller agrees to subordinate deed of trust to lien of buyer's other financing, *e.g.*, when property is to be developed (see discussion of considering subordinating seller's deed of trust, below, in this step);
- e. Tax liability may exceed proceeds (for discussion of how it affects tax payment, see [step 11](#), above);
- f. Taking back a note makes a tax-deferred exchange very difficult, if not impossible, from a practical standpoint;
- g. Buyer may have no personal liability (*i.e.*, if seller enforces the deed of trust through foreclosure, and the value of the property is insufficient to satisfy the debt, seller may have no legal recourse against buyer for the balance) (see [CCP §580b](#)); and
- h. If note does not provide for adequate interest, seller may be liable for additional taxes because of imputed interest under IRC §483.

CONSULT WITH TAX ADVISER

Advise seller to consult with tax adviser concerning:

- a. What constitutes a payment for purposes of the installment sale provisions, *e.g.*, a security, a letter of credit;

- b. Imputed interest rules;
- c. Tax and economic consequences to seller of seller financing.

**Further Research:** For further information, see [Real Property Sales, chap 9](#).

## CHOOSE METHOD OF SELLER FINANCING

### NOTE SECURED BY DEED OF TRUST

#### If Seller Provides Supplemental Financing

Use a note secured by a *second* deed of trust if buyer has obtained institutional financing, or is assuming seller's existing financing, and seller is providing an additional loan for part of the purchase price.

#### If Seller Provides Sole Financing

Use a note secured by a *first* deed of trust when seller is providing the only financing for the transaction.

#### How to Draft

When drafting the note and deed of trust, refer to:

- a. [Real Estate Finance, chaps 3-4](#); Real Property Forms Man §§5.1-6.2; and
- b. For simple transactions, forms provided by title insurance companies, supplemented with due-on-sale clause, hazardous materials restrictions, and any other terms critical to transaction. See, *e.g.*, Exhibits to [Appendix D](#) and clauses in [Real Estate Finance §§4.17-4.60](#).

#### If Personal Property Included

If there is personal property (*e.g.*, building plans, equipment), use a separate security agreement (and consider including a security agreement in deed of trust):

- a. File Form UCC-1 with Secretary of State ([Com C §§9302\(1\), 9401\(1\)](#)); and
- b. Record deed of trust as a fixture filing. [Com C §§9401-9403](#).

#### NOTE

Substantial changes to the Commercial Code, including renumbering of many sections, were effective July 1, 2001. See Andrew, *New UCC Article 9: Perfection of Personal Property Security Interests in Real Property Loan Transactions*, 24 CEB Real Prop L Rep 146 (May 2001).

**Further Research:** See [Real Estate Finance, chap 7](#), for forms and discussion of security agreements, fixture filings, and filing procedures.

### CONSIDER SUBORDINATING SELLER'S DEED OF TRUST

Buyer may require as a condition of the purchase that seller be willing to subordinate his or her deed of trust to a future loan that borrower plans to obtain, *i.e.*, that seller acknowledge in a recorded document that seller's lien is second in rank to the lien of the new lender.

#### When to Consider

Consider agreeing to subordinate seller's deed of trust to lien of *specific* future financing if:

- a. Seller is selling raw land that buyer will be developing through use of construction financing and/or permanent financing; or
- b. Buyer will find it difficult to obtain any financing because of the nature of the property.

#### If Smaller Property

Subordination may not be advisable when purchase price is not high, because attorney time can eat up seller's profit on small transaction.

#### Drafting Considerations and Sample Forms

Before negotiating and drafting a subordination clause or agreement, see [California Real Estate Finance Practice: Strategies and Forms §§1.12, 3.21, 3.96 \(Cal CEB 2000\)](#); [Real Property Sales §§9.66-9.99](#); [Mortgage & Deed of Trust, chap 9](#).

## ALL-INCLUSIVE DEED OF TRUST (WRAP-AROUND MORTGAGE)

### How It Works

As used in seller financing, all-inclusive deed of trust involves:

- a. Buyer providing seller with all-inclusive promissory note in which buyer promises to pay in installments:
  - (1) Amount that seller is lending (*i.e.*, the portion of purchase price that seller is deferring); *plus*
  - (2) Unpaid balance of an existing mortgage (held by a third party lender), which buyer and seller agree will remain on title after close of escrow;
- b. Parties recording an all-inclusive deed of trust on the property, securing buyer's all-inclusive promissory note; and
- c. Seller promising to continue to make the payments due on the preexisting ("underlying") mortgage, as long as buyer continues to make the payments to seller on the all-inclusive note.

### When Used

In particular circumstances, an all-inclusive deed of trust may provide some interest-spread or tax-planning benefits, although it also presents potential problems demanding careful planning. See [Real Estate Finance §1.53](#); [Real Property Sales, chap 9](#); [Mortgage & Deed of Trust, chap 9](#).

## INSTALLMENT LAND CONTRACT

An installment land contract is an agreement through which buyer pays for real property in installments, and seller retains title until payment of purchase price is complete; it is rarely used in California because of drawbacks for seller in the event of buyer's default. See [Real Property Remedies, chap 4](#); [Real Property Sales, chap 9](#).

MONITOR SELLER-FINANCING DISCLOSURES AND NOTICE OF BALLOON PAYMENT

## WHEN DISCLOSURES REQUIRED

Under [CC §§2956-2967](#), seller, buyer, and an "arranger of credit" (see below) must provide specific written disclosures regarding the credit transaction when the sale involves:

- a. A dwelling containing one to four units; and
- b. Financing provided through an "arranger of credit."

## ARRANGER OF CREDIT DEFINED

An arranger of credit is:

### Generally

A person who is generally *not a party* to the transaction and who ([CC §2957\(a\)\(1\)](#)):

- a. Assists in negotiating or developing the credit terms;
- b. Participates in completion of the credit documents; and
- c. Directly or indirectly receives compensation:
  - (1) For arranging the credit; or
  - (2) From any transaction that is facilitated by the extension of credit.

### Attorney

An attorney who *is a party* to the transaction if:

- a. Attorney also performs the activities and receives compensation as arranger of credit (see above); and

b. Neither party to the transaction is represented by an agent who is a real estate licensee. CC §2957(a)(2).

#### NOTE

Merely representing a party to the transaction will not make an attorney an arranger of credit. CC §2957(a)(1).

#### WHEN DISCLOSURES NOT REQUIRED

"Arranger of credit" disclosures are not required if a party is already entitled to loan disclosures under certain other statutes, *e.g.*, federal Truth-in-Lending Act (15 USC §1604), Real Estate Settlement Procedures Act (RESPA) (12 USC §2601). CC §2958.

**Further Research:** For a general discussion of the federal Truth-in-Lending Act and RESPA, see Real Property Sales §15.95.

#### MONITOR DISCLOSURES

If you (as an attorney/party) or your client (*e.g.*, as a nonparty or broker/party) is an arranger of credit, ensure that the disclosure statement is completed and distributed as required by CC §§2957(a), 2963.

**Sample Form:** See Real Property Forms Man §2.5 for a form covering the required disclosures.

#### IF NOTE CALLS FOR BALLOON PAYMENT

Advise seller to give written notice of balloon payment to trustor (buyer) or successor in accordance with CC §2966:

##### When to Notify

Seller must give notice not less than 90 or more than 150 days before balloon payment is due.

##### What to Include in Notice

Notice should state details of obligation, *i.e.*:

- a. Payor;
- b. Amount due;
- c. Due date; and
- d. Right to refinance, if any.

#### NOTE

See CC §2924i, which applies to owner-occupied residential property of one to four units if the loan is over 1 year and is a balloon payment loan.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Seller's Premarketing Due Diligence/STEP 15. CONSIDER ENGAGING IN A TAX-DEFERRED EXCHANGE

STEP 15. CONSIDER ENGAGING IN A TAX-DEFERRED EXCHANGE

---

WHEN APPROPRIATE

Advise seller to consider tax-planning opportunities of an IRC §1031 exchange if seller is:

- a. Selling investment or business property; and
- b. Interested in reinvesting in like-kind property.

CONSIDER ADVANTAGES

A tax-deferred exchange allows seller to (IRC §1031):

- a. Defer income tax on the gain realized on sale of the property;
- b. Pay tax only on cash or personal property received, or to the extent that the existing encumbrances on the property transferred exceed those on the property received; and
- c. Restructure seller's real property investment portfolio.

**Further Research:** See Real Property Exchanges, chap 1 (3d ed Cal CEB 2002), referred to throughout this Action Guide as Real Prop Exchanges; Real Property Sales §1.101.

WHEN NOT ADVISABLE

Advise seller against exchanging if:

- a. Selling or acquiring property held or to be held for sale (IRC §1031);
- b. Costs of professional services exceed tax savings, *i.e.*, when tax basis in property is high (see IRC §§1031, 1245, 1250);
- c. Seller considers probable IRS scrutiny of the transaction (and other items on seller's return) threatening;
- d. Selling will result in a tax loss (not recognized in a §1031 exchange);
- e. Gain on sale will be offset by existing losses.

**Further Research:** See Real Prop Exchanges, chap 1.

Transfers to Related Parties

Note that tax-deferred benefit will be lost if the exchange is between related parties and either party disposes of the property received in the exchange within 2 years. IRC §1031(f).

BASIC REQUIREMENTS FOR AN EXCHANGE

For information and directions on tax-deferred exchanges, see Real Prop Exchanges, chaps 2-4; Real Property Sales §1.101.

CONSULT WITH EXPERT

Before proceeding with an exchange, advise seller to consult with a tax adviser or an expert in IRC §1031 exchanges to:

- a. Determine tax impact of an exchange versus a purchase;
- b. Ensure that the proposed exchange complies with the strict requirements of IRC §1031 and regulations;
- c. Prepare agreements and escrow instructions documenting the exchange; and
- d. Advise on risks of outside safe harbors, for example, if considering a "reverse exchange" (acquiring target property before you sell existing property).

## STEP 16. RECOGNIZE BUYER'S DISCLOSURE OBLIGATIONS

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### BUYER MUST DISCLOSE

#### Inaccessible Facts About Property's Condition

Buyer must disclose to seller material information about the property's physical integrity known to buyer and not known *or accessible* to seller. See *Nussbaum v Weeks* (1989) 214 CA3d 1589, 1600, 263 CR 360.

#### NOTE

As a practical matter, buyer disclosure is rarely an issue, because buyer normally has less access to information about the property's condition than seller.

#### Not Other Factors Affecting Value

Buyer generally is not required to disclose to seller *other* material information affecting property's value (*e.g.*, pending zoning change or redevelopment project), unless (*Nussbaum v Weeks, supra*):

- a. A fiduciary or confidential relationship exists between buyer and seller (*e.g.*, buyer is seller's attorney or trustee);
- b. Buyer makes a partial or misleading disclosure to seller; or
- c. Buyer knows seller would reasonably expect a disclosure to be made.

#### NOTE

The *Nussbaum* opinion does not elaborate on when a seller might *reasonably* expect a buyer to disclose information that would positively affect the value or desirability of the property, and it is hard to envision such circumstances.

### BUYER MUST AVOID MISREPRESENTATIONS

If buyer actively misrepresents facts, buyer may be liable for fraudulently inducing seller to enter into purchase agreement. See *Palm v Smither* (1942) 52 CA2d 500, 126 P2d 428.

STEP 17. BUYER: DETERMINE FORM OF PURCHASING ENTITY

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OPTION 1 – FORM ENTITY BEFORE SIGNING PURCHASE AGREEMENT

If buyer is to be a legal entity rather than one or more individuals, form the purchasing entity before signing the purchase agreement, because if an entity that is not yet formed signs as buyer, seller may be able to withdraw from the transaction before the entity is formed. See Real Property Sales §4.20.

NOTE

Transfers after *closing*, even a mere change of form, may result in imposition of additional taxes, *e.g.*, transfer taxes (see step 26, below), income or gift taxes, or increased property taxes from a reassessment of the property. See step 30, below.

OPTION 2 – MAKE AGREEMENT ASSIGNABLE

If a decision cannot be made before signing the purchase agreement, have an existing entity (or an individual if he or she is willing to incur liability for purchase) enter into the agreement and make the agreement assignable.

NOTE

Buyer's rights are generally assignable even without a specific assignment clause, unless a contrary intention is apparent (see CC §1458; Farmland Irrig. Co. v Dopplmaier (1957) 48 C2d 208, 222, 308 P2d 732), but negotiate specific assignment rights to clarify parties' intentions and to release assignor from the purchase obligations. See below.

DRAFTING TIPS

To make the agreement assignable:

Add "or Assignee"

Add "or assignee" after buyer's name.

NOTE

Seller may not agree to simply adding "or assignee" and may prefer to address this issue through an assignment provision.

Add Assignment Provision

Add a specific provision that buyer may assign the agreement:

- a. Without obtaining seller's prior written consent; or
- b. To certain specified assignees, *e.g.*, a corporation in which buyer will have a majority interest.

Use Formal Assignment Agreement

- a. Use a formal assignment agreement to carry out the assignment;
- b. Understand that original buyer (assignor) will not be relieved of liability for performance of the purchase contract, unless the agreement so provides. See CC §1457.

Buyer

- a. Negotiate to release original buyer (assignor) from liability, effective on assignee's assumption of purchase agreement's obligations;
- b. Try to get seller to agree to the form and content of the assignment document, and attach it as an exhibit to the purchase agreement.

## Seller

Negotiate against release of original buyer, especially if seller is accepting a note for part of the purchase price and subordinating seller's deed of trust to buyer's other financing. See step 14, above.

## AVOID USING TERM "OR NOMINEE"

Do not use the term "or nominee" after buyer's name to make the agreement assignable (*e.g.*, "This agreement is made on May 1, 2009, between John Doe ('Seller') and Jane Roe or nominee ('Buyer'), who agree ..."). If you use "or nominee," the contract may be unenforceable as illusory. See Real Property Sales §§4.156-4.157.

## CHOOSE FORM OF OWNERSHIP

Help buyer weigh advantages and disadvantages of available forms of ownership, keeping in mind that:

a. The form of ownership buyer chooses will vary with:

- (1) Number of owners;
- (2) Type of property;
- (3) Use of the property; and
- (4) Buyer's tax situation.

b. Tax implications of buyer's purchase should be determined by a competent tax expert familiar with buyer's financial circumstances and the proposed purchase.

c. A limited partnership with a corporate general partner is generally used when purchasing investment property because of:

- (1) Greater flexibility in tax planning; and
- (2) Limited liability of the owners.

## NOTE

The corporate general partner must pay a franchise tax. See Rev & T C §23153.

ORDINARY CORPORATION
----------------------

## ADVANTAGES

Advantages of corporation are:

- a. Limited liability;
- b. Continuous uninterrupted existence if formalities are observed and taxes are paid;
- c. Flexibility of substituting new members, but may be limited by a buy-sell agreement; and
- d. Centralized management.

## DISADVANTAGES

Disadvantages of corporation are:

- a. Income is taxed at corporate level and possibly again as dividends to shareholders;
- b. Losses are not passed through to shareholders;
- c. Possible personal holding company tax and accumulated earning tax;

- d. Personal guaranties of controlling stockholders are often required by financial institutions, reducing advantage of limited liability;
- e. Compliance with corporate formalities is time consuming and expensive;
- f. Payment of annual franchise tax of 8.84 percent of net income, but not less than \$800 per year (Rev & T C §§23151, 23153);
- g. No step-up in the basis of assets if a shareholder dies or sells his stock; and
- h. Cannot withdraw contributed capital or distribute profits if remaining capital in company is insufficient to pay company's obligations.

## S CORPORATION

### ADVANTAGES

Advantages of S corporation are:

- a. Those of ordinary corporation (see advantages of ordinary corporation, above, in this step); and
- b. Partnership tax treatment with some differences, *e.g.*, California taxes S corporation net income at 1.5 percent (see Rev & T C §23802).

### DISADVANTAGES

Disadvantages of S corporation are:

- a. Loss deductions by shareholders:
  - (1) Are limited to shareholder's stock basis plus any shareholder loans to the corporation; but
  - (2) Do not include corporate third party debts (a partnership or limited liability company may be preferable if real property is substantially leveraged);
- b. Number and type of shareholders, source of income, and other tests must be met to qualify (IRC §§1361-1379);
- c. Filing election in a timely manner with IRS and Franchise Tax Board (FTB) is required;
- d. Compliance with corporate formalities is required;
- e. No step-up in the basis of assets if a shareholder dies or sells his stock; and
- f. No special allocations are possible.

**Further Research:** For further information, see Organizing Corporations in California §§1.48-1.56 (3d ed Cal CEB 2001).

## GENERAL PARTNERSHIP

### ADVANTAGES

Advantages of general partnership are:

- a. Conduit tax treatment and single level of tax:
  - (1) Income, whether or not distributed, is taxed to each partner;
  - (2) Losses are deductible, limited to each partner's basis, which may include partnership liabilities;
- b. Flexibility of structure;

- c. Generally, property may be contributed to or distributed from a partnership without any income tax consequences; and
- d. Basis of assets may be stepped up on death of partner or sale of a partnership.

## DISADVANTAGES

Disadvantages of general partnership are:

- a. Typically not useful, except when owners are friends or relatives;
- b. Partners do not enjoy limited liability, in contrast to corporate shareholders or limited partners;
- c. Unwieldy management—possibility of power struggles among investors if agreement is not carefully drafted; and
- d. Any partner may bind partnership (but, on effect of recording statement of partnership, see Advising California Partnerships §§4.123-4.124 (3d ed Cal CEB 1999), referred to throughout this Action Guide as Advising Partners).

**Further Research:** For discussion of evaluating the partnership form of entity, see Advising Partners, chap 1.

## LIMITED PARTNERSHIP

## ADVANTAGES

Advantages of limited partnership are:

- a. Conduit tax treatment and single level of tax (for discussion of general partnership, see above), but partners' loss deductions are limited by the passive-loss rules;
- b. Limited liability for the limited partners;
- c. Enhanced ability to raise capital;
- d. Centralized management;
- e. Flexibility of structure;
- f. Generally, property may be contributed to or distributed from a partnership without any income tax consequence; and
- g. Basis of assets may be stepped up on death of partner or sale of a partnership.

## DISADVANTAGES

Disadvantages of limited partnership are:

- a. Difficulty in identifying an individual or adequately capitalized entity to serve as general partner;
- b. Difficulty in negotiating terms;
- c. Compliance with tax-reporting requirements may be more complex than for general partnership;
- d. Compliance with state and federal securities laws may be time consuming and expensive; and
- e. Payment of minimum taxes of \$800 to FTB annually if general partner is a corporation. See Rev & T C §23153.

**Further Research:** For discussion of special considerations for limited partners, see Advising Partners §§1.42-1.50.

## LIMITED LIABILITY COMPANY

## DEFINITION

A limited liability company is an entity created under the Beverly-Killea Limited Liability Company Act (Corp C §17000-17655) that provides investors with the limited personal liability of a corporation but avoids double taxation.

#### ADVANTAGES

Advantages of limited liability company are:

- a. Good vehicle for foreign investors;
- b. Limited liability like ordinary corporation;
- c. Partnership tax treatment;
- d. May be more difficult for courts to "pierce the corporate veil" to find shareholders personally liable for obligations of company; and
- e. Fewer formalities to comply with than for corporations.

#### DISADVANTAGES

Disadvantages of limited liability company are:

- a. Financial institutions may require personal guaranties of members, or require members to agree to contribute capital sufficient to cover liabilities;
- b. Cannot withdraw contributed capital or distribute profits if remaining capital in company is insufficient to pay obligations of company;
- c. Unless provided otherwise, any member may bind the company;
- d. Compliance with tax-reporting requirements may be time consuming and expensive, as with partnerships;
- e. Compliance with state and federal securities laws may be time consuming and expensive; and
- f. Must pay minimum tax.

TRUST

#### ADVANTAGES

Advantages of trust are:

- a. Useful for holding and conserving family properties;
- b. If private, no public filings are required; and
- c. Simplifies transfer of interests on death, avoiding probate.

#### DISADVANTAGES

Disadvantages of trust are:

- a. May be taxed as a corporation if the trust appears to be doing business; and
- b. Trust vehicle is awkward in dealing with financial institutions and third parties.

**Further Research:** For further help in evaluating trust vehicles, see California Estate Planning (Cal CEB 2002); Drafting California Revocable Trusts, chap 1 (4th ed Cal CEB 2003); Drafting California Irrevocable Trusts, chap 5 (3d ed Cal CEB 1997).

JOINT TENANCY

## ADVANTAGES

Advantages of joint tenancy are:

- a. Simple procedure; and
- b. On death, property passes to surviving joint tenant, thus avoiding probate (but note that "community property with a right of survivorship" gives a surviving spouse the same advantage as a surviving joint tenant in avoiding probate (see [Fam C §750](#)). For summary transfer proceeding, see [Transferring Property Without Probate, step 20 \(Cal CEB Action Guide September 2008\)](#), referred to throughout this Action Guide as Transferring Prop.

## DISADVANTAGES

Disadvantages of joint tenancy are:

- a. Typically not useful, except among close family members;
- b. Cannot specially allocate tax benefits and burdens;
- c. Interests of joint tenants must be equal;
- d. May be treated as partnership for tax purposes if co-owners are conducting a joint business (Treas Reg §301.7701-3), but co-owners may be excluded or may elect to be excluded from partnership tax provisions in certain circumstances (see Treas Reg §1.761-2);
- e. On death, property passes to surviving joint tenant (thus, owners cannot devise property);
- f. In contrast to community property, only the portion of the property passing to surviving joint tenant receives a step-up in basis;
- g. An overall development plan may be destroyed by one cotenant transferring his or her interest;
- h. A transfer of ownership may cause a property tax reappraisal ([Rev & T C §61\(d\)](#));
- i. All actions require 100-percent agreement, which may cause management problems; and
- j. Entire property may be liable for debts of each joint tenant.

## TENANCY IN COMMON

## ADVANTAGES

Advantages of tenancy in common are:

- a. Simple procedure; and
- b. Cotenant can devise his or her interest in the property and engage in IRC §1031 exchange.

## DISADVANTAGES

Disadvantages of tenancy in common are:

- a. Cannot specially allocate tax benefits and burdens;
- b. Cotenants may be treated as partners for tax purposes if they are conducting a business (Treas Reg §301.7701-3), but co-owners may be excluded or may elect to be excluded from the partnership tax provisions in certain circumstances (see Treas Reg §1.761-2);
- c. An overall development plan may be destroyed by one owner transferring his or her interest or partitioning the property, *although* this can be prevented by:

- (1) Including in the cotenancy agreement buy-out provisions and restrictions on transfers; and
  - (2) Recording the agreement with the county recorder;
- d. A transfer of ownership may cause a reappraisal for property tax purposes (Rev & T C §61(e)); and
- e. Disagreements among co-owners may cause management problems.

COMMUNITY PROPERTY
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## ADVANTAGES

Advantages of community property are:

- a. Each spouse may devise his or her half, unless property is expressly held as community property with "right of survivorship" (see Fam C §750);
- b. On death of first spouse, both halves receive a step-up in basis; and
- c. On death of first spouse, property can be transferred to surviving spouse through summary transfer or simple petition, without probate. See Fam C §750; Prob C §§13650-13660; see also Transferring Prop, steps 2, 10-12, 20.

## DISADVANTAGES

Disadvantages of community property are:

- a. No matter what the source of funds, title in spouses' names creates a presumption of equal ownership as community property;
- b. Entire property may be liable for debts of one spouse.

## NOTE

While both spouses are alive, neither can transfer, sell, or otherwise dispose of property without written consent of other spouse. CC §5125(b).

*Further Research:* For discussion of community property, see Real Property Sales §§4.21, chap 10.

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STEP 18. BUYER AND SELLER: CONSIDER AN OPTION AGREEMENT

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OPTION AGREEMENT DEFINED

Generally, an option agreement is a contract in which seller (optionor), for a fee, gives buyer (optionee) the exclusive right to purchase the property on specific terms during a specific period of time. See [Real Property Sales, chap 8](#).

BUYER—WEIGH ADVANTAGES AND DISADVANTAGES

Advise buyer considering an option agreement to compare it with a purchase agreement by weighing advantages and disadvantages.

Advantages

Advantages are:

- a. Buyer controls the sales price and availability of the property for a specified period of time;
- b. Gives buyer time to:
  - (1) Investigate suitability of the property;
  - (2) Obtain financing;
  - (3) Secure permits; and
  - (4) Assemble adjacent parcels;
- c. Eliminates risk (inherent in every contingent sales contract) that agreement will be found to be an unenforceable, illusory contract because buyer is not really obligated to perform (see [Real Property Sales §4.3](#)); and
- d. Provides flexibility, *e.g.*, permits parties to negotiate a nominal payment for 30 days, with a substantial sum to follow, or vice versa.

Disadvantage

Disadvantage is that buyer pays for time to evaluate suitability instead of being able to engage in free investigation under a conditional sales contract. See [step 24](#), below.

SELLER—WEIGH ADVANTAGES AND DISADVANTAGES

Advise seller responding to an option offer to compare it with an offer of purchase by weighing its advantages and disadvantages:

Advantages

Advantages are:

- a. Compensates seller for removing the property from the market for a specified period of time;
- b. Contains a clearer statement of the transaction than when buyer's contingencies are so extensive that a purchase agreement would really function as an option; and
- c. Seller's claim to retain option consideration is less likely to be challenged than a claim to liquidated damages under [CC §§1675-1677](#). For discussion of liquidated damages, see [step 22](#), below.

## Disadvantages

Disadvantages are:

- a. Marketing the property is difficult during the term of the option;
- b. Does not limit buyer to specified contingencies;
- c. Possibly decreases value of property because of buyer's investigatory activities or occupancy (if leased to buyer during option); and
- d. May require recording of a quitclaim deed to clear title if option expires without exercise (but see CC §§884.010-884.030).

## DRAFT WRITTEN OPTION AGREEMENT

Recognize that the option agreement must be written to comply with the Statute of Frauds. CC §1624(a)(3).

**Further Research:** For a discussion of purchase and option terms to include in written agreement, see Real Property Sales §§7.2-7.5, 7.45-7.68; *Riverside Fence Co. v Novack* (1969) 273 CA2d 656, 663, 78 CR 536; *Woods v Bradford* (1967) 254 CA2d 501, 504, 62 CR 391.

**Sample Forms:** See Real Property Forms Man §§3.1-3.19; Real Property Sales, chap 8.

## RECORD OPTION AND EXTENSIONS

If Representing Buyer

If representing buyer:

- a. Record the option or a memorandum of the option to establish priority; and
- b. To *maintain* effective record notice, record a notice of:
  - (1) Any extension of the option; and
  - (2) Buyer's exercise of the option, if closing may occur more than 6 months after expiration date reflected in the recorded document(s). See CC §§884.010, 884.020.

If Representing Seller

If representing seller and option expires without buyer having exercised it, record a termination of option or quitclaim deed to clear record title.

