



The Voice of Real Estate in North Carolina

## **NORTH CAROLINA SELLER ADVISORY**

A CONSUMER INFORMATION PUBLICATION OF THE  
NORTH CAROLINA ASSOCIATION OF REALTORS®

**4511 Weybridge Lane  
Greensboro, NC 27407  
336/294-1415  
[www.ncrealtors.org](http://www.ncrealtors.org)**

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This Advisory is designed to assist home sellers in meeting their obligations as a seller of real property in North Carolina. Common issues that arise in North Carolina real property transactions are summarized in this Advisory. In addition to understanding these common issues, the seller should tell the broker with whom they are working about any special concerns or issues regarding the condition of the property, issues with the title to the property or other problems that may surface during the marketing of the property or any transaction involving the sale of the property.

North Carolina real estate brokers provide valuable services to property owners who wish to sell their property. A licensed real estate professional can provide a variety of services to sellers in addition to listing the property and placing it in a multiple listing service. These services include helping the seller complete any required disclosures, establishing a fair price, marketing the property, negotiating the sale and helping the seller with contract performance. A real estate broker is not, however, qualified to discover defects, evaluate the physical condition of property, give legal advice or provide other services beyond the scope of their real estate license.

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## LISTING PROPERTY FOR SALE

### **Listing Agreements**

North Carolina law requires that an agreement for brokerage services between a broker and an owner of the property to be in writing and signed by the parties from the time of its formation. Such agreements are commonly called “listing agreements.” A listing agreement is simply a written contract between the seller and the seller’s broker. The contract will contain the authorizations the broker needs to place the property in a multiple listing service, advertise and otherwise market and sell the property on the seller’s behalf.

In North Carolina, listing agreements are typically entered into between a seller and a real estate brokerage firm rather than an individual broker. Listing agreements contain important terms regarding how the property will be marketed, the asking price for the property, the obligations of both the broker and the seller, the duration of the listing, the broker’s compensation and other terms and conditions. The individual broker who signs the listing agreement on behalf of the Firm is primarily responsible for ensuring that the firm’s duties set forth in the agreement are fulfilled.

The exclusive right to sell listing is the most common form of listing agreement. It gives the brokerage firm the exclusive right to sell the property for an agreed-upon period of time, and a right to collect the agreed-upon commission if the listing firm, another firm, the seller or anyone else procures a ready, willing and able buyer during the term of the agreement.

Most listing agreements have a provision that determines how any forfeited earnest money will be distributed between seller and broker. You should carefully read the listing agreement and go over its terms with your listing agent before signing.

### **Multiple Listing Services**

A multiple listing service, called an “MLS,” provides information to real estate professionals who subscribe to the service about properties that are for sale in the area. Filing a listing with the MLS exposes the property to active real estate professionals in the local area. As such, it is a powerful marketing tool. The MLS is also a way for listing brokers to offer compensation to other brokers who may know of a suitable buyer. This cooperative feature of the MLS allows the listing brokers to share part of their commission with an agent working with a buyer. It is the ability to attract buyers through their agents that makes the MLS such an effective marketing tool.

MLS data and remarks are a form of advertising and, as such, must be accurate and truthful. You should therefore review MLS data and remarks for accuracy and bring any discrepancies or concerns to the attention of the listing agent. If personal property such as refrigerators, other appliances, furniture, tools, implements or accessories is listed in the MLS data, it may give rise to an expectation that such items will necessarily be included in any sale. In order to avoid later misunderstandings with the buyer, when a sales contract for the property is being negotiated, care should be taken to describe in the contract itself any items of personal property that will be included in the sale.

### **Seller Costs and Expenses**

Selling real property involves a certain amount of expense. The seller’s exact costs and expenses depend on the property being sold and the terms of the transaction. You should anticipate these expenses and plan for them at the time you list property for sale. Although accounting, financial consulting and tax advice are beyond the scope of a real estate broker’s expertise, the seller’s real estate agent can help you estimate some of the costs and expenses that will be associated with the sale.

Seller costs and expenses include everything from moving expenses to the mortgage pay-off. The seller typically pays for the cost of preparing a deed and an affidavit, commonly referred to as a “lien waiver,” verifying that persons or entities that have performed or furnished labor, services, materials or rental equipment to the property have been paid. The seller also typically pays state and any local excise taxes, commonly referred to as “deed stamps,” due as a result of the transfer of the property. The seller may agree to pay for repairs and/or improvements to the property identified during the buyer’s inspection of the property. Depending on the market and other factors, the seller may agree to pay an amount toward the buyer’s expenses associated with the purchase of the property. Typically, at the time of closing the seller will pay any real estate broker sales commissions agreed to in the listing agreement.

