

Multi-Board Residential Real Estate Contract 8.0

Webinar FAQ's - 1.10.25

Contract Questions

General Contract Questions:

1. What is the difference between “warrants” and “represents?” Both are referenced frequently in the contract.
 - a. A "representation" in the context of a contract is a statement (can be express or implied) made by one of two contracting parties to the other, before or at the time of making a contract, regarding some past or existing fact, circumstance, or state of facts pertinent to the contract, which is influential in bringing about the agreement.
A "warranty" is a promise that a proposition of fact is true. It is an undertaking that a certain fact in relation to the subject of a contract is, or shall be, as stated or promised to be.
The differences are:
A warranty must always be given contemporaneously as part of a contract; a representation precedes and induces the contract. The consequences are different as well: upon breach of warranty (or false warranty), the contract remains binding, with only damages recoverable for the breach of warranty; for false representation, the defrauded party may elect to avoid the contract and recover the entire price paid (a remedy called "rescission").
2. What is the difference between an “addendum” and an “agreement?”
 - a. An addendum is intended to become part of the contract negotiated between the buyer and seller and must be incorporated into the contract. The best way to do this is using line 549.
An agreement is NOT intended to become a part of the contract and may be used to solidify further negotiations between the buyer and seller after the execution of the original contract.

Paragraph 4 – Seller Contribution to Buyer Brokerage Compensation

1. Do we still need to use an addendum to reference compensation?
 - a. No. This paragraph is intended to replace the previously used *Seller Agreement to Pay Buyer's Brokerage Compensation – 7.0 Compensation Addendum*.

Paragraph 6 – Possession

1. Shouldn't the keys be delivered to the buyer's brokerage and not the seller's brokerage? What if the listing office is 50 miles or more apart?
 - a. The intent of the drafters was to allow the seller to discharge the seller's obligations to relinquish possession by delivering keys to the seller's brokerage. Therefore, it is not advisable to give the keys to the buyer broker prior to closing. While it is advisable for a listing broker to attend closing, if they are not planning on attending the closing, the keys should be delivered to the buyer's brokerage at the appropriate time and place.

Paragraph 7 – Fixtures and Personal Property at No Added Value

1. If the home features a drinking water filter and not a reverse osmosis system should that be referenced in line 62 (Other Items Included at No Added Value)?

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- a. Yes.
2. If a property has a radon mitigation system, should that be referenced in line 62?
 - a. Equipment that is not itemized yet difficult to remove, such as a radon mitigation system, sump pump, air conditioning system, etc. may be listed on this line, if the buyer wishes to do so.

Paragraph 8 – Financing

1. Is there anything in the 8.0 regarding a proof of funds request?
 - a. Yes. See paragraph 8 b). The buyer agrees to verify and authorizes the seller to receive financial information necessary to prove the availability of sufficient funds to close.
2. Are we using Paragraph 8 c) for clients using a HELOC (Home Equity Line of Credit) or is it treated as a cash sale?
 - a. If a buyer needs to obtain a HELOC, it may be referenced in Paragraph 8 a) as “other”.

Paragraph 9 – Homeowner Insurance

1. What is “standard premium rates?”
 - a. The drafters believed that the insurance industry maintains insurance rates that are "normal" and "reasonable" given ordinary loss history, claims and other factors in a given geographical area. However, if there are an unusual number of claims made with respect to a particular property, such "standard" premium rates" may not be available. A report from the Comprehensive Loss Underwriting Exchange ("CLUE" report) would disclose such unusual number of claims or other factors that would cause the premium for a particular property to exceed that of comparable or similarly situated property.

Paragraph 12 – Prorations

1. Why does 12 c) reference the date of acceptance instead of the date of closing?
 - a. The contract "speaks" using the Date of Acceptance so any representations (which are statements of fact) are made based on what is known on the Date of Acceptance. The seller agrees to pay such assessments that are confirmed prior to the Date of Acceptance, but it would not be fair to the seller to require they pay for assessments that were confirmed after the purchase price was determined. Presumably, the seller derives no benefit from assessments confirmed after the time when the purchase price is set (i.e. the Date of Acceptance), and only the buyer benefits from the improvements provided by the increase in assessments.

Paragraph 14 – As-Is Condition

1. Does Paragraph 14 apply to municipal inspections?
 - a. No. A municipal inspection is interposed by an entity that is not a party to the contract. The inspection required by a municipality is not voluntary, but required by governmental action, and not affected by the agreement of the parties.

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2. I anticipate that this paragraph will act as an assumed bar by most attorneys to any municipal repairs, thoughts on this? Paragraph 19 does not address this and seem to leave it up to negotiations.
 - a. The answer involves a significant amount of detail and will address the questions that follow on this topic.

