

## PRESENTATION ON NEW MULTI-BOARD COMMON CONTRACT 5.0

### A COMPARISON OF THE NEW MULTI-BOARD RESIDENTIAL REAL ESTATE CONTRACT 5.0 (YEAR 2009 VERSION) WITH THE 4.0 VERSION

In this outline I will attempt to review and contrast the Multi-Board Residential Real Estate Contract 5.0, approved or soon to be approved throughout the Chicago area, with the Multi-Board Residential Real Estate Contract 4.0, the so-called “Common Contract” currently in use. At the time these materials were compiled, the final draft of the 5.0 Contract had not been completed.

Many Boards of Realtors® in the Chicago area have heretofore adopted the 4.0 contract form as its regional contract of choice. Input was received from most of the signatory Boards and bar associations in the same geographical areas, 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, I will try to point out areas where the user will have to adapt to a slightly different way of doing business. The user should 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. My summary should not be assumed to be exhaustive.

At the time this comparison was drafted the drafting committee had not made final decisions regarding format, type font and layout.

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Respectfully submitted,

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<b><u>OVERVIEW</u></b>
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	<b><u>5.0 version</u></b>	<b><u>4.0 version</u></b>
<b><u>Contract title</u></b>	<b>Multi-Board Residential Real Estate Contract 5.0</b>	<b>Multi-Board Residential Real Estate Contract 4.0</b>
<b><u>Number of pages</u></b>	<b>11 (Loan Status Disclosure is not considered part of Contract and has no page number)</b>	<b>11 (includes Loan Status Disclosure Form p.11)</b>
<b><u>Paper size</u></b>	<b>8 ½ x 11</b>	<b>8 ½ x 11</b>
<b><u>Place for initials</u></b>	<b>bottom of pages in box</b>	<b>Same</b>
<b><u>Place for address of property</u></b>	<b>bottom of pages in box</b>	<b>Same</b>
<b><u>Type Font size</u></b>	<b>TBD (Palatino font)</b>	<b>11 (Times New Roman font)</b>
<b><u>Place for Proof of Presentation</u></b>	<b>yes (page 11)</b>	<b>yes (page 10)</b>
<b><u>Copyright</u></b>	<b>remains held by IRELA</b>	<b>Same</b>
<b><u>Signature page</u></b>	<b>Page 11</b>	<b>Page 10</b>
<b><u>Notice by Email</u></b>	<b>permitted (minor changes) “opt out” available</b>	<b>permitted</b>
<b><u>Notice by Overnight Delivery</u></b>	<b>permitted</b>	<b>Same</b>
<b><u>References to Calendar Days</u></b>	<b>Lead-Based Paint Inspection (#10) only</b>	<b>Same</b>
<b><u>Radon Rider</u></b>	<b>Available</b>	<b>Not available</b>
<b><u>Short Sale Addendum</u></b>	<b>Available</b>	<b>Not Available</b>

**Paragraph-by-paragraph changes:**

**5.0 version**

**4.0 version**

**Attorney Review**

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

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

Distinction b/w suggestions for changes that may be withdrawn if not accepted (no right to cancel) and modifications that require resolution

Nothing expressed regarding suggestions that may be withdrawn if not accepted

Notices “default” to modifications that require resolution unless otherwise specified

**Professional Inspection**

can declare deal off if no agreement w/i 10 bus. AND inspection results can be a basis for termination (no obligation to negotiate in such event)

deal dead automatically if agreement not reached w/i 10 bus. days

formatted in subparagraph form

narrative paragraph form

**Mortgage Contingency**

loan amount expressed as a percentage of price

loan amount expressed as a dollar amount

No mention of Loan Status Disclosure form

**Homeowner Insurance too Expensive (house “rated”)?**

Same basic provisions (minor changes in language)

Opt-out provision for cash deal -10 bus. days or by the mortgage contingency date