### **Income Taxes and Tax Withholding on Real Property Conveyances**

Gains on the sale of real property can generate income tax liability at the state and federal levels. Income tax liability issues are beyond the expertise of a real estate broker. Information on federal taxes can be found on the website of the Internal Revenue Service by clicking [here](#). General information about North Carolina personal income taxes can be found on the website of the NC Department of Revenue by clicking [here](#).

The disposition of a U.S. real property interest by a foreign person (the transferor) is subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) income tax withholding. FIRPTA authorized the United States to tax foreign persons on dispositions of U.S. real property interests. General information about FIRPTA can be found on the website of the Internal Revenue Service by clicking [here](#).

### **Property Taxes**

In North Carolina, when property is bought and sold, the real property taxes are prorated between the buyer and the seller according to the terms of the standard Offer to Purchase and Contract (jointly-approved by the NC Association of REALTORS and the NC Bar Association). The seller pays the taxes from January of the current year through the settlement date and the buyer pays the taxes from the settlement date through the end of the year.

Cities and counties in North Carolina operate on a fiscal year that begins on June 1st of each year, so tax rates are established and bills are released by the tax office in the middle of the year. If, at the time of settlement, tax rates and bills haven't been established/released, taxes are typically prorated based on the prior year's taxes, and the buyer is given a credit for the seller's portion of the taxes. In this case, the buyer is responsible for paying the taxes on the property for the entire year once the tax bill is released. If the tax rates and bills have been released by the tax office and have not yet been paid by the seller, taxes are prorated and paid at settlement. If the seller has already paid the taxes, taxes are prorated and the seller is given a credit for the buyer's portion of the taxes.

Some properties (such as properties being used for the production of agricultural, horticultural or forest products, or unoccupied property in a builder's inventory) are specially assessed and taxes deferred. The sale of such a property can result in changes in the tax status and cause deferred taxes to become due. You should consult with the tax office and/or seek the advice of a lawyer or other tax professional regarding the tax consequences of selling the property. Real estate agents are not trained or licensed to provide legal or tax advice.

### **Short Sales**

A "short sale" is a sale where: (1) the purchase price for the property will not result in sufficient proceeds to enable the seller to pay off the mortgage, other liens on the property, and other costs of sale, (2) the seller does not have sufficient liquid assets to make up the difference, and (3) creditors that have liens on the property agree to release their liens. The standard Short Sale Addendum (jointly-approved by the NC Association of REALTORS and the NC Bar Association) makes the transaction contingent upon the seller reaching agreement with the seller's lender (and other creditors with liens on the property) to release their liens upon payment of an amount less than what they are owed. Because the transaction is contingent upon the consent of third parties, short sales take a great deal of time and often fail.

Real estate agents can and do assist sellers in selling "short sale" properties. However, a short sale may have a negative impact on the credit rating or credit score of the seller and may result in taxable income to the seller even though the seller does not receive any cash proceeds from the sale. Before making a decision to list property that may require a short sale, you are advised to seek advice from an attorney, a certified public accountant or other professional regarding the credit, legal and tax consequences of a short sale and to determine whether options may be available to you, including but not limited to negotiating a modification of existing loans or liens, refinancing, bankruptcy, foreclosure, or deed in lieu of foreclosure.

## PROPERTY CONDITION, INVESTIGATION & DISCLOSURE

### **Seller's Common Law Disclosure Duties**

In North Carolina, sellers generally do not have any legal obligation to disclose the condition or characteristics of their property. However, sellers may not conceal a material defect about their property or negligently or fraudulently misrepresent the property in any material way, and, under certain circumstances, sellers may have a duty to disclose a material defect about the property that they know about and that the buyer will not be able to discover in the exercise of reasonable diligence.

Whether or not you choose to disclose material facts about your property, real estate agents are required by law to disclose all material facts about a property that they know about or reasonably should know about.

### **Seller's Property Disclosure Statement**

In most cases, residential property sellers in North Carolina must provide a Residential Property and Owners' Association Disclosure Statement (Disclosure Statement) to interested buyers before they make an offer. The form used by the seller is mandated by state law. A copy of the Disclosure Statement is available on the web site of the NC Real Estate Commission [here](#)

The owners of certain properties are not required to provide a Disclosure Statement, including but not limited to the owner of a dwelling that has never been inhabited and sold (new construction), the owner of unimproved property, and a lender that owns a property acquired after foreclosing on a loan made by the lender. A complete list of exclusions may be found in Section 47E-2 of the Residential Property Disclosure Act [here](#).