**Further Research:** For discussion of options generally, see Real Property Sales, chap 8.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Structuring the Transaction/STEP 19.  
BUYER AND SELLER: CONSIDER USING A LETTER OF INTENT

## STEP 19. BUYER AND SELLER: CONSIDER USING A LETTER OF INTENT

---

### WHAT YOU ACCOMPLISH

Consider using a letter of intent to:

- a. Record the major terms of the transaction before all the details are worked out; and
- b. Obtain a commitment from the other party to at least some of the terms.

### EVALUATE RISK OF ENFORCEMENT

*Before using, review risk that letter of intent may be considered an enforceable contract to purchase. See Edmonds of Fresno v MacDonald Group, Ltd. (1985) 171 CA3d 598, 605, 217 CR 375; see also Foley v Interactive Data Corp. (1988) 47 C3d 654, 254 CR 211, for discussion of good faith and fair dealing, which may apply to letters of intent.*

### ALTERNATIVES TO LETTER OF INTENT

Alternatives to a letter of intent include:

Definitive Agreement

Drafting a complete purchase and sale agreement; or

Term Sheet

Circulating an unsigned "term sheet" clearly marked that document is not to be binding, *i.e.*, "for discussion purposes only."

### WHAT TO INCLUDE IN LETTER OF INTENT

Include in letter of intent:

- a. Statement that the letter is *not* intended to be binding;
- b. Terms that will be in the definitive agreement;
- c. Length of time, if any, property will be taken off market;
- d. If representing seller, a waiver of buyer's right to specific performance and to file a lis pendens (see Real Property Remedies, chaps 6, 15).

Form Agreement

For a form agreement, see Sales and Mergers, chap 8; Brooks & Sykes, *A Practical Guide to Using Letters of Intent in Real Estate Transactions*, 15 Cal Real Prop J 15 (Spring 1997).

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 20. DEFINE ROLE YOU WILL PLAY IN NEGOTIATIONS AND IN DRAFTING AGREEMENT

Negotiating and Forming the Purchase Agreement

STEP 20. DEFINE ROLE YOU WILL PLAY IN NEGOTIATIONS AND IN DRAFTING AGREEMENT

---

DETERMINE STATUS OF TRANSACTION

Ascertain from client:

Terms

Whether client has agreed to or entered into negotiations regarding any terms; and

Documents

Whether client has signed any documents.

IDENTIFY CLIENT WISHES

Define assistance client is seeking, *e.g.*:

- a. Negotiating terms;
- b. Drafting purchase or sale documents;
- c. Reviewing existing purchase agreement;
- d. Anticipating or resolving problems arising under purchase and sale agreement.

**Further Research:** For a detailed discussion of the attorney's role, see [Real Property Sales, chap 1](#).

WHEN CLIENT HAS ALREADY SIGNED DOCUMENTS

Explain Binding Effect

Explain to client binding nature of agreements (clients often believe they can sign letters of intent, deposit receipts, or listing agreements, and then bring them to an attorney to "clean up").

Review Documents

Carefully review documents to determine:

- a. What, if anything, has been left out; and
- b. Whether further negotiation is desirable or possible.

WHEN NEGOTIATING

Remember to work in best interests of client:

Keep Economics in Mind

Keep economics of transaction in mind when negotiating legal points. See [Real Property Sales, chap 1](#).

Avoid Role of Deal Breaker

- a. Do not be a "deal breaker" by insisting on unreasonable demands or focusing solely on the legal problems (without considering

likelihood of risk actually occurring).

- b. Help client identify reasonable solutions and compromises to make the deal work.

#### Work Closely With Client

Make sure that positions you take are authorized by client after review with client of:

- a. Issues involved;
- b. Practical alternatives; and
- c. Legal consequences of the alternatives.

#### Advise Client Realistically

- a. Advise client of the legal consequences of actions, particularly those that will expose client to liability.
- b. Caution your client if he or she is taking unreasonable or unrealistic positions that will result in fruitless, expensive negotiations.

#### WHO SHOULD PREPARE PURCHASE AGREEMENT

Consider and discuss with client advantages of your preparing the purchase agreement, *i.e.*:

- a. The agreement will embody client's needs and protect client's interests;
- b. Reviewing and modifying a form agreement or the other party's agreement will not necessarily save time and money;
- c. As an attorney, you are best suited to draft legal documents and advise on the legal ramifications of actions.

#### NOTE

These considerations may be less applicable in a residential transaction, for which most of the widely used standard forms are very comprehensive.

#### WHEN TO USE PRINTED FORMS

- a. Use commercially preprinted forms when:
  - (1) Buyer is purchasing a single-family residence, including a condominium unit, or residential property of one to four units, in a simple transaction; or
  - (2) Buyer or seller finds a modified printed form easier to comprehend.
- b. Consider printing your own standard form for a client transacting many similar purchases.

**Sample Form:** For sample preprinted form agreement, see [Appendix B](#) (completed and marked up for a buyer client in a simple transaction); for modifications made for a seller client, see ¶¶2.D., 2.G., 3, 7.F., 9, 14, 27, and 72 of [Appendix B](#) and addendum in [Appendix C](#).

#### DRAFT CUSTOMIZED PURCHASE AGREEMENT

- a. For sample customized agreement, see [Appendix A](#); [Real Property Sales, chap 4](#); Real Property Forms Man §§4.1-4.119.
- b. Consider including escrow instructions as part of the purchase and sale agreement and/or drafting them concurrently (see [step 34](#), below) to avoid:
  - (1) Disputes and negotiations raised when later drafting escrow instructions; and
  - (2) Problems when escrow company's boilerplate language conflicts with the contract terms.
- c. If escrow instructions cannot be included or drafted when the purchase and sale agreement is prepared, consider writing purchase and sale agreement to provide that escrow instructions must be consistent with terms of purchase and sale.

## DEFINE YOUR ROLE IN DUE DILIGENCE INVESTIGATION

- a. Advise client of subject areas and issues to address in investigation (see, *e.g.*, step 5, above, and step 29, below);
- b. Ascertain what client is relying on you to do;
- c. Advise client of time and anticipated cost of your due diligence investigations; and
- d. Set out in writing the scope of your investigation.

### Limit Your Obligations

- a. Assume only duties that you can perform competently;
- b. Ensure that client understands what you are *not* doing; and
- c. Recommend either that client:
  - (1) Ask broker to suggest what type of property inspection (*e.g.*, physical, structural/pest, roof, soils) should be done and which inspection companies or consultants to use; or
  - (2) Use appropriate experts for specified inspections; but use extreme care in suggesting type of inspection or specific consultants. See *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325; *Leko v Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 103 CR2d 858.

### NOTE

Many brokers maintain lists of various inspection companies for their clients. Some brokers are willing to make recommendations or give preliminary information to assist clients in selecting the best company for the type of inspection that is desired.

For a list of mold inspection and remediation companies published by the California Department of Health Services, see <http://www.cal-iaq.org/FIRMS/Howto.htm>.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 21. SPECIFY PURCHASE PRICE AND METHOD OF PAYMENT

STEP 21. SPECIFY PURCHASE PRICE AND METHOD OF PAYMENT

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MAKE SURE CONSIDERATION IS ADEQUATE

Although you will rarely be involved in pricing, except in connection with seller financing (for advantages to seller, see [step 14](#), above), advise buyer and seller that:

- a. For the agreement to be *specifically enforceable*, the consideration each party delivers must be just and reasonable ([CC §3391](#)); but
- b. Even if the consideration is not adequate, it still may be sufficient to support a claim of *damages* for breach. See [CC §1605](#); [Horton v Kyburz \(1959\) 53 C2d 59, 65, 346 P2d 399](#). See also [Real Property Sales, chap 4](#).

IF CONSIDERATION SUBJECT TO CONTINGENCIES

Advise buyer and seller of creative means of pricing property when income from the property is critical, but uncertain, *e.g.*:

- a. Seller may agree to guarantee gross receipts or net income for a set period after closing;
- b. Seller and buyer may agree to escrow a portion of the sales proceeds, with release conditioned on satisfaction of contingencies, *e.g.*, achieving certain leasing levels;
- c. Seller may agree to reduce or cancel buyer's obligations under carryback financing (see [step 14](#), above) if certain operating benchmarks are not achieved;
- d. Seller may agree to take part of the purchase price in the form of a continuing interest in the profits of the property.

IF CONSIDERATION BASED ON ACREAGE OR INCOME

Advise buyer:

Acreage

To get a survey and a statement that it is an accurate reflection of the acreage.

Income

To hire an accountant to carefully examine books and tax returns, and define income to ensure that the property can produce what has been represented.

ALLOCATE PURCHASE PRICE AMONG ASSETS

- a. Advise client to consult with tax adviser concerning tax implications of allocating purchase price among assets, *e.g.*:
  - (1) Land;
  - (2) Improvements;
  - (3) Personal property; and
  - (4) If sale includes a business:
    - (a) Goodwill;
    - (b) Consulting agreements; and
    - (c) Covenants not to compete.

b. Decide whether to set forth the allocation in the purchase agreement. If you do:

(1) It is more difficult for a party to change his or her position after closing; and

(2) Although the allocation is not conclusive, the IRS is likely to concur if the allocation is the result of arm's-length negotiations. *Blackstone Realty Co. v Commissioner* (5th Cir 1968) 398 F2d 991; Sales and Mergers, chap 3.

#### NOTE

If you do not set forth the allocation in the purchase agreement, the IRS may later require buyer and seller to agree on a consistent allocation for tax purposes.

#### CHOOSE FORM OF PAYMENT

Advise parties of consequences of alternative forms of payment, *i.e.*:

If All Cash to Seller

If all cash to seller, make sure seller realizes that:

a. Gain on the sale is fully taxable; and

b. Payment of an existing mortgage may trigger a prepayment penalty. For discussion of prepayment penalty, see step 10, above.

If Cash and Assumption of Existing Loans

If cash and assumption of existing loans:

a. *Seller*: Make sure seller understands that:

(1) Seller is not released from liability to lender, but is liable as a surety, unless lender agrees to a novation or release;

(2) A due-on-sale clause in the existing note and deed of trust may give lender discretion to prevent or allow an assumption, or to charge an assumption fee (see step 10, above); and

(3) Existing guaranties continue in effect, unless lender agrees to a release.

b. *Buyer*: Assist buyer in determining:

(1) Whether existing loan (terms, interest, and assumption fee) compares favorably with new financing; and

(2) Whether he or she will be entitled to antideficiency protection. See Mortgage & Deed of Trust, chaps 4-5; Real Estate Finance, chap 6.

c. *Buyer and Seller*: Make sure that buyer and seller negotiate and agree on:

(1) Who pays assumption fees; and

(2) The form of estoppel letter to require of lender.

If Seller Carries Back Financing

See step 14, above.

#### DRAFT PURCHASE PRICE PROVISION

Refer to form agreement in Appendix A for sample purchase price language.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 22. AGREE ON DEPOSIT

STEP 22. AGREE ON DEPOSIT

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DETERMINE AMOUNT

Determine amount that seller should:

- a. Require buyer to deposit to show that buyer has financial capability to buy the property; and
- b. Be compensated for taking the property off the market.

LIQUIDATED DAMAGES

"Liquidated damages" refers to the sum agreed on in advance as payment for breach of contract; in real property sales, buyer and seller often agree that buyer's deposit will serve as liquidated damages if buyer breaches.

NOTE

If you represent seller, make sure that seller understands that liquidated damages will be the only recourse if buyer breaches; if you represent buyer, make sure buyer understands the chance of losing the deposit, or having it tied up.

To Create Enforceable Clause

To create an enforceable residential liquidated damages clause, buyer and seller must (CC §§1675-1681):

- a. Negotiate a *reasonable amount* to compensate seller in the event of buyer's default;
- b. Set out the provision, if in a printed contract, in at least 10-point boldface type or in contrasting red print in at least 8-point boldface type;
- c. Separately sign or initial the provision in the purchase agreement; and
- d. Sign a separate liquidated damages provision for any increased deposit.

LIQUIDATED DAMAGES LAW AFFECTING CONDOMINIUMS

a. Under CC §1675(f), when a buyer has paid more than 3 percent of the purchase price under a liquidated damages clause in a contract to purchase a newly constructed attached condominium unit and later defaults on the contract, the seller must:

- (1) Account for its costs and revenues fairly allocable to the construction and sale of the unit, including costs related to the buyer's default, within 60 days of the unit's final sale;
- (2) Make reasonable efforts to mitigate any damages arising from the default;
- (3) Refund to the buyer any amount in excess of either 3 percent of the purchase price or the seller's actual damages suffered as a result of the buyer's default, whichever is greater.

b. If the amount retained by the seller after the accounting does not exceed 3 percent of the purchase price, the amount is valid unless the buyer establishes that the amount is unreasonable.

c. If a "new qualified buyer" contracts to purchase the property in question for the same price or a higher price than the defaulting buyer had contracted to pay, the accounting of any actual damages must be performed within 60 days of the execution of the new contract. A "new qualified buyer" is defined as one who either:

- (1) Has contracted to pay a purchase price equal to or greater than that contracted for by the original buyer; or
- (2) Has been issued a satisfactory loan commitment, as defined.

NOTE

For properties other than residential one-to-four-unit owner-occupied properties, review requirements of CC §1671.

Limit Amount if Property Will Be Buyer's Residence

If the property is one to four residential units to be occupied by buyer (CC §1675):

- a. Limit amount claimed as liquidated damages to no more than 3 percent of the purchase price (to fall within the presumption of validity);
- b. If amount buyer deposits in escrow is less than amount specified in the contract as liquidated damages, the clause is presumed valid only up to amount of actual deposit.

**Further Research:** See Real Property Sales §4.142.

## NEGOTIATE DEPOSIT

Seller

If representing seller:

- a. Try to require cash and release of the deposit to seller (from escrow);
- b. If seller is considering accepting a letter of credit as the deposit, review potential problems and requirements for a valid instrument. See Gregora, *Letters of Credit in Real Property Finance Transactions*, 9 Cal Real Prop J 1 (Spring 1991).

Buyer

If representing buyer:

- a. Try to deposit a letter of credit (usually irrevocable) or a promissory note (specifying payment only on closing) to:
  - (1) Avoid a cash drain; and
  - (2) Enhance buyer's ability to recover his or her deposit, should the sale not close.

## NOTE

Advise buyer that a promissory note deposit may result in an unenforceable contract if the contract states that a deposit has been made, and the instrument is conditional. See Wilson v Lewis (1980) 106 CA3d 802, 808, 165 CR 396.

- b. If buyer deposits cash or check:
  - (1) Provide that it will be held in escrow in interest-bearing account, with interest to accrue to benefit of buyer.

## NOTE

Absent specific instructions, escrow holder has no duty to use interest-bearing account. Hannon v Western Title Ins. Co. (1989) 211 CA3d 1122, 1128, 260 CR 21.

- (2) Understand that escrow holder is required to deposit any check or money order in bank by close of next business day following receipt. Ins C §12413.2.

## PROVIDE FOR DISPOSITION OF DEPOSIT

Seller

If representing seller, consider including terms that:

- a. Release a portion or all of the deposit from escrow to seller if a specified event occurs before closing, *e.g.*:
  - (1) Require payment of daily interest rate if transaction fails to close after specified date (see Angell v Rowlands (1978) 85 CA3d 536, 543, 149 CR 574); or
  - (2) Require disbursement of deposit to seller from escrow in consideration for extension of closing date (see Horowitz v Noble

(1978) 79 CA3d 120, 136, 144 CR 710);

- b. Provide for payment of a sum to seller outside of escrow on specified conditions;
- c. Provide that if contract is terminated as a result of a failed contingency, a portion of the escrow deposit is released to seller to reimburse him or her for expenses (*e.g.*, preliminary report, escrow fee) or to pay for buyer's "free look."

Buyer

If representing buyer, negotiate for terms that:

- a. Call for a small deposit;
- b. Hold deposit in escrow, and limit conditions under which the deposit may be paid to seller;
- c. Provide for a sufficiently long "free look" period (buyer might consider negotiating options to extend the period).

Residential Transaction

If property is residential, review CC §1057.3 concerning *buyer's or seller's* liability for treble damages and attorney fees for wrongfully refusing to release funds from escrow after escrow fails to close.

DRAFT DEPOSIT SECTION

Refer to sample agreement ¶1, Appendix A, for specific deposit language.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 23. INCLUDE REQUIRED CONTRACT ELEMENTS AND DISCLOSURES

## STEP 23. INCLUDE REQUIRED CONTRACT ELEMENTS AND DISCLOSURES

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### FOR SPECIFIC PERFORMANCE

Specifically state in the *written agreement* each necessary element; *i.e.*:

- a. Parties;
- b. Price;
- c. Property description.

**Further Research:** See [CC §§1091, 1550, 1624\(a\), 3390\(5\)](#). See also [Real Property Remedies, chap 5](#).

### PARTIES

#### Properly Execute

Be sure that all parties sign (and initial where appropriate) so that the contract binds them. [CC §§1624\(a\), 1677, 1091](#). See [Roth v Malson \(1998\) 67 CA4th 552, 79 CR2d 226](#).

### NOTE

The Uniform Electronic Transactions Act ([CC §§1633.1-1633.17](#)) provides that an agreed-on electronic record or signature satisfies the Statute of Frauds. [CC §1633.8](#). See [Real Property Sales §4.12](#). See also Electronic Signatures in Global and National Commerce Act (Pub L 106-229, §3, 114 Stat 464).

#### Include All Necessary Parties

Be sure that all persons or entities named on the title or holding an ownership interest in the property sign so that transfer of the property can be specifically enforced. See [CC §§1550, 1624\(a\)\(3\)](#). For discussion of determining how property is held, see [step 12](#), above.

#### Don't Forget Spouse

If seller is married, have spouse sign or execute a waiver or quitclaim deed (if divorced, may need waiver or quitclaim deed from former spouse). For community property issues, see [Fam C §1102](#). See [step 12](#), above. See also [Real Property Sales §4.21](#).

#### Capacity

Be sure that party signing is not a minor, incompetent, or under a guardianship. [CC §§1550, 1556](#).

#### Status

- a. Indicate status of person signing, *e.g.*, president of *ABC* corporation, trustee of Abbott family trust.
- b. *After reviewing entity's governing documents*, warrant that party has authority to enter into the agreement. See [Real Property Sales §4.20](#).
- c. If a person is acting on behalf of a party, record document that empowers the signing agent, attorney, or trustee, if in recordable form. See [Govt C §§27280, 27287](#); [CC §1216](#); [Prob C §15210](#).

#### Assignment

If buyer intends to assign, add a specific clause. For discussion of option of making agreement assignable, see [step 17](#), above.

### PURCHASE PRICE AND METHOD OF PAYMENT

See [step 21](#), above.

## DESCRIPTION OF PROPERTY

a. Find correct property description from:

- (1) Seller's deed or other document by which he or she acquired title;
- (2) Preliminary report from title company; or
- (3) Surveys and engineering studies.

b. Determine whether the property owned by seller is the same as the property to be conveyed (you may need a survey).

c. Draft a description that furnishes means or data by which land to be conveyed may be identified.

**Further Research:** For a thorough discussion of real property descriptions, see [Real Property Sales, chap 11](#).

## Buyer

Make sure the property description is consistent with the description of the real property that will be insured under buyer's title insurance.

## SELLER—INCLUDE REQUIRED DISCLOSURES

### If There Is Seller Financing

a. Include, if applicable, the specific "arranger of credit" disclosures required under [CC §§2956-2967](#) (for discussion of monitoring seller-financing disclosures and notice of balloon payment, see [step 14](#), above); and

b. Make disclosures required by revised Truth-in-Lending Act (15 USC §§1601-1681) and revised Regulation Z (12 CFR §§226.1-226.29) *if*:

- (1) Seller is a "creditor" under 15 USC §1602(f), *i.e.*, regularly provides seller financing or other installment credit to consumers for personal, family, or household purposes;
- (2) Buyer is a natural person (see 15 USC §1602(h)); and
- (3) Financing is for personal, family, or household purpose, *e.g.*, purchase of a home. See 15 USC §1602(h).

**Further Research:** See [Real Property Sales, chap 15](#).

### Residential Real Estate Transfer Disclosure Statement (TDS)

*If seller is transferring one to four dwelling units*, include a representation by buyer that he or she has received, reviewed, and accepted the mandatory Transfer Disclosure Statement (TDS) (see [CC §§1102-1102.17](#)). See [step 8](#), above.

### Physical Conditions

Include required disclosures of material physical conditions or facts relating to the property (see [steps 5-8](#), above), *e.g.*:

- a. Hazardous substances;
- b. Within earthquake fault zone.

### Pest Control Report

Condition sale on buyer's receipt or waiver of the pest control report issued under [Bus & P C §§516](#), if required. For discussion of termite infestation, see [step 6](#), above. See also [CC §1099](#).

### Federal Interstate Land Sales

If using mail or other instruments of interstate commerce to sell certain unimproved land (*i.e.*, any lot in a subdivision containing 25 or more lots), deliver printed property report meeting the requirements of 15 USC §1707. See 15 USC §§1701-1720.

## CONDITIONS OF TITLE

Set forth any exceptions to seller's obligation to deliver free and clear title. For discussion of preparing to transfer clear title, see [step 12](#), above.

## INCLUDE FIRPTA WITHHOLDING DECLARATIONS

### FIRPTA

Include seller's declaration under penalty of perjury that seller is not a foreign person. For a sample, see sample agreement ¶14, [Appendix A](#). For discussion of compliance with FIRPTA, see [step 36](#), below. For state withholding requirements, see [Rev & T C §18662](#).

### California Withholding Law

California law requires all real estate transferees, unless exempt, to withhold  $3\frac{1}{3}$  percent of the sales price of specified California real property. See [Rev & T C §18662](#). There are numerous exemptions to this state withholding requirement, including:

- a. Sales for which the property sales price is under \$100,000;
- b. Sales in which the escrow has not given the transferee the specified written notice of the withholding requirements;
- c. Transfers to a corporate beneficiary through judicial or nonjudicial foreclosure or a deed in lieu of foreclosure;
- d. Sales of a principal residence under IRC §121;
- e. Like-kind exchanges under IRC §1031;
- f. Involuntary conversions under IRC §1033;
- g. Sales resulting in a loss for California income tax purposes.

### NOTE

Check with the Franchise Tax Board to get the latest forms because they are updated regularly. For a detailed discussion of the California Withholding Law and its exemptions, see [Real Prop Exchanges §§3.86-3.90](#).

### Mello-Roos and 1915 Bond Act Assessments

Under the Mello-Roos Community Facilities Act of 1982 ([Govt C §§53311-53368.3](#)), the transferor must make a good faith effort to obtain a disclosure notice concerning the special tax or assessment from each local agency that levies a special tax or assessment and deliver the notice(s) to the prospective transferee. [CC §1102.6b](#); [Govt C §§53340.2, 53341.5, 53754](#).

### Supplemental Taxes

Seller must disclose that California law requires real property to be revalued following sale and that the buyer will receive supplemental tax bills. [CC §1102.6c](#).

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 24. AGREE ON CONDITIONS PRECEDENT AND INCLUDE IN AGREEMENT

## STEP 24. AGREE ON CONDITIONS PRECEDENT AND INCLUDE IN AGREEMENT

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### UNDERSTAND EFFECT OF CONDITION PRECEDENT

A *true* condition precedent in an agreement allows the party whom the condition benefits to terminate the agreement without liability to the other party if the precondition cannot be realized by the agreed-on deadline.

**Example:** Clause gives buyer the right to terminate the purchase agreement if, within 10 days after receiving copies of the existing leases for the property, buyer notifies seller in writing that the leases are unacceptable. See sample agreement ¶4.3, [Appendix A](#).

### SELLER'S OBJECTIVES

### WHAT TO DO IF REPRESENTING SELLER

Try to accomplish the following when drafting or reviewing conditions for seller:

#### Limit Time

- a. Because the property will be off the market, limit the time buyer has to satisfy or waive conditions.
- b. Consider requiring buyer to waive contingencies on a phased basis, particularly if investigative period is long, *e.g.*, require buyer's:
  - (1) Approval of title within 10 days after receipt of preliminary report;
  - (2) Satisfaction or waiver of financing condition within 30 days after signing purchase agreement; and
  - (3) Approval of physical condition of property within 45 days after signing purchase agreement ("due diligence").

#### NOTE

For *residential* property, 5 to 10 days may be adequate to review and approve physical condition.

#### Reconsider Option Agreement

If buyer's conditions are extensive and require a long contingency period, require an option agreement and an option payment. See [step 18](#), above.

#### Coordinate With Representations and Warranties

Depending on seller's desire to limit representations and warranties (see [step 25](#), below), either:

- a. Permit extensive conditions and inspection by buyer and limit seller's representations and warranties; or
- b. Limit conditions and be prepared to make more extensive representations and warranties.

#### Accept Back-Up Offers

- a. Inform buyer that seller will be taking back-up offers while buyer is satisfying conditions;
- b. Consider providing in back-up agreement that changes can occur in the first purchase agreement without causing the back-up agreement to drop into first position; and
- c. Remind seller to condition back-up offers on termination of first purchase agreement.

#### Draft Seller's Conditions

Draft any conditions precedent needed by seller, *e.g.*:

- a. Review of buyer's financial condition if seller is providing financing;
- b. Completion of specified steps needed to clear title.

BUYER'S OBJECTIVES
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#### ALL PROPERTY

After analyzing the property and buyer's needs, consider including the following as conditions to buyer's obligation to complete the purchase:

##### Financing

Buyer must obtain satisfactory financing;

##### Title

Buyer must approve the condition of title after reviewing title company's preliminary report and recorded documents listed in the report (review [step 31](#), below, before drafting);

##### Survey

Buyer must conduct survey and/or approve:

- a. Boundaries;
- b. Encroachments;
- c. Access easements;
- d. Area;
- e. Location of improvements;
- f. Location of utilities; and
- g. Zoning (review [step 32](#), below, before drafting);

##### Improvements

Buyer must approve the condition of the improvements;

##### Codes and Permits

Property must satisfy applicable building codes and permit requirements;

##### Hazardous Substances

A proper environmental assessment must be conducted, with the result that the presence of any hazardous substances does not destroy the economic viability of the transaction (see discussion of providing for hazardous substance investigation, below);

##### Termite Report

Results of termite inspection are acceptable;

##### Soil, Hydrology, and Geology Reports

Any soil conditions, hydrology, and geology reports are acceptable;

##### Fixtures

Personal property and fixtures included in the sale are as represented;

Subdivision Map Act and Subdivided Lands Act

There has been or will be compliance with Subdivision Map Act (Govt C §§66410-66499.37) and Subdivided Lands Act (Bus & P C §§11000-11200);

Land Use Entitlements

All land use entitlements have been or can be obtained; and

Access

There is adequate access to the property from public roads or over enforceable easements.