**Paragraph-by-paragraph changes (continued):**

	<b><u>5.0 version</u></b>	<b><u>4.0 version</u></b>
<b><u>Title</u></b>	Title insurance may insure against “court-ordered forced removal of encroachments	
<b><u>Survey</u></b>	Similar requirements “visible evidence of improvements...” “set monuments or witness corners at all accessible corners... visibly staked or flagged”	Boundary survey “showing any encroachments...” “show all corners staked flagged or otherwise monumented”
<b><u>Seller’s Representations</u></b>	redesigned-column form Representations specifically survive closing All are based on seller’s actual knowledge or notice	paragraph form survival not specified some absolute reps, not limited to seller’s knowledge (e.g., improvements to property w/o permits, eligibility for tax exemptions
<b><u>Municipal Ordinance/ Transfer Tax/ Governmental Compliance</u></b>	New paragraph (former paragraph only dealt with tax reporting compliance) *Provides caution re compliance with local ordinances; Transfer taxes payable per ordinance*	

**Paragraph-by-paragraph changes (continued):**

	<b><u>5.0 version</u></b>	<b><u>4.0 version</u></b>
<b><u>Facsimile and Electronic Signatures</u></b>	allows for fax or digital signatures to for executing, negotiating or finalizing contract	Entitled: "Facsimile" in 4.0 form
<b><u>Direction to Escrowee</u></b>	moved language regarding disbursement of earnest money from Performance paragraph to this paragraph	
<b><u>Notice</u></b>	Opt-out provision regarding Notice by e-mail	
<b><u>Optional Provisions</u></b>	clarifies that paragraph numbers of Optional Paragraphs chosen need not be itemized in Para. 30	
<b><u>Sale of Buyer's Real Estate</u></b>	after "kick-out" notice, additional deposit required from buyer to be in form of cashier's check	
<b><u>"Credit at Closing"</u></b>	credit given at closing for Buyer's prepaid expenses, closing costs or both	Entitled: "Closing Cost Credit" in 4.0
<b><u>VA or FHA Financing</u></b>	incorporates by reference VA and FHA forms and disclosures omits requirement that Seller contribute to Buyer's lender fees	contains specific terms  requires Seller to contribute ≤ \$200.00 for lender fees
<b><u>Post-Closing Possession</u></b>	holdover "rent" 3 times daily use and occupancy expense	holdover "rent" 5 times daily use and occupancy expense

**Paragraph-by-paragraph changes (continued):**

**AS-IS**

**clarifies definition of Real Estate  
Proposal for Buyer to satisfy municipal repair ordinance deleted from original draft**

**Loan Status Disclosure**

**referred to as  
“recommended form –  
to be completed by lender”  
NOT intended as a  
required part of contract**

**available (page  
11) – intended  
to be part of  
contract**

## **FORMAT/LAYOUT**

- 1. The 5.0 contract may eventually be slightly longer than 4.0, but primarily due to formatting changes where information regarding selections is placed in column format. The 5.0 layout retains the concept of the 4.0 form of relocating the “Other Provisions” paragraph to paragraph 30, immediately before the Optional Provisions section. The paragraphs continue to follow in order of Basic Information (The Parties, The Real Estate [and the term “Real Estate” is newly defined], Fixtures and Personal Property, Purchase Price, Closing, Possession, Disclosures [renamed “Statutory Disclosures”], Prorations), Customary Contingencies (Attorney Review, Professional Inspection [renamed “Professional Inspections/Notices”]), 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 [renamed to add “Condemnation”], Real Estate Tax Escrow, Seller Representations, Condition of Real Estate and Inspections, Governmental Compliance [renamed “Municipal Ordinance/Transfer Tax/Governmental Compliance”]), General Provisions (Business Hours/Days, Facsimile [renamed “Facsimile and Digital Signatures”], Directions to Escrowee, Notice, Performance, Choice of Law/Good Faith, Other Provisions) and Optional Provisions (including the renamed “Credit at Closing” [rather than “Closing Cost Credit”]).**
- 2. The “Miscellaneous Provisions” paragraph has been expanded to include and a separate box for “1031/Starker Exchange” (which had previously been part of “Commercial/Investment”) and a new box for “Short Sale”.**
- 3. The type font has been changed from Times New Roman (in the 4.0 version) to Palatino, which was determined to be clearer than Times New Roman after a document has been faxed multiple times.**
- 4. In the Seller’s Representations paragraph, the boxes have been relocated so that the selection is located to the right of the box, to make this paragraph consistent with every other paragraph containing check boxes for such selections.**
- 5. The Loan Status Disclosure form is subtitled “Recommended Form - To Be Completed By Loan Officer” to help distinguish the form as not a required section of the Contract. Its use is still encouraged, but because it is not a form to be signed by one of the parties it does not constitute part of the Contract, which can be valid and binding even if the form is not used.**

