

## Document 1

### House Purchase Agreement<sup>1,2</sup>

This House Purchase Agreement, dated [date to be inserted], 20X5, is between Sally Seller (the “**Seller**”<sup>3</sup>) and Bob Buyer (the “**Buyer**”).<sup>4</sup>

#### Background

This Agreement<sup>5</sup> provides for the sale to the Buyer of the Seller’s house at 7221 Perada Drive, Walnut Creek, California 94595 (the “**House**”) and the land on which it is situated.<sup>6</sup>

The Seller and the Buyer agree as follows:<sup>7</sup>

#### Article 1 — Definitions

**1.1 Definitions.** The terms defined in the preamble and recital have their assigned meanings, and each of the following terms has the meaning assigned to it:<sup>8</sup>

“**Agreement**” means this House Purchase Agreement, its Schedules, and Exhibits, each as amended from time to time.<sup>9</sup>

“**Closing**” means the consummation of the transaction that this Agreement contemplates.

“**Closing Date**” has the meaning assigned to it in Section 2.3.<sup>10</sup>

“**Premises**” means the House, the land described in **Exhibit A**, and the household items that **Schedule 1.1** lists.

#### Article 2 — Purchase and Sale<sup>11</sup>

**2.1 Purchase and Sale.** At the Closing, the Seller shall sell the Premises to the Buyer, and the Buyer shall purchase the Premises from the Seller.<sup>12</sup>

1. This House Purchase Agreement is a simplified exemplar of a contract that parties would actually use. Notably, the agreement provides for no down payment.

2. Centered title above preamble uses the same title as that in the preamble, but font is larger.

3. *The* precedes the defined term *Seller*, so *the* is used in the body of the agreement each time the defined term *Seller* is used.

4. Preamble. Contemporary sentence format.

5. Although *Agreement* has not yet been defined, the defined term is used. This use violates the drafting guidelines for definitions and defined terms, but is common practice.

6. Brief recital stating property to be purchased. As defined, *House* does not include the land on which the House is situated.

7. Short statement of the words of agreement. Longer one unnecessary as the consideration is evident.

8. Introduction incorporates the terms previously defined in the preamble and recitals.

9. Definition makes explicit that the Schedules and Exhibits are part of the Agreement. The language referring to amendments simplifies any future amendments by not requiring the definition of *Agreement* to be amended.

10. Definition by cross-reference.

11. The provisions in this article are what the textbook refers to as the action sections.

12. Subject matter performance provisions (covenants).

**13.** This agreement does not mimic a real transaction in that it has no provision for a down payment.

**14.** The phrase *the date the transaction closes* prevents an ambiguity. Because *Closing Date* is defined in context, an issue could arise as to how much of what precedes the parenthetical is part of the definition of the defined term created in the parenthetical. Without the additional language, a party might argue that the meaning of *Closing Date* is limited to only the original date or only an alternative date. While that might not be a winning argument, it is enough to cause trouble.

**15.** In an acquisition agreement, the asset purchased must be conveyed and money must be paid to consummate the transaction.

This section is only for acts that are to take place at Closing or afterward. Therefore, the reference to *Payment of Purchase Price* refers only to payments to be made at Closing. Any down payments would be dealt with in a separate section after the statement of the purchase price.

**16.** The warranty deed is the document that conveys ownership of the Premises.

**17.** This *further assurances* provision operates at Closing. It requires the Seller to fix any glitches that might arise at Closing in connection with conveying the Premises.

**18.** The payment provision must cover *who* is paying *how much* to *whom* and *the manner of payment*.

**19.** This further assurances provision applies only after the Closing.

**20.** The representations and warranties should include all the information on which a party (here, the Buyer) is relying.

**2.2 Purchase Price.** The purchase price for the Premises is \$200,000.<sup>13</sup>

**2.3 The Closing.** The Closing is to occur on [date to be inserted], 20X5, or another date as to which the Seller and the Buyer agree (the date the transaction closes, the “**Closing Date**”).<sup>14</sup> It is to take place at the offices of Abbott & Peabody LLP, 100 Geary Street, San Francisco, California, beginning at 9:00 a.m. local time.