A listing agent has a duty to provide you with a copy of the Disclosure Statement, and to assist you in completing the Disclosure Statement and delivering it to prospective buyers. Your representations regarding the property are based upon your actual knowledge and are not the representations of your listing agent. You may, according to law, check "No Representations" with respect to any or all of the questions on the Disclosure Statement. If you have questions about whether you should check one or more "No Representation" boxes on the Disclosure Statement, such questions should be directed to an attorney rather than the listing agent. As noted above, a real estate broker must disclose to prospective buyers any material fact regarding a listed property which the agent knows or reasonably should know, even if you choose not to disclose the fact or to make no representation about it.

If a Disclosure Statement is not delivered to a prospective buyer before the buyer makes an offer to purchase, the buyer has a brief period of time within which to cancel any contract that may be entered into. (See "Note to Purchasers" above signature lines on page 1 of the Disclosure Statement.)

### **Square Footage and Acreage**

Most properties are listed in a multiple listing service (MLS). Most MLSs in North Carolina require a property's square footage to be reported. When a real estate agent reports square footage, they are expected to provide reasonably accurate information. Some sources of square footage information may not be relied on by a real estate agent, including square footage information determined by the property owner or included in property tax records, or included in a listing, appraisal report or survey prepared in connection with an earlier transaction. Agents may only report square footage that meets the "Living Area Criteria" as set forth in the NC Real Estate Commission's *Residential Square Footage Guidelines*, available on the Commission's website [here](#).

Real estate agents are expected to be able to accurately calculate the square footage of most dwellings. However, an agent may engage another professional such as a state-licensed or state-certified appraiser to assist in measuring the property and calculating its square footage, especially if the dwelling is of an unusual or complex design.

Sellers and their agents must likewise be very careful about making acreage representations. If property boundaries are in doubt in any way, you should consider having the property surveyed prior to putting it up for sale. While real estate agents are not trained and do not have the expertise to measure or calculate a property's acreage, they may be able to help you identify a North Carolina registered surveyor. A surveyor must be licensed by the NC Board of Examiners for Engineers and Surveyors. The license status of a surveyor can be checked on the Board's website [here](#).

### **Professional Home Inspections**

You should anticipate that one or more professional home inspections will be conducted by inspectors hired by potential purchasers. The resulting inspection reports will provide the buyer with detailed information about the home's physical condition, its systems and fixtures and usually note any potential future problems.

The standard Offer to Purchase and Contract permits the buyer to investigate the property for an agreed-upon period of time (known as the Due Diligence Period), and to terminate the Contract for any reason or no reason during the Due Diligence Period. Buyers typically have inspections of the property done during the Due Diligence Period. If a professional inspection shows defects in the property, the buyer may terminate the Contract or attempt to reach an agreement with you to repair the defects. Unless otherwise provided for in the Contract, the cost of inspections is a buyer expense and ordinarily will not be refunded to the buyer if the buyer terminates the Contract.

Sellers are oftentimes advised by their agents to obtain a home inspection for the purpose of evaluating the condition of the property in order to enhance its marketability and to help reduce concerns of prospective buyers. If you do have an inspection done, you should not allow a potential buyer to rely on your inspection. All buyers should be advised to contract and pay for their own inspection.

Inspection of property is beyond the scope of expertise of a real estate agent, but real estate agents can provide you with a list of local inspectors. Agents commonly will not recommend a specific inspector. Before hiring an inspector, you may check with the NC Home Inspector Licensure Board (NCHILB) to determine the inspector's current license status and whether there are any past or pending claims against the inspector. This can be done by visiting the NCHILB website [here](#).

### **Defective Products and Materials**

Some materials used in home construction have been subject to a recall, class action suit, settlement or litigation. These materials include modern engineered construction materials used for siding, roofing, insulation or other building purposes. Homes may also contain products in their systems or fixtures that are, or have been, subject to a recall, class action suit, settlement or litigation. Plumbing, heating and electrical systems, among others, may contain such products. You should carefully review any notices, settlements or other information you may have received regarding such materials.

The Residential Property and Owners' Association Disclosure Statement does not require a seller to disclose the existence of construction materials subject to a recall, class action suit, settlement or litigation unless the seller knows of an actual problem with any such materials. However, a buyer may ask about the presence of any such materials and/or the buyer's inspector may inspect for the presence of any such materials, so you should be prepared to address questions that may arise.

### **Repairs and Remodels**

If repairs or remodeling have been done on the property, you will want to make certain the work was properly done and permitted. Buyers will often ask the seller for any invoices or other documentation for obvious repairs or remodels. You should therefore anticipate questions about any recent repairs or remodels and be ready to demonstrate they were done properly with the required permits.

A real estate broker can help you assess the need to demonstrate building code compliance, but do not themselves have the training or expertise to evaluate building code compliance issues. If uncertain about permits, you should check with their city or county building department.