## SUBSTANTIVE CHANGES

In order of appearance, the changes in the text (new language indicated by italics) are:

- A. Paragraph 2 (“The Real Estate”) defines the term “Real Estate” as “the *Property*, all improvements thereon *and the fixtures and Personal Property included therein*”.
- B. Paragraph 5 (“Closing”) requires closing to occur at the *escrow office... of the title company (...or its issuing agent) that will issue the Owner’s Policy of Title Insurance*. The word “geographically” was considered superfluous and was removed from the phrase “situated nearest the Real Estate...”
- C. Paragraph 7 (now entitled “Statutory Disclosures”) has added checkboxes to indicate receipt by Buyer of the IEMA Pamphlet “Radon Testing Guidelines for Real Estate Transactions” and for receipt of the Disclosure of Information on Radon Hazards.
- D. Paragraph 8 (“Prorations”) the words *senior freeze or senior deferral* were added after the words “senior citizen or other exemption” because the freeze and deferral are technically not “exemptions” but are within the classification of tax relief vehicles a seller should apply for, maintain or obtain for the year of closing. The necessary documentation is to be submitted to the “*appropriate governmental entity*”, rather than to the “Assessor’s Office” as in the prior version of the Contract.
- E. Paragraph 9 (“Attorney Review”) no longer 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 the draconian results occasioned by the failure of the attorneys for the respective parties to resolve issues until after the 10<sup>th</sup> business day. The 5.0 contract, like the old 3.0 version, allows for continuation of such negotiations in that it provides for the Contract MAY BE terminated upon notice from either Party if written agreement is not reached with respect to proposed modifications.

The most significant change is the creation of four (4) subparagraphs that provide for the authority of the attorney. The drafters allowed for the specific election on the part of an attorney to suggest changes that, if not accepted, would not give rise to the right on the part of either Party to declare the Contract null and void. The language is as follows:

*Within five (5) Business Days after the Date of Acceptance, the attorneys for the respective Parties, by Notice, may:*

*a). Approve this Contract; or*

*b). Disapprove this Contract, which disapproval shall not be based solely upon the Purchase Price; or*

*c). Propose modifications except for the Purchase Price. If within ten (10) Business Days after Date of Acceptance written agreement is not reached by the Parties with respect to resolution of the proposed modifications, then either Party may terminate this Contract by serving Notice, whereupon this Contract shall be null and void; or*

*d). Propose suggested changes to this Contract. If such suggestions are not agreed upon, neither Party may declare this Contract null and void and this Contract shall remain in full force and effect.*

*Unless otherwise specified, all Notices shall be deemed made pursuant to Paragraph 9 (c). If Notice is not served within the time specified herein, the provisions of this Paragraph shall be deemed waived by the Parties and this Contract shall remain in full force and effect.*