**2.4 Instruments of Transfer; Payment of Purchase Price; Further Assurances.**<sup>15</sup>

- (a) **Seller’s Deliveries.** At the Closing, the Seller shall execute and deliver to the Buyer
  - (i) a general warranty deed<sup>16</sup> for the Premises, substantially in the form of **Exhibit B**; and
  - (ii) any other instrument or instruments of transfer that may be necessary or appropriate to vest in the Buyer good title to the Premises.<sup>17</sup>
- (b) **Buyer’s Deliveries.** At the Closing, the Buyer shall deliver to the Seller by wire transfer \$200,000 in funds immediately available in San Francisco, California.<sup>18</sup>
- (c) **Further Assurances.** Following the Closing, at the request of the Buyer, the Seller shall deliver any further instruments of transfer and take all reasonable action that may be necessary or appropriate to vest in the Buyer good title to the Premises.<sup>19</sup>

### Article 3 — Seller’s Representations and Warranties

The Seller represents and warrants to the Buyer as follows:<sup>20</sup>

**3.1 The House.** The House was built in 1953, along with the other houses in the neighborhood.

**3.2 The Roof.** The roof of the House is four years old.

**3.3 Appliances.** All of the appliances in the House are in excellent condition, except for the dishwasher, which is not working.

**3.4 Cable.** The House is wired for cable television, and the cable is functioning properly.

**3.5 Swimming Pool.**

- (a) **The Pool.** A swimming pool is in the backyard of the House. Its dimensions are 30 feet by 10 feet.
- (b) **Water Heater.** A water heater that uses propane gas heats the pool. The water heater is on the Premises and is in good working condition, ordinary wear and tear excepted.
- (c) **Propane Gas Tank.** The propane gas tank is on the Premises, and it is exactly one-half full with propane gas.

**3.6 Living Room Paint Color.** The living room's walls are painted eggshell white and were painted one year ago.

**3.7 Premises.** The land on which the House is situated is a one-acre lot that is accurately described in Exhibit A.<sup>21</sup>

**21.** The exhibit is a metes and bounds description of the Premises from the deed.

**Article 4 — Buyer's Representations and Warranties**

The Buyer represents and warrants to the Seller as follows:

**4.1 Financing.** The Buyer has sufficient funds to purchase the Premises without obtaining a loan.<sup>22</sup>

**22.** Buyers often refuse to give this representation and warranty because they do not have the funds. They need a mortgage.

**Article 5 — Seller's Covenants**

From the date of this Agreement to the Closing Date, the Seller shall perform as follows:<sup>23</sup>

**23.** This introductory language is appropriate because all the covenants are pre-closing covenants. If the parties agree to other covenants, omit the introductory language and state the time frame within each covenant.

**5.1 Dishwasher.** The Seller shall cause the dishwasher to be repaired.<sup>24</sup>

**24.** This covenant contemplates that the Seller may not herself fix the dishwasher, but establishes that she is contractually responsible if it is not fixed.

**5.2 Paint.** The Seller shall not paint the walls of any room in the House.

**5.3 Propane Gas Tank.** The Seller shall cause the propane gas tank to be at least one-third full on the Closing Date.

**25.** From a business perspective, the Seller cannot promise to settle the dispute. She has no control over the other owner. What kind of covenant could the Seller give the Buyer to assure him that the Seller will do what is necessary to settle the dispute?

**26.** This provision is tabulated. To enhance clarity through format, two subsections were created, one for each of the covenants. They are joined in one section because of the related subject matter.

**27.** Lawyers refer to this provision colloquially as a *bring-down* because it updates the representations and warranties down to the date of the Closing.

**28.** This is a broad condition and applies not only to pre-closing covenants but those necessary to consummate the transaction at the Closing. Therefore, if the Buyer does not pay the purchase price at Closing, the Buyer will have failed to satisfy this condition to the Seller's obligation to close. See covenant in Section 2.4(b).

**29.** Without the certificate, the Seller has no written evidence of the Buyer acknowledging that he satisfied the two previous closing conditions. The Seller may sue if the certified statements are not true.

**30.** The bracketed language contemplates that some of the facts true at signing may not be true at Closing. This is usually only an issue for a seller. For example, the amount of propane in the gas tank may have changed.