If any repairs are required during the transaction, you should make sure a licensed contractor performs the repairs. According to the standard Offer to Purchase and Contract, repairs or improvements must be made in a good and workmanlike manner, and the buyer has the right to verify the adequacy of the repairs or improvements prior to Settlement. Absent agreement to the contrary, a buyer would be responsible for the cost of any re-inspection done to assure that repairs or improvements were done properly.

### **Sewer and Septic Systems**

Whether the property is connected to a city sewer, septic system or other on-site wastewater treatment system is important information. The type and condition of such systems can be highly material in a real estate transaction. Real estate brokers are not licensed to do plumbing or septic inspections. If the property has a septic system or other on-site wastewater treatment system and you have any reason to believe that there may be a problem with the system, you should consider having the system inspected by a licensed on-site wastewater inspector prior to marketing the property. If the inspector discovers a problem with the system that requires repair, the repairs must be performed by a licensed on-site wastewater contractor after a permit for the repairs is issued by the county health department. On-site wastewater inspectors and contractors are licensed by the North Carolina Onsite Wastewater Contractor Inspector Certification Board ("NCOWCICB"). You should check with the NCOWCICB to confirm that the inspector and/or contractor is licensed, which can be done by visiting the NCOWCICB website [here](#).

Specific information about septic systems and other on-site wastewater treatment systems is usually available from the county. Buyers will often check with the county as part of their due diligence when purchasing property with an on-site wastewater treatment system. Sellers can avoid potential transaction problems by checking permitting and system status with the county prior to marketing. County websites can be found [here](#).

### **Wells**

If domestic water for the property is supplied by a private well and you have any reason to believe that there may be a problem with the quality of the well water, you should consider having the water quality tested prior to marketing the property. Testing may be performed by the county health department or by an employee of a state-certified laboratory. A listing of certified labs is available on the website of the NC Division of Environment and Natural Resources [here](#).

If there are any concerns about the condition of the well itself, any inspection of the well's structure should be done by a certified well contractor or an environmental health specialist. Well contractors are certified by the North Carolina Well Contractor's Certification Commission. A listing of certified well contractors is available on the Commission's website [here](#).

Local health departments are required to permit, inspect and test new private drinking water wells constructed on or after July 1, 2008. Construction permits are valid for 5 years from the date of issuance. Repairs to a private drinking water well also require a health department permit. Construction or repair of a private drinking water well must be performed by a certified well contractor or a licensed plumber who has taken the appropriate training courses/continuing education.

While real estate agents are not trained and do not have the expertise to test wells or the quality of well water, they may be able to help direct you to the appropriate well professionals.

### **Underground Oil Storage Tanks**

Although underground storage tanks ("USTs") used for home heating oil are not regulated, such tanks can cause serious problems if they have leaked oil. If the property has a UST and you have any reason to believe that there may be a problem with the tank, you should hire appropriately trained environmental professionals (environmental consulting companies, licensed geologists, licensed engineers) to inspect the tank. While real estate agents are not trained and do not have the expertise to test USTs, they may be able to help direct you to the appropriate environmental professionals.

If contamination is discovered, the local Division of Waste Management (DWM) regional office should be notified immediately. Primarily, the "statutory tank owner" is responsible for cleaning up the contamination. Who the "statutory tank owner" is depends upon when the tank was last used. If it was last used before November 8, 1984 then the last party who used the UST is considered the tank owner, even if that party no longer owns the property. If the UST was used on or after November 8, 1984, anyone who owned the tank would be considered the tank owner even if that person never used it. Information on home heating oil USTs can be found on the website of the DWM of the NC Department of Environment and Natural Resources [here](#).

If the Buyer is obtaining financing to purchase the property, some lenders may require a UST to be tested and some may require a UST to be removed and a "no further action letter" obtained from the DWM. Some local fire inspectors' offices regulate USTs, so the local office should be contacted prior to removal.

### **Environmental Hazards**

Environmental hazards include everything from expansive soils to landslides to forest fires, hurricanes, floods and earthquakes. Environmental hazards can also include indoor air quality (e.g., radon or carbon monoxide) and hazardous materials, like asbestos. Real estate brokers are not trained and do not have the expertise to discover and evaluate environmental hazards. Sellers therefore are advised to hire appropriately trained environmental professionals to inspect the property and its systems or fixtures for environmental hazards if there is any question regarding environmental hazards.

**Flood Hazards.** Buyers are encouraged to determine whether the property and/or any permanent improvements on the property are wholly or partially located in a Special Flood Hazard Area. A definition of the term "Special Flood Hazard Area" can be obtained from the website of the Federal Emergency Management Agency [here](#). Information about the state of North Carolina's Floodplain Mapping Program is available on the website of the NC Flood Mapping Program [here](#).