PROPERTY TO BE DEVELOPED

If buyer is purchasing property to be developed, consider including the following conditions:

Government Approvals

Necessary government approvals (*e.g.*, zoning and use) will be forthcoming for a proposed development (review step 32, below, before drafting);

Architectural Committee Approvals

If buyer will be constructing improvements on land subject to CC&Rs, architectural committee approval has been or can be obtained; and

CEQA Compliance

There has been California Environmental Quality Act (CEQA) compliance for all prior discretionary projects. See Govt C §§66452.1(c), 66452.2(c); Pub Res C §§21000-21177.

COMMERCIAL PROPERTY

If buyer is purchasing commercial property, consider including the following conditions:

- a. A financial analysis of seller's operations indicates that the investment is economically feasible;
- b. All necessary licenses for operation of the business can be transferred;
- c. Buyer's approval of all leases and obtaining estoppel certificates from all tenants and a certified rent roll from seller (review step 33, below, before drafting); and
- d. Contracts for services, employment, and collective bargaining agreements are either favorable or can be terminated (or their requirements may call for an adjustment to the purchase price).

BACK-UP OFFERS

Require notification of back-up offers, so that buyer will not lose priority if buyer amends his or her offer or purchase agreement.

BOTH PARTIES: DRAFT CONDITIONS

HOW TO DRAFT

- a. Refer to sample agreement ¶4, Appendix A, and Real Property Sales, chap 4, for samples of specific conditions precedent.
- b. Be sure the conditions address the factors below.

DELIVERY OF DOCUMENTS

Require seller to provide access to all documents that relate to the property, and, to the extent seller knows of others, inform buyer of contents.

#### TIME LIMIT

State time limit within which each condition must be satisfied:

Buyer

For buyer, state that the period begins when buyer obtains access to the appropriate material (*e.g.*, copies of all leases).

Seller

For seller, require that buyer eliminate conditions on phased basis, rather than keeping all contingencies open for one long period.

#### NOTICE

State manner in which party will be notified that a condition has been satisfied or waived.

#### WAIVER

State person who is benefited by the condition and how and by whom a condition may be waived.

#### IF NO NOTICE

Specify:

- a. Whether the contingencies are deemed waived; or
- b. Whether the contract is automatically terminated, if proper notice of satisfaction or waiver is not given.

#### IF NOT SATISFIED OR WAIVED

Specify what happens if the condition is neither satisfied nor waived, *e.g.*:

- a. Right of termination;
- b. Automatic termination; or
- c. If condition benefited buyer, reduction of purchase price.

#### NOTE

Be aware that a buyer can inadvertently terminate a purchase agreement by proposing a restructuring of the deal when a condition is not satisfied. See *Beverly Way Assoc. v Barham* (1990) 226 CA3d 49, 276 CR 240.

#### DEPOSIT

State who will receive the deposit and when, if a condition is neither fulfilled nor waived and the agreement is terminated.

#### RIGHT OF ENTRY

- a. Delineate the scope of buyer's right to enter property and perform tests, and responsibility for any damages that occur.
- b. Specify whether buyer has the right to discuss the property with government agencies, tenants, and other interested parties.

#### INDEMNIFICATION AND COVENANT TO RESTORE

Provide for:

- a. Prior notice to seller of buyer's entry, so seller can post and record a notice of nonresponsibility (see CC §3094; California Mechanics' Liens and Related Construction Remedies, chap 8 (3d ed Cal CEB 1998));
- b. Buyer's payment of costs, and indemnification of seller for any:

- (1) Expenses;
  - (2) Liens;
  - (3) Property damage; or
  - (4) Personal injury due to buyer's inspection; and
- c. Covenant by buyer to restore property to its pre-inspection condition.

## CONFIDENTIALITY

### Seller

For seller, state that data and test results are confidential and to be turned over to seller if transaction is terminated.

### Buyer

For buyer, avoid provisions that restrict buyer's future activities or business dealings more than is necessary to protect confidentiality.

## MUTUALITY OF OBLIGATIONS

Ensure that agreement is enforceable by:

- a. Imposing reasonable standards of buyer's approval rights; or
- b. Requiring good faith effort and due diligence to satisfy a condition.

**Further Research:** For a thorough discussion of conditions, see Real Property Sales, chaps 4, 15.

HAZARDOUS SUBSTANCE INVESTIGATION
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## HOW TO PROVIDE FOR INVESTIGATION

To permit hazardous substance investigation, make sure that the purchase agreement states:

- a. That buyer has a right to investigate and test the property for environmental hazards;
- b. Who will retain the experts for conducting investigation, *e.g.*, attorney or client;
- c. Discoveries that will terminate the transaction;
- d. Who has access to information generated by consultants, documents review, and site investigation;
- e. That information and contacts with public agencies are confidential; and
- f. That buyer will indemnify seller for liabilities, losses, damage, or other matters arising from the investigation, but not if related to results of buyer's investigation. See Machlin & Young §§19.03, 19.04(3).

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 25. AGREE ON REPRESENTATIONS AND WARRANTIES, AND INCLUDE IN AGREEMENT

STEP 25. AGREE ON REPRESENTATIONS AND WARRANTIES, AND INCLUDE IN AGREEMENT

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SELLER'S OBJECTIVES

Tie seller's representations and warranties to the conditions of the agreement by:

- a. Avoiding a representation and warranty if the issue can be resolved by conditioning buyer's obligation to purchase on the satisfactory outcome of buyer's investigation (*e.g.*, roof inspection); and
- b. Limiting representations and warranties to areas in which information is available only to seller and not discoverable through buyer's due diligence.

Positive Nonrepresentations

Consider making "positive nonrepresentations" in crucial areas that seller will not represent or warrant, *e.g.*, "Seller does not represent or warrant that the parking lot is in good condition."

Seller's Actual Knowledge

- a. Consider making certain representations and warranties limited "to seller's actual knowledge, with no duty to make inquiry," *e.g.*, that the mechanical systems and other physical aspects are in good operating condition.
- b. Also consider limiting representations and warranties to knowledge of certain named individuals (*e.g.*, to the actual knowledge of John Doe, Director of Corporate Real Estate").

Specific Warranties

Try to include a provision that buyer is purchasing property without reliance on any representations or warranties, except as specifically stated in the agreement.

Limits

Try to limit duration of and damages from representations and warranties. See discussion of drafting specific representations and warranties, below, in this step.

SELLER—BE AWARE OF IMPLIED WARRANTIES

- a. Advise seller of the implied warranty that he or she knows of no concealed material defects. See [steps 5-7](#), above.
- b. Advise seller that he or she impliedly warrants good title, free of certain encumbrances, unless this warranty is negated in the deed ([CC §1113](#)). For discussion of preparing to transfer clear title, see [step 12](#), above.
- c. Advise *developer/seller* of effect of:
  - (1) Implied warranties on newly constructed real property; and
  - (2) Strict liability theories. See [Kriegler v Eichler Homes, Inc. \(1969\) 269 CA2d 224, 227, 74 CR 749](#) (mass-produced homes).
- d. Warn seller that a disavowal of warranties does not eliminate all disclosure obligations. See [steps 5-7](#), above.

BUYER'S OBJECTIVES

If representing buyer, use representations and warranties to:

- a. Force full disclosure by seller;
- b. Protect buyer against unwanted liability; and

c. Expand buyer's remedies beyond contract remedies to include:

(1) Fraud and misrepresentation; and

(2) Breach of warranty.

#### DRAFT SPECIFIC REPRESENTATIONS AND WARRANTIES

Refer to sample agreement ¶¶4.8, 7, Appendix A. See also Real Property Sales, chap 4.

#### Specify Survival Period

a. Specify which representations and warranties survive closing and recording the deed. For discussion of no merger into deed, see step 28, below.

b. Consider imposing a time limit for making claims, but advise client that deadline will not apply to claims based on seller's active misrepresentation or knowing nondisclosure of material defect. See step 5, above; CC §2079.4.

c. Decide and specify whether buyer's successors or assigns may benefit from the representations and warranties.

#### Limit Damage Claims

a. *Ceiling*: Consider imposing a monetary limit on seller's liability for claims.

b. *Floor*: Consider prohibiting buyer's action for breach of a representation or warranty until buyer's out-of-pocket damages exceed an agreed-on amount.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 26. AGREE ON PAYMENT OF TRANSFER TAXES AND INCLUDE IN AGREEMENT

## STEP 26. AGREE ON PAYMENT OF TRANSFER TAXES AND INCLUDE IN AGREEMENT

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### DETERMINE WHETHER TRANSACTION IS SUBJECT TO TAX

Review local county transfer tax law (authorized by Rev & T C §11911) and city ordinances:

- a. Transaction may be subject to *both* county and city taxes;
- b. See county transfer tax exemptions in Rev & T C §§11921-11929.

### NOTE

Do not rely on Proposition 13 exemptions (Rev & T C §§62-66), which do not apply to transfer taxes.

### RATE OF TAX

#### County Transfer Tax

Maximum county rate of tax is \$1.10 per \$1000 (.11 percent), excluding the amount of any note secured by a deed of trust. Rev & T C §11911(a).

#### City Transfer Tax

Rates that cities charge vary considerably; check with escrow officer regarding current applicable rates.

### DECIDE WHO PAYS

- a. Check current local custom, but be aware that in most counties, seller pays tax.
- b. Regardless of custom, consider negotiating this obligation, because the amount is significant (especially when city taxes are added).

### KEEP PURCHASE PRICE PRIVATE

Keep purchase price and transfer tax out of public record by:

- a. Separate, written request to the county recorder (Rev & T C §11932) (some recorders require that you use their forms); and
- b. Instructing the title company not to reveal the purchase price.

### NOTE

You should first check listing agreement to determine whether seller has already authorized agent to report price to MLS.

### DRAFT PAYMENT OF TRANSFER TAX CLAUSE

Refer to sample agreement in ¶6.1, Appendix A, and preprinted form agreement in ¶4.I-J, Appendix B.

### PAY THROUGH ESCROW

Be sure forms and payment to authorities are submitted through escrow.

STEP 27. AGREE ON ALLOCATION OF RISK OF LOSS AND INCLUDE IN AGREEMENT

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IF CONTRACT SILENT

If you do not *specifically* provide by contract for allocation of the risk, [CC §1662](#) mandates that:

Seller

Seller bears risk of *material* loss by destruction or eminent domain if:

- a. Seller has legal title *and* possession; and
- b. In the case of destruction, loss is not buyer's fault.

Buyer

Buyer bears risk of *material* loss by destruction or eminent domain if:

- a. Buyer has legal title *or* possession; and
- b. In the case of destruction, loss is not seller's fault.

DRAFT RISK ALLOCATION CLAUSE

- a. Draft a risk allocation clause, which at a minimum:
  - (1) Defines a *material* loss;
  - (2) States who bears the risk of nonmaterial losses; and
  - (3) If buyer and seller agree, alters the allocation provided by statute.
- b. In situations in which seller bears the risk of loss, consider a provision that gives buyer an election to:
  - (1) Terminate the agreement; or
  - (2) Go forward with deal and receive the insurance proceeds.
- c. Refer to sample agreement in ¶9, [Appendix A; Real Property Sales, chap 4](#).

NOTE

Be sure that insurance coverage tracks the allocation of risk. Buyer's agreement to insure could be construed as evidence of buyer's intent to assume the risk of loss. See [Real Property Sales, chap 13](#).

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 28. AGREE ON MISCELLANEOUS PROVISIONS AND INCLUDE IN AGREEMENT

STEP 28. AGREE ON MISCELLANEOUS PROVISIONS AND INCLUDE IN AGREEMENT

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### ATTORNEY FEES

Include a clause providing for the payment of attorney fees if a dispute arises. [CC §1717](#).

**Sample Agreement:** Refer to sample agreement in ¶21.7, [Appendix A](#).

### IRC §1031 EXCHANGE PROVISION

#### Exchanging Party

If representing buyer who will be acquiring the property as exchange replacement property, or seller who intends to engage in an IRC §1031 exchange (see [step 15](#), above):

- a. Include a clause conditioning the close of escrow on effecting the exchange, because signing a purchase agreement without one may cause the IRS to determine that the transaction is not part of a valid exchange;
- b. State the nonexchanging party's obligation to cooperate; and
- c. Specify what happens if exchanging party cannot effect the exchange.

#### Nonexchanging Party

If representing nonexchanging party, condition his or her obligation to cooperate in the exchange on the following:

- a. The exchange must not delay the sale;
- b. The exchange must not alter the terms of payment of the purchase price;
- c. The exchange must not increase nonexchanging party's expense or liability exposure in any manner; and
- d. Nonexchanging party must not be required to hold title to any exchange property.

#### Drafting Tips

For drafting exchange transaction provisions, refer to sample agreement ¶22, [Appendix A](#). See also [Real Prop Exchanges, chap 4](#).

### NOTE

Remember that the exchanging party will also need to enter into an exchange agreement with the exchange accommodator. For discussion of exchanges, see [step 15](#), above.

### NOTICE

Specify how and where a notice is sent and when it is deemed received.

**Sample Agreement:** Refer to sample agreement in ¶12, [Appendix A](#).

### DISPUTE RESOLUTION

Specify manner for dispute resolution, *e.g.*, binding arbitration, mediation. On ADR in real property contracts generally, see [Real Property Remedies, chap 14](#).

#### Contractual Arbitration Provision

Be aware that a contractual arbitration clause must comply with the requirements of [CCP §§1298-1298.8](#). On dual forum issues in residential purchase and sale litigation created by binding arbitration clauses, see [Real Property Remedies §§14.17, 14.38](#).

**Sample Form:** See Real Property Sales §4.177 for sample clause providing for arbitration.

## SELLER'S USE OF PROPERTY BEFORE CLOSING

Buyer

If representing buyer, negotiate for provisions requiring seller to maintain property before closing, *i.e.*, that seller:

- a. Will maintain the property until closing in same manner as before;
- b. Will maintain insurance coverage;
- c. *If purchasing a going business*, will not, without buyer's consent:
  - (1) Deplete the cash;
  - (2) Remove other business assets;
  - (3) Make material changes in existing contracts or material new contractual commitments; or
  - (4) Make personnel changes;
- d. Will not amend leases, make new leases, or terminate leases without buyer's consent; and
- e. Will not enter into new agreements affecting the property without buyer's consent.

## NOTE

Consider compromise clauses that give seller needed operating flexibility, *e.g.*, permitting seller to sign leases or other agreements falling within certain parameters, without buyer's prior consent.

Seller

If representing seller, to minimize harm if the transaction does not close:

- a. Make sure that any requirements do not unduly restrict normal business transactions; or
- b. Ask for a price adjustment for loss of business or business interference caused by restrictions; and/or
- c. Impose time periods for buyer's review and approval of proposed leases or other documents; and/or
- d. Give buyer approval rights only after buyer's contingency period expires.

## BUYER'S USE OF THE PROPERTY BEFORE CLOSING

*If you represent seller*, advise against allowing buyer to take possession before closing without a signed lease in which buyer becomes seller's tenant (see California Landlord-Tenant Practice §§9.3-9.4 (2d ed Cal CEB 1997); Real Property Remedies, chap 10):

- a. Even *with* a lease, risk is involved; it can take several weeks to evict buyer if the transaction fails to close (see Landlord-Tenant §§9.6-9.7).
- b. Make sure the purchase agreement and lease are consistent, *e.g.*, on allocating risk of loss during buyer's preclosing possession. See step 27, above.

## PRORATIONS

Provide for proration of applicable charges, *e.g.*, interest, real and personal property taxes, rents, contract fees, insurance premiums, and utility services.

Proration of Rent

Spell out in the purchase agreement (see also discussion of rents, step 33, below):

- a. That final adjustments for, *e.g.*, retroactive rent escalation payments, operating cost pass-throughs, and percentage rentals, may be made outside of escrow;
- b. Whether rental payments received after closing are applied first to current rent due or first to the delinquency;
- c. Whether seller, with buyer's cooperation, may bring a legal action, *e.g.*, within 90 days after closing, to collect past-due rent.

#### Proration of Utilities and Services

Make clear in the purchase agreement that:

- a. Utility, maintenance, and service charges will be prorated on the basis of estimates (actual cost will not be known).
- b. If accurate or final information is not available at closing, final adjustment of charges will be made outside of escrow.

#### NOTE

Whenever possible, make proration in escrow; it may be difficult or impossible to do the proration and collect after closing.

- c. Utilities will be transferred to buyer, and any deposits to which seller is entitled will be refunded to seller.
- d. Nonrefundable deposits will be transferred to buyer in exchange for a credit to seller.

#### Draft Prorations Clause

Refer to ¶¶5.2-5.3 of sample agreement, [Appendix A](#).

#### TIME OF THE ESSENCE

- a. Consider including a provision that time is of the essence (see sample agreement ¶21.8, [Appendix A](#)) to:
  - (1) Highlight the importance of timely performance; and
  - (2) Permit a timely performing party to reject late performance by the other party without incurring liability for breach. See *McCown v Spencer* (1970) 8 CA3d 216, 222, 87 CR 213.
- b. Be aware that you will waive a time-of-the-essence requirement by:
  - (1) Contract language permitting broker to extend the closing date;
  - (2) Escrow instructions to escrow holder to close as soon after the closing date as possible (standard escrow instruction); or
  - (3) Conduct inconsistent with timely performance, *i.e.*, not insisting on strict performance. *Galđjie v Darwish* (2003) 113 CA4th 1331, 7 CR3d 178; *Johnson v Goldberg* (1955) 130 CA2d 571, 279 P2d 131.

#### NOTE

Brokers and other third parties should not be given authority to modify the agreement of the parties.

#### BROKER'S COMMISSION

##### What to Cover

State in the purchase agreement:

- a. Amount of broker's commission, who is responsible to pay, and each party's representation, warranty, and indemnity of other party against any other brokers or commissions owed;
- b. That payment of the commission is conditioned on closing; and
- c. That no other commission is due.

#### Draft Commission Clause

Refer to sample agreement ¶8, [Appendix A](#).

## If Commission Arrangement Varies From Broker Agreement

If commission arrangement set forth in the purchase agreement varies from that in the listing or brokerage agreement, brokers may need to sign separate writings (not inconsistent with listing terms) to address new commission issues.

## OPENING ESCROW

- a. State when, how, and with whom escrow opens. See sample agreement ¶2, [Appendix A](#).
- b. Define what it means to "open escrow."
- c. Consider an affirmative covenant by one party to open escrow, and a provision that, if escrow does not open by a certain date, the agreement is of no effect; but be aware that this may:
  - (1) Give the other party a way to avoid the contract (if obligated party is unable to get escrow opened on time); or
  - (2) Put parties at the mercy of escrow holder.

## CLOSING

- a. Specify that close of escrow means the date on which the transfer deed is recorded. See sample agreement ¶3, [Appendix A](#).
- b. If you do not define the triggering event, escrow is "closed" after satisfaction of all conditions to the transfer of funds and documents. See [Real Property Sales, chap 15](#).

## CLOSING COSTS

To avoid rude surprises at closing, state in the agreement who pays what costs, especially:

- a. Transfer taxes,
- b. Title insurance premiums; and
- c. Escrow fees.

**Sample Forms:** See sample agreement ¶¶5.2, 6.1-6.2, [Appendix A](#); preprinted form agreement ¶4.G-M, [Appendix B](#).

## NO MERGER INTO DEED

Generally, seller's representations, warranties, and covenants will "merge" into the deed at closing, resulting in a discharge of seller's contractual obligations, *unless* the purchase agreement specifies that seller's obligations will survive close of escrow and recording of the deed. See [Real Property Sales, chap 4](#).

### Buyer—Provide That All Seller Warranties Survive

If you represent buyer, provide that *all* seller representations, warranties, and covenants survive closing. See sample agreement ¶7, [Appendix A](#).

### Seller—Limit to Specific Clauses

If you represent seller, try to limit survival of representations and warranties to specific clauses (but see discussion of putting protection in purchase agreement, [step 25](#), above).

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 29. BUYER: PERFORM DUE DILIGENCE AND HAZARDOUS SUBSTANCE INVESTIGATION AND ALLOCATE REMEDIATION COSTS

STEP 29. BUYER: PERFORM DUE DILIGENCE AND HAZARDOUS SUBSTANCE INVESTIGATION AND ALLOCATE REMEDIATION COSTS

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PERFORM DUE DILIGENCE INVESTIGATION PROMPTLY

Review Conditions Precedent

- a. Review purchase agreement (see [step 24](#), above) to identify all conditions precedent, *e.g.*, environmental hazards, financing, termite inspection, government approvals; and
- b. Be sure through remainder of due diligence investigation (see [steps 30-33](#), below) that each of the other conditions precedent is satisfied or waived.

Environmental Due Diligence

Consider advising buyer to begin any hazardous substance investigation first, because presence of hazardous substance may destroy economic viability of transaction.

All Appropriate Inquiry

- a. Buyers can obtain defenses to liability for cleanup costs under federal law and immunities under state law if they conduct due diligence for subsurface conditions consistent with an EPA rule diligence. See 40 CFR pt 312 (effective November 1, 2006).
- b. To comply with the AAI requirements, buyer's consultants may comply with the standards for environmental due diligence known as ASTM E1527-05, issued by the Environmental Protection Agency on November 21, 2005.

NOTE

Buyers should note that the AAI rule also includes additional requirements for due diligence, including requirements for the user of the report (*e.g.*, the potential buyer). For a more detailed discussion of the ASTM, see [Real Property Sales §§7.27-7.29](#).

- c. Buyers should expand the scope of their environmental due diligence as necessary to include other issues, such as, *e.g.*, surveys for:
  - (1) Asbestos-containing materials;
  - (2) Mold;
  - (3) Lead-based paints;
  - (4) Lead in drinking water;
  - (5) Radon.

CONDUCT AND SCOPE OF HAZARDOUS SUBSTANCE INVESTIGATION

For additional information on conduct and scope of the investigation, see [Real Property Sales, chap 7](#).

EVALUATE RISKS OF COMPLETING SALE AND NEGOTIATE REMEDIATION PROVISIONS

If results of the investigation suggest a lower purchase price or need for a cleanup, buyer should renegotiate contract with seller.

**Further Research:** For discussion of risk allocation, remediation strategies, and other alternatives to consider following environmental investigation, see Taggart, *A Primer on Drafting Contractual Provisions to Cure Environmental Impairments*, 19 Cal Real Prop J 21 (Summer/Fall 2001); Machlin & Young §9.07, chap 19.



**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 30. BUYER: EVALUATE IMPACT OF REAL PROPERTY TAX REASSESSMENT

## STEP 30. BUYER: EVALUATE IMPACT OF REAL PROPERTY TAX REASSESSMENT

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### REAL PROPERTY TAX REASSESSMENT

Advise buyer of likelihood that the purchase will be a "change in ownership" under Rev & T C §§60-66, which will trigger a reassessment and increase in real property taxes. See Cal Const art XIII A, §§1-2; Rev & T C §§110-110.5.

**Further Research:** For a chart showing transactions that trigger reassessment under Rev & T C §§60-65, see Real Property Sales, Appendix A.

### REVIEW PLANNING OPPORTUNITIES

If it is important to buyer to avoid reassessment, advise him or her to consider:

#### Leasing for Less Than 35 Years

Delaying a change-in-ownership reassessment by leasing for term (including renewal option) of less than 35 years (see Rev & T C §61) (consider coupling the lease with an option to purchase);

#### Buy Fee Interest in Property Leased for 35 Years or More

Buying the fee interest in property subject to a lease with a remaining term (including renewal option) of 35 years or more (Rev & T C §61(c)):

- a. There will be no change-in-ownership reassessment of the portion of the property subject to the lease (although the balance, if any, will be reassessed); but
- b. On termination of a lease with term (including renewal option) of 35 years or more, the portion of property that was subject to the lease will be reassessed up to its fair market value;

#### Ownership Interest in Partnership or Corporation

Acquiring an ownership interest in a corporation or partnership owning property:

- a. In certain circumstances there is no reassessment (Rev & T C §§64(a), 25105); but
- b. Evaluate risks of stock or partnership ownership before taking such a step.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 31. BUYER: EXAMINE STATUS OF TITLE

## STEP 31. BUYER: EXAMINE STATUS OF TITLE

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### EXAMINE PRELIMINARY REPORT

Examine preliminary report and copies of all documents evidencing any exceptions to:

- a. Determine whether title is acceptable as is; and
- b. If not, whether unacceptable exceptions can be eliminated.

**Further Research:** For a comprehensive discussion of the scope and function of a preliminary report, see [Title Ins, chap 5](#).

### NOTE

Ask title company for copies of the recorded documents (*e.g.*, easements, deeds of trust) that give rise to the exceptions shown in preliminary report; company normally will not provide copies unless asked. Without the documents, there will be only title company's brief description of the document and possibly its effect.

### What Makes Title Acceptable

Title will not be acceptable unless you can confirm that:

- a. Seller is listed as the owner, and no questions or limitations are listed in the preliminary report;
- b. Legal description corresponds to what buyer believes he or she is buying;
- c. Restrictive covenants, if any, are acceptable to buyer and are not violated by existing or proposed uses;
- d. Improvements (existing or proposed) do not encroach onto other property or easement areas, or otherwise violate the terms of easements;
- e. Parking areas, roadways, and easements necessary to proper use of the property are included;
- f. There are no blanket or floating easements—easements are fixed in location and do not materially adversely affect the property; and
- g. Any unacceptable liens or title defects will be removed at or before closing.

### NOTE

Consider title insurance protection with respect to all of above. See [step 35](#), below.

### CONSIDER SURVEY

#### When Survey Is Needed

Advise buyer to employ an engineer or surveyor to prepare an "as built" (ALTA) survey:

- a. If buyer plans to obtain financing now or in the future, because survey will be required for lender's ALTA insurance, *unless*:
  - (1) Property will be buyer's dwelling; or
  - (2) Adequate survey already exists;
- b. When buyer desires ALTA owner's title insurance; or
- c. When there:

- (1) Is possible encroachment;
- (2) Are structural defects that may indicate problems with lateral support;
- (3) Are uncertain boundaries and a need to confirm the size of the property; or
- (4) Are possible landslides (survey will reveal whether property is affected or may be threatened by slides).

#### NOTE

Advise buyers that fences, hedges, and other unofficial designations of boundaries often do not properly disclose the boundary. A survey is the only sure way to determine boundaries.

#### If Survey Already Exists

If a previous survey exists (ask seller):

- a. Request an update or a no-change letter from surveyor, which will often be provided for a nominal cost;
- b. Consider asking that survey be recertified to buyer, so that buyer will have recourse against surveyor for survey errors.

***Further Research:*** On title status and survey issues, see Real Property Sales, chap 4.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 32. BUYER: REVIEW LAND USE RESTRICTIONS AND PERMITS REQUIRED FOR INTENDED USE

## STEP 32. BUYER: REVIEW LAND USE RESTRICTIONS AND PERMITS REQUIRED FOR INTENDED USE

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### CONFIRM ZONING

#### Check Ordinance and Authorities

Check zoning ordinance and with local authorities to confirm that the continuing or proposed future use is specifically permitted, *e.g.*:

- a. In compliance with current zoning; or
- b. Legally nonconforming.