Paragraph 14 concerns representations regarding the physical conditions of the real estate, which are inducements to enter into a contract. The better question is whether an agreement utilizing paragraph 15 c) (Inspection with No Requests) has an impact on the responsibility for compliance with repairs required by a municipality after an inspection required by an ordinance.

A municipality may lawfully require a particular party to obtain and pay for an inspection required by an ordinance. Many municipalities enacted ordinances that required a seller to make repairs prior to putting a property up for sale, reasoning that the buyer who recently came out of pocket to close and move into a home would not likely do the work after closing. The problem with that position is that it prevents a destitute seller from being able to sell and make adequate arrangements with the municipality to ensure that post-closing repairs are made. It interferes with the obligations of contract for a non-party, even a governmental actor, to dictate financial terms (i.e., payment for repairs) after the Purchase price is determined. Many municipalities that refused to allow transactions to close by refusing to sell transfer tax stamps without repairs being completed prior to closing by sellers faced challenges on constitutional grounds for interfering with the obligations of contract between the parties. The solution was to allow, in certain circumstances, one of the parties to post an adequate bond or surety or to allow a buyer to contract with a contractor prior to closing and deposit in escrow an amount required by the contractor to complete the repairs subsequent to closing. This is where the "otherwise agreed by the parties" language would allow a party not designated in the ordinance to be responsible for the costs of repairs.
3. Can as-is be used in the case where the seller's municipal inspection discovered code violations but the seller does not to fix them?
 - a. So much of this depends on the municipality and what their ordinance says. Some won't let it "wait until after closing" to be fixed by the buyer, some won't let the seller escrow money so the buyer can do it themselves.

Paragraph 19 clearly states the property may be in a municipality that has inspection requirement and "Cost of....any repairs required by an inspection pursuant to municipal ordinance shall be paid by the party designated in such ordinance unless otherwise agreed to by the parties."

Paragraph 14 AS IS Paragraph does NOT negate any obligations a municipality may have. If cited repairs have to be repaired, the parties could negotiate the cost to be borne by the buyer.
4. Regarding municipal inspections: a seller wishes to sell their property as-is, but a municipality requires a sale inspection. My buyer may be willing to purchase the property as-is, but that

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municipal inspection report isn't always available at the time an offer. Therefore, buyer wants it known their willingness to purchase as-is is subject to review of the municipal inspection report. Would the buyer write this into the Misc provisions paragraph on the "other" line?

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Paragraph 15 – Inspections

1. If the buyer designates the offer "As-Is" and then elects to initial 15 b), haven't they essentially voided the nature of an "As-Is" offer? It would seem the only two options for an as-is should be to waive the inspection or conduct an inspection, but not request repairs.

- a. Paragraph 14 is used for the seller to tell the buyer their intention. Paragraph 15 is used for the buyer to tell the seller their intention.

The as-is paragraph allows the seller to say that they are not making any representation or warranties related to the property. A buyer looking to make their offer stand out in a competitive situation could include Paragraph 14 to waive any kind of inspection, or conduct an inspection and still be able to walk away if major issues are found.

As-Is was the most debated and misunderstood term of the 7.0 Contract. These changes are designed to outline options and expectations of both parties

2. Why does this language appear in 15 b) 2): "Buyer SHALL NOT send any portion of the inspection report with the Notice provided under this subparagraph unless such inspection report, or any part thereof, is specifically requested in writing by Seller or Seller's attorney?"

- a. This language also appeared in the 7.0 Contract but has an increased emphasis here in the 8.0 Contract. The home inspection report belongs to the buyer, which contains opinions of the inspector the buyer hired. It should be the seller's decision as to whether they wish to see any portion of the report. It could be a liability for the seller to see the entire report as they could be placed in a situation where they are forced to repair, refute, or amend the disclosure report with the items made in the report. This could be problematic in situations when inspection reports are arbitrary, inconsistent, or simply inaccurate.

3. Could a radon inspection still be requested even if 15 c) is selected?

- a. Paragraph 15 c) allows the buyer to conduct any inspection they wish, including radon. If a test reveals a high level, the buyer may choose to mitigate that their expense.

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However, if the buyer requests or expects the seller to pay for the mitigation, the seller has the right to terminate the contract.

A buyer could agree to Paragraph 15 c), with the exception of a high radon reading. Any additional agreements outside of the contract would have to be agreed upon by both parties to the contract.