If the property is located in a Special Flood Hazard Area, the buyer's lender may require the buyer to purchase flood insurance in connection with their purchase of the property. The National Flood Insurance Program provides for the availability of flood insurance and establishes flood insurance policy premiums based on the risk of flooding in the area

where properties are located. Recent changes to federal law (The Biggert-Waters Flood Insurance Reform Act of 2012 and the Homeowner Flood Insurance Affordability Act of 2014, in particular) will result in changes to flood insurance premiums that are likely to be higher, and in the future may be substantially higher, than premiums paid for flood insurance prior to or at the time of sale of the property. As a result, you should not represent that the premiums paid for flood insurance on the property previously are an indication of the premiums that will apply after completion of the purchase. The buyer should consult with one or more carriers of flood insurance for a better understanding of flood insurance coverage, current and anticipated future flood insurance premiums, whether the prior owner's policy may be assumed by a subsequent purchaser of the property, and other matters related to the purchase of flood insurance for the property.

### **Mold**

Molds are one of a variety of biological contaminants which can be present in human structures, including residential housing. Mildew is perhaps the most common and best known of the molds. Less well known, and far less common, are certain molds identified as possible contributors to illness, particularly in people with allergies. Such cases usually involve property with defective siding, poor construction, water penetration problems, improper ventilation or leaking plumbing. In a few cases, these problems have led to the growth of molds which caused medical conditions in some people. If you suspect that potentially harmful molds are present on the property, you should consider having the property inspected by a qualified professional. Information on moisture intrusion and mold problems associated with human structures can be found on the EPA website [here](#). A Fact Sheet on mold prepared by the National Toxicology Program is available on the website of The American Industrial Hygiene Association [here](#).

Inspection, discovery and evaluation of specific water intrusion or mold problems requires specialized training and is well beyond the scope of a real estate agent's expertise. You are therefore advised to hire appropriately trained professionals to inspect the property if you are concerned about the possibility of harmful molds. Information on how to go about hiring a mold consultant or contractor is available on the website of the N.C. Department of Health and Human Services (Epidemiology Section) [here](#).

### **Smoke and Carbon Monoxide Alarms**

The NC Residential Building Code requires smoke alarms in all new construction, and in existing dwellings where alterations, repairs or additions requiring a building permit occur, or when one or more sleeping rooms are added or created. Counties and cities may also require smoke alarms in existing dwellings under local ordinances that are no more stringent than the State Building Code.

The NC Residential Building Code requires carbon monoxide alarms in all new construction, and in existing dwellings where interior alterations, repairs, fuel-fired appliance replacements, or additions requiring a building permit occur, or when one or more sleeping rooms are added or created. Counties and cities may also require carbon monoxide alarms in existing dwellings under local ordinances that are no more stringent than the State Building Code.

Requirements for smoke and carbon monoxide alarms in residential rental properties are governed by landlord-tenant laws, which may be viewed on the website of the NC General Assembly [here](#).

Real estate agents are not trained in building code compliance. Therefore, if there is doubt about whether a smoke or carbon monoxide alarm is required in a dwelling or an existing alarm complies with state and local requirements, a licensed home inspector or the local building inspections department should be consulted. Your real estate agent may be able to assist you in finding the right code compliance professional.

### **Disclosure of Death, Illness, or Conviction of Certain Crimes**

Certain facts are considered *not* to be "material" according to North Carolina law, including the fact that the property was occupied previously by a person who died or had a serious illness while occupying the property, or that a person who is required to register under North Carolina's Sex Offender and Public Protection Registration Program or the Sexually Violent Predator Registration Program occupies, occupied, or resides near the property. See NC General Statutes section 39-50, which may be viewed on the website of the NC General Assembly [here](#). Thus, neither you nor your listing agent is required to voluntarily disclose such facts; however, they may not make a false statement regarding any such fact. If a buyer specifically asks about such a matter, you or your listing agent may either decline to answer or respond honestly. If, however, a buyer inquires as to whether a previous owner or occupant had AIDS, you and your agent are prohibited from answering such an inquiry because persons with AIDS are considered to be "handicapped" under fair housing laws.

Information about registered sex offenders can be found by visiting the website of the NC Department of Justice [here](#).



### **Meth Labs**

North Carolina law requires owners, operators or other persons in control of a residence who have knowledge that the property has been used for the manufacture of methamphetamine (“meth”) to comply with decontamination standards established by the NC Department of Health and Human Services (DHHS”). A contaminated property may not be occupied prior to decontamination of the property in accordance with these standards, which are available on the Epidemiology Section of the DHHS website [here](#).

A real estate agent generally would be required to disclose the existence of a meth lab on a property if he or she either knew or reasonably should have known of its existence. However, if a contaminated property has been decontaminated in accordance with the decontamination standards, the previous existence of a meth lab on the property would not longer be considered a material fact which a real estate agent would be required to disclose.