#### If Use Not Permitted

If the use is not specifically permitted, consider obtaining:

- a. A conditional use permit (see California Land Use Practice §§7.10-7.20 (Cal CEB 2006), referred to throughout this Action Guide as California Land Use Practice);
- b. A variance (see California Land Use Practice §§7.1-7.9, 7.24, 8.6);
- c. Rezoning under Govt C §§65853-65857 (see California Land Use Practice §§4.30-4.36); or
- d. If nonconforming, confirmation from local zoning authorities that an existing nonconforming use may be continued on buyer's purchase and use of the property (see California Land Use Practice, chap 8).

### NOTE

Rely on your own investigation rather than solely on statements made by local agency employees.

#### Check for Specific Requirements

If buying for development, review zoning ordinance for specific requirements that may be applicable to buyer's development (see California Land Use Practice, chap 5), *e.g.*:

- a. Required lot and yard sizes;
- b. Building size;
- c. Bulk, height, and density restrictions;
- d. Building setbacks; and
- e. Restrictions resulting from special status or circumstances (*e.g.*, limitations on historic landmarks or grounds of archeological significance).

### CHECK GENERAL PLAN

Check the general plan (and any existing specific plan) to see whether zoning and all land use controls are consistent with general plan (and specific plan). See Govt C §§65455, 65860, 65867.5, 66473.5, 66474; Neighborhood Action Group v County of Calaveras (1984) 156 CA3d 1176, 1184, 203 CR 401; 58 Ops Cal Atty Gen 21 (1975).

### NOTE

Be aware that a charter city's zoning ordinance need not be consistent with the city's general plan, unless consistency is required by *city law*. Govt C §65803.

## CHECK BUILDING AND USE PERMITS

### Confirm Existing Permits

Confirm that existing improvements were built with permits by checking permit history of the property with applicable agency.

### Determine Transferability

If seller has existing building or use permits, check with local authorities to see whether they are transferable.

### Obtain Permits

a. Delegate responsibility for obtaining permits to buyer, construction manager, or architect, *regardless* of whether obtaining building and use permits is a condition to closing.

b. Answer buyer's questions concerning requirements of building permits, *e.g.*:

(1) The city or county having jurisdiction imposes requirements found in the Uniform Building Code and Uniform Housing Code promulgated by the State Department of Housing and Community Development (Health & S C §§17921-17922);

(2) Local agencies may attach conditions to issuance of a building permit. See, *e.g.*, *Friends of Westwood, Inc. v City of Los Angeles* (1987) 191 CA3d 259, 268, 235 CR 788; *Slagle Constr. Co. v County of Contra Costa* (1977) 67 CA3d 559, 563, 136 CR 748.

c. For information that must be included in a building permit and notice procedures, see Health & S C §19825.

## OTHER ENTITLEMENTS REQUIRED

Ensure that buyer has all entitlements required under zoning and other ordinances for the use sought, *e.g.*:

a. Approval of preliminary and final development plans;

b. Grading plans; and

c. Demolition permits.

## CHECK OCCUPANCY PERMITS

a. Because their existence indicates a project's compliance with other regulatory requirements, check to see that certificates of occupancy have been issued for all currently occupied tenant spaces.

b. Be aware that a separate certificate of occupancy can be issued for each portion of a project, as completed, so scrutinize the scope of any certificate.

## CHECK COMPLIANCE WITH LAWS GOVERNING SUBDIVISIONS

Determine whether the property:

a. Has been properly subdivided; and

b. Can be sold as a separate parcel in full compliance with the Subdivision Map Act (Govt C §§66410-66499.37), the Subdivided Lands Act (Bus & P C §§11000-11200), and requirements of local government bodies.

**Further Research:** See Subdiv Map Act, chaps 2-3.

## OTHER INQUIRIES

Determine whether the property is subject to restrictions imposed by:

a. California Coastal Commission (Pub Res C §§30000-30950);

b. Regional planning agencies, *e.g.*, Bay Conservation and Development Commission (Govt C §§66600-66682);

c. Army Corps of Engineers (33 CFR §§323.3-323.4);

- d. Williamson Act (see Govt C §51282 on removal of restrictions);
- e. Terms of a redevelopment plan (see local redevelopment agency and Health & S C §§33000-34160);
- f. A local agency in connection with a subdivision (see Govt C §66473.5);
- g. CEQA requirements (see Govt C §§66452.1(c), 66452.2(c); Pub Res C §§21000-21177; 14 Cal Code Regs §§15000-15387);
- h. The county, through issuance of notices of violation (see Govt C §66499.36);
- i. Other federal, state, regional, or local authorities having land-use jurisdiction over the property.

#### PARTIALLY DEVELOPED PROJECT

If buyer is purchasing a partially developed project, make additional inquiries to determine:

- a. Whether owner has obtained vested rights by beginning construction under terms of a building permit (see *Avco Community Dev., Inc. v South Coast Regional Comm'n* (1976) 17 C3d 785, 791, 132 CR 386);
- b. What portion of the project is protected against subsequent changes in the law (note that only the portions for which permits have been obtained and detrimentally relied on will be protected; see *Court House Plaza Co. v City of Palo Alto* (1981) 117 CA3d 871, 884, 173 CR 161);
- c. How any existing development agreement, conditional use or other permits, approvals, or conditions (*e.g.*, BCDC, open space, common-area requirements) affect use of the property (Govt C §§65864-65875);
- d. Whether seller's vested rights will inure to buyer's benefit (note that the only way to ensure that seller's rights will inure to the benefit of buyer is for the issuing agency to confirm the validity and assignability of these benefits);
- e. Whether construction complies with applicable codes and quality standards of buyer;
- f. Whether seller's contractor will warrant that the work has been constructed in accordance with the plans and specifications;
- g. Whether buyer has a right to assume or a right to terminate contracts with architects, construction management, and others; and
- h. Status of any outstanding construction, *e.g.*, contracts, mechanics' liens.

**Further Research:** On purchasing income property, see additional strategies in Real Property Sales §§4.85-4.93.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 33. BUYER: IF PURCHASING INCOME PROPERTY, INVESTIGATE EXISTING TENANCIES

STEP 33. BUYER: IF PURCHASING INCOME PROPERTY, INVESTIGATE EXISTING TENANCIES

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OBTAIN ESTOPPEL CERTIFICATES

a. Obtain estoppel certificates, with leases attached, from tenants, to:

- (1) Confirm that there are no agreements other than what is stated in the lease between seller and each tenant;
- (2) Estop tenants from claiming additional rights from buyer or claiming that seller waived certain provisions (see Evid C §623; Doll v Maravilas (1947) 82 CA2d 943, 949, 187 P2d 885 (buyer is bound by seller's acquiescence in tenant's breach of hours-of-operation clause));
- (3) Satisfy one of lender's requirements (if obtaining a loan);
- (4) Confirm all rights of both landlord and tenant under the lease, *e.g.*, and that there is a tenancy and any options or rights of first refusal;
- (5) Find out whether there are existing defaults or tenant complaints that may point out problems with the property; and
- (6) Determine status of deposits, prepaid rent, current rent, and method for determining rental adjustments.

b. If buyer is unable to obtain certificates from all tenants, consider assuming risk of accepting fewer than all the certificates, with a representation by seller for the missing certificates or an acceptance of certificates after closing.

**Sample Forms:** For sample estoppel certificates, see Real Property Sales, chaps 4, 5; Office Leasing: Drafting and Negotiating the Lease §§27.3-27.4, 43.2-43.19 (Cal CEB 1996).

Caution Buyer

Caution buyer not to rely solely on tenants' estoppel certificates, which usually are qualified by "to the best of tenant's knowledge," *i.e.*:

- a. Advise buyer to read the leases, offering assistance as needed; and
- b. Negotiate for indemnification by seller for tenant claims arising before close of escrow.

OBTAIN SECURITY DEPOSITS

a. Assist buyer in obtaining security deposits (and any cleaning deposit) from each tenant by direct transfer of deposit from seller or as a credit through escrow.

b. Advise buyer of residential real property that he or she will be jointly liable with seller to each tenant for repayment of the security deposit (CC §1950.5) unless seller:

- (1) Returns the security deposit to tenant with an accounting (rarely done); or
- (2) Notifies each tenant of the transfer of the security deposit to buyer, specifying:
  - (a) Amount transferred;
  - (b) Any claims made against the security; and
  - (c) Buyer's name(s), address(es), and telephone number(s).

**Further Research:** See CC §1950.7, governing security deposits on rental agreements for other than residential property.

NOTE

Advise buyer on whether security deposits are required to be deposited in interest-bearing accounts. Check local ordinances and CC §1950.5.

#### ADDITIONAL DOCUMENTS REQUIRED

Confirm receipt and acceptability of any additional documents required by buyer as condition to closing, *e.g.*:

- a. Assignment of leases in recordable form (although it typically is not recorded unless a lender requires it);
- b. Rent roll, certified to be true, correct, and current as of the closing;
- c. Originals of all leases, including amendments, records, and correspondence; and
- d. Notice to tenants that leases have been assigned to buyer, with instructions that tenants pay rent to buyer.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 34. PROCEED WITH ESCROW

STEP 34. PROCEED WITH ESCROW

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ESCROW DEFINED

Escrow is the process of a seller or grantor depositing a grant with a third party to be delivered to buyer or grantee on the performance of one or more conditions. [CC §1057](#); [Real Property Sales, chap 15](#).

Benefits of Escrow

Escrow:

- a. Increases chances that seller will receive the consideration when title is passed;
- b. Increases chances that buyer will receive title when the purchase price is paid;
- c. Is a means of satisfying the requirements of state and local laws, *e.g.*:
  - (1) [Bus & P C §24074](#) (transfer of liquor license); and
  - (2) [Com C §6106.2](#) (bulk transfer);
- d. Is a means of satisfying contractual requirements for holdbacks for disbursements after closing, *e.g.*, to pay for repairs and hazardous waste cleanup costs;
- e. Is a means of transferring leases and contracts; and
- f. May be used to clear up liens, *e.g.*, mechanics' and tax liens.

WHO ACTS AS ESCROW HOLDER

- a. *Northern California:* Title companies licensed as escrow companies ([Fin C §§17000-17702](#)) typically serve as escrow holders.
- b. *Southern California:* Title companies or independent, licensed escrow companies typically serve as escrow holders.
- c. Others can act as escrow holders (without being licensed as an escrow agent), *e.g.*:
  - (1) Bank or savings and loan association;
  - (2) Insurance company;
  - (3) Real estate broker (if incidental to transaction in which he or she is an agent or party); or
  - (4) Attorney who is not actively engaged in conducting escrow agency. [Fin C §17006](#). See [Real Property Sales §§15.2, 15.12](#).

NOTE

You should generally *not* act as escrow holder, to avoid conflicts between your duties as attorney to one of the parties, and the fiduciary duties of an escrow holder to *both* parties; also, be aware that your malpractice insurance might not cover handling escrows. For discussion of escrow holders' duties and liability, see [Real Property Sales §§15.18-15.25](#).

Review Rules Governing Escrow Companies

For rules governing escrow companies, see [Fin C §§17000-17702](#) and 10 Cal Code Regs §§1709-1769.

USE ESCROW AND TITLE OFFICER

- a. Establish good communication with escrow officers and title officers in your area to increase likelihood of smooth closing.

## NOTE

Be aware that escrow and title are separate functions, and establish communications with staff in both areas.

- b. "Walk through" your instructions with escrow officer. (On simple transactions, it may be enough simply to introduce yourself and invite escrow officer to call if he or she has questions.)
- c. Ask title officer to assist you in negotiating solutions to title problems; but do not abdicate responsibility.
- d. Ask title officer to assist you in obtaining up-to-date information on transfer taxes, without prematurely identifying the transaction to the public official.
- e. Request a pro forma closing statement, allocating and prorating all items of expense and income associated with the escrow.

**Further Research:** On escrow and other title company services, see [Title Ins, chap 15](#).

## DRAFTING ESCROW INSTRUCTIONS

### CHOOSE TYPE OF ESCROW INSTRUCTIONS

#### Separate Instructions From Buyer and Seller

Expect to find separate, reciprocal instructions from buyer and seller in Northern California transactions.

**Sample Forms:** For sample buyer's instructions and seller's instructions, see [Appendix D](#). See also [Real Property Sales §§15.49-15.73](#); Real Property Forms Man §§9.1-9.32.

#### Joint Escrow Instructions

Joint instructions (more common in Southern California transactions) are more complex, drafted to include instructions for both seller and buyer. See [Real Property Sales §15.32](#).

#### Joint Escrow Instructions Included in Purchase Agreement

Large, sophisticated transactions often include joint escrow instructions in the purchase and sale agreement.

### DRAFT ESCROW INSTRUCTIONS

Draft your own escrow instructions (either within the purchase agreement or as a separate document) for your client because:

- a. Through the escrow instructions you can educate the escrow holder and position the transaction for a quick closing;
- b. If the purchase agreement is already signed, drafting the escrow instructions allows you to:
  - (1) Review the transaction and organize the closing;
  - (2) Clarify ambiguities and resolve issues before closing (but see discussion of avoiding conflicts with purchase agreement, below);
- c. Reading and modifying form instructions is probably not less expensive than preparing your own.

#### Review Form Instructions From Escrow Holder

- a. Be aware that an escrow company may use form instructions in most transactions.
- b. Review form instructions because:
  - (1) They can be inaccurate and incomplete; and
  - (2) They may be drafted to benefit only the escrow holder and may contain onerous exculpatory provisions. See [Real Property Sales, chap 15](#).

- c. Supplement the escrow company's instructions with your own escrow instructions.

### Avoid Conflicts With Purchase Agreement

If escrow instructions are separate from the purchase agreement, draft the instructions yourself (do not let an escrow holder paraphrase the purchase agreement) and:

- a. Provide that the purchase agreement controls if there is a conflict between the instructions and the purchase agreement; or
- b. When there are intentional departures from the agreement, prepare addendum to agreement or acknowledge departure in escrow instructions, and have both buyer and seller sign.

### SCOPE OF INSTRUCTIONS

Set forth clearly every step escrow holder must take and all conditions that must be satisfied, *from your client's perspective*, to close escrow. See Real Property Sales, chap 15.

## CLOSING ESCROW

### REQUIREMENTS FOR CLOSING ESCROW

Generally, escrow holder will not close if:

- a. Unable to comply with the closing instructions (*e.g.*, has not received all necessary documents and funds from parties);
- b. Funds are not "good" (see definition, below) (Ins C §12413.1); or
- c. There are inconsistent demands by the parties, in which case escrow holder may bring an action for interpleader and deposit the funds and documents with the court. See Real Property Sales §15.98.

### "Good Funds" Defined

- a. Wired funds are accepted as "good funds" immediately (see Ins C §§12413.1(c), 12413.1(g); 12 CFR §229.2(p)), but be aware that wiring snags can occur, so plan ahead with banks, *e.g.*, to avoid peak hours and problems with different time zones.
- b. A California cashier's check is generally accepted as "good funds" on the next business day following deposit, and an out-of-state cashier's check after a 4-to-8-day clearance period.
- c. A draft will not be accepted until the funds actually have been credited to escrow holder's account.

### NOTE

Escrow holder *must* deposit checks and drafts by the close of the next business day following receipt. Ins C §12413.2. Escrow holder will not follow any instructions to hold a draft until the close of escrow.

### Understand Escrow Holder's Deadlines

Ask escrow holder how far in advance of actual recording he or she must receive funds and documents:

- a. Understand that in many counties recordings must be scheduled ahead of time, and all documents must be received and cleared for recording by a specific time on the day *before* recording; and
- b. To clear documents for recording, escrow holder must be in position to close, which requires good funds. See definition of "good funds," above.

**Further Research:** For discussion of escrows and escrow instructions generally, see Real Property Sales, chap 15.

**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 35. BUYER: EVALUATE TITLE INSURANCE NEEDS

STEP 35. BUYER: EVALUATE TITLE INSURANCE NEEDS

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TYPE OF POLICY

CLTA

- a. California Land Title Association (CLTA) is "standard coverage" title insurance policy with narrower coverage than ALTA (see below).
- b. With certain exclusions and exceptions, insures against:
  - (1) Title being vested other than as stated in policy;
  - (2) Defects in, liens or encumbrances on, title;
  - (3) Lack of access; and
  - (4) Inability to market title.
- c. Certain exceptions to title coverage are "standard"; others are specific to the property (*e.g.*, liens recorded against this property).

ALTA

- a. ALTA is an "extended coverage" policy. Major difference between ALTA and CLTA policies is that ALTA eliminates the following "standard" exceptions:
  - (1) Off-record easements and liens;
  - (2) Rights of parties in possession (although if there is evidence that there are parties in possession, that will appear as a "nonstandard" exception to coverage);
  - (3) Rights and claims that an inspection or a correct survey of the land would show (title company will require an ALTA survey for this, and will show as exceptions any items, such as encroachments, revealed by the survey);
  - (4) Mining claims, reservations in patents, and water rights.
- b. ALTA policy also gives broader coverage regarding access to and from the property.
- c. ALTA policy has been revised, but some title companies will still issue the 1970 form if requested. Review differences and make determination. See [Title Ins, Appendix F](#).

**Further Research:** See generally ALTA Policy Forms Handbook (Washington, D.C.: American Land Title Association). On additional features of CLTA and ALTA policies, see [Title Ins, chaps 6-7](#).

CONSIDER ENDORSEMENTS

Consider whether policy endorsements are available and appropriate for particular problems. See [Title Ins §§7.64-7.103, 8.50-8.118](#); [Real Estate Finance §1.64](#).

OTHER ISSUES

- a. Face amount of policy generally should be same as purchase price.
- b. Consider requesting special short-term rate if buyer intends to sell the property shortly. This reduces the aggregate title premiums.

**Further Research:** See generally [Title Ins, chaps 2-5](#).



**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 36. BUYER: COMPLY WITH NOTIFICATION REQUIREMENTS

STEP 36. BUYER: COMPLY WITH NOTIFICATION REQUIREMENTS

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FILE CHANGE-OF-OWNERSHIP STATEMENT

To file change-of-ownership statement:

- a. Obtain forms from county recorder or assessor.
- b. File a completed form at the same time you record any document effecting change of ownership, *e.g.*, deed. Rev & T C §480.3.

If an Exchange

- a. Person acting as both transferee and transferor in a simultaneous exchange (an "intermediate transferee") does not have to file a preliminary change-of-ownership statement. Rev & T C §480.3(f).
- b. To notify county recorders and assessors of this exception, attach to the deed a statement signed by the intermediate transferee, indicating that he or she is the transferee and transferor of the property.

NOTE

If you represent a party who is cooperating in another party's exchange, remember to negotiate a provision that protects your client from taking title to the exchange property.

COMPLY WITH FIRPTA WITHHOLDING LAW

Review FIRPTA

- a. FIRPTA imposes a tax on the disposition of an interest in United States real property by a nonresident alien individual or foreign corporation. IRC §897.
- b. Buyers are required to withhold 10 percent of the amount realized on transfers under IRC §§897 and 1445.
- c. Buyers failing to file withholding forms and pay withheld funds to the IRS are responsible for the 10-percent withholding, interest, and penalties.

Obtain Certificate of Nonforeign Status

- a. Advise buyer to obtain certificate of nonforeign status from seller to exempt buyer from withholding requirement (IRC §1445(b); Treas Reg §1.1445-2(a)(2)).
- b. Make sure that the statement is signed by seller *under penalty of perjury*, and that it sets forth:
  - (1) That transferor is not a foreign person;
  - (2) Transferor's name and address;
  - (3) Transferor's taxpayer identification number; and
  - (4) Property's address.

If Seller Is Foreign

If seller is foreign:

- a. Consider obtaining a withholding certificate well in advance of closing. See IRC §1445(b)(2); Treas Reg §1.1445-3.
- b. Refer to IRC §§897 and 1445 and regulations under these sections for information on filing and paying the withholding tax.

## FIRPTA Exchanges

If foreign seller is exchanging property in a nonrecognition transaction, see Treas Reg §1.1445-2(d)(2) for how buyer can avoid liability for withholding.

### NOTE

The California withholding statutes are found in Rev & T C §18661-18677. See step 23, above, for further information on California's withholding law.

### NOTIFY TENANTS

Buyer should:

- a. Notify tenants of the change of ownership and buyer's address; and
- b. Obtain security deposits held by seller.

For discussion of obtaining security deposits, see step 31, above.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/Negotiating and Forming the Purchase Agreement/STEP 37. PERFORM POSTCLOSING DUE DILIGENCE

STEP 37. PERFORM POSTCLOSING DUE DILIGENCE

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MAKE POSTCLOSING ADJUSTMENTS

Advise client to:

- a. Verify that closing statement prorations are consistent with those on the final balance sheets;
- b. Make adjustments as necessary for utility charges and other items for which information was unavailable at closing.

PREPARE CLOSING BINDER

Recommend that client prepare closing binder containing copies of all pertinent closing documents and an index, noting who has original documents; assist client as needed.

CONFIRM IRS AND FTB REPORTING

- a. Verify with escrow holder that the transaction was reported to the IRS and FTB in accordance with IRC §6045(e) and Rev & T C §18802.10.
- b. Be aware that you may become responsible for the reporting. See IRC §6045(e).

BUYER—REVIEW FINAL TITLE POLICY

Make sure that issued title policy conforms *exactly* to final escrow instructions, including the form of any endorsements and exceptions to title noted in the policy.

BUYER—CHECK INSURANCE

Verify with buyer that all new casualty and liability insurance is in place. The insurance should be in place before closing.

BUYER—CHECK BUSINESS PERMITS

Ensure that all permits necessary for operation of the property are issued in the proper owner's name.

BUYER—SECURE CONTRACTS

Advise buyer to make sure that all contracts, keys, and leases are transferred.

SELLER—TRANSFER UTILITIES

Remind seller to make sure that all utilities are in buyer's name.

SELLER—REVIEW INSURANCE

Casualty Insurance

- a. Remind seller to cancel casualty insurance on the property; but
- b. If seller is carrying financing, make sure buyer's casualty insurance:
  - (1) Is in effect;
  - (2) Is adequate; and
  - (3) Names seller as mortgagee.

Liability Insurance

Advise seller to review with insurance broker seller's liability insurance on the property, and either:

- a. Cancel; or
- b. Especially if the insurance is a "claims made" policy, consider keeping policy in effect for reasonable period after closing.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/APPENDIX A Purchase and Sale Agreement and Escrow Instructions

APPENDIX A

Purchase and Sale Agreement and Escrow Instructions

**NOTE:** This agreement is written for a buyer of real property. If representing a seller, edit the form to delete the provisions protective of buyer and add provisions protective of seller.

This agreement is made on \_\_[*date*]\_\_ between \_\_[*name of seller*]\_\_ ("Seller") and \_\_[*name of buyer*]\_\_ ("Buyer").

Buyer agrees to purchase from Seller and Seller agrees to sell to Buyer the property located at \_\_[*address*]\_\_, the legal description of which is attached as Exhibit A, including all tangible and intangible personal property now or hereafter located on or about the property or used in connection with the property, including, without limitation, all governmental permits, approvals, authorizations, declarations, and applications obtained or filed in connection with the property; all agreements, understandings, reports, plans, maps, bonds, deposits, fees, studies, notices and other materials prepared, given, filed, or used or to be used in connection with the property; and all contracts, if any, entered into by Seller and approved by Buyer, that shall affect directly or indirectly the property (collectively the "Property").

1. Purchase Price. The purchase price ("Purchase Price") for the Property is \$ \_\_[*amount*]\_\_ payable: (a) Buyer shall take subject to the existing loan encumbering the Property in the approximate amount of \$ \_\_[*amount*]\_\_, and (b) Buyer's \$ \_\_[*amount*]\_\_ note to Seller secured by a second deed of trust bearing interest at the rate of \_\_ \_\_ percent yearly, payable interest only or more monthly, all due \_\_ \_\_ years after the Close of Escrow; and (c) the balance paid in cash delivered to Escrow Holder at least one business day before the Close of Escrow. Concurrently with the opening of the Escrow, Buyer shall deposit into Escrow \$ \_\_[*amount*]\_\_ (the "Deposit"), which together with any other amounts deposited by Buyer into Escrow, shall be placed in an interest-bearing account with a federally insured bank, with interest credited to Buyer.

2. Escrow. Within 5 business days after the execution of this Agreement by Buyer and Seller, an escrow ("Escrow") shall be opened with \_\_[*name of escrow holder*]\_\_, \_\_[*address*]\_\_ ("Escrow Holder"). This Agreement shall constitute escrow instructions to the Escrow Holder. Seller and Buyer shall execute such additional escrow instructions as may be reasonably required by Escrow Holder.

3. Term of Escrow. Escrow shall close on or before \_\_[*date*]\_\_. "Opening of Escrow" shall mean the date on which a fully executed copy of this Agreement is delivered to Escrow Holder. "Close of Escrow" shall mean the date on which the grant deed from Seller to Buyer is recorded in the Office of the County Recorder where the Property is located.

4. Conditions to Buyer's Obligation. Buyer's obligations under this Agreement shall be contingent on satisfaction of all of the matters listed below.

4.1 Physical Inspection. Buyer's approval within \_\_ \_\_ days from the date of Opening of Escrow of inspections, tests, surveys, and other studies to be conducted by Buyer. Buyer, Buyer's representatives, or authorized agents may enter on the Property to make tests, surveys, or other studies of the Property. Buyer shall pay for all such tests and studies, keep the Property free and clear of any liens, repair all damage to the Property, and indemnify and hold Seller harmless from and against all liability, claims, demands, damages, or costs of any kind whatsoever arising from or connected with the tests, surveys, or studies.

4.2 Title. \_\_[*Name of title company*]\_\_ ("Title Company") can issue its ALTA extended owner's policy of title insurance, with liability in the amount of the Purchase Price, showing title to the Property vested in Buyer, subject only to those exceptions approved by Buyer within \_\_ \_\_ days after the delivery to Buyer through Escrow of the Preliminary Report and legible copies of the exceptions of record; and also subject to those exceptions approved by Buyer within \_\_ \_\_ days after Buyer's receipt of any ALTA supplemental title report. Escrow Holder is instructed to order immediately the Preliminary Report together with legible copies of all documents referred to in it. Seller agrees to convey title to the Property to Buyer at Close of Escrow free and clear of all monetary liens and encumbrances, excluding current real property taxes and those items approved by Buyer. If Seller does not remove one or more such monetary encumbrances, liens, or claims, in addition to all other remedies Buyer may have at law or in equity, Buyer may close Escrow on the scheduled closing date and offset dollar for dollar against the Purchase Price an amount equal to such monetary encumbrances, liens, or claims.

4.3 Leases. Buyer's approval of all leases and subleases affecting the Property, and all assignments, extensions, renewals, or modifications of them ("Lease Documents") within \_\_ \_\_ days after receipt by Buyer of copies of such Lease Documents and a rent roll listing each tenant, and its suite number, date of lease, expiration date, rental rate, date to which rent has been paid, and concessions granted to each tenant. This Agreement is also subject to Buyer's approval of estoppel certificates signed by all tenants of the Property and dated not more than \_\_ \_\_ days before the Close of Escrow. Such Estoppel Certificate shall be in the form required by Buyer's lender, or if there is no lender, in a form prepared by Buyer's attorney.