**F. Paragraph 10 (now entitled “Professional Inspections/Notices”) likewise no longer contains the same “automatic kill” language as has been removed from the Attorney Review paragraph. The paragraph consists of 4 subparagraphs. In subparagraph (a) the sentence “Buyer agrees that minor repairs and routine maintenance items of the Real Estate do not constitute defects and are not part of this contingency” has been moved from the end of the paragraph in the 4.0 version and placed in subparagraph (a) immediately after the descriptions of the available inspections. Immediately thereafter are located pre-existing sentences concerning useful life of components, indemnification for damage during inspections, the limitation on the scope of the inspections and a description of “major components”. Subparagraph (b) contains the Notice provisions and provides that if within ten (10) business days after the Date of Acceptance, written agreement *cannot* be reached with respect to resolution of all inspection issues “*either party may terminate this Contract by serving written notice...*” thereby confirming that termination is not automatic but rather requires the affirmative act of sending Notice. Failure of Buyer to conduct the inspection(s) and notify Seller within the time specified continues to operate as a waiver of Buyer’s rights, but such provision is now a “stand-alone” subparagraph (d).**

**A significant change is found in subparagraph (c) where a party may now terminate a transaction in the event the inspection “*...reveals that the condition of the Real Estate is unacceptable to Buyer...*” and proper notice of same is provided. Thus the results of the inspection(s) may give rise to termination of the Contract without the need for additional negotiation between the Parties.**

- G. Paragraph 11 (“Mortgage Contingency”)** has been changed so that the loan amount is expressed as a percentage of the sales price. In addition, the first sentence containing the check boxes to determine whether Seller has received a completed Loan Status Disclosure has been deleted, partly in an attempt to clarify that failure to complete and deliver the Loan Status Disclosure did not nullify the Contract. If FHA or VA financing is chosen by Buyer, the parties are directed to complete Optional Paragraph 35.
- H. Paragraph 12 (“Homeowner Insurance”)** contains minor changes, including the replacement of “Preferred” when referring to rates to “*standard*”.
- I. Paragraph 13 (“Flood Insurance”)** contains a minor change, replacing “within the term specified in paragraph 11” with “*by the mortgage contingency deadline date described in paragraph 11*” when referring to the time limitation for exercise of right to declare the Contract null and void for those buyers who use the Mortgage Contingency paragraph.
- J. Paragraph 14 (“Condominium/Common Interest Associations”)** contains an addition to subparagraph (b) that “Seller shall be responsible for *payment of* all regular assessments ...”
- K. Paragraph 16 (“Title”)** – The sentence “If the title commitment discloses any unpermitted exceptions, or if the Plat of Survey shows any encroachments which are not acceptable to Buyer, then Seller shall have said exceptions, survey matters or encroachments removed, or have the title insurer commit to insure against loss or damage that may be cause by such exceptions or encroachments” was replaced with “*If the title commitment discloses any unpermitted exceptions, or if the Plat of Survey shows any encroachments or other survey matters that are not acceptable to Buyer, then Seller shall have said exceptions, survey matters or encroachments removed, or have the title insurer commit to either insure against loss or damage that may result from such exceptions or survey matters or insure against the court-ordered forced removal of the encroachments*”. This change conforms the terms of the Contract to the title insurance coverage available pursuant to the 2006 ALTA Owner’s Policy.
- L. Paragraph 17 (“Plat of Survey”)** has been rewritten by Dick Bales of Chicago Title changed to read as follows: “Not less than one (1) Business Day prior to closing, except where the Real Estate is a condominium (see Paragraph 14) Seller shall, at Seller’s expense, furnish to Buyer or Buyer’s attorney a plat of survey that conforms to the current Minimum Standards of Practice for boundary surveys, is dated not more than six (6) months prior to the date of Closing, and is prepared by a *professional land surveyor licensed under the laws of the State of Illinois to practice land surveying*. *The plat of survey shall show visible evidence of improvements, rights of way, easements, use and measurements of all parcel lines. The land surveyor shall set monuments or*

*witness corners at all accessible corners of the land. All such corners shall be visibly staked or flagged. The plat of survey shall include the following statement placed near the professional land surveyor seal and signature: "This professional service conforms to the current Illinois minimum standards for a boundary survey." A Mortgage Inspection, as defined, is not a boundary survey and is not acceptable."*