### **Neighborhoods**

Neighborhoods change over time. Some of these changes can affect the value or desirability of property. Building permits, zoning applications and other planning actions are a matter of public record and notice. If you have any notice of planning actions in the area, or even knowledge of future plans by neighbors or the government, you should discuss this with your real estate agent to determine what, if any, disclosure should be made to buyers.

A neighborhood’s physical boundaries may be defined in a plat or map that was recorded when the neighborhood was originally developed. A seller who wishes to advertise that the property is located in a particular neighborhood should be careful to ensure that the property is actually within its defined boundaries to avoid confusion or any argument that the seller has misrepresented the location of the property.

Location within a school district can be a very important attribute of a neighborhood. School boundaries, however, are subject to change. If location within a particular school district is going to be advertised to attract buyers or justify the asking price, you should investigate the boundaries and the likelihood of change by contacting the school district directly.

### **Historic Property**

Cities and counties in North Carolina may by law choose to create Historic Preservation Commissions and to designate local historic districts and landmarks. A Historic Preservation Commission has the power to recommend to the local governing board properties to be designated as historic districts and landmarks. If your property has been designated as a landmark or is in a designated historic district, this is important information for a buyer to know, as it may affect the property taxes and/or the buyer’s ability to make changes to the property.

## CONTRACT DOCUMENTS AND CONTRACT PROCESS

### **Real Estate Sale Form (Sale Agreement)**

A contract for the sale of real property must be in writing to be enforceable in a North Carolina court. A VERBAL AGREEMENT SHOULD NOT BE RELIED UPON. Contracts for the sale of real property are legally binding contracts, and with limited exceptions (for example, the first sale of a condominium unit), are not subject to any "cooling off" period during which the buyer may terminate any such contract. You should seek competent legal advice from a North Carolina real estate attorney before signing any contract you do not fully understand. In North Carolina, many real estate agents use the standard Offer to Purchase and Contract form (jointly-approved by the NC Association of REALTORS and the NC Bar Association) for North Carolina residential real property transactions. This contract form includes provisions concerning the payment of a "due diligence fee" and one or more earnest money deposits, as well as who will hold the earnest money and under what conditions it may be refunded to the buyer or forfeited to the seller. The contract form also provides for a Due Diligence Period during which the buyer may investigate the property and the transaction and terminate the contract for any reason or no reason. The amount of the due diligence fee and earnest money deposit(s), and the length of the Due Diligence Period are important matters that should be carefully negotiated between the buyer and the seller.

YOU ARE RESPONSIBLE FOR SELECTING THE TERMS AND CONDITIONS OF YOUR AGREEMENT. YOUR REAL ESTATE AGENT CAN GIVE YOU IMPORTANT MARKETING, BUSINESS AND NEGOTIATING ADVICE AND INFORMATION AND CAN ASSIST IN PREPARATION OF THE SALE AGREEMENT, BUT ONLY PURSUANT TO YOUR INSTRUCTIONS. REAL ESTATE AGENTS ARE NOT ATTORNEYS AND ARE PROHIBITED BY LAW FROM GIVING LEGAL ADVICE. Your real estate agent may be able to assist you in finding a North Carolina real property attorney. Also, the North Carolina Bar Association Foundation operates a Lawyer Referral Service as a public service. Information about the Service is available on the website of the NC Bar Association [here](#).

### **Oil and Gas Rights Disclosure**

The minerals in place underneath the surface of the earth, including oil and gas, can be owned separately from the surface of the property. This means that minerals and mining rights can be created and transferred separately from the surface rights, and that those mineral rights constitute a separate and distinct property interest. Information about oil and gas leases in North Carolina in two NC Department of Justice publications is available on the NC Real Estate Commission's website [here](#) and [here](#).

State law requires sellers of most residential property consisting of one to four dwelling units to disclose in the sales contract the status of oil and gas rights regarding the property. The mandatory language to include in boldface type in the real estate contract is set forth in N.C. General Statutes § 47E-4(b2), available on the website of the NC General Assembly [here](#). The mandatory disclosure language is included in the standard Offer to Purchase and Contract forms used for the sale of existing and new properties containing one to four dwellings.

The law requires the seller to answer three specific questions, and then obtain the buyer's initials to acknowledge the oil and gas disclosure as part of the real estate contract. You must answer the following: 1) whether the oil and gas rights were severed from the property by a previous owner; 2) whether you have personally severed such rights from the property in the past; and, 3) whether you intend to sever said rights from the property prior to transfer of title to the potential buyer. All three questions must be answered "yes" or "no," except that question 1) may be answered "no representation" by you. You well may not know whether a prior owner had severed oil and gas rights from the property. In such a case, you may check "no representation" as to the first question.