4.4 Other Contracts. Buyer's approval of all license agreements, contracts to provide goods or services for the Property, maintenance agreements, equipment and furniture leases, and copies of all warranties relating to the building fixtures and personal property, if any, within \_\_\_ days after receipt of all of such documents by Buyer.

4.5 Financial Data. Buyer's approval of the last 3 years' financial statements for the Property, certified by Seller to be true and correct, within \_\_\_ days after receipt of all such documents by Buyer.

4.6 Notes and Deeds of Trust. Buyer's approval of all notes and deeds of trust to remain of record, and any documents affecting such notes and deeds, within \_\_\_ days after receipt of all such documents by Buyer.

4.7 New Loan. Buyer obtaining, within \_\_\_ days after the Opening of Escrow, a commitment from a lender of Buyer's choice for a new loan secured by a first trust deed on the Property in the amount of \$\_\_[amount]\_\_, at a \_\_[fixed/variable]\_\_ interest rate of \_\_\_ percent or less, amortized over \_\_\_ years and payable over \_\_\_ years at a cost of not more than \_\_\_ points, plus title, escrow, and survey costs.

4.8 Survey. Buyer's approval of a survey of the Property within \_\_\_ days after Buyer's receipt of either a survey provided by Seller and satisfactory to the Title Company as the basis for an ALTA extended owner's policy of title insurance or Buyer's receipt of a new survey commissioned by Buyer. Seller shall provide Buyer with any survey of the Property that Seller may have.

4.9 Pest Inspection. Buyer's approval of a pest and vermin inspection of the Property by an inspector of Buyer's choice.

4.10 Seller's Representations and Warranties. Seller's representations and warranties set forth in article 7 shall be true and correct as of the Close of Escrow.

All conditions to the Close of Escrow or to Buyer's obligations under this Agreement are for Buyer's benefit only and Buyer may waive all or any part of such rights by written notice to Seller and Escrow Holder. If Buyer shall, within the applicable periods set forth here, disapprove of any of the items that are subject to Buyer's approval, or if any of the conditions set forth in this Agreement are not met within the times called for, Buyer may thereafter terminate this Agreement without any further liability on the part of Buyer by giving written notice of termination to the Escrow Holder, with a copy to Seller. Escrow Holder shall, without further consent from Seller, return to each party the documents deposited by them and to Buyer the funds deposited by Buyer together with the interest earned on the Deposit but less escrow and title company cancellation charges. If Buyer does not give written notice of disapproval to the Escrow Holder of any item listed in this paragraph 4 within the time provided, such failure to give notice shall be deemed Buyer's approval of the item.

## 5. Closing.

5.1 Documents to Be Delivered. At the Close of Escrow, Seller shall deliver to Buyer through Escrow the following original documents, which shall be in a form satisfactory to Buyer's counsel:

- (a) A grant deed conveying the Property to Buyer;
- (b) All leases affecting the Property and an assignment of them to Buyer;
- (c) Estoppel Certificates under paragraph 4.3, signed by tenants of the Property;
- (d) An assignment of all guaranties and warranties relating to the Property, and a Bill of Sale of the equipment and fixtures on it, if any;
- (e) All contracts affecting the Property.

At the Closing, Escrow Holder shall cause the Grant Deed to be recorded in the Official Records of \_\_[name of county]\_\_ County, California, and shall cause the Bill of Sale, leases, assignment of leases, and an ALTA extended owner's coverage policy of title insurance complying with paragraph 4.2 to be delivered to Buyer.

5.2 Closing Costs and Prorations. Buyer shall be credited and Seller charged with security deposits or advance rentals made by tenants under the Leases. Escrow Holder shall prorate the following between the parties as of the Close of Escrow: (a) interest on any note that will remain a lien against the Property; (b) real estate taxes and personal property taxes for the year \_\_[year]\_\_; (c) rent payments under the leases; (d) charges and fees paid or payable under service contracts that are assigned to Buyer; and (e) premiums payable under insurance assigned to Buyer at Buyer's request. All prorations shall be based on a 30-day month. Escrow Holder is to assume that all rents have been collected unless otherwise advised by Seller. Rent from tenants who are more than 30 days in arrears in payment of rent shall not be prorated.

5.3 Utilities. Seller shall try to have all meters read and final bills rendered for all utilities servicing the Property, including, without limitation, water, sewer, gas, and electricity, for the period to and including the day preceding the Close of Escrow, and Seller shall pay such bills. Buyer shall arrange for utility service to the Property after the Closing.

5.4 Possession. Possession shall be given to Buyer at Close of Escrow, subject to the rights of tenants in possession.

## 6. Expenses.

6.1 Expenses of Seller. Seller shall pay: (a) the documentary transfer tax applicable to this transaction; (b) the premium for a CLTA owner's title insurance policy; (c) one-half the escrow fees; (d) expenses of clearing title; and (e) other costs or expenses not expressly provided for here.

6.2 Expenses of Buyer. Buyer shall pay: (a) all recording charges on any document recorded under this Agreement; (b) the difference between the premium for an ALTA extended owner's title insurance policy and the premium for a CLTA owner's title policy; (c) the cost of any title endorsements requested by Buyer; (d) any costs associated with obtaining the consent of the holder of the existing loan to the transfer of the Property without accelerating or modifying the loan, or the costs of obtaining a new loan; and (e) one-half the escrow fee.

7. Seller's Representations and Warranties. Seller represents, warrants, and covenants the following, each of which shall be true in all respects as of the date of this Agreement and as of the date of Close of Escrow and shall survive the Close of Escrow:

7.1 During Escrow Seller will, at its sole cost, maintain the Property in good condition and repair, including, without limitation, all mechanical equipment and appliances.

7.2 Seller shall not remove any fixtures or personal property from the Property.

7.3 Seller has no knowledge of any violation of applicable law or ordinances affecting the Property, and there is no hazardous waste on, under, or near the Property. Seller warrants that there are not now nor ever have been underground storage tanks located on the Property, no hazardous waste has been released on the Property, and there is no asbestos or PCB present anywhere on the Property. Seller hereby assigns to Buyer all of Seller's right, title, and interest under policies of insurance covering the Property for all periods of Seller's ownership.

7.4 Seller has delivered true, accurate, and complete copies of all Lease Documents, contracts, income and expense schedules, surveys, plans, and specifications describing the Property and known by Seller to exist. No document supplied to Buyer by Seller contains any untrue statement of material fact or fails to state any fact that would be necessary, considering the circumstances, to make the documents supplied not misleading.

7.5 At the Close of Escrow, there will be no outstanding expenses not fully paid, except those expenses previously approved by the Buyer in writing.

7.6 Seller has no knowledge of any pending or threatened claim or litigation against the Property and Seller has not received any notice from any governmental authority of defects in the Property or noncompliance with any applicable law, code, or regulation.

7.7 The persons executing this Agreement are authorized by the Seller to enter into the transaction.

7.8 During the Escrow period, Seller shall not enter into any new lease, or option to lease, or extension of an existing lease, or any other contract or agreement pertaining to the Property, unless Seller shall first send to Buyer for approval a copy of the document it proposes to sign. Buyer shall have 3 business days after receipt of the document to object in writing to Seller's signing of the document. Any such objection shall, in the case of any lease, lease option, or lease extension, not be unreasonable. Buyer's failure to respond shall be deemed approval.

7.9 Except as previously disclosed by Seller to Buyer in writing, all leases are in full force and effect, there are no offsets or concessions owed to any tenant, and no tenant is presently in bankruptcy.

7.10 The Property has not been repaired, replaced, or restored with federal disaster relief assistance that was conditioned on obtaining flood insurance for the Property, such that the Buyer will be required to obtain flood insurance under applicable federal law. 42 USC §§4001-4129.

[If applicable, add]

7.11 The Property is subject to the lien to secure a bond under the Mello-Roos Community Facilities Act of 1982.

[If applicable, add]

7.12 Because the Property contains unreinforced masonry walls, Seller therefore concurrently has delivered to Buyer a copy of "Commercial Property Owner's Questions about Earthquake Safety" and Buyer acknowledges receipt of it.

[Continue]

8. Broker's Commission. Seller shall pay through Escrow at the Close of Escrow, on consummation of this Escrow, a total broker's commission of \$ \_ [amount] \_ \_ to \_ [name of broker] \_ \_ , broker's license no. \_ \_ \_ \_ \_ . Buyer and Seller acknowledge that, except as set forth here, no broker's commission or finder's fee is payable in connection with this transaction; and each indemnitor agrees to indemnify and hold the other harmless from and against all liability, claims, demands, damages, or costs of any kind whatsoever arising from or connected with any broker's or finder's fee or commission or charge claimed to be owed to any person arising from the indemnitor's conduct with respect to this transaction, other than the commissions authorized in this paragraph.

9. Damage or Destruction. If the Property is damaged before Close of Escrow by an insured casualty that would cost \$ \_ [amount] \_ \_ or more to repair, Buyer may terminate this Agreement by written notice to Seller given within \_ \_ \_ days after Seller notifies Buyer of such event, or at Close of Escrow, whichever is earlier. If Buyer does not terminate, or if the damage would cost less than \$ \_ [amount] \_ \_ to repair, the Closing shall take place as provided here and Seller shall assign to Buyer at Close of Escrow Seller's insurance proceeds payable on account of such damage and shall pay to Buyer the amount of any deductible under Seller's insurance. If an uninsured casualty occurs that would cost more than \$ \_ [amount] \_ \_ to repair, either party may terminate this Agreement at any time before Close of Escrow. If this Agreement is not terminated, Buyer shall receive a credit against the Purchase Price in an amount equal to the cost of repairing the damage in question. If Seller elects to terminate this Agreement, Buyer may override such termination by choosing to bear the cost of repairing the damage and receive a credit at Close of Escrow of \$ \_ [amount] \_ \_ . Seller shall bear the risk and expense of any uninsured loss of \$ \_ [amount] \_ \_ or less. If this Agreement is terminated, Buyer's Deposit, plus accrued interest, shall be immediately returned to Buyer, less any Escrow and title company cancellation fees.

10. Assignment. Buyer may assign its rights under this Agreement, to any other person, firm, or entity.

11. No Back-Up Offers. Seller shall not enter into any other agreements to sell the Property as long as this Agreement is in force.

12. Notices. All notices, demands, and requests that may be given by either party to the other or to Escrow Holder shall be in writing and shall be deemed to have been given, on personal delivery or 48 hours after deposit in the United States mail, registered or certified, return receipt requested, postage prepaid, addressed to the party to be notified at the address following the party's signature or if addressed to Escrow Holder, at the address in paragraph 2. Either party may designate by written notice to the other party in the manner set forth in this Agreement another address for notice. All notices to Escrow Holder shall make specific reference to the escrow number of the Escrow. Rejection or other refusal to accept or the inability to deliver because of changed address, of which no notice was given as required here, shall be deemed to be receipt of the notice sent.

13. Liquidated Damages. IF, BEFORE THE CLOSE OF ESCROW, BUYER REFUSES WITHOUT CAUSE TO PERFORM ITS OBLIGATIONS UNDER THIS AGREEMENT WITHIN \_ \_ \_ BUSINESS DAYS AFTER WRITTEN DEMAND FROM SELLER ON BUYER SO TO DO, THEN BUYER SHALL BE DEEMED IN DEFAULT UNDER THIS AGREEMENT. THE PARTIES RECOGNIZE THAT SELLER WILL INCUR EXPENSE IN CONNECTION WITH THE TRANSACTION CONTEMPLATED BY THIS AGREEMENT AND THAT THE PROPERTY WILL BE REMOVED FROM THE MARKET AT A TIME WHEN ITS SALE IS CRITICAL TO SELLER'S INTERESTS; FURTHER, THE PARTIES RECOGNIZE THAT IT IS EXTREMELY DIFFICULT AND IMPRACTICAL TO ASCERTAIN THE DAMAGE TO SELLER CAUSED BY THE BREACH BY BUYER OF THIS AGREEMENT AND THE FAILURE OF THE CONSUMMATION OF THIS AGREEMENT OR THE AMOUNT OF COMPENSATION SELLER SHOULD RECEIVE AS A RESULT OF BUYER'S DEFAULT. THEREFORE, BUYER AND SELLER AGREE THAT IF THE SALE OF THE PROPERTY IS NOT CONSUMMATED BECAUSE OF BUYER'S DEFAULT, SELLER'S DAMAGES SHALL BE \$ \_ [AMOUNT] \_ \_ . RECEIPT BY SELLER OF \$ \_ [AMOUNT] \_ \_ , EITHER BY THE RETENTION OF \$ \_ [AMOUNT] \_ \_ FROM THE DEPOSIT OR OTHERWISE, SHALL BE SELLER'S SOLE AND EXCLUSIVE REMEDY FOR ANY BREACH OR DEFAULT BY BUYER UNDER OR IN CONNECTION WITH THIS AGREEMENT AND SHALL BE INSTEAD OF ANY OTHER MONETARY RELIEF OR ANY OTHER RELIEF TO WHICH SELLER MAY OTHERWISE BE ENTITLED BY VIRTUE OF THIS AGREEMENT AT LAW OR IN EQUITY.

SELLER'S INITIALS

BUYER'S INITIALS

\_\_\_\_\_

\_\_\_\_\_

14. Arbitration of Disputes. ANY CONTROVERSY ARISING FROM THIS AGREEMENT OR ITS BREACH SHALL BE DETERMINED BY 3 ARBITRATORS APPOINTED AS SET OUT BELOW:

WITHIN 10 DAYS AFTER A NOTICE BY EITHER PARTY TO THE OTHER REQUESTING ARBITRATION AND STATING THE BASIS OF THE PARTY'S CLAIM, THE REQUESTING PARTY SHALL COMMENCE AN ARBITRATION PROCEEDING EITHER UNDER THE AUSPICES OF THE AMERICAN ARBITRATION ASSOCIATION OR JAMS/ENDISPUTE, INC. THE ARBITRATION SHALL BE CONDUCTED UNDER THE RULES OF THE ORGANIZATION SELECTED AND CODE OF CIVIL PROCEDURE §§1280 THROUGH 1294.2. ALL NOTICES, INCLUDING NOTICES UNDER CODE OF CIVIL PROCEDURE §1290.4, SHALL BE GIVEN AS PROVIDED IN PARAGRAPH 12.

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW, AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

SELLER'S INITIALS

BUYER'S INITIALS

\_\_\_\_\_

\_\_\_\_\_

15. Federal Reporting Requirements. Buyer and Seller acknowledge that IRC §6045(e) requires that the amount of gross proceeds from a real estate transaction be reported to the IRS. Buyer and Seller hereby instruct the Escrow Holder to comply with that code section and make said report. Seller hereby instructs the Escrow Holder to report the gross proceeds of this sale to the IRS on Form 1099-B or W-9 or any subsequently approved IRS form.

16. Federal Withholding. So that Buyer may comply with the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), Seller hereby declares under penalty of perjury that it is not a foreign person, as defined in FIRPTA, and Seller's Taxpayer Identification Number is \_\_\_\_\_. Seller shall provide Buyer with such additional information and affidavits as may be necessary for Buyer to comply with FIRPTA.

17. Preliminary Change of Ownership Report. Buyer is aware that any person acquiring an interest in real property must file a Preliminary Change of Ownership Report with the County Recorder or Tax Assessor on recording any document effecting a change of ownership, unless the document is accompanied by an affidavit that the transferee is not a resident of California. Failure to file may result in an additional recording fee for the Buyer.

18. Reassessment. Property will be reassessed on a change of ownership. This will affect the taxes to be paid. A supplemental tax bill may be issued that shall be paid as follows: (a) for periods after the Close of Escrow, by Buyer, and (b) for periods before the Close of Escrow by Seller. Tax bills issued after the Close of Escrow shall be handled directly between Buyer and Seller.

19. Miscellaneous Provisions.

19.1 Waiver. The waiver of any provision of this Agreement shall be invalid unless evidenced by a writing signed by the party to be charged with it. The waiver of, or failure to enforce, any provision of this Agreement shall not be a waiver of any further breach of such provision or of any other provision of this Agreement. The waiver by either or both parties of the time for performing an act shall not be a waiver of the time for performing any other act required under this Agreement.

19.2 Modifications. No change or addition to this Agreement or any part of it shall be valid unless in writing and signed by each of the parties.

19.3 Successors and Assigns. This Agreement shall inure to the benefit of and be binding on the successors and assigns of the respective parties.

19.4 Governing Law. This Agreement shall be governed by California law.

19.5 Headings. The headings in this Agreement are for convenience only and shall not be used to interpret this Agreement.

19.6 Further Acts. Each party agrees to take such further action and to execute and deliver such further documents as may be

necessary to carry out the purposes of this Agreement.

19.7 Attorney Fees. If either party incurs attorney fees to enforce this Agreement or because of a breach of this Agreement by the other party, the prevailing party shall be entitled to recover reasonable attorney fees as set by the court from the other party.

19.8 Time. Time is of the essence for this Agreement.

19.9 Faxed Signatures. The parties agree that faxed signatures may be used to expedite the transaction contemplated by this agreement. Each party intends to be bound by its faxed signature and each is aware that the other will rely on the faxed signature, and each acknowledges such reliance and waives any defenses to the enforcement of the documents effecting the transaction contemplated by this Agreement based on a faxed signature.

19.10 Expiration of Agreement. Seller shall have until 5:00 p.m. on \_\_[*date*]\_\_ to accept the Agreement by signing and dating a copy of this Agreement and delivering such copy to Buyer.

20. Exchange Transaction. Seller agrees on the request of Buyer to cooperate with Buyer in closing this transaction as an exchange under IRC Section 1031 provided that Seller shall incur no additional expense or liability in connection with it and is not required to take title to any property in connection with such exchange.

21. Review by Counsel. Each party (the "Represented Party") acknowledges that he or she has been represented (or has had the opportunity to be represented) in the review and signing of this agreement by independent legal counsel selected of the Represented Party's free will; and the Represented Party has had the opportunity to discuss this agreement with such counsel. The Represented Party further acknowledges that he or she has read and fully understands the meaning and ramifications of this Agreement and by signing below indicates his or her full agreement to the foregoing terms.

SELLER:

BUYER:

\_\_[*signature*]\_\_

\_\_[*signature*]\_\_

\_\_[*typed name*]\_\_

\_\_[*typed name*]\_\_

\_\_[*address for notices*]\_\_

\_\_[*address for notice*]\_\_

\_\_[*city, state, zip*]\_\_

\_\_[*city, state, zip*]\_\_

\_\_[*fax number*]\_\_

\_\_[*fax number*]\_\_

\_\_[*date of Seller's signature*]\_\_

\_\_[*date of Buyer's signature*]\_\_

Following are possible additional provision topics to add to inspection or representations sections:

A. Structural, foundation, roof, plumbing, heating, ventilating and air conditioning, electrical, mechanical, security, and appliance provisions, and any personal property included in the sale.

B. Square footage, room dimensions, lot size, and age of Property improvements (any numerical statements regarding these items are approximations only and should be verified by Buyer).

C. Property lines and boundaries (fences, hedges, walls, and other natural or constructed barriers or markers do not necessarily identify true Property boundaries; Property lines may be verified by survey).

D. Sewer, septic, and well systems and components (Property may not be connected to sewers and applicable fees may not have been paid; septic tank may need to be pumped and leach field may need to be inspected).

E. Limitations, restrictions, and requirements regarding Property use, future development, zoning, building size, governmental permits, and inspections.

F. Water and utility availability and use restrictions.

G. Potential environmental hazards, including asbestos, formaldehyde, radon gas, lead-based paint, other lead contamination, fuel or chemical storage tanks.

H. Geologic/seismic conditions, soil and terrain stability, suitability, and drainage.

I. Neighborhood conditions, proximity to schools, proximity and adequacy of law enforcement, proximity to other commercial,

industrial, residential, or agricultural activities, crime statistics, fire protection, other governmental services, existing and proposed transportation, construction and development, airport noise, noise or odor from any source or other nuisances, hazards, or circumstances and any conditions of significance in certain cultures and/or religions.

J. Buyer is advised to make further inquiries to governmental agencies, lenders, insurance advisors, architects, and other appropriate persons and entities concerning the use of the Property under applicable zoning, fire, or health and safety codes and for evaluation of potential hazards.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/APPENDIX B Form: Sample Residential Purchase Agreement and Joint Escrow Instructions (and Receipt for Deposit); Buyer's Inspection Advisory (CAR Forms RPA-CA and BIA-11)

APPENDIX B

Form: Sample Residential Purchase Agreement and Joint Escrow Instructions (and Receipt for Deposit); Buyer's Inspection Advisory (CAR Forms RPA-CA and BIA-11)\*





CALIFORNIA  
ASSOCIATION  
OF REALTORS®

**CALIFORNIA  
RESIDENTIAL PURCHASE AGREEMENT  
AND JOINT ESCROW INSTRUCTIONS**

For Use With Single Family Residential Property — Attached or Detached  
(C.A.R. Form RPA-CA, Revised 10/02)

Date May 18, 2004, at Danville, California.

**1. OFFER:**

- A. **THIS IS AN OFFER FROM** Daniel J. Collette ("Buyer").  
 B. **THE REAL PROPERTY TO BE ACQUIRED** is described as 618 Mount Lane, Assessor's Parcel No. 123-4567-89, situated in Town of Danville, County of Contra Costa, California, ("Property").  
 C. **THE PURCHASE PRICE** offered is One Million Two Hundred Fifty Thousand and 00/100 Dollars \$ 1,250,000

D. **CLOSE OF ESCROW** shall occur on \_\_\_\_\_ (date) (or  60 Days After Acceptance).

**2. FINANCE TERMS:** Obtaining the loans below is a contingency of this Agreement unless: (i) either 2K or 2L is checked below; or (ii) otherwise agreed in writing. Buyer shall act diligently and in good faith to obtain the designated loans. Obtaining deposit, down payment and closing costs is not a contingency. Buyer represents that funds will be good when deposited with Escrow Holder.

- A. **INITIAL DEPOSIT:** Buyer has given a deposit in the amount of ..... \$ 10,000 to the agent submitting the offer (or to  \_\_\_\_\_), by personal check (or  \_\_\_\_\_), made payable to Escrow Holder, which shall be held uncashed until Acceptance and then deposited within 3 business days after Acceptance (or  \_\_\_\_\_), with Escrow Holder, (or  into Broker's trust account).  
 B. **INCREASED DEPOSIT:** Buyer shall deposit with Escrow Holder an increased deposit in the amount of .. \$ 27,500 within 30 Days After Acceptance, or  \_\_\_\_\_.  
 C. **FIRST LOAN IN THE AMOUNT OF** ..... \$ 1,000,000  
 (1) NEW First Deed of Trust in favor of lender, encumbering the Property, securing a note payable at maximum interest of 6.0 % fixed rate, or N/A % initial adjustable rate with a maximum interest rate of N/A %, balance due in 30 years, amortized over 30 years. Buyer shall pay loan fees/points not to exceed 2% of \_\_\_\_\_ (These terms apply whether the designated loan is conventional, FHA or VA.)  
 (2)  FHA  VA: (The following terms only apply to the FHA or VA loan that is checked.)  
 Seller shall pay \_\_\_\_\_ % discount points. Seller shall pay other fees not allowed to be paid by Buyer,  not to exceed \$ \_\_\_\_\_. Seller shall pay the cost of lender required Repairs (including those for wood destroying pest) not otherwise provided for in this Agreement,  not to exceed \$ \_\_\_\_\_. (Actual loan amount may increase if mortgage insurance premiums, funding fees or closing costs are financed.)  
 D. **ADDITIONAL FINANCING TERMS:**  Seller financing, (C.A.R. Form SFA);  secondary financing, ... \$ \_\_\_\_ (C.A.R. Form PAA, paragraph 4A);  assumed financing (C.A.R. Form PAA, paragraph 4B)  
No prepayment penalty

E. **BALANCE OF PURCHASE PRICE** (not including costs of obtaining loans and other closing costs) in the amount of .. \$ 212,500 to be deposited with Escrow Holder within sufficient time to close escrow.

F. **PURCHASE PRICE (TOTAL):** ..... \$ 1,250,000

G. **LOAN APPLICATIONS:** Within 7 (or  \_\_\_\_\_) Days After Acceptance, Buyer shall provide Seller a letter from lender or mortgage loan broker stating that, based on a review of Buyer's written application and credit report, Buyer is prequalified or preapproved for the NEW loan specified in 2C above.

H. **VERIFICATION OF DOWN PAYMENT AND CLOSING COSTS:** Buyer (or Buyer's lender or loan broker pursuant to 2G) shall, within 7 (or  \_\_\_\_\_) Days After Acceptance, provide Seller written verification of Buyer's down payment and closing costs.

I. **LOAN CONTINGENCY REMOVAL:** (i) Within 17 (or  \_\_\_\_\_) Days After Acceptance, Buyer shall, as specified in paragraph 14, remove the loan contingency or cancel this Agreement; OR (ii) (if checked)  the loan contingency shall remain in effect until the designated loans are funded.

J. **APPRAISAL CONTINGENCY AND REMOVAL:** This Agreement is (OR, if checked,  is NOT) contingent upon the Property appraising at no less than the specified purchase price. If there is a loan contingency, at the time the loan contingency is removed (or, if checked,  within 17 (or \_\_\_\_\_) Days After Acceptance), Buyer shall, as specified in paragraph 14B(3), remove the appraisal contingency or cancel this Agreement. If there is no loan contingency, Buyer shall, as specified in paragraph 14B(3), remove the appraisal contingency within 17 (or \_\_\_\_\_) Days After Acceptance.

K.  **NO LOAN CONTINGENCY** (If checked): Obtaining any loan in paragraphs 2C, 2D or elsewhere in this Agreement is NOT a contingency of this Agreement. If Buyer does not obtain the loan and as a result Buyer does not purchase the Property, Seller may be entitled to Buyer's deposit or other legal remedies.

L.  **ALL CASH OFFER** (If checked): No loan is needed to purchase the Property. Buyer shall, within 7 (or  \_\_\_\_\_) Days After Acceptance, provide Seller written verification of sufficient funds to close this transaction.

**3. CLOSING AND OCCUPANCY:**

- A. Buyer intends (or  does not intend) to occupy the Property as Buyer's primary residence.  
 B. **Seller-occupied or vacant property:** Occupancy shall be delivered to Buyer at 11:00 AM/PM,  on the date of Close Of Escrow;  on \_\_\_\_\_; or  no later than \_\_\_\_\_ Days After Close Of Escrow. (C.A.R. Form PAA, paragraph 2.) If transfer of title and occupancy do not occur at the same time, Buyer and Seller are advised to: (i) enter into a written occupancy agreement; and (ii) consult with their insurance and legal advisors.

