

PRESENTATION ON NEW MULTI-BOARD COMMON CONTRACT 4.0

A COMPARISON OF THE NEW MULTI-BOARD RESIDENTIAL REAL ESTATE CONTRACT 4.0 (YEAR 2006 VERSION) WITH THE 3.0 VERSION

In this outline I will attempt to review and contrast the Multi-Board Residential Real Estate Contract 4.0, approved or soon to be approved throughout the Chicago area, with the Multi-Board Residential Real Estate Contract 3.0, the so-called "Common Contract" currently in use.

The Boards of Realtors® in the area encompassed by the Multiple Listing Service of Northern Illinois (MLSNI) have heretofore adopted the 3.0 contract form as its regional contract of choice. Input was received from many Boards, in part accounting for the changes and for the fact that practice and procedure can differ from place to place, even within the region.

In addition to comparing the two contract forms, it is my assignment to point out areas where the user will have to adapt to a slightly different way of doing business. Compare these differences with the impact in those areas (the South/Southwest Association, the city of Chicago or the Will County area, for instance) where other contract forms are used.

I trust that those in attendance understand that my list cannot be assumed to be exhaustive. With that in mind, I thank those in attendance for their attention and trust that their valuable time will be well spent.

Respectfully submitted,

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<u>OVERVIEW</u>

	<u>3.0 version</u>	<u>4.0 version</u>
<u>Contract title</u>	Multi-Board Residential Real Estate Contract 3.0	Multi-Board Residential Real Estate Contract 4.0
<u>Number of pages</u>	8	11 (includes Loan Status Disclosure Form p.11)
<u>Paper size</u>	8 ½ x 11	8 ½ x 11
<u>Place for initials</u>	bottom of pages	bottom of pages in box
<u>Place for address of property</u>	bottom of pages	bottom of pages in box
<u>Type Font size</u>	11 and 10	11 throughout
<u>Place for Proof of Presentation</u>	yes (page 10)	yes (page 8)
<u>Copyright</u>	held by IRELA	still held by IRELA
<u>Signature page</u>	Page 8	Page 10
<u>Social security #</u>	not required	still not required
<u>Notice by Email</u>	permitted	permitted
<u>Notice by Overnight Delivery</u>	not specifically permitted	permitted
<u>References to Calendar Days</u>	Lead-Based Paint (#10) and Specified Party Approval (#39)	Lead Based Paint Inspection only
<u>Spaces Between Paragraphs</u>	No	Yes
<u>Homeowner Insurance too Expensive (house “rated”)?</u>	no provision	Opt-out provision (10 business days)

Flood Insurance

obtain if required by lender

Opt-out provision (10 business days)

Loan Status Disclosure

not required or included

available (page 11)

Attorney Review

can declare deal off if no agreement w/i 10 bus. days

deal dead if no agreement w/i 10 bus. days

Professional Inspection

can declare deal off if no agreement w/i 10 bus. days

deal dead if no agreement w/i 10 bus. days

FORMAT/LAYOUT

1. The 4.0 contract is slightly longer than 3.0, but primarily due to spaces between paragraphs and certain instances where boxes were used to highlight certain terms where initials were desirable. The layout makes more sense, with the relocation of the “Other Provisions” paragraph to paragraph 30, immediately before the Optional Provisions section. The paragraphs now follow in order of Basic Information (The Parties, The Real Estate, Fixtures and Personal Property, Purchase Price, Closing, Possession, Disclosures, Prorations), Customary Contingencies (Attorney Review, Professional Inspection, Mortgage Contingency, Homeowner Insurance, Flood Insurance, Condominium/Common Interest Associations), Transfer of Title Issues (Deed, Title, Plat of Survey, Escrow Closing, Damage to Real Estate Prior to Closing, Real Estate Tax Escrow, Seller Representations, Condition of Real Estate and Inspections, Governmental Compliance), General Provisions (Business Hours/Days, Facsimile, Directions to Escrowee, Notice, Performance, Choice of Law/Good Faith, Other Provisions) and Optional Provisions.
2. There are longer lines and more space in paragraph 1 to identify the Parties.
3. Spaces between the paragraphs in the contract provide for better differentiation. In the 3.0 version there were spaces between the Optional Paragraphs but not between the required provisions.
4. The type font is 11 throughout the contract. The type font in the 3.0 version got smaller on the last few pages.
5. There are boxes at the bottom of each page to separate the place for the parties’ initials and the address of the real estate from the text of the contract.
6. Other than in paragraph 3 (Fixtures and Personal property), when a check mark is required a box is provided (e.g., paragraph 4, 7, 11 and 21).
7. On the signature page, the text stands out better, in larger type font, with a requirement that the Parties’ name(s) be printed. The parties need to be identifiable so that counsel can send notice if no attorney’s name is provided.
8. Bold print is used to alert the user to provisions where rights of Parties may be adversely affected or where the Contract may be deemed null and void.
9. Brackets are used to indicate that a choice is to be made.
10. Paragraph number references in the text of the Contract were changed where necessary.
11. A box is provided in the newly named section “Seller Rejection” on page 10.