If oil and gas rights (or other similar rights) *have* been severed from the title to a parcel of real property, it would be considered a material fact that a real estate broker would be required to disclose, but only if the agent knew or should have known about the severance. Typically, a real estate agent wouldn't know or have reason to know. A real estate agent would not be expected to conduct an independent investigation to confirm whether your answers are correct or, in the case of a "no representation" answer to question #1, to determine whether oil and gas rights have or have not been severed by a previous owner. Discovering and rendering opinions on matters affecting title to real property is outside the scope of a real estate agent's expertise and constitutes the practice of law. On the other hand, if a real estate agent knows or should know under the circumstances that oil and gas rights have been or may have been severed from the property, he or she would be required to disclose his or her knowledge to prospective buyers.

The standard Offer to Purchase and Contract obligates the seller to convey title to the property free and clear of encumbrances and defects, so if oil and gas rights (or other similar rights) have been or will be severed from the

property, you should consult with an attorney before entering into a contract to sell the property.

### **Lead-Based Paint Disclosure Form**

Residential property built before 1978 (called “target” housing) is subject to the Residential Lead-Based Paint Disclosure Program administered by the Environmental Protection Agency (EPA) and the Department of Housing and Urban Development. The Act requires sellers of target housing to provide the buyer with a lead-based paint disclosure and the pamphlet entitled “Protect Your Family From Lead in Your Home,” and give the buyer an agreed-upon period of time to obtain a risk assessment or inspection of the property for the presence of lead-based paint and/or lead-based paint hazards. Information about the requirements can be found on HUD’s website [here](#).

Owners of homes built before 1978 should anticipate and discuss with their agents their obligations under the disclosure statute. In North Carolina, a “Lead-Based Paint Or Lead-Based Paint Hazard Addendum” (jointly-approved by the NC Association of REALTORS and the NC Bar Association) is commonly provided by sellers of homes built before 1978 to prospective buyers.

If renovation, repair, or painting (RRP) on a home built before 1978 is planned, you should be aware of EPA rules that require such work be done by certified contractors who must follow certain work guidelines. This may complicate or add expense to such projects. RRP rules in North Carolina are administered and enforced by the Health Hazards Control Unit (HHCU) of the NC Department of Health and Human Services, Division of Public Health. No person may perform lead-based paint renovation activities for compensation in target housing in North Carolina until that person has been certified under the state program. Information about various aspects of the state program is available on the HHCU’s website [here](#). The EPA publication “Small Entity Compliance Guide to Renovate Right” contains an excellent summary of the requirements of the new EPA rules and is available on the EPA’s website [here](#).

Homeowners who do their own work in their own home are exempt from RRP rules. The EPA does, however, urge homeowners to read EPA’s *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers, and Schools*, available on the website of the Consumer Product Safety Commission [here](#).

### **Owners’ Association Documents, Covenants, Conditions and Restrictions**

Covenants, conditions and restrictions (“CC&Rs”) are formally recorded private limitations on the right to use real property. Many properties are subject to CC&Rs. Often, but not always, CC&Rs are enforced by an owners’ association. If the property is subject to regulation by an owners’ association, the association will have governing documents and rules and regulations which typically provide for mandatory fees and other ongoing owner obligations.

CC&Rs and association rules and regulations can significantly impact a buyer’s use of and plans for the property, and therefore may affect price or desirability. Buyers are encouraged to review CC&Rs and the governing documents, financial statements and other owners’ association documents as part of the “due diligence” process, as well as any information the seller may provide in answering several questions contained in the Residential Property and Owners’ Association Disclosure Statement which address owners’ associations and CC&Rs.

It is not uncommon for CC&Rs or owners’ association governing documents and/or rules and regulations to change. In addition, an association’s governing body may be considering action or have recently taken action affecting the property of which the seller is unaware. Therefore, if possible, all information and/or documents pertaining to any owners’ association and/or CC&Rs affecting the seller’s property should be provided to prospective buyers by the association manager or the association president in order to ensure that current, accurate information and/or documents are provided.

### **Financing**

The buyer’s ability to finance the purchase of property is an important aspect of most residential transactions. If the standard Offer to Purchase and Contract form is used in a transaction, the buyer must pursue qualification for and approval of any loan during the Due Diligence Period. The Due Diligence Period should allow sufficient time for any appraisal to be completed and for buyer’s lender to provide the buyer sufficient information to decide whether to proceed with or terminate the transaction.

Although the buyer is not required to provide the seller a letter from a lender pre-approving the buyer for a loan, you should consider asking for such a letter prior to accepting an offer on the property. A pre-approval letter should state that the lender has reviewed the buyer’s credit report, income requirement and cash to close and pre-approves the buyer for the loan, subject to an acceptable appraisal of the property. The appraiser will normally work for the lender, not the seller. You may check the status of an appraiser on the website of the North Carolina Appraisal Board [here](#).