**M. Paragraph 21 ("Seller Representations") has been reformatted and reorganized to eliminate (except in cases of Special Assessments and Special Service Area taxes) unconditional or absolute representations by Seller. All other representations are now based solely upon Seller's knowledge. Seller's representations now expressly survive the closing. The checkboxes concerning special assessments and SSA's have been reoriented to precede the selection rather than follow it, to conform to the orientation of checkboxes in the remainder of the contract. The new Paragraph 21 is set forth in full in blue as follows:**

**21. SELLER REPRESENTATIONS:** *Seller represents that with respect to the Real Estate Seller has no knowledge of nor has Seller received written notice from any Governmental body regarding:*

- (a) zoning, building, fire or health code violations that have not been corrected;*
- (b) any pending rezoning;*
- (c) boundary line disputes;*
- (d) any pending condemnation or Eminent Domain proceeding;*
- (e) easements or claims of easements not shown on the public records;*
- (f) any hazardous waste on the Real Estate;*
- (g) any improvements to the Real Estate for which the required permits were not obtained;*
- (h) any improvements to the Real Estate which are not included in full in the determination of the most recent tax assessment; or*
- (i) any improvements to the Real Estate which are not eligible for the home improvement tax exemption.*

Seller further represents:

1. There **[check one]**  **is**  **is not** a pending or unconfirmed special assessment affecting the Real Estate payable by Buyer after date of Closing.
2. The Real Estate **[check one]**  **is**  **is not** located within a Special Service Area, payments for which will not be the obligation of Seller *after the year in which the closing occurs.*

**If any of the representations contained herein regarding a special assessment or Special Service Area are unacceptable to Buyer, Buyer shall have the option to declare this Contract null and void. If written notice of the option to declare this Contract null and void is not given to Seller within ten (10) Business Days after Date of Acceptance or by the mortgage contingency deadline date described in Paragraph 11 (whichever is later), Buyer shall be deemed to have waived such option and this Contract shall remain in full force and effect. Seller's representations contained in this paragraph shall survive the closing.**

- N. Paragraph 23 (formerly “Governmental Compliance” and now entitled “Municipal Ordinance/Transfer Tax/Governmental Compliance”) adds a new subparagraph A as follows: *“Parties are cautioned that the Real Estate may be located in a municipality that has adopted a pre-closing inspection requirement, municipal transfer tax or other similar ordinance. Transfer taxes required by municipal ordinance shall be paid by the party designated in such ordinance.”* An earlier proposal to require Seller to comply with the terms of pre-closing inspection ordinances required by municipalities and to provide Buyer evidence of compliance prior to closing was deleted as inconsistent with the stated position of many member organizations regarding the enforceability and constitutionality of such ordinances.
- O. Paragraph 26 (“Direction to Escrowee” adopts after the existing text the last three sentences from Paragraph 28 (Performance”) regarding disbursement of earnest money, with the change in the beginning of the penultimate sentence from “(A)bsent an agreement...” to “(A)bsent a direction...”.
- P. Paragraph 27 (“Notice”) contains an “opt-out” provision regarding notice via e-mail, not because the drafters wished to discourage the use of notice via e-mail but in recognition of the many unresolved problems associated with substantiating proof of delivery of notice by this method. The “opt-out” was intended to be prospective only so as not to invalidate any prior e-mail notices successfully delivered and received. New subparagraph (d) now reads as follows: *“By sending e-mail transmission if an e-mail address has been furnished by the recipient Party or the recipient Party’s attorney to the sending Party or is shown on this contract form. Notice shall be effective as of date and time of e-mail transmission, provided that in the event e-mail Notice is transmitted during non-business hours, the effective date and time of Notice is the first hour of the next Business Day after transmission. An attorney or Party may opt out of future e-mail Notice by any form of Notice provided by this Contract...”* The requirement in the 4.0 Contract form that the recipient of the e-mail provide written acknowledgement to the sender of receipt of the e-mail transmission by e-mail, facsimile, regular mail or commercial overnight delivery has been eliminated from 5.0.
- Q. Paragraph 28 (“Performance”) contains only the bold print sentence stating “Time is of the essence of this Contract” and the fee-shifting provision for the prevailing Party in litigation. The remainder, as indicated above, has been moved, with one change, to Paragraph 26.
- R. Paragraph 30 (“Other Provisions”) has been clarified. It now reads: “This Contract is also subject to those OPTIONAL PROVISIONS initialed by the Parties and *the following attachments*, if any...”. The phrase “which are contained in the following paragraphs” was deleted.