SUBSTANTIVE CHANGES

In order of appearance, the changes in the text are:

- In paragraph 2, if the Real Estate is a condominium, cooperative apartment or townhome, and there is a parking space or spaces included, there is a place to indicate the number of parking spaces included and the identification number of the space or spaces (if known). The manner in which the user indicates whether the parking space is deeded, limited common element or an assigned space is clearly delineated by boxes. If this information is not known or not available, I suggest adding “TBD”.
- In the Personal Property section, “Outdoor Playsets” is set forth beneath “Window Air Conditioner(s)”. Regarding “Electronic Garage Door Opener(s)” the space for inclusion of the number of transmitters has been replaced with the word “all”.
- The Closing paragraph has been relocated to Paragraph 5, but no changes were made to the text of the Closing paragraph.
- The Possession paragraph still follows the Closing paragraph. The Possession paragraph begins as follows: “Unless otherwise provided in Paragraph 39...” to eliminate the ambiguity that existed in the 3.0 version. In the 3.0 version the Possession paragraph requires that “Seller shall deliver possession at closing” and the Optional Post-Closing Possession paragraph attempts to provide a mechanism for the delivery of possession after closing.
- In the Prorations Paragraph (now #8) proratable items include “...Special Service Area tax for the year of closing only...” The paragraph relocates the recitation that accumulated reserves of a Homeowner/Condominium Association are not a proratable item from the end of the paragraph to immediately prior to the reference to the amount of the assessments. The paragraph includes reference to assessments for a Master/Umbrella association, if applicable. Installments due after the year of closing for Special Service Area taxes (payable in advance, unlike general real estate taxes, which are paid in arrears) are specifically described as not proratable and are intentionally treated differently than Governmental (Non-Homeowner) Special Assessments for public improvements.
- The Attorney Review paragraph (now #9) provides for an “automatic kill’ of the Contract if written agreement on proposed modifications is not reached within 10 business days after acceptance. This change was deemed warranted by applicable case law and the desire of the drafters to avoid any possible ambiguity resulting from negotiations that are carried on after the 10th business day without written agreement to extend the time period. The

3.0 contract allows for continuation of such negotiations in that it provides for the Contract to be deemed null and void if “...written agreement on proposed modifications cannot be reached...(emphasis added)”whereas the language in the 4.0 Contract is more direct and definite, to wit: “...if...written agreement is not reached (emphasis added)...”

- o The Inspections paragraph (now #10) likewise contains the same “automatic kill” language as is contained in the Attorney Review paragraph. The paragraph also further emphasizes that word “only” (by both underlining and using bold print) in the context that the inspection is to cover major components of the improvements. The paragraph contains a new sentence: “The fact that a functioning component may be at the end of its useful life shall not render the component defective for the purpose of this paragraph” in an attempt to end potential disputes over whether such old components may be described as “defective” and therefore eligible for credits or repairs under this paragraph. Finally, the paragraph clarifies that if radon mitigation is performed, Seller is to pay for a retest.
- o The Mortgage Contingency paragraph refers to the Loan Status Disclosure that is attached as an exhibit on page 11. This Disclosure was developed in 2002 by a committee comprised of representatives of IRELA, IAR and IAMB (Illinois Association of Mortgage Brokers) as an attempt to standardize and make meaningful the so-called “Pre-approval” or “prequalification” letters presented by loan officers to buyers and used as inducements to sellers to enter into contracts. The paragraph was also amended to replace “unconditional” with “firm” with reference to the financing commitment to be obtained by a buyer, on the theory that all loan commitments contain conditions of some sort (continued employment, no new debt, surviving and remaining of sound mind and memory to the time of closing, etc.) that should not be considered to be a basis for extending the financing contingency. Otherwise, buyers would continue to seek extensions of the financing contingency through the date of closing. The type of financing (fixed or adjustable, conventional or FHA or VA or other) is to be clearly determined in this paragraph at the time of executing the contract. If there is to be a closing costs credit there is a reference to a specific optional paragraph. The remaining terms have been rearranged for better organization.
- o New paragraph 12 is entitled “Homeowner Insurance”. The 3.0 version does not contain a comparable paragraph. The paragraph addresses the situation where a buyer finds the cost of Homeowner’s Insurance to be unreasonably high, typically due to the fact that the property has had multiple insurance claims and as a result has been “rated” by one or more insurance companies. The terms used (“Insurance Service Organization Homeowner 3” policy and “Preferred Premium” rates) are terms of art in the insurance industry, and they reflect the type of coverage and typical premium payable in most residential transactions. While counsel may not be conversant with such