## Home Warranties

A home warranty is an insurance contract. Home warranties for existing homes are common in today's real estate market. The warranty generally covers the repair and replacement of equipment and appliances such as dishwashers, plumbing systems, electrical systems, and so on. Optional coverage may be available at additional costs for pools, built-in spa equipment, well pumps and other systems. Coverage and price vary considerably among warranty companies. A home warranty can be included as a term of a purchase agreement. You should discuss home warranties with your real estate agent at the time of listing and/or selling their property. Your agent can provide you with information on companies offering home warranties for purchase.

## Title Report and Commitment

The standard "Offer to Purchase and Contract" form obligates the seller to deliver a general warranty deed to the property which conveys "fee simple marketable and *insurable* title" to the property. A title insurance policy insures the condition of the title to a certain piece of property. Virtually every lender requires a lender's policy of title insurance in most real estate transactions in North Carolina. Before a policy of title insurance can be issued in North Carolina, a title examination must be conducted under the supervision of an independent attorney licensed to practice law in North Carolina.

A title insurance commitment to insure the title of the property will be issued by a title insurance company on a standard form promulgated by the American Land Title Association, based upon the attorney's title examination and report. The title insurance commitment contains important information about the quality of the title to be conveyed by the seller. In particular, the title insurance commitment will contain a list of requirements in Schedule B, Section 1, which must be satisfied before the title insurer is obligated to issue its policy.

Schedule B, Section 2 of the title insurance commitment will list certain "exceptions" to title which are matters for which the insured will not be provided coverage under the terms of the title insurance policy.

Questions about the title insurance commitment, the exceptions and other matters relating to title should be directed to the attorney providing the title report to the title insurer or to the buyer's attorney. In most instances the attorney providing the title report to the title insurer and the buyer's attorney is the same person. Review of the title insurance commitment for legal adequacy or deficiencies constitutes the practice of law and cannot be performed by the real estate agent.

## Mechanics' liens

If repairs or remodels have been made to a seller's property, the law permits a lien to be filed against the property by certain persons who provide labor and/or materials to the property if there is any dispute about payment for such labor or materials. Any such lien must be filed no more than 120 days after the last furnishing of the labor or materials to the property. These liens can be filed *after* a property is transferred and yet "relate back" to a date *before* the transfer that the labor, materials or services were first provided. Thus, such liens may be "hidden" and not show up on a title search. For that reason, sellers are typically asked at Settlement to sign a "lien waiver" certifying that all persons who have furnished labor or materials to the property have been paid.

A significant change to North Carolina's mechanics' lien law took effect in 2013. The change applies to projects to improve real property for which the anticipated cost of the project at the time the building permit is issued is \$30,000.00 or more.

The new law is designed to protect buyers from liens filed after a title policy is issued and the property is transferred by requiring potential lien claimants to provide notice of their involvement on a project before the property is transferred. Notice must be given to a "lien agent" who must be designated by the owner of the property being improved. The lien agent will be a title insurance company chosen from among a list of registered lien agents that is maintained by the Department of Insurance. Lien agents may be designated online [here](#). The owner is required to give notice of the lien agent's contact information, either by posting the information on the project site or by providing the information to a potential lien claimant on request.

The attorney closing a transaction subject to the new law may search the web site to get the names of any persons who have notified the lien agent of their potential lien. The attorney will require all such persons to sign a lien waiver confirming that they have been paid in full. The claim of any potential lien claimant who refuses to sign a lien waiver will need to be addressed before the closing can take place.

The great majority of real estate transactions that are subject to the new law involve sales of new construction and sales by investors who have purchased and made significant improvements to the property being sold. The new law

does not apply to improvements made to an existing single-family residential dwelling unit that is used by the owner as a residence. However, the existing lien law will continue to apply to the sale of such dwelling units. Specific questions about whether the law will apply in a particular situation and how it will work should be answered by a North Carolina real property lawyer.

### **Homeowners' Insurance**

The standard "Offer to Purchase and Contract" form advises buyers to investigate the availability and cost of insurance for the property during the Due Diligence Period. The insurance claims history for a home may affect the cost and availability of homeowners' insurance. Most insurance companies use a database service called the Comprehensive Loss Underwriting Exchange (CLUE) to track claims made. Depending on the content of the CLUE report, and the insurance company's policy, home insurance may prove more difficult to get than expected.

Sellers who have made claims on their homeowner's insurance (especially for flooding or water intrusion) may want to check their CLUE Report prior to marketing the property to make certain buyers will not have difficulty obtaining insurance. You can obtain a copy of the report for your property online [here](#).