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**RPA-CA REVISED 10/02 (PAGE 1 OF 8) Print Date**

Buyer's Initials (\_\_\_\_)(\_\_\_\_)

Seller's Initials (\_\_\_\_)(\_\_\_\_)

Reviewed by \_\_\_\_\_ Date \_\_\_\_\_



Property Address: 618 Mount Lane, Danville, California Date: May 18, 2004

~~G. Tenant-occupied property: (i) Property shall be vacant at least 5 (or  ) Days Prior to Close Of Escrow, unless otherwise agreed in writing. Note to Seller: If you are unable to deliver Property vacant in accordance with rent control and other applicable Law, you may be in breach of this Agreement.~~

OR (ii) (if checked)  Tenant to remain in possession. The attached addendum is incorporated into this Agreement (C.A.R. Form PAA, paragraph 3.);

OR (iii) (if checked)  This Agreement is contingent upon Buyer and Seller entering into a written agreement regarding occupancy of the Property within the time specified in paragraph 14B(1). If no written agreement is reached within this time, either Buyer or Seller may cancel this Agreement in writing.

D. At Close Of Escrow, Seller assigns to Buyer any assignable warranty rights for items included in the sale and shall provide any available Copies of such warranties. ~~Brokers cannot and will not determine the assignability of any warranties.~~

E. At Close Of Escrow, unless otherwise agreed in writing, Seller shall provide keys and/or means to operate all locks, mailboxes, security systems, alarms and garage door openers. If Property is a condominium or located in a common interest subdivision, Buyer may be required to pay a deposit to the Homeowners' Association ("HOA") to obtain keys to accessible HOA facilities.

4. ALLOCATION OF COSTS (If checked): Unless otherwise specified here, this paragraph only determines who is to pay for the report, inspection, test or service mentioned. If not specified here or elsewhere in this Agreement, the determination of who is to pay for any work recommended or identified by any such report, inspection, test or service shall be by the method specified in paragraph 14B(2).

A. WOOD DESTROYING PEST INSPECTION:

(1)  Buyer  Seller shall pay for an inspection and report for wood destroying pests and organisms ("Report") which shall be prepared by Acme Termite & Pest, a registered structural pest control company. The Report shall cover the accessible areas of the main building and attached structures and, if checked:  detached garages and carports,  detached decks,  the following other structures or areas \_\_\_\_\_.

Property is a condominium or located in a common interest subdivision, the Report shall include only the separate interest and any exclusive-use areas being transferred and shall not include common areas, unless otherwise agreed. Water tests of shower pans on upper level units may not be performed without consent of the owners of property below the shower.

OR (2)  (If checked) The attached addendum (C.A.R. Form WPA) regarding wood destroying pest inspection and allocation of cost is incorporated into this Agreement.

B. OTHER INSPECTIONS AND REPORTS:

- (1)  Buyer  Seller shall pay to have septic or private sewage disposal systems inspected \_\_\_\_\_.
- (2)  Buyer  Seller shall pay to have domestic wells tested for water potability and productivity \_\_\_\_\_.
- (3)  Buyer  Seller shall pay for a natural hazard zone disclosure report prepared by a company acceptable to Buyer \_\_\_\_\_.
- (4)  Buyer  Seller shall pay for the following inspection or report mold \_\_\_\_\_.
- (5)  Buyer  Seller shall pay for the following inspection or report \_\_\_\_\_.

C. GOVERNMENT REQUIREMENTS AND RETROFIT:

- (1)  Buyer  Seller shall pay for smoke detector installation and/or water heater bracing, if required by Law. Prior to Close Of Escrow, Seller shall provide Buyer a written statement of compliance in accordance with state and local Law, unless exempt.
- (2)  Buyer  Seller shall pay the cost of compliance with any other minimum mandatory government retrofit standards, inspections and reports if required as a condition of closing escrow under any Law. \_\_\_\_\_.

D. ESCROW AND TITLE:

- (1)  Buyer  Seller shall pay escrow fee, in accordance with Contra Costa County custom. Escrow Holder shall be Chicago Title Insurance Company.
- (2)  Buyer  Seller shall pay for owner's title insurance policy specified in paragraph 12E. Owner's title policy to be issued by Escrow Holder. (Buyer shall pay for any title insurance policy insuring Buyer's lender, unless otherwise agreed in writing.)

E. OTHER COSTS:

- (1)  Buyer  Seller shall pay County transfer tax or transfer fee \_\_\_\_\_.
- (2)  Buyer  Seller shall pay City transfer tax or transfer fee N/A.
- (3)  Buyer  Seller shall pay HOA transfer fee N/A.
- (4)  Buyer  Seller shall pay HOA document preparation fees N/A.
- (5)  Buyer  Seller shall pay the cost, not to exceed \$ 1,000, of a one-year home warranty plan, issued by a company to be designated by Buyer \_\_\_\_\_, with the following optional coverage: air conditioning and heating.
- (6)  Buyer  Seller shall pay for \_\_\_\_\_.
- (7)  Buyer  Seller shall pay for \_\_\_\_\_.

5. STATUTORY DISCLOSURES (INCLUDING LEAD-BASED PAINT HAZARD DISCLOSURES) AND CANCELLATION RIGHTS:

- A. (1) Seller shall, within the time specified in paragraph 14A, deliver to Buyer, if required by Law: (i) Federal Lead-Based Paint Disclosures and pamphlet ("Lead Disclosures"); and (ii) disclosures or notices required by sections 1102 et. seq. and 1103 et. seq. of the California Civil Code ("Statutory Disclosures"). Statutory Disclosures include, but are not limited to, a Real Estate Transfer Disclosure Statement ("TDS"), Natural Hazard Disclosure Statement ("NHD"), notice or actual knowledge of release of illegal controlled substance, notice of special tax and/or assessments (or, if allowed, substantially equivalent notice regarding the Mello-Roos Community Facilities Act and Improvement Bond Act of 1915) and, if Seller has actual knowledge, an industrial use and military ordnance location disclosure (C.A.R. Form SSD).
- (2) Buyer shall, within the time specified in paragraph 14B(1), return Signed Copies of the Statutory and Lead Disclosures to Seller.
- (3) In the event Seller, prior to Close Of Escrow, becomes aware of adverse conditions materially affecting the Property, or any material inaccuracy in disclosures, information or representations previously provided to Buyer of which Buyer is otherwise unaware, Seller shall promptly provide a subsequent or amended disclosure or notice, in writing, covering those items. However, a subsequent or amended disclosure shall not be required for conditions and material inaccuracies disclosed in reports ordered and paid for by Buyer.

Buyer's Initials (\_\_\_\_)(\_\_\_\_)  
Seller's Initials (\_\_\_\_)(\_\_\_\_)

Reviewed by \_\_\_\_\_ Date \_\_\_\_\_



Property Address: 618 Mount Lane, Danville, California

Date: May 18, 2004

(4) If any disclosure or notice specified in 5A(1), or subsequent or amended disclosure or notice is delivered to Buyer after the offer is Signed, Buyer shall have the right to cancel this Agreement within ~~3 Days After delivery in person, or 5 Days After delivery by deposit in the mail,~~ <sup>5</sup> by giving written notice of cancellation to Seller or Seller's agent. (Lead Disclosures sent by mail must be sent certified mail or better.) Buyer's receipt

(5) **Note to Buyer and Seller: Waiver of Statutory and Lead Disclosures is prohibited by Law.**

**B. NATURAL AND ENVIRONMENTAL HAZARDS:** Within the time specified in paragraph 14A, Seller shall, if required by Law: (i) deliver to Buyer earthquake guides (and questionnaire) and environmental hazards booklet; (ii) even if exempt from the obligation to provide a NHD, disclose if the Property is located in a Special Flood Hazard Area; Potential Flooding (Inundation) Area; Very High Fire Hazard Zone; State Fire Responsibility Area; Earthquake Fault Zone; Seismic Hazard Zone; and (iii) disclose any other zone as required by Law and provide any other information required for those zones.

**C. DATA BASE DISCLOSURE: NOTICE:** The California Department of Justice, sheriff's departments, police departments serving jurisdictions of 200,000 or more and many other local law enforcement authorities maintain for public access a data base of the locations of persons required to register pursuant to paragraph (1) of subdivision (a) of Section 290.4 of the Penal Code. The data base is updated on a quarterly basis and a source of information about the presence of these individuals in any neighborhood. The Department of Justice also maintains a Sex Offender Identification Line through which inquiries about individuals may be made. This is a "900" telephone service. Callers must have specific information about individuals they are checking. Information regarding neighborhoods is not available through the "900" telephone service.

**6. CONDOMINIUM/PLANNED UNIT DEVELOPMENT DISCLOSURES:**

**A. SELLER HAS:** 7 (or  \_\_\_\_\_) Days After Acceptance to disclose to Buyer whether the Property is a condominium, or is located in a planned unit development or other common interest subdivision (C.A.R. Form SSD).

**B.** If the Property is a condominium or is located in a planned unit development or other common interest subdivision, Seller has 3 (or  \_\_\_\_\_) Days After Acceptance to request from the HOA (C.A.R. Form HOA): (i) Copies of any documents required by Law; (ii) disclosure of any pending or anticipated claim or litigation by or against the HOA; (iii) a statement containing the location and number of designated parking and storage spaces; (iv) Copies of the most recent 12 months of HOA minutes for regular and special meetings; and (v) the names and contact information of all HOAs governing the Property (collectively, "CI Disclosures"). Seller shall itemize and deliver to Buyer all CI Disclosures received from the HOA and any CI Disclosures in Seller's possession. Buyer's approval of CI Disclosures is a contingency of this Agreement as specified in paragraph 14B(3).

**7. CONDITIONS AFFECTING PROPERTY:**

**A.** Unless otherwise agreed: (i) the Property is sold (a) in its PRESENT physical condition as of the date of Acceptance and (b) subject to Buyer's Investigation rights; (ii) the Property, including pool, spa, landscaping and grounds, is to be maintained in substantially the same condition as on the date of Acceptance; and (iii) all debris and personal property not included in the sale shall be removed by Close Of Escrow.

**B. SELLER SHALL, within the time specified in paragraph 14A, DISCLOSE KNOWN MATERIAL FACTS AND DEFECTS affecting the Property, including known insurance claims within the past five years, AND MAKE OTHER DISCLOSURES REQUIRED BY LAW (C.A.R. Form SSD).**

**C. NOTE TO BUYER:** You are strongly advised to conduct investigations of the entire Property in order to determine its present condition since Seller may not be aware of all defects affecting the Property or other factors that you consider important. Property improvements may not be built according to code, in compliance with current Law, or have had permits issued.

**D. NOTE TO SELLER:** Buyer has the right to inspect the Property and, as specified in paragraph 14B, based upon information discovered in those inspections: (i) cancel this Agreement; or (ii) request that you make Repairs or take other action.

**8. ITEMS INCLUDED AND EXCLUDED:**

**A. NOTE TO BUYER AND SELLER:** Items listed as included or excluded in the MLS, flyers or marketing materials are not included in the purchase price or excluded from the sale unless specified in 8B or C.

**B. ITEMS INCLUDED IN SALE:**

- (1) All EXISTING fixtures and fittings that are attached to the Property;
- (2) Existing electrical, mechanical, lighting, plumbing and heating fixtures, ceiling fans, fireplace inserts, gas logs and grates, solar systems, built-in appliances, window and door screens, awnings, shutters, window coverings, attached floor coverings, television antennas, satellite dishes, private integrated telephone systems, air coolers/conditioners, pool/spa equipment, garage door openers/remote controls, mailbox, in-ground landscaping, trees/shrubs, water softeners, water purifiers, security systems/alarms; and
- (3) The following items: water heater, refrigerator, washer, dryer and potted plants

(4) Seller represents that all items included in the purchase price, unless otherwise specified, are owned by Seller.

(5) All items included shall be transferred free of liens and without Seller warranty.

**C. ITEMS EXCLUDED FROM SALE:** \_\_\_\_\_

**9. BUYER'S INVESTIGATION OF PROPERTY AND MATTERS AFFECTING PROPERTY:**

**A.** Buyer's acceptance of the condition of, and any other matter affecting the Property, is a contingency of this Agreement as specified in this paragraph and paragraph 14B. Within the time specified in paragraph 14B(1), Buyer shall have the right, at Buyer's expense unless otherwise agreed, to conduct inspections, investigations, tests, surveys and other studies ("Buyer Investigations"), including, but not limited to, the right to: (i) inspect for lead-based paint and other lead-based paint hazards; (ii) inspect for wood destroying pests and organisms; (iii) review the registered sex offender database; (iv) confirm the insurability of Buyer and the Property; and (v) satisfy Buyer as to any matter specified in the attached Buyer's Inspection Advisory (C.A.R. Form BIA). Without Seller's prior written consent, Buyer shall neither make nor cause to be made: (i) invasive or destructive Buyer Investigations; or (ii) inspections by any governmental building or zoning inspector or government employee, unless required by Law.

**B.** Buyer shall complete Buyer Investigations and, as specified in paragraph 14B, remove the contingency or cancel this Agreement. Buyer shall give Seller, at no cost, complete Copies of all Buyer Investigation reports obtained by Buyer. Seller shall make the Property available for all Buyer Investigations. Seller shall have water, gas, electricity and all operable pilot lights on for Buyer's Investigations and through the date possession is made available to Buyer.

Buyer's Initials (\_\_\_\_)(\_\_\_\_)  
Seller's Initials (\_\_\_\_)(\_\_\_\_)

Reviewed by \_\_\_\_\_ Date \_\_\_\_\_



Property Address: 618 Mount Lane, Danville, California

Date: May 18, 2004

- 10. **REPAIRS:** Repairs shall be completed prior to final verification of condition unless otherwise agreed in writing. Repairs to be performed at Seller's expense may be performed by Seller or through others, provided that the work complies with applicable Law, including governmental permit, inspection and approval requirements. Repairs shall be performed in a good, skillful manner with materials of quality and appearance comparable to existing materials. It is understood that exact restoration of appearance or cosmetic items following all Repairs may not be possible. Seller shall: (i) obtain receipts for Repairs performed by others; (ii) prepare a written statement indicating the Repairs performed by Seller and the date of such Repairs; and (iii) provide Copies of receipts and statements to Buyer prior to final verification of condition. (if applicable) if Buyer does not purchase the property
- 11. **BUYER INDEMNITY AND SELLER PROTECTION FOR ENTRY UPON PROPERTY:** Buyer shall: (i) keep the Property free and clear of liens; (ii) Repair all damage arising from Buyer Investigations; and (iii) indemnify and hold Seller harmless from all resulting liability, claims, demands, damages and costs. Buyer shall carry, or Buyer shall require anyone acting on Buyer's behalf to carry, policies of liability, workers compensation and other applicable insurance, defending and protecting Seller from liability for any injuries to persons or property occurring during any Buyer Investigations or work done on the Property at Buyer's direction prior to Close Of Escrow. Seller is advised that certain protections may be afforded Seller by recording a "Notice of Non-responsibility" (C.A.R. Form NNR) for Buyer Investigations and work done on the Property at Buyer's direction. Buyer's obligations under this paragraph shall survive the termination of this Agreement related to Buyer's Investigations
- 12. **TITLE AND VESTING:**
  - A. Within the time specified in paragraph 14, Buyer shall be provided a current preliminary (title) report, which is only an offer by the title insurer to issue a policy of title insurance and may not contain every item affecting title. Buyer's review of the preliminary report and any other matters which may affect title are a contingency of this Agreement as specified in paragraph 14B.
  - B. Title is taken in its present condition subject to all encumbrances, easements, covenants, conditions, restrictions, rights and other matters, whether of record or not, as of the date of Acceptance except: (i) monetary liens of record unless Buyer is assuming those obligations or taking the Property subject to those obligations; and (ii) those matters which Seller has agreed to remove in writing.
  - C. Within the time specified in paragraph 14A, Seller has a duty to disclose to Buyer all matters known to Seller affecting title, whether of record or not.
  - D. At Close Of Escrow, Buyer shall receive a grant deed conveying title (or, for stock cooperative or long-term lease, an assignment of stock certificate or of Seller's leasehold interest), including oil, mineral and water rights if currently owned by Seller. Title shall vest as designated in Buyer's supplemental escrow instructions. THE MANNER OF TAKING TITLE MAY HAVE SIGNIFICANT LEGAL AND TAX CONSEQUENCES. CONSULT AN APPROPRIATE PROFESSIONAL.
  - E. Buyer shall receive a CLTA/ALTA Homeowner's Policy of Title Insurance. A title company, at Buyer's request, can provide information about the availability, desirability, coverage, and cost of various title insurance coverages and endorsements. If Buyer desires title coverage other than that required by this paragraph, Buyer shall instruct Escrow Holder in writing and pay any increase in cost.
- 13. **SALE OF BUYER'S PROPERTY:**
  - A. This Agreement is NOT contingent upon the sale of any property owned by Buyer.
- OR B.  (If checked): The attached addendum (C.A.R. Form COP) regarding the contingency for the sale of property owned by Buyer is incorporated into this Agreement.
- 14. **TIME PERIODS; REMOVAL OF CONTINGENCIES; CANCELLATION RIGHTS:** The following time periods may only be extended, altered, modified or changed by mutual written agreement. Any removal of contingencies or cancellation under this paragraph must be in writing (C.A.R. Form CR).
  - A. **SELLER HAS:** 7 (or  \_\_\_\_\_) Days After Acceptance to deliver to Buyer all reports, disclosures and information for which Seller is responsible under paragraphs 4, 5A and B, 6A, 7B and 12.
  - B. (1) **BUYER HAS:** 17 (or  \_\_\_\_\_) Days After Acceptance, unless otherwise agreed in writing, to:
    - (i) complete all Buyer Investigations; approve all disclosures, reports and other applicable information, which Buyer receives from Seller; and approve all matters affecting the Property (including lead-based paint and lead-based paint hazards as well as other information specified in paragraph 5 and insurability of Buyer and the Property); and
    - (ii) return to Seller Signed Copies of Statutory and Lead Disclosures delivered by Seller in accordance with paragraph 5A.
  - (2) Within the time specified in 14B(1), Buyer may request that Seller make repairs or take any other action regarding the Property (C.A.R. Form RR). Seller has no obligation to agree to or respond to Buyer's requests.
  - (3) By the end of the time specified in 14B(1) (or 2I for loan contingency or 2J for appraisal contingency), Buyer shall, in writing, remove the applicable contingency (C.A.R. Form CR) or cancel this Agreement. However, if (i) government-mandated inspections/ reports required as a condition of closing; or (ii) Common Interest Disclosures pursuant to paragraph 6B are not made within the time specified in 14A, then Buyer has 5 (or  7) Days After receipt of any such items, or the time specified in 14B(1), whichever is later, to remove the applicable contingency or cancel this Agreement in writing.
  - C. **CONTINUATION OF CONTINGENCY OR CONTRACTUAL OBLIGATION; SELLER RIGHT TO CANCEL:**
    - (1) **Seller right to Cancel; Buyer Contingencies:** Seller, after first giving Buyer a Notice to Buyer to Perform (as specified below), may cancel this Agreement in writing and authorize return of Buyer's deposit if, by the time specified in this Agreement, Buyer does not remove in writing the applicable contingency or cancel this Agreement. Once all contingencies have been removed, failure of either Buyer or Seller to close escrow on time may be a breach of this Agreement.
    - (2) **Continuation of Contingency:** Even after the expiration of the time specified in 14B, Buyer retains the right to make requests to Seller, remove in writing the applicable contingency or cancel this Agreement until Seller cancels pursuant to 14C(1). Once Seller receives Buyer's written removal of all contingencies, Seller may not cancel this Agreement pursuant to 14C(1).
    - (3) **Seller right to Cancel; Buyer Contract Obligations:** Seller, after first giving Buyer a Notice to Buyer to Perform (as specified below), may cancel this Agreement in writing and authorize return of Buyer's deposit for any of the following reasons: (i) if Buyer fails to deposit funds as required by 2A or 2B; (ii) if the funds deposited pursuant to 2A or 2B are not good when deposited; (iii) if Buyer fails to provide a letter as required by 2G; (iv) if Buyer fails to provide verification as required by 2H or 2L; (v) if Seller reasonably disapproves of the verification provided by 2H or 2L; (vi) if Buyer fails to return Statutory and Lead Disclosures as required by paragraph 5A(2); or (vii) if Buyer fails to sign or initial a separate liquidated damage form for an increased deposit as required by paragraph 16. **Seller is not required to give Buyer a Notice to Perform regarding Close of Escrow.**
    - (4) **Notice to Buyer To Perform:** The Notice to Buyer to Perform (C.A.R. Form NBP) shall: (i) be in writing; (ii) be signed by Seller; and (iii) give Buyer at least 24 (or  72) hours (or until the time specified in the applicable paragraph, whichever occurs last) to take the applicable action. A Notice to Buyer to Perform may not be given any earlier than 2 Days Prior to the expiration of the applicable time for Buyer to remove a contingency or cancel this Agreement or meet a 14C(3) obligation.

Buyer's Initials (\_\_\_\_)(\_\_\_\_)  
Seller's Initials (\_\_\_\_)(\_\_\_\_)



Reviewed by \_\_\_\_\_ Date \_\_\_\_\_

Property Address: 618 Mount Lane, Danville, California

Date: May 18, 2004

- D. **EFFECT OF BUYER'S REMOVAL OF CONTINGENCIES** : If Buyer removes, in writing, any contingency or cancellation rights, unless otherwise specified in a separate written agreement between Buyer and Seller, Buyer shall conclusively be deemed to have: (i) completed all Buyer Investigations, and review of reports and other applicable information and disclosures pertaining to that contingency or cancellation right; (ii) elected to proceed with the transaction; and (iii) assumed all liability, responsibility and expense for Repairs or corrections pertaining to that contingency or cancellation right, or for inability to obtain financing.
- E. **EFFECT OF CANCELLATION ON DEPOSITS**: If Buyer or Seller gives written notice of cancellation pursuant to rights duly exercised under the terms of this Agreement, Buyer and Seller agree to Sign mutual instructions to cancel the sale and escrow and release deposits to the party entitled to the funds, less fees and costs incurred by that party. Fees and costs may be payable to service providers and vendors for services and products provided during escrow. **Release of funds will require mutual Signed release instructions from Buyer and Seller, judicial decision or arbitration award. A party may be subject to a civil penalty of up to \$1,000 for refusal to sign such instructions if no good faith dispute exists as to who is entitled to the deposited funds (Civil Code §1057.3).** (subject to any remaining contingency or cancellation rights)
- 15. **FINAL VERIFICATION OF CONDITION**: Buyer shall have the right to make a final inspection of the Property within 5 (or \_\_\_\_\_) Days Prior to Close Of Escrow, ~~NOT AS A CONTINGENCY OF THE SALE, but solely~~ to confirm: (i) the Property is maintained pursuant to paragraph 7A; (ii) Repairs have been completed as agreed; and (iii) Seller has complied with Seller's other obligations under this Agreement and as Seller's sole remedy in law or equity,
- 16. **LIQUIDATED DAMAGES**: If Buyer fails to complete this purchase because of Buyer's default, Seller shall retain, as liquidated damages, the deposit actually paid. If the Property is a dwelling with no more than four units, one of which Buyer intends to occupy, then the amount retained shall be no more than 3% of the purchase price. Any excess shall be returned to Buyer. Release of funds will require mutual, Signed release instructions from both Buyer and Seller, judicial decision or arbitration award.  
**BUYER AND SELLER SHALL SIGN A SEPARATE LIQUIDATED DAMAGES PROVISION FOR ANY INCREASED DEPOSIT. (C.A.R. FORM RID)**

Buyer's Initials _____ / _____	Seller's Initials _____ / _____
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- 17. **DISPUTE RESOLUTION**:
  - A. ~~MEDIATION~~: Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement or any resulting transaction, before resorting to arbitration or court action. Paragraphs 17B(2) and (3) below apply whether or not the Arbitration provision is initiated. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. **THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED.**
  - B. **ARBITRATION OF DISPUTES**: (1) Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, ~~which is not settled through mediation,~~ shall be decided by neutral, binding arbitration, including and subject to paragraphs 17B(2) and (3) below. The arbitrator shall be a retired judge or justice, or an attorney with at least 5 years of residential real estate Law experience, unless the parties mutually agree to a different arbitrator, who shall render an award in accordance with substantive California Law. The parties shall have the right to discovery in accordance with California Code of Civil Procedure §1283.05. In all other respects, the arbitration shall be conducted in accordance with Title 9 of Part III of the California Code of Civil Procedure. Judgment upon the award of the arbitrator(s) may be entered into any court having jurisdiction. Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act.  
 (2) ~~EXCLUSIONS FROM MEDIATION AND ARBITRATION~~: The following matters are excluded from ~~mediation and~~ arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage or installment land sale contract as defined in California Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; and (iv) any matter that is within the jurisdiction of a probate, small claims or bankruptcy court. The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the mediation and arbitration provisions.  
 (3) ~~BROKERS~~: Buyer and Seller agree to mediate and arbitrate disputes or claims involving either or both Brokers, consistent with 17A and B, provided either or both Brokers shall have agreed to such mediation or arbitration prior to, or within a reasonable time after, the dispute or claim is presented to Brokers. Any election by either or both Brokers to participate in mediation or arbitration shall not result in Brokers being deemed parties to the Agreement.