guidelines for insurance premiums, the paragraph adopts an ascertainable insurance industry standard which will be resistant to arbitrary claims of lack of insurability. The paragraph will also assist buyer's counsel in determining whether insurance proceeds were used to correct defects exist which may have been recently addressed by a seller but not disclosed to a buyer. The drafters considered excepting the situation where the increased cost of insurance resulted from the claims history of the buyer rather than of the Real Estate. The drafters decided that in most situations where a buyer could not obtain insurance at Preferred Premium rates such a buyer, if seeking financing, might also have difficulty obtaining financing approval. The time period for the buyer to opt out of the transaction was limited to 10 business days after acceptance to protect the diligent buyer and tie the time period to the same period for Attorney Review and Professional Inspections. While the determination of insurability and the cost thereof is often left for the last few days of the transaction, the drafters decided that allowing the buyer to opt out on the eve of closing would do a disservice to sellers. The trade-off in allowing buyers to opt out under this paragraph is to have it occur as early as possible in the transaction.

- o Flood Insurance (new paragraph #13) is another paragraph that deviates substantially from the 3.0 version. The right is granted to the buyer to opt out of the transaction if the Real Estate is determined to be “in a special flood hazard zone which requires Buyer to carry flood insurance” (emphasis added). Some committee members argued for language more favorable to buyers that would not have included the emphasized text, on the theory that the final language provided no protection to a cash buyer upon whom no requirements are ever placed. This issue is one that will be determined in practice. Implicit in the term “requires” are conditions placed upon a buyer by a lending institution. So why allow only 10 business days to opt out, instead of the adopting the time of mortgage commitment? It was decided that, absent a failure by a seller to disclose a special flood zone status under the Residential Real Property Disclosure Act, fairness required that the time for the opt-out be consistent with the same 10-business day window found in the Homeowner Insurance, Attorney Review and Professional Inspection paragraphs. Opt-out provisions should award the diligent and should not be availed by those who “sleep on their rights”.
- o Condominium – This paragraph is now #14 instead of #27 as in the 3.0 version. Reference is now made, where applicable, to “Common Interest Associations”, the term used in the Illinois Condominium Property Act to describe what are commonly called “town home associations”. Bold print was used to alert the user of the contract to the possibility of a declaration that the contract would be declared null and void.
- o There were no changes to the Deed and Title paragraphs.