S. Paragraph 31 (“Sale of Buyer’s Real Estate”) was modified only as follows:

- In Subparagraph (B) (1) the second sentence begins “Such contract *should* (rather than “shall”) referring to the closing date to be used for the contract of sale of Buyer’s real estate. The last sentence remains in parentheses but the word “must” is underlined and in bold print.
- In Subparagraph (D) the additional earnest money to be deposited by Buyer after waiver of Paragraph 31 (B) contingencies (that is, after receipt of a “kick-out” notice) is required to be in the form of a cashier’s or certified check.

T. Paragraph 33 (renamed “Credit at Closing” instead of “Closing Cost Credit”) now reads as follows: “Provided Buyer’s lender permits such credit to show on the HUD-1 Settlement Statement, and if not, such lesser amount as the lender permits, Seller agrees to credit Buyer at closing \$ \_\_\_\_\_ to be applied to prepaid expenses, closing costs or both”.

U. Paragraph 35 (“VA or FHA Financing”) has been modified to reflect the fact that required federal disclosures are routinely added to sales contracts at the behest of lenders not satisfied with the attempt in the 4.0 contract form to incorporate the required language in this paragraph. What remains is as follows: “If Buyer is seeking VA or FHA financing, this provision shall be applicable: Required FHA or VA amendments *and disclosures* shall be attached to this Contract. If VA, the funding fee, or if FHA, the Mortgage Insurance Premium (MIP) shall be paid by Buyer and [check one]  shall  shall not be added to the mortgage loan amount.” The provision that Seller contribute toward Buyer’s additional miscellaneous expenses required by FHA or VA not to exceed \$200.00 has been deleted.

V. In Paragraph 38 (“Wood-Destroying Infestation”) the last sentence excepting condominium properties and newly constructed properties from the provisions of this paragraph has been deleted.

W. In Paragraph 39 (“Post-Closing Possession”) subparagraph (b) has been amended to provide that the amount of use and occupancy payable after the date possession was to have been delivered as described therein increases threefold, rather than fivefold, as was the case in the 4.0 contract form.

- X. Paragraph 40 (“As-Is”) has been amended to provide for the following change to the sentence in bold print: “In the event that the Inspection reveals that the condition of the *Real Estate improvements, fixtures or personal property to be conveyed or transferred* is unacceptable...” (old matter stricken). A proposal for Buyer to conduct pre-closing repairs in these situations was ultimately deleted as inconsistent with the position taken by many members organizations regarding enforceability and constitutionality of such pre-closing inspection ordinances.
- Y. Paragraph 43 (“Miscellaneous Provisions”) realigns the selections, adds a selection for “Short Sale” and removes “Starker Exchange” from the “Commercial/Investment” category and renames the selection “1031/Starker Exchange”.
- Z. The identity of the website for the Illinois Real Estate Lawyers Association has been corrected to read [www.irela.org](http://www.irela.org).
- AA. The new subtitle of the Loan Status Disclosure is “Recommended Form – To Be Completed By Loan Officer” in an attempt to clarify that the Disclosure remains recommend for use but is not intended to be a required portion of the Contract so as to nullify the Contract if it is not completed. The Disclosure continues to require initials of the Parties but is to be signed only by the loan originator.