**5.4 Settlement of Border Dispute.** The Seller shall pay all costs related to settlement of the border dispute with the owner of the house at 7221 Perada Drive, Walnut Creek, California 94595.<sup>25</sup>

**5.5 Carpet Cleaning.**<sup>26</sup> The Seller shall

- (a) cause all carpeting in the House to be professionally cleaned before the Closing Date; and
- (b) pay the cost for the cleaning, but no more than \$500, no later than the Closing Date.

### Article 6 — Conditions to the Seller's Obligations

The Seller is obligated to consummate the transactions that this Agreement contemplates only if each of the following conditions has been satisfied or waived on or before the Closing Date.

**6.1 Representations and Warranties.** The Buyer's representations and warranties must have been true on the date that they were made and must be true as of the Closing Date with the same force and effect as though made on and as of the Closing Date.<sup>27</sup>

**6.2 Covenants.** The Buyer must have performed each of the covenants to be performed by him on or before the Closing Date.<sup>28</sup>

**6.3 Buyer's Closing Certificate.**<sup>29</sup> The Seller must have received a certificate of the Buyer, certifying to the truth of the statements in Sections 6.1 and 6.2.

### Article 7 — Conditions to the Buyer's Obligations

The Buyer is obligated to consummate the transactions that this Agreement contemplates only if each of the following conditions has been satisfied or waived on or before the Closing Date.

**7.1 Representations and Warranties.** The Seller's representations and warranties must have been true on the date that they were made and must be true as of the Closing Date with the same force and effect as though made on and as of the Closing Date, [except to the extent that this Agreement contemplates changes.]<sup>30</sup>

**7.2 Covenants.** The Seller must have performed each of the covenants to be performed by her on or before the Closing Date.

**7.3 Seller's Closing Certificate.** The Buyer must have received a certificate of the Seller, certifying to the truth of the statements in Sections 7.1 and 7.2.

**7.4 Property Line Dispute Resolution.**<sup>31</sup> The Seller and the owner of the house at 7221 Perada Drive, Walnut Creek, California 94595 must have settled their dispute as to the property line establishing the boundaries of the land between the two houses.

## Article 8 — Termination<sup>32</sup>

### 8.1 Seller's Right to Terminate.

- (a) **Grounds for Termination and Notice of Termination.** The Seller may send a notice<sup>33</sup> to the Buyer regarding this Agreement's termination if any one or more of the following events has occurred on or before the Closing Date:
- (i) **Misrepresentations and Breaches of Warranties.** The condition stated in Section 6.1 has not been satisfied or waived.
  - (ii) **Covenants.** The condition stated in Section 6.2 has not been satisfied or waived.
  - (iii) **Closing Certificate.** The condition stated in Section 6.3 has not been satisfied or waived.
- (b) **Effective Date of Termination.** If the Seller sends a notice regarding this Agreement's termination as permitted by Section 8.1(a), this Agreement terminates on the day the Buyer receives the notice.
- (c) **Consequences of Termination.** On termination of this Agreement under this Section 8.1, neither party has any further rights or obligations under this Agreement, except for the Seller's rights and the Buyer's obligations arising from any Buyer misrepresentation, breach of warranty, or breach of covenant.

**31.** The Buyer will insist on this condition because the covenant only addresses the payment of settlement costs. Only through this condition does the Buyer have the right to walk away if the dispute is not resolved. How could the drafting of this condition be improved from the Buyer's perspective? Re-read Annotation 25. Does there need to be an express condition that the Seller has paid all the associated costs?

**32.** Termination provisions are some of the most difficult to negotiate and draft. If this is your first time reading these provisions, just try to get a sense of them. We'll spend time on them during the semester.

**33.** The provision does not require written notice because Section 9.7 states that all notices must be in writing. That provision covers all notices sent under the agreement.