- **Plat of Survey (now #17) contains a subtle change. On line 193 the language reads: “...survey shall show all corners *staked, flagged, or otherwise* monumented.” The comparable language in the 3.0 version stated “...*staked and flagged or otherwise* monumented”. The drafters found nothing in the Illinois Administrative Code that required a boundary survey to include stakes or flags. In many areas where the contract is used flags or stakes constitute an additional cost; nevertheless, the contract still requires the surveyor to certify that the survey satisfies the requirements of a boundary survey.**
- **Escrow Closing (now #18, moved from #23) – a sentence was added to the end of the paragraph to address the cost of an Agency closing in a cash transaction. While different from a Deed and Money or “New York” style closing, Agency escrow closings are commonly used in the applicable area, with the parties and real estate professionals expecting to receive a HUD-1 Settlement Statement from a title company, even where the buyer pays cash. The 4.0 version clarifies that the cost of Agency escrow closings in cash transactions shall be shared by the parties.**
- **Damage to Real Estate Prior to Closing (still #19) – this paragraph has included reference to Condemnation, even though the title of the paragraph contains no such reference. In the 4.0 version the words “...together with the proceeds of the condemnation award...” was added at line 208; the 3.0 version lacked any such reference.**
- **Real Estate Tax Escrow – This paragraph is now paragraph #20, moved from #17 in the 3.0 version. Other than the change in the title (the word “Property” has been deleted), the text of the paragraph is the same as in 3.0.**
- **Seller Representations (now #21, moved from #20) contains the addition of a representation regarding pending condemnation or eminent domain proceeding and a significant change in the area of Special Service Area tax. The paragraph also makes a distinction between a “*pending unconfirmed* special assessment” and a “*proposed or confirmed* special assessment”. Check boxes were added to the text to ensure complete disclosure of information in this regard. While many committee members expressed concern that the boxes should not be checked by buyers or their agents, neither of whom may have the necessary information, and that as a result the contract requires the seller to insert the appropriate response, thereby creating a “counter-offer” situation, the subject matter was considered to be of such importance that the usual concerns regarding the necessity of obtaining initials and signatures in a counter-offer situation were outweighed by the desire to avoid confusion that results when buyers “attempt to make representations for sellers” in contracts.**

- **Business Days/Hours (new #24) combines old paragraph 26 and the provisions in the Notice paragraph regarding the length of Business Days.**
- **Direction to Escrowee (new #26) incorporates in one paragraph the many instances in the 3.0 contract where the requirement was set forth of written direction to Escrowee or a court order for the disbursement of earnest money.**
- **Notice (now #27) specifically excepts the provisions of this paragraph from those notice provisions contained in the paragraph entitled “Sale of Buyer’s Real Estate”. It also provides that notice may be served by commercial overnight delivery, such as Federal Express.**
- **Performance (now #28) contains a significant change in the first sentence dealing with the potential for an award of attorney’s fees. The language in the 3.0 version “In the event of default by Seller or Buyer...” has been changed to “In any action with respect to this Contract...” The language allows for fee-shifting in cases other than those involving defaults and adopts language and reasoning of the decision in the case of *Erlimbush v. Largent*.**
- **Sale of Buyer’s Real Estate (now #31) has several changes. The use of “his” has been changed to “such” when referring to the real estate to be sold by the buyer. Certain formatting changes were made to make the paragraph easier to use.**
 - **Subparagraph (B) (1) formerly provided that the contract would be contingent upon the Buyer “...having a contract for the sale of Buyer’s real estate in full force and effect as of...”; the language now reads: “...having entered into a contract for the sale of Buyer’s real estate that is in full force and effect as of...” There was also added language to determine the rights of buyers who served notice that they had not procured a contract for the sale of buyer’s real estate (contract would be deemed null and void) and of those buyers who did not serve such notice as of the date set forth in said subparagraph (contract would remain in full force and effect).**
 - **Subparagraph (B) (2) addresses the problem that results when buyers have difficulty closing sales of their real estate, often scheduled to occur on the same date as the closing of the subject transaction. Since counsel for such buyers are often unable to provide contemporaneous written notice to sellers that the closing of the sale of buyer’s real estate has not occurred (often due to last-minute lender issues), this subparagraph provides for notice from buyer of buyer’s inability to close the sale of buyer’s real estate to be given no later than the close of business on the next Business Day.**