**"NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY."**

**"WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION."**

Buyer's Initials _____ / _____	Seller's Initials _____ / _____
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Buyer's Initials (\_\_\_\_)(\_\_\_\_)  
 Seller's Initials (\_\_\_\_)(\_\_\_\_)

Reviewed by _____	Date _____
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Property Address: 618 Mount Lane, Danville, California

Date: May 18, 2004

- 18. **PRORATIONS OF PROPERTY TAXES AND OTHER ITEMS:** Unless otherwise agreed in writing, the following items shall be PAID CURRENT and prorated between Buyer and Seller as of Close Of Escrow: real property taxes and assessments, interest, rents, HOA regular, special, and emergency dues and assessments imposed prior to Close Of Escrow, premiums on insurance assumed by Buyer, payments on bonds and assessments assumed by Buyer, and payments on Mello-Roos and other Special Assessment District bonds and assessments that are now a lien. The following items shall be assumed by Buyer WITHOUT CREDIT toward the purchase price: prorated payments on Mello-Roos and other Special Assessment District bonds and assessments and HOA special assessments that are now a lien but not yet due. Property will be reassessed upon change of ownership. Any supplemental tax bills shall be paid as follows: (i) for periods after Close Of Escrow, by Buyer; and (ii) for periods prior to Close Of Escrow, by Seller. TAX BILLS ISSUED AFTER CLOSE OF ESCROW SHALL BE HANDLED DIRECTLY BETWEEN BUYER AND SELLER. Prorations shall be made based on a 30-day month.
- 19. **WITHHOLDING TAXES:** Seller and Buyer agree to execute any instrument, affidavit, statement or instruction reasonably necessary to comply with federal (FIRPTA) and California withholding Law, if required (C.A.R. Forms AS and AB).
- 20. **MULTIPLE LISTING SERVICE ("MLS"):** Brokers are authorized to report to the MLS a pending sale and, upon Close Of Escrow, the terms of this transaction to be published and disseminated to persons and entities authorized to use the information on terms approved by the MLS.
- 21. **EQUAL HOUSING OPPORTUNITY:** The Property is sold in compliance with federal, state and local anti-discrimination Laws.
- 22. **ATTORNEY FEES:** In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 17A.
- 23. **SELECTION OF SERVICE PROVIDERS:** If Brokers refer Buyer or Seller to persons, vendors, or service or product providers ("Providers"), Brokers do not guarantee the performance of any Providers. Buyer and Seller may select ANY Providers of their own choosing.
- 24. **TIME OF ESSENCE; ENTIRE CONTRACT; CHANGES:** Time is of the essence. All understandings between the parties are incorporated in this Agreement. Its terms are intended by the parties as a final, complete and exclusive expression of their Agreement with respect to its subject matter, and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. If any provision of this Agreement is held to be ineffective or invalid, the remaining provisions will nevertheless be given full force and effect. **Neither this Agreement nor any provision in it may be extended, amended, modified, altered or changed, except in writing Signed by Buyer and Seller.**
- 25. **OTHER TERMS AND CONDITIONS,** including attached supplements:
  - A.  Buyer's Inspection Advisory (C.A.R. Form BIA)
  - B.  Purchase Agreement Addendum (C.A.R. Form PAA paragraph numbers: \_\_\_\_\_) See Attached Addendum
  - C.  Statewide Buyer and Seller Advisory (C.A.R. Form SBSA)
  - D. \_\_\_\_\_
- 26. **DEFINITIONS:** As used in this Agreement:
  - A. "Acceptance" means the time the offer or final counter offer is accepted in writing by a party and is delivered to and personally received by the other party or that party's authorized agent in accordance with the terms of this offer or a final counter offer.
  - B. "Agreement" means the terms and conditions of this accepted California Residential Purchase Agreement and any accepted counter offers and addenda.
  - C. "C.A.R. Form" means the specific form referenced or another comparable form agreed to by the parties.
  - D. "Close Of Escrow" means the date the grant deed, or other evidence of transfer of title, is recorded. If the scheduled close of escrow falls on a Saturday, Sunday or legal holiday, then close of escrow shall be the next business day after the scheduled close of escrow date.
  - E. "Copy" means copy by any means including photocopy, NCR, facsimile and electronic.
  - F. "Days" means calendar days, unless otherwise required by Law.
  - G. "Days After" means the specified number of calendar days after the occurrence of the event specified, not counting the calendar date on which the specified event occurs, and ending at 11:59PM on the final day.
  - H. "Days Prior" means the specified number of calendar days before the occurrence of the event specified, not counting the calendar date on which the specified event is scheduled to occur.
  - I. "Electronic Copy" or "Electronic Signature" means, as applicable, an electronic copy or signature complying with California Law. Buyer and Seller agree that electronic means will not be used by either party to modify or alter the content or integrity of this Agreement without the knowledge and consent of the other.
  - J. "Law" means any law, code, statute, ordinance, regulation, rule or order, which is adopted by a controlling city, county, state or federal legislative, judicial or executive body or agency.
  - K. "Notice to Buyer to Perform" means a document (C.A.R. Form NDP), which shall be in writing and Signed by Seller and shall give Buyer at least 24 hours (or as otherwise specified in paragraph 14C(4)) to remove a contingency or perform as applicable.
  - L. "Repairs" means any repairs (including pest control), alterations, replacements, modifications or retrofitting of the Property provided for under this Agreement.
  - M. "Signed" means either a handwritten or electronic signature on an original document, Copy or any counterpart.
  - N. Singular and Plural terms each include the other, when appropriate.

Buyer's Initials (\_\_\_\_)(\_\_\_\_)  
Seller's Initials (\_\_\_\_)(\_\_\_\_)

Reviewed by \_\_\_\_\_ Date \_\_\_\_\_





**27. AGENCY:**

- A. **DISCLOSURE:** Buyer and Seller each acknowledge prior receipt of C.A.R. Form AD "Disclosure Regarding Real Estate Agency Relationships."
- B. **POTENTIALLY COMPETING BUYERS AND SELLERS:** Buyer and Seller each acknowledge receipt of a disclosure of the possibility of multiple representation by the Broker representing that principal. This disclosure may be part of a listing agreement, buyer-broker agreement or separate document (C.A.R. Form DA). Buyer understands that Broker representing Buyer may also represent other potential buyers, who may consider, make offers on or ultimately acquire the Property. Seller understands that Broker representing Seller may also represent other sellers with competing properties of interest to this Buyer.
- C. **CONFIRMATION:** The following agency relationships are hereby confirmed for this transaction:  
 Listing Agent Coldwell Banker (Print Firm Name) is the agent of (check one):  the Seller exclusively; or  both the Buyer and Seller.  
 Selling Agent The Ellis Company (Print Firm Name) (if not same as Listing Agent) is the agent of (check one):  the Buyer exclusively; or  the Seller exclusively; or  both the Buyer and Seller. Real Estate Brokers are not parties to the Agreement between Buyer and Seller.

**28. JOINT ESCROW INSTRUCTIONS TO ESCROW HOLDER:**

- A. The following paragraphs, or applicable portions thereof, of this Agreement constitute the joint escrow instructions of Buyer and Seller to Escrow Holder, which Escrow Holder is to use along with any related counter offers and addenda, and any additional mutual instructions to close the escrow: 1, 2, 4, 12, 13B, 14E, 18, 19, 24, 25B and C, 26, 28, 29, 32A, 33 and paragraph D of the section titled Real Estate Brokers on page 8. If a Copy of the separate compensation agreement(s) provided for in paragraph 29 or 32A, or paragraph D of the section titled Real Estate Brokers on page 8 is deposited with Escrow Holder by Broker, Escrow Holder shall accept such agreement(s) and pay out from Buyer's or Seller's funds, or both, as applicable, the Broker's compensation provided for in such agreement(s). The terms and conditions of this Agreement not set forth in the specified paragraphs are additional matters for the information of Escrow Holder, but about which Escrow Holder need not be concerned. Buyer and Seller will receive Escrow Holder's general provisions directly from Escrow Holder and will execute such provisions upon Escrow Holder's request. To the extent the general provisions are inconsistent or conflict with this Agreement, the general provisions will control as to the duties and obligations of Escrow Holder only. Buyer and Seller will execute additional instructions, documents and forms provided by Escrow Holder that are reasonably necessary to close the escrow.
- B. A Copy of this Agreement shall be delivered to Escrow Holder within 3 business days after Acceptance (or  \_\_\_\_\_). Buyer and Seller authorize Escrow Holder to accept and rely on Copies and Signatures as defined in this Agreement as originals, to open escrow and for other purposes of escrow. The validity of this Agreement as between Buyer and Seller is not affected by whether or when Escrow Holder Signs this Agreement.
- ~~C. Brokers are a party to the escrow for the sole purpose of compensation pursuant to paragraphs 29, 32A and paragraph D of the section titled Real Estate Brokers on page 8. Buyer and Seller irrevocably assign to Brokers compensation specified in paragraphs 29 and 32A, respectively, and irrevocably instruct Escrow Holder to disburse those funds to Brokers at Close Of Escrow or pursuant to any other mutually executed cancellation agreement. Compensation instructions can be amended or revoked only with the written consent of Brokers. Escrow Holder shall immediately notify Brokers: (i) if Buyer's initial or any additional deposit is not made pursuant to this Agreement, or is not good at time of deposit with Escrow Holder; or (ii) if Buyer and Seller instruct Escrow Holder to cancel escrow.~~
- D. A Copy of any amendment that affects any paragraph of this Agreement for which Escrow Holder is responsible shall be delivered to Escrow Holder within 2 business days after mutual execution of the amendment.

~~**29. BROKER COMPENSATION FROM BUYER:** If applicable, upon Close Of Escrow, Buyer agrees to pay compensation to Broker as specified in a separate written agreement between Buyer and Broker.~~

**30. TERMS AND CONDITIONS OF OFFER:**

This is an offer to purchase the Property on the above terms and conditions. All paragraphs with spaces for initials by Buyer and Seller are incorporated in this Agreement only if initialed by all parties. If at least one but not all parties initial, a counter offer is required until agreement is reached. Seller has the right to continue to offer the Property for sale and to accept any other offer at any time prior to notification of Acceptance. Buyer has read and acknowledges receipt of a Copy of the offer and agrees to the above confirmation of agency relationships. If this offer is accepted and Buyer subsequently defaults, Buyer may be responsible for payment of Brokers' compensation. This Agreement and any supplement, addendum or modification, including any Copy, may be Signed in two or more counterparts, all of which shall constitute one and the same writing.

Buyer's Initials (\_\_\_\_)(\_\_\_\_)  
Seller's Initials (\_\_\_\_)(\_\_\_\_)

Reviewed by \_\_\_\_\_ Date \_\_\_\_\_



Property Address: 618 Mount Lane, Danville, California Date: May 18, 2004

31. EXPIRATION OF OFFER: This offer shall be deemed revoked and the deposit shall be returned unless the offer is Signed by Seller and a Copy of the Signed offer is personally received by Buyer, or by the Selling Agent, who is authorized to receive it by 5:00 PM on the third calendar day after this offer is signed by Buyer (or, if checked,  by May 23, 2004 (date), at 5:00 AM/PM).

Date \_\_\_\_\_ Date \_\_\_\_\_  
BUYER \_\_\_\_\_ BUYER \_\_\_\_\_

(Print name) \_\_\_\_\_ (Print name) \_\_\_\_\_

(Address) \_\_\_\_\_

32. BROKER COMPENSATION FROM SELLER:

A. Upon Close Of Escrow, Seller agrees to pay compensation to Broker as specified in a separate written agreement between Seller and Broker.

~~B. If escrow does not close, compensation is payable as specified in that separate written agreement.~~

33. ACCEPTANCE OF OFFER: Seller warrants that Seller is the owner of the Property, or has the authority to execute this Agreement. Seller accepts the above offer, agrees to sell the Property on the above terms and conditions, and agrees to the above confirmation of agency relationships. Seller has read and acknowledges receipt of a Copy of this Agreement, and authorizes Broker to deliver a Signed Copy to Buyer.

(If checked) SUBJECT TO ATTACHED COUNTER OFFER, DATED \_\_\_\_\_

Date \_\_\_\_\_ Date \_\_\_\_\_  
SELLER \_\_\_\_\_ SELLER \_\_\_\_\_

(Print name) \_\_\_\_\_ (Print name) \_\_\_\_\_

(Address) \_\_\_\_\_

CONFIRMATION OF ACCEPTANCE: A Copy of Signed Acceptance was personally received by Buyer or Buyer's authorized agent on (date) \_\_\_\_\_ at \_\_\_\_\_ AM/PM. A binding Agreement is created when a Copy of Signed Acceptance is personally received by Buyer or Buyer's authorized agent whether or not confirmed in this document. Completion of this confirmation is not legally required in order to create a binding Agreement; it is solely intended to evidence the date that Confirmation of Acceptance has occurred.

REAL ESTATE BROKERS:

- A. Real Estate Brokers are not parties to the Agreement between Buyer and Seller.
- B. Agency relationships are confirmed as stated in paragraph 27.
- C. If specified in paragraph 2A, Agent who submitted the offer for Buyer acknowledges receipt of deposit.
- D. COOPERATING BROKER COMPENSATION: Listing Broker agrees to pay Cooperating Broker (Selling Firm) and Cooperating Broker agrees to accept, out of Listing Broker's proceeds in escrow: (i) the amount specified in the MLS, provided Cooperating Broker is a Participant of the MLS in which the Property is offered for sale or a reciprocal MLS; or (ii)  (if checked) the amount specified in a separate written agreement (C.A.R. Form CBC) between Listing Broker and Cooperating Broker.

Real Estate Broker (Selling Firm) \_\_\_\_\_  
By \_\_\_\_\_ Date \_\_\_\_\_  
Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
Telephone \_\_\_\_\_ Fax \_\_\_\_\_ E-mail \_\_\_\_\_

Real Estate Broker (Listing Firm) \_\_\_\_\_  
By \_\_\_\_\_ Date \_\_\_\_\_  
Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
Telephone \_\_\_\_\_ Fax \_\_\_\_\_ E-mail \_\_\_\_\_

ESCROW HOLDER ACKNOWLEDGMENT:

Escrow Holder acknowledges receipt of a Copy of this Agreement, (if checked,  a deposit in the amount of \$ \_\_\_\_\_), counter offer numbers \_\_\_\_\_ and \_\_\_\_\_, and agrees to act as Escrow Holder subject to paragraph 28 of this Agreement, any supplemental escrow instructions and the terms of Escrow Holder's general provisions.

Escrow Holder is advised that the date of Confirmation of Acceptance of the Agreement as between Buyer and Seller is \_\_\_\_\_

Escrow Holder \_\_\_\_\_ Escrow # \_\_\_\_\_  
By \_\_\_\_\_ Date \_\_\_\_\_

Address \_\_\_\_\_

Phone/Fax/E-mail \_\_\_\_\_

Escrow Holder is licensed by the California Department of  Corporations,  Insurance,  Real Estate. License # \_\_\_\_\_

(\_\_\_\_\_/\_\_\_\_\_) REJECTION OF OFFER: No counter offer is being made. This offer was reviewed and rejected by Seller on  
(Seller's Initials) \_\_\_\_\_ (Date)

THIS FORM HAS BEEN APPROVED BY THE CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.). NO REPRESENTATION IS MADE AS TO THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISION IN ANY SPECIFIC TRANSACTION. A REAL ESTATE BROKER IS THE PERSON QUALIFIED TO ADVISE ON REAL ESTATE TRANSACTIONS. IF YOU DESIRE LEGAL OR TAX ADVICE, CONSULT AN APPROPRIATE PROFESSIONAL.  
This form is available for use by the entire real estate industry. It is not intended to identify the user as a REALTOR®. REALTOR® is a registered collective membership mark which may be used only by members of the NATIONAL ASSOCIATION OF REALTORS® who subscribe to its Code of Ethics.



Published by the California Association of REALTORS®



Reviewed by \_\_\_\_\_ Date \_\_\_\_\_



CALIFORNIA ASSOCIATION OF REALTORS®

BUYER'S INSPECTION ADVISORY

Property Address: 618 Mount Lane, Danville, California ("Property").

A. IMPORTANCE OF PROPERTY INSPECTION: The physical condition of the land and improvements being purchased is not guaranteed by either Seller or Brokers. For this reason, you should conduct thorough inspections of the Property personally and with professionals who should provide written reports of their inspections. A general physical inspection typically does not cover all aspects of the Property nor items affecting the Property that are not physically located on the Property. If the professionals recommend further investigation, tests or inspections, including a recommendation by a pest control operator to inspect inaccessible areas of the Property, you should contact qualified experts to conduct such additional investigations, tests or inspections.

B. BUYER RIGHTS AND DUTIES: You have an affirmative duty to exercise reasonable care to protect yourself, including discovery of the legal, practical and technical implications of disclosed facts, and the investigation and verification of information and facts that you know or are within your diligent attention and observation. The purchase agreement gives you the right to inspect the Property. If you exercise these rights, and you should, you must do so in accordance with the terms of the Agreement. This is the best way for you to protect yourself. It is extremely important for you to read all written reports provided by professionals and to discuss the results of inspections with the professional who conducted the inspection. You have the right to request that Seller make Repairs, corrections or take other action based upon items discovered in your inspections or disclosed by Seller. If Seller is unwilling or unable to satisfy your requests, and you do not want to purchase the Property in its disclosed and discovered condition, you have the right to cancel the Agreement. If you do not timely and properly cancel the Agreement and if you do not perform on the contract because of the condition of the Property, you may be in breach of contract.

C. SELLER RIGHTS AND DUTIES: Seller is required to disclose to you all material facts known to him/her that affect the value or desirability of the Property. However, Seller may not be aware of some Property defects or conditions. Seller does not have an obligation to inspect the Property for your benefit nor is Seller obligated to repair, correct or otherwise cure known defects that are disclosed to you or previously unknown defects that are discovered by you or your inspectors during escrow. The purchase agreement obligates Seller to make the Property available to you for inspections.

D. BROKER OBLIGATIONS: Brokers do not have expertise and therefore cannot advise you on many items, such as soil stability, geologic conditions, hazardous substances, structural conditions of the foundation or other improvements, or the condition of the roof, heating, air conditioning, plumbing, electrical, sewer, septic, waste disposal, or other system. The only way to accurately determine the condition of the Property is through an inspection by an appropriate professional selected by you. If Broker gives you referrals to such professionals, Broker does not guarantee their performance. You may select any professional of your choosing. In sales involving residential dwellings with no more than four units, Brokers have a duty to make a diligent visual inspection of the accessible areas of the Property, and to disclose the results of that inspection. However, as some Property defects or conditions may not be discoverable from a visual inspection, it is possible Brokers are not aware of them. If you have entered into a written agreement with a Broker, the specific terms of that agreement will determine the nature and extent of that Broker's duty to you. YOU ARE STRONGLY ADVISED TO INVESTIGATE THE CONDITION AND SUITABILITY OF ALL ASPECTS OF THE PROPERTY. IF YOU DO NOT DO SO, YOU ARE ACTING AGAINST THE ADVICE OF BROKERS.

E. YOU ARE ADVISED TO CONDUCT INSPECTIONS OF THE ENTIRE PROPERTY, INCLUDING, BUT NOT LIMITED TO THE FOLLOWING:

- 1. GENERAL CONDITION OF THE PROPERTY, ITS SYSTEMS AND COMPONENTS: Foundation, roof, plumbing, heating, air conditioning, electrical, mechanical, security, pool/spa, and other structural and non-structural systems and components, fixtures, built-in appliances, any personal property included in the sale, and energy efficiency of the Property. (Structural engineers are best suited to determine possible design or construction defects, and whether improvements are structurally sound.)
2. SQUARE FOOTAGE, AGE, BOUNDARIES: Square footage, room dimensions, lot size, age of improvements, and boundaries. Any numerical statements regarding these items are APPROXIMATIONS ONLY, and have not been and cannot be verified by Brokers. Fences, hedges, walls, retaining walls, and other natural or constructed barriers or markers do not necessarily identify true Property boundaries. (Professionals such as appraisers, architects, surveyors, or civil engineers are best suited to determine square footage, dimensions and boundaries of the Property.)
3. PEST CONTROL: Presence of, or conditions likely to lead to the presence of wood destroying pests and organisms and other infestation or infection. (A registered structural pest control company is best suited to perform these inspections.)

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REVISION DATE 10/2000 Print Date BIA-11 (PAGE 1 OF 2)

Buyer acknowledges receipt of a copy of this page.

Buyer's Initials ( ) ( )

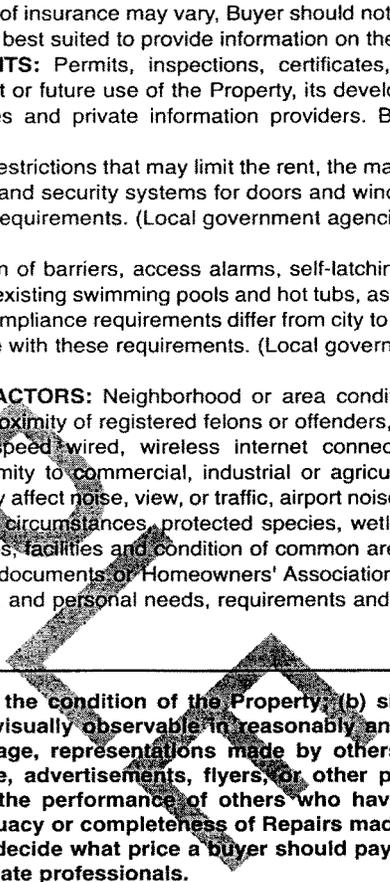
Reviewed by Broker or Designee Date



Property Address: 618 Mount Lane, Danville, California

Date: May 18, 2002

4. **SOIL STABILITY:** Existence of fill or compacted soil, expansive or contracting soil, susceptibility to slippage, settling or movement, and the adequacy of drainage. (Geotechnical engineers are best suited to determine such conditions, causes, and remedies.)
5. **ROOF:** Present condition, age, leaks, and remaining useful life. (Roofing contractors are best suited to determine these conditions.)
6. **POOL/SPA:** Cracks, leaks or operational problems. (Pool contractors are best suited to determine these conditions.)
7. **WASTE DISPOSAL:** Type, size, adequacy, capacity and condition of sewer and septic systems and components, connection to sewer, and applicable fees.
8. **WATER AND UTILITIES; WELL SYSTEMS AND COMPONENTS:** Water and utility availability, use restrictions, and costs. Water quality, adequacy, condition, and performance of well systems and components.
9. **ENVIRONMENTAL HAZARDS:** Potential environmental hazards, including asbestos, lead-based paint and other lead contamination, radon, methane, other gases, fuel, oil or chemical storage tanks, contaminated soil or water, hazardous waste, waste disposal sites, electromagnetic fields, nuclear sources, and other substances, including mold (airborne, toxic or otherwise), fungus or similar contaminant, materials, products, or conditions. (Read the booklets "Environmental Hazards: A Guide for Homeowners and Buyers," "Protect Your Family From Lead in Your Home," or consult an appropriate professional.)
10. **EARTHQUAKE AND FLOOD; HAZARD AND OTHER INSURANCE:** Susceptibility of the Property to earthquake/seismic hazards and propensity of the Property to flood. These and other conditions including age of Property may affect the availability and need for certain types of insurance. Since the time it may take to obtain certain types of insurance may vary, Buyer should not wait to explore these options. (An Insurance agent, Geologist, or Geotechnical Engineer is best suited to provide information on these conditions.)
11. **BUILDING PERMITS, ZONING AND GOVERNMENTAL REQUIREMENTS:** Permits, inspections, certificates, zoning, other governmental limitations, restrictions, and requirements affecting the current or future use of the Property, its development or size. (Such information is available through appropriate governmental agencies and private information providers. Brokers are not qualified to review, or interpret any such information.)
12. **RENTAL PROPERTY RESTRICTIONS:** Some cities and counties impose restrictions that may limit the rent, the maximum number of occupants, and the right to terminate a tenancy. Deadbolt or other locks and security systems for doors and windows, including window bars, should be examined to determine whether they satisfy legal requirements. (Local government agencies can provide information about these restrictions and other requirements.)
13. **SECURITY AND SAFETY:** State and local Law may require the installation of barriers, access alarms, self-latching mechanisms and/or other measures to decrease the risk to children and other persons of existing swimming pools and hot tubs, as well as various fire safety and other measures concerning other features of the Property. Compliance requirements differ from city to city and county to county. Unless specifically agreed, the Property will not be in compliance with these requirements. (Local government agencies can provide information about these restrictions and other requirements.)
14. **NEIGHBORHOOD, AREA, SUBDIVISION CONDITIONS; PERSONAL FACTORS:** Neighborhood or area conditions, including schools, proximity and adequacy of law enforcement, crime statistics, the proximity of registered felons or offenders, fire protection, other governmental services, availability, adequacy and cost of any speed wired, wireless internet connections or other telecommunications or other technology services and installations, proximity to commercial, industrial or agricultural activities, existing and proposed transportation, construction and development that may affect noise, view, or traffic, airport noise, noise or odor from any source, wild and domestic animals, other nuisances, hazards, or circumstances, protected species, wetland properties, historic or other governmentally protected sites or improvements, cemeteries, facilities and condition of common areas of common interest subdivisions, and possible lack of compliance with any governing documents or Homeowners' Association requirements, conditions and influences of significance to certain cultures and/or religions, and personal needs, requirements and preferences of Buyer.



Buyer acknowledges and agrees that Brokers: (a) do not guarantee the condition of the Property; (b) shall not be responsible for defects that are not known to Broker(s) or are not visually observable in reasonably and normally accessible areas of the Property; (c) have not verified square footage, representations made by others, or other information contained in inspection reports, Multiple Listing Service, advertisements, flyers, or other promotional material, unless otherwise agreed in writing; (d) do not guarantee the performance of others who have provided services or products to Buyer or Seller; (e) do not guarantee the adequacy or completeness of Repairs made by Seller or others; (f) cannot identify Property boundary lines; and (g) do not decide what price a buyer should pay or a seller should accept. Buyer agrees to seek desired assistance from appropriate professionals.

By signing below, Buyer acknowledges receipt of a Copy of this document. Buyer is encouraged to read it carefully.

Buyer Signature \_\_\_\_\_

Date \_\_\_\_\_

Buyer Signature \_\_\_\_\_

Date \_\_\_\_\_

THIS FORM HAS BEEN APPROVED BY THE CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.). NO REPRESENTATION IS MADE AS TO THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISION IN ANY SPECIFIC TRANSACTION. A REAL ESTATE BROKER IS THE PERSON QUALIFIED TO ADVISE ON REAL ESTATE TRANSACTIONS. IF YOU DESIRE LEGAL OR TAX ADVICE, CONSULT AN APPROPRIATE PROFESSIONAL.

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Reviewed by \_\_\_\_\_  
 Broker or Designee \_\_\_\_\_ Date \_\_\_\_\_



REVISION DATE 10/2000 Print Date  
BIA-11 (PAGE 2 OF 2)

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This form was completed from a buyer's perspective by C. Gregg Ankenman, of Wendel, Rosen, Black & Dean, LLP, Oakland.

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**Source:** Real Property/Handling Real Property Sales Transactions (Action Guide)/APPENDIX C Addendum to Residential Purchase Agreement and Joint Escrow Instructions

APPENDIX C

Addendum to Residential Purchase Agreement and Joint Escrow Instructions\*

**NOTE:** This appendix was designed to be a special addendum to the CAR forms in Appendix B. Each numbered paragraph in Appendix C corresponds to the same-numbered paragraph in Appendix B and is a continuation of the CAR form unless otherwise indicated. Paragraphs 13 and 25 favor the buyer; the remaining paragraphs favor the seller.

SELLER:                \_\_ [name of seller] \_\_  
BUYER:                 \_\_ [name of buyer] \_\_  
PROPERTY:            \_\_ [address of property] \_\_  
DATE:                 \_\_ [date] \_\_

This Addendum to Residential Purchase Agreement and Joint Escrow Instructions (and Receipt for Deposit) (the "Addendum") is an attachment to and an amendment of that certain Residential Purchase Agreement and Joint Escrow Instructions (and Receipt for Deposit) (the "Deposit Receipt") of the same date, between Buyer and Seller in connection with the property referenced above (the "Property"). In the event of any conflict between the provisions of this Addendum and the provisions of the Deposit Receipt, the provisions of this Addendum shall prevail. This Addendum and the Deposit Receipt shall be referred to collectively as the "Agreement."

**2.D ADDITIONAL FINANCING TERMS.** In addition to the terms listed in the Deposit Receipt and in CAR Form SFA (Seller Financing), Buyer's promissory note shall provide for compound interest on any interest not paid when due and shall contain an attorney fees clause.