**8.2 Buyer's Right to Terminate.**

- (a) **Grounds for Termination.** The Buyer may send a notice to the Seller regarding this Agreement's termination if any one or more of the following events has occurred on or before the Closing Date:
  - (i) **Misrepresentations and Breaches of Warranties.** The condition stated in Section 7.1 has not been satisfied or waived.
  - (ii) **Covenants.** The condition stated in Section 7.2 has not been satisfied or waived.
  - (iii) **Seller's Closing Certificate.** The condition stated in Section 7.3 has not been satisfied or waived.
  - (iv) **Property Line Dispute.** The condition stated in Section 7.4 has not been satisfied or waived.
- (b) **Termination under Sections 8.2(a)(i), 8.2(a)(ii), or 8.2(a)(iii).**
  - (i) **Effective Date of Termination.** If the Buyer sends a notice regarding this Agreement's termination under any one or more of Sections 8.2(a)(i), 8.2(a)(ii), and 8.2(a)(iii), this Agreement terminates on the date the Seller receives the notice.
  - (ii) **Consequences of Termination.** On termination of this Agreement under any one or more of Sections 8.2(a)(i), 8.2(a)(ii), and 8.2(a)(iii), neither party has any further rights or obligations, except for the Buyer's rights and the Seller's obligations arising from any Seller misrepresentation, breach of warranty, or breach of covenant.
- (c) **Termination under Section 8.2(a)(iv).**
  - (i) **Effective Date of Termination.** This Agreement terminates on the day the Buyer receives the notice regarding termination.<sup>34</sup>

**34.** If a down payment had to be repaid, the contract would include the specifics of *who* pays *what*, *when*, and *how*. In addition, the termination of the agreement would be postponed until the required payment had been received.

- (ii) **Consequences of Termination.** On termination of this Agreement under Section 8.2(a)(iv), neither party has any further rights or obligations.

## Article 9 — General Provisions

**9.1 Assignment and Delegation.** Neither party may assign its rights or delegate its obligations under this Agreement without the consent of the other party, which party shall not unreasonably withhold its consent.<sup>35</sup>

**9.2 Assigns.** This Agreement binds and benefits the parties and their respective permitted assigns.<sup>36</sup>

**9.3 Merger.** This Agreement states the final and exclusive agreement between the parties regarding the transaction that this Agreement contemplates. It supersedes all previous negotiations and agreements.<sup>37</sup>

**9.4 Counterparts.** The parties may execute this Agreement in counterparts, each of which is an original, but all of which constitute only one agreement between the parties.<sup>38</sup>

**9.5 Severability.** If any provision of this Agreement is illegal or unenforceable, that provision is severed from the Agreement, and the other provisions remain in effect only if the essential business and legal provisions are legal and enforceable.<sup>39</sup>

**9.6 Governing Law.** The laws of California, without regard to its conflict of laws principles, govern all matters arising under or relating to this Agreement, including torts.

**9.7 Notices.**<sup>40</sup> The parties must send all notices in writing. No notice is deemed received until the addressee has received it.

**9.8 Waiver of Right to a Jury Trial.**<sup>41</sup> Each party waives its right to a trial by jury in all matters relating to and arising under this Agreement, including torts. Each party has initialed this provision to indicate that the party has read the

**35.** This language is typical, but it does not void an assignment.

**36.** This language no longer serves its original purpose — to clarify whether a delegation occurred contemporaneously with an assignment and whether the delegate assumed the obligations. Chapter 16 suggests alternative language, which has yet to be widely accepted. This provision typically also refers to successors, but that is a corporate concept.

**37.** To prevent the inclusion of parol evidence, an agreement must be both *final* and *exclusive*.

**38.** This provision permits signatories to sign separate copies of the agreement, collate them, and create a complete original. It also authorizes multiple originals. (Never have multiple originals of a promissory note.)

**39.** Often, these provisions state simply that the other provisions remain in effect. But that does not typically reflect the real business deal: The contract should continue only if the economic and legal terms stay intact.

**40.** Notices are risk allocation provisions. Specifically, they allocate the risk of nonreceipt of the notice.

**41.** Because this waiver is of a constitutional right, courts insist the waiver be knowing, intentional, and voluntary. The drafter's challenge is to demonstrate through contract language that the waiver was given under those circumstances. One factor that courts have used in deciding whether a waiver met the constitutional standard is whether the provision was prominent. Making the waiver the last provision and using a larger font are two ways of doing so.

provision and makes the waiver knowingly, intentionally, and voluntarily.

To evidence the parties' agreement to this Agreement, they have executed and delivered it on the date stated in the preamble.<sup>42</sup>

42. Contemporary concluding paragraph language.

**Seller**

\_\_\_\_\_  
Sally Seller

**Buyer**

\_\_\_\_\_  
Bob Buyer