4. Why does earnest money need to be returned if the buyer is acting in bad faith in 15 c)?
 - a. Counsel believes an aggrieved seller does not relinquish a claim for damages by releasing earnest money, so long as that seller makes an affirmative declaration to that effect when the contract is terminated. Returning to the discussion of the difference between warranties and representations, a false representation by a buyer made to induce a seller to enter into a contract ("I'll buy the house but I won't ask for any repairs") allows for the seller to seek money damages for that misrepresentation.
5. If a buyer selects 15 c) and finds a big issue, can they still terminate and back out of the contract?
 - a. Yes. This subparagraph states that if the condition of the real estate is unacceptable to the buyer, they may declare the contract null and void, provided they notify the seller within 5 business days after date of acceptance.
6. What if my buyer wants an additional inspection not listed in the contract such as radon, sewer scope, etc.?
 - a. Paragraph 15 b) continues to allow listed inspections or "any other inspections desired by Buyer."

Repair Request Agreement

1. Please explain the intention behind this document. Would brokers be practicing law through it's use? Is it binding?
 - a. This form is intended to assist in the negotiations of repairs and to generate agreement, which may be then submitted to the attorneys for the respective parties. Providing that the form is being used for this purpose and the broker is not providing legal advice, then their participation and use of this document does not constitute the unauthorized practice of law. It may be especially useful when the parties are not using an attorney.
2. Is this form required?
 - a. No. It is provided as a tool only and is not intended to be incorporated into the contract.

Paragraph 16 - Additional Inspections

1. In 16 b), pumping was an option in the previous contract. Why was it removed?
 - a. Pumping was not addressed in the 7.0 Contract under Paragraph 33 - Well or Sanitary System Inspections. Regardless, the question of pumping and payment for pumping has no bearing on determining the party responsible for paying for the inspection.
2. In our area, the buyer pays for the inspection outlined in 16 b), but the seller pays to pump, why does this indicate that the seller pay for the inspection?
 - a. The 7.0 Contract also identified the seller to be responsible to test and pay for the inspection. If the seller wants the buyer to pay for the inspection, seller may be crossed out and replaced with buyer, provided both parties agree and initial the change. The

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Paragraph 20 – Title

1. As it relates to title insurance, many real estate brokers are not registered title insurance agents. If the contract changes the seller's selection of the title company referenced originally in the marketing agreement, should the IDFPR DS-1 Form be included in this contract?
 - a. No. The DS-1 form is not an element of the contract. It is not an agreement between Buyer and Seller. It is a disclosure to the parties by a title agent required by IDFPR regulation. Not all transactions involve title agents.

Paragraph 24 – Seller Representations Regarding Notifications and Knowledge

1. If the seller finished the basement and did not pull a permit to do so, are they required to attempt any remedy prior to closing?
 - a. This answer is very broad and will depend on the specific situation. Therefore, it is important for a client to obtain a legal opinion. For example, a buyer may find it acceptable for no permit to have been pulled when installing a toilet, but not acceptable if no permit was pulled when the seller added the deck.
2. What if you are aware of a special assessment for example? Where on contract should that be noted?
 - a. Paragraph 12 – Prorations.
3. What if the seller is aware of a tax assessment not reflected (in the case of a newly constructed home). Would 24 i) be crossed off and initialed?
 - a. Representations that the seller does not want to make in Paragraph 24, due to awareness of certain subject matters addressed in this paragraph, should be crossed out and initialed. If the parties are concerned that a lender will make (for example) compliance with a permitting requirement a condition for loan approval, it is possible for the resolution of this issue to be part of the Attorney Review process, but I would be concerned that the issue could "fall through the cracks" if not addressed at the time of contract execution.
4. 24 k) references "any proposed, unconfirmed or pending special assessments." Why is the seller asked to represent that they are not aware of an unconfirmed special assessment?
 - a. The intent of this language is to ensure that the seller is disclosing information they might have related to special assessments. For example, a homeowner association might be seeking bids to replace the roof with the intention of assessing the costs for each property and proceeding within the year. This should be disclosed to a buyer and may even be negotiated within the contract.
5. 24 k) appears to be a possible problem, doesn't proposed and unconfirmed mean the same?
 - a. A "proposed" assessment is simply in the discussion stage; an "unconfirmed" assessment may involve an assessment that the association has put up for vote, but the vote has not yet been taken; a "pending" assessment has been approved, but the payment date is in the future.

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Paragraph 34 - Alternative Energy

1. This paragraph references that the seller is to provide the buyer not later than 3 business days after date of acceptance with copies of documentation and agreements, and then allows the buyer to declare the contract null and void after another 3 business days after the receipt of that documentation. Does this conflict with the attorney review paragraph which provides 5 days?
 - a. Attorney review is not resolved in 5 business days, this is just the amount of time to provide requests to the other side. More than likely, the time period for the cancellation under this paragraph may expire prior to the end of attorney review.
3. Would other energy systems, like geo, go in solar panel section?
 - a. Yes. Other systems (e.g. wind turbine, hydropower systems, geothermal system, etc.) may be listed in this paragraph.