**2.I LOAN CONTINGENCY REMOVAL.** Any other provision of this Agreement to the contrary notwithstanding, Seller shall have the right to continue to market the Property and to entertain and accept back-up offers and/or to make counteroffers to any offer from any other potential buyer. If Seller receives an offer from another buyer, Seller may notify Buyer. Buyer shall have a period of 72 hours from receipt of Seller's notice to either satisfy or waive in writing the loan contingency. If within such 72-hour period Buyer has not so satisfied or waived this contingency, Seller may terminate this Agreement by written notice to Buyer. In the event of such termination, the deposit shall be returned to Buyer (less any escrow fees), the parties shall be relieved of all further obligations and liabilities thereafter accruing under this Agreement, and Seller shall be free to sell the Property to any third party.

[If appropriate, add one of the following alternatives]

[Alternative 1: Seller-oriented provision]

**7.E CONDITION OF PROPERTY.** Buyer acknowledges and agrees that: (i) Buyer and/or Buyer's representatives have inspected the Property and will further inspect the Property; (ii) Buyer will accept the Property in its "AS-IS CONDITION WITH ALL FAULTS" as of Close of Escrow; and (iii) Buyer is relying solely on its Inspections and not on any statement, information, and/or other material from Seller or Seller's representatives with respect to the Property, including, without limitation, the physical condition of the Property, the boundaries of the Property, the state of title to the Property, development requirements for the Property, and/or the uses to which the Property can or may be put.

[Alternative 2: Buyer-oriented provision]

**7.E CONDITION OF PROPERTY.** Seller represents and warrants that as of the date of this Agreement and as of the date of escrow the roof shall be free of leaks; all built-in appliances, the electrical, plumbing, sewer, and heating and air-conditioning systems and equipment shall be in good working order; the plumbing systems, sinks, bathtubs, shower pans, and shower enclosures shall be free of leaks; all windows, screens, and doors shall be in good repair with no cracks or broken seals; and there are no material defects or conditions in or affecting the Property known to Seller and not disclosed in writing to Buyer.

**9.C BUYER'S INVESTIGATION OF PROPERTY AND MATTERS AFFECTING PROPERTY.** Buyer shall provide Seller with no less than 24 hours' prior written notice of any Investigation involving entry onto the Property. Buyer's Investigations shall not interfere with Seller's use of the Property and shall be subject to any reasonable timing restrictions Seller may impose.

**13. SALE OF BUYER'S PROPERTY.** \_\_ [use if paragraph 13.B is checked and Buyer's property is in escrow] \_\_ Buyer may render Seller's cancellation under this paragraph ineffective by delivering such documents to Seller within three business days after receipt of Seller's notice of cancellation.

14. TIME PERIODS; REMOVAL OF CONTINGENCIES; CANCELLATION RIGHTS. Buyer shall act in good faith and with due diligence to satisfy all conditions under this Agreement. Buyer shall not unreasonably fail to approve any items with respect to such conditions and contingencies.

## 25. OTHER TERMS AND CONDITIONS

A. Seller's representations and warranties under this Agreement shall survive the close of escrow and the recording of the grant deed conveying title to Buyer.

27. AGENCY. Buyer acknowledges that it is represented by \_\_[*name of broker*]\_\_ ("Buyer's Broker") and is solely responsible for any commissions owed to Buyer's Broker based on the transaction contemplated in this Agreement. Buyer agrees to indemnify, protect, defend, and hold Seller harmless from and against any and all claims, costs, expenses (including reasonable attorney fees and costs), and liabilities for any sales commissions or finder's fees associated with the purchase and sale of the Property due or claimed by Buyer's Broker or any other party as a result of Buyer's actions. The foregoing indemnification shall survive the termination of this Agreement or the Close of Escrow, as the case may be.

34. SUCCESSORS AND ASSIGNS. Buyer may not assign this Agreement without Seller's written consent, which consent Seller may withhold in its sole and absolute discretion. Any purported assignment of this Agreement without Seller's written consent shall, at Seller's option, be null and void. Subject to the preceding restrictions on assignment, all the terms and provisions of this Agreement shall be binding on, inure to the benefit of, and be enforceable by and against the heirs, successors, executors, permitted assigns, and personal representatives of the parties to this Agreement.

35. EXCHANGE COOPERATION. At the request of Seller, Buyer shall cooperate with Seller in effectuating a tax-deferred, like-kind exchange under Internal Revenue Code §1031 and related regulations and cases; provided, however, that Buyer shall be put to no greater expense or liability than Buyer would have incurred or been exposed to if the Property had been acquired by purchase without such exchange. Such exchange may, at Seller's election, be simultaneous or delayed.

Buyer shall execute all documents and take all other actions reasonably necessary to facilitate Seller's exchange, provided, however, that in no event shall Buyer be obligated to (i) sign any promissory note or deed of trust or any other document that might impose personal liability on Buyer, or (ii) acquire title to any exchange property.

BUYER:

SELLER:

\_\_\_\_\_

\_\_\_\_\_

Joan Chirico

Frank Mornay

\_\_\_\_\_

C. Gregg Ankenman, of Wendel, Rosen, Black & Dean, LLP, Oakland, prepared this addendum from a seller's perspective.

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APPENDIX D  
Escrow Instructions\*

**NOTE:** This appendix is in two parts: buyer's escrow instructions and seller's escrow instructions.

Sample Buyer's Escrow Instructions (Sale of Apartment Building)

— [date] —

ABC Title Company  
One Corporate Plaza, Suite 1  
Oakland, CA 94612

Attention: Susan Smith, Escrow Officer

Re: Escrow No. 123456

Property: 123 Main Street, Berkeley, California

Ladies and Gentlemen:

This letter constitutes escrow instructions to you in connection with the above-referenced escrow on behalf of ABC Properties, LLC, a California limited liability company ("Buyer"). This firm represents Buyer and is authorized to execute these instructions on its behalf.

I. **OUTLINE OF TRANSACTION.** Through this escrow, Buyer will acquire from John Jones ("Seller") that certain improved real property commonly known as 123 Main Street, Berkeley, California (the "Property"), as described more particularly in ABC Title Company's preliminary report no. 123456 dated as of — [date] — (the "Preliminary Report"). To acquire the Property, Buyer will pay Seller a total price of \$3,000,000 in the form of (i) a cash payment of \$750,000, with credit being given for the \$50,000 deposit you already hold, and (ii) the proceeds of a \$2,250,000 new first loan from XYZ Bank ("Lender").

II. **DEPOSITS IN ESCROW.**

A. **Buyer's Deposits.** We enclose, or will deliver to you, for deposit in escrow the following:

1. The sum of \$3,000,000 (the "Purchase Price") representing the \$750,000 cash down payment (including the \$50,000 deposit you already hold) and the proceeds of the \$2,250,000 new first loan, as well as an amount equal to the costs and expenses to be paid by Buyer in connection with this escrow.
2. A fully executed preliminary change of ownership report (the "Report").
3. A fully executed promissory note (the "Note") in the amount of \$2,250,000 payable by Buyer to Lender.
4. A fully executed and acknowledged deed of trust (the "Deed of Trust") securing payment of the Note.

B. **Seller's Deposits.** Before close of escrow, Seller shall deposit the following into escrow:

1. A fully executed Certificate of Nonforeign Status sufficient to comply with applicable legal requirements, including Internal Revenue Code §1445, and a fully executed Certificate Regarding California Withholding sufficient to comply with applicable legal requirements, including California Revenue and Taxation Code §§18662 and 18668 (collectively, the "Certificates").
2. A fully executed and acknowledged grant deed (the "Grant Deed") conveying the Property from Seller to Buyer.
3. A fully executed bill of sale (the "Bill of Sale"), in form and content of Exhibit A, conveying to Buyer the 2 stoves and 2 refrigerators and all other personal property used in the operation of or the production of income on the Property.
4. A fully executed assignment of leases (the "Assignment of Leases"), in form and content shown on Exhibit B, assigning to Buyer Seller's interest as landlord under the leases for premises on the Property.

III. **INSTRUCTIONS TO CLOSE ESCROW.** You are authorized and instructed to deliver to Seller the Purchase Price, to deliver to Lender the Note, and to deliver to Lender and record with the Alameda County Recorder the Deed of Trust in accordance with these instructions when, and only when, you are in a position to do, and will do, each of the following:

- A. Deliver to Buyer and record with the Alameda County Recorder the Grant Deed.
- B. Deliver the original, fully executed Certificates, Bill of Sale, and Assignment of Leases to Buyer.
- C. Issue your standard ALTA owner's policy of title insurance in the amount of \$3,000,000 insuring Buyer that title to the

Property is vested in Buyer subject only to current real property taxes, to a lien not yet delinquent, to exception number 3 of the Preliminary Report, and to the Deed of Trust; and issue to Lender a Lender's Policy of Title Insurance in satisfaction of Lender's requirements in the amount of \$2,250,000 insuring Lender that the Deed of Trust is a first lien on the Property subject only to those exceptions listed above.

IV. PRORATIONS; COSTS AND EXPENSES.

- A. Buyer shall pay all escrow fees and the premiums for the policies of title insurance set forth in Section III.C.
- B. Buyer shall pay all fees to be paid through escrow to Lender.
- C. Seller shall pay all City of Berkeley and Alameda County documentary transfer taxes and shall pay current installments on any bond or assessment that is a lien on the Property.
- D. Real property taxes and assessments, premiums on fire insurance acceptable to Buyer, rents, utilities, and other items of income and expense shall be prorated between Buyer and Seller as of close of escrow.
- E. Through escrow, Seller shall deliver to Buyer the amount of all security deposits and prepaid rent held in connection with any leases or rental agreements on the Property, as set forth on a schedule to be delivered by Seller and approved by Buyer before close of escrow.

V. ADDITIONAL INSTRUCTIONS.

- A. You shall insert the date of close of escrow on all undated documents except as otherwise directed by Lender.
- B. On close of escrow, you shall file the Report with the Alameda County Recorder.
- C. On close of escrow, you shall deliver to Buyer recordation-conformed copies of the Grant Deed and the Deed of Trust.
- D. On close of escrow, you shall deliver the original Note to Lender and a copy of it to Buyer.
- E. Close of escrow, as provided in these instructions, shall be the date the Grant Deed is recorded.
- F. Escrow is to close as soon as possible, but no later than September 30, 2005. Time is of the essence in these instructions. If escrow is not closed or if you anticipate that escrow will not close as provided in this Agreement, you shall immediately notify the undersigned and, on written demand, return all materials deposited with or under these instructions to the entity or person depositing such materials.
- G. If you receive any conflicting instructions from any third party, you are to suspend all closing proceedings and immediately contact the undersigned for further instructions.
- H. These instructions can be amended only in writing by Buyer, the undersigned, or John Jones of this office.
- I. The attached Exhibits A and B are incorporated in and made a part of these instructions.

Please acknowledge your receipt and acceptance of these instructions by executing the enclosed copy where indicated below and by returning the signed copy to the undersigned in the enclosed envelope; however, your taking any actions in connection with this escrow without returning such signed copy shall conclusively be deemed your acceptance of an agreement to be bound by these instructions.

Very truly yours,

\_\_\_\_\_  
WENDEL, ROSEN, BLACK & DEAN LLP

C. Gregg Ankenman

Attorneys for Buyer

INSTRUCTIONS RECEIVED, ACCEPTED, AND APPROVED

ABC Title Company

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

EXHIBIT A

BILL OF SALE

For good and valuable consideration, receipt of which is hereby acknowledged, \_ \_[name of seller]\_ \_ ("Seller") hereby grants, sells, transfers, and delivers to \_ \_[name of buyer]\_ \_ ("Buyer") all the personal property used in the production of income at real property located at \_ \_[address]\_ \_ as described more particularly in Schedule 1 attached here and incorporated in this Agreement (the "Personal Property").

To have and to hold the same to Buyer, and its successors and assigns, to its use forever.

Seller represents and warrants to Buyer that: (a) Seller is the lawful owner of the Personal Property as of the date of transfer of the Personal Property to Buyer; (b) the Personal Property is free and clear of all liens and encumbrances as of the date of transfer of the Personal Property to Buyer; (c) the Personal Property is in good working order as of the date of transfer to Buyer; (d) Seller has the right to sell the Personal Property; and (e) Seller will warrant and defend all of the above against the claims and demands of all persons.

Date: \_ \_ \_ \_ \_ SELLER: \_\_\_\_\_

[Attach Schedule 1]

EXHIBIT B

ASSIGNMENT OF LEASES

THIS ASSIGNMENT OF LEASES (the "Assignment") is made as of \_ \_[date]\_ \_ , 20\_ \_ , by \_ \_[name of assignor]\_ \_ ("Assignor"), in favor of \_ \_[name of assignee]\_ \_ , ("Assignee"), with reference to the following facts and objectives:

- A. Assignor is the owner of that certain improved real property (the "Real Property") located in the City of \_ \_[name of city]\_ \_ , County of \_ \_[name of county]\_ \_ , State of California, more particularly described in Schedule 1.
- B. Assignor, as owner of the Real Property, has an interest, as landlord, in the tenant leases of space on the Real Property (the "Leases"), as such Leases are described in Schedule 2.
- C. Assignor desires to assign, transfer, and convey to Assignee all of Assignor's right, title, and interest in and to the Leases.

NOW, THEREFORE, Assignor and Assignee agree as follows:

- 1. Assignor assigns, transfers, and conveys to Assignee all of Assignor's right, title, and interest in and to the Leases, and Assignee accepts such assignment.
- 2. Assignor warrants and represents that:
  - (a) Schedule 2 includes all of the leases affecting the Real Property, Assignor has not executed or otherwise entered into any other leases, tenancies, occupancy agreements, or other agreements with respect to rights affecting possession of the Real Property or any portion of it, and there are no such agreements executed or otherwise entered into by any third party.
  - (b) The Leases are in full force and effect and there is no default on the part of Assignor as landlord or on the part of any tenant, and there exists no condition that with the passage of time or the giving of notice or both would constitute such a default.
- 3. Assignor agrees to indemnify, protect, defend, and hold harmless Assignee from and against any and all liability, claims, loss, cost, damage, and expense (including, without limitation, attorney fees and costs) relating to Assignor's obligations with respect to the Leases accruing before the date of this Assignment and/or the breach of any of Assignor's warranties and representations under Section 2.
- 4. The provisions of this Assignment shall be binding on and inure to the benefit of Assignor and Assignee and their respective successors and assigns.
- 5. The attached Schedule 1 and Schedule 2 and the recitals at the beginning of this Assignment are incorporated in and made a part of this Assignment.

IN WITNESS WHEREOF, Assignor and Assignee have executed this Assignment of Leases as of the date first set forth above.

ASSIGNOR:	ASSIGNEE:
_____	_____
By _____	By _____
Title _____	Title _____

[Attach Schedules 1 and 2]

Sample Seller's Escrow Instructions (Transaction Involves Seller Financing)

— [date] —

ABC Title Insurance Company

One Corporate Plaza, Suite 1

Oakland, CA 94612

Attn: Susan Smith, Escrow Officer

Re: Escrow No. 123456

Property: 123 Main Street, Oakland, California

Ladies and Gentlemen:

This letter constitutes escrow instructions to you on behalf of John Q. Smith ("Seller") in connection with the above-referenced escrow. This firm represents Seller and is authorized to execute these instructions on his behalf.

Through this escrow, Seller will convey to James A. Jones and Ann Z. Jones, husband and wife, as joint tenants (collectively, "Buyer"), the real property (the "Property") commonly known as 123 Main Street, Oakland, California, and described more particularly in your preliminary report No. \_\_\_ dated \_\_ [date] \_\_ (the "Preliminary Report").

I. DEPOSITS IN ESCROW.

A. We enclose, or will cause to be delivered, for deposit in escrow, the following:

1. A fully executed and acknowledged quitclaim deed conveying any interest in the Property held by Sally Smith (Seller's wife) to Seller (the "Quitclaim Deed").
2. A fully executed and acknowledged grant deed conveying the Property from Seller to Buyer (the "Grant Deed").
3. A fully executed Certificate of Nonforeign Status sufficient to comply with applicable legal requirements, including Internal Revenue Code §1445, and a fully executed Certificate Regarding California Withholding sufficient to comply with applicable legal requirements, including California Revenue and Taxation Code §§18662 and 18668 (collectively, the "Certificates").

B. Buyer shall deposit the following into escrow:

1. The sum of \$200,000 representing the cash down payment toward the purchase price of the Property to be paid by Buyer to Seller.
2. A fully executed promissory note (the "Note") in form and content shown on Exhibit A and in the principal amount of \$800,000 payable to Seller.
3. A fully executed and acknowledged deed of trust granting a security interest in the Property to Seller securing payment of the Note and in form and content shown on Exhibit B (the "Deed of Trust").

II. INSTRUCTIONS TO CLOSE. You are authorized and instructed to record with the Alameda County Recorder the Quitclaim Deed and the Grant Deed in accordance with these instructions, when, and only when, you are in a position to do, and will do, each of the following:

A. Deliver to Seller the amount of the \$200,000 cash down payment less those expenses chargeable to Seller under Section IV below.

B. Deliver to Seller the original fully executed Note.

C. Record the Deed of Trust with the Alameda County Recorder with the recorded original to be returned to Seller.

D. Issue your standard ALTA-R joint protection policy of title insurance in the amount of the purchase price (\$1,000,000) insuring Buyer that title to the Property is vested in Buyer subject only to current real property taxes, to a lien not yet delinquent, to the Deed of Trust, and to exceptions 3, 4, 5, and 7 of the Preliminary Report and insuring Seller that the Deed of Trust is a first deed of trust and a valid lien on the Property subject only to those same exceptions.

III. PRORATIONS; COSTS AND EXPENSES.

A. Buyer and Seller shall each pay one-half of all escrow fees and one-half of any City of Oakland Transfer Tax.

B. Seller shall pay the Alameda County Transfer Tax.

C. Buyer shall pay the premiums for the policy of title insurance set forth in Section II.D.

D. Real property taxes and assessments, premiums on any insurance assumed by Buyer, rents, interest, and other operating expenses shall be prorated between Buyer and Seller as of the date of close of escrow.

E. Seller shall pay a commission of \$50,000 to XYZ Realty Company on close of escrow.

F. You are authorized and instructed to deduct from the cash down payment and to disburse to the appropriate parties all amounts payable by Seller under this Section III.

IV. ADDITIONAL INSTRUCTIONS.

A. Before Buyer's execution, you shall complete the Note in accordance with Exhibit A and the Deed of Trust in accordance with Exhibit B. You shall insert the name of Buyer as the grantee as designated by Buyer in the Grant Deed.

B. You shall insert the date of close of escrow on all undated documents.

C. Immediately on recordation of the Quitclaim Deed, the Grant Deed, and the Deed of Trust, you shall deliver a recordation-conformed copy of each such document to Seller in care of the undersigned.

D. On close of escrow, you shall deliver the Certificates to Buyer.

E. Close of escrow, as provided in these instructions, shall be the date the Grant Deed is recorded.

F. Escrow is to close as soon as possible, but in no event later than October 1, 2005. Time is of the essence for these instructions. If escrow is not closed as provided in this Agreement, unless such time has been extended by all parties, you shall, on written demand, return all materials deposited with or under these instructions to the undersigned.

G. If you receive any conflicting instructions from any third party, you are to suspend all closing proceedings and immediately contact the undersigned for further instructions.

H. These instructions can be amended only in writing by Seller, the undersigned, or by John Jones of this office.

I. The attached Exhibits A and B are incorporated in and made a part of these instructions.

Please acknowledge your receipt and acceptance of these instructions by executing the enclosed copy where indicated below and by returning the signed copy to the undersigned in the enclosed envelope; however, your closing escrow without returning the signed copy shall conclusively be deemed your acceptance of and agreement to be bound by these instructions.

Very truly yours,

\_\_\_\_\_  
WENDEL, ROSEN, BLACK & DEAN LLP

C. Gregg Ankenman

Attorneys for Seller

CGA: kg

Enclosures

cc: John Q. Smith

INSTRUCTIONS RECEIVED,

ACCEPTED, AND APPROVED:

ABC Title Insurance Company

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

EXHIBIT A

DO NOT DESTROY THIS NOTE: When paid, this note and the Deed of Trust must be surrendered to the First American Title Insurance Company with request for reconveyance.

# INSTALLMENT NOTE

(INTEREST INCLUDED)

(This note contains an acceleration clause)

\$   [amount]     Oakland  , California, on   [date of close of escrow]  

In installments and at the times hereinafter stated, for value received James A. Jones and Ann Z. Jones promise to pay to

John Q. Smith

or order, at 111 First Street, Oakland, CA 94611 the principal sum of   [amount]   Dollars, with interest from   [date of close of escrow]   until said principal sum is paid, at the rate of 10 percent, per annum. Principal and interest due in monthly installments of   [spell out dollar amount in words]   Dollars, (\$   [amount]   ), or more on the   [day of the month that escrow closes, e.g., 1st]   day of each and every month, beginning on the   [day of the month that escrow closes, e.g., 1st]   day of   [month after escrow closes]  ,   20  , and continuing until said principal sum and the interest on it has been fully paid. AT ANY TIME, THE PRIVILEGE IS RESERVED TO PAY MORE THAN THE SUM DUE. Each payment shall be credited first, on the interest then due; and the remainder on the principal sum; and interest shall thereupon cease on the amount so credited on the said principal sum. Should default be made in the payment of any of said installments when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

This note is secured by a deed of trust that contains the following provision:

"If the trustor shall sell, convey or alienate said property, or any part thereof, or any interest therein, or shall be divested of his title or any interest therein in any manner or way, whether voluntarily or involuntarily, without the written consent of the beneficiary being first had and obtained, beneficiary shall have the right, at its option, except as prohibited by law, to declare any indebtedness or obligations secured hereby, irrespective of the maturity date specified in any note evidencing the same, immediately due and payable."

Should suit be commenced to collect this note or any portion of it, such sum as the Court may deem reasonable shall be added to it as attorney fees. Principal and interest payable in lawful money of the United States of America. This note is secured by a certain DEED OF TRUST to the ABC TITLE INSURANCE COMPANY, a California corporation, as TRUSTEE.

_____	_____
James A. Jones	Ann Z. Jones
_____	_____
_____	_____

## EXHIBIT B

Order No.

Escrow No.

Loan No.

## WHEN RECORDED MAIL TO:

John Q. Smith  
111 First Street  
Oakland, CA 94611

\_\_\_\_SPACE ABOVE THIS LINE FOR RECORDER'S USE\_\_\_\_

## DEED OF TRUST WITH ASSIGNMENT OF RENTS

(This Deed of Trust contains an acceleration clause)

This DEED OF TRUST, made   [Insert date of close of escrow]  , between James A. Jones and Ann Z. Jones herein called TRUSTOR,

whose address is 123 Main Street, Oakland, California 94611;

FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called TRUSTEE; and

John O. Smith, herein called BENEFICIARY,

WITNESSETH: That Trustor grants to Trustee in Trust, with Power of Sale, that property in the City of Oakland, County of Alameda, State of California, described as:

See Exhibit A attached hereto and incorporated herein.

[Attach legal description of property as Exhibit A]

If the trustor shall sell, convey, or alienate said property, or any part of it, or any interest in it, or shall be divested of his title or any interest in it in any manner or way, whether voluntarily or involuntarily, without the written consent of the beneficiary being first had and obtained, beneficiary shall have the right, at its option, except as prohibited by law, to declare any indebtedness or obligations secured hereby, irrespective of the maturity date specified in any not evidencing the same, immediately due and payable.

Together with the rents, issues, and profits thereof, subject, however, to the right, power, and authority hereinafter given to and conferred on Beneficiary to collect and apply such rents, issues, and profits.

For the Purpose of Securing (1) payment of the sum of \$800,000 with interest thereon according to the terms of promissory note or notes of even date herewith made by Trustor, payable to order of Beneficiary, and extensions or renewals of it, and (2) the performance of each agreement of Trustor incorporated by reference or contained here, and (3) Payment of additional sums and interest on it that may be loaned to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Deed of Trust.

To protect the security of this Deed of Trust, and with respect to the property above described, Trustor expressly makes each and all of the agreements, and adopts and agrees to perform and be bound by each and all of the terms and provisions set forth in subdivision A, and it is mutually agreed that each and all of the terms and provisions set forth in subdivision B of the fictitious deed of trust recorded in Orange County August 17, 1964, and in all other counties August 18, 1964, in the book and at the page of Official Records in the office of the county recorder of the county where said property is located, noted below opposite the name of such county, namely:

COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE	COUNTY	BOOK	PAGE
Alameda	1288	558	Kings	858	713	Placer	1028	379	Sierra	38	187
Alpine	3	130-31	Lake	437	110	Plumas	168	1307	Siskiyou	506	762
Amador	133	438	Lessen	192	367	Riverside	3778	347	Solano	1287	621
Butte	13330	513	Los Angeles	T-3878	874	Sacramento	5039	124	Sonoma	2067	427
Calaveras	185	338	Madera	911	136	San Benito	300	405	Stanislaus	1970	56
Colusa	323	391	Marin	1849	122	San Bernardino	6213	768	Sutter	655	585
Contra Costa	4684	1	Mariposa	90	453	San Francisco	A-804	596	Tehama	\$57	183
Del Norte	101	549	Mendocino	667	99	San Joaquin	2855	283	Trinity	108	595
El Dorado	704	635	Merced	1660	753	San Luis Obispo	1311	137	Tulare	2530	108
Fresno	5052	623	Modoc	191	93	San Mateo	4778	175	Tuolumne	177	160
Glenn	469	76	Mono	69	302	Santa Barbara	2065	881	Ventura	2607	237
Humboldt	801	83	Monterey	357	239	Santa Clara	6626	664	Yolo	769	16
Imperial	1189	701	Napa	704	742	Santa Cruz	1638	607	Yuba	398	693
Inyo	165	672	Nevada	363	94	Shasta	800	633			
Kern	3756	690	Orange	653	7182	San Diego	SERIES 5 BOOK 1964, Page 149774				

shall inure to and bind the parties to this Deed of Trust, with respect to the property above described. Said agreements, terms, and provisions contained in said subdivision A and B (identical in all counties, and printed on the reverse side of this document) are by the within reference, incorporated here and made a part of this Deed of Trust for all purposes as fully as if set forth at length here, and Beneficiary may charge for a statement regarding the obligation secured by this document, provided the charge for it does not exceed the maximum allowed by law.

The undersigned Trustor requests that a copy of any notice of default and any notice of sale hereunder be mailed to him at his address set forth in this Deed of Trust.

)

STATE OF CALIFORNIA )

ss. Signature of Trustor

COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_  
before me, the undersigned, a Notary Public in and  
for said State, personally appeared

\_\_\_\_\_  
James A. Jones

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
**Ann Z. Jones**

(This area for official notarial seal)

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same.

WITNESS my hand and official seal.

Signature \_\_\_\_\_

\_\_\_\_\_  
C. Gregg Ankenman, of Wendel, Rosen, Black & Dean, LLP, Oakland, prepared these escrow instructions.

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