- **Subparagraph (C) provides for notice of seller' intention to execute another contract for the sale of the subject Real Estate and refers to it colloquially as a "kick-out" notice. The manner of providing notice was incorporated in this subparagraph to provide clarification that the differences in the manner of giving notice applied only to the "kick-out" notice described in this subparagraph and not to any other type of notice referred to earlier in paragraph 31. Notice is to be made only upon a party and not upon the agent and not upon the attorney. Notice by facsimile was deleted and notice by commercial overnight delivery (effective upon delivery or as of 4:00 pm on the next delivery day following deposit) was added. A waiver of ethical objections allows for a seller's attorney or representative to serve notice upon a represented buyer.**
- **Subparagraph (E) incorporates the requirement set forth in a different subparagraph in the 3.0 version that the buyer cooperate and provide relevant information. The subparagraph stands alone to indicate that the requirement of cooperation extends to all matters addressed in paragraph 31.**
- **Closing Cost Credit (new #33) did not exist in any earlier version of the contract. It provides for the allowance of credit from seller to buyer for closing costs (not necessarily a percentage of the purchase price or "loan points") in a definite amount, not to exceed those allowed by a lender to be disclosed on a HUD-1 Settlement Statement. This paragraph will address many common situations and is designed to prevent possible loan fraud.**
- **Interest-Bearing Accounts (now #3) raises the allowable "administrative fee" to set up and administer the account from \$75.00 to \$100.00.**
- **Well and/or Septic/Sanitary Inspections (now #37) contains significant changes requested by certain Boards. There are specific standards regarding the volume of output from the well. The septic report can be provided by "the applicable County Health Department, a Licensed Environmental Health Practitioner or a licensed well and septic inspector..." The Seller may opt not to correct defects when the cost thereof, including the cost of landscaping, exceeds \$3,000.00 and the parties cannot reach agreement on the allocation of repair costs. The cost of any additional required testing is the responsibility of the seller. The parties may establish an escrow if the report recommends additional testing.**
- **Wood-Destroying Infestation (new #38) follows commonly used "Termite Inspection" riders commonly used in many areas. The inspection is to be undertaken and a report provided by a seller to a buyer within 10 business days after acceptance; the buyer then has 5 business days after receipt of the report to opt out.**

- **Post-Closing Possession (now #39) contains significant changes to what was contained in #32 in the 3.0 version. The amount of the possession escrow can be expressed as a percentage of the sale price or an agreed negotiated amount. Use and occupancy expense is payable only for the number of days of actual possession, notwithstanding the expression that possession may be retained for a specific (and possibly different) number of days after closing. Seller's right to the return of the deposit is conditioned upon compliance with the paragraph regarding the condition of the Real Estate upon surrender of possession, making the deposit not merely a guaranty regarding the payment of use and occupancy. The amount of use and occupancy payable after the date possession was to have been delivered as described on line 428 increases fivefold pursuant to subsection (b). The amount of the deposit is not the maximum due from seller to buyer pursuant to this paragraph.**
- **Specified Party Approval (now #42) has been amended to bring the time period for opt-out pursuant thereto in line with other provisions in the contract. In the 3.0 version the time period was expressed in calendar days; the time period in the 4.0 version is 10 business days after acceptance.**
- **Miscellaneous Provisions (now #43) adds two new categories of "Commercial/Investment/Starker Exchange" and "Cooperative Apartment" to the paragraph. Agreements in these six areas are to be drafted by counsel for the respective parties and executed on or before closing.**
- **On lines 470-471 the representation was intended to prevent unauthorized "knock-off contracts", especially those that designated title providers and restricted the rights of the parties.**
- **The copyright to the Contract continues to be held by the Illinois Real Estate Lawyers Association for the benefit of all the Boards and Bar Associations that participated. An opinion from Intellectual Property Law counsel suggests that one entity hold the copyright and that entity should be prepared to litigate issues of unauthorized use. In this manner, the Boards would avoid the expense of such litigation.**
- **In addition to the requirement on the signature page that the names of the parties be printed, the lines to insert addresses of attorneys and agents have been deleted. A line has been provided for Homeowner's/Condo Association (if any), Management Company or other contact, and phone number.**
- **On lines 518-520, proof of presentation of offers and an indication that the Seller has rejected an offer in a multiple-offer scenario is available and the section is separated from the signature area by a box. A Seller negotiating price or other terms with a Buyer would not use this section.**

- **The Loan Status Disclosure is intended to provide uniformity and substance to “prequalification” and “pre-approval” letters commonly issued by loan officers. The various sections correspond with the various stages of inquiry and allow “house shoppers” to be distinguished from those ready to make an offer for the purchase of real estate.**

- **The only significant substantive change made to the Amendment, Notice and Response forms was the deletion from the Cancellation Agreement of the signature lines for the brokers. Attorneys should note that implicit in the omission of the signature lines is fact that brokers will no longer be deemed to waive any claim for commission when this form is used to direct the escrowee to return earnest money. Brokers did not want to be forced to waive commission claims merely because the buyer was to receive the return of earnest money. Likewise, a buyer should not be required to wait for the signature of a broker who is unwilling to cooperate in the return of a buyer’s deposit. The right to the return of an earnest money deposit and the right to a commission are independent matters.**